Case No. 84986

In the Supreme Court of Nevada

STARR SURPLUS LINES INSURANCE CO., Petitioner, *vs.* THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE MARK DENTON, District Judge, Respondents, and JGB VEGAS RETAIL LESSEE, LLC, Real Party in Interest.	District Court Case No. A-20-816628-B

PETITIONER'S FOURTH NOTICE OF SUPPLEMENTAL AUTHORITY AND RESPONSE TO REAL PARTY IN INTEREST'S THIRD NOTICE OF SUPPLEMENTAL AUTHORITIES

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

AMY M. SAMBERG (SBN 10212)
LEE H. GORLIN (SBN 13879)
CLYDE & CO US LLP
7251 W. Lake Mead Blvd., Suite 430
Las Vegas, Nevada 89128
(725) 248-2900

Attorneys for Petitioner

Petitioner Starr provides the following supplemental authority to the Court's attention. NRAP 31(e), This is a pertinent, state supreme court decision issued since Starr's Third Notice of Supplemental Authorities, which is based on a Starr Policy. Starr also hereby submits its Response to Real Party in Interest JGB Vegas Retail Lessee, LLC's ("JGB's") Third Notice of Supplemental Authorities, filed May 15, 2023 ("Third JGB Notice"), as allowed by NRAP 31(e).

STARR'S FOURTH NOTICE OF SUPPLEMENTAL AUTHORITY

1. The District Court erred by deeming this question of policy interpretation as an issue of fact for a jury to decide.

The interpretation of an insurance policy is a question of law for the court to decide. *See* Petition for Writ of Mandamus or Prohibition (Pet.) at 9; Reply in Support of Petition for Writ of Mandamus or Prohibition (Reply) at 4-5

1) *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, No. 2022-0155, ___ A.3d ___, 2023 WL 3357980, at *3 (N.H. May 11, 2023) (holding that "the interpretation of insurance policy language, like any contract language, is ultimately an issue of law for the court to decide."

2. *"Direct Physical Loss or Damage" requires a tangible alteration of the insured property.*

At the heart of Starr's briefing is that the phrase "direct physical loss or damage" as used in the Policy requires a tangible alteration of insured property to trigger coverage. Pet. at 13-14; Reply at 9-12.

1) *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, No. 2022-0155, ___ A.3d ___, 2023 WL 3357980, at *7 (N.H. May 11, 2023) (holding that "direct physical loss or damage" requires a "distinct and demonstrable alteration" to property and that the "fact that the property could become a vector for transmission of a virus that poses a risk to human health due to the presence of SARS-CoV-2 in the air at the property is not relevant to the question of whether there has been "physical loss of or damage to property," because the policies insure property, not people.").

3. *Loss of use of insured property is not the same as a "direct physical loss."*

Closely tied to the first principle of Starr's briefing, noted above, is that the mere loss of use of the insured property is not a "direct physical loss" within the meaning of the Policy. *See* Pet. at 19-20; Reply at 18.

1) *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, No. 2022-0155, ___ A.3d ___, 2023 WL 3357980, at *10 (N.H. May 11, 2023) (rejecting the insureds' argument that its ability to use property is pertinent in determination of coverage and holding that while the Court has "long recognized that the right to use property is an 'essential quality' of the property rights protected under New Hampshire law . . . , an insured's right to use its property **does not operate to create coverage** under an insurance policy where none exists) (internal citations omitted) (emphasis added).

4. *The general presence of COVID-19 in the community or at an insured location is not a material alteration.*

Starr's briefing argued that the presence of COVID-19 in the community, or even its assumed presence at the insured property, could not constitute the sort of tangible alteration "direct physical loss or damage" requires. Pet. at 14-18; Reply at 12-14.

1) *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, No. 2022-0155, ___ A.3d ___, 2023 WL 3357980, at *7-8 (N.H. May 11, 2023) (concluding that "that the presence of SARS-CoV-2 in the air or on surfaces at a premises would not satisfy a requirement under a property insurance policy of "direct physical loss of or damage to property."[1]

5. *Starr's position is consistent with the clear trend in the law of other jurisdictions.*

Starr's briefing referenced the nearly unanimous authority from other jurisdictions that have read "direct physical loss or damage" as discussed above. Pet. at 20-21; Reply at 17-20.

1) *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, No. 2022-0155, ___ A.3d ___, 2023 WL 3357980, at *8 (N.H. May 11, 2023) (noting that its conclusion is "consistent with the conclusions of an "overwhelming majority of federal and state courts construing language similar or identical to the language contained in the policies at issue" and adding New Hampshire to said "overwhelming majority."[2]

[1] And to avoid all doubt, the policyholders alleged actual property damage due to the presence of the virus. *Id.* at *2.

[2] Starr notes that while the *Schleicher* Starr Policy contained the same pollutants and contaminants exclusion, the Court declined to reach the question as moot because it determined there was no coverage in the first instance. This Court can (and should) reach the same conclusion.

RESPONSE TO JGB'S THIRD NOTICE

The Third JGB Notice advises this Court of two foreign intermediate appellate rulings. They do not serve JGB. Both rulings **affirmed** demurrers in favor of the insurer. The only discussion of "direct physical loss or damage" in *Coast Restaurant Group* was in dicta. And the court's understanding of that phrase in *Starlight Cinemas* is, in fact, in line with Starr's position before this Court.

1. *Coast Restaurant Group* only discusses "direct physical loss or damage" in dicta

JGB presents a California intermediate appellate ruling that affirmed the insurer's demurrer on the grounds that the subject policy included applicable exclusions, one of which excluding coverage for "viruses." *Coast Restaurant Group, Incorporated v. AmGUARD Insurance Company*, 2023 WL 2850023 (Cal. Ct. App. Apr. 10, 2023). The holding of this case is that there was no coverage because of the exclusions. Thus the court's discussion, which contradicted the majority of California law, pertaining to "direct physical loss or damage" is mere dicta. It is not controlling in California and entitled to even less consideration from this Court.

This dictum is inapposite, in any event, because it was entered at to the pleadings stage. Here all facts are in, and discovery is closed.

2. *Starlight Cinemas* supports Starr's Position regarding "direct physical loss or damage"

JGB presents another California intermediate appellate ruling that also sustained the insurer's demurrer. *Starlight Cinemas, Incorporated v. Massachusetts Bay Insurance Company*, 2023 WL 3168354 (Cal. Ct. App. May 1, 2023). JGB's presentation of this ruling is perplexing. As JGB admits, the *Starlight* Court held that "direct physical loss or damage" required physical alteration of property.

Indeed, the *Starlight* Court recognized ""the 'now-existing wall of precedent' (other than [the dicta in] *Coast*) that the policy language requires a physical alteration of the covered property." *Id.* at *8. The court in *Starlight* thus joined the overwhelming majority, disagreeing with the *Coast* dicta that a "temporary deprivation of an insured's right to use covered property constitutes a covered loss under policy language covering a "direct physical loss of or damage to property." *Id*. at *9.

The *Starlight* Court noted that "if a Starlight manager had left a film projector on, she could go into the theater to turn the projector off, or to retrieve her personal property (even potentially to show a movie to her family)." *Id*. JGB's case is no different. Both JGB, its related entities, and its tenants were able to access their properties at all times during the closure orders and the pandemic, itself. The *Starlight* Court also disagreed with the *Coast* dicta and JGB's position, noting the significance of the "period of restoration" language in the policy, similar to the "period of indemnity" language in JGB's policy.[3]

For all of these reasons, *Starlight* supports Starr's position that there is no coverage under JGB's Policy because neither closure orders nor the mere presence of a virus constitute "direct physical loss or damage" to property.

[3] Similarly, the *Schleicher* Court, in analyzing a Starr Policy, noted that the "period of restoration . . . reinforces the conclusion that the presence of SARS-CoV-2 at the plaintiffs' properties . . . did not arise from a "physical loss." __ A.3d __, 2023 WL 3357980, at *8.

3. JGB Continues to Misrepresent *Casino West* and other cases regarding Pollution and/or Contamination Exclusions

JGB continues to overread and misrepresent *Casino West*. *Casino West* did not hold as an absolute matter of law that all pollution and contamination exclusions are limited to "traditional environmental" pollution. *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 400, 329 P.3d 614, 617 (2014). Instead it held that policy's exclusion, "**as drafted [t]here**," was ambiguous as to whether it covered damage by carbon monoxide, where the exclusion could be read either way to include or exclude it. *Id.* (emphasis added). Thus, because that policy was ambiguous as to that claim, the Court applied the insured's "reasonable expectations." *Id.* at 401, 329 P.3d at 618.

Here, the Starr exclusion clearly, and unambiguously includes "virus" among the sources of loss or damage excluded. No reasonable reading, particularly that of a lay person, could delete the word "virus." Even JGB's legalese cannot persuasively take it there.[4]

[4] Even if the Court somehow does deem the language to be ambiguous (which of course it is not), limiting the exclusion to "traditional environmental" viruses is not a reasonable expectation of the insured, as

As a final note, Starr would remind the Court that *Casino West* involved a third-party "duty to defend" case, which naturally imposes a broader duty than a first-party case for property coverage. As such, even if JGB correctly represented the *Casino West* holding, which it has repeatedly failed to do, the ruling would not be binding in this less broad context.

JGB makes the same misrepresentations regarding *MacKinnon v. Truck Insurance Exchange*. There too, the issue was in the context of the duty to defend under a CGL Policy. 73 P.3d 1205, 1208 (Cal. 2003), *as modified on denial of reh'g* (Sept. 17, 2003) (suit brought after insurer withdrew defense of insured due to exclusion). Further, there the issue was whether a "Pollutants" exclusion which did not include "poisons" or "pesticides" in its definition was sufficient to exclude coverage for a claim of injury due to pesticide. *Id.* at 1207. Starr notes that this exclusion did not include "virus" either, which belies JGB's contention that the "terms [are] identical to Starr's..." Compare *id.*, with JGB's 3rd

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demonstrated in the insured's deposition, where its corporate representative was unable to identify a single "traditional environmental" virus. III PA 381.

Supplement at 6, n.6. Like the court in *Casino West*, the court in *MacKinnon* found that in the context of that case, the exclusion could be read to include "virtually any substance." 73 P.3d at 1214. Again, this does not provide any guidance to a first-party property policy case, where here the question is whether an exclusion that includes "any . . . virus" means any virus.

The rest of JGB's contentions on the topic of this are deceptive as well. First, In *Novant Health Inc. v. American Guarantee & Liability Insurance. Co.*, the court noted that if the contamination exclusion remained part of the policy, it **would** preclude coverage. 563 F. Supp. 3d 455, 460 (M.D.N.C. 2021). The issue there was that there were conflicting endorsements, and the insurer had not yet met its burden to show that the exclusion remained a part of the policy. *Id.* at 462. Here, there is no doubt that the exclusion remains a valid part of JGB's Policy, and the *Novant Health Court* found that it would exclude coverage, unless deleted from the policy. *Id.*

Second, JGB's cited ruling in *Procaccianti Companies*, makes no mention of any exclusion. It is a mere minute order denying a Motion to Dismiss, which reads in full:

> TEXT ORDER denying 10 Defendant Zurich American Insurance Company's Rule 12(b)(6) Motion to Dismiss the Complaint. Having reviewed the papers, including the supplemental authority, the Court concludes that Plaintiffs have adequately alleged plausible claims for relief, and thus declines to dismiss them at this early stage. The instant Motion is therefore denied. However, resolution of the issues discussed in the papers, including whether the presence of Covid-19 constitutes "direct physical loss of or damage" to property and the effect of the Amendatory Endorsement on the original policy language, may be appropriate on a summary judgment motion following discovery. So Ordered by District Judge William E. Smith on 9/2/2021. (Urizandi, Nisshy) (Entered: 09/02/2021).

See, Docket, *Procaccianti Companies Inc et al v. Zurich American Insurance Company*, 1:20CV00512 (D.R.I.). Starr notes that the insurer subsequently filed a Motion for Summary Judgment in that matter, the Court heard oral argument on January 24, 2023, and the motion remains pending.[5] *Id*.

As such, this Court should continue to adhere to Nevada's longstanding policy of interpreting clear, and unambiguous policy

[5] JGB's reliance on *Sacramento Downtown Arena LLC v. Factory Mutual Insurance Co.*, 2022 WL 16529547, at *5 (E.D. Cal. Oct. 28, 2022) is misplaced as thoroughly described in *Carilion Clinic v. Am. Guarantee & Liab. Ins. Co.*, No. 7:21-CV-00168, 2022 WL 16973256, at *3-*4 (W.D. Va. Nov. 16, 2022).

language as it is written. As other courts have nearly unanimously determined, "virus" means virus.[6]

Respectfully submitted.

DATED: May 25, 2023

LEWIS ROCA ROTHGERBER CHRISTIE LLP

/s/ Daniel F. Polsenberg
Daniel F. Polsenberg (SBN 2376)
Joel D. Henriod (SBN 8492)
Abraham G. Smith (SBN 13250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169

CLYDE & CO US LLP

/s/ Lee H. Gorlin
Amy M. Samberg (SBN 10212)
Lee H. Gorlin (SBN 13879)
7251 W. Lake Mead Boulevard,
Suite 430
Las Vegas, Nevada 89128

Attorneys for Petitioner

[6] Again, in lieu of presenting the hundreds of pro-insurer COVID-19 rulings nationwide, Starr submits that the Court can stay current via the University of Pennsylvania's tracker of similar suits nationwide. *See* https://cclt.law.upenn.edu/appeals/ (for appeals) and https://cclt.law.upenn.edu/judicial-rulings/ (for trial court rulings).

CERTIFICATE OF SERVICE

I certify that on May 25, 2023, I submitted the foregoing *"Fourth Notice of Supplemental Authority and Response to Real Party in Interest's Third Notice of Supplemental Authorities"* for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Bradley Schrager, Esq. Wolf Rifkin Shapiro Schulman Rabkin LLC 3773 Howard Hughes Pkwy Suite 590 South Las Vegas, NV 89169 bschrager@wrslawyers.com	Mark T. Ladd, Esq. Cohen Ziffer Frenchman & McKenna LLP 1350 Avenue of the Americas New York, NY 10019 mladd@cohenziffer.com
Attorneys for Real Party in Interest JGB Retail Vegas Lessee, LLC	

Pisanelli Bice PLLC James J. Pisanelli, Esq. Debra L. Spinelli, Esq., 400 South 7th Street, Suite 300 Las Vegas, NV 89101 (702) 214-2100 JJP@pisanellibice.com DLS@pisanellibice.com	Reed Smith LLP John N. Ellison Richard P. Lewis 599 Lexington Avenue New York, NY 10022 (212)521-5400 jellison@reedsmith.com rlewis@reedsmith.com
Attorneys for Amicus Curiae United Policyholders	

Wystan M. Ackerman Robinson & Cole LLP 280 Trumbull Street Hartford, CT 06103 wackerman@rc.com	Tyler Watson Christian Kravitz Dichter Johnson & Sluga 8985 S. Eastern Ave., Suite 200 Las Vegas, NV 89123 tywatso@ksjattorneys.com
Attorneys for Amicus Curiae American Property Casualty Insurance Association	

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

The Honorable Mark R. Denton
DISTRICT COURT JUDGE – DEPT. 13
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

/s/ Cynthia Kelley
An Employee of Lewis Roca Rothgerber Christie LLP