THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

J. Michelle Childs, United States District Judge

RECEIVED
Jan 15 2021
S.C. SUPREME COURT

Appellate Case No. 2020-001285

Miriam Butler and Evelyn Stewart, in her capacity as
personal representative of Joseph Stewart and
individually and on behalf of others similarly situated..Plaintiffs

v.

The Travelers Home and Marine Insurance Company, and
The Standard Fire Insurance Company.. Defendants

PLAINTIFFS' REPLY BRIEF

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INTRODUCTION

The parties agree that actual cash value ("ACV") payments are substantially reduced when labor is withheld as depreciation. *See* Pls.' Br. at 8-9, 16-17; Defs.' Br. at 12.[1] The parties also agree that some insurers withhold labor as depreciation, *e.g*., the Travelers Group, and some do not, *e.g*., the Nationwide Group. *See* Dkt. 22, at 8; Dkt. 1, ¶ 63.[2]

When shopping for homeowners' coverage, how are consumers to know what type of ACV insurance they have purchased? Travelers' response brief does not provide an answer to this fundamental question. This is because, in sharp contrast to some other carriers, Travelers' forms are silent on whether Travelers will withhold labor as depreciation.

Because of the dramatic impact of withholding labor as depreciation—coupled with the diametrically opposed approaches to withholding labor within the homeowners' insurance market—property insurers, courts, insurance regulators and even the leading insurance industry advisory group have all provided or advocated for policy form clarity. Simply put, policyholders have a right to know precisely what they are buying in an insurance policy *at the time they are purchasing it.*

When policy forms are silent, a property insurer should only depreciate materials in calculating ACV payments. As discussed in Argument Section I.A., *infra*, dozens of appellate judges from across the country have supported this approach. *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when

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[1] Reference to "Pls.' Br." is to Plaintiffs' opening appellate brief filed with this Court on November 16, 2020, and reference to "Defs.' Br.' is to Travelers' appellate response filed on December 15, 2020.

[2] Reference to "Dkt." is to the Case Management/Electronic Case Filing System for the United States District Court for the District of South Carolina, which can be accessed at: https://ecf.scd.uscourts.gov/cgi-bin/login.pl, using case number 3:19-cv-02621.

the terms are reasonably susceptible to more than one interpretation."). Moreover, this approach is entirely consistent with the goal of indemnity[3] at the heart of the ACV calculation—namely, to return the policyholder's property to the same condition it was in right before the loss. *South Carolina Electric & Gas Co. v. Aetna Ins. Co.*, 238 S.C. 248, 262, 120 S.E.2d 111, 118 (1961) (holding an ACV payment "is summed up in the idea 'the cost of replacing in as nearly as possible the condition as it existed at the date of the fire.'" (internal citation omitted)). The certified question should therefore be answered in favor of the Plaintiffs.

I. Travelers Has Not Met Its Burden Of Demonstrating That "Depreciation" Unambiguously Includes Labor.

A. A Slight Majority Of Appellate Decisions Favor Plaintiffs.

Travelers must show that its forms unambiguously permit labor depreciation. If Travelers' form can be reasonably interpreted any other way, this Court resolves the ambiguity by adopting the policyholder's interpretation. *S.C. Dep't of Nat. Res.*, 345 S.C. at 623; *Greenville Cnty. v. Ins. Reserve Fund,* 313 S.C. 546, 547, 443 S.E.2d 552, 553 (1994).

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[3] ACV coverage provides pure indemnity, the purpose of which is to restore the insured to the position she was in prior to the loss. Steven Plitt *et al.*, COUCH ON INSURANCE §§ 175:19 (3rd ed. Dec. 2020) ("'Actual cash value policy' is a pure indemnity contract, and its purpose is to make the insured whole …."); Richard J. Cohen, 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY ED. § 47.04 (2020) ("An actual cash value policy is a pure indemnity contract. Its purpose is to make the insured whole but never to benefit her because of the loss."); *Lammert v. Auto-Owners (Mut.) Ins. Co.,* 572 S.W.3d 170, 173-74 (Tenn. 2019) ("insurance contracts are contracts of indemnity, meaning that the purpose of the insurance contract 'is to reimburse the insured; to restore him as nearly as possible to the position he was in before the loss'"; indemnity is "accomplished through recovery of the actual cash value of the damaged property." (internal citation omitted)); *Mitchell v. State Farm Fire & Cas. Co.*, 95 F.3d 700, 706-07 (5th Cir. 2020) ("Mitchell's definition, which results in paying the costs necessary to place a homeowner in the *status quo ante*, is reasonable."). "[D]epreciating labor does not make the policyholder whole but rather *frustrates the indemnity purpose of [ACV] coverage* … [because] the cost of labor to install a new garage would be [the] same as installing a garage with 10 year old materials." *Hicks v. State Farm Fire & Cas. Co.,* 751 Fed. App'x. 703, 706 (6th Cir. 2018) (internal quotation marks and citation omitted; emphasis added).

Travelers argues that a "majority rule" supports its policy interpretation, and that this Court generally follows the majority position. *See* Defs.' Br. at 28. However, appellate decisions are now tilted adverse to Travelers, given last year's clear trend (4-1) in favor of policyholders. The following two tables illustrate the current divide:

APPELLATE COURT DECISIONS FAVORING POLICYHOLDERS

Case Name	Replacement cost less depreciation methodology jurisdiction or agreement?	Holding	Majority / dissent
Sproull v. State Farm Fire & Cas. Co., --- N.E.3d ---, 2020 WL 4251702 (Ill. App. Ct. July 24, 2020), *on further appeal.*	Yes	Ambiguity	3-0
Cranfield v. State Farm Fire & Cas. Co., 798 Fed. App'x 929 (6th Cir. 2020) (Ohio)	Yes	Ambiguity	3-0
Perry v. Allstate lndem. Co., 953 F.3d 417 (6th Cir. 2020) (Ohio)	Yes	Ambiguity	3-0
Mitchell v. State Farm Fire & Cas. Co., 95 F.3d 700 (5th Cir. 2020) (Mississippi)	Yes	Ambiguity	3-0
Lammert v. Auto-Owners (Mut.) Ins. Co., 572 S.W.3d 170, 178 (Tenn. 2019)	Yes	Ambiguity	5-0
Hicks v. State Farm Fire & Cas. Co., 751 Fed. App'x 703 (6th Cir. 2018) (Kentucky)	Yes	Ambiguity	2-1
Shelter Mut. Ins. Co. v. Goodner, 477 S.W.3d 512 (Ark. 2015)	Yes	Public policy	4-2
Adams v. Cameron Mut. Ins. Co., 430 S.W.3d 675 (Ark. 2013)	Yes	Ambiguity	5-0
TOTAL APPELLATE JUDGES			26-3

APPELLATE COURT DECISIONS FAVORING INSURERS

Case Name	Replacement cost less depreciation methodology jurisdiction or party agreement?	Holding	Majority / dissent
Accardi v. Hartford Underwriter Ins. Co., 838 S.E.2d 454 (N.C. 2020)	No. Broad evidence	Permitted	7-0

Graves v. Am. Family Mut. Ins. Co., 686 Fed. App'x. 536 (10th Cir. 2017) (Kansas)	Yes	Permitted	3-0
Henn v. American Family Mutual Ins. Co., 894 N.W.2d 179 (Neb. 2017)	No. Broad evidence	Permitted	5-0
In re: State Farm Fire and Cas. Co., 872 F.3d 567 (8th Cir. 2017)	No. Fair market value	Permitted	3-0
Redcorn v. State Farm Fire & Cas. Co., 55 P.3d 1017 (Okla. 2002) and *Branch v. Farmers Ins. Co.,* 55 P.3d 1023 (Okla. 2002) (companion cases)	No. Broad evidence	Depreciation allowed for installation labor but not removal labor	5-3
TOTAL APPELLATE JUDGES			23-3

Curiously, Travelers argues that this Court should ignore all the federal circuit court decisions referenced above because the opinions are merely "*Erie* guesses." Def. Br. at 35-36. However, Travelers' new argument plainly conflicts with its prior argument before the district court. There, Travelers urged the district court to rely upon federal case law in lieu of certifying a question to this Court. *See* Dkt. 26, at 14-15 ("While Defendants agree that there is no controlling precedent of the South Carolina Supreme Court, several federal district courts and federal courts of appeals have found sufficient guidance in the basic principles of insurance law.").

In truth, Travelers urges the Court to ignore all of the adverse federal appellate decisions solely because these judges have now rejected Travelers' interpretation arguments.[4] This body of case law reflects a reality Travelers does not want to acknowledge—many highly respected appellate jurists agree that undefined policy terms such as "actual cash value" and "depreciation" are ambiguous in the context of insurers' withholding of labor as "depreciation."

[4] Most recently, in *Shields v. Metro. Prop. & Ins. Co.*, the district court held that "the term 'actual cash value' in the subject policy is ambiguous and can be interpreted to either include or exclude labor cost depreciation; the Court thus resolves that ambiguity in favor of the Plaintiff." No. 19-00222, 2020 WL 7338065, at *4 (N.D. Miss. Dec. 14, 2020); *see also* Pls.' Br. at 21-23, n.7 (collecting cases).

Travelers' suggestion that "it remains uncertain" whether the federal court of appeals decisions relied upon by Plaintiffs correctly reflect state law, (Defs.' Br. at 36), is belied by the fact that the Fifth Circuit's decision in *Mitchell, supra,* and the Sixth Circuit's decision in *Hicks, supra,* are entirely consistent with what state insurance regulators require before an insurer may depreciate labor in the calculation of ACV payments—namely, the policy must state in "a clear and unambiguous manner the practice of withholding labor depreciation in the adjudication of a property claim payment." Commonwealth of Kentucky Department of Insurance ("KDOI"), Advisory Op. 2020-01 (Feb. 7, 2020);[5] *accord* Mississippi Department of Insurance ("MDOI") Bulletin 2017-8 (Aug. 4, 2017) ("If such a practice is used, the insurer should clearly provide for the depreciation of labor in the insurance policy.").[6] In Kentucky, the insurance department's advisory opinion was issued specifically "in light of the recent holding presented in *Hicks*" and conforms to the Sixth Circuit's decision. KDOI Advisory Op., 2020-01. Thus, the Fifth and Sixth Circuit's labor depreciation decisions (as well as numerous district court decisions) are in accord with the Mississippi and Kentucky Departments of Insurance. Travelers' assertion that there is some uncertainty on the law in these states should be rejected.

Ultimately, this Court need not adopt all the reasoning in the cases relied upon by Plaintiffs to answer the certified question in their favor—some of which involve indemnity principles, some rely on dictionary definitions, and some do not focus their analysis on the ordinary understanding of a reasonable insured. *Lammert*, 572 S.W.3d at 178-79 (declining to decide whether labor can logically depreciate or whether indemnity is achieved to answer certified labor depreciation question because "this case turns on our standard for interpreting insurance contracts").

[5] *Available at:* https://insurance.ky.gov/ppc/Documents/AdvisoryOpinion2020-01.pdf (last visited Jan. 14, 2021).

[6] *Available at:* https://www.mid.ms.gov/legal/bulletins/20178bul.pdf (last visited Jan. 14, 2021).

Nevertheless, "they point the way to the correct resolution of the [certified question], because they make clear that a reasonable insured, armed only with the Policy language and everyday meaning of the words used, could reasonably understand that ACV does not encompass depreciation of labor costs." *Arnold v. State Farm Fire & Cas. Co.*, 268 F. Supp. 3d 1297, 1312 (S.D. Ala. 2017); *Lammert*, 572 S.W.3d at 178-79 (similar holding); *see also Titan Exteriors, Inc. v. Certain Underwriters at Lloyd's*, 297 F. Supp. 3d 628, 634 (N.D. Miss. 2018) (discussing conflicting labor depreciation case law and stating "[t]he Court need not decide which of these interpretations is correct. It needs [sic] only find that each is reasonable, and the Court so finds that 'actual cash value' when defined as 'replacement cost less depreciation' is subject to more than one reasonable interpretation").

B. The Most Generous Method Of Valuation Must Be Applied So Long As It Is Reasonable, Even If This Court "Conceptually Agrees" With Travelers.

In an insurance contract dispute, this Court adopts the "method of valuation" most favorable to the policyholder even if this Court "conceptually agree[s]" with the insurer on a lower valued methodology. *Whitlock v. Steward Title Guaranty Co.*, 399 S.C. 610, 616, 732 S.E.2d 626, 628 (2012) (choosing to value property on the date of purchase versus date of the discovery of the defect even though this Court conceptually agreed with the insurer). Similarly, in out-of-state labor depreciation cases, courts have repeatedly held that a policyholder need only demonstrate that her interpretation "is a reasonable one—not necessarily the most reasonable." *E.g.*, *Mitchell*, 95 F.3d at 706; *Arnold*, 268 F. Supp. 3d at 1309 ("[I]t does not matter if the defendant's construction is (before or after initiation into various property and insurance concepts) more reasonable.").

Therefore, in order to prevail on its policy interpretation, Travelers must demonstrate that *no* reasonable insured could possibly understand that Travelers' undefined ACV policy term includes depreciation of both materials and labor costs. *See, e.g., Arnold v. State Farm Fire & Cas.*

Co., No. 17-0148, 2017 WL 5451749, at *7 (S.D. Ala. Nov. 14, 2017) (insurer "failed because the defendant failed to sustain its burden of showing that the undefined term 'actual cash value' unambiguously contemplates depreciation of labor costs").

"[T]he split of authority amongst the other courts that have addressed this issue," demonstrates the reasonableness of Plaintiffs' interpretation. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 639, 594 S.E.2d 455, 460 (2004); *Greenville Cnty.* 313 S.C. at 548; *see also Arnold*, 268 F. Supp. 3d at 1311-12 and n.23 ("the fact remains that … some percentage of insurance adjusters, like some percentage of jurists, share the plaintiff's understanding"). As the Fifth Circuit recently explained in *Mitchell*:

> [Plaintiffs'] definition, which results in paying the costs necessary to place a homeowner in the *status quo ante*, is reasonable. Several other courts interpreting the term "Actual Cash Value" where "Actual Cash Value" is defined as "cost of replacement less depreciation" have reached the same conclusion. *See, e.g., Hicks*, 751 F. App'x at 710; *Lammert v. Auto-Owners (Mut.) Ins. Co.*, 572 S.W.3d 170, 178 (Tenn. 2019); *Adams v. Cameron Mut. Ins. Co.*, 2013 Ark. 475, 430 S.W.3d 675, 679 (2013), *superseded by statute*, Ark. Code Ann. § 23-88-106(a)(2).
>
> [The insurer's] definition of ACV instead views "depreciation" as the reduction in the *appraised* or *market* value of the [property] prior to the damage. **This definition may be reasonable as well. But it is not so singularly compelling as to make [Plaintiffs'] definition of ACV unreasonable**. We resolve the dispute in favor of [the policyholder] under the canon that "ambiguity and doubt in an insurance policy must be resolved in favor of the insured."

Mitchell, 95 F.3d at 706-07 (italicized emphasis in original; bold emphasis added).

"Therefore, with the insured's interpretation controlling, labor may not be depreciated when the insurance company calculates the [ACV] of a property using the replacement cost less depreciation method." *Lammert*, 572 S.W.3d at 179. The certified question should be answered in the negative.

II. Travelers Had Both The Means And Responsibility To Disclose Its Restrictive Method Of Valuation By Utilizing A Labor Permissive Form But Elected Not To Do So.

Travelers failed to draft unambiguous policy language to convey the intent that it now claims to have had all along. This is true despite the fact that the propriety of labor depreciation has been actively litigated for nearly two decades. During this time, Travelers clearly monitored the resulting decisions, including numerous decisions adverse to insurers that, like Travelers, failed to utilize a policy form that expressly permits labor depreciation. However, instead of *proactively* eliminating the policy ambiguity resulting from its failure to expressly define ACV to include labor depreciation, Travelers' response to the controversy has been entirely *reactionary*.

For example, after the Arkansas Supreme Court issued its labor depreciation ruling in favor of the policyholder over seven years ago in *Adams v. Cameron Mutual Ins. Co.*, 430 S.W.3d 675 (Ark. 2013), Travelers issued refunds to Arkansas policyholders from whom labor costs had previously been withheld from ACV payments. *See* Dkt. 13-8. More recently, Travelers issued refund payments to over 1,600 Tennessee policyholders in response to the Tennessee Supreme Court's decision in *Lammert v. Auto-Owners (Mutual) Ins. Co.*, 572 S.W.3d 170 (Tenn. 2019), wherein the court held that labor may not be depreciated when the insurer calculates ACV using the replacement cost less depreciation methodology in the absence of policy language expressly addressing labor depreciation. *See* Dkt. 13-7.

Travelers' reactive approach is unreasonable because it impermissibly allows it to benefit from the imprecision in its own drafting to its policyholders' detriment. This is contrary to South

Carolina insurance law as any ambiguity in an insurance policy must be construed in favor of the insured. *S.C. Dep't of Nat. Res.*, 345 S.C. at 623; *Greenville Cnty.,* 313 S.C. at 547.[7]

"Given the sheer number of court cases nationwide involving [this issue], an insurer surely understands that it will likely face claims" under its homeowners' policies based on its practice of withholding labor costs in the absence of clear policy language expressly permitting the practice. *Johnson v. Am. United Life Ins. Co.*, 716 F.3d 813, 816 (4th Cir. 2013) (internal quotation marks and citation omitted). "The interpretive onus belongs on the insurers who draft these [homeowners'] insurance policies; they can eliminate dilemmas like this one by clearly and plainly stating" that both material and non-material labor costs will be withheld from ACV payments as depreciation "so that the insured know[s] what he is getting in his insurance policy." *Id.* (internal quotation marks and citation omitted). Indeed, numerous insurers operating in South Carolina have utilized labor permissive forms for years. *See* Pls.' Br. at 9-11, 24 (citing Dkts. 13-5 and 13-6).

Travelers' position that it need not add clarifying language is contradicted by the insurance industry itself. For instance, National Underwriter Company is a 124-year-old insurance industry publisher. FC&S Bulletins (or Fire, Casualty & Surety) provide coverage interpretation guidance

[7] Travelers is no stranger to policy language ambiguity in South Carolina. South Carolina courts have, on several occasions, held that Travelers' failure to draft clear policy language required construction of policy terms in favor of its insureds. *See, e.g., Super Duper Inc. v. Penn. Nat. Mut. Cas. Ins. Co.*, 385 S.C. 201, 210, 683 S.E.2d 792, 796 (2009) ("If Travelers intended to restrict its exposure solely to the common law tort of misappropriation, then Travelers had both the means and the responsibility to use restrictive language in the contract instead of the general term 'misappropriation.'"); *W.N. Leslie, Inc. v. Travelers Ins. Co.,* 264 S.C. 408, 413, 215 S.E.2d 448, 450 (1975) (liberally construing policy in favor of insured and affirming coverage); *see also Travelers Prop. Cas. Co. v. Senn Freigh Lines, Inc.*, No. 2014-MO-022, 2014 WL 3015985, at *1 (July 2, 2014) (unpublished) (reversing court of appeals' denial of coverage and noting that an insurance contract that is ambiguous or capable of multiple meanings must be construed in favor of the insured). The same result should occur here.

to insurance underwriters and adjusters and have been issued for several decades by National Underwriter.

Because National Underwriter's advice is directed to claims and underwriting professionals themselves, FC&S Bulletins "are particularly persuasive as interpretive aids where they support coverage on behalf of the insured." *Golden Eagle Ins. Co. v. Ins. Co. of the West*, 121 Cal. Rptr. 2d 682, 688 (Cal. Ct. App. 2002); *see also Travco Ins. Co. v. Ward*, 468 Fed. App'x. 195, 2012 WL 666230, at *200, n.6 (4th Cir. Mar. 1, 2012) (FC&S Bulletins are "an insurance industry publication which provides expert analysis on insurance policy interpretation"); *Eder v. Allstate Ins. Co.*, 60 F.3d 833, 1995 WL 398822, at *5 (9th Cir. 1990) (holding it is difficult to interpret insurance policy contrary to FC&S Bulletin as it reflects interpretation by the insurance industry); *Casetech Specialties, Inc. v. Selective Ins. Co*., No. 13-11792, 2013 WL 6835098, at *7 n.4 (E.D. Mich. Dec. 23, 2013) (relying on FC&S Bulletin); *Glendale v. National Union Fire Ins. Co*., No. 12-380, 2013 WL 1296418, at *11-12 (D. Ariz. Mar. 29, 2013) (same).

Consistent with the arguments of Plaintiffs here, National Underwriter has formally stated its position that "depreciation should not apply to labor unless a policy explicitly states that it should." FC & S BULLETIN, *Should depreciation be applied to demolition, cleaning, and odor control costs following a fire loss?* (Nat'l Underwriter Co. December 5, 2014) (Dkt. 22-1).

Insurance regulators have also notified carriers that they should use clarifying policy language before engaging in the practice of labor depreciation, especially in the absence of controlling case or statutory law. *See* MDOI Bulletin 2017-8 ("There is no statutory law in Mississippi prohibiting the practice of labor depreciation in the adjustment of property loss claims," but "[i]f such a practice is used, the insurer should clearly provide for the depreciation of labor in the insurance policy."). After the Arkansas Supreme Court precluded

withholding labor under a policy that does not so allow, *Adams supra*, the Arkansas legislature enacted a statute precluding labor depreciation in the absence of permissive language in the policy by statute. Ark. Code Ann. § 23-88-106. Again, these authorities are intended to allow the policyholder to be an informed consumer without precluding the practice.

Judicial opinions follow suit. "Strictly construing ambiguous terms presents [property insurers like Travelers] with a clear alternative: draft [policies] that reasonable people can understand or pay for the ambiguity." *Johnson*, 716 F.3d at 822 (internal quotation marks and citation omitted); *Harwell v. Mut. Ben. Health & Acc. Ass'n*, 207 S.C. 150, 160, 35 S.E.2d 160, 164 (1945) ("Insurance companies cannot [] couch their contracts in doubtful language and allow their salesmen to employ the construction most favorable to the insured to catch the unwary, and then, when the company is haled into court, claim the construction most favorable to it." (internal quotation marks and citation omitted)). As one district court aptly stated in holding that a similarly undefined ACV term does not unambiguously permit labor depreciation:

> [T]he defendant has not explained why it should be judicially protected from this foreseeable consequence of its own imprecise drafting regarding an issue of which it has actually been aware (as the defendant in *Redcorn*) since at least 2002. That the defendant scraped by with a 5-3 decision might well have prompted a reasonable insurer to consider defining ACV so as to eliminate the controversy.

Arnold, 268 F. Supp. 3d at 1310, n.18.

It is appropriate to require insurers like Travelers to set forth explicitly how ACV payments will be calculated and to state unambiguously whether both materials and labor costs will be withheld as depreciation. Indeed, under South Carolina law, if Travelers wished to withhold labor costs as "depreciation" in calculating ACV payments, "*Travelers had both the means and responsibility*" to draft explicit language to that effect. *Super Duper Inc. v. Penn. Nat. Mut. Cas. Ins. Co.*, 385 S.C. 201, 210, 683 S.E.2d 792, 796 (2009) (emphasis added); *Crossman Comm. of*

N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 47, n. 4, 717 S.E.2d 589, 592-93 (2011) (construing ambiguous term against insurer and stating, "[w]e are aware that this construction may be at odds with a more limited nature of coverage actually intended by policyholders and the insurance industry. However, if insurers intend to preclude this construction, it is incumbent upon them to include clear language accomplishing this result."); *Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 149-50, 781 S.E.2d 137, 149-50 (S.C. Ct. App. 2015) (construing ambiguous term against insurer because "the burden rests with the insurer to clearly enumerate the terms in its policy" and highlighting numerous ways in which insurer "could have easily" eliminated ambiguity); *accord Adams*, 430 S.W.3d at 677 (holding that if insurer "thought that labor should be depreciable under the policy … it was in the best position to clarify … when it drafted the policy."); *Hicks*, 751 F. App'x at 709 ("State Farm could have removed any ambiguity by simply writing its policies to expressly include labor depreciation when calculating ACV."). Instead, the policy here simply leaves "actual cash value" undefined and susceptible to more than one interpretation if labor is withheld as depreciation. *See Johnson*, 716 F.3d at 822 (construing undefined policy term against insurer). The resulting ambiguity is thus properly construed in Plaintiffs' favor.

Travelers seeks to excuse its failure to utilize a labor permissive form by arguing that its interpretation of ACV is purportedly so well-established within the relevant case law that it was unnecessary for Travelers to clarify its position explicitly within its policy. *See, e.g.,* Def. Br. at 14, n.8. But the fact that the district court certified, and this Court accepted, the legal question presented demonstrates that South Carolina law is not clear. Travelers, not the policyholders, should bear the consequences of its imprecise drafting decisions. *Harwell*, 207 S.C. at 159 ("Insurance companies frame their own policies, use their own language, …; insert their own

complicated, and in some instances obscure and equivocal, conditions; *and courts uniformly give the insured the benefit of any doubt in the construction of the terms used in such policy*." (emphasis added)).

Travelers suggests that the policyholders should be properly charged with the knowledge of the recent decisions of the supreme courts of Oklahoma, Nebraska, Minnesota and North Carolina upon which Travelers relies. Def. Br. at 14, n.8. But requiring policyholders to be aware of a foreign split in the case law is absurd. *See Lammert*, 572 S.W.3d at 179 ("an insured should not have to consult a long line of case law or law review articles and treatises to determine the coverage he or she is purchasing under an insurance policy"); *Arnold*, 268 F. Supp. 3d at 1305-06 (holding insurer failed to establish that policyholders are charged with knowledge of insurance law so as to alter the well-established rules of policy construction); *accord S.C. Farm Bureau Mut. Ins. Co. v. Dunham,* 380 S.C. 506, 511, 671 S.E.2d 610, 612-13 (2009) (holding trial court erred by failing to interpret undefined policy term by "attempting to ascertain the understanding to the ordinary person," and opting instead to apply legal definitions and tests developed under tort law). To the contrary, if a reasonable policyholder in Plaintiffs' position, "not possessing specialized knowledge or expertise about such matters and knowing only the Policy language and the common, everyday meaning of the language employed, could reasonably understand that ACV does not include depreciation of labor costs, the term is ambiguous[,]" and the certified question must be answered adverse to Travelers. *Arnold*, 268 F. Supp. 3d at 1309.

III. Travelers' Reliance On *Accardi v. Hartford Underwriters Ins. Co.* Is Misplaced.

Throughout its Response, Travelers attempts to rely on the North Carolina Supreme Court's February 2020 decision in *Accardi v. Hartford Underwriters Ins. Co.*, 838 S.E.2d 454

(N.C. 2020). But, Travelers' reliance is misplaced because the *Accardi* court's application of North Carolina law is particularly unhelpful here.

First, Travelers erroneously argues that *Accardi* dictates resolution of the certified question, in part, because "[t]here is no reason why the rule of law on the certified question presented here should differ based on which side of the North/South Carolina border a property is on." Defs.' Br. at 2. But *Accardi* holds just the opposite. The North Carolina Supreme Court expressly refused to consider labor depreciation case law from any other jurisdiction, including the decided law of its bordering state, Tennessee, holding: "Decisions from other jurisdictions, however, provide little guidance to this Court because the policy language in each case differs meaningfully, *as do the insurance laws of each state*." *Accardi*, 838 S.E.2d at 457 (emphasis added).

While this Court looks to North Carolina case law in the discrete area of workers compensation law due to South Carolina's earlier adoption of North Carolina's workers' compensation code,[8] there is no similar requirement for other insurance disputes. *E.g.*, *Travelers Ins. Co. v. Lawson*, 276 S.C. 587, 590, 281 S.E.2d 116, 118 (S.C.1981) (rejecting North Carolina law in favor of Fourth Circuit decision). Here, South Carolina insurance law as it relates to the certified question "differs meaningfully" from North Carolina law. *Accardi*, 838 S.E.2d at 457.

Accardi held that, under the subject policy, ACV "is not susceptible to more than one reasonable interpretation and the term unambiguously includes costs for the depreciation of labor." *Id*. To reach its holding, the court determined plaintiff's interpretation—that labor should not be depreciated under a policy that, like Travelers' policies here, did not allow for labor depreciation—

[8] *Pierre v. Seaside Farms, Inc*., 386 S.C. 534, 543, 689 S.E.2d 615, 619 (S.C. 2010) ("[A]lthough South Carolina courts frequently look to North Carolina's rulings since our workers' compensation code is very similar, there is not requirement that we abide by North Carolina's determination for our own law").

was not a fair or reasonable construction. *Id*. The court came to this conclusion because it agreed with the lower court that "'it does not make logical sense to separate the cost of labor from that of physical materials when evaluating the depreciation of a house or its component parts,' when the value of a house is more than simply the costs of the materials used." *Id*. at 456.

In stark contrast to North Carolina law, this Court has already held in *S.C. Elec.* that it ***does*** "make logical sense to separate the cost of labor from that of physical materials…." 238 S.C. at 251, 261-263; Pls.' Br. at 18-21. Since Plaintiffs' interpretation is reasonable based on this Court's *S.C. Elec.* decision, Travelers' policies are ambiguous and should be interpreted in favor of Plaintiffs. *See S.C. Dep't of Nat. Res.*, 345 S.C. at 623 ("contract is ambiguous when the terms are reasonably susceptible to more than one interpretation"). Moreover, as detailed in Section IV, *infra*, Travelers itself separated the cost of labor and physical materials when adjusting Plaintiffs' claims here, and in some cases, chose not to depreciate labor costs. Travelers' own claims practices further support the reasonableness of Plaintiffs' position

Second, Travelers argues that Plaintiffs take the position that *S.C. Elec.* "set[s] forth a rule of law that depreciation may never be applied to embedded labor costs." Defs. Br. at 27. This is not so. Travelers fundamentally misstates Plaintiffs' position. Plaintiffs do not contend that labor can never be depreciated even in the face of policy language that unambiguously allows it. *See* Pls.' Br. at 10, 24. Instead, Plaintiffs maintain that the holding in *S.C. Elec.*—like the many cases outside South Carolina in accord—show that Plaintiffs' reading is a reasonable interpretation of ACV if otherwise left undefined. *See* Pls.' Br. at 21; *Arnold*, 268 F. Supp. 3d at 1311 ("Again, however, the question is whether the plaintiff's construction is also reasonable. The jurists in the plaintiff's cases have all thought so.").

Third, North Carolina is a "broad evidence rule" jurisdiction, which allows insurers to consider "market value" in lieu of reproduction cost. *See Kinlaw v. N.C. Farm Bureau Mut. Ins. Co.*, 389 S.E.2d 840, 844 (N.C. Ct. App. 1990). Consistent with a broad evidence methodology, the *Accardi* court expressly allowed for fair market value consideration to reduce the value of an ACV payment. 838 S.E.2d at 457 ("The value of a house is determined by considering it as a fully assembled whole.").

In sharp contrast, the parties here agreed on the use of the replacement cost less depreciation methodology. *See* Pls.' Br. at 5, 30 (citing Dkt. 13, ¶¶ 27-30, 39-40, 42; Dkt. 16-1, at 1); *see also* Dkt. 40, at 6 (recognizing that "replacement cost less depreciation" methodology "is the methodology used in [Plaintiffs'] policies"). Further, both South Carolina courts and the South Carolina Department of Insurance have adopted the replacement cost less depreciation methodology, and this Court has held under that methodology that labor is "undepreciable." *S.C. Elec.*, 238 S.C. at 262-63; Dkt. 22-10. Travelers concedes that neither South Carolina courts nor its regulators have ever adopted the broad evidence rule. *See* Dkt. 26, at 10.

Courts in replacement cost less depreciation jurisdictions are near unanimous in disallowing the withholding of labor as depreciation in the absence of an express policy form authorizing the practice. *See, supra,* at Argument Section I.A.; Pls.' Br. at 34-36. As the Sixth Circuit held in *Hicks*, "the instructive precedents are not those from states that reject reproduction cost, but those that define actual cash value as replacement cost less depreciation, like Illinois, Ohio, and Alabama." *Hicks*, 751 Fed. App'x at 711. Accordingly, *Accardi* is properly limited to its stated holding—it is applicable only to jurisdictions whose insurance laws do not "differ[] meaningfully." *Accardi*, 838 S.E.2d at 457.

Finally, no appellate court that has addressed labor depreciation since *Accardi* has followed the decision. Indeed, while *Accardi* was the earliest appellate labor depreciation decision in 2020—having been issued on February 28, 2020—none of the subsequent four appellate labor depreciation decisions followed *Accardi*. *Compare Accardi*, 838 S.E.2d 454, *with Perry*, 953 F.3d 417 (issued Mar. 18, 2020); *Cranfield*, 798 Fed. App'x 929 (issued Mar. 23, 2020); *Mitchell*, 954 F.3d 700 (issued Mar. 30, 2020); *Sproull*, 2020 WL 4251702 (issued July 24, 2020). Based upon South Carolina law and the weight of authority, this Court should likewise decline to follow *Accardi*.

IV. Travelers' Reliance On Consumer Guidance From The South Carolina Department Of Insurance To Support Its Policy Interpretation Is Also Misplaced.

Travelers also argues that general consumer guidance from the South Carolina Department of Insurance ("SCDOI") supports its policy construction that labor is depreciable. Defs.' Br. at 17 (citing Dkt. 16-4). This is patently incorrect, as the consumer guidance does *not* address labor depreciation. *See id*. In *Hicks*, the Sixth Circuit rejected an identical argument from a carrier that general consumer guidance explaining the concept of depreciation must allow labor depreciation. *Hicks*, 751 F. App'x at 708, n.3. As the Sixth Circuit explained,

> As relevant to this appeal, the document contains one paragraph alerting consumers that insurance companies often offer roof repair at a depreciated basis. There is also an example illustrating that ACV payment may be significantly less than replacement cost coverage. Even assuming this were an official interpretation of the ACV regulation, entitled to special agency deference, it nonetheless fails to address the issue at hand. The document says nothing about labor depreciation. As State Farm conceded during oral argument, the DOI website example is merely 'guidance for consumers to consult.'

Id.

Of course, when the KDOI chose to specifically address labor depreciation in a later bulletin, it explained, consistent with the holding in *Hicks*, that a carrier may depreciate labor costs

only if "the policy defines in a clear and unambiguous manner the practice of withholding labor depreciation in the adjudication of a property claim payment…." KDOI Advisory Op. 2020-01; *accord* MDOI Bulletin 2017-8 ("If such a practice is used, the insurer should clearly provide for the depreciation of labor in the insurance policy."). Like in *Hicks*, the general consumer guidance does not support Travelers' position here.

The SCDOI general consumer guidance is also unhelpful to Travelers because the examples it gives are inconsistent with the way Travelers *actually* applied depreciation here. *Compare* Defs.' Br. at 17, with Dkt. 13-1 at 3, *and* Dkt. 13-2 at 5. The SCDOI general guidance Travelers cites applies straight-line depreciation (*i.e.*, deducting $1,000 per year depreciation on a roof) to explain to consumers the concept that actual cash value coverage will result in a lower payment than replacement cost value. Travelers argues that since "the South Carolina Department of Insurance's example does not segregate materials from labor in applying depreciation[,]" it is "squarely inconsistent with Plaintiffs' proposed approach of depreciating only the cost of materials." Defs.' Br. at 17. But, Travelers' own estimates "segregate materials from labor in applying depreciation." *Id*. For example, for certain electrical repairs on Ms. Stewart's estimate, Travelers itself not only "segregate[d] materials from labor in applying depreciation," but also chose *not* to apply depreciation to the labor costs (line 49, immediately below), while simultaneously applying depreciation to materials (line 48):

Electrical

DESCRIPTION	QTY	UNIT PRICE	TAX	RCV	DEPREC.	ACV
DWELLING						
48. (Material Only) 110 volt copper wiring run, box and outlet	1.00 EA	9.60	0.77	10.37	(1.04)	9.33
49. Electrical - Labor Minimum	1.00 EA	175.01	0.00	175.01	(0.00)	175.01
above is material and labor for replacement of the damaged outlet and wiring to the outlet.						
Dwelling Totals:			**0.77**	**185.38**	**(1.04)**	**184.34**
Totals: Electrical			**0.77**	**185.38**	**1.04**	**184.34**

Dkt. 13-2 at 5. Of course, in contrast to line item 49, above, Travelers depreciated labor on many other line items in its estimates. Given that Travelers itself segregates materials and labor, its criticism of Plaintiffs' approach as being inconsistent the general guidance provided to consumers by the SCDOI fails. The general guidance does not support Travelers' position.

V. Travelers' Alternative Argument To Adopt The Outlier Approach Of The Minnesota Supreme Court Should Be Rejected.

The certified question presents an issue of law that is not appropriate for the contractual appraisal process,[9] and the Court should reject Travelers' alternative argument to adopt the approach of the Minnesota Supreme Court. *See* Defs.' Br. at 44-47. In 2016, the Minnesota Supreme Court ruled inconsistently with all other state supreme courts and held that the question of whether labor can be withheld as depreciation is a question for an appraisal panel to decide. *Wilcox v. State Farm Fire & Cas. Co.*, 874 N.W.2d 780, 785 (Minn. 2016). This approach was an enigma both then and now and was unique to the intricacies of Minnesota law concerning insurance appraisals, which dramatically differ from black letter law in the State of South Carolina

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[9] The Butler Policy contains the following appraisal provision:

> **Appraisal.** If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent and impartial appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.
>
> Each party will:
>
> a. Pay its own appraiser; and
>
> b. Bear the other expenses of the appraisal and umpire equally.

(Dkt. 16-2, p. 28 of 44). The Stewart Policy contains a substantially similar provision. (Dkt. 16-3, p. 23 of 50).

and elsewhere. For multiple reasons as discussed below, appraisals cannot—and should not—be utilized to decide questions of law, which of course must be decided by the courts as opposed to layperson members of an appraisal panel.

First, there is no dispute between the parties concerning the valuations of labor and materials necessary to repair Plaintiffs' property. Indeed, the Amended Complaint makes clear that Plaintiffs "do[] not dispute [Travelers'] valuations of the amount of labor and materials necessary for the repair of [their] property to its pre-loss condition," and that Plaintiffs "do not dispute any of [Travelers'] valuations as to the depreciated values of the tangible property at the time of the loss." Dkt. 13, ¶¶ 36, 48. Instead, Plaintiffs "only dispute[] whether portions of the agreed-to and undisputed amounts of labor, as determined by [Travelers] itself, may be withheld by [Travelers] as 'depreciation' from [their] ACV payment under the terms and conditions of [Plaintiffs'] insurance polic[ies]. *Id.* Because Plaintiffs have not even alleged a dispute concerning the amount of loss, there is nothing for an appraisal panel to appraise. Indeed, the dispute at issue is *not* one relating to amount, or quantity, but rather one relating to solely to contract interpretation, *i.e.*, whether labor can be withheld from an ACV payment under a replacement cost less depreciation methodology.

Second, despite Travelers' suggestion to the contrary, the laws of the state of South Carolina dramatically differ from those of Minnesota concerning insurance appraisals and appraisal panels' role in interpreting policy language. For example, Travelers suggests in its response brief that Minnesota law does not allow an appraisal panel to construe an insurance policy, but the case it cites, *Quade v. Secura Ins.*, 814 N.W.2d 703 (Minn. 2012), specifically held that "'questions of law or fact, which are involved as mere incidents to a determination of the amount of loss or damage,' are appropriate to resolve in an appraisal in order to ascertain the

'amount of loss.'" *Id.* at 707. This holding was confirmed by the Minnesota Supreme Court again in 2014 in *Cedar Bluff Townhome Condo. Ass'n. v. Am. Family Mut. Ins. Co.*, 857 N.W.2d 290, 293 (Minn. 2014). In *Cedar Bluff*, the court noted that the appraisal panel was allowed to considering meanings of phrases within the insurance policy that bear on the amount of loss, and in a further show of deference to the appraisal panel's legal interpretation, concluded "that the appraisal panel applied the correct legal standard" in interpreting phrases within the policy. *Id.*

In contrast, South Carolina law does *not* allow an appraisal panel to interpret a policy, but instead reserves contract interpretation as a matter of law for only the courts to decide. *Harwell v. Home Mut. Fire Ins. Co.*, 228 S.C. 594, 598, 91 S.E.2d 273, 275 (S.C. 1956) ("An agreement to submit to [appraisal] all questions of law and fact that may arise under a contract is contrary to the public policy and void, and an attempt to oust courts of their jurisdiction." (citation omitted)); *Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 526, 167 S.E.2d 420, 423 (S.C. 1969) ([I]n a long line of cases …, this court has held … that the construction of the particular policy was a matter of determination by the court."); *Whitlock*, 399 S.C. at 615 ("It is a question of law for the court whether the language of an [insurance policy] is ambiguous.").

In fact, in its presentation of the certified question to this Court, the district court also concluded that the issue presented was one of law, not fact. Dkt. 40, at 8-9 (holding that the "the question of law at issue is determinative of the outcome of the instant suit," and framing the issue presented as a question of law—"The court certifies the following question of law…."). In light of this extraordinary difference between how Minnesota and South Carolina courts allow disputes over contract language to be resolved, the *Wilcox* case is of no significance to this Court's disposition of the certified question and is nothing but an outlier that is unique to Minnesota. Put simply, to place the issue of contract interpretation in the hands of layperson appraisers would

amount to a seismic shift in South Carolina law that has been steadfast in its jurisprudence for decades.

Third, precluding judicial resolution of labor depreciation contract interpretation issues is particularly illogical when one considers, as noted in Plaintiffs' opening brief (at pp. 14-15), that a substantial portion of South Carolina insurance policies expressly address this precise subject matter within their policies. Dkt. 13-5 and 13-6. Appraisers should have no authority to simply disregard express policy language dealing with the issue of labor depreciation. The parties are bound by the contractual terms.

For the same reasons, appraisers should similarly have no authority to determine if a policy is ambiguous concerning the issue of labor depreciation. Only a court should interpret Travelers' policies concerning the subject of labor depreciation, including resolution of any ambiguity issues. Only judicial resolution will provide guidance to lower courts, insurers, policyholders, and appraisers.

Fourth, judicial resolution of contract interpretation issues results in consistency of awards for similarly situated policyholders. If appraisal panels are forced to resolve this legal dispute, there will be inconsistent results. Two homeowners with the same properties, policies, and losses (*e.g.*, a twin home) could receive dramatically differing ACV payments, all because a layperson umpire decided whether withholding labor is appropriate.

Finally, an appraisal is almost never demanded, as the small value of the claim makes the retention of appraisers and umpires administratively infeasible. If this Court were to adopt the outlier *Wilcox* approach, property insurers could uniformly depreciate labor without disclosure in their policies or judicial recourse, resulting in thousands of South Carolina claimants being left

underpaid each year. For these many reasons, this Court should reject Travelers' proposed alternative argument concerning appraisal.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court answer the certified question posed by Judge Childs in the negative, holding that labor may not be depreciated when the insurer calculates the ACV of property damage using the replacement cost less depreciation methodology.

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January 15, 2021

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