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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 12, 2026 Session

**JAMES P. LITTLE v.
UNITED SERVICES AUTOMOBILE ASSOCIATION, INC.**

**Appeal from the Chancery Court for Hamilton County
No. 21-0139 Jeffrey M. Atherton, Chancellor**

No. E2024-01434-COA-R3-CV

The plaintiff insured filed a claim against his homeowners insurance company for damages from an earthquake that occurred in 2018. The insurance company denied the claim, and the insured subsequently filed this action against the insurer alleging claims of breach of contract, fraud, and bad faith. The trial court conducted a jury trial spanning several days. During trial, at the close of the plaintiff's proof, the defendant insurer moved for a directed verdict on all claims. The trial court directed a verdict on the fraud claim but allowed the other claims to proceed. Following deliberation, the jury returned a verdict in favor of the plaintiff in the amount of \$2,000,000. The jury found that the defendant had breached its contract with the plaintiff but declined to find that the defendant had acted in bad faith. The defendant insurer filed a post-trial motion, which was denied by the trial court. The plaintiff timely appealed. Following our thorough review, we affirm the trial court's judgment in all respects. However, we deny the insurer's request for an award of attorney's fees on appeal.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which W. NEAL MCBRAYER and KRISTI M. DAVIS, JJ., joined.

Rebecca M. Little, Chattanooga, Tennessee, for the appellant, James P. Little.

Derek W. Mullins, Chattanooga, Tennessee, and Michael D. Mulvaney, Birmingham, Alabama, for the appellee, United Services Automobile Association, Inc.

OPINION

I. Factual and Procedural Background

On March 2, 2021, the plaintiff, James P. Little, filed a complaint in the Hamilton County Chancery Court (“trial court”) and named United Services Automobile Association, Inc. (“USAA”) as the defendant. In his complaint, Mr. Little stated that he had maintained homeowners insurance with USAA for many years and that his policy included a specific earthquake endorsement. During the years that the coverage had been in place, USAA had inspected the home from time to time, reporting after an inspection performed in October 2016 that the structural integrity of the residence was “fine.” According to Mr. Little, seismic activity near Signal Mountain in December 2018 had caused significant sinking and shifting of roads, homes, and driveways in the area, including damage to Mr. Little’s home and driveway. Mr. Little averred that his ex-wife and children had been forced to leave the home and find lodging elsewhere due to this damage.

Mr. Little asserted that he had submitted a timely claim to USAA on March 4, 2019, regarding the earthquake damage to his home and driveway. USAA had subsequently sent an independent adjustor to examine the property damage, as well as a civil engineer. Mr. Little claimed that although USAA had later sent a letter confirming that earth shifting had occurred and that Mr. Little’s home had sustained damage, USAA nonetheless had denied his claim. USAA stated in its denial letter that the civil engineer had opined that any damage to the home was caused by construction deficiencies in the home’s retaining wall and was not the result of a “single, sudden, or recent event.” Mr. Little also alleged that the denial letter contained “patently false statements” attributed to Mr. Little’s ex-wife regarding purported long-standing issues with the home.

Mr. Little noted that following receipt of the denial letter, he had hired structural engineers to ascertain the cause of the damage. According to Mr. Little, these engineers had reported that “the ground shifting was of such a magnitude that they would be unable to draw plans for remediation or provide an opinion on the cause of the earth shifting without a geotechnical investigation.” Mr. Little then hired a geotechnical engineering firm to perform the investigation.

Mr. Little further stated that he had received a report in December 2020 from the geotechnical engineering firm, which concluded that the issues with Mr. Little’s property were due to “saturation and seismic events.” Mr. Little, through his insurance agent, promptly sent a letter to USAA demanding payment of his claim. In turn, USAA denied his demand for payment, asserting that there was no coverage for the loss. Mr. Little’s agent reportedly filed a complaint with the Tennessee Department of Commerce and Insurance (“the Department”) regarding the denial. Mr. Little later received a copy of the response that USAA had submitted to the Department, which he characterized as replete

with misrepresentations of fact. Mr. Little averred that USAA had also failed to comply with his multiple requests for policy documents and had engaged in dilatory and evasive tactics since the claim was filed. In addition, Mr. Little alleged that USAA had ultimately “fabricated” reasons to deny coverage and discontinue the insurance policy.

Mr. Little asserted claims of breach of contract, bad faith, and fraud against USAA and included a jury demand in his complaint. He asked that the trial court (1) require USAA to produce the underwriting file, initial policy, and inspection documents related to the claim; (2) enjoin USAA from terminating Mr. Little’s insurance coverage; (3) sanction USAA for restricting Mr. Little’s access to claim and policy documents under USAA’s control; (4) award Mr. Little compensatory, bad faith, and punitive damages; and (5) award Mr. Little attorney’s fees.

USAA filed an answer, denying the material allegations of the complaint and presenting various affirmative defenses. On August 18, 2021, the trial court conducted a hearing regarding a petition for injunctive relief that had been filed by Mr. Little, and the court entered an order denying the petition. On June 29, 2023, Mr. Little filed a motion for partial summary judgment. Mr. Little subsequently filed an amended motion for partial summary judgment on February 5, 2024, wherein he posited that he was entitled to judgment as a matter of law regarding his claims of breach of contract and bad faith. USAA filed a competing motion for summary judgment on that same date. Although no order related to the motions for summary judgment appears in the record, these motions were apparently denied by the trial court, and the matter proceeded to trial in August 2024, spanning multiple days.

On August 16, 2024, upon the close of Mr. Little’s proof, USAA moved for a directed verdict concerning Mr. Little’s claims. The trial court granted a directed verdict in favor of USAA on the fraud claim such that the only claims remaining for the jury’s determination were for breach of contract and bad faith. On August 20, 2024, after both parties had rested, USAA renewed its motion for directed verdict concerning those claims. The trial court denied the motion.

After deliberation, the jury returned a verdict in favor of Mr. Little, finding that USAA had breached the insurance contract but declining to find that USAA had acted in bad faith. The jury awarded damages to Mr. Little in the amount of \$2,000,000. The trial court entered a judgment in accordance with the jury’s verdict. USAA then filed a motion for entry of a judgment pursuant to its motion for a directed verdict, and the trial court denied this motion. Mr. Little timely appealed.

During the appellate proceedings, Mr. Little’s initial brief was stricken and his counsel was granted additional time to file a corrected brief. After the corrected brief’s filing, USAA filed a motion to strike the brief and dismiss the appeal, which motion was deferred to this panel for adjudication.

II. Issues Presented

Mr. Little presents the following issues for our review, which we have restated and reordered slightly:

1. Whether the jury's finding that USAA had not acted in bad faith was contrary to the clear weight of the evidence.
2. Whether the trial court erred by granting a directed verdict in USAA's favor respecting Mr. Little's fraud claim rather than allowing the jury to determine the claim.
3. Whether USAA acted improperly by denying Mr. Little's claim without conducting a good faith investigation into the peril expressly covered by its insurance policy.

USAA presents additional issues for this Court's consideration, which we have also restated slightly:

4. Whether the jury's determination that USAA had breached its insurance contract with Mr. Little was unsupported by material evidence in the record.
5. Whether Mr. Little waived appeal of his fraud claim by failing to (1) develop his argument regarding the applicable elements of the claim, (2) support his argument with evidence in the record, and (3) properly raise his issues before the trial court.
6. Whether Mr. Little waived appeal of his bad faith claim by failing to (1) file a motion for new trial regarding the claim, (2) develop arguments regarding the applicable elements of the claim, and (3) support his argument with evidence in the record.
7. Whether Mr. Little's appeal is frivolous such that USAA should be awarded costs and attorney's fees on appeal.

III. Standard of Review

Regarding review of a jury's verdict that has been approved by the trial court, this Court has clarified:

Our review of the trial court's approval of a jury verdict is based on a "material evidence" standard. Under this standard, "appellate courts may only review the record to determine whether it contains material evidence to support the jury's verdict." *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 718 (Tenn. Ct. App. 1999) (citing Tenn. R. App. 13(d)); see *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 704 (Tenn. 2000). As with the standard for reviewing the denial of a motion for a [judgment notwithstanding the verdict], this Court must "(1) take the strongest legitimate view of all the evidence in favor of the verdict; (2) assume the truth of all evidence that supports the verdict; (3) allow all reasonable inferences to sustain the verdict; and (4) discard all [countervailing] evidence." *Crabtree Masonry Co. v. C & R Constr., Inc.*, 575 S.W.2d 4, 5 (Tenn. 1978); see also *Foster v. Bue*, 749 S.W.2d 736, 741 (Tenn. 1988).

In re Estate of Blackburn, 253 S.W.3d 603, 613 (Tenn. Ct. App. 2007).

Concerning the denial of a motion for a directed verdict, the following standard of review applies:

In ruling on a motion for directed verdict, trial courts must take the strongest legitimate view of the evidence in favor of the non-moving party, construing all evidence in that party's favor and disregarding all countervailing evidence. *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994). A court may grant the motion only if reasonable minds could reach only one conclusion from the evidence. *Id.* Appellate courts apply the same standard in reviewing the trial court's decision on a directed verdict. *Sauls v. Evans*, 635 S.W.2d 377, 379 (Tenn. 1982).

Gaston v. Tenn. Farmers Mut. Ins. Co., 120 S.W.3d 815, 819 (Tenn. 2003). The same standard applies to a motion for judgment notwithstanding the verdict. *Mairose v. Fed. Express Corp.*, 86 S.W.3d 502, 511 (Tenn. Ct. App. 2001) ("In ruling on a motion for a judgment notwithstanding the verdict, the standard applied by both the trial court and the appellate court is the same as that applied to a motion for a directed verdict made during the trial.").

IV. Bad Faith

Mr. Little contends that the jury's determination that USAA had not acted in bad faith was contrary to the clear weight of the evidence. In response, USAA asserts that Mr. Little has waived this issue by failing to file a motion for a new trial regarding his bad faith claim. Upon review, we agree with USAA.

Our Supreme Court has explained:

It has long been the rule in this state that in order to preserve errors for appeal, the appellant must first bring the alleged errors to the attention of the trial court in a motion for a new trial. *See Memphis St. Ry. Co. v. Johnson*, 114 Tenn. 632, 88 S.W. 169 (1905). This requirement was initially imposed by this Court to make more efficient the process of reviewing “the ever increasing number of appeals,” and we have recognized that this practice significantly aids the functions of the appellate courts by limiting and defining the issues for review. *See Board of Equalization v. Nashville, C. & St. L. Ry.*, 148 Tenn. 676, 680, 257 S.W. 91, 93 (1923) (noting that this Court “was constrained to exercise its power of prescribing rules of practice, requiring that errors be first assigned in a motion for new trial presented to the trial court, and . . . limiting the inquiry on appeal to error assigned in the motion”). Moreover, and perhaps most importantly, motions for a new trial also help to ensure that

the trial judge might be given an opportunity to consider or to reconsider alleged errors committed during the course of the trial or other matters affecting the jury or the verdict, such as alleged misconduct of jurors, parties, or counsel which either occurred after the trial or could not reasonably have been discovered until after the verdict.

McCormic v. Smith, 659 S.W.2d 804, 806 (Tenn. 1983). In modern appellate practice, the requirement of filing a motion for a new trial to preserve most errors is governed by Rule of Appellate Procedure 3(e), which reads in relevant part,

[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

Fahey v. Eldridge, 46 S.W.3d 138, 141-42 (Tenn. 2001). This Court has further noted that an appellant who asserts that the jury’s verdict was unsupported by material evidence must first raise the issue in a motion for new trial to avoid waiver of the issue. *See Chilton v. Austin*, No. M2001-02891-COA-R3-CV, 2003 WL 237365, at *3 (Tenn. Ct. App. Feb. 4, 2003) (“[The appellant] asserts that there is no evidence to support the jury verdict. This ground requires a motion for a new trial in the trial court in order to raise it on appeal, *see*

Tenn. R. App. P. 3(e)[.]”); *see also Johnson v. Ford*, No. E2011-00486-COA-R3-CV, 2012 WL 1253269, at *10 (Tenn. Ct. App. Apr. 12, 2012) (finding that the appellants had waived the issue of whether material evidence supported the jury’s verdict that the appellants were not entitled to punitive damages by failing to raise it in their motion for new trial).

Here, Mr. Little failed to file a motion for new trial or any post-trial motion pursuant to Tennessee Rule of Appellate Procedure 3(e). Accordingly, Mr. Little has waived appellate review of this issue.

V. Fraud

Mr. Little asserts that the trial court erred by granting a directed verdict concerning his fraud claim rather than allowing the claim to go to the jury.¹ USAA contends that the trial court’s grant of a directed verdict was proper due to the lack of evidence of fraudulent misrepresentations by USAA. USAA further argues that Mr. Little failed to properly support his arguments on appeal, resulting in waiver of this issue.

Regarding the review of a grant of directed verdict, our Supreme Court has clarified:

On review of the grant of a directed verdict on motion of a defendant, it is not the office of an appellate court to weigh the evidence. Rather, it must take the strongest legitimate view of the evidence in favor of the plaintiff, indulging in all reasonable inferences in his favor, and disregarding any evidence to the contrary. The trial judge’s action may be sustained only if there is no material evidence in the record that would support a verdict for the plaintiff, under any of the theories that he has advanced.

Conatser v. Clarksville Coca-Cola Bottling Co., 920 S.W.2d 646, 647 (Tenn. 1995) (quoting *Williams v. Brown*, 860 S.W.2d 854, 857 (Tenn. 1993)). “A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion.” *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004).

In Tennessee, a fraud claim must satisfy the following elements:

(1) the defendant made a representation of an existing or past fact; (2) the representation was false when made; (3) the representation was in regard to a material fact; (4) the false representation was made either knowingly or without belief in its truth or recklessly; (5) plaintiff reasonably relied on the

¹ Mr. Little’s failure to file a post-trial motion is not dispositive of this issue. Tennessee Rule of Civil Procedure 50.05 specifically provides: “Whenever a court shall have granted a directed verdict, it shall not be necessary for the party against whom the verdict was directed to file a motion for a new trial in order to obtain appellate review of such action of the court.”

misrepresented fact; and (6) plaintiff suffered damage as a result of the misrepresentation.

Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 311 (Tenn. 2008). “The party alleging fraud bears the burden of proving each element.” *PNC Multifamily Capital Institutional Fund XXVI Ltd. P’ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 548 (Tenn. Ct. App. 2012).

In his appellate brief, Mr. Little posits that he proved knowing misrepresentations made by USAA’s representative, Sabra Johnson. In support, Mr. Little cites to Ms. Johnson’s testimony from the 2021 preliminary injunction hearing. During the subsequent jury trial, Mr. Little’s counsel sought to introduce the prior testimony of Ms. Johnson by reading portions of that testimony aloud to the jury. The trial court allowed the testimony to be introduced to the jury in this manner; however, the trial transcript merely reflects that testimony was read to the jury but does not contain an actual transcription of what was read aloud. USAA therefore urges that Mr. Little cannot demonstrate that the trial court erred in granting a directed verdict as to his fraud claim because the record does not contain a sufficient transcript of the evidence introduced at trial in support of that claim.

Although Mr. Little relies primarily on testimony from Ms. Johnson to support his fraud claim, he cites to her testimony introduced at a prior hearing regarding a preliminary injunction. During the jury trial, Mr. Little’s counsel introduced portions of Ms. Johnson’s testimony from the injunction hearing by reading to the jury from the prior hearing transcript. In doing so, counsel relied on Tennessee Rule of Civil Procedure 65.04(7), which states in pertinent part:

[A]ny evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

The trial court permitted portions of the testimony from the injunction hearing to be read to the jury. However, the transcript from the jury trial merely states, “testimony of [witness] read aloud” and does not contain an actual transcription of what was read to the jury.

By failing to provide this Court with an actual transcript of the portions of Ms. Johnson’s prior testimony that were read to the jury, Mr. Little has waived review of this proof. Mr. Little is responsible for providing this Court with an adequate record to review the issues that he has raised. *See State v. Ballard*, 855 S.W.2d 557, 561 (Tenn. 1993). As this Court has explained:

Appellant’s failure to provide a record of the proceedings below does not enable us to review the issues he raises. As the Supreme Court stated in

State v. Ballard, 855 S.W.2d 557 (Tenn. 1993), “[w]hen a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal.” *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983). Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. *State v. Roberts*, 755 S.W.2d 833, 836 (Tenn. Cr. App. 1988).

Sturgeon v. Sturgeon, No. E2008-01099-COA-R3-CV, 2009 WL 2213485, at *3 (Tenn. Ct. App. July 24, 2009). Moreover, Tennessee Rule of Appellate Procedure 24(b) provides that “the appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.”

Here, Mr. Little has failed to provide this Court with a transcript that reflects what transpired during trial with respect to the testimony upon which he seeks to rely. Without a transcript detailing the portions of the prior testimony that were read to the jury, we cannot fully evaluate the trial court’s basis for directing a verdict on the fraud claim.

In addition to the preliminary injunction hearing testimony, Mr. Little also relies on certain exhibits that were introduced at trial, namely USAA’s initial denial letter regarding his claim and USAA’s response sent to the Department following Mr. Little’s consumer complaint. Mr. Little further mentions other documentary exhibits, including the independent adjuster’s report, notes recorded by Ms. Johnson during her investigation of the claim, Mr. Little’s complaint filed with the Department, and the engineering report prepared by GEOServices, LLC. However, none of these documents demonstrate that a “false representation was made either knowingly or without belief in its truth or recklessly,” upon which Mr. Little relied or that caused him to suffer damages. *See Walker*, 249 S.W.3d at 311.

Mr. Little first references the report from an independent adjuster, dated March 21, 2019. In this report, the adjuster noted multiple areas in and around the home that contained cracks and concluded by stating:

There were some cracks on the right side of the home that appeared to have been sealed over previously, and insured’s ex-wife advised those cracks were previously present, indicating the area is prone to settlement. The home sits on the edge of the mountain, with the grounds being very steep downward from the front of the home to the rear. Based on our inspection, it appears likely that due to the heavy rains in the area recently, the soil is heavily saturated and is eroding, causing the home to settle. The services of a

structural and/or soil engineer may be needed to ensure the grounds are stable.

As Mr. Little points out, Ms. Johnson's notes reflect that Ms. Johnson then telephoned Mr. Little on April 4, 2019, following receipt of the independent adjuster's report, and advised Mr. Little that the adjuster had noted "some damages that may be earth movement" and had stated that because of the earthquake endorsement, USAA would need to hire an expert to determine the cause of the losses. Ms. Johnson stated that USAA would thus hire an engineer "to inspect and confirm [cause of loss]."

It is undisputed that USAA retained a structural engineer to inspect the home. Following inspection, the structural engineer provided a report to USAA, wherein he concluded that "observed distress throughout the residence, including sloping floors and interior/exterior cracks and separations, is the result of long-term differential movement of the foundation due to deficiency in initial construction details of the retaining wall. These items were not the result of any single, sudden, or recent event." Ms. Johnson sent the initial denial letter to Mr. Little on May 17, 2019, along with a copy of the structural engineer's report. Relying on that report, USAA denied coverage. Ms. Johnson stated in the letter that in order to trigger coverage under the earthquake endorsement, "the damage must be direct physical loss caused by an earthquake."

We note that it was not until Mr. Little's receipt of the report from GEOServices, LLC, dated December 30, 2020, more than a year after the initial denial by USAA, that he obtained an engineer's opinion that the damage to his home was likely due in part to seismic activity. Accordingly, Ms. Johnson's representations in 2019, which essentially quoted the structural engineer's report, cannot be classified as knowingly or recklessly false. Ms. Johnson's letter evinced that she was relying upon the expert opinion that was available to her at that time.

Similarly, although Mr. Little sent his complaint to the Department on January 12, 2021, which was after the date of the GEOServices report, he failed to mention that report in his complaint. Instead, his complaint focused on USAA's purported lack of cooperation with requests for policy documents. Accordingly, in USAA's responsive letter to the Department, USAA addressed the document requests and again cited the structural engineer's report regarding the cause of Mr. Little's losses. Although USAA did acknowledge that Mr. Little had supplied an "engineer's report," apparently referring to the report by GEOServices, USAA stated that "the engineer's report supplied by [Mr. Little] does not state any evidence of earthquake damage. The decision to deny remains unchanged."

Mr. Little now propounds that USAA's statement that "the engineer's report . . . does not state any evidence of earthquake damage" was false or misleading because the GEOServices report does cite seismic activity as a cause of the damages. Even if we

assume, *arguendo*, that this amounts to a knowing or reckless misrepresentation, Mr. Little's evidence still falls short of supporting his fraud claim because he failed to demonstrate that he "reasonably relied on the misrepresented fact" or that he was damaged thereby. *See Walker*, 249 S.W.3d at 311. As the trial court noted in its explanation regarding its grant of a directed verdict on the fraud claim:

[W]hen I granted the motion for a directed verdict . . . there was the issue of reliance and damages related to misrepresentation. And that is what I didn't hear during the course of the plaintiff's proof, and that was the primary focus when I said you have intentional misrepresentation, and you got the elements that are listed there. Even if we were to assume, for argumentative purposes only, that there was an intentional misrepresentation made to the Tennessee Department of Commerce and Insurance, kind of hard to rely upon representation you didn't hear. Kind of hard to suffer damages, when it wasn't discussed what authority the Tennessee Department of Commerce and Insurance would've had to somehow intervene in the process anyway. There was no—there was not enough proof to get to the jury on reliance and damages related to the misrepresentation, which is why the Court granted that motion for a directed verdict on that.

We agree with the trial court's determination.

This Court has previously elucidated that a "false representation alone does not amount to fraud; there must be a showing by plaintiff that the representation was relied on by him or her, and that the reliance was reasonable under the circumstances." *Homestead Grp., LLC v. Bank of Tenn.*, 307 S.W.3d 746, 752 (Tenn. Ct. App. 2009). Mr. Little has shown neither of these elements. Mr. Little clearly did not rely upon USAA's representation made to the Department because he has consistently maintained since receipt of the GEOServices report that his losses were caused by seismic activity. As the trial court stated, Mr. Little did not present any proof of reliance or damages related to the purported misrepresentation made by USAA to the Department. Taking the strongest legitimate view of the evidence in favor of Mr. Little, we conclude that there exists no material evidence in the record that would support a verdict in favor of Mr. Little regarding his fraud claim. *See Conatser*, 920 S.W.2d at 647. We therefore affirm the trial court's grant of a directed verdict on the fraud claim.

VI. Breach of Contract

The jury returned a verdict in favor of Mr. Little, finding that USAA had breached the insurance contract and awarding to Mr. Little \$2,000,000 in damages. USAA subsequently filed a post-trial motion and requested that the trial court enter a judgment in accordance with its directed verdict, but the court denied the motion. USAA contends that

the jury's finding of breach of contract was not supported by material evidence in the record.

This Court has explained:

On appeal, “our review of a jury’s factual findings in a civil action is limited to determining whether any material evidence supported the verdict.” *Potter v. Ford Motor Co.*, 213 S.W.3d 264, 268 (Tenn. Ct. App. 2006) (citing *In re Estate of Brindley*, No. M1999-02224-COA-R3-CV, 2002 WL 1827578, at *2 (Tenn. Ct. App. Aug. 7, 2002); Tenn. R. App. P. 13(d)). We “do not determine the credibility of witnesses or weigh evidence on appeal from a jury verdict.” *Id.* at 268-69 (citing *In re Estate of Brindley*, 2002 WL 1827578, at *2; *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d 646, 647 (Tenn. 1995); *Benson v. Tennessee Valley Elec. Coop.*, 868 S.W.2d 630, 638-39 (Tenn. Ct. App. 1993)). “Where the record contains material evidence supporting the verdict, the judgment based on that verdict will not be disturbed on appeal.” *Id.* at 269 (citing *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822, 823 (Tenn. 1994); *Whaley v. Rheem Mfg. Co.*, 900 S.W.2d 296, 300 (Tenn. Ct. App. 1995)).

State ex rel. Slatery v. Witherspoon Law Grp. PLLC, 700 S.W.3d 370, 382 (Tenn. Ct. App. 2022). In determining whether there is material evidence to support a verdict, this Court must: “(1) take the strongest legitimate view of all the evidence in favor of the verdict; (2) assume the truth of all evidence that supports the verdict; (3) allow all reasonable inferences to sustain the verdict; and (4) discard all [countervailing] evidence.” *Old Republic Life Ins. Co. v. Woody*, 652 S.W.3d 418, 424-25 (Tenn. Ct. App. 2022) (quoting *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 704 (Tenn. 2000)).

USAA postulates that the jury’s verdict was in error because (1) no material evidence existed supporting a finding of breach because there was no evidence of direct physical loss caused by an earthquake, (2) the policy purportedly excluded rainwater issues from coverage, and (3) Mr. Little failed to provide evidence of recoverable damages. We will address each of these contentions in turn.

A. Direct Physical Loss

USAA advances the position that because the insurance policy required proof of a “direct physical loss” due to earthquake to afford coverage, the jury’s determination of breach was unsupported by the evidence. The earthquake endorsement attached to Mr. Little’s insurance policy provides in pertinent part:

For an additional premium, we insure for direct physical loss to property covered under SECTION I-PROPERTY WE COVER of the policy to which

this endorsement is attached caused by earthquake including land shock waves or tremors before, during or after a volcanic eruption.

(Emphasis added.) The policy does not define the phrase, “direct physical loss.”

With regard to proper construction of the language incorporated in an insurance policy, our Supreme Court has instructed:

The analysis used in construing insurance policies is well settled. “Insurance contracts like other contracts should be construed so as to give effect to the intention and express language of the parties.” *Blaylock & Brown Construction, Inc. v. AIU Insurance Co.*, 796 S.W.2d 146, 149 (Tenn. App. 1990). Words in an insurance policy are given their common and ordinary meaning. Where language in an insurance policy is susceptible of more than one reasonable interpretation, however, it is ambiguous. *See e.g., Moss v. Golden Rule Life Insurance Co.*, 724 S.W.2d 367, 368 (Tenn. App. 1986). Where the ambiguous language limits the coverage of an insurance policy, that language must be construed against the insurance company and in favor of the insured. *Allstate Insurance Co. v. Watts*, 811 S.W.2d 883, 886 (Tenn. 1991).

Tata v. Nichols, 848 S.W.2d 649, 650 (Tenn. 1993). Our Supreme Court has also stated:

Where there is no ambiguity, it is the duty of the Court to apply to the words used their ordinary meaning and neither party is to be favored in their construction. The well recognized rule of construing language of an insurance policy most strongly against the insurance company does not permit or cause the Court to create an ambiguity where none exists.

Brown v. Tenn. Auto Ins. Co., 237 S.W.2d 553, 554-555 (Tenn. 1951) (citation omitted).

Mr. Little and USAA differ in their positions concerning the proper construction of the phrase, “direct physical loss.” In its most basic form, this disagreement involves whether the damages must have immediately manifested following the earthquake and whether any other contributing cause existed. Concerning this issue, the trial court instructed the jury as follows:

Now, to prove that the defendant owes benefits under the earthquake endorsement, the plaintiff must prove by a preponderance of the evidence that an earthquake caused direct physical loss to his dwelling or other structures on the property. It is physical loss damage or injury that, in the natural and continuous sequence unbroken by an efficient intervening cause, produces the injury and without which the results would not have occurred.

However, you may find coverage exists or that there is coverage if a non-excluded cause is a substantial factor in producing the damage or injury, even though an excluded cause may have in -- may have contributed in some form to the ultimate result and standing alone would have properly invoked the exclusion contained in the policy.

The trial court's instruction mirrors the language of *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 888 (Tenn. 1991), wherein the Supreme Court adopted the "concurrent causation doctrine," holding that "an insurer should not be excused from its obligation under a homeowner's policy unless it has been determined that the loss being complained of did not result in substantial part from a risk for which it provided coverage and collected a premium."

USAA insists that this instruction was in error because the policy contains an "anti-concurrent cause" provision ("ACC clause"), which states:

**LOSSES WE DO NOT COVER UNDER DWELLING PROTECTION,
OTHER STRUCTURES PROTECTION AND PERSONAL PROPERTY
PROTECTION:**

1. We do not insure for damage consisting of or caused directly or indirectly by any of the following regardless of:
 - (i) The cause of the excluded event or damage that; or
 - (ii) Other causes of the loss that; or
 - (iii) Whether the event or damage occurs, suddenly or gradually, involves isolated or widespread damage, or occurs as a result of any combination of these to; or
 - (iv) Whether other causes or events act concurrently or in any sequence with the excluded event toproduce the loss.

The policy then lists several exclusion clauses, such as "earth movement," including "landslide," and "weather conditions," including "rain."

As a general rule, however, the provisions of a specific endorsement on a policy of insurance will take precedence over conflicting terms of the initial policy. *See Hamill v. Nationwide Mut. Ins. Co.*, 499 S.W.2d 892, 898 (Tenn. Ct. App. 1972). Ergo, the inclusion of a provision (accompanied by payment of an additional premium) expressly covering

earthquake damage would take precedence over general exclusions found in the initial policy. Moreover, if the loss is covered under one portion of the policy, the insurer may not rely on conflicting policy provisions to deny that coverage. *See Solomon v. Hager*, No. E2000-02586-COA-R3-CV, 2001 WL 1657214, at *8 (Tenn. Ct. App. Dec. 27, 2001) (“Allstate will not be permitted to *specifically* provide coverage for an event and then take it away in the *general* language of the policy.”).

In *Solomon*, the plaintiff was a homeowner who had been constructing a home and had obtained a “builder’s risk policy” through Allstate Insurance Company. *Id.* at *1. During construction of the home, a basement wall collapsed following several days of heavy rain. *Id.* When the plaintiff attempted to file a claim for the loss, Allstate’s adjuster viewed the damage, consulted with an engineer, and told the plaintiff that the claim was denied. *Id.* at *2. The plaintiff filed a lawsuit against Allstate, which proceeded to a jury trial. *Id.* During the trial, experts testified that the cause of the wall’s collapse was defective construction practices/materials. *Id.* at *2-3.

Allstate claimed that the loss was not covered under the policy because the policy excluded factors contributing to the wall’s collapse, including rain, earth movement, and defective construction practices or materials. *Id.* at *3. The plaintiff, however, relied upon a section of the policy entitled, “Additional Protections,” which specifically covered a loss due to “collapse” when the collapse was caused by “defective methods or materials used in construction[.]” *Id.* at *5. The jury found in the plaintiff’s favor and awarded her damages for the loss. *Id.* at *4. On appeal, this Court affirmed the verdict, determining that there was material evidence in the record to support the finding that the plaintiff’s loss was caused by “collapse.” *Id.* at *7.

Addressing Allstate’s arguments on appeal in *Solomon*, this Court stated:

The . . . problem with Allstate’s approach is that the exclusions it relies upon are in direct conflict with the coverage provided by the policy for certain collapses. The policy provides that a loss is covered if it is the result of a collapse caused by, among other things, “defective methods or materials used in construction, repair, remodeling or renovation,” if the collapse occurs in the course of construction, repair, remodeling or renovation. One of the exclusions relied upon by Allstate, however, excludes losses caused by, among other things, inadequate or defective “materials used in repair, construction, renovation or remodeling.” This conflicting language leads us to conclude that the exclusions relied upon by Allstate do not apply in the event of a collapse. Allstate will not be permitted to *specifically* provide coverage for an event and then take it away in the *general* language of the policy.

We have determined that there was a collapse within the meaning of the policy and that there is material evidence to support a finding that the collapse was caused by a defective method of construction. Accordingly, we hold that the policy covers the plaintiff's loss. Allstate's argument that other exclusions in the policy operate to exclude that coverage is without merit.

Id. at *8.

Similarly, here, the earthquake endorsement provided for coverage in the event of direct physical loss from an earthquake. As such, other exclusions in the policy that contradict the specific earthquake endorsement (such as the ACC clause and its earth movement/landslide exclusion) do not apply. Accordingly, as the trial court instructed, the only pertinent issue is whether the loss that Mr. Little experienced could be considered "direct physical loss to [Mr. Little's home] caused by earthquake[.]"

As this Court has recently explained regarding the meaning of the term, "direct physical loss," as used in an insurance policy:

The operative term "direct physical loss" is not defined in the contract. To aid in ascertaining the plain, ordinary, and popular meaning of the terms, courts regularly consult dictionaries to provide definitions. *Strategic Acquisitions Grp., LLC v. Premier Parking of Tenn., LLC*, No. E2019-01631-COA-R3-CV, 2020 WL 2595869, at *5 (Tenn. Ct. App. May 22, 2020). *Black's Law Dictionary* defines "direct" as "[f]ree from extraneous influence; immediate;" "physical" as "[o]f, relating to, or involving material things; pertaining to real, tangible objects;" and "loss" as "[t]he failure to maintain possession of something." BLACK'S LAW DICTIONARY (12th ed. 2024). We find nothing unexpected from consulting these dictionary definitions.

From the parties' briefing, both in the trial court and on appeal, it is evident that there has been no shortage of ink spilled over the phrase "direct physical loss." Courts from around the country, both state and federal, have defined this phrase. For example, the Sixth Circuit defined this phrase thusly:

"Direct" means "[e]ffected or existing without intermediation or intervening agency; immediate." *Oxford English Dictionary Online* (3d ed. 2021). "Physical" means "natural; tangible, concrete." *Id.* "Loss" means "[p]erdition, ruin, destruction; the condition or fact of being 'lost,' destroyed, or ruined," or "being deprived of." *Id.* And "property" means "any residential or other building (with or without associated

land) or separately owned part of such building (as an apartment, etc.),” as well as “[s]omething belonging to a thing; an appurtenance; an adjunct.” *Id.*

Santo’s Italian Café LLC v. Acuity Ins. Co., 15 F.4th 398, 401 (6th Cir. 2021). That court found that, even under “a thesaurus-rich paraphrase of” the words “a direct physical loss of” property—i.e., “an ‘immediate’ ‘tangible’ ‘deprivation’ of property,” the meaning stayed the same. *Id.* The Alaska Supreme Court adopted a similar understanding, noting that “Black’s Law Dictionary defines ‘direct’ as ‘[f]ree from extraneous influence; immediate’ [and] it defines ‘physical’ as ‘[o]f, relating to, or involving material things; pertaining to real, tangible objects.’” *Baxter Senior Living, LLC v. Zurich Am. Ins. Co.*, 556 P.3d 757, 765 (Alaska 2024) (footnote omitted).

From these definitions flows the concept that “direct physical loss to property requires a distinct, demonstrable, physical alteration of property.” *Another Planet Ent., LLC v. Vigilant Ins. Co.*, 548 P.3d 303, 322 (Cal. 2024). As the Supreme Court of Alaska found, “[d]irect physical loss’ therefore must exclude losses that: (1) are not the immediate or closely connected outcome of some ‘covered cause of loss’; or (2) are intangible or incorporeal.” *Baxter Senior Living*, 556 P.3d at 765-66. That court found that a loss of use without physical alteration was “a classic example of an intangible loss,” and that “‘direct physical loss’ must require *some* physical alteration of property or a deprivation of possession; mere loss of use is insufficient.” *Id.* at 766. Stated another way, “[t]he pairing of the word ‘physical’ with ‘loss’ demonstrates ‘there must be some *physicality* to the loss . . . of property—*e.g.*, a physical alteration, physical contamination, or physical destruction.” *Another Planet*, 548 P.3d at 322 (citation modified).

Zurich Am. Ins. Co. v. Tom James Co., No. M2025-00404-COA-R9-CV, 2026 WL 1584703, at *7 (Tenn. Ct. App. June 3, 2026) (footnote omitted).

Based on the plain meaning of the phrase, “direct physical loss,” as elucidated above, we conclude that the jury’s verdict in favor of Mr. Little was supported by material evidence in the record. For example, the testimony of several members of Mr. Little’s family who were living in the home in late 2018 and early 2019 revealed that prior to the seismic activity in December 2018, the home manifested no structural concerns. Many of these witnesses related that a large family gathering was held in the home for Thanksgiving 2018 with no issues. Following the December 2018 earthquake (which was felt by certain family members who were at home when it occurred) and the period of heavy rainfall that followed in early 2019, these witnesses expressed that they began to notice problems with the house such as cracks appearing in walls and ceilings, doors that would not open or close, large cracks in the driveway, and other issues that significantly worsened over a short

period of time. According to the family members, their driveway quickly became impassable in certain areas, floors appeared visibly skewed, laminate flooring began to separate, a patio near the garage became sunken, the home's deck had pulled away from the house, and the deck's stairs "came off." These family members also reported that other homes in the area had suffered similar or worse damage, resulting in the demolition of at least one home.

Derek Kilday, the geotechnical engineer from GEOServices who performed a "geological investigation of the home" and assessed for "possible causes of loss," testified during trial regarding his findings. After checking the integrity of Mr. Little's retaining wall, Mr. Kilday had concluded that the retaining wall was not the cause of the damages. As Mr. Kilday pointed out, several other homes in the area had also suffered damage and that damage was clearly not caused by Mr. Little's retaining wall.

After drilling and taking soil samples, Mr. Kilday concluded that the earthquake that occurred in December 2018 had caused damage to the soil by causing "micro-cracking in the soil's structure." Mr. Kilday explained that the soil in the area of Mr. Little's home was colluvium, which was a soil type that was more prone to movement. He also opined that the seismic event in December 2018 had caused disruption to the soil, which could have created new flow paths for water such that the effect of the heavy rains that fell in early 2019 was exacerbated. According to Mr. Kilday, the rain was unlikely to have caused the damage to Mr. Little's home without the disruption to the soil caused by the earthquake, relying on evidence that the house had been there for almost thirty years and that there had been more significant periods of rainfall during that time than the rainfall in early 2019. Mr. Kilday further opined that the stability of the colluvium could not be guaranteed such that the home could be stabilized and repaired.

Based on the expert proof demonstrating that the December 2018 earthquake had, more likely than not, caused an immediate disruption to the soil that had ultimately resulted in damages to Mr. Little's home when combined with the subsequent heavy rains, we conclude that there was material evidence in the record demonstrating that the earthquake caused a "distinct, demonstrable, physical alteration of [the] property." *See Zurich Am. Ins. Co.*, 2026 WL 1584703, at *7 (quoting *Another Planet Ent., LLC v. Vigilant Ins. Co.*, 548 P.3d 303, 322 (Cal. 2024)). Accordingly, the loss would be covered by the earthquake endorsement, and the jury properly awarded compensatory damages to Mr. Little due to USAA's breach of the insurance contract when it failed to honor the claim. *See ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005) ("The essential elements of any breach of contract claim include (1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract.").

B. Exclusion of Rainwater

USAA similarly posits that the jury's verdict was in error because the ACC provision in the general insurance policy specifically excluded rainwater issues from coverage. However, this argument is unavailing for the same reasons, explained above, that the other exclusions in the general policy did not bar Mr. Little's recovery for damages attributable to direct physical loss due to earthquake. *See Hamill*, 499 S.W.2d at 898 (determining that provisions of a specific endorsement on an insurance policy will take precedence over conflicting terms of the initial policy); *Solomon*, 2001 WL 1657214, at *8 (stating that an insurer cannot "*specifically* provide coverage for an event and then take it away in the *general* language of the policy."). Inasmuch as the record contains material evidence that seismic activity caused a direct physical loss, the earthquake endorsement controls and would cover the damages caused by the earthquake despite conflicting exclusions found in the general policy.

C. Recoverable Damages

USAA also contends that the jury's verdict was in error because Mr. Little failed to provide evidence of recoverable damages. USAA claims that by reason of the policy's language, Mr. Little had to prove the "actual cash value" ("ACV"), which the policy defines as:

[T]he amount it would cost to repair or replace covered property, at the time of loss or damage, with material of like kind and quality, subject to a deduction for obsolescence and a "deduction for depreciation." The "deduction for depreciation" will be determined as follows:

For property covered under Coverage A—Dwelling Protection or Coverage B—Other Structures Protection, the deduction will be based on the age and condition of the materials making up the damaged property and will apply to materials, labor, sales tax, and overhead and profit that are included in the cost to repair or replace the damaged property.

Mr. Little's policy also provided for recovery of costs for additional living expenses due to loss of use of the home if it was deemed uninhabitable.

The undisputed proof established that USAA had commissioned inspections and valuations of the home from time to time to assess the replacement value of the home for insurance purposes. Two such reports were entered as exhibits at trial without objection, establishing a range of \$1,885,000 in 2008 to \$2,077,000 in 2011 for replacement cost of

the home.² Mr. Little testified that USAA regularly increased the policy limit and premiums on the homeowners policy through the years to reflect the increasing value of the home. As further proof of this, the homeowners policy in force in 2018-2019, which was also introduced as an exhibit at trial, provided policy limits of \$2,277,000 related solely to the home, plus \$569,250 for “other structures protection” and an “unlimited” amount for “loss of use protection.”

In addition, Mr. Little testified as to his opinion that the policy limit of \$2,277,000 related to the value of the home was an accurate assessment of the home’s replacement cost at the time of the loss. Mr. Little also expressed his understanding that the ACV would involve a deduction for depreciation. “It is an accepted principle of Tennessee law that ‘the owner of real property is held to be qualified, by reason of his ownership alone, to give an opinion in evidence of the value of his land.’” *Piedmont Nat’l Gas Co., Inc. v. BlueRoad Fontanel, LLC*, No. M2024-01860-COA-R3-CV, 2026 WL 893231, at *13 (Tenn. Ct. App. Apr. 1, 2026) (quoting *State ex rel. Smith v. Livingston Limestone Co.*, 547 S.W.2d 942, 943 (Tenn. 1977)).

Furthermore, Mr. Little testified regarding additional expenses that he incurred as a result of having to move his family from the home and store their belongings when the home was deemed unsafe for habitation. Mr. Little added that he had continued to pay the mortgage and other recurring expenses related to the home despite its uninhabitable status. He stated that he had also taken steps to mitigate damage to the home, which caused him to incur additional expense.

With reference to the damages issue, the trial court instructed the jury:

Now, the plaintiff bears the burden of proving the amount of damages of each of his claims, including his claims for breach of contract. If you find that the evidence presented by the plaintiff is insufficient to enable you to make a fair and reasonable assessment of the amount of damages, you must find for the defendant on that claim.

The plaintiff’s claim for breach of contract involved three coverages. First, coverage for damage to the dwelling on his property, second, coverage for loss of use, and third, coverage for mitigation efforts. Now, for damage to the dwelling on the plaintiff’s property, if you find the dwelling is a total loss and obtaining replacement costs is an impossibility, you may award the full value of the policy as to the dwelling. You may not award the plaintiff more than the actual cash value of his loss. Now, the actual cash value is

² These reports and other trial exhibits demonstrated that the house was approximately 8,000 square feet, and numerous photographs were introduced as part of the trial exhibits, depicting the home’s scale and quality.

calculated as the amount it would cost to repair or replace covered property at the time of loss or damage with material of like kind and quality subject to a deduction for depreciation and a deduction for obsolescence.

Now, the depreciation deduction must be based on the age and condition of the materials making up the damages, property, and will apply to materials, labor, sales tax, and overhead and profit that are included in the cost to repair or replace the damaged property.

The plaintiff also seeks damages for mitigation efforts. To award the plaintiff damages for mitigation, you must find that the plaintiff incurred expenses or necessary measures taken solely to protect against further damage to his dwelling. If you find that the plaintiff took those necessary measures, you may then award the plaintiff the amount of reasonable expenses you find that the plaintiff incurred to take those necessary measures.

Now, a person whose property has been damaged by the wrongful act of another is bound to use reasonable care to avoid loss and to minimize damages. A party may not recover for losses that could have been prevented by reasonable efforts or by expenditures that might reasonably have been made.

Following its deliberations, the jury awarded Mr. Little damages in the total amount of \$2,000,000.

As our Supreme Court has previously elucidated regarding a jury's award of damages:

We entrust the responsibility of resolving questions of disputed fact, including the assessment of damages, to the jury.

* * *

The trial judge, charged with ensuring a fair trial, serves as an important check on a jury's discretion to award damages. One way the trial judge does this is by serving as the thirteenth juror. As thirteenth juror, the trial judge must independently weigh and review the evidence presented at trial to determine whether it preponderates in favor of the verdict and decide whether he or she agrees with and is satisfied with the jury's verdict. No verdict is valid unless approved by the trial judge acting as the thirteenth juror.

Generally, if the trial judge is not satisfied with the jury's verdict, the judge must set aside the verdict and order a new trial. If the trial judge's dissatisfaction, however, is based only upon the jury's award of damages, the trial judge may suggest a remittitur, which, if accepted by the plaintiff, would reduce the award to an amount the judge deems appropriate.

* * *

Due to concerns of cost and efficiency, we have encouraged trial courts to cure excessive verdicts, whenever feasible, through the practice of remittitur, rather than by ordering a new trial. A request for remittitur is implicit in a motion for a new trial and is a valid alternative to a new trial.

Trial judges may suggest adjustments to a jury's verdict even if the verdict is within the range of reasonableness. The range of reasonableness is determined by establishing the upper and lower limits of an award of damages that can be supported by material proof.

* * *

Where the trial judge has approved the verdict in its role as thirteenth juror—as the trial court did in this case—the Court of Appeals' review of the verdict and its ability to suggest a remittitur is limited to a review of the record to determine whether the verdict is supported by material evidence. Material evidence is “evidence material to the question in controversy, which must necessarily enter into the consideration of the controversy and by itself, or in connection with the other evidence, be determinative of the case.” An appellate court is required to take “the strongest legitimate view of all the evidence in favor of the verdict, assume the truth of all evidence that supports the verdict, allowing all reasonable inferences to sustain the verdict, and to discard all countervailing evidence.” *Akers v. Prime Succession of Tenn., Inc.*, 387 S.W.3d 495, 501-02 (Tenn. 2012) (quoting *Barkes v. River Park Hosp., Inc.*, 328 S.W.3d 829, 833 (Tenn. 2010)). The material evidence analysis is very deferential to the award by the jury and the judgment of the trial court when it affirms the verdict as the thirteenth juror. “It matters not a whit where the weight or preponderance of the evidence lies under a material evidence review.” *Hohenberg Bros. Co. v. Mo. Pac. R.R. Co.*, 586 S.W.2d 117, 119-20 (Tenn. Ct. App. 1979). “It is simply a search of the record to ascertain if material evidence is present to support the verdict.” *Id.* Because the material evidence standard lies at the foundation of the right to trial by jury, if there is material evidence to support a jury verdict, the appellate courts must affirm it.

Meals ex rel. Meals v. Ford Motor Co., 417 S.W.3d 414, 420-23 (Tenn. 2013) (other internal citations omitted) (footnotes omitted).

Upon thorough review of the evidence presented, we determine that the jury herein was presented with ample proof regarding the home's value, size, and quality. Mr. Little, as the owner of the home, provided his opinion that the homeowners policy limit of \$2,277,000 related to the value of the home was an accurate assessment of the replacement cost at the time of the loss. Reports from 2008 and 2011 supported a value for the home of approximately \$2,000,000 in those years, and Mr. Little testified that the value of the home had increased over time. Although replacement value does not include a deduction for depreciation as is required by the ACV definition in the policy, we note that the jury's verdict was significantly less than the policy's stated replacement value of \$2,277,000. Moreover, the jury heard evidence of other expenses incurred by Mr. Little regarding mitigation of damages to the home and moving expenses for the family once the home was deemed unsafe. Considering all of the evidence presented, we conclude that the jury's verdict of \$2,000,000 in damages was supported by material evidence.

We further note: "The rule in this state is firmly established that the trial court shall exercise the function of a thirteenth juror upon hearing of a motion for a new trial; that it is his duty to weigh the evidence and independently determine therefrom whether or not it is sufficient to sustain the verdict." *Cent. Truckaway Sys. v. Waltner*, 253 S.W.2d 985, 991 (Tenn. Ct. App. 1952). Accordingly, where a trial judge has simply approved the verdict without comment, this court will presume that he has adequately performed his function as a thirteenth juror. *See id.* In this matter, when USAA filed a post-trial motion that essentially sought a judgment notwithstanding the verdict, the trial court denied the motion. Moreover, in doing so, the trial court did not suggest any remittitur or adjustment to the jury's award of damages to Mr. Little even though USAA had clearly raised the issue of whether damages were sufficiently proven at trial. Having concluded that the jury's verdict was supported by material evidence in the record, we determine that USAA's issue in this regard is without merit.

VII. Attorney's Fees on Appeal

Finally, USAA argues that it should be awarded attorney's fees and costs on appeal because Mr. Little's appeal is frivolous. USAA relies on Tennessee Code Annotated § 27-1-122 (2017) which provides:

When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

This Court has previously explained:

Parties should not be forced to bear the cost and vexation of baseless appeals. Accordingly, in 1975, the Tennessee General Assembly enacted Tenn. Code Ann. § 27-1-122 to enable appellate courts to award damages against parties whose appeals are frivolous or are brought solely for the purpose of delay. Determining whether to award these damages is a discretionary decision.

A frivolous appeal is one that is devoid of merit or one that has no reasonable chance of succeeding.

Young v. Barrow, 130 S.W.3d 59, 66-67 (Tenn. Ct. App. 2003) (internal citations omitted).

Notwithstanding the overall outcome of this appeal, we determine that this appeal was not so devoid of merit as to be deemed frivolous. Therefore, we exercise our discretion to deny USAA's request for damages for a frivolous appeal.

VIII. Conclusion

For the foregoing reasons, we affirm the trial court's judgment in all respects. Having addressed issues with insufficiency of the appellate record in this Opinion, we deny USAA's second motion to strike or dismiss. We further deny USAA's request for an award of attorney's fees and costs on appeal. We remand this matter to the trial court for enforcement of the judgment and collection of costs below. Costs on appeal are assessed one-half to the appellant, James P. Little, and one-half to the appellee, United Services Automobile Association, Inc.

s/Thomas R. Frierson, II

THOMAS R. FRIERSON, II, JUDGE