UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

EVEREST NATIONAL INSURANCE CO.	CIVIL ACTION NO. 15-1491
VERSUS	JUDGE ELIZABETH ERNY FOOTE
TRI-STATE BANCSHARES, INC. AND TRI-STATE BANK AND TRUST	MAGISTRATE JUDGE HORNSBY

MEMORANDUM RULING

This case stems from a bank Vice-President's embezzlement of nearly two million dollars and the bank's subsequent attempts to collect on a fidelity bond which insured against theft committed by dishonest employees. Before the Court are the following motions: (1) motion for summary judgment filed by the Plaintiff, Everest National Insurance Co. ("Everest") [Record Document 32]; (2) motion for partial summary judgment filed by the Defendants, Tri-State Bancshares, Inc. and Tri-State Bank and Trust (collectively "Tri-State") [Record Document 37]; and (3) motion for summary judgment seeking to dismiss Tri-State's counterclaim, filed by Everest [Record Document 38]. Both parties oppose the other's motions and have filed opposition and reply briefs accordingly. [See Record Documents 41, 42, 43, 44, 45, & 46]. For the reasons that follow, Everest's motion for summary judgment [Record Document 32] is **DENIED**; Tri-State's motion for partial summary judgment [Record Document 37] is **DENIED**; and Everest's motion for summary judgment on Tri-State's counter-claim [Record Document 38] is **DENIED**.

BACKGROUND

I. Tri-State Bank & Trust.

Tri-State Bank & Trust is a small bank headquartered in Haughton, Louisiana. It is owned by Tri-State Bancshares. Ed Kennon ("Kennon") is the President and majority interest owner of the bank. Tri-State has two branches with a combined total of eight to ten employees. It also has a Board of Directors.

Jim Scott ("Scott) worked at Tri-State for over twenty years, and at the time of his termination in July of 2014, was the Vice-President of Operations. While Kennon managed Tri-State's lending and investments, Scott managed the day-to-day operations and deposit accounts. Scott's responsibilities included management and oversight of bank employees, employee account review, bookkeeping and auditing, and he was also the security administrator for the electronic banking system used by Tri-State. Scott's wife, Patricia, also worked at Tri-State as the Vice-President of Lending.

The electronic banking system utilized by Tri-State was hosted by Computer Services Inc. ("CSI"). As previously mentioned, Scott was the security administrator for the CSI system. CSI's processing was used to maintain customer accounts, process transactions, generate reports, and maintain the bank's ledgers and sub-ledgers. Various reports could be generated through the system. Tri-State employees accessed the system using a unique user name and password.

II. The Fidelity Bond.

Tri-State maintained a two million dollar financial institution bond to insure it against, among other things, the risk of employee dishonesty or theft. Jeff Pitts ("Pitts"), employed by insurance broker Querbes and Nelson, assisted Tri-State in securing bond coverage, though the extent of his involvement in the process is disputed. There are two bond applications relevant to the issues before the Court. The first is a 2011 application (the "2011 Application") submitted to Progressive Casual Insurance Company, which was Everest's predecessor-in-interest. Tri-State secured the 2011 Bond, which was then renewed in 2014. The Bond insured Tri-State against losses stemming from the dishonest or fraudulent acts of its employees if those acts were discovered during the Bond period.[1]

The 2011 Application asked whether Tri-State's employees' accounts were segregated and reviewed for unusual activity at least monthly. See Record Document 32-6, pp. 9-10. Tri-State answered "Yes." Id. at p. 10. The Application also asked whether there was "a formal program requiring the segregation of duties in every area, so that no single transaction can be fully controlled from origination to posting by one person?" Id. Tri-State answered "Yes." Id. Under the heading "Losses, Pending Litigation And Claims History," the following question was asked: "Does the undersigned or any director or officer have knowledge of any fact, circumstance or situation involving the Applicant, its Subsidiaries or any past or present director, officer or employee, which could reasonably be expected to give rise to a future claim?" Id. at p. 11. Tri-State answered "No." Id.

[1] There is no dispute that the employee theft at issue, discussed infra, was discovered during the 2014 Bond period.

The 2011 Application further provided:

> NEW APPLICANTS: IT IS UNDERSTOOD AND AGREED THAT ANY CLAIM ARISING FROM ANY PRIOR OR PENDING LITIGATION OR WRITTEN OR ORAL DEMAND SHALL BE EXCLUDED FROM COVERAGE. IT IS FURTHER UNDERSTOOD AND AGREED THAT IF KNOWLEDGE OF ANY FACT, CIRCUMSTANCE OR SITUATION WHICH COULD REASONABLY BE EXPECTED TO GIVE RISE TO A CLAIM EXISTS, ANY CLAIM OR ACTION SUBSEQUENTLY ARISING THEREFROM SHALL BE EXCLUDED FROM COVERAGE.

Id.

In addition, the 2011 Application contained the following provision:

> The undersigned declare that, to the best of their knowledge and belief, the statements in this application . . . are true, accurate and complete, and that reasonable efforts have been made to obtain sufficient information from each and every individual or entity proposed for this insurance. It is further agreed by the Applicant that the statements in this Application are their representations, they are material and that the Bond is issued in reliance upon the truth of such representations.
>
> . . .
>
> If a Bond is issued, it is understood and agreed that the Insurer relied upon this Application in issuing each such Bond
>
> . . . .

Id. at pp. 11-12. The 2011 Application required two Tri-State signatures, which were provided by Kennon and Scott. Id. at p. 12. Pitts signed as the agent. Id.

Tri-State applied to renew the Bond coverage in 2014. Id. at pp. 14-17. The 2014 Application ("2014 Renewal Application") asked whether there was "a formal program requiring the segregation of duties, so that no single transaction can be fully controlled

from origination to posting by one person?"[2] Tri-State answered "Yes." The 2014 Renewal Application did not inquire, as the 2011 Application did, whether employee accounts were segregated and reviewed for unusual activity on a monthly basis, nor did it ask whether the signatories had knowledge of a claim. Instead, in that respect, it stated:

> RENEWAL APPLICANTS: IT IS UNDERSTOOD AND AGREED THAT IF THE UNDERSIGNED OR ANY INSURED HAS KNOWLEDGE OF ANY FACT, CIRCUMSTANCE OR SITUATION WHICH COULD REASONABLY BE EXPECTED TO GIVE RISE TO A FUTURE CLAIM, THEN ANY INCREASED LIMIT OF LIABILITY OR COVERAGE ENHANCEMENT SHALL NOT APPLY TO ANY CLAIM ARISING FROM OR IN ANY WAY INVOLVING SUCH FACTS, CIRCUMSTANCES OR SITUATIONS. IN ADDITION, ANY INCREASED LIMIT OF LIABILITY OR COVERAGE ENHANCEMENT SHALL NOT APPLY TO ANY CLAIM, FACTS, CIRCUMSTANCES OR SITUATIONS FOR WHICH THE INSURER HAS ALREADY RECEIVED NOTICE.

Id. at p. 16. The 2014 Renewal Application also contained the following representation:

> The undersigned declare that, to the best of their knowledge and belief, the statements in this application, [and] any prior application . . . are true, accurate and complete, and that reasonable efforts have been made to obtain sufficient information from each and every individual or entity proposed for this insurance. It is further agreed by the Applicant that the statements in this Application are their representations, they are material and that the Bond/Policy is issued in reliance upon the truth of such representations.
>
> . . .
>
> If a Bond/Policy is issued, it is understood and agreed that the Insurer relied upon this Application in issuing each such Bond/Policy and any Endorsements thereto.

Id. The 2014 Renewal Application was signed by Kennon and Scott. Once again, Pitts

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[2] The distinction between the 2011 question and the 2014 question is that 2011 asked if there was a program of segregation "in every area." 2014 did not make such a specific inquiry.

signed as the agent.

On the 2014 Bond, Insuring Agreement (A) described fidelity coverage as follows:

> Loss resulting directly from dishonest or fraudulent acts committed by an Employee, acting alone or in collusion with others. Such dishonest or fraudulent acts must be committed by the Employee with the manifest intent:
> (1) to cause the Insured to sustain such loss; and
> (2) to obtain an improper financial benefit for the Employee or another person or entity. . . .

Id. at p. 21. The Warranty Statement Rider stated:

> REPRESENTATION OF THE INSURED
> D. No statement made by, or on behalf of, the Insured, whether contained in the Application or otherwise, shall be deemed to be a warranty of anything except that it is true to the best of the knowledge and belief of the Insured.
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> . . .
>
> However, notwithstanding the above, any omission, concealment, or incorrect statement in the Application or otherwise, shall be grounds for the rescission of this bond provided that such omission, concealment or incorrect statement is material.

Id. at p. 63. The term "Application" was defined to include the actual application signed to obtain the initial bond, as well as any material submitted to renew that bond. Id. at 63.

III. The Scheme and Ensuing Loss.

In July of 2014, Scott was hospitalized and unable to appear at work. Because certain reports needed to be generated on a time-sensitive basis, Kennon contacted James Branch ("Branch"), a CPA, to assist Tri-State. After handling employee payroll, Branch tried to reconcile Tri-State's general ledger with its sub-ledger. A Tri-State employee, Melinda Williams ("Williams"), printed the reports that Branch needed to perform this task. Branch

discovered a $900,000 discrepancy between the two ledgers. Together, he and Williams sought assistance from CSI representative Ray Hobson ("Hobson"). Hobson reported that the CSI system had a built-in "balancer," which evidently is a report that can be issued daily that will automatically reconcile the general ledger and sub-ledger and detect any discrepancies between the two. Once the balancer report was generated, it corroborated the $900,000 discrepancy discovered by Branch. Through investigation, Hobson realized that Scott had locked the CSI system so that no other Tri-State employee (other than Scott himself) could access the balancer report. Ultimately, it was revealed that the $900,000 had been posted to a demand deposit account ("DDA") in the name of Patricia Scott and Jim Scott. The accounts Scott used to embezzle funds from Tri-State were locked in the CSI system, such that they could not be accessed or even searched for by any Tri-State employee, including Kennon himself.

Eventually, Tri-State realized that Scott had employed two distinct, yet similar, schemes to accomplish his embezzlement. Chronologically, the $900,000 loss was actually the second scheme. The first scheme, meanwhile, had been ongoing for over a decade and resulted in the loss of approximately $896,000. That money was embezzled bit by bit on a weekly basis over many years when Scott made small, manual entries in the CSI system. In general, he debited Tri-State's overhead account (an account holding money for the payment of interest owed on customer accounts) and then made a corresponding credit into his own account. In this way, the bank's ledgers always stayed balanced, and the embezzlement went undetected.

In the months before his hospitalization, Scott dramatically increased the amount of money he embezzled from Tri-State and used a less sophisticated scheme than that described above. This second scheme resulted in the $900,000 loss. To perpetrate that fraud, Scott made a limited number of very large credits to either his checking account or his savings account, but by and large, did not attempt to disguise them in the way he did previously. He did not attempt to make corresponding debits to other accounts; rather, these were one-legged transactions which caused the ledgers to become out of balance. After the money was in his accounts, he wrote one check and made several wire transfers to deplete the funds from his Tri-State accounts. Pursuant to the dual control system, the wire transfers had to be approved by another employee. Scott used his wife's credentials in order to approve those wire transfers.

Hobson explained Scott's method of theft as follows:

> . . . [H]e fabricated transactions. So in other words, he would enter deposits to his accounts and back that up with entries that would keep the system in balance between sub-ledgers and ledgers, okay, as far as the overall general ledger goes.
>
> So in other words, the whistles and bells that trigger alarms in the system, he countered those. So if the system became out of balance, then it would -- you know, he could circumvent that process where it would generate a transaction.
>
> So that's the best way I know to explain that. He had a very good knowledge through errors, okay, of how entries had to be made in order to compensate online entry, and he had these transactions very well thought out as to how he would go through entering them.

Record Document 32-9, pp. 24-25. With respect to Scott's first scheme, Hobson stated

that the most of the amounts were small enough that they may not have attracted anyone's attention, even if the balancer reports had been reviewed by other employees. Id. at 25.

Once Scott's embezzlement was discovered, the authorities were alerted and Jim and Patricia Scott were fired from Tri-State.[3] Meanwhile, Tri-State timely filed a claim with Everest, reporting the loss on July 23, 2014 and requesting coverage under the fidelity provision of the financial institution bond. Everest retained ABA Insurance Services to process the claim on its behalf. ABA assigned the matter to John Cullen ("Cullen"). Tri-State's Proof of Loss dated August 12, 2014, with supporting documentation, claimed a loss of $1,559,693.59. On September 2, 2014, Tri-State submitted additional documentation, claiming a total loss of $1,796,156.20.[4]

Cullen visited Tri-State on November 6 and 7, 2014, at which time he interviewed employees and reviewed documents. Cullen again visited Tri-State on January 16, 2015, to meet with employees and obtain additional documents. Tri-State provided these documents to Cullen by January 22, 2015. The parties dispute whether the January visit was necessary and the extent to which it actually addressed the internal safety controls that ultimately supported Everest's decision to deny coverage.

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[3] The United States prosecuted Scott criminally for the embezzlement. He pled guilty in 2015, and on February 25, 2016 was sentenced to forty-two months imprisonment. At the sentencing hearing, the district court calculated the loss amount to Tri-State as $1,794,156.20.

[4] While Cullen may have received the document on September 4, the parties agree it was submitted by Tri-State on September 2.

Everest maintains that Cullen "regularly communicated with Tri-State" during his review of Tri-State's claim. Record Document 38-2, p. 3. Nonetheless, at the end of March, Tri-State had not received a coverage determination from Everest. Accordingly, on March 30, 2015, Tri-State's counsel sent a letter to Cullen demanding payment. Cullen's April 15, 2015 response to Tri-State's counsel indicated that he had completed his investigation, which included reviewing thousands of pages of documentation and witness interviews, but implied that he had not yet submitted his report to Everest. His letter represented that he was "currently in the process of submitting my report to the carrier in order to make a final decision on the Claim. I anticipate being able to report to you and the Bank of its decision shortly." Record Document 38-9, pp. 2-3. His letter closed with a reservation of Everest's rights in this matter. Id. at 3. However, Cullen's ultimate Proof of Loss Analysis is dated April 6, 2015, before he ever authored his letter to Tri-State's counsel.

Cullen's Proof of Loss Analysis concluded that Scott made a material misrepresentation on the 2011 Application by denying that he had knowledge of facts, circumstances, or a situation involving Tri-State and himself as a director, officer, or employee that would give rise to a claim under the Bond. Cullen stated that Everest informed him that it would not have issued coverage if the question had been answered honestly, nor would it have issued coverage based on Kennon's signature alone.

Cullen further concluded that coverage should be denied because, together, the 2011 Application and the 2014 Renewal Application represented that employee accounts

were segregated and reviewed for unusual activity at least monthly and that there was a formal program in place requiring the segregation of duties such that no single transaction could be controlled by one employee, when the facts demonstrated that Scott's accounts were not segregated and reviewed and he was able to access the system and post credits to his own accounts. Again, Cullen noted that the Bond would not have issued without two signatures, meaning Kennon alone could not have signed and obtained coverage. Cullen ultimately concluded that the Bond did not provide coverage for the loss stemming from Scott's embezzlement.

Rather than issuing a denial of coverage to Tri-State, Everest instead filed suit in this Court on April 30, 2015. Its complaint seeks rescission of the Bond based on the same grounds outlined in Cullen's Proof of Loss Analysis; alternatively, Everest seeks a declaratory judgment that Tri-State is not entitled to recovery under the Bond. When Tri-State answered the suit, it enumerated several affirmative defenses, and also lodged a counterclaim against Everest, in which it alleges breach of contract, failure to promptly pay the claim in violation of Louisiana Revised Statute 22:1892, detrimental reliance based on Everest's failure to process the claim in a quick and timely manner when delays allegedly allowed Scott to transfer the embezzled funds beyond the reach of Tri-State, and a declaratory judgment that Tri-State's loss is covered under the Bond provisions.

The instant cross-motions for summary judgment followed.

LAW AND ANALYSIS

Federal Rule of Civil Procedure 56(a) directs that a court "shall grant summary

judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[5] Summary judgment is appropriate when the pleadings, answers to interrogatories, admissions, depositions and affidavits on file indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986). When the burden at trial will rest on the non-moving party, the moving party need not produce evidence to negate the elements of the non-moving party's case; rather, it need only point out the absence of supporting evidence. See id. at 322-323.

Once the movant carries its initial burden, it is incumbent upon the non-moving party to demonstrate the existence of a genuine dispute as to a material fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986); Wallace v. Texas Tech. Univ., 80 F.3d 1042, 1047 (5th Cir. 1996)(citations omitted). If the motion is properly made, however, Rule 56(c) requires the nonmovant to go "beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." Wallace, 80 F.3d at 1047 (citations omitted). This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory or unsubstantiated allegations, or by a mere scintilla of evidence. See Little v. Liquid Air Corp., 37 F.3d 1069,

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[5] Rule 56 was amended effective December 1, 2010. Per the comments, the 2010 amendment was intended "to improve the procedures for presenting and deciding summary judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged." Therefore, the case law applicable to Rule 56 prior to its amendment remains authoritative, and this Court will rely on it accordingly.

1075 (5th Cir. 1994)(citations omitted). However, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505 (1985)(citations omitted); Reid v. State Farm Mut. Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986)(the court must "review the facts drawing all inferences most favorable to the party opposing the motion").

Additionally, Local Rule 56.1 requires the moving party to file a statement of material facts as to which it contends there is no genuine issue to be tried. Pursuant to Local Rule 56.2, the party opposing the motion for summary judgment must set forth a "short and concise statement of the material facts as to which there exists a genuine issue to be tried." All material facts set forth in the statement required to be served by the moving party "will be deemed admitted, for purposes of the motion, unless controverted as required by this rule." Local Rule 56.2.

Under the Erie doctrine, federal courts sitting in diversity apply the substantive law of the forum state and federal procedural law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817 (1938). In the instant case, it is undisputed that Louisiana law applies to Everest's cause of action.

I. Rescission of the Bond (Everest's Motion for Summary Judgment).

Tri-State's primary argument is that the Bond should be deemed void *ab initio*, pursuant to Louisiana Revised Statute 22:860, which provides:

> A. Except as provided in Subsection B of this Section, R.S. 22:1314, and 1315, no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat

> or void the contract or prevent it attaching, unless the misrepresentation or warranty is made with the intent to deceive.
>
> B. In any application for life, annuity, or health and accident insurance made in writing by the insured, all statements therein made by the insured shall, in the absence of fraud, be deemed representations and not warranties. The falsity of any such statement shall not bar the right to recovery under the contract unless either one of the following is true as to the applicant's statement:
>
> (1) The false statement was made with actual intent to deceive.
>
> (2) The false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer under the policy.

La. R.S. 22:860. In this case, Everest submits that it is entitled to rescind the Bond because both the 2011 Application and the 2014 Renewal Application contained material misrepresentations that were made with the intent to deceive. Dialing this argument down, Everest's contentions are actually two-fold: (1) that Scott, who signed both Applications, made material misrepresentations with the intent to deceive and (2) that Kennon, who signed both Applications, made material misrepresentations with the intent to deceive. Everest bears the burden of proving that Tri-State (1) misrepresented a material fact with (2) the intent to deceive. See State Farm Mut. Auto. Ins. Co. v. Bridges, 45,162 (La. App. 2 Cir. 5/19/10), 36 So. 3d 1142, 1147.

Everest highlights four alleged misrepresentations in the two Applications:

(1) The 2011 Application question regarding whether employees' accounts were segregated and reviewed for unusual activity at least monthly, to which Tri-State answered yes.

(2) The 2011 Application question regarding whether there was a formal program requiring the segregation of duties in every area, so that one employee could not control a single transaction from start to finish, to which Tri-State answered yes.

(3) The 2011 Application question regarding whether the signatories or any director or officer had knowledge of any fact, circumstance, or situation involving Tri-State, which could reasonably be expected to give rise to a future claim, to which Tri-State answered no.

(4) The 2014 Bond Renewal Application question regarding whether there was a formal program requiring the segregation of duties, so that one employee could not control a single transaction from start to finish, to which Tri-State answered yes.

Tri-State does not dispute the materiality of the Application representations. See Kahl v. Chevalier, 2015-1028 (La. App. 3 Cir. 3/23/16), 188 So. 3d 449, 455 ("[t]o prove materiality of a false statement under La. R.S. 22:860, the insurer must show that the statement was of such a nature that, had it been true, the insurer would either not have contracted or would have contracted only at a higher premium rate.") (internal marks omitted). Indeed, it is undisputed that if the aforesaid questions had been answered differently, in light of the facts now known, Everest would not have issued or renewed the Bond. Thus, the materiality of the representations in the Bond Applications are not at issue.

Accordingly, the Court's inquiry as to both Scott and Kennon is whether their respective representations were made with the intent to deceive. If so, the Bond is subject

to rescission under La. R.S. 22:860. In order to determine whether one acts with the requisite intent to deceive, Louisiana law instructs courts to look to the surrounding circumstances "which indicate the insured's knowledge of the falsity of the representations made in the application and his recognition of the materiality thereof, or from circumstances which create a reasonable assumption that the insured recognized the materiality of the misrepresentations." State Farm, 36 So. 3d at 1147.

A. Scott's Representations.

1. Intent To Deceive.

As the Fifth Circuit has oft-instructed, when state of mind is at issue, summary judgment is rarely appropriate. See Guillory v. Domtar Indus. Inc., 95 F.3d 1320, 1326 (5th Cir. 1996); see also Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 956 n.3 (5th Cir. 1993) ("when state of mind is at issue, summary judgment is less fashionable because motive or intent is inherently a question of fact which turns on credibility . . . . Such determinations are within the sole province of the fact-finder.") However, that precept is not without qualification: "[t]hough summary judgment is rarely proper when an issue of intent is involved, the presence of an intent issue does not automatically preclude summary judgment; the case must be evaluated like any other to determine whether a genuine issue of material fact exists." Guillory, 95 F.3d at 1326.

Here, it has not been urged by either party that Scott acted with anything other than an intent to deceive. The undisputed facts demonstrate that Scott knew of his own embezzlement from Tri-State. Scott manually overrode many of the CSI functions to

hinder Tri-State's ability to detect his theft. He violated Tri-State's dual-control mechanisms so that he could control a transaction from start to finish. On the Bond Applications, he denied that he knew of any information that could reasonably be expected to give rise to a future claim, which was plainly a false statement in light of his own defalcations and surreptitious overrides of the bank's dual-control mechanisms. It can not plausibly be urged, nor has it been argued, that Scott would not have recognized that his embezzlement of funds over many years, and the method by which he accomplished that embezzlement, would have been deemed material in a fidelity bond application, when the bond being applied for was to insure against the very losses he was creating. In these circumstances, the Court has no pause in finding that Scott acted with an intent to deceive.

That conclusion, however, does not resolve the issue before the Court. Indeed, the true inquiry, and one briefed extensively by the parties, is whether Scott's knowledge of his own theft and his circumvention of the dual-control system implemented at Tri-State can be imputed to the bank. That is, is Tri-State presumed to have knowledge of what its Vice-President, Scott, knew to be true, such that Scott's intentional mispresentations on the Bond Applications- though unknown to Tri-State at the time of the 2011 Application and 2014 Renewal Application- are sufficient to rescind coverage? Unsurprisingly, Everest urges this Court to find that coverage is rescinded because Scott made material misrepresentations with the intent to deceive and Scott's knowledge is imputable to Tri-State. Tri-State, on the other hand, submits that the adverse interest exception applies in this case, such that Scott's knowledge is not imputable to it. After review of the briefs

and following the Court's independent research, the Court agrees with Tri-State. Scott's misrepresentations are not imputable to Tri-State.

2. The Adverse Interest Exception.

Under agency principles, the general rule is that the acts or knowledge of an agent are imputable to the principal, so long as the agent is acting within his general authority or on behalf of the corporation. See D'Aubin v. Mauroner-Craddock, Inc., 262 La. 350 (La. 1972). There is a significant exception to that rule, alluded to in D'Aubin itself. The adverse interest exception holds that if an agent is acting adversely to his principal and is acting solely for his own benefit or the benefit of another, then the agent's knowledge is not imputed to the principal. See Restatement (Third) of Agency § 5.04. Everest implies that Louisiana law does not support application of the adverse interest exception. To the contrary, the Court has found plenty of support in Louisiana law for the adverse interest exception. In Louisiana, "the law is clear that where a corporate officer obtains knowledge when he is acting in a capacity other than his position as a corporate official and such information is against the welfare and interest of the corporation, that such knowledge is not imputable to the corporation." Wright v. Mark C. Smith and Sons P'ship, 264 So. 2d 304, 310 (La. App. 1 Cir. 1972); see also Aleman Planting & Mfg. Co. v. Hines, 157 La. 625, 631-32 (La. 1925).

In fact, as far back as 1933, the Louisiana Supreme Court employed the adverse interest exception under circumstances similar to those presented here. See Slidell Sav. & Homestead Ass'n v. Fid. & Deposit Co. of Md., 178 La. 548 (La. 1933). There, a bank

learned that one of its long-standing employees secretly had been embezzling for years. Id. at 550-51. The bank attempted to recoup its losses by collecting on a fidelity bond. Id. at 550. The insurer denied coverage, asserting that the bank did not timely submit a claim because it had prior knowledge of the employee's theft. Id. at 551-52. Specifically, the insurer argued that the bank president was aware of facts that should have led him to conclude that the employee was embezzling, and therefore the bank was on notice of the loss. Id. at 553. The Louisiana Supreme Court disagreed, explaining that under the insurer's theory, the bank president was essentially in collusion with the employee and that his knowledge

> could not be imputed to [the bank], within the rule that the knowledge of an officer of a corporation, within the scope of his duties, is the knowledge of the corporation, for it would be so contray [sic] to [the president's] interest to divulge facts, implicating him in dishonest transactions, that it could not be expected of him to divulge them any more than it could be expected of the defaulting secretary and treasurer, Mrs. Morris, to divulge her wrongs as they were being committed by her.

Id. at 555. The court foreclosed the insurer's defense to payment on these grounds.

Similarly and based on like reasoning, other federal courts in Louisiana have both recognized and applied the adverse interest exception. See Multi-Transp. Corp. v. Gulf States Toyota, Inc., 1994 WL 676445, *2 (E.D. La. Dec. 5, 1994) ("if the corporate agent acts with interest adverse to that of the corporation, the corporation is not necessarily charged with the agent's knowledge"); Fed. Sav. and Loan Ins. Corp. v. McGinnis, 808 F. Supp. 1263, 1273 n.10 (E.D. La. 1992) ("When corporate insiders engage in misconduct, their wrongdoing is not attributable to the bank if the insiders, and not the institution,

benefit from the wrongdoing."); Creager v. Womack, 1987 WL 5614, *1 (E.D. La. Jan. 21, 1987) ("Intentional misrepresentation and concealment used by a corporation's officer to deceive a selling stockholder is not attributable to the corporation when the officer is not acting in the course of the corporation's business and the corporation does not benefit by the act.")[6] The Court is convinced that Louisiana jurisprudence recognizes and approves of the adverse interest exception.

Moreover, this Court's own research has found that the overwhelming majority of courts nationwide employ the adverse interest exception. One such opinion is particularly persuasive. In BancInsure, Inc. v. U.K. Bancorporation Inc./ United Kentucky Bank of Pendleton Cty., Inc., 830 F. Supp. 2d 294 (E.D. Ky. 2011), the district court was faced with an embezzlement factually analogous to the one suffered by Tri-State. Wood, the president and CEO of the bank perpetrated, a long-running embezzlement scheme, whereby she was able to steal more than two million dollars from the bank's coffers. Id. at 297. When the bank realized the embezzlement, it submitted a claim under its financial institution bond and professional liability policy. Those applications had been completed by Wood herself and on them she had denied knowledge of any act, error, or omission which might give rise to a claim. Id. at 298-99. The insurer denied coverage, explaining that it was rescinding the policy based on Wood's misrepresentations in the original and

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[6] The Fifth Circuit has repeatedly recognized the adverse interest exception, but upon closer review of those cases, it is apparent that the court was applying Texas state law. See FDIC v. Shrader & York, 991 F.2d 216 (5th Cir. 1993); FDIC v. Ernst & Young, 967 F.2d 166 (5th Cir. 1992); FDIC v. Lott, 460 F.2d 82 (5th Cir. 1972); and FDIC v. Aetna Cas. & Sur. Co., 426 F.2d 729 (5th Cir. 1970).

renewal applications because Wood's knowledge of her own acts was imputable to the bank. Id. at 300. Applying the adverse interest exception, the district court disagreed, explaining that "where the communication of a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating, the agent's knowledge is not imputed to the principal." Id. at 302 (internal marks omitted). The court concluded that when Wood applied for insurance coverage, her interests were adverse to the bank's, and thus not imputable to it.

> For approximately eight years, Wood had been involved in [a] large scale fraudulent scheme which culminated in an embezzlement of over 2.2 million dollars from [the bank]. It is clear that she would not communicate this fact to [the bank] because it would necessarily prevent the consummation of the fraudulent scheme which she was engaged in perpetrating. If Wood answered [the question] on the renewal application truthfully, her fraud would have been revealed, and she would not have been able to continue embezzling funds from [the bank]. Therefore, since Wood's interests in concealing her fraudulent activity [were] adverse to [the bank's] interests, her knowledge of her embezzlement will not be imputed to [the bank].

Id.

That same reasoning applies with equal force in this case. Everest does not seriously or credibly dispute that Scott's embezzlement was for his own benefit and was adverse to the interests of Tri-State.[7] Indeed, a nearly two million dollar embezzlement straight from

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[7] Everest seemingly concedes that Scott's embezzlement and/or his misrepresentations about his embezzlement were adverse to Tri-State's interests. However, Everest attempts to parse the extent to which Scott's interests diverged from Tri-State by arguing that because the Bond covered risks such as forgery and robbery, to which Scott had no adverse interest, then Scott must not have had an adverse interest to the majority of the Bond provisions. There is no legal support cited or

the coffers of Tri-State was not beneficial to Tri-State. That Scott's misrepresentations jeopardized Tri-State's fidelity coverage is not beneficial to Tri-State.

The Court has no hesitation in concluding that Scott's embezzlement was not a fact that he would have disclosed on the 2011 Application or 2014 Renewal Application because to do so would have exposed his fraud and brought his scheme to a screeching halt. If his scheme was discovered, Scott would be facing criminal prosecution, the loss of his job, the prospect of having to repay all of the misappropriated funds, and the concomitant damage to his and his family's reputation. Because Scott was acting in his own interest in lying on the 2011 Application and 2014 Renewal Application, and because his interests starkly diverged from the best interest of Tri-State, the Court finds that Scott's knowledge of his own defalcations is not imputable to Tri-State. Accordingly, Scott's misrepresentations will not bar Tri-State from recovering on the fidelity bond. See also FDIC v. Shrader & York, 991 F.2d 216 (5th Cir. 1993) (finding adverse interest exception inapplicable because corporate officer's interests were not adverse to the corporation); FDIC v. Ernst & Young, 967 F.2d 166 (5th Cir. 1992) (finding adverse interest exception inapplicable because bank's CEO and sole shareholder acted fraudulently to benefit the bank, which in turn benefitted him personally; therefore, his interests were not adverse to the bank); Adair State Bank v. Am. Cas. Co., 949 F.2d 1067 (10th Cir. 1991) (overruled on other grounds) (court would not impute to corporation conduct that adversely affected it); Gould v. American-Hawaiian S.S. Co., 535 F.2d 761 (3d Cir. 1976) (corporation does not have

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analysis provided for Everest's bare conclusion, and quite frankly, such parsing of the Bond application makes little sense in theory or in application.

knowledge of a fact when the primary perpetrator of the fraud acted in his personal capacity and for his personal gain); FDIC v. Lott, 460 F.2d 82 (5th Cir. 1972) (bank president's knowledge of his own fraudulent acts, which were adverse to the bank's interests, was not imputed to the bank and therefore did not bar fidelity coverage); FDIC v. Aetna Cas. & Sur. Co., 426 F.2d 729 (5th Cir. 1970) (fraudulent acts of bank director not imputed to the bank because his interests were adverse to the bank's); Chamberlain Grp. Inc. v. Nassimi, 2010 WL 1875923 (W.D. Wash. May 10, 2010) ("The rule from the Restatement Second of Agency is applicable here. Under the adverse agent doctrine, where an agent secretly acts entirely for his or her own benefit, the agent's knowledge is not imputed to the principal." (internal marks omitted)); Comeau v. Rupp, 810 F. Supp. 1127 (D. Kan. 1992) ("If the corporation's agent acted adversely to the interests of the corporation, the agent's acts are not imputed to the corporation."); In re Sunpoint Sec., Inc., 377 B.R. 513 (Bankr. E.D. Tex. 2007) ("The practice of *presuming* the transfer of knowledge, and thus *imputing* the agent's knowledge to the principal, is a fiction . . . . That fiction is untenable, however, when an agent has *totally abandoned* the interests of his principal, and acted *entirely* in his own or a third party's interest, because an agent cannot be presumed to have disclosed that which would expose and defeat his fraudulent purpose." (quoting Ernst & Young v. Bankr. Servs. Inc. (In re CBI Holding, Inc.), 311 B.R. 350 (Bankr. S.D.N.Y. 2004)); Shields v. Nat'l Union Fire Ins. Co. of Pittsburgh (In re Lloyd Sec., Inc.), 1992 WL 119362 (Bankr. E.D. Pa. May 21, 1992) (holding that plaintiff could pursue coverage under fidelity bond, for principals' knowledge of their own defalcation

could not be imputed to the corporation); Puget Sound Nat'l Bank v. St. Paul Fire and Marine Ins. Co., 645 P.2d 1122 (Wash. App. 1982) (regarding coverage on a fidelity bond obtained by defalcating bank director, court held that director's knowledge of his defalcations was not imputable to the bank); Mechanicsville Trust & Sav. Bank v. Hawkeye-Security Ins. Co., 158 N.W.2d 89 (Iowa 1968) (regarding bank's attempt to recover on bond after bank's managing agent embezzled funds, court found there was a "clear presumption [managing agent] would not reveal to the bank his fraudulent conduct. To agree with defendant's contentions would render the terms of the bond meaningless and impossible of performance.")[8]

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[8] The cases cited by Everest to support the denial of the adverse interest exception are distinguishable and inapposite. For instance, in Federal Deposit Insurance Corp. v. Duffy, 47 F.3d 146, 151-52 (5th Cir. 1995), the Fifth Circuit held that a law firm's professional liability insurance policy was void *ab initio* because the partner who obtained coverage made material misrepresentations with the intent to deceive. The court did not engage in any discussion of imputed knowledge or adverse interest because, as the opinion discloses, the deceptive partner's acts benefitted the firm. Id. at 151. Indeed, he engaged in fraud in order to generate fees for his law firm, id., therefore his interest was never adverse to the firm. This holding does not support Everest's position in this matter. In Costa Brava Partnership v. ChinaCast Education Corp. (In re ChinaCast Educ. Corp. Sec. Litig.), 809 F.3d 471 (9th Cir. 2015), also cited by Everest, the Ninth Circuit reversed the district court which had dismissed the plaintiff's complaint after applying the adverse interest exception. There, the Ninth Circuit recognized the viability of the adverse interest exception, but simply held that it must yield to innocent third-party sharehholders who were swindled by the corporation's CEO. Id. at 476-77. In this case, as discussed below, the Court is not faced with similar considerations of innocent third-parties, and therefore this case is inapposite. Everest also directs the Court to Pereira v. Aetna Cas. & Surety Co. (In re Payroll Express Corp.), 186 F.3d 196 (2d Cir. 1999), where the Second Circuit imputed the corporation's president's knowledge of his theft to the corporation. Critically, in that case, the Second Circuit applied New Jersey law and was thus constrained by New Jersey Supreme Court precedent. Id. at 207-08. The New Jersey Supreme Court had not yet "ascertain[ed] the operation and scope of the adverse interest doctrine," and binding state law precedent compelled the court's ultimate conclusion. Id. As

Everest maintains two primary arguments against the application of the adverse interest exception which will be discussed below.

a. Sole Control Theory.

Everest submits that the adverse interest exception is defeated by another exception, referred to as the sole control theory. Everest argues that a person who is in sole control of the bank should not be allowed, through fraudulent means, to insure himself against his own defalcations. The Restatement (Third) of Agency § 5.04's Reporter's Notes explain that the "adverse interest exception is inapplicable when all of an organization's relevant decisionmakers are involved in the wrongful conduct at issue." The Fifth Circuit approves of this exception to the adverse interest exception. See Lott, 460 F.2d at 87. In this vein, Everest contends that Scott was in sole control of Tri-State because he was in charge of operations, was the security administrator for CSI, supervised and directed the work of the internal auditor, and had his reports "rubber-stamp[ed]" by the audit committee members. While these facts highlight the various ways in which Scott was an integral, valued, high-ranking officer of Tri-State, they do not prove he was in sole control of the bank. Indeed, by focusing exclusively on what Scott was in charge of, Everest disregards everything over which Scott had no involvement or direction.

There is substantial record evidence that Scott was not a sole actor at the bank such that he can be viewed as its alter ego. It is undipsuted that Kennon was in charge of the entire lending and investment side of Tri-State and that Scott had no involvement in this

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discussed in this opinion, Louisiana law does, in fact, recognize and apply the adverse interest exception; therefore, Payroll Express is not persuasive.

substantial bank activity. Another Tri-State employee was charged with conducting internal audits, though the extent of Scott's control over her audits is unclear and/or disputed. Tri-State had a Board of Directors. While the legitimacy of the Board and the extent of its involvement in banking matters is disputed, it is conceded that Scott could not have applied for the Bond without the approval of the Board of Directors.

The undisputed facts evidence that Scott was simply at the helm of the operational side of the bank. That he may have been in the top position of authority on one particular side of the bank does not mean that he was the alter ego of the bank, for such a finding would disregard the other legitimate and substantial areas of the bank in which Scott was uninvolved. It also cannot be said that Scott was the sole actor with respect to the Bond Applications since he needed approval from the Board of Directors in order to apply for the Bond. Therefore, Scott could not, by definition, act alone. The Court finds Scott was not in sole control of Tri-State.

b. Innocent Third Parties.

Next, Everest maintains that the adverse interest exception must yield to innocent third parties, such that the bank, as opposed to third parties, must bear the risk of a dishonest agent. On its face, this proposition finds support in the law. As the Restatement (Third) of Agency § 5.04(b) explains, even when an agent acts adversely to his principal, notice will be imputed "when necessary to protect the rights of a third party who dealt with the principal in good faith . . . ." The Comment section provides further guidance:

> A principal assumes the risk that the agents it chooses to interact on its behalf with third parties will, when actual or

> apparent authority is present, bind the principal to the legal consequences of their actions. This is because the principal chooses its agents, has the right to control them, and determines how to characterize its agents' positions and indicia of authority in manifestations made to third parties.

Restatement (Third) of Agency § 504, Comment (c). However, on this point, the Restatement of Agency is clear: when it comes to fidelity bonds obtained to provide coverage for the specific risk of disloyal or dishonest employees, the adverse interest exception does not yield to the insurer to bar coverage. Indeed, Comment (c) to the Restatement (Second) of Agency § 280 explains:

> *Insurance against embezzlement.* If, in order to protect himself against the embezzlement or other wrongdoing of an agent, the principal obtains a contract of indemnity which states that the signer has no knowledge of any prior wrongdoing by the agent, the knowledge of his own embezzlement by the agent who signs the contract is not imputed to the principal. The risk of embezzlement by dishonest agents is the risk insured against and it would defeat the purpose of the contract to bind the principal by the knowledge of such agents.

Restatement (Second) of Agency § 280, Comment (c). The Court finds this explanation both persuasive and prudent.

In this case, Tri-State obtained fidelity coverage to protect itself against the very type of theft that Scott was secretly perpetrating all the while. Voiding coverage under these circumstances would, it seems, render fidelity coverage illusory. Therefore, like the Restatement principles, the Court distinguishes an innocent third party from an insurer who contracted to provide fidelity coverage, finding that the insurer has assumed the very risk that is presented in these circumstances. See Restatement (Second) of Agency § 280,

Reporter's Notes ("the principal relies upon the guarantor to afford him protection against the kind of conduct of which his agent is guilty. In construing this agreement, it should be understood that the guarantor and not the principal assumes the risk . . . ."); see also Restatement (Third) of Agency § 5.03, comment (b) ("[T]he nature of a principal's relationship or transaction with a third party may require performance by the third party under terms that provide no defense to the third party that is derived from imputation of an agent's knowledge. For example, if a principal makes a claim under a fidelity bond covering an employee's dishonesty, the issuer of the bond may not decline to pay on the basis that the employee's knowledge of the employee's own wrongdoing is imputed to the principal.")

As the BancInsure court aptly observed, "this is a difficult case with two legitimate, competing interests." BancInsure, 830 F. Supp. 2d at 304. That sentiment is no less true in the instant case. On the one hand, Tri-State believed its long-standing Vice-President was a trustworthy person of integrity and character. Because this trust had never before been questioned, Tri-State was led to believe Scott conducted Tri-State's business in the manner that was best for Tri-State. That included routine matters such as completing bond applications. On the other hand is Everest, an insurer who relied upon its insured's representations in the Applications in agreeing to provide coverage. Considering the legal principles previously espoused, along with equitable considerations, the Court finds that Scott's knowledge of his own defalcations cannot be imputed to Tri-State; Everest bears the risk of those misrepresentations. Hence, Everest cannot deny coverage on the basis

of Scott's misrepresentations alone.

B. Kennon's Representations.

Everest next asserts that the Bond can be deemed void *ab initio* because Kennon represented both that the statements in the Applications were true and accurate and that reasonable efforts had been made to obtain sufficient information from each person proposed for the insurance. Once again, it is Everest's burden to prove that Kennon made misrepresentations with the intent to deceive.

The Court finds that it cannot determine on summary judgment whether any of Kennon's representations were knowingly false and made with the intent to deceive. There are disputed issues of fact which relate to the design and function of, and Scott's subterfuge of, Tri-State's internal control mechanisms. That is, though the facts reveal that Scott had a secret DDA account that was not reviewed by another employee on a monthly basis, it is argued that was because of his own surreptitious actions in hiding that account and controlling access thereto, rather than by the design of the Tri-State internal control system. Further, while there was a plan in place to prohibit one employee from being able to process a transaction from start to finish, that system was overridden by Scott in order to perpetuate his own scheme. Whether it was done so solely by Scott's own manipulations and is isolated to his scheme, or whether that was a commonplace event, is unknown. The Court views all of these as genuine disputes of material fact that cannot be resolved at summary judgment.

The Court is aware that the parties agree that Kennon did not read the 2011

Application or 2014 Renewal Application before signing those documents. The parties also agree that Kennon made no independent investigation before signing either Application. Nonetheless, it is Everest's burden to prove that Kennon made misrepresentations with the intent to deceive, and it has failed to satisfy this burden. It has cited no legal authority to support its proposition that a failure to read a document before signing it, in and of itself, constitutes a material misrepresentation made with the intent to deceive. Aside from Kennon's admission that he failed to read the documents, Everest has pinpointed no facts to demonstrate that Kennon knew the documents contained misrepresentations and that, despite recognizing the materiality of those misrepresentations, he signed and submitted the Applications anyway. Because fact issues remain, summary judgment is not appropriate for the resolution of this issue.

For all of the above reasons, Everest's motion for summary judgment [Record Document 32] shall be DENIED.

II. Statutory Penalties for Failure To Investigate, Pay, or Deny the Loss (Tri-State's Motion for Partial Summary Judgment).

Tri-State moves for partial summary judgment, seeking a determination that Everest violated Louisiana Revised Statute 22:1892 by failing to timely investigate, pay, or deny its claim, thus entitling Tri-State to statutory penalties. Under Louisiana law, insurers owe certain duties to their insureds when adjusting and paying claims. Louisiana Revised Statute 22:1892 provides a penalty for the insurer's failure to pay a claim within thirty days after it has received satisfactory proof of loss if the failure is arbitrary, capricious, or without probable cause. Louisiana Revised Statute 22:1973 provides that an insurer owes

a duty of good faith and fair dealing to an insured and provides a penalty for the insurer's failure to pay a claim within sixty days after receiving satisfactory proof of loss if the failure was arbitrary, capricious, or without probable cause. These two statutes prohibit "virtually identical" conduct, with the primary difference being the time periods allowed for payment. Reed v. State Farm Mut. Auto. Ins. Co., 2003-0107 (La. 10/21/03); 857 So. 2d 1012, 1020.

Statutory penalties are penal in nature and must be strictly construed. See id. "One who claims entitlement to penalties and attorney fees has the burden of proving the insurer received satisfactory proof of loss as a predicate to a showing that the insurer was arbitrary, capricious, or without probable cause." Id. "The sanctions of penalties and attorney fees are not assessed unless a plaintiff's proof is clear that the insurer was in fact arbitrary, capricious, or without probable cause in refusing to pay." Id. at 1021. Statutory penalties are "inappropriate when the insurer has a reasonable basis to defend the claim and acts in good-faith reliance on that defense." Id. Thus, when there is a "reasonable and legitimate question as to the extent and causation of a claim, bad faith should not be inferred from an insurer's failure to pay within the statutory time limits when such reasonable doubts exist." Id.

In Reed, the Louisiana Supreme Court instructed that "arbitrary, capricious, or without probable cause" is synonymous with vexatious. See id. A "'vexatious refusal to pay' means unjustified, without reasonable or probable cause or excuse." Id. The insurer's refusal to pay is not, for instance, based on a good faith defense. See id. The determination of whether an insurer's refusal to pay can be deemed arbitrary, capricious,

or without probable cause is primarily a fact question, which is dependent upon the facts known to the insurer at the time of its action. See id.

One fact to which the parties agree is that neither Cullen nor Everest ever communicated a denial of coverage to Tri-State. Rather, Everest filed suit seeking to void the Bond. However, a number of disputed facts exist with respect to Cullen's investigation (both the timeliness and extent of his actions) and his communications with Kennon and Tri-State. There is also a dispute as to whether Everest's denial of coverage was made in good faith. These facts will ultimately inform the legal determinations of whether Everest acted arbitrarily, capriciously, or without probable cause. In light of disputed facts, resolution of this issue is inappropriate for summary judgment, and therefore Tri-State's motion for partial summary judgment shall be DENIED.

III. Statutory Penalties and Detrimental Reliance (Everest's Motion for Summary Judgment on Tri-State's Counterclaim).

Everest seeks summary judgment on two claims asserted in Tri-State's counterclaim: statutory penalties and detrimental reliance. The Court's inability to resolve the availability of statutory penalties at summary judgment has already been discussed. The Court will now address the issue of detrimental reliance.

Tri-State argues that it detrimentally relied on Everest's representations that the claim would be resolved in a quick and timely manner. It further contends that, in reliance on Everest's representations, it chose to forego efforts to recover funds from Scott. Now that Everest has attempted to void the policy, Tri-State asserts that Everest has jeopardized its ability to mitigate damages by seeking recovery on its own. The parties agree that

pursuant to Louisiana law, Tri-State must establish three elements to succeed on its claim of detrimental reliance: "(1) a representation by conduct or work; (2) justifiable reliance thereon; and (3) a change of position to one's detriment because of the reliance." Morris v. Friedman, 94-2808 (La. 11/27/95), 663 So. 2d 19, 25.

Tri-State concedes that Cullen never represented that Everest would pay its claim, and it also agrees that Cullen's written communications contained a reservation of Everest's rights. Kennon's deposition testimony, however, conveys that although Cullen told Kennon that he had everything he needed to write his Proof of Loss Analysis, during most, if not all, of the conversations subsequent to that, Cullen "stalled" and consistently said, month after month, that he needed a few more weeks. Record Document 42-3, pp. 134-36. Kennon's testimony further indicates that Cullen never indicated that Scott's knowledge of his own misrepresentations on the Bond would be an issue in determining coverage. In addition, Kennon's deposition testimony states that Cullen directed him not to pursue recovery against Scott, but rather allow Everest to handle that. Kennon testified that he had a lead on recovery, but ultimately did not pursue it at the behest of Cullen. Unsurprisingly, Everest disputes these facts and the significance that would attach thereto. Once again, because of disputed facts, this issue cannot be resolved on summary judgment. Accordingly, Everest's motion for partial summary judgment on Tri-State's counterclaim shall be DENIED.

CONCLUSION

After careful consideration of the briefs and exhibits filed and for the foregoing

reasons, the Court finds that there are genuine issues of material fact precluding summary judgment. Accordingly, Everest's motion for summary judgment [Record Document 32] is **DENIED**; Tri-State's motion for partial summary judgment [Record Document 37] is **DENIED**; and Everest's motion for summary judgment on Tri-State's counter-claim [Record Document 38] is **DENIED**.

THUS DONE AND SIGNED this 1st day of August, 2016 in Shreveport, Louisiana.

ELIZABETH E. FOOTE
UNITED STATES DISTRICT JUDGE