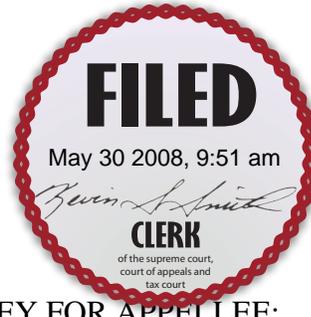


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRET D. SHAW,)
)
Appellant-Plaintiff,)
)
vs.) No. 49A02-0801-CV-17
)
AMERICAN FAMILY MUTUAL)
INSURANCE COMPANY,)
)
Appellee-Defendant.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D13-0601-PL-1390

May 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Bret D. Shaw appeals the trial court's order granting summary judgment in favor of American Family Mutual Insurance Company ("American Family") on Shaw's bad faith and breach of contract claims based on American Family's denial of coverage under his homeowner's insurance policy. We affirm.

Facts and Procedural History

The relevant designated facts most favorable to Shaw, the nonmovant, indicate that on November 24, 2003, Shaw notified American Family that his home had been broken into and vandalized five days earlier, resulting in the damage, loss, and destruction of both real and personal property. Shaw's homeowner's policy with American Family reads in pertinent part as follows:

INSURING AGREEMENT

We will provide the insurance described in this policy in return for your premium payment and compliance with all policy terms. We will provide this insurance to you in reliance on the statements you have given us in your application for insurance with us.

You warrant the statements in your application to be true and this policy is conditioned upon the truth of your statements. We may void this policy if the statements you have given us are false and we have relied on them.

You and all insureds must comply with the policy terms. *Any failure to comply with policy terms by you or any other insured will affect the coverage by this insurance for you and all insureds.*

....

CONDITIONS – SECTION I

....

9. Loss Payment. We will adjust all losses with you. We will pay you unless some other party is named in the policy or is legally entitled to receive payment. *Loss will be payable 60 days after we receive your properly completed proof of loss and:*
- a. *we reach agreement with you;*
 - b. *there is an entry of a final judgment; or*
 - c. *there is a filing of an arbitration award with us.*

....

18. Suit Against Us. *We may not be sued unless there is full compliance with all the terms of this policy.* Suit must be brought within one year after the loss or damage occurs.

19. *What You Must Do in Case of Loss. In the event of a loss to property that this insurance may cover, you and any person claiming coverage under this policy must:*

- a. *give notice as soon as reasonably possible to us or our agent....*

....

- d. *as often as we reasonably require:*
 - (1) *show us the damaged property before permanent repairs or replacement is made;*
 - (2) *provide us with records and documents we request and permit us to make copies; and*
 - (3) *let us record your statements and submit to examinations under oath by any person named by us, while not in the presence of any other insured, and sign the transcript of the statements and examinations;*
- e. *submit to us, within 60 days after we request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:*
 - (1) *the date, time, location and cause of loss;*
 - (2) *the interest you and others have in the property, including any encumbrances;*
 - (3) *the actual cash value and amount of loss of each item damaged or destroyed;*
 - (4) *other insurance that may cover the loss;*
 - (5) *changes in title, use, occupancy or possession of the property during the policy period;*
 - (6) *the plans and specifications of any damaged dwelling or structure we may request;*
 - (7) *detailed estimates for repair of the damage; [and]*

- (8) *receipts for any increased costs to maintain your standard of living while you reside elsewhere, and records pertaining to any loss of rental income[.]*

....

GENERAL CONDITIONS

....

5. Cooperation. You must cooperate with us in performing all acts required by this policy.

Appellant’s App. at 376-88 (italicized emphases added) (bold emphases omitted).

On December 5, 2003, American Family sent Shaw a proof of loss form to be completed and returned by February 3, 2004. Shaw retained certified public adjuster Bryan Jerman of Assura Corporation to assist him with obtaining coverage under the policy. On January 14, 2004, Jerman sent a letter and a notice to American Family regarding his representation of Shaw. The notice, signed by Shaw, requested that American Family contact Assura “directly on all matters regarding or related to [his] loss.” *Id.* at 86.

On January 30, 2004, American Family claims examiner Joe Duffy sent a letter to Jerman, with a copy to Shaw,¹ stating that he had sent a proof of loss form to Shaw on December 5, 2003; that Shaw had acknowledged receipt of the form; and that Jerman had “60 days or until Tuesday, February 3, 2004 to complete the sworn Proof of Loss and return it to [American Family] with supporting documentation. Mr. Shaw’s notarized signature is REQUIRED.” *Id.* at 87. Duffy’s letter further states in pertinent part,

We request that you attach the following items or documents to the sworn Proof of Loss:

¹ Duffy sent Shaw a copy of all letters that he sent to Jerman.

1. As provided under Conditions, Section I, point 19, c, found on page 9 of your policy, furnish us with a detailed list of the damaged property, showing the quantities, when and where acquired, original cost, current replacement value and the amount of loss claimed.
2. As provided under Conditions, Section I, point 19, e, paragraph 6, found on page 9 of your policy, provide the plans and specifications of the damaged dwelling or structure.
3. As provided under Conditions, Section I, point 19, e, paragraph 7, found on page 9 of your policy, provide detailed estimates for the repair of damage to your dwelling.

As provided under Conditions, Section I, point 19, e., paragraph 8, found on page 9 of your policy, provide receipts for any increased costs to maintain your standard of living while you reside elsewhere, and records pertaining to any loss of rental income.

I do not have the authority to make any verbal agreements or commitments on behalf of American Family Mutual Insurance Company. All agreements must be in writing.

The “CONDITIONS—SECTION I” portion of the policy entitled What You Must Do In Case Of Loss, outlines the insured’s duties. None of these requirements will be waived by American Family Mutual Insurance Company.

Id. at 87-88 (bold emphasis omitted).

In a letter to Jerman dated February 16, 2004, Duffy stated that he had not yet received the proof of loss form. He acknowledged that Shaw had complained that his furnace had stopped working, ostensibly because of the vandalism, although it was Duffy’s “understanding that the furnace [had] not been working for some time.” *Id.* at 90. Duffy stated that he had arranged to have someone inspect the furnace that day if Shaw could be contacted for an appointment. Finally, Duffy noted that he had requested a recorded statement from Shaw regarding the furnace claim, to which Jerman had agreed only if he

could provide the list of questions that Duffy would ask. Duffy noted that he had rejected this condition because he could not “conduct a proper investigation being constrained to such a list.” *Id.* at 90-91. Duffy noted that Jerman had agreed to drop this condition and that they had set an appointment for the recorded statement for 10:00 a.m. on February 19, 2004.

In a letter to Jerman dated February 23, 2004, in which Duffy enclosed a certified copy of Shaw’s policy, Duffy stated that Jerman had informed him on February 18 that Shaw “did not want to make our meeting of February 19, 2004.” *Id.* at 92. Duffy further stated that a furnace technician had contacted Shaw and agreed to inspect the furnace on the morning of February 17, but that Shaw did not answer either the door or his phone at the appointed time. According to Duffy, when the technician called Shaw later that same day, Shaw informed him that the furnace had been repaired over the weekend and was “now working fine.” *Id.* Duffy stated that because American Family had not been “able to inspect the furnace [it would not be] able to give consideration to a claim for the furnace or Additional Living Expense as a direct result of this claim filed.” *Id.*

In a letter to Jerman dated February 25, 2004, Duffy stated that he had received a proof of loss form from Jerman and that American Family was “denying the Proof of Loss after careful review.” *Id.* at 93. Duffy stated that the form submitted by Jerman was “not in compliance with the American Family Insurance Form” and that he had enclosed another “American Family Sworn Statement in Proof of Loss form.” *Id.* Duffy reiterated the terms of the policy’s insuring agreement and conditions and asked Jerman to

return the properly completed form with all supporting documentation. The proof must include all claims being made under Coverage[s] A [dwelling and dwelling extension], B [personal property] and C [loss of use and

supplementary coverages]. The actual dollar amounts being claim[ed] must too appear on the Proof. In addition, there is no way to tell who[] actually notarized your proof, so please be sure to have your notary print their name as well as sign their name.

As an insurance professional you should know what is required in a Sworn Statement in Proof of Loss. The form you submitted is incomplete and not on the proper form. The form provided is not a Proof of Loss by definition.

Id. at 94.

In a letter to Jerman dated February 27, 2004, Duffy enclosed an authorization for information and access form and requested that Shaw read, sign, and return the form. Duffy reiterated the policy's cooperation clause and stated,

American Family is requesting the form to continue its investigation. Failure to provide us[] with the properly signed ... form will hinder our ability to give proper consideration to the claims Bret Shaw has made and the insured's failure to cooperate with us[] is against the policy provisions.

I spoke to George yesterday. There is a misunderstanding regarding the estimate [for the repair of Shaw's home]. When asked by you if I had an estimate on February 10, 2004, I stated I did have an estimate, but was waiting on Jerry Hostetler's estimate along with the proof. I never stated I'd send you a copy of my estimate prior to receiving the proof.

Id. at 95.

On March 2, 2004, Duffy sent Jerman a letter that reads in pertinent part as follows:

This will acknowledge the message you left on my voice mail yesterday, March 1, 2004. You stated that you spoke to Mr. Shaw earlier that morning and Mr. Shaw stated he refuses to sign the previously mailed authorization form enclosed in my letter dated February 27, 2004.

Mr. Shaw's refusal to sign the Authorization for Information and Access form is in violation of the terms and conditions of his policy. By not signing the authorization, Mr. Shaw is not complying with the terms and conditions of the policy indicating he must cooperate with us. His refusal to sign may jeopardize coverage and payment under his insurance policy with American Family Insurance.

To address your request that we set up an EUO, Examination Under Oath, of Mr. Shaw immediately, I must respectfully decline. We will determine when and if an EUO is needed. Until then I would suggest you respond to my letter dated February 25, 2004 in which we rejected your Proof and requested a proper Proof of Loss on the American Family form. I will await your response.

Id. at 96.

On March 23, 2004, Duffy sent Jerman a letter that reads in pertinent part as follows:

This letter is to remind you that we rejected your Proof of Loss.....

The Proof must include all claims being made under Coverage[s] A, B and C. The actual dollar amounts being claimed must appear on the Proof. Furthermore, all supporting documentation must also accompany the Proof.

Here are some points of fact that your Proof submission did not include:

1. The actual dollar amount of loss claimed for each coverage.
2. The insured's interest in all property, contents and building.
3. Any other person(s), company or organization having an ownership interest in the contents or building.
4. Does any other insurance apply to this loss and will a claim be made under that insurance?
5. Prior to the loss, was there any change in your interest, use or occupancy of the building or contents?
6. The fraud language which is above the insured's signature must be included on the Proof of Loss and is required on all Proofs submitted.^[2]

We are enclosing again our Proof of Loss form which has all items needed, including the fraud language, for your ease and simplification in responding to the Proof of Loss. You must attach documentation to support your claim. It is our understanding that you are in agreement with our building repair estimate. If that is correct, then please indicate that amount on the Proof of Loss.

² See Ind. Code § 27-2-16-3(a) (“All preprinted claim forms provided by an insurer to a claimant that are required as a condition of payment of a claim must contain a statement that clearly states in substance the following: “A person who knowingly and with intent to defraud an insurer files a statement of claim containing any false, incomplete, or misleading information commits a felony.”).

In addition, there is no way to tell who actually notarized your proof, so please be sure to have your notary print their name as well as sign their name.

You had received the Sworn Statement in Proof of Loss form on February 26, 2004. Therefore, your properly completed Proof of Loss must be submitted by April 25, 2004.

I have also enclosed a copy of my March 2, 2004 letter outlining the fact that Mr. Shaw had refused to sign and return our Authorization for Information and Access form.

Please be reminded on page 13 of 16 GENERAL CONDITIONS, it states;

5. Cooperation. You must cooperate with us in performing all acts required by this policy.

By not signing the authorization, Mr. Shaw is not complying with the terms and conditions of the policy. His refusal to cooperate may jeopardize coverage and payment under his insurance policy with American Family Mutual Insurance Company. We are again asking Mr. Shaw to sign the Authorization for Information and Access form, so I have enclosed another copy for your convenience.

We want to have the Authorization for Information and Access form signed and returned to us with in 10 days of your receipt of this letter.

Id. at 98-99 (bold emphases omitted).

In a letter to Jerman dated November 18, 2004, American Family property claim manager George Deel stated,

This will acknowledge the letter we received from Mr. Shaw's Power of Attorney, [his parents³] Jerry and Carolyn Shaw dated November 9, 2003

Apparently, Mr. and Mrs. Shaw are misinformed with what has transpired on this claim. They seem to think we have been the delay in handling this claim, when in fact, Mr. Shaw has never submitted a proper Sworn Statement in Proof of Loss as required by the policy and requested by us. The only proof we have received was a partial proof which we received in February of 2004

³ While his claim was pending, Shaw was incarcerated and granted his parents a power of attorney.

and rejected on February 25, 2004. We reiterated the rejection and requested a proper proof on March 25, 2004.

As we have indicated to you on numerous occasions, we cannot begin to process the claim of Mr. Shaw without this proof and the accompanying documentation to substantiate the claim being made. I should remind you that any items replaced after November 19, 2004, the one year anniversary of the loss date, can only be settled at actual cash value (ACV) and are not eligible for replacement cost (RC).

Also, please contact Joe Duffy to make arrangements for him to stop by your office to inspect the Power of Attorney (POA). As we mentioned previously, the seal of the notary did not show up in the faxed copy you sent us and to deal with Mr. & Mrs. Pinson [sic], we need to visually verify they had the POA properly signed and notarized. We have to do this to make sure Bret Shaw is protected.

We look forward to working with you on this claim.

Id. at 105.

On February 9, 2005, Duffy sent a letter to Shaw's attorney, Konstantine Orfanos, that begins,

This letter is in regard to your letter of representation I received by fax on February 2, 2005. You indicate that we have not cooperated, but we have. We have given ample opportunity for both Mr. Shaw and Mr. Jerman to provide us an actual Proof of Loss with supporting documentation.

Id. at 107. Duffy summarized his correspondence with Jerman, cited the applicable policy provisions, and detailed Shaw's and Jerman's failure to comply with them. Duffy went on to say,

We never received a properly completed Proof of Loss from Bryan Jerman or Bret Shaw. It wasn't until June 6, 2004 that we talked and Bryan stated a Proof of Loss was dropped off at our office on or about March 25, 2004. He stated he had a signed receipt of the mail being delivered to our office. Bryan has failed to provide us with the documentation proving he delivered a revised Proof of Loss. I sent him a letter certified, as with all letters, offering to meet him to obtain the Proof of Loss and the signed receipt showing he delivered

the Proof of Loss to the office on or about March 25, 2004. On June 10, 2004 I spoke to Bryan and he stated the proof may not have been sent after all. As I previously stated, we never received a Proof after the one rejected on February 25, 2004.

....

In conclusion, we gave ample time to resubmit the proof of loss. We gave them every opportunity to comply with the policy. The time limit has passed for completing the Proof of Loss. We made it very clear that we were not waiving our rights under the policy and that we were only giving them 60 more days to resubmit the Proof. It was never returned. This is a breach of contract. Further, Mr. Shaw never properly cooperated with us. He refused to sign an Authorization form, which we needed for the proper completion of our investigation. This is also a breach of the insurance contract. The one year time limit to collect replacement cost on any contents expired one year from the date of loss. A proper claim was never submitted. Finally, the one year limit to file suit ran on November 19, 2004, which is one year from the date of loss. This concludes any coverage on this loss. The actions of Mr. Shaw and his agent, Mr. Jerman have violated the contract and substantially prejudiced our ability to investigate this claim. We are denying Bret Shaw's claim in its entirety. We are denying the claim for the above reasons either singularly or in any combination.

Id. at 109-10.

On January 11, 2006, Shaw filed a complaint against American Family and Jerman.⁴ On April 10, 2006, American Family filed a motion to dismiss/motion for judgment on the pleadings. On July 20, 2006, the trial court granted the motion to dismiss as to Shaw's breach of contract claim, which it allowed him to replead, and denied the motion as to his bad faith claim. Shaw filed his first amended complaint on May 19, 2006, and his second amended complaint on July 31, 2006.

⁴ Shaw's original complaint does not appear in the record before us.

On May 3, 2007, American Family filed a motion asserting that it was entitled to summary judgment on two separate grounds: (1) that Shaw failed to file suit within one year after the loss occurred as required by the policy; and (2) that Shaw had breached the policy by failing to submit a proper proof of loss and a signed authorization for access and information. Shaw filed a response on September 4, 2007, and the trial court held a hearing on the motion nine days later. On October 22, 2007, the trial court entered an order that reads in pertinent part as follows:

The Court, being duly advised in the premises, determines that the material facts are not in dispute and that the law is with the Defendant and against Plaintiff, Bret D. Shaw. The Court, finding that there is no just reason for delay, now grants Defendant's Motion for Summary Judgment and enters a final judgment in favor of the Defendant, American Family Mutual Insurance Company, and against the Plaintiff, Bret D. Shaw. The Court holds that: Plaintiff breached the terms, conditions and requirements of the policy of insurance; the Defendant, American Family Mutual Insurance Company, owes no insurance coverage or liability to Plaintiff as a result of his alleged loss on November 19, 2003, and that the Defendant is not liable for any bad faith or punitive damages as alleged.

Id. at 8. Shaw now appeals.

Discussion and Decision

Our standard of review in such cases is well settled:

Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. A factual issue is "genuine" if it is not capable of being conclusively foreclosed by reference to undisputed facts. Although there may be genuine disputes over certain facts, a fact is "material" when its existence facilitates the resolution of an issue in the case.

When we review a trial court's entry of summary judgment, we are bound by the same standard that binds the trial court. We may not look

beyond the evidence that the parties specifically designated for the motion for summary judgment in the trial court. We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. A party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous.

Van Kirk v. Miller, 869 N.E.2d 534, 539-40 (Ind. Ct. App. 2007) (some citations omitted), *trans. denied*.

We also note that summary judgment orders do not require specific findings or conclusions. Pursuant to Trial Rule 56(C), the trial court must state the issues and claims upon which summary judgment is granted only when summary judgment is granted upon less than all the issues. Otherwise, the rule imposes no requirement upon the trial court to state the specific legal basis for granting summary judgment. Moreover, although the trial court's findings and conclusions facilitate appellate review and offer valuable insight into the trial court's rationale for its decision, they are not binding upon this court.

SCI Ind. Funeral Servs., Inc. v. D.O. McComb & Sons, Inc., 820 N.E.2d 700, 706 (Ind. Ct. App. 2005) (citations omitted), *trans. denied*.⁵ “If the trial court's entry of summary judgment can be sustained on any theory or basis in the record, we must affirm.” *Nationwide Ins. Co. v. Heck*, 873 N.E.2d 190, 196 (Ind. Ct. App. 2007).

As mentioned above, Shaw's homeowner's policy states that American Family “may not be sued unless there is full compliance with all the terms of this policy.” Appellant's App. at 384. There is no dispute that Shaw failed to comply fully with all the terms of the

⁵ Accordingly, we find no merit in Shaw's criticism of the trial court's verbatim adoption of American Family's proposed summary judgment order. *Cf. Safety Nat'l Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 993 n.6 (Ind. Ct. App. 2005) (stating that trial court's verbatim adoption of party's proposed special findings and conclusions thereon requested pursuant to Ind. Trial Rule 52 “weakens our confidence as an appellate court that the findings are the result of considered judgment by the trial court.”), *trans. denied*.

policy, in that he failed to give a recorded statement as requested by American Family;⁶ failed to submit within sixty days of American Family's requests a signed and sworn proof of loss on the form provided by American Family—which, unlike the form submitted by Jerman, contained the fraud proviso required by Indiana Code Section 27-2-16-3(a)—with the corresponding documentation required by the policy and requested by American Family; failed to submit an estimate for home repairs as requested by American Family; failed to indicate his agreement with American Family's estimate for home repairs via a proof of loss form as requested by American Family; and refused to sign and return American Family's authorization for information and access form.⁷

Contrary to Shaw's assertion, the policy provisions with which he failed to comply do not involve the policy's cooperation clause; rather, they involve “an entirely separate condition that explicitly requires the policyholder to perform specific duties” in case of loss. *Morris v. Econ. Fire & Cas. Co.*, 848 N.E.2d 663, 666 (Ind. 2006). As such, American

⁶ Shaw states that he offered to arrange for an examination under oath, which American Family declined. The policy does not allow the insured to dictate the terms of his compliance with its provisions. See *Morris v. Econ. Fire & Cas. Co.*, 848 N.E.2d 663, 666 (Ind. 2006) (“The [insureds'] principal argument is that they did not refuse to comply with [the insurer's] demands regarding an examination under oath, but that they simply would not do so until they were given their previous statements. But the contract does not provide that an insured can impose this prerequisite upon the insurer before complying with agreed duties.”).

⁷ American Family notes that

Shaw had submitted a personal property contents claim in the replacement cost amount of \$73,236.71, and actual cash value amount of \$60,452.64. Importantly, Shaw had filed for Chapter 13 Bankruptcy, in which on November 10, 2003 (nine (9) days before the loss), ... Shaw declared “under the penalty of perjury” that he had only a market value of \$2,800.00 worth of personal property, including household goods and furnishings, and clothing. Shaw further advised the bankruptcy court that he was unemployed. American Family clearly questioned the ability of Shaw to obtain at least an additional \$57,652.64 worth of personal property within nine (9) days when he was unemployed.

Appellee's Br. at 32 (citations to appendix omitted).

Family was not required to establish that it was prejudiced by Shaw’s multiple breaches of the policy provisions. *See id.* (“While disputes regarding alleged breaches of an insured’s duty under a separate ‘cooperation clause’ may necessitate consideration of resulting prejudice to the insurance company, such prejudice is not a necessary consideration in determining the enforceability of *other* insurance policy provisions.”) (citing *Miller v. Dilts*, 463 N.E.2d 257, 265 (Ind. 1984)) (emphasis added).⁸

American Family repeatedly advised Shaw that it was not waiving those provisions and that his failure to comply could jeopardize his coverage under the policy, and American Family in fact denied Shaw coverage based on his multiple breaches of those provisions.⁹ Given that Shaw does not specifically contend that those breaches were immaterial, we affirm the trial court’s entry of summary judgment in favor of American Family. *See id.* at 667 (affirming summary judgment in favor of insurer on insureds’ breach of contract and bad

⁸ In his reply brief, Shaw claims that

Morris cannot be used—as [American Family] urges—for a general proposition that prejudice is not a necessary consideration to all [insurance policy provisions other than a cooperation clause]. Were that the holding of *Morris*, it would overrule *Miller* with respect to the notice provisions in insurance policies, the breach of which—when notice is unreasonably late—may trigger a rebuttable presumption of prejudice. *Miller*, 463 N.E.2d at 265. *Miller* was not overruled. Our Supreme Court does not overrule long-standing precedent so casually.

Appellant’s Reply Br. at 14. Given that *Miller* was cited in *Morris*, we find it extremely unlikely that our supreme court was unaware of its own precedent when it used such broad language in *Morris*. Moreover, we are not concerned here with a notice provision, as in *Miller*, but with provisions governing the duties of an insured in case of loss, as in *Morris*. Thus, *Miller* is inapposite.

⁹ Shaw contends that property claim manager Deel waived the policy’s one-year suit limitation provision by stating that American Family “look[ed] forward to working with [Jerman] on this claim” in a letter written one day prior to the one-year deadline. Appellant’s App. at 105. Any purported waiver of the one-year limitation is inconsequential because Shaw was in breach of the policy at the time he filed suit. Consequently, we need not address the parties’ arguments on this point.

faith claims, where insureds unsuccessfully claimed that they did not breach policy and did not “alternatively contend that the breach was immaterial.”); *see also Harvest Life Ins. Co. v. Getche*, 701 N.E.2d 871, 875 (Ind. Ct. App. 1998) (“[A] party first guilty of a material breach of contract may not maintain an action against the other party or seek to enforce the contract against the other party should that party subsequently breach the contract.”), *trans. denied* (1999).¹⁰

Affirmed.

BARNES, J., and BRADFORD, J., concur.

¹⁰ “Whether a breach is material is generally a question of fact to be decided by the trier of fact.” *Collins v. McKinney*, 871 N.E.2d 363, 375 (Ind. Ct. App. 2007). We note, however, that Shaw did not designate this question as a material issue of fact precluding summary judgment as required by Indiana Trial Rule 56. *See* Ind. Trial Rule 56(C) (“A party opposing the [summary judgment] motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto.”); Ind. Trial Rule 56(H) (“No judgment rendered on the motion shall be reversed on the ground that there is a genuine issue of material fact unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court.”); *see also Collins*, 871 N.E.2d at 375 (listing five factors to be considered in determining whether breach is material, none of which are mentioned in Shaw’s opposition to American Family’s summary judgment motion).