IN THE SUPREME COURT OF THE STATE OF NEVADA

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| ZURICH AMERICAN INS. CO., et al.<br><br>*Plaintiffs - Appellants*<br><br>v.<br><br>IRONSHORE SPECIALTY INS. CO.<br><br>*Defendant - Respondent* | Case No.: 81428 |



# APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes



Other

## I. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter by virtue of an Order it issued accepting certified questions from the Ninth Circuit Court of Appeal as to a matter pending before it. AA5084-5104. The matter pending before the Ninth Circuit, in turn, arises from a final judgment entered in favor of Respondent Ironshore Specialty Ins. Co. ("Ironshore" or "Respondent") and against Appellants Zurich American Insurance Company and American Guarantee & Liability Ins. Company (collectively "Zurich" or "Appellants") following the rulings on the parties' motions for summary judgment. AA5043-5050.

## II. ROUTING STATEMENT

As this matter involves certified questions of law from a Federal Court, the Supreme Court presumptively retains jurisdiction. NRAP 17(a)(6).

## III. STATEMENT OF ISSUES

This matter raises the following core issue - whether an insurer may decline to defend based on a policy exclusion that eliminates coverage for “continuous” damages, but not for damages which occur suddenly, when the allegations asserted as to the homes are silent regarding the timing, scope and extent of the alleged damages. While the Federal Court has posed this

question as one of burden, applicable to an exception to an exclusion, Zurich contends that the "sudden and accidental" phrase in the exclusion is better understood as defining which damages are excluded by defining what constitutes a "continuous" damage and what does not.

One Federal Court in an underlying suit between these same parties issued a series of rulings holding that an insurer owes a duty to defend when allegations of damages are silent regarding the timing, scope and extent of the damages given that a potential exists that some of the damages could have occurred suddenly. See *Assurance Co. of America v. Ironshore Spec. Ins. Co.*, 2016 WL 1169449 (D. Nev. 2016); *Assurance Co. of America v. Ironshore Spec. Ins. Co.*, 2015 WL 4579983 (D. Nev. 2015); *Assurance Co. of America v. Ironshore Spec. Ins. Co.*, 2014 WL 4829709 (D. Nev. 2014).[1] In these rulings, the court held that Respondent's inability to prove that none of the damages occurred suddenly barred it from meeting its burden of demonstrating that no potential for coverage existed to justify its refusal to defend. Id.

The trial court ruling at issue in connection with the instant appeal held exactly the opposite - namely that that no duty to defend exists when

[1] In connection with an appeal of these rulings, the Ninth Circuit issued a stay pending this Court's responses to the certified questions. See *Zurich Amer. Ins. Co. v. Ironshore Spec. Ins. Co.*, 801 Fed.Appx. 576 (9th. Cir. 2020).

the underlying claims at issue are silent as to the timing, scope and extent of the damages as in the absence of any specific allegations that any damage occurred suddenly, no potential for coverage existed. AA5043-5049. Under this rationale, the trial court necessarily held that allegations of damages which are silent as to the scope, extent and timing of the damages do not create the potential that some of the damages could have occurred suddenly and accidentally. Id.

As these rulings regarding Respondent's duty to defend cannot be reconciled, the Ninth Circuit certified questions to this Court as to one of the matters in order to confirm the correct standard to apply while staying the other matter. AA 5084-5102; *Zurich Amer. Ins. Co.*, *supra*, 801 Fed.Appx. 576. Per the Ninth Circuit Order:

> [W]e submit these questions only because of their significance to actions brought to enforce an insurer's duty to defend under Nevada insurance law.

AA5086.

The Ninth Circuit framed the questions as follows:

> Whether, under Nevada law, the burden of proving the applicability of an exception to an exclusion of coverage in an insurance policy falls on the insurer or the insured? Whichever party bears such a burden, may it rely on evidence extrinsic to the complaint to carry its burden, and if so, is it limited to extrinsic evidence available at the time the

> insured tendered the defense of the lawsuit to the insurer?

AA5086.

In framing the questions presented to this Court, the Ninth Circuit explained that its "phrasing of the questions should not restrict the Court's consideration of the issues involved" as this Court "may rephrase the questions as it sees fit in order to address the contentions of the parties." AA 5086. This Court, therefore, is empowered to provide the Ninth Circuit with guidance as to core issue in dispute - namely whether Respondent met its burden of proof in refusing to defend.

The particular coverage dispute before this Court is the application of an exclusionary provision in the Ironshore policies, entitled, "Continuous Injury Endorsement." The exclusion provides:

> This insurance does not apply to any "bodily injury" or "property damage":
>
> 1. which first existed, or is alleged to have first existed, prior to the inception of this policy. "Property damage" from "your work", or the work of any additional insured, performed prior to policy inception will be deemed to have first existed prior to the policy inception, unless such "property damage" is sudden and accidental and takes place within the policy period . . .

AA5089.

Under the exclusion, coverage is barred for damages involving work

completed prior to the inception of the policy "unless such [damage] is sudden and accidental and takes place within the policy period." The analysis as to whether a defense is owed, therefore, is entirely dependent on what standard applies to an insurer that seeks to apply this exclusion in evaluating its duty to defend.

As discussed herein, pleadings which are silent as to the scope, extent and timing of damages do not permit an insurer to rule out the potential that alleged damages occurred suddenly. By virtue of this potential, a duty to defend is owed because when an insurer such as Ironshore cannot establish and prove that the policy exclusions eliminate coverage for all of the alleged damages. For this reason, Respondent's decision to deny a defense to its insureds in multiple cases, based solely on the exclusion, was and is contrary to law.

## IV. STATEMENT OF THE CASE

This Court has consistently held that an insurer owes a duty to defend to its insured whenever the insurer ascertains facts which give rise to the potential of coverage under an insurance policy. *Century Surety Company v. Andrew*, 134 Nev. 819 (2018); see also *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407 (2011). Under this standard, any doubt about whether the duty has arisen is resolved in favor of the insurer owing a duty to defend. *United*

*National Ins. Co. v. Frontier Ins. Co., Inc.*, 120 Nev. 678 (2004). As this Court has explained, mandating that an insurer provide a defense when doubts as to existence of coverage prevents an insurer from evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint. *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 (2011); *Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co.*, 124 Nev. 319, 322 (2008).

Appellants and Respondent agree that the allegations of damages asserted in the underlying cases at issue in this matter are generally silent as to the timing, scope and extent of damages. While the trial court in connection with the instant appeal held that this silence permitted the insurer to deny coverage since no specific allegations of sudden damages were asserted, the trial court in the other companion matter between these same parties held otherwise - namely that the silence as to the scope, extent and timing of the alleged damages created doubt regarding the potential for sudden damages such that a defense was owed. Compare AA 5043-5049 with *Assurance Co. of America, supra.*, 2015 WL 4579983. This latter ruling is in accord with Nevada law.

Courts in other jurisdictions have reached conclusions similar to the latter court in concluding that when pleadings are silent as to the scope,

extent and timing of the damages, a potential exists that some damages occurred suddenly. See *KB Home Jacksonville, LLC v. Liberty Mutual Fire Ins. Co.*, 2019 WL 4228602; see also *Interstate Fire & Casualty Ins. Co. v. First Specialty Ins. Co.*, 2020 WL 5107612 (E.D. Cal. 2020); *Newmont USA Ltd. v. American Home Assurance Co.*, 676 F.Supp.2d 1146 (E.D. Wash 2009); *Mahl Bros. Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 307 F.Supp.2d 474 (W.D. Wash. 2004). Existing Nevada law dictates the same result.

While Ironshore seizes on the absence of any specific allegations of sudden damages asserted in the underlying lawsuits in concluding that no defense is owed, it does so by conceding that it has a pattern and practice of never investigating the existence of sudden damages such that it candidly can never rule out that sudden damages could have occurred. AA 1791:22-1795:5, 1796:2-21. Stated simply, when pleadings are silent as to the scope, timing and extent of damages, common sense necessarily dictates that a potential necessarily exists that the damages could have occurred suddenly. Id.

Given this, in responding to the first certified question, it is respectfully submitted that where a potential for coverage is initially held to exist, an insurer seeking to disclaim coverage bears the burden of proving

that coverage is conclusively excluded. Under this standard, if an insurer cannot meet its burden of proving that coverage is conclusively excluded, a defense is owed.

Ironshore should not be permitted to flip burdens on their heads by asserting that phrases within the exclusion can be described as "exceptions" such that an insured must prove when and how a damage occurred before a duty to defend arises. The policy excludes damages which are continuous in nature and states that the converse -- damages which are sudden -- are not excluded. Under well-established rules of policy interpretation, therefore, Ironshore's denial of a duty to defend was proper in these cases only if Ironshore can establish through uncontroverted facts that no potential for sudden damage was raised in the complaints. See *Assurance Co. of America v. Ironshore Spec. Ins. Co.*, 2014 WL 4829709 (D. Nev. 2014).

As to the second certified question, this Court has already held that an insurer may not rely on facts outside the complaint in assessing its initial duty to defend. "[A]s a general rule, facts outside of the complaint cannot justify an insurer's refusal to defend its insured. Restatement of Liability Insurance § 13 cmt. c (cite omitted).

Nonetheless, an insurer can always agree to defend the insured with the limiting condition that it does not waive any right to later deny coverage

based on the terms of the insurance policy under a reservation of rights. *Andrew,* supra, 134 Nev. at 822, fn 4. Under the rule stated in *Andrew,* an insurer must initially provide a defense if a potential for coverage exists. It can terminate that duty through a declaratory relief action:

> Accordingly, facts outside the complaint ***may be used in an action brought by the insurer seeking to terminate its duty to defend its insured in an action whereby the insurer is defending under a reservation of rights***. Restatement of Liability Insurance § 13 cmt. c (Am. Law Inst., Proposed Final Draft No. 2, 2018) ("Only in a declaratory-judgment action filed while the insurer is defending, or in a coverage action that takes place after the insurer fulfilled the duty to defend, may the insurer use facts outside the complaint as the basis for avoiding coverage.").

*Ibid*. [emphasis added.]

As to the claims at issue in this matter, the record upon which the trial court ruled in favor of Respondent included no evidence to prove that none of the damages occurred suddenly since, as Respondent admits, it has a pattern and practice of never conducting an investigation regarding this issue. See AA 1791:22-1795:5, 1796:2-21. In the absence of any investigation, therefore, Respondent possessed no evidence to demonstrate and/or prove that none of the damages could have occurred suddenly when it refused to defend. In the absence of this evidence, Respondent's decision to not defend is improper.

## V. STATEMENT OF FACTS

### A. Ironshore Policies

The dispute between Appellants and Respondent pertains to sums Appellants incurred on behalf of the following common insureds:

- Cedco, Inc. ("Cedco")
- Centex Homes ("Centex")[2]
- Debard Plumbing, Inc. ("Debard")
- JP Construction Co., LLC ("JP Construction")
- Laird Whipple Construction, Inc. ("Laird Whipple")
- PR Construction Corp. ("PR Construction")
- Stewart & Sundell, Inc. ("Stewart & Sundell")
- Universal Framing, LLC ("Universal Framing")

Respondent issued each of the insureds (collectively "Insureds") insurance policies generally in effect between 2009 and 2011. AA0215-1004. The terms and provisions of these policies are identical in all relevant respects, as each policy incorporates a standard liability form, CG0001 (entitled “Commercial General Liability Coverage Form”) which provides as follows:

[2] The claims as to Centex are based on its status as an additional insured under a policy Ironshore issued to Lukestar Corp. dba Champion Masonry ("Champion Masonry").

> a. We will pay those sums that the Insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the Insured against any "suit" seeking those damages. . . .
>
> . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if
>
> (1) The "bodily injury" or" property damage" is caused by an "occurrence that takes place in the "coverage territory";
>
> (2) The "bodily injury" or "property damage" occurs during the policy period . . .
> . . .
>
> "Occurrence" means an accident. including continuous or repeated exposure to substantially the same general harmful conditions.
>
> . . .
>
> "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property . . .

AA0219, 0231; 0282, 0294; 0345, 0357; 0408, 0420; 0469, 0481; 0525, 0537; 0578, 0590; 0641, 0653; 0707, 0719; 0766, 0778; 0823, 0835; 0884, 0896; 0947, 0959.

The policies likewise each include an endorsement entitled, "Continuous Injury Endorsement," form IB.EX.0148 (7/08 Ed.) which provides as follows:

> This endorsement modifies Insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> This insurance does not apply to any "bodily Injury" or "property damage":
>
> 1. which first existed, or is alleged to have first existed, prior to the inception of this policy. "Property damage" from "your work", or the work of any additional insured, performed prior to policy inception will be deemed to have first existed prior to the policy inception, unless such "property damage" is sudden and accidental and takes place within the policy period or
>
> 2. which was, or is alleged to have been, in the process of taking place prior to the Inception date of this policy, even if the such "bodily injury" or "property damage" continued during this policy period; or
>
> 3. which is, or is alleged to be, of the same general nature or type as a condition, circumstance or construction defect which resulted in "bodily Injury" or "property damage" prior to the Inception date of this policy,

AA0245, 0312, 0373, 0433, 0495, 0551, 0604, 0669, 0733, 0796, 0849, 0912, 0973.

This exclusion upon which Ironshore relied in denying coverage in each of the underlying suits at issue serves as the basis for the certified questions directed to this Court.

B. Underlying Matters

One or more of the Insureds were named as Defendants in the following fourteen separate actions, each filed in Nevada State Court:

- *Anthem Country Club COA v. Terravita*, Clark County Case No. A634626 ("*Anthem*") AA1598-1621.
- *Bennett v. American West Homes*, Clark County Case No.: A558243 ("*Bennett*") AA1500-1534.
- *Boyer v. PN II*, Clark County Case No.: A603841 ("*Boyer*") AA1558-1579.
- *Casallas v. Barker-Coleman Construction*, Washoe County Case No.: CV10-03610 ("*Casallas*") AA1457-1479.
- *Clark v. D.W. Arnold*, Washoe County Case No.: CV13-01125 ("*Clark*") AA1718-1753.
- *Drost v. Silver Wing Development*, Washoe County Case No.: CV12-02656 ("*Drost*") AA1370-1382.
- *Garcia v. Centex Homes*, Clark County Case No.: A616729 ("*Garcia*") AA1274-1304.
- *Lino v. Lakemont Copper Hills*, Washoe County Case No.: CV11-03683 ("*Lino*") AA2589-2599.
- *Marcel v. The Developers of Nevada*, Clark County Case No.:

A654209 ("*Marcel*") AA1342-1355.

- Mohan - Chapter 40 Proceeding ("*Mohan*")[3] AA1237-1238.
- *Seven Hills Masters COA v. Granite Silver*, Clark County Case No.: A639041 ("*Seven Hills*") AA1243-1258.
- *Stallion Mountain COA v. W. Lyon Homes*, Clark County Case No.: A599651 ("*Stallion Mtn.*") AA1642-1651.
- *Sun City Anthem COA v. Del Webb Comm.*, Clark County Case No.: A608708 ("*Sun City*") AA1673-1683; and
- *Wikey v. K & M Homes of Nevada*, Washoe County Case No.: CV11-01836 ("*Wikey*") AA1428-1439.

In each of the suits, homeowners joined together as plaintiffs, naming the developer and/or general contractor as defendants. See AA1237-1238, 1243-1258, 1274-1304, 1342-1355, 370-1382, 1428-1439, 1457-1479, 1500-1534, 1558-1579, 1598-1621, 1642-1651, 1673-1683, 1718-1753, and 2589-2599. In these suits, the homeowner-plaintiffs alleged damages because of physical injury to tangible property arising from defective conditions for which the respective insureds were alleged to be liable. Id. Of significance, the allegations made in each matter are uniformly silent as to the scope,

[3] A homeowner seeking to assert claims based on construction defects in Nevada must generally first serve a Notice disclosing the defects ("Chapter 40 Notice"). NRS 40.640. Per NRS 40.649, insurance companies are required to treat Chapter 40 Notices as equivalent to civil actions.

extent and timing of the damages arising from the defects. Id.

For example, the following allegations were made in *Anthem*:

> 33. Within the past two years, Association has discovered that the project has been and is experiencing defective conditions of the real property and structures thereon, including without limitation: cracked and deteriorated concrete curb and gutter; chips in the concrete curb and gutter; water ponding in concrete gutters; vertical offset concrete curb; cracked concrete drainage swales or cross gutters; cracked, chipped and deteriorated concrete sidewalks; vertical offset concrete sidewalk; ponding on concrete sidewalk; cracked and eroded asphalt pavement; deteriorated asphalt seal; asphalt pavement below edge of swale; brick pavers set below edge of swale; irregular asphalt pavement surface (gouges); sinkhole in asphalt pavement; asphalt not sealed for certain communities; ponding on asphalt pavement; ponding on pavers; deteriorated concrete utility pad; debris on finish surface; blue reflective fire hydrant blue pavement markers omitted; sinkhole has formed in the street; broken utility collar; cracked concrete manhole cover; chipped concrete utility pad or manhole cover; cracked concrete vault cover or pad; settled concrete utility vault; sinking storm drain inlets; efflorescence forming on retaining walls; decorative caps on retaining walls are deteriorating; color coat on retaining walls is deteriorating and color is changing; cracked masonry fence; short vertical reinforcing in masonry fence; missing vertical and horizontal reinforcing in masonry fence; metal fence or post installed in direct contact with soil; metal fencing is not properly installed; metal fencing is rusting; cracked concrete landscape curb at base of fence; expansion joint filled with stucco or grout; exposed wall footing; deteriorated wall caps; incorrect drain inlets at cul-de-sacs; ramp is omitted; mail boxes are too low; pool lights are improperly installed; a second "residents only" entry and exit was not provided; and cracks in the bottom of the community pool. Said components are not of merchantable quality, nor were they designed, erected, constructed or installed in a workmanlike manner, but instead are defective and, as now known, the subject components demonstrate improper, nonexistent, and/or inadequate design, construction, manufacture, installation, and/or build. Association is informed

> and believes and thereon alleges that the structures may be additionally defective in ways and to an extent not precisely known, but which will be established at the time of trial, according to proof.
>
> …
>
> 46. Association is informed and believes and thereon alleges that as a direct and proximate result of the defects set forth herein, Association has suffered damages in an amount precisely unknown, but believed to be within the jurisdiction of this Court in that it has been and will hereafter be required to perform works of repair, restoration, and construction to portions of the Common Areas to prevent further damages and to restore the structures to their proper condition. Association will establish the precise amount of such damages at trial, according to proof, for the following damages:
>
> a. The cost of any repairs already made;
>
> b. The cost of any repairs yet to be made that are necessary to cure any construction defect;
>
> c. The expenses of temporary housing reasonably necessary during the repairs;
>
> d. The loss of the use of all or any part of the residences;
>
> e. The value of any other property damaged by the construction defects;
>
> f. The reduction in market value of the residences;
>
> g. Any additional costs incurred by the Plaintiff, including, but not limited to, any costs and fees incurred for the retention of experts;
>
> h. Any reasonable attorney's fees;
>
> i. Any interest provided by statute;

AA 1200-1201, 1204-1205.

In *Bennett*, plaintiffs alleged:

> 41. The defects set forth herein include, without limitation, patent defects, latent defects and/or defects which Defendants, and each of them, knew

or in the exercise of reasonable diligence should have known would occur.

…

47. These deficiencies and inadequacies may include but are not limited to choices of windows, window framing, slab foundations, doors, roof structures, footings for wall blocks, toilet mounting rings (also known as closet rings or closet flanges). tub/shower valve leaks at the trim assembly, roof mounted forced air units lack provisions for condensate overflow protection, windows without sealant behind nail fin, roof valleys with obstructed water flow to the roof perimeter, chimneys with cap top fastened allowing water penetration to the framing, roof ridges and hips with missing weather blocking, eaves with missing edge metal, b-vents with missing storm collar, electrical panels with missing flashing, unsealed sliding glass door thresholds, pot shelves with inadequate waterproofing installation, weather exposed entry doors with missing pan flashing, failure of basement structure, architecture, wind proofing and/or waterproofing, breach in the one hour firewall construction, glass block windows with no flashing, sheet metal flashing improperly installed at deck perimeter, sliding glass doors on balconies with missing pan flashing under thresholds, OSB sheathing used instead of exterior grade plywood on decks, balcony wall tops and columns with inadequate waterproofing, oversized anchor bolt holes for securing the framing to the slab, hold down nailing which missed or split studs, non-code compliant Romex cables, lack of grounding electrode connections to bond the hot and cold water lines to the electrical ground at the panel, and fire rated spaces above electrical panels not fire sealed. Plaintiffs are further informed and believe and thereupon allege that the structures may be additionally defective in ways and to an extent not precisely known, but which will be established at the time of trial, according to proof.

…

64. As a direct and proximate result of the conduct of Defendants AMERICAN WEST HOMES, INC. and DOES 1 through 100 herein alleged, Plaintiffs, and each of them, inclusive, have suffered damages in an amount precisely unknown, but believed to be within the jurisdiction of this Court in that they have been and will hereafter be required to perform investigations and works of

repair, restoration, and construction to portions of the structures to prevent further damage to the structures and other property and to restore the structures to their proper condition and/or will suffer damages in an amount the full nature and extent of which shall be ascertained according to proof at trial, but believed to be in excess of Ten Thousand Dol1ars ($10,000). Plaintiffs, and each of them, seek damages available pursuant to NRS section 40.655. Those items of damages include but are not limited to the following;

a. For the costs of expert investigation, redesign and reconstruction of the construction defects, ongoing and/or to be completed, including but not limited to those set forth herein, and for which Plaintiffs have suffered and/or will suffer damages in an amount the full nature and extent of which shall be ascertained according to proof at trial;

b. For damages to the real property and structures thereon which are the legal/proximate consequence of the construction defects, including but not limited to those set forth herein, and for which Plaintiffs have suffered or will suffer damages in an amount the full nature and extent of which shall be ascertained according to proof at trial;

c. For diminution in value and/or lost profit which is the legal/proximate result of the construction defects involving structural damages, including but not limited to those specified herein, and for which Plaintiffs have suffered and/or will suffer damages in an amount the full nature and extent of which shall be ascertained according to proof at trial;

d. For lost or diminished rental income which is the legal/proximate consequence of the construction defects, including but not limited to those specified herein, for which Plaintiffs have suffered and/or will suffer damages the full nature and extent of which shall be ascertained according to proof at trial;

e. For relocation costs and related costs when repairs are effectuated, which is the legal/proximate consequence of the construction defects, including but not limited to those specified herein, for which Plaintiffs have suffered and/or will suffer damages the full nature and extent of which shall be ascertained according to proof at trial;

f. For the lost monetary value of property due to

> the stigma which is the legal/proximate consequence of the construction defect problems, including but not limited to those specified herein, and for which Plaintiffs have suffered and/or will suffer damages the full nature and extent of which shall be ascertained according to proof at trial; and
>
> g. For the costs of certain repairs and expert investigation which were completed which are the legal/proximate consequence of the problems, including but not limited to those specified herein, and for which Plaintiffs have suffered and/or will suffer damages the full nature and extent of which shall be ascertained according to proof at trial.

AA 1509-1512, 1515-1516.

In *Boyer*, the complaint stated:

> 12. Plaintiffs are informed and believe and thereupon allege that construction defects exist in the Subject Properties. Generally, the nature and scope of construction defects, include but may not be limited to, improperly identified, designed, excavated, placed, prepared, graded and/or compacted soils, improperly designed or constructed footings, slabs, post-tensioned cables, anchor bolts, sill plates, walkways, driveways, pads, foundations, exterior masonry site retaining/fence walls, and landscape, The Subject Properties also have stucco, roofing, framing, drywall, window, door, architectural, structural and other specialty trade defects, Additionally, the Subject Properties may be defective in ways and to the extent not precisely known, but which will be augmented by expert opinions and inserted here and by way of amendment or will be established at the time of trial according to proof Expert reports and Job Files generated to date were provided during the Chapter 40 pre-litigation proceedings.
>
> …
>
> 16. Pursuant to NRS 40.640, Defendants, and each of them, are liable for damages resulting from construction defects due to its individual acts or omissions or the acts or omissions of its agents, employees and subcontractors. As a result acts and omissions of the Defendants, Plaintiffs have been forced to hire counsel to prosecute this action and to incur attorney's fees and costs.

AA 1566-1567.

In *Casallas, Garcia, Lino, Marcel* and *Wikey* (matters all filed by the same lawfirm) the following allegations were generally made:

> 9. Plaintiffs have discovered defects and damages within the periods of the applicable statutes of limitations that the subject property has and is experiencing defective conditions, in particular, there are damages stemming from, among other items, defectively built roofs, leaking windows, dirt coming through windows, drywall cracking, hardboard separating, hardboard staining, stucco cracking, stucco staining, and other poor workmanship.
>
> . . .
>
> On numerous occasions Defendants represented to Plaintiffs that the defective systems and materials were not inadequate, and that repairs had been successfully performed thereby inducing reasonable reliance thereupon by Plaintiffs that conditions were not in need of repairs, therefore, Defendants are estopped from asserting any potentially applicable statutes of limitations.
>
> 10. Within the last year, Plaintiffs have discovered that the subject property has and is experiencing additional defective conditions, in particular, there are damages stemming from, among other items, defectively built roofs, leaking windows, dirt coming through windows, drywall cracking, hardboard separating, hardboard staining stucco cracking, stucco staining and other poor workmanship.[4]

See AA 12-1-1292, 1346-1347, 1402, 1433-1434, 1473-1474.

In *Clark*, plaintiffs alleged the following:

[4] The allegations are generally the same as the Complaints were filed by the same lawfirm. The allegations included in the Complaints filed in *Garcia* and *Marcel* are verbatim while the allegations made in the Complaints filed in *Casallas*, *Lino* and *Wikey* have minor differences. As these differences are immaterial, the Complaints filed in each are effectively identical.

> 0.11 Plaintiffs are informed and believe, and thereupon allege that when marketed, purchased and sold, the Subject Property was defective and unsafe and/or unsuitable for the intended use and purpose in numerous particulars.
>
> 0.12 Pursuant to NRS § 40.645, Plaintiffs directed notices to defendants advising the same of constructional defects present in the Subject Property. Despite being presented with notice of defects, Defendants elected to not repair or correctly repair all of the constructional defects.
>
> 0.13 As a further proximate result of said defects, many parts of the Subject Property have been damaged and/or are defective and are reasonably believed to cause damage in the future and must be repaired and/or replaced, including but not limited to those defects as outlined in Plaintiffs' Notices in Compliance Nevada Revised Statute §40.645 which is attached hereto as Exhibit 1, Exhibit 2 and Exhibit 3.
>
> 0.14 These defects are causing or likely will cause injury to person and/or property. Plaintiffs have also suffered and will continue to suffer loss of use and enjoyment of the Subject Property for extended time periods all to their detriment.

AA 1720.

In *Drost*:

> 10. As of the present, the Subject Properties, and each of them, continue to suffer from construction defects, including, but not limited to fogged windows, broken window frames, water penetration, roof leaks, electrical, HVAC, plumbing defects, framing, roof defects, venting defects, as more fully described in the Chapter 40 Notices. Investigation is ongoing and Plaintiffs may discover additional defects which they shall then disclose.
>
> …
>
> 30. As a further proximate result of said defects, Plaintiffs have sustained property damage to the Subject Properties which must be repaired. These defects are causing or likely will cause additional injury to person and/or property. Plaintiffs have also suffered, and will continue to suffer, loss of

> use and enjoyment of the dwelling for extended periods of time.

AE 1371, 1374.

In *Mohan*, the following allegations were made:

> Non-invasive inspections of this residence have demonstrated and documented constructional defects and resulting damage in said residence in the following building systems, as specifically set forth in the Pacific Adjusting & Consultants, Inc., Chapter 40 Defect Listing for Mr. Mohan's home; concrete systems, masonry systems, wood/plastics/composites systems, thermal moisture protection systems, openings systems, finishes systems, plumbing systems, HVAC systems, and electrical systems. The causes of the constructional defects and resulting damages set forth herein and in the attached expert report include: (1) applicable building code violations, (2) standard of care violations, (3) violations of approved plans, and/or (4) utilization of substandard and/or defective building materials.

AE 1238.

In *Seven Hills*, plaintiffs alleged:

> 15. After work at the project was completed, the Plaintiff became informed and believes and on that basis alleges the Subject Property, in particular the Association and Sub-Association entry monuments and the adjacent landscape, irrigation and irrigation metering and the community wide street light poles including the electrical components, are not of merchantable quality but, in fact, are defective and fail to meet all applicable building codes and industry standards, resulting in damage thereto. The damages known to the Plaintiff at this time are progressive and continue to worsen.
>
> …
>
> 27. The Plaintiff is informed and believes and on that basis alleges that as a direct and proximate result of the defects set forth herein and the breach of the aforesaid implied warranties by the Defendants, and each of them, the Plaintiff has suffered damages in an amount precisely unknown, but believed to be in excess of this court's jurisdiction in that it has been, and will hereafter be, required to perform works of repair, restoration and construction to defective portions

> of the Subject Property to prevent further damage and to restore those portions of the Subject Property to their proper condition. Further, the Plaintiff has and will incur expert fees and costs to investigate the defective conditions to determine the nature, extent and cause of the defects as well as the reasonable and appropriate repairs. The Plaintiff will establish the precise amount of such damages at trial, according to proof.

AA 1248, 1250.

In *Stallion Mountain*, the following allegations were made:

> 9. After the work at the SUBJECT PROPERTY was purportedly completed, PLAINTIFF became aware that the work at the SUBJECT PROPERTY was not merchantable quality, but is, in fact, defective and fails to meet applicable building codes and industry standards and has caused damage to the SUBJECT PROPERTY. This damage is progressive and continues to worsen.
>
> 10. PLAINTIFF is informed and believes and thereupon alleges, that DEFENDANT failed to properly and adequately investigate, inspect, plan, engineer, supervise, produce, develop, or construction the common areas of the SUBJECT PROPERTY, in that said SUBJECT PROPERTY has experienced, and continues to experience, defects and deficiencies, and damages resulting there from, as more specifically described below.
>
> 11. PLAINTIFF is informed and believes and thereupon alleges, that the SUBJECT PROPERTY may be defective or deficient in other ways and to other extents not presently known to PLAINTIFF, and not specified above. PLAINTIFF reserves the right to amend this Complaint upon discovery of any additional defects or deficiencies not referenced herein and/or to present evidence of the same at the trial of this action.
>
> …
>
> 18. As a direct and proximate cause of DEFENDANT'S breach of contract, PLAINTIFF has suffered and continues to suffer damages which include, without limitation, the cost to repair the defects and deficiencies in the design and construction of the residences and improvements and appurtenances thereto on the SUBJECT

> PROPERTY, which now pose and which will continue to pose a threat to the health, safety and welfare of PLAINTIFF, guests and the general public until such repairs are effected, as well as damages incident to, and consequent of, DEFENDANT'S breach. All of the above-described damages have occurred, but the amount thereof is precisely unknown, and when the precise amount is known, it will be established by way of amendment to these pleadings or according to proof at the time of trial.

AA 1644-1645.

Finally, in *Sun City*, the following allegations were made:

> 23. Plaintiff is informed and believes and thereon alleges that the subject structures and subject premises were not constructed in accordance with applicable law or according to sound standards of engineering and construction, were not constructed in a workmanlike manner, were not free from defective materials, and were not of proper durability, reliability, habitability, merchantability, and/or general quality and not fit for their intended use all as herein described.
>
> 24. Plaintiff is informed and believes and thereupon alleges that as a direct and proximate result of the defects set forth herein, Plaintiff has suffered damages in an amount precisely unknown, but believed to be within the jurisdiction of this Court in that it has been and will hereafter be required to perform works of repair, restoration, and construction to portions of the structures to prevent further damages and to restore the structures to their proper condition. Plaintiff will establish the precise amount of such damages at trial, according to proof, for the following damages:
>
> a. The cost of any repairs already made;
>
> b. The cost of any repairs yet to be made that are necessary to cure any construction defect;
>
> c. The expenses of temporary housing reasonably necessary during the repair;
>
> d. The loss of the use of all or any part of the residence;

> e. The value of any other property damaged by the construction defect;
>
> f. The reduction in market value of the residences;
>
> g. Any additional costs incurred by the Plaintiff, including, but not limited to, any costs and fees incurred for the retention of experts;
>
> h. Any reasonable attorney's fees;
>
> l. Any interest provided by statute.

AA 1678-1679.

Given the breadth of the allegations in each suit, the Insureds were potentially liable for all of the alleged damages. Indeed, Ironshore concedes that the complaints allege a potential for liability for property damage occurring during the respective policy periods.

In nonetheless refusing to provide a defense, Ironshore contends simply that if the work of the insured was completed prior to the inception of the policy, all of the alleged damages constitute "continuous" damage, falling within the policy exclusionary endorsement. As discussed herein. Ironshore takes this position despite recognizing that the complaints do not clarify whether some defects might also have resulted in a "sudden" damage.

C. Ironshore Disclaims Coverage.

In response to tenders, Ironshore refused to provide a defense as to all matters based on the contention that no potential for coverage existed. See AA 1006-1191. Ironshore issued identical, boilerplate position letters that

provided as follows:

> Based on our review of the materials and information submitted regarding the subject construction project, Ironshore must respectfully decline coverage for this claim. Our reasons for this conclusion include:
>
> • The claims made do not fall within the scope of the insuring agreement as discussed above;
>
> • The project was completed by CEDCO, Inc. prior to the Ironshore policy's issue date and given the nature of the allegations is excluded under the Continuous or Progressive Injury or Damage Exclusion.

See AA1016; see also 1025, 1034, 1048, 1059, 1071, 1080, 1089, 1102, 1115, 1124, 1133, 1146, 1158, 1167, 1179, 1190.

To substantiate that all work was completed prior to the inception of its policies, Ironshore sometimes obtained homeowner matrices listing close of escrow or deed transfer dates for some homes. See, e.g., AA 2620. Ironshore assumed that that all work at issue was completed before the transfer dates. See e.g., AA 2627.[5]

[5] Ironshore included copies of the subcontract agreements in an effort to argue that the court should ignore some of the claims. As an insurer owes a duty to defend suits that assert claims that are baseless and meritless, Ironshore's argument is misplaced and contrary to law. See *United Specialty Insurance Company v. Hachiman, LLC*, 2018 WL 2245057 (D. Nev. 2018), noting that in evaluating the duty to defend, it is immaterial whether the claims asserted are false, fraudulent, or unprovable.

As to the issue of its investigation of the existence of potential sudden damages, Ironshore concedes it does very little:

> Q. Let me make this representation. Every denial that's at issue in this case is based upon this endorsement. So I'll represent to you that this is the centerpiece of this litigation.
>
> A Okay.
>
> Q . . . So my question to you, given that this document and this endorsement is at issue in every claim issue in this case, is what do you all do to pin down whether the property damage is sudden and accidental?
>
> MR. MORISON: Objection. Vague and ambiguous. Overbroad.
>
> THE WITNESS: I don't think we do.
>
> BY MR. REEVES: Q Do you do anything?
>
> A. Yes. I think we determine -- we look at the first notice of loss.
>
> Q Uh-huh.
>
> A We determine when the work was performed. We obtain subcontract agreement. We generally speak with our insured, if that's possible. Find out when they did the work. And if the work was performed prior to the policy, then the endorsement applies.
>
> Q Okay. When you say the endorsement applies, how do you rule out that the damages are not sudden and accidental?

> A We don't rule out. In our denial letter, we ask if there's any evidence of sudden and accidental damage during the policy period.
>
> Q What if it's unknown?
>
> A Then it doesn't exist.

AA 1791:22-1793:4.

In further elaborating on this issue, Ironshore concedes as follows:

> [W]e don't typically investigate whether there was sudden and accidental damage if the endorsement applies. That's the initial -- we have to get past the initial part of the endorsement. If the exclusion applies, then it's -- the burden is on the insured to prove that there was sudden and accidental damage during the policy period.

AA 1794:24-1795:5.

D. The Trial Court Disposes Of All Of Zurich's Claims.

The parties each filed Motions for Summary Judgment. See AA0181-1859; 1860-4903. In ruling on these motions, the trial court granted Ironshore's Motion and denied Zurich's Motion. AA 5043-5049.

In addressing the argument as to the potential for sudden damages, the trial court held:

> The plaintiffs maintain that the allegations against the insureds in the underlying actions create a potential for coverage triggering Ironshore's duty to defend under its policy. They reason that although the complaints did not allege that any sudden accidents happened, they also did not expressly state there were no such accidents. In

> short: because the insureds were sued for causing property damage, and because causing property damage could, in theory, include an accident—there is a potential for coverage triggering the duty to defend.
>
> The plaintiffs' argument would expand the duty to defend to the breaking point. Before the duty is triggered, there must be some allegation or evidence to create a current potential for coverage. And an allegation that is so vague that it could possibly encompass covered allegations in the future is not enough. Not only are there no actual allegations here that a sudden accident occurred, there is not even the suggestion of an accident in any of the complaints. The thrust of the complaints is that the insureds defectively built homes before Ironshore's policies started. And that claim is precisely what Ironshore's policies exclude: claims related to an insured's work performed prior to the policy-start date. The parties' policies are explicit about this exclusion.
>
> Without any existing evidence or allegations giving rise to a potential for covered liability, there is no present duty to defend. Taking all of the allegations in the underlying complaints and the extrinsic evidence offered here, there is no indication that the insureds were being sued for an act covered by Ironshore's policy. There was thus no duty to defend.

AA 5047:2-19 .

In seeking reconsideration from this ruling, Appellants pointed out that the court in the companion manner, based on identical allegations (since the *Garcia* matter was at issue in both cases), ruled as follows:

The Continuous or Progressive Injury or Damage exclusion precludes coverage of property damage "which first existed, or is alleged to have first existed, prior to the inception of this policy. 'Property damage' from 'your work', or the work of any additional insured, performed prior to policy inception will be deemed to have first existed prior to the policy inception, unless such 'property damage' is sudden and accidental and takes place within the policy period." (Ironshore Policy at 33, ECF No. 16–3). Ironshore argues that this exclusion applied because "undisputed and incontrovertible proof exists that all work on the residences in the Garcia action, including work performed by Champion, was completed many years before the Ironshore Policy inception date of May 31, 2009." (Response 14:5–9). Furthermore, Ironshore argues that the "sudden and accidental" exception to the exclusion is not implicated by the alleged property damage. (Response 14:15–15:2). The Court disagrees.

Based upon the allegations in the Garcia Complaint, the Court is not convinced that the Continuous or Progressive Injury or Damage exclusion precluded all possible or arguable coverage because the "sudden or accidental" exception could have been implicated. For example, the Garcia Complaint alleged "damages stemming from, among other items, defectively built roofs, leaking windows, dirt coming through windows, drywall cracking, stucco cracking, stucco staining, water and insect intrusion through foundation slabs, and other poor workmanship." (Underlying Compl. at 7, ECF No. 16–4). Moreover, the Garcia Complaint alleged that "[w]ithin the last year, Plaintiffs have discovered that the subject property has and is experiencing additional defective conditions, in particular, there are damages stemming from, among other items,

> defectively built roofs, leaking windows, dirt coming through windows, drywall cracking, stucco cracking, stucco staining, water and insect intrusion through foundation slabs, and other poor workmanship." (Id. at 8). The Court finds that the Garcia Complaint is vague as to the temporal implications of the alleged damages, and therefore, it is not clear on the face of the Garcia Complaint whether the alleged damages were or were not sudden and accidental. Accordingly, this exclusion alone did not preclude all possible or arguable coverage.

AA 5051-5056; *Assurance Co. of America*, *supra* 2014 WL 4829709.

In denying the motion for reconsideration, the trial court maintained its ruling based on the explanation that it was "not persuaded" by the rulings made by its sister court. AA 5076-5082.

## VI. SUMMARY OF ARGUMENT

An insurer owes a duty to defend to its insured whenever the insurer ascertains facts which give rise to the potential of coverage under an insurance policy with any doubt requiring the insurer to provide a defense. *Century Surety Company v. Andrew*, 134 Nev. 819 (2018); see also *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407 (2011). When pleadings are silent as to the scope, extent and timing of damages, doubt necessarily exists as to whether any damages occurred suddenly and accidentally. By virtue of this doubt, a potential for coverage existed such that Ironshore was obligated to defend its insureds.

An insurer may not rely on facts outside the complaint in assessing its initial duty to defend. See *Andrew*, supra, 134 Nev. at 822, fn 4; see also *OneBeacon Ins. Co. v. Probuilders Specialty Ins. Co.*, 2009 WL 2407705 (D. Nev. 2009). Instead, an insurer may only rely on extrinsic facts that are both conclusive and dispositive regarding coverage in any effort to terminate any duty otherwise owed with evidence. Id. As Ironshore did not possess any evidence to prove that none of the damages occurred suddenly, it possessed no evidence to demonstrate that none of the damages could have occurred suddenly such that its decision not to defend was improper.

## VII. ARGUMENT

An insurer must defend its insured unless it can establish there is no potential for coverage under the insurance policy. *United National*, supra, 120 Nev. at 686-687. The language of an insurance policy is broadly interpreted in order to afford 'the greatest possible coverage to the insured. *National Union v. Reno's Executive Air*, 100 Nev. 360, 365 (1984). "If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured.

The purpose behind construing the duty to defend so broadly is to prevent an insurer from evading its obligation to provide a defense for an insured without at least investigating the facts behind a complaint." *Id*. at

687. Any ambiguity or uncertainty in an insurance policy must be resolved against the insurer and in favor of the insured. *Benchmark Ins. Co. v. Sparks*, 254 P.3d 617, 620 (2011); *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 (2011); *Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co.*, 124 Nev. 319, 322 (2008).

A disclaiming insurer does not get the benefit of hindsight to retroactively bolster a disclaimer as the insurer is limited to what is known at the time of the tender, which would necessarily be limited to the documentation in its file. *Turk v. TIG*, 616 F.Supp.2d 1044 (D. Nev. 2009).

Further, an exclusion "must be stated clearly and unambiguously so as to readily communicate to the insured the specific circumstances under which he or she will not receive the expected coverage." *Reno's Executive Air, supra*, 100 Nev. at 366. If an insurer wishes to exclude coverage, it must (1) write the exclusion in obvious and unambiguous language in the policy, (2) establish that the interpretation excluding covering under the exclusion is the only interpretation of the exclusion that could fairly be made, and (3) establish that the exclusion clearly applies to this particular case. *Powell, supra*, 252 P.3d at 674.

A. A Potential Existed For Sudden Damages.

Under the policies Respondent issued, coverage extends to damages

because of “property damage” occurring during the policy period. See AA1007-1009. Ironshore admits that each of the complaints alleged such damages. Further, the policies exclude “continuous” damages, but damages which occur suddenly (an undefined term) are not “continuous.” See AA1014. Ironshore owed a duty to defend, therefore, if a potential existed that any of the claims asserted in the underlying matters included the possibility that some damage arose suddenly.

It is undisputed that each of the underlying matters included no allegations regarding the timing and extent of the damages claimed as the pleadings include broad allegations of defects to nearly every aspect of the homes at issue followed by vague allegations that the defects caused damages. None of the underlying complaints, therefore, include specific allegations regarding the timing and extent of the damages caused by the alleged defects.

The pleadings likewise do not describe the type and extent of "damage" arising from the defects necessitating repairs, nor do they comment on when physical injury to the property occurred. Given this, it is axiomatic that some of the damages could have occurred suddenly. Stated otherwise, in the absence of specific allegations as to how the damages occurred, a potential exists that the damages could have occurred suddenly.

In adjudicating the parties' motions, the trial court incorrectly framed the issue as follows:

> The plaintiffs maintain that the allegations against the insureds in the underlying actions create a potential for coverage triggering Ironshore's duty to defend under its policy. They reason that although the complaints did not allege that any sudden accidents happened, they also did not expressly state there were no such accidents. In short: because the insureds were sued for causing property damage, and because causing property damage could, in theory, include an accident—there is a potential for coverage triggering the duty to defend.

AA 5047.

The dispute between the parties did not center on whether an accident occurred since alleged damages arising from alleged defects necessarily potentially involve an accident. See *United National Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678 (Nev. 2004), holding that allegations of property damage arising from alleged negligence may be covered. Rather, the issue to be adjudicated is whether all of the alleged damages were, beyond doubt, "continuous" and, therefore, did not occur suddenly.

By framing the issue in the manner it did, the trial court erred in holding as follows:

> The plaintiffs' argument would expand the duty to defend to the breaking point. Before the duty is triggered, there must be some allegation or

> evidence to create a current potential for coverage. And an allegation that is so vague that it could possibly encompass covered allegations in the future is not enough. Not only are there no actual allegations here that a sudden accident occurred, there is not even the suggestion of an accident in any of the complaints. The thrust of the complaints is that the insureds defectively built homes before Ironshore's policies started. And that claim is precisely what Ironshore's policies exclude: claims related to an insured's work performed prior to the policy-start date. The parties' policies are explicit about this exclusion. (emphasis added)

AA 5047.

By virtue of this holding, the trial court appears to have not reached the issue of whether any damages could have conceivably occurred suddenly. But it cannot be reasonably disputed that a defect in a product or structure can lead to damages that occur either slowly over time or suddenly.

Here, the pleadings do not allege that the damages were "slowly caused" by defects. Nothing in the pleadings, therefore, leads to the conclusion that all of the damages were "continuous" so as to fall within the scope of the Ironshore exclusion.

Instead, the pleadings are silent regarding how and when the damages occurred. It is precisely this silence which creates the potential that the damages occurred suddenly so as to create a potential for coverage and a corresponding duty to defend.

*KB Home*, *supra*, 2019 WL 4228602 is instructive. Similar to the allegations at issue in in this case, the homeowners in the *KB Home* matter alleged defects and damages associated with stucco cracks. Of significance, the allegations in that case were likewise silent as to the scope, extent and/or timing of the damages.

In assessing the application of the identical exclusion at issue in this case, the Court there held that where Ironshore could not establish that all the damages alleged were continuous and not sudden, so as to fall within the scope of the policy exclusion, the insurer could not deny the duty to defend. The court explained:

> Upon consideration, the Court concludes that the reasoning of Assurance I is more persuasive given the Nevada authority cited above regarding the duty to defend. Indeed, Nevada law is clear that "an insurer's duty to defend is triggered whenever the potential for [coverage] arises," *Benchmark*, 254 P.3d at 621, and a potential for coverage "exists when there is arguable or possible coverage," *United Nat'l*, 99 P.3d at 1158. Here, the plaintiffs allege in the Underlying Complaints that "[s]ubsequent to construction of the Home, certain design and construction deficiencies were observed at the Home, which include, but are not limited to, an inadequately and improperly installed stucco system." Gilbert Complaint at 3; see also Rowland Complaint at 3. The plaintiffs further allege that "[t]he existence or causes of the defects are not readily recognizable by Plaintiffs," and that "[t]he defects are hidden by components or finishes, are latent in nature, and are defects that

require special knowledge or training to ascertain and determine the nature and causes of the defects." Gilbert Complaint at 3-4; see also Rowland Complaint at 3-4. However, the Underlying Complaints are silent as to when FSP's allegedly faulty workmanship began to physically damage other parts of the Project or when that alleged property damage was discovered. Nor are there any allegations regarding the nature of the property damage caused by FSP's allegedly faulty workmanship from which this Court could infer that the property damage was more likely gradual and nonaccidental, as opposed to sudden and accidental. As such, the Court finds that the CP Exclusion does "not preclude all arguable or possible coverage under the Ironshore Policy." See *Assurance I*, 2014 WL 4829709, at *4; *Leonard Roofing, Inc. v. Ironshore Specialty Ins. Co.*, Case No. 12-cv-156-VAP-DTB, 2013 WL 12129653, at *10 (C.D. Cal. Mar. 29, 2013) ("[I]t is entirely possible that the plaintiffs are seeking sudden and accidental damage caused by water damage that first occurred during the policy period. As Ironshore has failed to prove that there was no possibility of coverage at the time of tender, Ironshore is not entitled to summary adjudication regarding the duty to defend Leonard in the [underlying action]."). See also *Wynn's Intern., Inc. v. Cont'l Ins. Co.*, Case No. 94-cv-3766-CAL-ENE, 1995 WL 498846, at *4 (N.D. Cal. Aug. 14, 1995) (analyzing a chemical exclusion with a similar sudden and accidental exception and concluding that "[w]here the charging complaint is silent on the question of whether a release is sudden or gradual, that is enough to trigger the duty to defend"); *Nat'l Fire & Marine Ins. Co. v. Redland Ins. Co.*, 3:13-cv-00144-LRH, 2014 WL 3845153, at *5 (D. Nev. Aug. 5, 2014) ("Because the date on which the property damage occurred is not ascertainable from the Underlying Complaint,

> the Court cannot conclude that there was no potential for arguable or possible coverage under the policies....”). Thus, the Underlying Complaints potentially seek damages within the coverage of the policy.
>
> Because the Court is required to resolve any doubts as to a duty to defend in favor of the insured, and because an insurer must defend if the allegations against the insured allege facts potentially and even only partially within coverage, see *United Nat'l*, 99 P.3d at 1158, the Court determines that Ironshore has a duty to defend KB Home in the Underlying Litigation with respect to the 83 Underlying Complaints at issue in the Motion.

*Id.* at 9.

As the court in *KB Home* applied rules consistent with Nevada law regarding the duty to defend and the interpretation of policies, the logic applied by the court in *KB Home* is also applicable here.

*Newmont USA Ltd. v. American Home Assurance Co.*, 676 F.Supp.2d 1146 (E.D. Wash 2009) is likewise instructive. In *Newmont*, the court held that duty to defend was owed when a pollution exclusion stated that sudden and accidental discharges of a contaminant were not within its scope. Because the insurer could not determine from the pleading whether the pollution discharge had been sudden and accidental, the carrier’s obligation was to defend, explaining its decision as follows:

> It is undisputed that the EPA's complaint did not include

> any specific facts regarding the alleged discharges or how the discharges occurred. Rather the complaint is couched in general terms appropriate for a CERCLA action. The insurers concede, that there are no specific facts pled in the EPA's complaint about the releases and "there are no allegations of the underlying complaint that would characterize the contamination at issue as sudden and/or accidental." . . . Likewise, as Plaintiffs point out, there are no allegations in the underlying complaint that would rule out the potential for coverage and the possibility of facts demonstrating that the contamination at issue was sudden and accidental. . . .

*Id*. at 1159-1160.

Per *Newmont*, and based on the concept that an insurer must be able to eliminate through uncontroverted facts any potential that coverage exists to refuse to defend validly, an obligation was owed because the pleading in the underlying action did not state whether the pollution discharge had been sudden or gradual. The same analysis applies under Nevada law as it is precisely the absence of these allegations which gives rise to the duty to defend. See also *Axis Surplus Ins Co. v. James River Ins. Co.,* 2009 WL 675938 (U.S.D.C., W.D. Wash 2009), explaining that an insurer cannot disclaim coverage based on a claim in progress exclusion when the pleading is silent as to when the damages commenced; *IDC Construction LLC v. Admiral Ins. Co.*, 339 F.Supp.2d 1342 (S.D. Fla. 2004), same.

The standard set forth in these cases is simple and straight forward. Generalized allegations of defects can give rise to sudden damages,

especially since the lawsuits at issue contained no allegations that the damages occurred “continuously” or "slowly."

By way of example, a window defect can give rise to glass that cracks suddenly. A roof defect can give rise to framing members that break suddenly. A foundation defect can cause tile to crack suddenly. A drainage defect can give rise to a room that floods suddenly. As the construction defects which plaintiffs alleged could have caused a myriad of damages that occurred suddenly, Ironshore owed a duty to defend under Nevada law.

### B. An Insurer Can Terminate the Duty to Defend Based on Extrinsic Facts Through A Declaratory Relief Action.

As to the second certified question, this Court has already held that an insurer may not rely on facts outside the complaint in assessing its initial duty to defend. “Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy.” *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 687 (2004). In *Century Sur. Co. v. Andrew*, 134 Nev. 819, 822 (2018), the Nevada Supreme Court explained that the “general rule” is that facts outside the complaint cannot be used to deny the duty to defend, but could be used in a coverage action, where the insurer sought to terminate the defense it had first assumed on the basis of the allegations in the complaint:

> We take this opportunity to clarify that where there is

> potential for coverage based on "comparing the allegations of the complaint with the terms of the policy," an insurer does have a duty to defend. [*United National*] at 687. In this instance, as a general rule, facts outside of the complaint cannot justify an insurer's refusal to defend its insured. Restatement of Liability Insurance § 13 cmt. c (Am. Law Inst., Proposed Final Draft No. 2, 2018) ("The general rule is that insurers may not use facts outside the complaint as the basis for refusing to defend...."). Nonetheless, the insurer can always agree to defend the insured with the limiting condition that it does not waive any right to later deny coverage based on the terms of the insurance policy under a reservation of rights. See Woo, 164 P.3d at 460 ("Although the insurer must bear the expense of defending the insured, by doing so under a reservation of rights ... the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending itself from a claim of breach."). Accordingly, facts outside the complaint may be used in an action brought by the insurer seeking to terminate its duty to defend its insured in an action whereby the insurer is defending under a reservation of rights. Restatement of Liability Insurance § 13 cmt. c (Am. Law Inst., Proposed Final Draft No. 2, 2018) ("Only in a declaratory-judgment action filed while the insurer is defending, or in a coverage action that takes place after the insurer fulfilled the duty to defend, may the insurer use facts outside the complaint as the basis for avoiding coverage.").

As laid out by this Court, an insurer must initially provide a defense if a potential for coverage exists based on the allegations in a complaint. Once a defense is provided, an insurer can use extrinsic facts to establish that no potential for coverage exists on the policy.

Accordingly, in *Andrew*, this Court held that an insurer had to defend

an insured where it was alleged that the insured had caused an injury through an automobile accident which occurred while the insured was in the course and scope of his work. The policy at issue, which applied only if the insured was working at the time of the accident, therefore, obligated the insurer to defend, even though extrinsic facts indicated that the insured was not working at the time of the accident.

The Court's ruling does not eliminate the use of extrinsic evidence, but instead limits when it can be used. Stated differently, where a duty to defend exists based on the facts alleged in the complaint, the insurer must defend. Where the insurer possesses extrinsic evidence that is not controverted in the underlying action and that conclusively demonstrates that no potential for coverage exists, a carrier can terminate that duty to defend through a declaratory judgment action on the policy. *Id*. If unable to meet its burden in the coverage action, an insurer must provide a defense, while reserving rights regarding the duty to indemnify.

## VIII. CONCLUSION AND SUMMARY OF REQUESTED RELIEF

In responding to the first certified question, it is respectfully submitted that where a potential for coverage is initially held to exist, an insurer seeking to disclaim coverage bears the burden of proving that coverage is conclusively excluded. Under this standard, if an insurer cannot meet its

burden of proving that coverage is conclusively excluded, a defense is owed.

Here, the exclusion at issue states that property damage which occurs during the policy period is excluded from coverage where it is continuous, but not where the converse is true – where damages are sudden. While Ironshore seeks to cast this dispute as one regarding an exception to an exclusion, in fact, the issue remains simply one of whether its exclusion for continuous damages applies. As Ironshore cannot eliminate the potential that covered damages were alleged, Ironshore owed a duty to defend.

With respect to the second certified question, this Court addressed this issue in 2018 in *Century Surety v. Andrew.* In that case, this Court reiterated the general rule that extrinsic facts cannot eliminate a duty to defend where the allegations of the complaint create one. Instead, the insurer must defend and can terminate that obligation in a coverage action in which it can set forth extrinsic facts.

Dated: November 11, 2020

MORALES FIERRO & REEVES

By: /s/ William C. Reeves
William C. Reeves
Attorneys for Appellants

## IX. CERTIFICATE OF COMPLIANCE

I certify that I have read the Appellants' Opening Brief and, to the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose.

I certify that the brief complies will all applicable Nevada Rules of Appellate Procedure, including the requirement that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number of the appendix where the matter relied on is to be found. I certify that the brief complies with the formatting requirements of Rule 32 (a) (4)-(6) and with the type-volume limitation stated in Rule 32 (a) (7). The brief contains 10,641 words, excluding those sections exempted from the computation of type-volume limitation by NRAP 32(a)(7)(C). I understand that I may be subjected to sanctions in the event that the brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: November 11, 2020

MORALES FIERRO & REEVES

By: /s/ William C. Reeves
William C. Reeves
Attorneys for Appellants

CERTIFICATE OF SERVICE

I, William Reeves, hereby certify that on November 12, 2020, I served the following:

APPELLANTS' OPENING BRIEF

APPELLANTS' APPENDICES, VOLS 1-21

By agreement between the parties service was effectuated on counsel for Respondent electronically at wcm@morisonlaw.com.

I declare that the foregoing is true and correct based on my own personal knowledge.

Dated: November 12, 2020

William C. Reeves