IN THE SUPREME COURT OF THE STATE OF NEVADA

ZURICH AMERICAN INSURANCE COMPANY, et al., *Plaintiffs and Appellants*, vs. IRONSHORE SPECIALTY INSURANCE COMPANY, *Defendant and Respondent*.	No. 81428

RESPONDENT'S ANSWERING BRIEF

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IRONSHORE SPECIALTY INSURANCE COMPANY

NRAP 26.1 DISCLOSURE

Ironshore Specialty Insurance Company is wholly owned by Ironshore Holdings (U.S.), Inc., which is wholly owned by Ironshore Insurance Ltd., which is wholly owned by Ironshore, Inc.

Ironshore, Inc., is wholly owned by Liberty Mutual Insurance Company, which is wholly owned by Liberty Mutual Group, Inc., which is wholly owned by LMHC Massachusetts Holding, Inc., which is wholly owned by Liberty Mutual Holding Company Inc.

None of these companies are publicly held.

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JURISDICTIONAL STATEMENT

Respondent does not contest appellants' jurisdictional statement. Respondent adds that the Court has jurisdiction pursuant to Nevada Rules of Appellate Procedure ("NRAP") 5.

STATEMENT OF ISSUES

Appellants' statement of issues is inaccurate and incomplete. On September 11, 2020, the Court accepted the following certified questions from the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"):

> 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?

Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co., 964 F.3d 804, 806 (9th Cir. 2020). Although the issues were clearly delineated by the Ninth Circuit, appellants' statement of issues bears little or no resemblance to the certified questions. Appellants raised a host of issues that are not relevant to the questions before the Court. To the extent appellants raised those other issues in its appeal to the Ninth Circuit, they have been and will be addressed there.

STATEMENT OF THE CASE

This case is one of three appeals involving appellants, Zurich American Insurance Company, et al. ("Zurich"), and respondent, Ironshore Specialty Insurance Company ("Ironshore"). One appeal has already been decided in Ironshore's favor. *Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 801 F.App'x 576, 577 (9th Cir. 2020). The other two appeals are stayed pending the Court's determination here. All three appeals raise substantially similar issues arising from equitable contribution lawsuits brought by appellants. Appellants issued liability insurance policies to multiple subcontractors working on various construction projects in California and Nevada. Appellants' policyholders were sued in various construction defects lawsuits. Appellants defended and requested that respondent participate in that defense.

Based on the applicability of paragraph 1 of the Continuous or Progressive Injury or Damage Exclusion ("CP Exclusion") in the Ironshore policies, respondent declined. The Ninth Circuit has already held that exclusion bars any obligation under the Ironshore policies, subject only to whether the exception to the exclusion applies.

Appellants sued respondent for equitable contribution. Instead of bringing a separate lawsuit for each underlying construction defect lawsuit or for each insured, appellants elected to bring its lawsuits in three batches.

Chronologically, the first case filed was *Assurance Company of America v. Ironshore Specialty Insurance Company*, 2:13-CV-02191-GMN-CWH, in United States District Court, District of Nevada. The appeal of that case is stayed pending the outcome of the Court's consideration of the certified questions.

The second filed case is *American Zurich Insurance Company v. Ironshore Specialty Insurance Company*, 2:14-CV-00060-TLN-DB, in the Eastern District of California. The appeal of that case ended with a Ninth Circuit affirmance of the summary judgment entered in favor of respondent. The court held that respondent did not have a duty to defend because the CP Exclusion eliminated any potential for coverage and that appellants failed to meet their burden that the sudden and accidental property damage exception to the CP Exclusion was potentially applicable. *Zurich Am. Ins. Co., supra,* 801 F.App'x at 577.

The third filed case is *Assurance Company of America v. Ironshore Specialty Insurance Company,* 2:15-CV-00460-JAD-PAL, which is the instant matter.[1] Although *Nevada Zurich I* was the last case chronologically, a judgment was entered on August 24, 2017, before judgment was entered in *Nevada Zurich II*

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[1] Because there are three lawsuits involving essentially the same parties, respondent will abbreviate the cases according to the Ninth Circuit's convention. The first case was designated by the Ninth Circuit as "*Nevada Zurich II*" given that it was the second Nevada case to go to final judgment. The instant case will be referred to as "*Nevada Zurich I*". The remaining case venued in the Eastern District of California will be referred to as "*California Zurich*".

on August 31, 2018. Accordingly, the judgment in *Nevada Zurich I* has res judicata and collateral estoppel effect and controls the issues in *Nevada Zurich II*. *Chicago, R.I. & P.R. Co. v. Schendel*, 270 U.S. 611, 616-617 (1926); *Kirsch v. Traber*, 414 P.3d 818, 819-820 (Nev. 2018); *Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993).

STATEMENT OF FACTS

The pertinent facts of *Nevada Zurich I* and *Nevada Zurich II* are set forth in the Ninth Circuit certification order and also, in part, in the parties' appellate briefs in *Nevada Zurich I*, which were lodged with the Court. Appellants' statement of facts appears to be a full regurgitation of its appellate brief in support of its appeal to the Ninth Circuit. Respondent will not reiterate its entire factual statement that has already provided to the Court but instead will focus on the key facts of this case.

I. SUMMARY OF *NEVADA ZURICH I*

Appellants seek equitable contribution for defense fees and settlements paid in connection with fifteen separate underlying construction defect actions, involving several subcontractors allegedly insured by both appellants and respondent. The underlying lawsuits were similar. The Ironshore policies at issue in each underlying action contained the same CP Exclusion:

> 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 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.[2]

Zurich Am. Ins. Co., supra, 964 F.3d at 807-808.

The District Court issued an order on August 24, 2017 on the parties' cross-motions for summary judgment, granting respondent's motion and denying appellants'. (AA 5043-5049.)

The court ruled that under the CP Exclusion "there is no coverage for damages caused by things that the insured construction companies did prior to the policy-start dates." *Assurance Co. of Am. v. Ironshore Specialty Ins. Co.*, 2017 U.S. Dist. LEXIS 135895, at *3 (D.Nev. 2017). The Court noted that the CP

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[2] The Ninth Circuit's certified questions focused on the sudden and accidental exception under paragraph 1 of the CP Exclusion. Although not relevant to the issues before the Court, paragraphs 2 and 3 of the CP Exclusion also applied to many of the underlying construction defect cases in *Nevada Zurich I* and *Nevada Zurich II*.

Exclusion posed a "problem for the plaintiffs, because there is *no dispute* that all of the construction work was done prior to Ironshore's policies going into effect." *Id.* at *3-*4 (emphasis supplied). Appellants argued that the sudden and accidental exception to paragraph 1 of the CP Exclusion was applicable. The court rejected appellants' argument after reviewing the allegations in each underlying complaint:

> 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.

Id. at *6-*7. The court also noted that there was no extrinsic evidence of sudden or accidental damage within the policy period: "Without any existing evidence or allegations giving rise to a potential for covered liability, there is no present duty to defend." *Id.* at *7.

On appeal, the Ninth Circuit concurred in holding that "the complaint alone would not trigger such a duty [to defend]." *Zurich Am. Ins. Co., supra,* 964 F.3d at 812. The Ninth Circuit concluded with certainty that at least paragraph 1 of the CP Exclusion applied. The only remaining issue was who bore the burden of proving the applicability or inapplicability of the sudden and accidental property damage exception to paragraph 1 of the CP Exclusion.

> Beginning in the early 2000s, about a dozen development companies built thousands of homes using various subcontractors.

> Eight subcontractors are relevant here. Each of these subcontractors completed its work on the various properties before 2009. During this period, each was insured by Zurich for property damage that occurred during the policy period.
>
> Some time after completion of their work on these housing developments, each of the eight subcontractors obtained an insurance policy from Ironshore. The Ironshore policy insured the subcontractors for bodily injury or property damage that occurred during the policy period. The policy period for each subcontractor began in 2009 and ended in either 2010 or 2011.

Id. at 807. Because it was undisputed that the subcontractors' work was completed before the inception of the Ironshore policies, all property damage, regardless of when such damage occurred, allegedly caused by the work of the subcontractors was deemed to have occurred prior to the inception of the Ironshore policies and the claims were therefore excluded.

The Ninth Circuit observed that none of the underlying complaints alleged such sudden and accidental property damage, which is entirely consistent with the district court's findings.

> The typical complaint said the following:
>
> > 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.
> >
> > . . .

> 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.
>
> Although each complaint alleged that the homeowner suffered property damage, no complaint made specific allegations describing when or how the property damage occurred.

Id. at 807-808.

II. SUMMARY OF *NEVADA ZURICH II*[3]

Nevada Zurich II involved the same issues. *Zurich Am. Ins. Co., supra,* 964 F.3d at 809. Appellants' lawsuit placed at issue sixteen construction defect lawsuits involving multiple subcontractors allegedly insured by both Zurich and Ironshore. (RA 1-36.[4])

Following the summary judgment ruling, the parties proceeded to a bench trial on the duty to indemnify. The parties stipulated to the facts and submitted the case on briefs with oral argument to follow. (RA 52-88.) Among the stipulations were: "(t)he construction work in each underlying action was performed prior to the inception date of the earliest applicable Ironshore policy", (2) that "*neither*

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[3] The designation of "appellant" and "respondent" do not apply. Ironshore is the appellant in *Zurich Nevada II*. The Zurich entities are the respondents.

[4] Respondent's Appendix are paginated RA 1 to 103.

party had evidence of any sudden and accidental damage with respect to any underlying case" (emphasis supplied); and (3) that "(t)he allegations in each underlying complaint are nonspecific as to when property damage existed" with the exception of three lawsuits. (RA 54.) These stipulated facts were ignored by the *Nevada Zurich II* court. Instead, that court simply adopted in haec verba appellants' proposed findings and conclusions. (RA 37-51, 89-103.)

SUMMARY OF ARGUMENT

Under Nevada law, the burden of proving the applicability of an exception to an exclusion in an insurance policy falls on the insured. None of the complaints in the underlying lawsuit contain any allegations that create a potential for coverage. The paragraph 1 of CP Exclusion is applicable to all damage alleged in those complaints. Because the exception for sudden and accident property damage during the Ironshore policy period is a grant of coverage, the insured bears the burden of proving the applicability of that coverage grant. That burden is consistent with Nevada law on the interpretation of insurance contracts and conforms with the majority rule that places the burden on the insured.

Nevada Rules of Evidence and Nevada Rules of Civil Procedure are also consistent with allocating the burden of proof to the appellants. Nevada's standards on summary judgment motions are the same as the Federal standards. The outcome of the district court's ruling that granted respondents' motion for summary

judgment against appellants is consistent with Nevada law. Appellants as plaintiffs had the burden of proving every element that was essential to their equitable contribution claims. After respondent demonstrated that there was no duty to defend, appellants had the burden of proving that an exception to respondents' defense applied. They failed to meet that burden.

Either party to this lawsuit may rely on evidence extrinsic to the complaint to carry its burden regardless which party bears the burden of proving or disproving that an exception to an exclusion is applicable. Nevada law that restricts or permits the use of extrinsic evidence to establish a potential for coverage in a dispute between an insurer and insured is not applicable to an equitable contribution lawsuit between two or more insurers. An equitable contribution action is based on the factual predicate that the insured already received a defense. A defending insurer asserting a claim for equitable contribution is not asserting a claim that is derivative of the insured's rights. An equitable contribution claim is a separate and independent cause of action. Accordingly, the law that applies to an insurer-insured dispute is inapplicable.

With respect to the duty to defend, the parties in an equitable contribution lawsuit are limited to evidence that was available at the time of tender. But with respect to the duty to indemnify, the parties may introduce extrinsic evidence without regard to when that evidence was acquired.

ARGUMENT

I. APPELLANTS MISCHARACTERIZE THE ISSUE BEFORE THE COURT

Appellants attempt mightily to avoid the Ninth Circuit's holding and to reframe the issue. Throughout their brief, appellants fundamentally and repeatedly mischaracterize the issue before the court in at least two respects. First, appellants attempt to recast the applicable exclusion as one distinguishing between continuous damage and sudden damage. As will be shown, the exclusion does no such thing. Second, appellants simply wish away the fact that the Court is addressing an exception to an exclusion. Appellants, perhaps understandably, wish to ignore that fact and repeatedly insist that this case merely presents the application of an exclusion.

The Ninth Circuit has already held that "Ironshore's policy unambiguously excludes property damage caused by work that was completed before the policy's inception, subject only to the exception to the exclusion." *Zurich Am. Ins. Co., supra,* 964 F.3d at 810, fn. 8. Appellants are bound by that holding. Their attempt to reframe the issue fails.

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II. UNDER NEVADA LAW, THE BURDEN OF PROVING THE APPLICABILITY OF AN EXCEPTION TO AN EXCLUSION OF COVERAGE FALLS ON THE INSURED

Assigning to the insured the burden of proving the applicability of an exception to an exclusion is fully consistent with existing Nevada law for the reasons discussed below.

A. Preliminarily, Neither Appellants Nor An Insured May Speculate To Create A Potential For Coverage

It cannot be discerned from appellants' brief where they stand on who bears the burden of proof. Appellants avoid that question. Appellants' entire case hinges on whether they can persuade a court to accept speculation, in lieu of evidence, that there was a potential for coverage. The Ninth Circuit, however, has already held that this is a case where "the complaint alone would not trigger. . . a duty [to defend]." *Zurich Am. Ins. Co.*, *supra*, 964 F.3d at 812. Moreover, the undisputed facts of this case are that the subcontractors work was completed before the inception of the Ironshore policies. The exclusion applies and bars coverage, including any duty to defend.

Appellants' arguments to the contrary notwithstanding, what is *not* at issue in this case is that (1) the Ironshore exclusion unambiguously excludes property damage caused by work that was completed before the Ironshore policies' inception, (2) all the work at issue was completed before the Ironshore policies' inception, (3) prior to the Ironshore policies, appellants insured each of the

subcontractors performing that work, (4) only after completion of the work did the subcontractors obtain insurance from Ironshore, (5) no complaint made any allegations of sudden and accidental property damage, let alone during the Ironshore policy period, (6) Ironshore investigated the claims tendered by appellant and denied coverage because all the work at issue was performed prior to Ironshore policy inception and was thus excluded pursuant to the subject exclusion, (7) the complaints alone do not give rise to a duty to defend, and (8) the Ironshore exclusion applies to bar a duty to defend in this matter, subject only to the application of the exception. *Zurich Am. Ins. Co., supra,* 964 F.3d. at 807-810, 812.

"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 Natl Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 687 (2004). The duty to defend is based on the allegations in the complaint, and "'if facts [in a lawsuit] are alleged which if proved would give rise to the duty to indemnify,' which then 'the insurer must defend.'" *Century Sur. Co. v. Andrew*, 432 P.3d 180, 184 (Nev. 2018). "A potential for coverage only exists when there is arguable or possible coverage." *United Natl Ins. Co., supra,* 120 Nev. at 687 (citing *Morton by Morton v. Safeco Ins. Co.*, 905 F.2d 1208, 1212 (9th Cir. 1990) (applying California law).) The insured bears the initial burden of establishing the potential for coverage. *Nat'l*

Auto. & Cas. Ins. Co. v. Havas, 75 Nev. 301, 303 (1959); *Turk v. TIG Ins. Co.*, 616 F.Supp.2d 1044, 1050 (D.Nev. 2009).

Where the complaint on its face does not demonstrate there is arguable or possible coverage, the insured cannot speculate to create a potential for coverage. *See Assurance Co. of Am., supra,* 2017 U.S.Dist.LEXIS 135895, at *5 ("The allegations in a complaint must create a current potential of coverage, not merely raise a theoretical possibility that a potential for coverage could exist in the future"); *Beazley Ins. Co. v. Am. Econ. Ins. Co.*, 2013 U.S. Dist. LEXIS 71699, at *22-23 (D.Nev. 2013) (quoting *Gunderson v. Fire Insurance Exchange*, 37 Cal.App.4th 1106, 1114 (1995) ("An insured may not trigger the duty to defend by speculating about extraneous facts regarding potential liability or ways in which the third-party claimant might amend its complaint at some future date")).[5]

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[5] Nevada will often look to California law when Nevada law is undecided. *U.S. Fid. & Guar. Co. v. Peterson*, 91 Nev. 617, 620 (1975). California law is settled that an insured cannot speculate to create a potential for coverage. *Gunderson, supra,* 37 Cal.App.4th at 1114; *Ulta Salon v. Travelers Property Cas. Co.*, 197 Cal.App.4th 424, 433 (2011); *Low v. Golden Eagle Ins. Co.*, 99 Cal.App.4th 109, 113 (2002); *Hurley Construction v. State Farm*, 10 Cal.App.4th 533, 538 (1992); and *Zurich Am. Ins. Co., supra,* 801 F.App'x at 577. Nevada law and California law appear to be identical on the duty to defend. *United Natl Ins. Co., supra*, 120 Nev. at 686 ("The duty to defend is broader than the duty to indemnify. There is no duty to defend 'where there is no potential for coverage.' In other words, 'an insurer . . . bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy'"). Those quotes in *United Natl Ins. Co.* were taken from *Horace Mann Ins. Co. v. Barbara B.*, 846 P.2d 792, 794 (1993); *Bidart v. Am. Title Ins. Co.*, 103 Nev. 175, 179 (1987); and *Gray v. Zurich Insurance Company*, 419 P.2d 168, 176 (Cal. 1966). The prohibition

Allowing an insured to introduced unfettered speculation regarding unpled and other hypothetical facts would necessarily stretch the duty to defend beyond its limits. The Court did not engage in any such speculation in *United Natl Ins. Co.* That case involved the collapse of the Las Vegas Hilton marquee sign on July 18, 1994. The hotel hired a lighting contractor to install the sign. That contractor hired a subcontractor to erect prefabricated steel support components. The lighting contractor's insurer and the hotel filed lawsuits against the subcontractor alleging claims for negligence, breach of contract, and breach of implied warranty. There were allegations that the subcontractor "negligently, carelessly, and improperly modified and welded connections for the sign's support structure". *United Natl Ins. Co., supra*, 120 Nev. at 682. The subcontractor's work was completed by December 1993. *Id.* The subcontractor had liability insurance through United National Insurance Company and Assicurazioni Generali S.P.A. for the period April 1993 to April 1994. The policy indisputably required "an 'occurrence' and 'property damage' during the policy period for coverage to be effective". *Id.* at 684.

United Natl Ins. Co. addressed whether the allegations in the complaints against the subcontractor by the insured and its subsequent insurer created a

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against speculating to create a potential for coverage under California law is consistent with Nevada law, given the identical law on duty to defend in California and Nevada.

potential for coverage where the subcontractor clearly performed and completed its work during the United National/Generali policy period and the complaint alleged that the subcontractor's work was negligently performed. "[T]he question we must answer is this: Do allegations of general negligence or negligent welding constitute an allegation of an occurrence of property damage sufficient to create a potential for coverage under the CGL insurance policy?" *Id.* at 688. The Court concluded that there was no potential for coverage based on the allegations in the complaint.

> The complaints did not allege that any physical, tangible injury to the sign occurred during the United and Generali CGL insurance policy period-April 29, 1993, through April 29, 1994. Rather, the complaints only alleged that the sign suffered physical, tangible injury when it collapsed on July 18, 1994, nearly three months after the United and Generali policy expired. Therefore, we conclude that there was no potential, or possible, coverage under the CGL insurance policy and United and Generali owed no duty to defend Uriah.

Id. at 689. The Court could have speculated regarding damage caused by the subcontractor's completed work to create a potential for coverage. But the Court did not speculate, and the Court did not look beyond the allegations in the complaint.

Speculation that the subcontractor's completed work caused damage in *United Natl Ins. Co.* is no different than appellants' speculation here that the underlying subcontractors' work "could have" suddenly and accidentally caused property damage during the Ironshore policy period. But merely because the underlying complaints do not allege that there was any sudden and accidental

property damage does not mean there is a possibility that there "could have" been sudden and accidental property damage.[6] There are no allegations to support such speculation. Appellants' brief contains 10 pages of cherry-picked allegations from the underlying complaints. Yet still appellants offer no allegations of sudden and accidental damage. Indeed, appellants concede that "the allegations made in each matter are uniformly silent as to the scope, extent and time of the damages. . . ." (Appellants' Opening Brief at 14-15). In this case, the district court reviewed the allegations in each underlying complaint and concluded that "[n]ot 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". *Assurance Co. of Am., supra*, 2017 U.S. Dist. LEXIS 135895 at *6-*7.

Regardless which party bears the burden of proof, the lack of allegations of sudden and accident property damage in the underlying complaints do not and

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[6] Appellants argue that "in the absence of specific allegations as to how the damages occurred, a potential exists that the damages *could* have occurred suddenly." (Appellants' Opening Brief at 34 [emphasis supplied].) That argument was rejected by the court in *California Zurich. Am. Zurich Ins. Co. v. Ironshore Specialty Ins. Co.*, 2018 U.S.Dist.LEXIS 154968, at *9 (E.D.Cal. 2018). While the Ninth Circuit Court suggests that this may be a "reasonable argument" (*Zurich Am. Ins. Co., supra*, 964 F.3d 810-811), despite its affirmance in *California Zurich*, it is in fact not reasonable. That argument leads to hypothetical and speculative arguments regarding the existence of unpled facts. If such speculation was truly permissible, then the Court need not even review the allegations in the complaint but instead could rely solely on the insured's imagination to determine whether there is a potential for coverage.

cannot support the conclusion that there was a potential for coverage. Any such "potential" would be entirely speculative. Merely because the complaints do not allege something does not equate to a finding that "the something" may have happened.

B. Nevada Rules Of Contractual Interpretation Require The Insured To Prove The Applicability Of Any Coverage Grants, Including An Exception To An Exclusion

It is basic Nevada insurance law that the insured has the burden of proving that a claim falls within the policy's coverage grant. *Nat'l Auto. & Cas. Ins. Co., supra,* 75 Nev. at 302 (1959). Once the insured has done so, the burden shifts to the insurer to prove that the loss comes within an exclusion to coverage. *Id.*

The paragraph of the Ironshore exclusion at issue contains no requirement of "continuous" damage. That this is so is clear from a simple reading of that provision. At least as equally important, the Ninth Circuit has already held in this case that the exclusion "unambiguously excludes property damage caused by work that was completed before the policy's inception." *Zurich Am. Ins. Co., supra*, 964 F.3d at 810, fn. 8. Appellants' repeated attempts throughout their brief otherwise to cast the subject exclusion are not only misguided, they underscore the baselessness of their argument.

Paragraph 1 of the CP Exclusion has three parts. The first part describes what is not covered under the policy: "'property damage'. . . 'which first existed, or

is alleged to have first existed, prior to the inception of this policy.'" The second part is a provision wherein "'[p]roperty damage'" from the insured's work or the additional insured's work "performed prior to policy inception will be deemed to have first existed prior to the policy inception". Even if property damage may not have occurred before the policy period, even if that property damage was not continuous, if work was performed prior to the policy period, this provision provides that all such property damage existed prior to the Ironshore policy period and is therefore excluded. The third part is the "sudden and accidental" exception to the exclusion.[7]

The first and second parts are the exclusion. The third part gives back limited coverage to the insured for "sudden and accidental" property damage occurring during the Ironshore policy period. The CP Exclusion is not the only instance of a "sudden and accidental" exception to an exclusion. Other exclusions that incorporate a "sudden and accidental" exception include, without limitation,

[7] Although "sudden" is not defined in the Ironshore policy, it has a plain, ordinary, and common meaning. *McDaniel v. Sierra Health & Life Ins. Co.*, 118 Nev. 596, 599 (2002) ("In interpreting an insurance policy, this court examines the language 'from the viewpoint of one not trained in law' or insurance, giving the terms their plain, ordinary, and popular meaning").

the pollution exclusion[8] and the impaired property exclusion[9]. Sudden and accidental exceptions to exclusions are commonplace. Cases that interpret sudden and accidental exceptions to other exclusions are relevant to this case. Sudden and accidental exceptions to exclusions are almost universally interpreted as coverage grants, for which the insured bears the burden to establish. *Aeroquip Corp.* surveyed the law and found that "the majority of decisions place the burden on the insured". *Aeroquip Corp., supra,* 26 F.3d at 894-95. *Aeroquip* noted that there were a few federal decisions that predicted that their state supreme courts would assign the burden of proof to the insurer. *Id.* Subsequently, the California Supreme Court updated *Aeroquip's* survey and noted that those federal decisions wrongly predicted that their state supreme courts would adopt the minority rule. *Aydin Corp. v. First State Ins. Co.*, 959 P.2d 1213, 1216 (Cal. 1998). "[A]ll of the currently valid federal appellate decisions predicting how other state high courts would rule have placed the burden on the insured." *Id.*

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[8] *See, e.g., Aeroquip Corp. v. Aetna Cas. & Sur. Co.*, 26 F.3d 893, 893 (9th Cir. 1994) ("Each policy excluded coverage for pollution, but some policies contained an exception to the exclusion for "sudden and accidental" pollution").

[9] *See, e.g., All Green Electric, Inc., supra,* 22 Cal.App.5th at 411 ("[t]his exclusion does not apply to the loss of use of other property arising out of the sudden and accidental physical injury to 'your product' or 'your work' after it has been put to its intended use").

An example of an incorrect prediction is *New Castle Cty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1182 (3d Cir. 1991):

> We nonetheless predict that, if the Delaware Supreme Court were confronted with this issue, it would allocate the respective burdens of proof in accordance with the traditional distinction between coverage clauses and exclusionary clauses. . . . Because the "sudden and accidental" exception is part of an exclusionary clause (the pollution exclusion) we believe that Delaware would impose on the insurer (CNA) the burden of proving not only that the property damage at issue resulted from the discharge of pollutants, but also that the discharge was neither sudden nor accidental.

This argument and its reasoning is precisely what appellants advance here.

In *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997), the Delaware Supreme Court rejected the Third Circuit's prediction in *New Castle Cty.* Instead, it adopted "the majority rule. . . that a policyholder seeking coverage under an exception to a policy exclusion bears the burden of proving its entitlement". The Delaware Supreme Court concurred with the lower court's reasoning:

> The traditional rationale for placing the burden on the insureds is the exception to the exclusion creates coverage where it would not otherwise exist. Because the burden is on the insureds to prove the claim falls within the scope of coverage, the insureds must prove coverage is revived through applying the exclusion's exception.

E.I. Du Pont de Nemours & Co. v. Admiral Ins. Co., 711 A.2d 45, 53 (Del.Super.Ct. 1995).

Under Nevada law, "insurance policies are treated like other contracts, and thus, legal principles applicable to contracts generally are applicable to insurance policies." *Century Sur. Co., supra,* 432 P.3d at 183. The interpretation of a policy provision "must include reference to the entire policy and be read as a whole in order to give reasonable and harmonious meaning to the entire policy." *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 44 (1993). Whether the sudden and accidental exception is contained in an exclusion does not alter its purpose. "[I]t is the function served by policy language, not the location of language in an insurance policy[] that is determinative". *Aydin Corp., supra*, 959 P.2d at 1217.

The function of clauses 1 and 2 of CP Exclusion, paragraph 1, is to bar coverage. The function of the "sudden and accidental" exception is to restore coverage to the insured. Accordingly, it is the insured that bears the burden of proving that the exception to the exclusion is applicable because the insured has the burden of proving that a claim falls within the policy's coverage grant. *Nat'l Auto. & Cas. Ins. Co., supra*, 75 Nev. at 302.

Appellants offered no evidence whatsoever that any of the alleged damage was both sudden and accidental, let alone occurred during the Ironshore policy period as is required for satisfaction of the exception to the exclusion. In the related *Nevada Zurich II* action, appellants admitted that they had no such

evidence. (RA 54 ("neither party had evidence of any sudden and accidental damage with respect to any underlying case")).

C. Twenty-Six States Have Adopted or Applied the Majority Rule

More than half the states in the United States of America have adopted the majority rule that the burden of proving an exception to an exclusion is on the party seeking coverage. The highest court of precisely two states have held to the contrary: Iowa and Louisiana.

- *Lawler Mach. & Foundry Co. v. Pac. Indem. Ins. Co.*, 383 So.2d 156, 158 (Ala. 1980) (Alabama law; reversing lower court's finding that the insurer had a duty to defend);
- *Hudnell v. Allstate Ins. Co.*, 945 P.2d 363, 365 (Ariz.Ct.App. 1997) (Arizona law);
- *Aydin Corp., supra,* 959 P.2d at 1216 (California law); *All Green Elec., Inc. v. Sec. Nat'l Ins. Co.*, 22 Cal.App.5th 407, 416-17 (2018) (granting motion for summary judgment on duty to defend; the insured had the burden of providing extrinsic evidence that an exception to an exclusion was applicable and created a potential for coverage; the insured's evidence was "too 'tenuous and farfetched'" to impose a duty to defend); *McMillin Cos., LLC v. Am. Safety Indem. Co.*, 233 Cal.App.4th 518, 533, fn. 23 (2015) (the burden of proof on

the duty to defend is borne by the insured; the insured bears the burden of proving an exception to an exclusion is applicable);

- *Rodriguez ex rel. Rodriguez v. Safeco Ins. Co.*, 821 P.2d 849, 852-53 (Colo.Ct.App. 1991) (Colorado law);
- *Schilberg Integrated Metals Corp. v. Cont'l Cas. Co.*, 819 A.2d 773, 783 (Conn. 2003) (Connecticut law; granting motion for summary judgment on the grounds that "if the insured has the burden of proving the applicability of the sudden and accidental discharge exception in the context of the duty to indemnify; . . . we can discern no reason, nor does the plaintiff offer one, as to why the insured should not shoulder that burden in the context of the duty to defend");
- *E.I. du Pont de Nemours, supra*, 693 A.2d at 1061 (Delaware law);
- *Erie Ins. Exch. v. Compeve Corp.*, 32 N.E.3d 160, 167 (Ill.Ct.App. 2015) (Illinois law; granting motion for summary judgment that the insurer had no duty to defend);
- *A. Johnson & Co. v. Aetna Cas. & Sur. Co.*, 741 F.Supp. 298, 305 (D. Mass. 1990) (predicting Maine law; granting motion for summary judgment that the insurer had no duty to defend);
- *Highlands Ins. Co. v. Aerovox Inc.*, 676 N.E.2d 801, 804-805 (Mass. 1997) (Massachusetts law; "we agree with the United States Court of

Appeals for the Ninth Circuit that placing the burden on the insured is the better rule. . ." (citing *Aeroquip Corp., supra,* 26 F.3d at 895);

- *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 702 F.Supp. 1317, 1329 (E.D. Mich. 1988) (predicting Michigan law; granting motion for summary judgment that the insurer had no duty to defend);
- *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 314 (Minn. 1995) (partially overruled on other grounds *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 918 (Minn. 2009)) (Minnesota law; "[w]e hold that once the insurer shows the application of an exclusion clause, the burden of proof shifts back to the insured because the exception to the exclusion "restores" coverage for which the insured bears the burden of proof);
- *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research*, 108 P.3d 469, 476 (Mont. 2005) (Montana law; granting motion for summary judgment that the insurer had no duty to defend because the insured failed to satisfy its burden of proof). "This allocation appropriately aligns the burden with the benefit as the party seeking the benefit of a particular policy provision bears the burden of proving its application";

- *Kaiser v. Allstate Indem. Co.*, 949 N.W.2d 787, 795 (Neb. 2020) (Nebraska law);
- *NVR, Inc. v. Nat'l Indem. Co.*, 2010 N.J.Super.Unpub.LEXIS 2336, *32 (N.J.Super. 2010) (New Jersey law; finding no duty to defend after court trial and surveying cases that apply the majority rule);
- *Northville Industries v. Nat. Union Ins.*, 679 N.E.2d 1044, 1048-1049 (N.Y. 1997) (New York law; granting motion for summary judgment that the insurer had no duty to defend) "In determining whether the underlying complaint can be read as even potentially bringing the claim within the sudden and accidental exception to the exclusion of pollution coverage, a court should not attempt to impose the duty to defend on an insurer through a strained, implausible reading of the complaint "that is linguistically conceivable but tortured and unreasonable";
- *Home Indem. Co. v. Hoechst Celanese Corp.*, 494 S.E.2d 774, 783 (N.C.App.Ct. 1998) (North Carolina law; granting motion for summary judgment that the insurer had no duty to defend);
- *Plasticolors v. Cincinnati Ins. Co.*, 620 N.E.2d 856, 858 (Ohio.Ct.App. 1992) (Ohio law; granting motion for summary judgment that the insurer had no duty to defend because the

"complaint does not allege that the discharge, if any, was sudden and accidental");

- *Ky. Bluegrass Contracting, LLC v. Cincinnati Ins. Co.*, 363 P.3d 1270, 1279 (Okla.Ct.App. 2015) (Oklahoma law; granting motion for summary judgment that the insurer had no duty to defend);
- *Emplrs Ins. of Wausau v. Tektronix, Inc.*, 156 P.3d 105, 122 (Or.App.Ct. 2007) (Oregon law; reversing jury verdict in part finding that the insurer had a duty to defend). The majority rule "is consistent with the principles that Oregon courts generally have used in allocating the burdens of production and persuasion in contract cases. . . . Typically, in the context of contractual disputes, Oregon courts have required the party seeking the benefit of a particular provision to bear the burden of proving its application. . . . In this case, Tektronix seeks the benefit of the exception to the pollution exclusion. For that reason, it is appropriate that Tektronix bear the burden of proving that the exception is applicable";
- *CONRAIL v. Ace Prop. & Cas. Ins. Co.*, 182 A.3d 1011, 1027 (Pa.Super. 2019) (Pennsylvania law; granting motion for summary judgment that the insurer had no duty to defend);

- *St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp.*, 26 F.3d 1195, 1200 (1st Cir. 1994) (predicting Rhode Island law; granting motion for summary judgment that the insurer had no duty to defend "[b]ecause the insured bears the burden of establishing coverage under an insurance policy, it makes sense that the insured must also prove that the exception affords coverage after an exclusion is triggered");
- *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 594 S.E.2d 455, 460 fn. 5 (S.C. 2004) (South Carolina law);
- *Demaray v. De Smet Farm Mut. Ins. Co.*, 801 N.W.2d 284, 287 (S.D. 2011) (South Dakota law);
- *Telepak v. United Servs. Auto. Ass'n*, 887 S.W.2d 506, 507 (Tex.App. 1994) (Texas law; "[a]n exception to an exclusion is not 'language of exclusion' or an 'exception to coverage.' An exception to an exclusion creates coverage rather than excluding it or limiting it");
- *Quaker State Minit-Lube v. Fireman's Fund Ins. Co.*, 868 F.Supp. 1278, 1312 (D.Utah 1994) (predicting Utah law; granting motion for summary judgment that the insurer had no duty to defend and surveying cases that apply the majority rule); and
- *Sinclair Oil Corp. v. Republic Ins. Co.*, 929 P.2d 535, 543 (Wyo. 1996) (Wyoming law).

Appellants do not even attempt to address the majority rule, its reasoning, and the overwhelming authority that supports it. Instead, appellants rely on a smattering of trial court decisions purporting to apply the minority rule, leading off with *KB Home Jacksonville LLC v. Liberty Mut. Fire Ins. Co.*, 2019 U.S.Dist.LEXIS 151235, at *19 (M.D.Fla. 2019). (Appellants' Opening Brief at 36, 39.) *KB Home Jacksonville LLC* is a case where a Florida trial court purported to apply Nevada law and chose to follow *Zurich Nevada II* instead of *Zurich Nevada I*. The fact that another court picked *Zurich Nevada II* over *Zurich Nevada I* only demonstrates and reinforces that there is a split of authority between United States District Courts in Nevada on this issue.[10] In any event, *KB Home Jacksonville LLC* erroneously applied the minority rule and Nevada law.

Significantly, Nevada's law on the duty to defend is not dissimilar to that of California and the majority of states. *United Natl Ins. Co., supra*, 120 Nev. at 687; *Zurich Am. Ins. Co., supra*, 964 F.3d at 811 (also noting that "Nevada courts often look to California for guidance"). In evaluating an insurer's duty to defend, California unquestionably follows the majority rule. *McMillin Cos., LLC, supra,*

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[10] There is also a split of authority in United States District Courts in Florida. *IDC Construction, LLC v. Admiral Ins. Co.*, 339 F.Supp.2d 1342 (S.D.Fla. 2004), which is one of the cases cited by appellants, considered a Pre-Existing Damage Exclusion with language materially different from the Ironshore CP Exclusion. That case is inconsistent with the majority rule, which was followed in *Hudson Ins. Co. v. Double D Management Co.*, 768 F.Supp. 1542, 1545 (M.D.Fla. 1991).

233 Cal.App.4th at 533, fn. 23 (the burden of proof on the duty to defend is borne by the insured; the insured bears the burden of proving an exception to an exclusion is applicable); *All Green Elec., Inc., supra,* 22 Cal.App.5th at 416-17 (the court found no duty to defend because the insured failed to demonstrate that the sudden and accidental exception of the impaired property exclusion was applicable).

Appellants' other authorities— *Newmont USA Ltd. v. Am. Home Assur. Co.*, 676 F.Supp.2d 1146 (E.D.Wash. 2009) and *Axis Surplus Ins. Co. v. James River Ins. Co.*, 2009 U.S.Dist.Lexis 22614 (W.D.Wash. 2009)—also erroneously applied the minority rule. *Axis Surplus Ins. Co.*, purported to discern Washington law and applied the minority rule. As of 2016, however, Washington law has not adopted either the minority or majority rule. *Port of Longview v. Arrowood Indem. Co.*, 2016 Wash.App.LEXIS 3100, at *57 (Wash.App. 2016) ("No Washington case has addressed who has the burden of proof on the "sudden and accidental" exception to the qualified pollution exclusion, but courts in other jurisdictions have placed the burden of proof on the insured"). *Newmont USA Ltd., supra*, purported to apply Washington and New York law. Washington law is silent, as noted above, and *Newmont* misapplied New York law by applying the minority rule. New York has adopted the majority rule. *Northville Industries, supra,* 679 N.E.2d at 1048-1049.

To establish a duty to defend, Nevada law squarely places the burden of proof on the insured to demonstrate that the claim is "within the terms of the policy." *Nat'l Auto. & Cas. Ins. Co., supra,* 75 Nev. at 303. It logically follows that whether an exception to an exclusion applies, which returns coverage to the insured, the burden similarly rests on the insured. Such an allocation aligns the burden with the benefit and is consistent with the general principle that while the burden is on the insurer to prove a claim falls within an exclusion, the burden is on the insured to prove that a claim is within the scope of coverage.

The Ninth Circuit generously concluded that there are "reasonable arguments on both sides" of the question whether it is the insured's burden to show the applicability of an exception to an exclusion. *Zurich Am. Ins. Co., supra*, 964 F.3d at 810. In fact, applying existing Nevada law, there are not "reasonable arguments" on both sides. Determination of the duty to defend is based on the allegations in the complaint. *United Natl Ins. Co., supra*, 120 Nev. at 686. The court in *United National* held that there was no duty to defend because the allegations of the complaint did not allege property damage during the policy period. The *United National* reasoning applies equally here. As the Ninth Circuit in *Nevada Zurich I* observed, "no complaint made specific allegations describing when or how the property damage occurred." *Zurich Am. Ins. Co., supra*, 964 F.3d at 808. More specifically, there is no dispute that none of the complaints alleged

any "sudden and accidental" property damage, let alone during the Ironshore policy period. To find coverage in such a situation would run squarely afoul of the rule and holding of *United National*. Appellant's contrary argument is not only unreasonable, it is based neither on allegations nor evidence but rather pure speculation.

D. Rules Of Evidence Require Appellants To Prove The Applicability Of Any Coverage Grants, Including An Exception To An Exclusion

In *Rivera v. Philip Morris*, 125 Nev. 185, 190-91 (2009), the Court explained that burden of proof is an "umbrella phrase" that encompasses the burden of persuasion and the burden of production.

> At the outset, we note that cases are governed, in part, by evidentiary burdens and determining which party carries these burdens. The determination of which party caries a burden is critical because it can impact the outcome of a case. The term "burden of proof" is an umbrella phrase that describes two related, but separate, burdens. . . . First, there is the burden of production. The party that carries the burden of production must establish a prima facie case. . . . The burden of production may be switched from one party to another by a presumption. . . . Second, there is the burden of persuasion. The burden of persuasion rests with one party throughout the case and "determines which party must produce sufficient evidence to convince a judge that a fact has been established."

In *Aydin Corp., supra,* 959 P.2d at 1216, the California Supreme Court held that with respect to the sudden and accidental exception under the pollution exclusion, "there is no compelling reason to alter the normal allocation of the burden of proof with respect to the 'sudden and accidental' exception." The burden

of proving the applicability of an exception to an exclusion belongs to the insured. "Shifting the burden of proof [to the insurer] would . . . reward ignorance by increasing the likelihood of insurance coverage. Rewarding an insured's 'see no evil' position would also undercut the insured's obligations to the insurer of notice, cooperation, and good faith." *Id.* The California Supreme Court further held:

> [T]he general rule allocating the burden of proof applies "except as otherwise provided by law." The exception is included in recognition of the fact that the burden of proof is sometimes allocated in a manner that is at variance with the general rule. In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact.

Id. The purpose for assigning the burden of proof to the insured "is also consistent with the usual rules for allocating burdens of proof. The rule places the burden on the party who will generally have access to facts. . . ." *Aeroquip Corp., supra*, 26 F.3d at 895.

Appellants are the parties with knowledge of sudden and accidental property damage (if any). Appellants had access to facts (if any) that would support an argument that the sudden and accidental exception to the CP Exclusion was applicable. Appellants decided to defend, and thus assigned and maintained control over defense counsel. Appellants had access to discovery responses, expert reports, homeowner deposition transcripts, and other documentary evidence in the

underlying lawsuits. Appellants had every opportunity to introduce evidence (if any) of sudden and accidental property damage after they sued Ironshore for equitable contribution. Appellants found no evidence or even allegations of sudden and accidental property damage.

The most desirable public policy if there is no evidence of an exception to an exclusion is to enforce an unambiguous policy exclusion. *United Rentals Highway Techs., Inc. v. Wells Cargo, Inc.*, 128 Nev. 666, 677 (2012) ("[T]his court will not "'attempt to increase the legal obligations of the parties where the parties intentionally limited such obligations.'" . . . Additionally, "[e]very word [in a contract] must be given effect if at all possible"). The Court "will not rewrite contract provisions that are otherwise unambiguous." *Farmers Ins. Group v. Stonik By and Through Stonik*, 110 Nev. 64, 67 (1994). The Ninth Circuit has already held that the CP Exclusion "unambiguously excludes property damage caused by work that was completed before the policy's inception. . . ." *Zurich Am. Ins. Co., supra*, 964 F.3d at 810, fn. 8.

The probability of the existence of evidence of sudden and accidental damage is speculative. The complaints are devoid of any such allegations. The parties litigating the underlying construction defect lawsuit have access to any such facts. Appellants had access to evidence developed in each underlying action. It is unfair to require respondent to prove a negative, when appellants occupy a better

position to be aware of any such evidence. *Las Vegas Metro. Police Dep't v. Coregis Ins. Co.*, 127 Nev. 548, 555 (2011) (concluding that it was unfair to require an insured to prove that its insurer was *not* prejudiced by the insured's late notice).

E. Rules Of Civil Procedure Require Appellants To Prove The Applicability Of Any Coverage Grants, Including An Exception To An Exclusion

Nevada Zurich I is an appeal from a judgment entered by a United States District Court following its ruling on cross-motions for partial summary judgment and summary judgment. Nevada applies the same summary judgment standards.

> With respect to burdens of proof and persuasion in the summary judgment context, we follow the federal approach outlined in *Celotex Corp. v. Catrett.* The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. If such a showing is made, then the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact. The manner in which each party may satisfy its burden of production depends on which party will bear the burden of persuasion on the challenged claim at trial. If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence. But if the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) "pointing out . . . that there is an absence of evidence to support the nonmoving party's case." In such instances, in order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact.

Cuzze v. Univ. & Cmty. Coll. Sys., 123 Nev. 598, 602-03 (2007).

Likewise, the Federal Rules of Civil Procedure require the District Court to grant summary judgment on a claim "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The moving party's burden is affected by whether it has the burden of proof on the issue raised. *S. Inyo Healthcare Dist. v. Optum Bank, Inc.*, 612 B.R. 750, 757 (E.D.Cal. 2019). Where the non-moving party has the ultimate burden of proof, the moving party "must produce either evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 1999). Where the moving party has the ultimate burden of proof, it "must establish 'beyond controversy every essential element'" of its claim. *Southern Calif. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).

Appellants are the plaintiffs in an equitable contribution action, and they bore the burden of persuasion that respondent had a duty to defend in *Nevada Zurich I*.[11] Respondent demonstrated, in part, that at least paragraph 1 of the CP

[11] In *Nevada Zurich II*, appellants bore the burden of persuasion that respondent had the duty to defend and the duty to indemnify.

Exclusion applied to each underlying construction defect lawsuit and paragraphs 2 and 3 of the exclusion also applied to many of the underlying cases. That appellants should bear the burden of persuasion for the applicability of the sudden and accidental exception to the exclusion is consistent with the law applicable to any other affirmative defense under Nevada law. In *Nev. Ass'n Servs. v. Eighth Judicial Dist. Court of Nev.*, 130 Nev. 949 (2014), the Court held that once a defendant has successfully proved an affirmative defense, the burden shifts to the plaintiff to demonstrate that an exception to the defense is applicable. *Id.* at 995.

III. THE PARTY THAT BEARS THE BURDEN OF PROOF MAY RELY ON EVIDENCE EXTRINSIC TO THE COMPLAINT AVAILABLE AT THE TIME OF TENDER TO CARRY ITS BURDEN

One of the issues certified to the Court is the use of extrinsic evidence in connection with determining a duty to defend. Appellant made no argument below or to the Ninth Circuit that any such evidence may not be considered. Accordingly, any such argument is forfeited. *United States v. Depue*, 912 F.3d 1227, 1232-33 (9th Cir. 2019).

Setting that aside, neither party in this case had any extrinsic evidence of sudden or accidental property damage, let alone during the Ironshore policy period. Appellants did not offer any evidence in response to respondent's motion for summary judgment or in support of appellants' own motion for partial summary

judgment in *Nevada Zurich I*. In *Nevada Zurich II*, appellants *stipulated* that they have no such evidence.[12]

In *Century Sur. Co., supra*, 432 P.3d at 184 fn. 4, the Court cited to the Proposed Final Draft of the Restatement (Third) of the Law of Liability Insurance. In that footnote, the Court observed that extrinsic evidence may be utilized by an insurer in terminating its defense obligation to an insured. That rule is inapplicable to this case for at least two reasons.

First, respondent does not seek to terminate its defense obligation. No obligation ever arose in the first instance. As presented by the Ninth Circuit, this case is one where the complaint does not on its face demonstrate a potential for coverage. The Ninth Circuit sought the Court's guidance whether extrinsic evidence may be introduced to create such a potential.[13]

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[12] It is important to distinguish between the duty to defend and the duty to indemnify. *Nevada Zurich I* was a duty to defend case. *Nevada Zurich II* involved both the duty to defend and the duty to indemnify.

[13] Section 13(2)(b) of the Draft Restatement states that in addition to considering the allegations in the complaint an insurer should also consider "[a]ny information not alleged in the complaint or comparable document stating the legal action, that a reasonable insurer would regard as a basis for adding an allegation to the action." The Draft Restatement permits the consideration of information that a "reasonable insurer would regard as the basis for adding an *allegation* to the action." That rule does not permit speculation. To the extent that the Court is including to follow the Draft Restatement, it should also follow it in disallowing speculation to show a potential for coverage.

Second, this action is not a lawsuit between an insured and insurer. The standard governing whether or not an insured can utilize extrinsic evidence is not applicable to an insurer seeking equitable contribution from other insurer. Although the Court in *United Nat'l Ins. Co., supra*, 120 Nev. 681-682, similarly treated the insured and participating insurer, neither *Nevada Zurich I* nor *Nevada Zurich II* are cases where the participating insurer joined with the insured in pursuit of the non-participating insurer. Appellants are the sole plaintiffs in each of the three lawsuits against respondent. They are not asserting the insureds' claims. A cause of action for equitable contribution is not derivative of the insured's rights; it is a separate cause of action. *Am. Cas. Co. v. Gen. Star Indem. Co.*, 125 Cal.App.4th 1510, 1522 (2005) ("the right to equitable contribution exists independently of the rights of the insured"); *Navigators Specialty Ins. Co. v. Nationwide Mut. Ins. Co.*, 50 F.Supp.3d 1186, 1194 (D.Ariz. 2014) (equitable contribution "is not derivative from any third person, but exists as an independent action by one insurer against another").

In *United Natl Ins. Co.*, the Court explained that "[t]he 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." *United Natl Ins. Co., supra*, 120 Nev. at 687. That purpose is not implicated in an equitable contribution action. An equitable

contribution action is based on the fact that the plaintiff carrier at least defended the insured and is seeking reimbursement of defense fees from another carrier. Because the insured received an insurer-funded defense, it follows that for purposes of determining whether one or more insurers had a co-extensive defense obligation neither insurer should be prohibited from introducing extrinsic evidence that was available to either insurer at the time of tender to demonstrate the existence or absence of a potential for coverage.

Illustrative is *Monticello Ins. Co. v. Essex Ins. Co.*, 162 Cal.App.4th 1376 (2008). *Monticello* was an equitable contribution action where the defending insurer sought to establish the non-defending insurer's defense duty in reliance on allegations contained in a defect list. The court concluded that because the defect list was not provided to the non-defending carrier during the pendency of the underlying action, the defect list could not be used to create a potential for coverage. "We conclude the Defect List plays no role in our duty to defend analysis because Monticello failed to establish said document was tendered to Essex during the pendency of the underlying action." *Id.*, at 1388.

> In sum, Essex was never provided with the Defect List at any time while it still had the opportunity to participate in the defense of Blumenfeld in the underlying action. The record reflects the Defect List was not presented to Essex until May 18, 2004—15 months after said document was created and six months after the underlying action had settled. Essex had no opportunity to consider the Defect List in conjunction with Monticello's demand that Essex contribute to the

> defense of Blumenfeld. Therefore, Monticello's reliance on the Defect List at this juncture is unavailing.

Id., at 1388-1389. Whether the insurer had a duty to defend was dependent on whether it had information that showed the potential for coverage at the time of tender. Another insurer, seeking equitable contribution, cannot retroactively seek to impose a duty to defend on a non-defending insurer with evidence not previously provided.[14]

The duty to indemnify is narrower than the duty to defend, arising only "when there is actual coverage under an insurance policy." *United Natl Ins. Co.*, *supra*, 120 Nev. at 681. Because the duty to defend is broader than the duty to

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[14] This is not a case where a non-defending insurer failed to investigate and relied solely on the defending insurer's failure to meet its burden of proof to avoid a duty to defend. Respondents investigated and found no evidence to demonstrate a potential for coverage. As the Ninth Circuit observed:

> Ironshore investigated the claims and disclaimed coverage pursuant to the exclusion provision in its insurance policy. Specifically, Ironshore relied on paragraph 1 of the exclusion, which provides that its insurance does not apply to property damage from work performed by a subcontractor before the policy inception, because such damage is deemed to have existed before the inception of the policy.

Zurich Am. Ins. Co., supra, 964 F.3d at 808. Regardless which party bears the burden of proof, respondents met that burden. Appellants offered no evidence to rebut respondent's assertion that there was no evidence of sudden and accidental property damage, let alone during the Ironshore policy period. (AA1976-2103, 2155-2235, 2285-2319, 2388-2542, 2568-2570, 2624-2834, 2922-2924, 2951-3076, 3162-3165, 3238-3257, 3330-3339, 3621-3643, 3747-3809, 3872-3876, 3926-3977, and 4022-4036.)

indemnify, if an insurance company does not have a duty to defend, it follows that it also does not have a duty to indemnify. *City of San Buenaventura v. Ins. Co.*, 719 F.3d 1115, 1119 (9th Cir. 2013); *see also Certain Underwriters at Lloyd's of London v. Superior Court*, 24 Cal.4th 945, 961 (2001) ("'It is . . . well settled that because the duty to defend is broader than the duty to indemnify,' a determination that 'there is no duty to defend automatically means that there is no duty to indemnify'").

> In contrast to the duty to defend, the duty to indemnify arises only when the insured "becomes legally obligated to pay damages in the underlying action that gives rise to a claim under the policy." . . . . Because the duty to indemnify arises only when the insured is liable under the policy, the duty to indemnify does not exist in the absence of insurance coverage.

Turk, supra, 616 F.Supp.2d at 1050. In evaluating whether or not an insurer has a duty to indemnify, the Court must necessarily consider evidence that is extrinsic to the complaint regardless whether such evidence was available at the time of tender. In *Zurich Nevada II*, the parties stipulated that "neither party had evidence of any sudden and accidental damage with respect to any underlying case". (RA 54.) Accordingly, regardless of burden, there was no duty to indemnify.

CONCLUSION

The party seeking coverage bears the burden of demonstrating that an exception to an exclusion applies. In the context of an equitable contribution

action, both plaintiff and defendant may introduce extrinsic evidence available to either party at the time of tender to demonstrate a potential or absence of a potential for coverage. With respect to the duty to indemnify, addressed in *Zurich Nevada II*, both parties may introduce extrinsic evidence acquired at any time.

Dated: January 11, 2021

Respectfully submitted,

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By: _____
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NRAP 28.2 CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 10,416 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the

requirements of the Nevada Rules of Appellate Procedure.

Dated this 11th day of January 2021.

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CERTIFICATE OF SERVICE

I, William C. Morison, hereby certify that on January 11, 2021, I served the following:

RESPONDENT'S ANSWERING BRIEF

RESPONDENT'S APPENDIX

By agreement between the parties service was effectuated on counsel for Appellants electronically at wreeves@mfrlegal.com.

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

Dated: January 11, 2021

William C. Morison