COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-01-146-CV

CHARLES J. WALCH — APPELLANT

V.

UNITED SERVICES AUTOMOBILE ASSOCIATION PROPERTY AND CASUALTY INSURANCE CO. — APPELLEE

FROM THE 17TH DISTRICT COURT OF TARRANT COUNTY

OPINION

Charles J. Walch ("Walch") appeals from summary judgment in favor of United Services Automobile Association Property and Casualty Insurance Company ("USAA"). In four issues, Walch argues that USAA wrongfully denied a claim for coverage of fire damage to his rental house under an insurance policy USAA issued to him. Walch alleges that the trial court erred in granting summary judgment to USAA because: (1) a question of fact exists regarding

whether the property was vacant; (2) the court improperly sustained USAA's objections to portions of Walch's summary judgment evidence; (3) questions of fact exist regarding Walch's extra-contractual claims; and (4) the summary judgment addressed claims not included in USAA's motion. We affirm in part and reverse and remand in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Walch owned a small rental house located at 7416 Willis in Fort Worth, Texas. USAA insured the house under a Texas Dwelling Policy ("Policy"), which included coverage for losses caused by fire and other losses during the policy term ending on October 3, 1999. On May 15, 1999, Walch's tenants moved out of the house and left it in a damaged condition. Around ten days later, Walch began the process of renovating the house. On September 2, 1999, Walch discovered that the house had been damaged by a fire, and in October 1999, Walch filed a claim with USAA for losses resulting from the fire. After an investigation, USAA denied Walch's claim, citing the Policy's "vacancy clause":

CONDITIONS

. . . .

> **17. Vacancy.** During the policy term, if an insured building is vacant for 60 consecutive days immediately before a loss, we will not be liable for a loss by the perils of fire and

> lightning or vandalism or malicious mischief. Coverage may be provided by endorsement to this policy.

Walch filed suit against USAA in September 2000 asserting, among other causes of action, claims for breach of contract, breach of the duty of good faith and fair dealing, violations of the Deceptive Trade Practices Act, and violations of Article 21.21 of the Texas Insurance Code. USAA answered by general denial and specifically denied coverage for Walch's loss based on the vacancy provision. In January 2001, USAA moved for both a traditional and a no-evidence summary judgment on Walch's breach of contract claims, on the ground that there was no coverage for Walch's loss under the express terms of the vacancy clause, contending that evidence established that the house was "vacant" under the terms of the Policy, as a matter of law.

USAA's motion also sought summary judgment on Walch's extra-contractual claims based on no breach of contract with Walch or commission of an independent tort. USAA further based its motion on the summary judgment record demonstrating that there was no coverage for the loss and, in any event, that the denial of the claim was reasonable. Finally, USAA's motion set forth that there was no liability for exemplary damages because the summary judgment record demonstrated the lack of coverage and absence of malice on the part of USAA, as a matter of law.

Walch responded by asserting that fact issues existed regarding his contractual and extra-contractual claims and by attaching summary judgment evidence in the form of affidavits, Walch's testimony taken during an examination under oath, letters, a copy of the Policy, and photographs of the house. USAA objected to various portions of affidavits submitted by Walch. The trial court granted summary judgment for USAA "as to all claims," without specifying the grounds upon which the judgment was based. The court later amended the summary judgment expressly sustaining USAA's objections to portions of Walch's summary judgment evidence.

II. STANDARD OF REVIEW

A. TRADITIONAL SUMMARY JUDGMENT

In a summary judgment case, the issue on appeal is whether the movant met his summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The burden of proof is on the movant, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. *Rhone-Poulenc, Inc. v. Steel,* 997 S.W.2d

217, 223 (Tex. 1999); *Friendswood Dev. Co. v. McDade + Co.,* 926 S.W.2d 280, 282 (Tex. 1996); *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965). Therefore, we must view the evidence and its reasonable inferences in the light most favorable to the nonmovant. *Great Am.*, 391 S.W.2d at 47.

A defendant is entitled to summary judgment if the summary judgment evidence establishes, as a matter of law, that at least one element of a plaintiff's cause of action cannot be established. *Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 803 (Tex. 1999). The defendant as movant must present summary judgment evidence that negates an element of the plaintiff's claim. Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the plaintiff to come forward with competent controverting evidence raising a genuine issue of material fact with regard to the element challenged by the defendant. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

A defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense. *KPMG Peat Marwick*, 988 S.W.2d at 748. To accomplish this, the defendant-movant must present summary judgment evidence that establishes each

element of the affirmative defense as a matter of law. *Ryland Group, Inc. v. Hood,* 924 S.W.2d 120, 121 (Tex. 1996).

B. NO-EVIDENCE SUMMARY JUDGMENT

After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense. TEX. R. CIV. P. 166a(i). The motion must specifically state the elements for which there is no evidence. *Id.; In re Mohawk Rubber Co.,* 982 S.W.2d 494, 497-98 (Tex. App.—Texarkana 1998, orig. proceeding). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. *See* TEX. R. CIV. P. 166a(i) cmt.; *Moore v. K Mart Corp.,* 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied); *Jackson v. Fiesta Mart, Inc.,* 979 S.W.2d 68, 71 (Tex. App.—Austin 1998, no pet.).

A no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied)*; Moore,* 981 S.W.2d at 269. We review the evidence in the light most favorable to the party against whom the no-evidence summary judgment was rendered, disregarding

all contrary evidence and inferences. *Szczepanik v. First S. Trust Co.,* 883 S.W.2d 648, 649 (Tex. 1994). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Moore*, 981 S.W.2d at 269.

When the trial court's order does not specify the grounds relied upon for the summary judgment, the judgment will be upheld on appeal if any of the theories advanced are meritorious. *See State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993).

III. ANALYSIS

In his first issue, Walch argues that the trial court erred in granting summary judgment on his breach of contract claim because the summary judgment evidence established a genuine issue of material fact regarding whether the house was "vacant," as set forth in the policy condition. For the following reasons, we agree.

A. VACANCY CLAUSE

Walch and USAA present competing views on how the vacancy clause in this Policy should be read. Walch contends that the term "vacant" means entire abandonment, deprived of contents, empty, that is, deprived of contents of substantial utility. In contrast, USAA argues that the term "vacant," as defined under Texas law, does not simply refer to the presence of the materials

in a dwelling, but rather, whether the character of the building's contents, if any, is such that a person could find it being used as a residence or dwelling. In other words, USAA urges us to consider not simply whether the house contained items of substantial utility to the owner but also to examine whether the items demonstrated an intent of the owner to return or use the house as a residence place of abode. Under USAA's interpretation of the Policy's vacancy clause, USAA contends that Walch's house was vacant as a matter of law.

The interpretation of insurance contracts is governed by the same rules of construction applicable to other contracts. *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997). Whether the policy is ambiguous is a question of law for the court. *Id*. A contract, however, is unambiguous as a matter of law if it can be given a definite or certain legal meaning. *Id*. While "[b]oth the insured and the insurer are likely to take conflicting views of coverage . . . neither conflicting expectations nor disputation is sufficient to *create* an ambiguity." *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994). In this case, neither party claims the term "vacant" is ambiguous; rather, they differ over the word's legal meaning.

In examining whether the trial court erred in granting summary judgment, we determine the meaning of "vacant" as a question of law, in light of Texas law and the terms of the Policy itself. *See Transcon. Ins. Co v. Frazier*, 60

S.W.2d 268, 271 (Tex. Civ. App.—Waco 1933, no writ) (holding interpretation of the term "unoccupied" in a vacancy clause to be a question of law);[1] *see also* 6 LEE R. RUSS & THOMAS F. SEGALA, COUCH ON INSURANCE § 94:109 (3d ed. 1996) (stating "the meaning of the terms used in vacancy clauses, such as 'vacant' . . . undoubtedly is a question of law").

While the Policy does not explicitly define the word "vacant," longstanding precedent sheds light on the meaning of "vacant" under Texas law. *See S. Nat'l Ins. Co. v. Cobb*, 180 S.W. 155, 156 (Tex. Civ. App.—San Antonio 1915, writ ref'd) ("Under the weight of authority 'vacant' means entire abandonment, deprived of contents, empty.").

With only slight modification, this definition of "vacant" has consistently been followed in subsequent case law. *See Phoenix Assur. Co. v. Shepherd*, 134 Tex. 669, 137 S.W.2d 996, 997 (1940) (holding the definition of the word "vacant" as used in a fire insurance policy means "entire abandonment, deprived of contents, empty"); *Jerry v. Kentucky Cent. Ins. Co.*, 836 S.W.2d

[1] While not at issue in this case, we note that the term "vacant" is not synonymous with the term "unoccupied." Commentators and courts have concluded that the term "vacant" refers to the absence of inanimate objects; whereas, the term "unoccupied" refers to the lack of animate occupants. 4A JOHN ALAN APPPLEMAN, INSURANCE LAW AND PRACTICE § 2833, at 491-92 (1969); *see also Phoenix Assur. Co. v. Shepherd*, 115 S.W.2d 992, 993 (Tex. Civ. App.—Galveston 1938) ("'Vacant' means without inanimate objects; 'unoccupied' means without animate occupants."), *aff'd*, 134 Tex. 669, 137 S.W.2d 996 (1940) .

812, 815 (Tex. App.—Houston [1st Dist.] 1992, writ denied) ("The term 'vacant' means entire abandonment, deprived of contents, empty, that is, without contents of substantial utility."); *Knoff v. United States Fid. & Guar. Co.*, 447 S.W.2d 497, 501 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ) ("The term vacant means 'entire abandonment, deprived of contents, empty[]' . . . 'that is, without contents of substantial value.'"); *see, e.g., Republic Ins. Co. v.* Watson, 70 S.W.2d 441, 443 (Tex. Civ. App.—Beaumont 1934, writ dism'd); *Cont'l Ins. Co. v. Nabors*, 6 S.W.2d 151, 154-55 (Tex. Civ. App.—Fort Worth 1928, writ ref'd); *Western Assur. Co. v. Busch*, 203 S.W. 460, 461 (Tex. Civ. App.—Austin 1918, no writ).

We are not persuaded by USAA's argument that the meaning of "vacant" under Walch's policy goes beyond the straightforward definition found in the aforementioned cases. USAA's reliance on the Iowa Supreme Court case of *Snyder v. Fireman's Fund Ins. Co.* is misplaced. 42 N.W. 630 (Iowa 1889). In *Snyder*, the court interpreted a policy provision containing the phrase "vacant or unoccupied," which is unlike the clause in this case, and the court applied a different legal standard to the vacancy clause than is found under Texas insurance law. *Id* at 631. The court focused on the term "unoccupied" and stated, "The one fatal defect in the plaintiff's case is that the continuity of the occupancy was completely broken." *Id.* As we noted earlier, the terms

"vacant" and "unoccupied" have dissimilar meanings under Texas law. *Phoenix Assur. Co.,* 115 S.W.2d at 993. Under Texas law, lack of occupancy, in and of itself, does not render a property vacant.

USAA also utilizes *Jerry* in support of its argument that summary judgment was proper in this case based on the trial court's interpretation of the Policy's vacancy clause; however, *Jerry* provides no such support for USAA's position. 836 S.W.2d 812. In *Jerry*, an insured appealed from a bench trial judgment concerning coverage under a fire policy vacancy clause, claiming the trial court erred in finding the house "vacant." *Id*. at 814. The court of appeals affirmed the trial court's judgment, holding the evidence was legally and factually sufficient to support the court's factual finding that the house was "vacant." *Id.* at 815. In reaching this conclusion, the court considered the following: the owners had moved out of state, had cut-off the utilities to the house, and no one had occupied the house for eleven months. *Id*. The evidence before the trial court also demonstrated that everything of value had been stolen from the house, and the parties disputed whether the stolen items had been replaced. *Id*. One witness testified that he was making repairs to the house, had seen furniture in the home, and had been storing building materials inside the house two to three weeks before the fire. *Id.* An experienced insurance adjuster testified, however, that upon his investigation of the home,

the home contained no refrigerator; stove; furniture, except a chest of drawers; pots and pans; or a light meter. Also, during his investigation, the adjuster saw unburned mattresses in the front yard (indicating that the home was abandoned before the fire), and he discovered that the doors to the house had been left open for months before the fire. *Id.*

Jerry, contrary to USAA's argument, did not turn on whether the contents inside the dwelling demonstrated that a person either resided or intended to return and reside in the dwelling. Rather, the court reviewed the record to determine whether the evidence supported the trial court's factual finding that the home was "vacant," with "vacant" being defined as "entire abandonment, deprived of contents, empty, that is, without contents of substantial utility." *Id*. Unlike *Jerry*, we are reviewing a summary judgment to determine whether a genuine issue of material fact exists to support the trial court's judgment, not whether the evidence is legally and/or factually sufficient to support a factual determination.[2]

[2] *Jerry* also addressed whether the owner's efforts to repair his property fell under a construction clause in the insurance policy stating that a "building in the course of construction shall not be deemed vacant." *Id*. at 814-16. The court found the clause inapplicable in the context of the policy at issue. *Id*. at 816. No such clause is found in Walch's policy.

We hold, under the terms of this Policy and consistent with Texas case law, the term "vacant" means entire abandonment, deprived of contents, empty, that is, without contents of substantial utility. *Knoff*, 447 S.W.2d at 501.

B. CONTRACTUAL CLAIM

We now turn to whether the house was vacant as a matter of law. USAA relied on summary judgment evidence consisting of a portion of Walch's examination under oath and a copy of the Policy, authenticated by Jeffery Collignon's affidavit.[3] Walch presented summary judgment evidence showing that he was the owner of the house, which was insured by USAA against loss to the property caused by fire. Walch stated in his examination under oath that in May 1999, his tenants moved out of the rental house and left it damaged.

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[3] Walch argues, and USAA does not dispute, that the vacancy clause created a condition subsequent, to which USAA bore the burden "to plead and prove the occurrence of the condition." *Knoff*, 447 S.W.2d at 500-01 (holding a similarly-worded vacancy provision contained in the section of the policy entitled "Basic Conditions" was a condition subsequent with the burden on the insurer to plead and prove exception to coverage); *see also Nabors*, 6 S.W.2d at 156 ("The [insurer] particularly pleaded this clause of the policy, and thus assumed the burden of proving the unoccupancy of the building[.]"); *Shaffner v. Farmers Mut. Fire Ins. Co.*, 859 S.W.2d 902, 908 (Mo. Ct. App. 1993) ("Vacancy or unoccupancy were affirmative defenses."). Therefore, USAA's burden on summary judgment is to show vacancy as a matter of law. If USAA produced sufficient evidence to establish the right to summary judgment, the burden would shift back to Walch to come forward with evidence that raises a genuine issue of material fact as to the vacancy clause. *See Centeq Realty, Inc*., 899 S.W.2d at 197.

Soon thereafter, he hired workers to renovate the house's interior. Between the time Walch's tenants moved out and the time of the fire, Walch claims he inspected and checked on the house a couple of times a week. Additionally, at the time of the fire, the following items remained inside the house: a refrigerator, mattress and bedsprings, stove, built-in dishwasher, uninstalled sink and vanity, building materials, reciprocating saw, mop bucket and mop, sawhorses, tools, paint, floor tiles, and tarps.[4] In addition, Walch claimed that the house was locked and the utilities were on when the fire damaged the property.

The foregoing evidence raises a genuine issue of material fact regarding the vacancy clause. We cannot affirm the summary judgment on the ground that Walch's house was vacant as a matter of law. Whether Walch's property was vacant within the meaning of this policy's vacancy clause remains a question for the jury. *See Germania Farm Mut. Aid Ass'n v. Anderson*, 463 S.W.2d 24, 25 (Tex. Civ. App.—Waco 1971, no writ) (refusing to hold vacancy was established as a matter of law); *Cavin v. Charter Oak Fire Ins. Co.*, 384

[4] Notwithstanding the trial court's ruling that Walch could not characterize these items as "personal property" in his affidavit, in its brief, USAA concedes that these items were in the house at the time of the fire, and that the listing of items survived USAA's objections during the summary judgment proceedings. Therefore, it is unnecessary for us to review the trial court's ruling on that point.

N.E.2d 441, 443 (Ill. App. Ct. 1978) (holding fact issues existed regarding whether the insured's building was vacant and reversing summary judgment for the insurer where evidence showed that, at the time of loss, no tenants remained in the property, the property was furnished, the property was being renovated, and the insured was storing building materials in the dwelling); *see also Lundquist v. Allstate Ins. Co.,* 732 N.E.2d 627, 631 (Ill. App. Ct. 2000) ("[W]hether the subject dwelling was vacant or unoccupied at the time of the loss is a question of fact."); 6 LEE R. RUSS & THOMAS F. SEGALA, COUCH ON INSURANCE § 94:108 (3d ed. 1996) ("Whether or not insured premises have become vacant, unoccupied, or the like within the meaning of a forfeiture provision in an insurance policy is usually a question for the jury."). Accordingly, we hold the trial court erred in granting summary judgment on Walch's contractual claim.

C. EXTRA-CONTRACTUAL CLAIMS

In his second and third issues, Walch complains that the trial court improperly sustained USAA's objections to Walch's summary judgment evidence and that the trial court erred in granting summary judgment on his extra-contractual claims because the summary judgment evidence establishes genuine issues of material fact regarding such claims. We will address the trial court's rulings on Walch's summary judgment evidence only to the extent

necessary to decide whether genuine issues of material fact exist on Walch's extra-contractual claims.

1. BAD FAITH CLAIMS

USAA first argues that, since it was entitled to summary judgment based on the vacancy clause, USAA was likewise not liable on any of Walch's extra-contractual bad faith claims. Alternatively, USAA argues that even if a genuine issue of material fact exists on Walch's contractual claim, none exist that USAA acted in bad faith.

Walch asserted claims against USAA based on an alleged breach of the common law duty of good faith and fair dealing and on alleged violations of article 21.21 of the insurance code. *See* TEX. INS. CODE ANN. art. 21.21, §§ 4, 16 (Vernon Supp. 2003) (establishing a private right for unfair insurance settlement practices)*; Arnold v. Nat'l County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) (holding an insurer has a duty to deal fairly and in good faith with its insured in the processing and payment of claims). In its original definition of the tort of the breach of good faith and fair dealing, the supreme court stated:

> A breach of the duty of good faith and fair dealing is established when: (1) there is an absence of a reasonable basis for denying or delaying payment of benefits under the policy and (2) the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim.

Republic Ins. Co. v. Stoker, 903 S.W.2d 338, 340 (Tex. 1995) (citing *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988)). In *Giles*, the court recast the liability standard in positive terms such that "an insurer will be liable if the insurer knew or should have known that it was reasonably clear that the claim was covered." 950 S.W.2d 48, 56 (Tex. 1997).

Giles articulated the "reasonably clear" standard found in article 21.21 and made it applicable to common law bad faith claims. *See* TEX. INS. CODE ANN. art. 21.21, § 4(10)(a)(ii); *Giles*, 950 S.W.2d at 55-56 (stating that the court is "unif[ying] the common law and statutory standards for bad faith"). Thus, "an insurer breaches its duty of good faith and fair dealing by denying [or delaying payment of] a claim when the insurer's liability has become reasonably clear." *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998).

Whether an insurer violated the "reasonably clear" standard is ordinarily a question for the fact-finder. *Giles*, 950 S.W.2d at 56. However, circumstances may exist where judgment may be rendered as a matter of law because no genuine issues of material fact exist. *See* TEX. R. CIV. P. 166a(e); *see also United States Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 269 (Tex. 1997) (holding insurer cannot be liable for bad faith for erroneous interpretation of a rule); *Connolly v. Serv. Lloyds Ins. Co.*, 910 S.W.2d 557, 561 (Tex.

App.—Beaumont 1995, no writ) (holding insurer established a bona fide coverage dispute existed and therefore was entitled to judgment as a matter of law). "[A]s long as the insurer has a reasonable basis to deny or delay payment of [a] claim, even if that basis is eventually determined . . . to be erroneous, the insurer is not liable for the tort of bad faith." *Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597, 600 (Tex. 1993).

In bad faith claims, the key inquiry is the reasonableness of the insurer's conduct. *Id*. To analyze this issue, an objective standard is employed to determine "whether a reasonable insurer under similar circumstances would have delayed or denied the claimant's benefits." *Aranda*, 748 S.W.2d at 213. Evidence that only shows "a bona fide coverage dispute does not demonstrate that there was no reasonable basis for denying a claim." *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 194 (Tex. 1998). Similarly, "evidence of a coverage dispute is not evidence that liability under the policy had become reasonably clear." *Id*.

In this case, both parties contest the applicability of the Policy's vacancy clause. This coverage dispute between Walch and USAA does not constitute evidence that liability under the policy had become reasonably clear. *See id.* The crux of Walch's bad faith claims is that USAA knew of the contents in the house, knew that the property was not vacant, and thus denied coverage when

liability was reasonably clear. The record shows that USAA denied coverage under the vacancy clause on January 6, 2000. At that time, USAA had inspected the property twice and had examined Walch under oath. Based upon its investigation and its interpretation of the *Jerry* decision, USAA denied Walch's claim. We hold that evidence of this basis for the denial of coverage is not evidence that liability under the policy had become reasonably clear. *See id* at 193-94; *see also Lyons*, 866 S.W.2d at 600 ("[C]arriers . . . maintain the right to deny invalid or questionable claims and will not be subject to [bad faith] liability for an erroneous denial of a claim.") (internal quotations omitted).

Walch also correctly points out that insurers also have a duty to properly investigate claims. *See Simmons*, 963 S.W.2d at 44. "[A]n insurer cannot insulate itself from bad faith liability by investigating a claim in a manner calculated to construct a pretextual basis for denial." *Id*. Article 21.21 also establishes that an insurer's "refus[al] to pay a claim without conducting a reasonable investigation with respect to the claim" constitutes an unfair settlement practice. TEX. INS. CODE ANN. art. 21.21, § 4(10)(a)(viii).

In support of his bad faith claims, Walch argues that his summary judgment evidence raises genuine issues of material fact that USAA's adjuster's investigation was a pretext intended to develop defenses to Walch's claim and to deter him from pursuing his claim. We disagree.

It is undisputed that the fire that damaged Walch's property occurred on September 2, 1999. Despite learning of the fire and visiting the house on the same day, Walch did not immediately contact USAA. Rather, Walch, incorrectly assumed that he had no insurance on the home and began extensive remodeling, including the addition of a second story to the house. Around October 15, Walch opened a renewal letter from USAA, and it was at that time, he said in his examination under oath, that he realized he had insurance and decided to contact USAA to file his claim.

On October 18, USAA sent an adjuster, Kent Stephenson, to investigate the property. Stephenson conducted a walk-through of the house with Walch, took photos of the damage with a digital camera, and recorded a statement from Walch. Two days after the investigation, Stephenson sent Walch a letter, in which USAA stated its willingness to continue investigating Walch's claim, but also reserved the right to deny the claim. The letter listed the following reasons as possible bases for denying coverage under the Policy: the vacancy clause, Walch's failure to give prompt notice after the loss, Walch's failure to make reasonable and necessary repairs to protect the property, and that late reporting and completed repairs could potentially jeopardize USAA's investigation.

On November 22,1999, USAA conducted Walch's examination under oath ("EUO"). During the EUO, Walch admitted, "I knew I had made a major mistake, . . . I had screwed up. I wasn't knowledgeable about my insurance coverage." However, Walch's chief complaint about USAA's investigation was in regards to Stephenson's investigation. Walch stated, "He didn't bring a flashlight. He didn't crawl under the house to see where a lot of the major damage was on that back wall." Walch later stated that toward the end of Stephenson's inspection "I was just really upset about [Stephenson's] tone and his demeanor."

Walch's affidavit, offered in response to USAA's motion for summary judgment, similarly addressed Walch's concerns regarding Stephenson's attitude during the initial investigation. Walch averred, in pertinent part:

> [Kent Stephenson] made a cursory inspection in that he took no notes, made no estimate of the damage, took no pictures of the damage, did not have a flashlight to inspect the damage, and did not inspect the foundation or floor joists which were damaged by fire, was condescending in attitude and demeanor toward me, interrogated me about matters irrelevant to the loss, including my employment status, whether I owned other houses and the insurance coverage I had on them, and about how much income I had, suggested that I had committed arson, and repeatedly tried to discourage me from making a claim by telling me I did not have a valid insurance claim. I told the adjuster that the house was rent property and he asked me questions about the renters. I stressed the importance of settling the claim because I was losing income from having the property unrented. At one point said adjuster told me I had no claim because I had done work to secure the house

> and prevent further damage by the elements. The adjuster also told me that I needed builder's risk insurance for the loss to be covered. The adjuster spent the majority of his time interrogating me, not adjusting the loss.

The trial court ruled that this portion of Walch's affidavit constituted speculation and hearsay. We review rulings concerning the exclusion of summary judgment evidence under an abuse of discretion standard. *See Power v. Kelley*, 70 S.W.3d 137, 140 (Tex. App.—San Antonio 2001, pet. denied); *Barraza v. Eureka Co.*, 25 S.W.3d 225, 228 (Tex. App.—El Paso 2000, pet. denied). We uphold USAA's hearsay objection with respect to the statements made by Walch to Stephenson, but we hold that the trial court abused its discretion as to Stephenson's statements because these statements constituted admissions by a party opponent. *See* TEX. R. EVID. 801(e)*; City of Stephenville v. Tex. Parks & Wildlife Dep't,* 940 S.W.2d 667, 677-78 (Tex. App.—Austin 1996, writ denied). We also hold that, as to Walch's statements regarding the tone and demeanor of Stephenson, the trial court did not abuse its discretion in ruling on USAA's objections because these statements were conclusory and based upon speculation. *See Hall v. Rutherford*, 911 S.W.2d 422, 424 (Tex. App.—San Antonio 1995, writ denied) ("Statements in an affidavit which are mere conclusions or which represent the affiant's opinion are insufficient.").

Walch argues in his reply brief that his affidavit contained five directly observed actions of Stephenson: (1) he took no notes; (2) he made no estimates; (3) he took no pictures; (4) he had no flashlight; and (5) he did not inspect portions of the property damaged by the fire. Even if we were to determine that the trial court improperly sustained USAA's objections regarding Walch's claimed observations, we have reviewed all of the summary judgment evidence and do not find that a genuine issue of material fact exists regarding the alleged pretextual nature of USAA's investigation.

During his EUO, to which USAA made no objection, Walch testified under oath that Stephenson read factual information into a tape recorder, took pictures with a digital camera, and told Walch that he needed additional information to complete his report. Additionally, Walch acknowledged in his affidavit that Stephenson came back out to inspect the property a second time on November 30, 1999. Walch further stated that Stephenson inspected the damage at that time. Walch presented no facts or details demonstrating that the second inspection was less than thorough or that Stephenson's full investigation was inadequate—an investigation that we note began with Walch's initial call, included two on-site inspections and Walch's EUO, and concluded with the letter denying coverage in January.

Walch comments that some of the initial reasons given for negating the company's rights to deny coverage are inconsistent with the reason for the ultimate denial based on the vacancy clause, citing to Stephenson's first letter, which included several potential bases for the denial of coverage. Walch also complained that Stephenson alluded to possible arson. Walch argues that the giving of these alternative grounds is evidence that USAA was searching for a pretext on which to deny coverage. However, while USAA may have given different reasons for denying coverage at different times, this is not evidence that USAA's denial was pretextual. *Castaneda*, 988 S.W.2d at 197-98.

In reviewing the entire record, we hold that Walch has not shown that a genuine issue of material fact exists regarding USAA's allegedly pretextual investigation. Because Walch presents no issues of material fact on his bad faith claims, the trial court properly granted USAA's motion for summary judgment on these claims. We overrule Walch's third issue.

2. OTHER EXTRA-CONTRACTUAL CLAIMS & EXEMPLARY DAMAGES

In his fourth issue, Walch contends that the trial court erred in granting summary judgment "as to all claims" because the summary judgment disposed of claims that Walch pleaded, but which were not raised in USAA's motion for summary judgment. We agree.

In his original petition, Walch alleged that USAA made misrepresentations in violation of the Texas Insurance Code and the Deceptive Trade Practices Act. Walch points out that, with respect to his extra-contractual claims, USAA's motion for summary judgment only attacked Walch's bad faith claims. In response, USAA asserts that Walch waived any error by failing to brief this issue adequately. *See* TEX. R. APP. P. 38.1(f); *Thedford v. Union Oil Co.*, 3 S.W.3d 609, 615 (Tex. App.—Dallas 1999, pet. denied). We disagree, as Walch's brief and reply brief both have appropriate argument and authority.

Rule 166a(c) of the Texas Rules of Civil Procedure explicitly states, "The motion for summary judgment shall state the specific grounds therefor." TEX. R. CIV. P. 166a(c). The Texas Supreme Court has strictly interpreted Rule 166a(c) and concluded that a defendant's motion for summary judgment must expressly present the grounds upon which it is made and must stand or fall solely on these grounds. *McConnell v. Southside Indep. Sch. Dist.,* 858 S.W.2d 337, 341 (Tex. 1993). Rule 166a(i) also states that a no-evidence motion for summary judgment "must state the elements as to which there is no evidence." TEX. R. CIV. P. 166a(i).

Because USAA's motion for summary judgment did not expressly raise whether there is a genuine issue of material fact as to the alleged misrepresentations of USAA, the trial court's judgment cannot be affirmed on

that issue. We sustain Walch's fourth issue as to Walch's claims of misrepresentations made in violation of the Texas Insurance Code and the Deceptive Trade Practices Act.

With respect to the issue of exemplary damages, however, we agree with USAA that Walch has waived any error on this issue. USAA's motion for summary judgment stated there is no liability for exemplary damages because there was no showing of malice. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 (Tex. 1994). While Walch's brief references his claim for exemplary damages, Walch provides no argument or authority, along with facts necessary to support reversal. *See* TEX. R. APP. P. 38.1(f) Bare assertions of error without argument or authority waive error. *See Thedford*, 3 S.W.2d at 615; *see also Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994) (discussing "long-standing rule" that point may be waived due to inadequate briefing). We overrule Walch's fourth issue as to his claims for exemplary damages.

IV. CONCLUSION

Having overruled Walch's third and fourth issues, in part, we affirm the trial court's judgment as to Walch's bad faith claims and his claims for exemplary damages. Because we hold a genuine issue of material fact exists as to Walch's contractual claim and because we hold the trial court erred in

granting summary judgment on Walch's claims of misrepresentations made in violation of the Texas Insurance Code and the Deceptive Trade Practices Act, we reverse the trial court's judgment as to those claims and remand them to the trial court for a trial on the merits.

ANNE GARDNER
JUSTICE

PANEL B: HOLMAN, GARDNER, and WALKER, JJ.

PUBLISH
[DELIVERED NOVEMBER 21, 2002]