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SUPREME COURT OF TEXAS
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No. 22-0414

IN THE SUPREME COURT OF TEXAS

HAROLD FRANKLIN OVERSTREET,
Appellant
v.
ALLSTATE VEHICLE AND PROPERTY INS. CO.,
Appellee.

On Certified Questions from the
United States Fifth Circuit Court of Appeals

BRIEF OF AMICI CURIAE, TEXAS HOSPITAL ASSOCIATION, TEXAS HOTEL AND LODGING ASSOCIATION, TEXAS LEAGUE OF COMMUNITY CHARTER SCHOOLS, TEXAS COMMUNITY ASSOCIATION ADVOCATES, TEXAS AUTOMOBILE DEALERS ASSOCIATION, TEXAS INDEPENDENT AUTOMOBILE DEALERS ASSOCIATION AND TEXAS ORGANIZATION OF RURAL AND COMMUNITY HOSPITALS

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On Behalf of Amici Curiae

IDENTITY OF AMICUS CURIAE AND COUNSEL

This brief is submitted jointly on behalf of several amici curiae, whose common interest is that they represent the interests of various owners of commercial and multi-family property in Texas whose stakeholders pay substantial premiums for property insurance, and who depend upon clear legal duties being imposed on their insurers to promptly investigate and pay for covered losses in good faith. The purpose of this brief is to apprise the Court of the history of the Texas legislature's efforts to appropriately place the burdens of proving covered and excluded losses on the insurer rather than policyholders, and the history of lower courts confusing the issue, both by mischaracterizing the nature of "concurrent causation" disputes and overlooking or misapplying the plain language of a statute meant to apply to this specific issue in contravention of the legislature's obvious purposes.

Because the outcome of this case substantially affects the rights of all Texas property owners to timely obtain full insurance benefits for covered losses, these amici curiae join together in this brief urging the Court to follow the plain language of, and protect the public policies embodied in, the Texas Legislature's passage of Chapter 554.002 of the TEXAS INSURANCE CODE.

No fee has been charged by the undersigned counsel for the preparation and filing of this brief.

TEXAS HOSPITAL ASSOCIATION (THA) serves Texas hospitals as the trusted source and unified voice to influence excellence in health care for all Texans. THA is one of the largest, most respected health care associations in the country, and the only association that represents the entire Texas hospital industry. THA serves as the political and educational advocate for more than 430 hospitals and health systems statewide.

TEXAS HOTEL AND LODGING ASSOCIATION (THLA) is a nonprofit trade association representing every aspect of the lodging and tourism industry. THLA membership ranges from the largest convention center hotel to the smallest bed & breakfast, full service and limited-service operators, convention and visitor bureaus, chambers of commerce, and vendors who work within the hospitality industry. THLA is the largest state hotel association in the nation, with over 5,000 members.

THE TEXAS LEAGUE OF COMMUNITY CHARTER SCHOOLS is a statewide member association of Texas open-enrollment charter schools and operators. The member schools consist of highly innovative and quality-focused small, mid-sized and community charter schools from around the state. Founded in 2014, the League seeks to protect the legal rights of Texas charter schools, and safeguard the educational freedom intended by Texas Statute for charter schools by preserving meaningful educational choices for parents.

TEXAS COMMUNITY ASSOCIATION ADVOCATES (TCAA) is the public policy voice of community associations and the professionals who serve them. TCAA represents the interests of community associations, board members, managers, attorneys, developers, builders, title companies, management companies, real estate professionals, realtors, homeowners and others who provide service to those living in deed restricted communities. TCAA is the voice for millions of Texas homeowners who choose to live in community associations and want to preserve the value of their homes - the greatest asses most Texans will purchase in their lifetime. TCAA is funded primarily by voluntary contributions from those who live in and work with community associations.

TEXAS AUTOMOBILE DEALERS ASSOCIATION (TADA) represents over 1,400 franchised automobile dealerships in 290 communities throughout the state of Texas. TADA advocates on behalf of the dealers at the Texas Legislature, Congress, and all regulatory agencies. TADA member dealerships also employ over 100,000 Texans statewide.

TEXAS INDEPENDENT AUTOMOBILE DEALERS ASSOCIATION (TIADA) has been and continues to be the only statewide organization for independent automobile dealers since 1944. TIADA represents the interests of small, medium and large independent and used vehicle dealers. TIADA is a member-owned, member-governed association that consists of more than 1400 of the best used car dealers in Texas who believe in creating a better image for the industry while

protecting the rights of auto dealers as business owners. In addition to the protection afforded directly to TIADA members for their own inventory and buildings, TIADA members have another important interest that is guarded by the Court's and the legislature's rules governing the handling and payment of insurance claims, because many of their members also directly provide and service loans related to their customer's automobile purchase. Like any business that secures a debt through collateral in property (such as mortgage banks and credit unions) TIADA members are often dependent upon good faith investigation and payment of covered losses (under comprehensive auto policies) to protect their security for loans made against vehicles sold by TIADA members and may often find themselves in the position of policyholders trying to secure insurance coverage payments when a debtor defaults in payments on damaged or destroyed collateral.

THE TEXAS ORGANIZATION OF RURAL AND COMMUNITY HOSPITALS (TORCH) provides advocacy to elected officials and governmental/regulatory entities on rural and community health issues, develops specialized programs, education, activities and services for rural and community hospitals and supports local access and delivery of health care service to the community residents and leverages the collective power of rural healthcare providers and facilities.

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ARGUMENT & AUTHORITIES

At the heart of this certified question is the mystery of a missing statute. Specifically, a statute enacted to address the very questions certified to this Court by the Fifth Circuit. It is a statute that curiously is almost never cited as court after court applying Texas law have taken Texas law out of line with every other jurisdiction as it relates to who has the burden of proof when it comes to exclusions in a property insurance policy. The roots of this mystery run deep in Texas jurisprudence . . . all the way back to 1965.

In 1991 Texas codified the burdens of proof applicable to insurance claims and exclusions in Article 21.58 of the Texas Insurance Code, now recodified as Section 554.002 of the Texas Insurance Code. This statute, entitled "Burden of Proof and Pleading," provides in relevant part as follows:

> In a suit to recover under any insurance or health maintenance organization contract, the insurer or health maintenance organization has the burden of proof as to any avoidance or affirmative defense that the Texas Rules of Civil Procedure require to be affirmatively pleaded, *and language of exclusion in the contract or an exception to coverage claimed by the insurer constitutes an avoidance or an affirmative defense*."

TEX. INS. CODE §554.002 (emphasis added)(hereinafter "the statute").

As discussed in Section I, infra, this statute was a specific legislative action to address the Texas judiciary's prior attempts to deal with the "concurrent cause"/burden of proof issue as it arose in property insurance disputes. The common law history of this doctrine is intertwined with the hurricane history of

Texas and sheds considerable light on how this statute was intended to address the specific questions raised by the Fifth Circuit.

As explained in detail in Section II, this approach to placing the burden of demonstrating the applicability of an exclusion on the insurer as well as the burden to prove how much of an otherwise covered loss is excluded is also consistent with decades of academic writing on this subject in the major insurance law treatises, such as Appleman and Couch. Moreover, placing the burden on insurers to prove that a loss falls within exclusionary language of a policy is the approach taken in *every* state . . . "with the possible exception of Texas."

Section III deals with a related question of whether the statute can or should be applied differently to an "all-risks" policy than it is when the dispute concerns a "named perils" or "specified causes of loss" type policy.

Finally, as discussed in Section IV, infra, the plain language of the statute places the burden of proof as to excluded perils (as affirmative defenses) on the insurer, which necessarily includes the burden to quantify the amount of the loss that was caused by an excluded cause. To that end, the Court should overrule the erroneous San Antonio Court of Appeals' opinion in *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300 (Tex. App. – San Antonio 1999, no pet.), in order to give effect to the plain language of Section 554.002, which has been consistently disregarded for over thirty years since it was originally enacted as Art. 21.58.

I. The Birth of a Statute: Hurricane Carla, *Paulson*, *Berglund* and *Lyons.*

Hurricane Carla struck the Texas coast in the Autumn of 1961 as the equivalent to a Category 4 storm. From the devastation wrought on Texas property owners emerged two important court of appeals cases addressing this notion of "concurrent causation" and who has the burden of proving how much of a loss was caused by an excluded peril: *Fire Ins. Exch. v. Paulson*, 381 S.W.2d 199 (Tex. Civ. App. – San Antonio 1964) ("*Paulson I*") *affirmed Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316, 318 (Tex. 1965)("*Paulson II*") and *Berglund v. Hardware Dealers Mut. Fire Ins. Co.*, 381 S.W.2d 631 (Tex. Civ. App. – Houston 1964)("*Berglund I*") *reversed Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309 (Tex. 1965) ("*Berglund II*"). The courts' opinions occur within a few pages of one another in the Southwestern Reporter because they were decided just one day apart by the San Antonio and Houston courts of appeals, respectively. And there was a split of authority between them.

In *Paulson I*, a home in Palacios was insured by both a flood policy and a windstorm policy and the issue arose in the form of which party has the burden of allocating the cost to repair the damage caused by each peril. In that case, Texas Fire Ins. Exchange had an exclusion in its policy for loss caused by tidal waves and high water whether driven by wind or not – essentially a flood exclusion. *Id.* 381 S.W.2d at 200. In *Berglund I*, the policyholders' home in Hitchcock was completely swept away by Carla. The windstorm insurance

company refused to pay, and the issue was framed as whether the homeowners' total loss was caused by flood or by windstorm – and how either proposition could be proven (and who had to prove it) when the whole home was washed out to sea in the dark of night. *Id.*, 381 S.W.2d at 634.

The position of the plaintiffs in both cases was that each had an "all risk" policy, as most homeowners' do in Texas, meaning that all the insured need do is prove that the loss comes within the purview of the policy in the sense that a physical loss to covered property happened during the policy period. The plaintiffs claimed that if the insurance company wanted to come forward and plead in avoidance or defense some exclusion in the policy such as a flood exclusion, such a position constituted an affirmative defense in avoidance of the coverage provided under the contract. As is still true today, when a defendant raises affirmative defenses, that defendant has the burden of pleading and proof on the issues thereby raised.[1]

The *Berglund I* court accepted this argument and placed the burden of proof upon the insurer to allocate between the concurrent causes. The *Paulson I* court, however, held it to be solely the plaintiff's burden. Because the courts split on this precise issue the two cases were heard by this Court, which decided them

[1] *See e.g. Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 485 (Tex. 2016); *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 156 (Tex. 2015)("Whether classified as an affirmative defense or an avoidance, the hallmark characteristic of both categories of defenses is that the burden of proof is on the defendant to present sufficient evidence to establish the defense and obtain the requisite jury findings.").

on the same day, with Justice Norvell writing the opinion in both. Justice Norvell based his opinions on the 1890 case of *Pelican Ins. Co. v. Troy Co-op.*, 77 Tex. 225, 13 S.W. 980 (1890), where he found the dictum that "a party suing upon an insurance policy has the burden of proving that the insurance policy covered the loss." From this he took the precarious leap of reasoning this must mean it is the insured's burden to disprove exclusions.

Thus, the Court held in 1965, as a result of Hurricane Carla, that Mr. Paulson and Mr. Berglund had the burden to prove a negative – that the loss was *not* caused by an excluded peril (or how much of the loss, in the *Paulson II* case, was not caused by the excluded peril). In *Berglund II*, where the home was completely destroyed, there was simply no way to prove it. The case was over. The Berglunds lost their home and their insurer paid nothing.

These two 1965 cases represent the initial adoption of a doctrine that is often referred to as "concurrent causation" by Texas courts epitomized by this flood/wind dichotomy.[2] The initial iteration of that doctrine was that *where two perils, one insured and one excluded, combined to cause a loss, it was the insured's burden to prove the extent to which the excluded peril caused damage* <u>*and*</u> *the extent to which the insured peril caused damage*. To reach this result, Justice Norvell had to distinguish Rule of Civil Procedure 94, adopted in 1941. Rule 94 to this day requires that any matter of avoidance, such as an exclusion or exception to general coverage provisions,

[2] *See* n.9, infra.

must be affirmatively pleaded *as an affirmative defense* – just as the plaintiffs in *Paulson* and *Berglund* had argued. *See* TEX. R. CIV. P. 94.

Justice Norvell did not mention Rule 94 in his opinion in *Paulson II*, but he did discuss it in *Berglund II*. The court navigated around Rule 94's treatment of exclusions as affirmative defenses by concluding the rule only places the burden of *pleading* on the insurer – not the burden of proof. The court relied on the last clause of Rule 94 that it was not intended to "change the burden of proof on such issue as it now exists." *Berglund II*, 393 S.W.2d at 311 (*quoting* TEX. R. CIV. P. 94). Looking back to two prior opinions that pre-dated the enactment of Rule 94, Justice Norvell found support for the burden to disprove exclusions being placed on policyholders.[3] This despite the long-standing rule – then as now – that the defendant bore the burden of proof on any other affirmative defense.[4]

Justice Norvell's holding that the plaintiff must be the one who bears the burden of separating out what was caused by flood and what caused by wind was

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[3] The Court cited *Shaver v. National Title & Abstract Co.*, 361 S.W.2d 867 (Tex. 1962) and *T.I.M.E. Inc. v. Maryland Casualty Co.*, 157 Tex. 121, 300 S.W.2d 68 (1957), for the following proposition: "the burden of producing evidence to demonstrate their losses were not attributable to the pleaded excluded hazards rested upon [the insured]." *Shaver* held the insured had to prove "their right to recover was not defeated by an exception" pleaded by the insurer. *Id.* at 869. The *Shaver* court concluded that Rule 94 merely shifted the burden of pleading onto the insured and not the burden of proof. *Id.*

[4] *See e.g. Fort Worth v. Johnson*, 388 S.W.2d 400, 403 (Tex. 1964)("Laches is an affirmative defense. Rule 94, Texas Rules of Civil Procedure. Being an affirmative defense, the burden was on Respondents, as defendants, to prove its essential elements."); *Sw. Fire & Cas. Co. v. Larue*, 367 S.W.2d 162, 163 (Tex. 1963)("Under Rule 94 and Rule 95, payment is thus an affirmative defense on which the defendant has the burden of proof, which must be specially pleaded"); *Reed v. Buck*, 370 S.W.2d 867, 874 (Tex. 1963)("tender," being an affirmative defense, placed the burden of proof on the defendant).

reiterated by the Court in 1971 in *Travelers Indemnity Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971). The Court simply lifted the language about concurrent causation out of the *Berglund II* and *Paulson II* opinions and repeated it in *McKillip* to once again deny the policyholder a recovery on the basis that there were two causes – one excluded and one covered – that combined to cause his loss. Thus, the homeowner was owed no benefits under the policy because he could not disprove that an excluded peril had contributed to cause the loss. *Id.*

With *Paulson*, *Berglund* and *McKillip* the Court had spoken – the burden of negating exclusions was on the policyholder and not the insurer, and nothing in Rule 94 changed that burden of proof.

This is where matters rested until the early 1990s and the case of *Millers Cas. Ins. Co. v. Lyons*, 798 S.W.2d 339, 340 (Tex. App. – Eastland 1990)(*"Lyons I"*) *affirmed Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597, 601 (Tex. 1993)(*"Lyons II"*). The court of appeals' 1990 opinion cited *Berglund* for the proposition that it is the insured's burden to separate out an excluded cause from an otherwise covered loss. The case reached this Court in 1993 and is most well-known for its holding regarding the proof required to establish a bad faith claim. Citing *Paulson II* this time instead of *Berglund II*, the Court once again applied the same rule: when an excluded peril is pled as a cause of an otherwise covered loss, it is the plaintiff's burden to separate them out. *Lyons*, 866 S.W.2d at 601.

However, something important had happened in between the court of

appeals' opinion and this Court's opinion in *Lyons II*. The Texas Legislature had enacted Article 21.58 (now codified as TEX. INS. CODE §554.002), which explicitly placed the burden of pleading *and proof* on an insurer seeking to establish an exclusion or exception to coverage. The new section was rather obviously in response to the court of appeals' decision just six months earlier in *Lyons I*, bringing attention to the *Berglund/Paulson/McKillip* rule on burden of proof. However, the passage of that statute, which overrules the *Berglund/Paulson/McKillip* rule by legislative mandate, was not relevant to *this* Court's review in *Lyons II* simply because Article 21.58 had not been enacted until the *Lyons* case was already on appeal.

Confusion resulted from the timing of the Court's 1993 opinion that post-dates and seemingly ignores a contrary rule in Article 21.58 of the Insurance Code. Because of this chronological anomaly, many practitioners and courts are still today simply unaware that the legislature had already abolished the very rule on concurrent causation announced and repeated in *Lyons II* – a year before that opinion was even handed down.

Only two cases have directly dealt with Article 21.58 in the context of "concurrent causation." The first is *Telepak v. United Services Auto. Assoc.*, 887 S.W.2d 506, 507-08 (Tex. App. – San Antonio 1994, writ denied). *Telepak* presents a crucial difference from the prior concurrent cause cases like *Paulson* and *Berglund*. It did not involve one peril covered under the policy and one peril

excluded and the burden of allocating between them. *Telepak* is a case where the insured's damage was *all* excluded by the "settling and foundation movement" exclusion of the policy. However, there was an *exception* to that exclusion for any amount of the excluded damage that was *also* caused by plumbing leaks. The *Telepak* court acknowledged Article 21.58 had been passed by the legislature, and that the court is bound to follow it, and that it requires that USAA (the insurer, not the policyholder) to plead *and prove* how much of the damage claimed was caused by settling and cracking. This was because – as an exclusion – that fact was the basis of an affirmative defense under the statute. The *Telepak* court explained:

> Prior to September 1, 1991, an insurer claiming that the loss was excluded by the policy only needed to plead the applicability of the exclusion. Plaintiffs then had the burden to negate that exclusion. *Hardware Dealers Mutual Ins. Co. v. Berglund*, 393 S.W.2d 309, 311 (Tex. 1965); *Travelers Indemnity Co. v. McKillip*. 469 S.W.2d 160, 163 (Tex. 1971). However, as of September 1, 1991, insurers are now required to both plead and prove the applicability of an exclusion . . .
>
> . . . Neither party contends that article 21.58(b) or the insurance policy is ambiguous. Nor do we find that the statute requires judicial construction. The statute must therefore be enforced according to its express language. *Cail v. Service Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983). The statute requires insurers to sustain the burden of proof as to "any language of exclusion in the policy" and "any exception to coverage."

Telepak, 887 S.W.2d at 507.

The court expressly gave effect to the clear intent of the statute and held

that USAA had and met that burden of proof by showing *all* the damage claimed was caused by settling and cracking and thus fell within the exclusion. *Id.* The real question in the case then was who has the burden to plead and prove *an exception* to the exclusion that would bring all or part of the loss back within coverage. *Id.* Holding that an *exception to an exclusion* is neither "language of exclusion" or "any exception to coverage," the court placed the burden of proof back on the policyholder to prove the extent to which the exception to the exclusion applied. *Id.*

The rationale was that 21.58 only required insurers to bear the burden of proving the application of their exclusions, not the burden of *negating exceptions to those exclusions*. This is the same rule applied with respect to other "affirmative defense/exceptions to such defenses situations." For example, the defendant must prove the facts surrounding the running of a statute of limitations because it is an affirmative defense to liability. However, if the defendant shoulders that burden and the plaintiff wants to claim an exception, such as equitable tolling, a tolling statute, fraudulent concealment, etc., the burden of proving that exception to the affirmative defense is the plaintiff's.

So far, so good. Nothing about *Telepak* is inconsistent with the plain and unambiguous language of Article 21.58. To the contrary *Telepak* confirms the purpose of the statute was to override the rule in concurrent cause/burden cases like *Paulson, Berglund* and *McKillip* and to place the burden of allocating loss caused

by an excluded peril on the insurer.

But then came *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300 (Tex. App. – San Antonio 1999, no pet.). Seven years after *Telepak* the same court of appeals did a complete about face on the effect of Article 21.58 on the burden of proving exclusions in concurrent causation cases. And it is the *Wallis* case that is habitually cited by subsequent courts as the basis for continuing the same concurrent causation rule from *Paulson, Berglund, McKillip* and *Lyons* without any mention or analysis of the 1991 statute that voided and superseded this rule.[5]

To be clear, the *Wallis* court *does* discuss the statute, but the court's analysis does not hold up to logical scrutiny. To avoid the effect and intent of the statute, which was obvious and unambiguous to the same court and required no judicial construction seven years earlier in *Telepak*, the *Wallis* court simply redefined the "concurrent causation" doctrine as though it did not involve the burden of proof

[5] *See e.g. Dall. Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 222 (Tex. App. – Dallas 2015, no pet.)(citing *Wallis* for the "concurrent causation" burden shifting rule, but making no mention of Section 554.002); *USAA v. Mainwaring*, No. 05-03-01250-CV, 2005 Tex. App. LEXIS 2161, at *8 (Tex. App. – Dallas 2005, no pet.)(mem. op.)(same); *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 318 (Tex. App. – San Antonio 2002, pet. denied)(same); *Seahawk Liquidating Tr. v. Certain Underwriters at Lloyds London*, 810 F.3d 986, 994-95 (5th Cir. 2016)(same); *Mt. Hawley Ins. Co. v. JBS Parkway Apartments, LLC*, No. MO:18-CV-00092-DC, 2020 U.S. Dist. LEXIS 252528, at *23 (W.D. Tex. Dec. 30, 2020)(same); *Allison v. Allstate Tex. Lloyd's*, Civil Action No. 4:16-cv-00979-O-BP, 2017 U.S. Dist. LEXIS 180233, at *8 (N.D. Tex. Oct. 16, 2017)(citing *Wallis* and *Lyons* with no mention that Section 554.002 was enacted the year before *Lyons* was decided by this Court); *Underwood v. Allstate Fire & Cas. Ins. Co.*, Civil Action No. 4:16-cv-00962-O-BP, 2017 U.S. Dist. LEXIS 165380, at *7 (N.D. Tex. Sep. 19, 2017)(same); *Nasti v. State Farm Lloyds*, No. 4:13-CV-1413, 2015 U.S. Dist. LEXIS 3009, at *9 (S.D. Tex. Jan. 9, 2015)(citing *Wallis*, *Paulson* and *McKillip* without mentioning the statute); *U.E. Tex.-One Barrington, Ltd. v. Gen. Star Indem. Co.*, 243 F. Supp. 2d 652, 668 n.110 (W.D. Tex. 2001)(same).

on an exclusionary provision of an insurance policy – stating that when a covered and excluded peril combine to cause a loss the burden is on the insured to allocate the amount excluded quite regardless of what Article 21.58 plainly states, relying on case authorities the statute was specifically enacted to override. *Id.* at 302-303.

To justify this illogical distinction – and absent any language to support it in the statute – the *Wallis* court looked back to this Court's opinion in *Employers Casualty Co. v. Block*, 744 S.W.2d 940, 945 (Tex. 1988) *overruled in part on other grounds*, 925 S.W.2d 696 (Tex. 1996), from which it pulled the unhelpful general rule that "insureds are not entitled to recover under an insurance policy unless they prove their damage is covered under the policy." *Wallis*, 2 S.W.3d at 303.[6] That justification should look very familiar – because it is the same justification originally used as the basis for Justice Norvell's opinions in *Paulson II* and *Berglund II*. But critically Justice Norvell was dealing with Rule 94's *pleading* requirements instead the plain language and obvious purpose of a statute that shifted the burden of *proof* as well.

Therein lies the obvious error in the *Wallis* court's analysis. *Wallis* cited *Paulson* and *McKilip* as though they were still good law after the statute –

[6] Aside from also pre-dating the codification of Art. 21.58, *Block* has nothing to do with concurrent causation and does not even mention it. In fact, *Block* has nothing to do with insurance exclusions at all – but rather concerned the duty to defend under a liability policy where the damaging event did not occur during the policy period. *Id.*, 744 S.W.2d at 942.

overlooking this very critical distinction. *Wallis* at 303. The only reason Justice Norvell had disregarded the policyholder's arguments based on Rule 94 in *Berglund* is because he found the rule only applicable to the burden of pleading and not the burden of proof. In doing so, the *Berglund* court relied on the last clause of Rule 94 stating it was not intended to change the burdens of proof that were already applicable when the rule was enacted. There is no logical way *that* distinction can be applied to a statute whose plain language expanded Rule 94 to expressly include the burden of proof as the legislature did when it enacted Art. 21.58. Importantly, the *Berglund* court's holding was *only* possible because Rule 94 did not shift the burden of proof – only the burden of pleading.

The *Wallis* court's reliance on these 1965 cases to ignore the plain language of a statute that *does* shift the burden of proof onto an insurer introduced a manifest and pervasive error into Texas jurisprudence – an error that yielded the certified questions that should be easily addressed by reference to a statute that is still good law and was intended to resolve the issue legislatively.

The *Wallis* court's rationale renders the statute largely meaningless and absurd. An insurer has the burden of proof as to an excluded peril *only* if the entire loss is excluded, but not if that excluded peril combines with a covered loss? There is nothing in the language of the statute to support such a construction. Tellingly, the *Telepak* court was aware of and cited this same general rule that an insured bears the initial burden of demonstrating a covered loss (also

citing *Block* as the basis for it), but concluded Article 21.58 was obviously and unambiguously intended to legislatively override *Paulson, Berglund* and *McKillip*. *Telepak*, 887 S.W.2d at 507. Yet, seven years later, the same court cited and relied on *Paulson* and *Berglund* as though the legislature had not directly changed the burden of proof by statute.

It is the *Wallis* case combined with the timing of the Court's opinion in *Lyons* that seems to have created much confusion and seemingly erased the statute from Texas law, perpetuating the very rule the statute was enacted to overrule. But it is really with *Wallis* that the trouble starts, as *Wallis* is the case that is regularly cited to keep the concurrent causation/burden rule alive in case after case without any mention or discussion of the statute that abolished it.[7]

The statute applies to this case because the issue here concerns exclusionary language in an otherwise all-risks policy. The insured's claim does not involve reinserting coverage through an exception to an exclusion (as in *Telepak*), nor does it involve additional insurance purchased through an endorsement that adds coverage back in despite an exclusion in the main policy form. *See JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 603 (Tex. 2015)("Law & Ordinance" and "DICC" endorsements provided coverage despite exclusion in main policy form).

However, where the dispute concerns what role, if any, a risk described by

[7] *See* n.5, surpa.

"language of exclusion" – i.e. loss that would otherwise be covered but for the exclusion – then the statute unambiguously places the burden on the insurer and was designed to override the "concurrent causation" doctrine as it was applied in cases like *Paulson*, *Berglund*, *McKillip* and *Lyons*.

As outlined above, this distinction is often missed by courts addressing Texas law to this day. What keeps happening is that both trial courts and appellate courts are picking up the dicta that originated in 1890 and that has been made pointedly obsolete by the 1991 adoption of Article 21.58/Section 554.002, and courts have continued to hold, without reflection or commentary, that based on *Wallis* (and sometimes *Lyons*, *Paulson* and *Berglund*) the claimant has the burden to allocate the damage between covered and excluded causes – ignoring the statute entirely.[8]

In short, the original argument that was made by Mr. Berglund when Hurricane Carla washed away his entire house that dark and stormy night was vindicated by legislative action with the passage of Article 21.58 twenty-six years later. But the statute was buried by a plainly erroneous decision from an intermediate court of appeals and the unfortunate timing of this Court's opinion in *Lyons* published the year after the statute became Texas law.

No other state in the United States has this problem. It is only in Texas where this mistake has been perpetuated – made more troubling by the fact that

[8] *See* n.5, supra.

there was a deliberate legislative action to override this common law doctrine, and courts have consistently ignored it. And the burden-shifting rule reflected in Rule 94 and the statute is no outlier or deviation from established law. *Every other state* follows the well-worn rule – reiterated over and over in all the major academic treatises on insurance law for decades – that *the insurer* bears the burden of proving when a loss falls within exclusionary language of a policy.

II. Texas Is the Lone Holdout When It Comes To Burden of Proof On Exclusions.

As one of the two major treatises on insurance law summed it up: "That the insurer has the burden of proof to prove no coverage under an all-risks policy is the American rule in all states, *with the possible exception of Texas*." *Battishill v. Farmers All. Ins. Co.*, 2006-NMSC-004, ¶ 6, 139 N.M. 24, 26, 127 P.3d 1111, 1113 (N.M. 2006)(*quoting* 1 Eric Mills Holmes & Mark S. Rhodes, HOLMES'S APPLEMAN ON INSURANCE, § 1.10, at 45 (2d ed. 1996)(emphasis added). For decades, both Appleman and Couch have repeated the basic rule that the burden of proving that a loss falls within an exclusion is on *the insurer*. *See e.g. Id.*; 5 Jeffery E. Thomas & Susan Lyons, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION §41.02(1)(b)(i) (2017 ed.)("Once the insured makes a prima facie showing that the all-risks coverage exists and there is damage to or loss of the covered property, the burden shifts to the insurer to demonstrate that the damage or loss falls within one of the exclusions listed in the policy."); 7 COUCH ON

INSURANCE § 101:7 (3d ed. 2015)("In an 'All-Risk' policy, the insured has the initial burden to prove that the loss occurred. The burden then shifts to the insurer to prove that the cause of the loss is excluded by the policy."); *New Castle Cty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1181 (3rd Cir. 1991)(*citing* 19 G. Couch, COUCH ON INSURANCE 2d § 79:315, at 256 (M. Rhodes rev. ed. 1983); Lee R. Russ & Thomas F. Segalla, 7 COUCH ON INSURANCE §101:7 (3d ed. 2007); *Children's Friend & Serv. v. St. Paul Fire & Marine Ins. Co.*, 893 A.2d 222, 230 (R.I. 2006) (*citing* 19 COUCH ON INSURANCE § 79:315 (Ronald A. Anderson, 2d ed. 1981)).

This disconnect between Texas and the rest of the country (and the conflict with how Texas law was treating affirmative defenses raised by insurers and those raised by all other defendants) is specifically what led to the enactment of Article 21.58, as is apparent from the introduction of this part of the Bill containing 21.58 to the Economic Development Committee shows:

> Under the Rules of Civil Procedure, Rule 94, insurance carriers, unlike other defendants, do not have the burden of proof for affirmative defenses. This would require insurers who assert affirmative defenses to plead and prove those defenses as required by every other party in Texas. ***This brings Texas in line with the rest of the nation.***

72nd Tex. Leg., Reg. Sess., Economic Devel. Comm., Subcommittee on

Insurance, May 20, 1991, Tape 0588 Side 1 (emphasis added).[9]

Were it not for the erroneous and faulty logic underlying the way Texas courts apply the "concurrent causation" doctrine to all risks coverage, Texas would be consistent with the American rule that has been followed everywhere else. This Court should address the erroneous logic underlying *Wallis* and the cases that cite it, give meaning and effect to the statute, and thereby bring Texas in line with the rest of the country on this issue.

III. All-Risks and Named Perils Are the Same Under the Statute.

As discussed in the above authorities, this burden-shifting to the insurer applies to "all-risks" coverage. It may be tempting to draw a bright line distinction between how the "concurrent causation" doctrine works in "all-risks" policies as opposed to "named peril" policies. However, the statute does not allow for that distinction. Instead, it applies to *any* policy and focuses on whether the issue concerns "language of exclusion" or "an exception to coverage," where the burden of pleading under Rule 94 is on the insurer. TEX. INS. CODE §554.002.

Turning to Rule 94 as referenced in the statute, it likewise does not distinguish between "all-risks" or "named perils" coverage, but turns on whether the "suit is on an insurance contract which insures against *certain general hazards*,

[9] Available for download from the Texas Digital Archive through the following URL: https://tsl.access.preservica.com/uncategorized/IO_5d29a6d9-b0b9-4d6b-a5a8-006afd45b13a

but contains other provisions limiting such general liability." TEX. R. CIV. P. 94 (emphasis added). The plain language of Rule 94, which is incorporated by reference into the statute, applies this burden of pleading (and thus the burden of proof now by statute) on either "all-risks" coverage or "named perils" coverage as both types of policies "insure against certain general hazards, but contain . . ." exclusions. *Id.*

Nevertheless, some courts have tried to carve out a middle-ground approach applying the concurrent causation doctrine differently depending on whether the policy at issue is either "all risks" or "named perils." *See e.g. Mid-Continent Cas. Co. v. Petro. Sols., Inc.*, No. 4:09-0422, 2016 U.S. Dist. LEXIS 133972, at *75 n.177 (S.D. Tex. Sep. 29, 2016); *Poteet v. Kaiser*, No. 2-06-397-cv, 2007 Tex. App. LEXIS 9749, 2007 WL 4371359, at *1 (Tex. App. – Fort Worth 2007, pet. denied)(mem. op.) (insurance policy offered coverage for "sudden and accidental damage from smoke"); *Kelly v. Travelers Lloyds of Tex. Ins. Co.*, No. 14-05-00825-cv, 2007 Tex. App. LEXIS 1320, 2007 WL 527911, at *3 (Tex. App. – Houston [14th Dist.] 2007)(mem. op.) ("Under their homeowners' policy, the Kellys' claim for personal property damage under Coverage B required proof of 'physical loss' to their personal property caused by a named peril.").

As the court explained in *Mid-Continent*:

> There are significant differences between an insured's burden under a "named peril" policy and under an "all-risks" policy. Named peril policies "cover[] losses caused by specified perils; to the extent not

> specified, no coverage results." Under an "all-risk" policy, coverage is "allowed for fortuitous losses unless the loss is excluded by a specific policy provision; the effect of such a policy is to broaden coverage . . ."

Id. at 119 (*quoting* 10A COUCH ON INSURANCE § 148:48 (3d ed. 2016)). But this distinction makes no difference under the statute so long as the loss would be otherwise covered but for "language of exclusion." Put another way, so long as the insured meets its initial burden of showing the cause of a loss was covered under the policy's general coverage *if there were no exclusions*, then in avoidance of paying all or part of the loss, the insurer has the burden to plead and prove any applicable exclusions.

In an all-risks policy, i.e. a policy that insures all risks of direct physical loss unless otherwise excluded, coverage is not automatic. The insured must still demonstrate an event that caused physical loss to a covered property during the policy period. If any part of that damage would not be covered due to "language of exclusion" then the insurer has the burden to plead and prove it. In a named perils policy it works the same except that there is one more element added to the insured's initial burden. In addition to showing physical loss to a covered property during the policy period, if the policy is not "all risks" but has enumerated perils, the insured must initially demonstrate that the event causing the loss is one of the general types of covered perils listed the policy.

However, once this initial burden is met – showing that there was some

direct physical loss to covered property during the policy period or some physical loss to covered property during the policy period, the burden of pleading and proving that some or all of the loss falls within "language of exclusion" or "exceptions to coverage" under the policy is squarely on the insurer by statute.

IV. Burdens of Proof and "Wear and Tear" Exclusions

The policy, specifically the loss valuation provisions, defines "loss" in terms of the need for repair and the cost thereof. Thus "direct physical loss" *means* repair cost necessitated by direct physical action of a covered peril – i.e. property that needs to be repaired because of a covered event. The policy also lists "wear and tear" as an excluded peril, but it does so in terms of a "loss or damage *caused by*….wear and tear…" – or in terms of the policy providing that it does not "insure against…wear and tear." In either event, the result is the same: the policy excludes payment for repair or replacement of property made necessary by wear and tear.

The insurance carrier in this case misunderstands both the nature of "loss" and the wear and tear exclusion – confusing "wear and tear" with depreciation. Every real property insured from loss, except a brand-new structure, is always "used" to some extent and will have some imperfections from its use and age. As Fifth Circuit's certified questions already explicitly recognize, every roof or other item of tangible or real property has a definable useful life and is scuffed, scratched, weathered, or otherwise diminished in value over time, even of only by

gradual normal exposure to sun, wind, rain, or ordinary daily use. The very structure of the policy (and of virtually every other property policy in existence) already recognizes this fact in embracing the concept of *depreciation*. This is the exact mechanism - bargained for by the policyholder and the carrier - by which normal wear and tear (i.e., "loss") is routinely handled.

The question is whether this "wear and tear" caused the loss – i.e. was there physical loss that necessitates the repair or replacement aside from wear and tear? If so, then wear and tear simply figures into the value of the roof for purposes of depreciation, and if the insurer does not wish to replace an older, well-used roof, the solution is to sell a policy that only pays on an ACV basis.

An insured simply proves the amount of the loss as actual cash value – which is "replacement cost value" with depreciation held back. In policies that pay on a replacement cost value basis, the depreciation holdback is then typically paid to the owner only once the repairs have been performed. By confusing and conflating "wear and tear" and depreciation, insurers seek to avoid the bargain they make with policyholders for how to handle ordinary depreciation – i.e. that does not cause the "loss."

If, however, the need for repair or replacement was caused by ordinary wear and tear to the property that occurred during the policy period *instead* of some other cause that is not excluded, then it falls within the exclusion. But the burden of pleading *and* proving *that* lies with the insurer under Rule 94 and

section 554.002.

To illustrate: A roof that is several years old is damaged by a severe hailstorm. If some damage to the roof resulted from ordinary wear and tear during the policy period, then once the insured demonstrates damage from the hailstorm (covered event) sufficient to cause loss (i.e. physical loss to the roof that requires some repair or replacement), the insurer would have the burden of showing the loss or some part of the loss was actually caused by wear and tear, and therefore falls within the "language of exclusion" in the policy. For example, maybe part of the roof has degraded over the course of the policy period as the natural result of aging – particles of sandy grit on a shingle's surface gradually stop adhering as a natural result of the materials used to make it, for instance. But part of the roof has large clumps of the grit knocked out by strikes from hail stones – damage that would not have occurred in the absence of the hailstorm event during the policy period. The burden of proving what loss was caused by the excluded peril – the natural degradation – would be on the insurer, not the policyholder.

Put simply, once the insured demonstrates need for repair or replacement arises from a covered peril during the term of the policy (or mere physical loss of any kind under an "all risks" coverage), if the insurer cannot demonstrate an excluded peril such as wear and tear actually caused all or part of the loss, (i.e. that the repair or replacement would not have been necessary without the excluded

peril damaging the property)[10], then the condition of the used roof simply factors into how depreciation is handled under the policy in question.

This key distinction between when an otherwise covered event occurs (the insured's burden) and when an excluded event *that produces the loss* occurs (the insurer's burden) was explained in *AGCS Marine Ins. Co. v. World Fuel Servs.*, 187 F. Supp. 3d 428, 438 (S.D.N.Y. 2016). "Once the insured has met its prima facie burden, the burden shifts to the insurer to establish that an exclusion or exception to coverage applies . . ." The issue is "*not* the burden of showing when the loss occurred, but the burden of showing when 'the event *producing* the loss' occurred . . . the *latter* burden should be on the insurer."). *Id.* (emphasis in original)(*quoting Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 429 (5th Cir. 1980)).

[10] This is another manner by which "concurrent causation" is frequently misunderstood and misapplied by courts. It is not a rule about whose burden it is to prove an exclusion or segregate damages, but rather a rule about causation that concerns whether a covered peril and an excluded peril combine to cause the loss that neither would have caused on its own. There are essentially four possibilities for how an excluded and covered peril can be causally related to a loss: (1) the covered peril caused the loss independent of the excluded peril (covered); (2) both the covered peril and the excluded peril were sufficient to cause the loss independent of the other (covered); (3) the excluded peril caused the loss independent of the covered peril (excluded); and (4) the excluded peril and the covered peril were both necessary to cause the loss – i.e. the repairs would not have been necessary had the excluded peril not contributed to cause the loss (excluded). Only that last option concerns the actual "concurrent causation" doctrine as this Court explained in *Utica Nat. Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 204 (Tex. 2004). The first two result in coverage for the insured while the second two do not. *See id.* As the Court explained in *Utica*: "In cases involving separate and independent causation, the covered event and the excluded event each independently cause the plaintiff's injury, and the insurer must provide coverage despite the exclusion . . . In cases involving concurrent causation, the excluded and covered events combine to cause the plaintiff's injuries. Because the two causes cannot be separated, the exclusion is triggered." *Id.* Thus, by statute, the insured initially produces evidence that the covered peril caused the loss and the burden shifts to the insurer to either raise evidence negating that fact or else demonstrating that the damage from the covered peril would not have caused the loss on its own without acting concurrently with an excluded peril.

If this formulation is not followed by the courts, then the policy's provisions for loss valuation, loss payment, and depreciation are meaningless, even though inherent in the calculation of the relevant risk and premium when the parties negotiate the contract. Ignoring this structure of the policy allows the insurer to deny coverage for a covered loss under circumstances where the parties agreed it would be handled as depreciation and not as excluded perils. And shifting the burden of proving its absence, or relative absence, to the insured as a matter of coverage rather than depreciation violates the nearly unanimous American rule as well as the plain language of Section 554.002 meant to bring Texas law into line with the rest of the country.

As a result, the American rule places the burden of proof on insurers to prove a loss falls within exclusionary language, and the vast majority of courts have specifically applied this burden to insurers seeking to avoid coverage on the basis of "wear and tear" exclusions. See e.g. Appendix 1. The cases that do not place the burden on the insurer to demonstrate a loss was caused by "wear and tear" are either cases following the Texas-specific "concurrent causation" error (i.e. those relying on *Wallis* or *Lyons* despite the statute), and one Pennsylvania court's opinion in *Dougherty v. Allstate Prop. & Cas. Ins. Co.*, 185 F. Supp. 3d 585, 595 (E.D. Pa. 2016). There, the insurer did not deny the claim based on "wear and tear" exclusion, but based on a maintenance exclusion. The *plaintiff* sought to prove it was "wear and tear" that caused the loss and not lack of maintenance

because the former had a specific *exception* the plaintiff wanted to use to reinsert coverage. The court held that since only the plaintiff was invoking and relying on the "wear and tear" exclusion in order to get to the exception, the burden was actually on the plaintiff to prove both the exclusion and its exception. *Id.* This is consistent with *Telepak*, which correctly interpreted Section 554.002 to shift the burden back to the insured to prove an exception to an exclusion.

What *Wallis* purports to do is separate the burden of proof into two facets – proving the exclusion applies and "segregating" the loss between the excluded peril and the covered cause – a burden it places on the insured. The logic of that is suspect on its face. If the insurer cannot prove what portion of a loss was caused by an excluded peril it effectively has not proven that any amount of the loss was caused by the excluded peril and has simply not met its burden under the statute. Quantifying the role the excluded cause played in causing a loss is an essential element of the affirmative defense. This is apparent from how Texas law treats another affirmative defense that involves a matter of quantifying damages.

There is no logical reason why an affirmative defense based on language of exclusion as a basis for avoidance should work any differently under Texas law than similar affirmative defenses such as "failure to mitigate."[11] The actual use of

[11] *See e.g. Stucki v. Noble*, 963 S.W.2d 776, 781 (Tex. App. – San Antonio 1998, no pet.)("the burden of proving failure to mitigate is on the defendant, who must also show the amount

the defense in avoidance in the case of both mitigation and an exclusion is that it avoids a liability the defendant would otherwise have. Placing the burden on the claimant to *quantify* the insurer's exclusion defense in avoidance *still* places the burden of proof as to a key element of the defense on the claimant. And it does so in a way that is especially burdensome because such a rule will typically require extensive expert testimony from causation and loss valuation experts, and in some cases (such as the *Berglund* house that was swallowed whole by Hurricane Carla) is simply impossible for the insured to meet. Regardless, it places the burden incorrectly on the insured in direct contravention of Section 554.002.

Consequently, consistent with the basic logic of the American rule, courts across the county (with the possible exception of Texas) have accordingly also placed the burden of segregating the amount of the loss that is excluded on the insurer and generally left the final apportionment between covered and excluded losses for the finder of fact. *See e.g. Preis v. Lexington Ins. Co.*, 279 F. App'x 940,

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by which the plaintiff's damages were increased by the failure to mitigate."); *Rauscher Pierce Refsnes, Inc. v. Great S.W. Sav. F.A.*, 923 S.W.2d 112, 117 (Tex. App. – Houston [14th Dist.] 1996, no writ)("Appellant also had the burden of proving the amount the damages were increased by the failure to mitigate, which it failed to meet."); *BMB Dining Servs. (Willowbrook) v. Willowbrook I Shopping Ctr., L.L.C.*, No. 01-19-00306-CV, 2021 Tex. App. LEXIS 4320, at *19 (Tex. App. – Houston [1st Dist.] June 3, 2021, no pet.)(mem. op.)(*quoting Cole Chem. & Distrib., Inc. v. Gowing*, 228 S.W.3d 684, 688 (Tex. App. – Houston [14th Dist.] 2005, no pet.)("[W]here a defendant proves failure to mitigate but not the amount of damages that could have been avoided, it is not entitled to any reduction in damages."); *Z.M. Shay Jayadam3, LLC v. Omnova Sols., Inc.*, No. 14-19-00623-CV, 2020 Tex. App. LEXIS 8439, at *24 (Tex. App. – Houston [14th Dist.] 2020, no pet.)(mem. op.)("'The defendants bear the burden to prove failure to mitigate damages; they must prove lack of diligence as well as the amount by which the damages were increased as a result of the failure to mitigate.'")(*quoting Turner v. NJN Cotton Co.*, 485 S.W.3d 513, 523 (Tex. App. – Eastland 2015, pet. denied)).

944 (11th Cir. 2008)(Louisiana law); *Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.*, 638 F. Supp. 2d 692, 695 (E.D. La. 2009)("The insurer therefore must show 'how much of the damage' was caused by an excluded peril.")(*quoting Dickerson v. Lexington Ins. Co.*, 556 F.3d 290 (5th Cir. 2009)(Lousiana law)); *Covington Lodging, Inc. v. W. World Ins. Grp. (In re Covington Lodging Inc.)*, Nos. 19-54789-WLH, 19-5348-WLH, 2021 Bankr. LEXIS 2519, at *43-44 (Bankr. N.D. Ga. Sep. 15, 2021)("Where at least some of the damage is covered, the insurer has to prove how much of the damage is excluded from coverage under the policy.")(*citing Dickerson*, supra); *Leonard v. Nationwide Mut. Ins. CV.*, 499 F. 3d 419 (5th Cir. 2007) (the insurer had the burden of proving what portion of the total loss was attributable to water damage and was thus within the water damage exclusion)(Mississippi law); *Hoover v. United Servs. Auto. Ass'n*, 125 So. 3d 636, 642 (Miss. 2013)("USAA bears the burden to prove, by a preponderance of the evidence, that the loss was caused by, *or concurrently contributed to*, by an excluded peril.")(emphasis in original)[12]; *Matthews v. Allstate Ins. Co.*, 731 F. Supp. 2d 552, 565 (E.D. La. 2010)(Louisiana law, noting cases placing burden to segregate on policyholder relying on *pre-Dickerson* authorities are mistaken); *Lightell v. State Farm Fire & Cas. Co.*, 703 F. Supp. 2d 600, 603 (E.D. La. 2009)(same);

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[12] In *Hoover*, the Mississippi supreme court disagreed with Fifth Circuit's *Erie*-guess that Mississippi law switches the burden of segregating losses back onto the policyholder, expressly disapproving *Broussard v. State Farm Fire & Casualty Co.*, 523 F. 3d 618, 627 (5th Cir. 2008).

When reviewing language from cases discussing this burden shifting issue, it is important to note whether the dispute in a particular case concerns an exclusion or an exception to an exclusion. This distinction is still very much relevant to who has the burden. Some version of the following rule will often be stated: once the insurer establishes an exclusion applies to the loss, the burden shifts back to the insured to segregate the loss between covered and non-covered causes. *See e.g. Fiess v. State Farm Lloyds*, 392 F.3d 802, 807 (5th Cir. 2004); *Kelly*, 2007 Tex. App. LEXIS 1320, at *22 (*citing Telepak*, supra). However, that rule comes from cases where the "covered" cause at issue is now in the form of an *exception* to an exclusion - as in *Telepak*.

Thus, looking at the two cases cited by the Fifth Circuit in *Fiess*, for instance, *both* specifically involved coverage disputes over exceptions to exclusions (as did *Fiess* itself), and not disputes about exclusions to otherwise covered perils. *Fiess* at n.13, (*citing Guar. Nat. Ins. Co. v. Vic Mfg. Co.*, 143 F.3d 192, 193 (5th Cir. 1998)("Once the insurer has proven that an exclusion applies, the burden shifts back to the insured to show that the claim falls within an exception to the exclusion"); *Venture Encoding Serv., Inc. v. Atl. Mut. Ins. Co.*, 107 S.W.3d 729, 733 (Tex. App. – Forth Worth 2003, pet. denied)(same)).

In short, whichever party has the burden of proof has the burden of quantifying that portion of the loss to correspond to the policy language on which they rely – as it logically should be as a matter of fundamental legal

principle.[13] The *insured* has the initial burden to quantify a loss to covered property during the policy period caused by a covered peril (or any physical loss under an all-risks policy). The *insurer* then has the burden to plead, prove and quantify how much, if any, of an otherwise covered loss falls within an exclusion to avoid its general coverage obligation. The burden then shifts back to the insured to prove how much of a loss otherwise excluded falls within an exception to an exclusion. Each carries the burden of proof in accordance with those provisions on which they have the burden of pleading. And both by statute and by Rule 94, the burden of pleading and proving a loss falls within an exclusion is properly placed

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[13] *See e.g. Rodgers v. Roland*, 309 Ky. 824, 828, 219 S.W.2d 19, 20 (1949):

> "The fundamental principle is that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue and remains there until the termination of the action. It lies upon the person who will be defeated as to either a particular issue or the entire case if no evidence relating thereto is given on either side. In other words, one alleging a fact which is denied has the burden of establishing it."

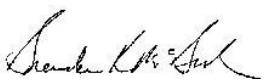
Id. (*quoting* 20 AM. JUR. Evidence, § 135 at pp. 138-139). This principle has been cited frequently over the years for placing the burden of proof on the party to whose benefit the matter to be proven would run. *Miller v. Westwood*, 238 Neb. 896, 908, 472 N.W.2d 903, 911 (1991)(same); *United States W. Communs., Inc. v. N.M. State Corp. Comm'n (United States W. Communs., Inc.)*, 1998-NMSC-032, ¶ 34, 125 N.M. 798, 808, 965 P.2d 917, 927 (N.M. 1998)(same); *Joseph A. Bass Co. v. United States*, 340 F.2d 842, 844 (8th Cir. 1965)(same); *see also Lincoln Intermediate Unit #12 v. Bermudian Springs Sch. Dist.*, 65 Pa. Commw. 53, 56-57, 441 A.2d 813, 815 (Pa. 1982)("The general rule is that the burden of proof is upon the party who, in substance, alleges that a thing is so, or, as it is more commonly put, the burden of proof rests upon the party having the affirmative of the issue as determined by the pleadings."); *Cox v. Roberts*, 248 Ala. 372, 374, 27 So. 2d 617, 618 (Ala. 1946)("The burden of proof as to a fact or issue generally rests on the party asserting or pleading it or having the affirmative of the issue, and remains on that party throughout the trial."); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 485, 283 N.W.2d 25, 37 (1979)("The fundamental principle of the law of evidence is to the effect the burden of proof in any cause rests upon the party who asserts the matter.")(*citing* 29 AM. JUR. 2D, Evidence, § 134 at p. 167).

on the insurer.

CONCLUSION

Placing the burden of proof on the insurer to prove that all or part of an otherwise covered loss falls within exclusionary language or a policy is the only result consistent with Rule 94 and the plain language of Section 554.002. The latter was enacted to cure this very defect in Texas common law to legislatively overrule *Paulson*, *Berglund, McKillip* and the court of appeals' opinion in *Lyons I* that came just prior to the statute's enactment. But Texas courts applying faulty logic have effectively ignored the statute and improperly shifted the burden of proof regarding exclusions back onto the insured in violation of the statute. It is time this Court gave effect to section 554.002 – by expressly overruling *Wallis* and placing the entirety of the burden of proof regarding exclusionary provisions to otherwise covered losses on the *insurer*, including the burden of proving "wear and tear" or "inherent vice" caused the loss in question and to segregate how much of the loss was caused by a peril described by the policy's "language of exclusion."

Respectfully submitted,



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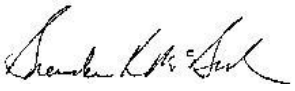

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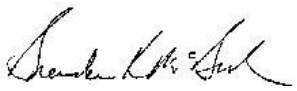

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APPENDIX I

Cases that placed the burden of proof for "wear and tear" exclusions on the insurer:

1. *The Bartram, Ltd. Liab. Co. v. Landmark Am. Ins. Co.*, 864 F. Supp. 2d 1229, 1236 (N.D. Fla. 2012)(insurer failed to show "wear and tear" caused airplane crash);

2. *Lam Inv. Research, LLC v. Pub. Serv. Mut. Ins. Co.*, No. 12-5576 (KM) (MAH), 2016 U.S. Dist. LEXIS 45116, at *16-17 (D.N.J. Apr. 1, 2016)(placing burden to prove "wear and tear" exclusion on insurer, but finding insurer conclusively established entire loss was caused by wear and tear);

3. *GF&C Holding Co. v. Hartford Cas. Ins. Co.*, No. 1:11-cv-00236-BLW, 2013 U.S. Dist. LEXIS 38669, at *9 (D. Idaho Mar. 15, 2013)(same);

4. *Superhost Hotels Inc. v. Selective Ins. Co. of Am.*, 2018 NY Slip Op 02519, ¶ 1, 160 A.D.3d 1162, 1163, 75 N.Y.S.3d 124, 127 (App. Div. 3rd Dept.);

5. *Sonstegard Foods Co. v. Wellington Underwriting, Inc.*, No. 05-532 (DWF/AJB), 2007 U.S. Dist. LEXIS 37027, at *19 (D. Minn. May 21, 2007)(". . . the Court finds that Wellington has not met its burden of proving that the Wear and Tear Exclusion applies to bar coverage.");

6. *MY. P.I.I., LLC v. Markel Am. Ins. Co.*, No. 20-CV-60038-WILLIAMS/VALLE, 2021 U.S. Dist. LEXIS 110061, at *17 (S.D. Fla. June 10, 2021)(placing burden to prove "wear and tear" exclusion on insurer, but finding parties produced evidence raising a triable issue of fact);

7. *Crandall v. Hartford Cas. Ins. Co.*, No. CV 10-00127-REB, 2013 U.S. Dist. LEXIS 17653, at *24 (D. Idaho Feb. 8, 2013);

8. *Fry v. Phx. Ins. Co.*, 54 F. Supp. 3d 354, 363 (E.D. Pa. 2014)(insurer did not meet its burden to show the exclusion applied);

9. *Ehsan v. Ericson Agency, Inc.*, No. CV010085772S, 2003 Conn. Super. LEXIS 1969, at *47 (Super. Ct. July 3, 2003)(same);

10. *Libbey-Owens-Ford Co. v. Ins. Co. of N. Am.*, 9 F.3d 422, 431 (6th Cir.

1993)(holding jury instruction that insurer had burden of proving "wear and tear, deterioration, rust, corrosion or erosion. . ." was a cause of the loss was correct instruction because these were exclusions under the policy);

11. *Easy Sportswear, Inc. v. Am. Econ. Ins. Co.*, Civil Action No. 05-1183, 2007 U.S. Dist. LEXIS 86114, at *28 (W.D. Pa. Nov. 21, 2007)(finding a triable issue of fact, but noting burden was on insurer to demonstrate "wear and tear" exclusion applied);

12. *Rapid Park Indus. v. Great N. Ins. Co.*, 2010 U.S. Dist. LEXIS 115747, at *13 (S.D.N.Y. Oct. 1, 2010)(placing burden on insurer to support "wear and tear" exclusion, among others);

13. *Jihan, Inc. v. Amco Ins. Co.*, No. 20-CV-97 TWR (WVG), 2021 U.S. Dist. LEXIS 92950, at *38 (S.D. Cal. May 14, 2021)(placing burden on insurer, but holding insurer conclusively established the entire loss fell within the exclusion);

14. *Nabil v. Scottsdale Ins. Co.*, No. 17-21507-CIV-ALTONAGA/Goodman, 2018 U.S. Dist. LEXIS 244489, at *36 (S.D. Fla. Feb. 16, 2018)(placing burden on insurer, but finding triable issue of fact);

15. *Travelers Prop. Cas. Co. of Am. v. B & W Res., Inc.*, No. 6:05-CV-355 KKC, 2006 U.S. Dist. LEXIS 78311, at *8 (E.D. Ky. Oct. 26, 2006)(addressing numerous exclusions including "wear and tear" and explaining: "In determining coverage under an insurance policy that contains an exclusion clause, the insurer bears the burden of proving the exclusion bars coverage . . . However, 'once the insurer shows the application of an exclusion clause, the burden of proof shifts back to the insured because the exception to the exclusion 'restores' coverage for which the insured bears the burden of proof.');

16. *Gallegos v. Safeco Ins. Co. of Am.*, Civil Action No. 14-cv-1114-WJM-MJW, 2015 U.S. Dist. LEXIS 72435, at *8 (D. Colo. June 4, 2015)(burden of proving the exclusion was on insurer, but burden of proving exception to the exclusion was on insured);

17. *WAMFAM5, Inc. v. Nova Cas. Ins. Co.*, No. 15-1195, 2017 U.S. Dist. LEXIS 40159, at *20 (C.D. Ill. Mar. 21, 2017)("Nova has the burden of establishing that an exclusion applies.");

18. *GBS Inv. Grp. v. United Specialty Ins. Co.*, No. 18-23310-CIV, 2020 U.S. Dist. LEXIS 145011, at *39 (S.D. Fla. Aug. 11, 2020)("Thus, the burden was on USIC to show that an exclusion to coverage applied, such as the wear and tear exclusion or hurricane exclusion.");

19. *Sunpro, LLC v. Nationwide Prop. & Cas. Ins. Co.*, Civil Action No. 1:08cv192, 2010 U.S. Dist. LEXIS 7391, at *3 (N.D.W. Va. Jan. 29, 2010)("An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.");

20. *Weshifesky v. State Farm Fire & Cas. Co.*, No. A-6010-04T5, 2006 N.J. Super. Unpub. LEXIS 1207, at *10 (Super. Ct. App. Div. May 4, 2006)("The letter did not explain why, in State Farm's opinion, the roof or siding damage constituted wear and tear . . . As plaintiff met her burden of bringing her claim within the policy . . . the burden to establish an exclusion fell solely on defendant");

21. *Gronik v. Balthasar*, No. 10-cv-0954, 2015 U.S. Dist. LEXIS 25652, at *25 (E.D. Wis. Mar. 3, 2015)(regarding exclusion of gradual deterioration, wear and tear and wet or dry rot . . . "Defendant has the burden of proving an exclusion.");

22. *Fabozzi v. Lexington Ins. Co.*, 23 F. Supp. 3d 120, 125 (E.D.N.Y. 2014)(". . . it would be Defendant's burden to show that the claim was based on an exclusionary provision, such as wear and tear, settlement or collapse.");

23. *Riedling v. Motorist Ins. Grp.*, No. 11-47-DLB-JGW, 2012 U.S. Dist. LEXIS 148389, at *9 (E.D. Ky. Oct. 16, 2012)("Simply put, Defendant has met its burden with respect to the exclusion, as the company has shown that any damage to Plaintiff's vehicle was caused by wear and tear.");

24. *AGCS Marine Ins. Co. v. World Fuel Servs.*, 187 F. Supp. 3d 428, 438 (S.D.N.Y. 2016)("Once the insured has met its prima facie burden, the burden shifts to the insurer to establish that an exclusion or exception to coverage applies . . ." the issue is "*not* the burden of showing when the loss occurred, but the burden of showing when 'the event *producing* the loss' occurred . . . the *latter* burden should be on the insurer.");

25. *Klein v. Franklin Mut. Ins. Co.*, No. A-0125-16T1, 2017 N.J. Super. Unpub.

LEXIS 2653, at *3 (Super. Ct. App. Div. Oct. 23, 2017)(insurer met its burden to prove loss was caused by wear and tear);

26. *Easthampton Congregational Church v. Church Mut. Ins. Co.*, 322 F. Supp. 3d 230, 235 (D. Mass. 2018)(insured met its burden of showing covered cause of loss, shifting burden to insurer to demonstrate loss was caused by faulty construction or wear and tear);

27. *Royal Cosmopolitan, LLC v. Scottsdale Ins. Co.*, No. 06-4557, 2008 U.S. Dist. LEXIS 39048, at *3 (E.D. La. May 13, 2008)(Burden on wear and tear and maintenance exclusions shifts to insurer after insured demonstrates loss falls within the general terms of the policy.); and,

28. *Mazzarella v. Amica Mut. Ins. Co.*, No. 3:17-cv-598 (SRU), 2018 U.S. Dist. LEXIS 20737, at *11 (D. Conn. Feb. 8, 2018)(As to wear and tear and foundation exclusions: "Because Amica relies on exclusionary clauses to deny coverage, it bears the burden of demonstrating 'that all the allegations within the complaint fall completely within the exclusion.'").

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