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**IN THE UNITED STATES DISCTRICT COURT,
STATE OF UTAH, CENTRAL DIVISION**

JOHN CHAD ANDREW, an individual, Plaintiff, vs. THE TRAVELERS HOME AND MARINE INSURANCE COMPANY, Defendant.	**OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** Case No. 1:20-cv-00179-DBB-JCB Judge: David Barlow Magistrate Judge: Jared C. Bennett Hearing Requested

Plaintiff John Chad Andrew ("Plaintiff" or "Andrew") submits the following Opposition to Motion for Summary Judgment.

RELIEF SOUGHT AND INTRODUCTION

Plaintiff requests that the Defendant's motion be denied because Defendant has failed to carry its summary judgment burden and there are disputed issues of material fact precluding summary judgment.

Ice and snow build up damaged Andrew's elevated decks. During the claims process, Defendant first asserted that the loss was not covered because it involved "patios," citing one policy provision. Subsequently, over a year later, Defendant asserted that the loss was not

covered because it involved long-term damage, citing a different policy provision. Now, in its Motion for Summary Judgment, it remains unclear what exclusion Defendant is asserting and how that exclusion applies. Defendant has just string cited a number of mutually exclusive exclusions and has provided no support for which exclusion applies and why. It is not enough to point to an exclusion and point to an unsown expert report that does not include any of the terms or phrases used in the policy. It is Defendant's burden to establish that the loss is excluded, and Defendant has failed to do so. For this reason, Defendant's motion fails. Alternatively, there is a disputed issue of fact regarding whether the cited exclusions apply.

In addition, Defendant has the burden of proof on the affirmative defense that the claim was fairly debatable (as a defense the Second Cause of Action for Breach of the Duty of Good Faith and Fair Dealing). But Defendant has not submitted any evidence to show that the denial was fairly debatable. This analysis is based on what the Defendant had in its possession as of when it made the denial, and the only evidence in the summary judgment record about the denial is that Defendant did in fact deny the claim. This is not enough to establish the fairly debatable defense.

RESPONSE TO STATEMENTS OF FACT

1. Travelers issued Policy Number 984157772 633 1 ("the Policy") to John C. Andrew. *See* Exhibit A at p. 1.

RESPONSE: Admit.

2. The Policy applies to a home located at 1527 Homestead Circle, Centerville, Utah 84014. *Id.*

RESPONSE: Admit.

3. The Travelers Policy provides:

COVERAGE A – DWELLING AND COVERAGE B OTHER STRUCTURES

1. We insure against risk of direct physical loss to property described in Coverages A and B.

2. We do not insure, however, for loss:
a. Excluded under Section I – Exclusions;

c. Caused by:

(2) Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:

(a) Fence, pavement, patio or swimming pool;

(5) Constant or repeated seepage or leakage of water or steam, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more; or

(6) Any of the following:

(a) Wear and tear, marring, deterioration;

(b) Mechanical breakdown, latent defect, inherent vice, or any quality in property that causes it to damage or destroy itself;

(f) Settling, shrinking, bulging or expansion, including resultant cracking, of bulkheads, pavements, patios, footings, foundations, walls, floors, roofs or ceilings

Id. at pp. 28-29.

RESPONSE: Admit other than the language was modified by endorsement. The Policy, with the endorsement, states more fully:

SECTION I-PERILS INSURED AGAINST

COVERAGE A – DWELLING AND COVERAGE B OTHER STRUCTURES

1. We insure against risk of direct physical loss to property described in Coverages A and B.

2. We do not insure, however, for loss:
. . .
c. Caused by:

. . .

(2) Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:

(a) Fence, pavement, patio or swimming pool;
(b) Footing, foundation, bulkhead wall, or any other structure or device that supports all or part of a buildings, or other structure;
(c) Retaining wall or bulkhead that does not support all or part of a building or other structure; or
(d) Pier, wharf or dock.

. . .

(4) Constant or repeated seepage or leakage of water or steam, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more; or

(5) Any of the following:

(a) Wear and tear, marring, deterioration;

(b) Mechanical breakdown, latent defect, inherent vice, or any quality in property that causes it to damage or destroy itself;

. . .

(f) Settling, shrinking, bulging or expansion, including resultant cracking, of bulkheads, pavements, patios, footings, foundations, walls, floors, roofs or ceilings

Under items 1.b and c, any ensuing loss to property described in Coverages A, B and C not excluded by any other provision in this policy is covered.

4. Mr. Andrew made a claim to Travelers and Travelers inspected the property on May 22, 2019. *See* Exhibit B.

RESPONSE: Admit that Travelers only reviewed the property via a video call on May 22, 2019 and deny any implication that Travelers "inspected" the property in person after Andrew made the insurance claim. Andrew Decl. ¶ 3.

5. A denial letter issued on June 3, 2019. *Id.*

RESPONSE: Admit.

6. Mr. Andrew later requested reconsideration of the denial. Exhibit C.

RESPONSE: Admit.

7. Following a June 1, 2020 coverage review, Travelers issued a second denial letter on June 24, 2020. *Id.*

RESPONSE: Admit.

8. Plaintiff retained Utah Public Adjusters. Exhibit D.

RESPONSE: Admit.

9. Utah Public Adjusters prepared its most recent estimate on July 21, 2021. *Id.*

RESPONSE: Admit.

10. The estimate contains numerous photos of the damage at issue. *Id.* at pp. 16-47.[1]

RESPONSE: Admit.

11. The damage is concentrated on exterior paved surfaces and an exterior staircase. *Id.*

RESPONSE: Admit that the damage includes the surface of the decks at issue and a staircase, along with other components of the dwelling, but deny that it is a "paved" surface. Further, the term "paved" does not exist in the Policy and is therefore inapplicable. See Ex. A to Def.'s Mtn. Further, the components that were damaged by the ice dam include: the structures supporting the deck, the underlayment, and the substrate under the deck coating, as well as the decorative composite finish material on the top of the deck. Cox. Decl. ¶ 3; Andrew Decl. ¶ 4. The decorative composite material is not a "paved" surface. Cox. Decl. ¶ 4; Andrew Decl. ¶ 5. A paved surface is something that can be driven on or parked on or a sidewalk. Cox. Decl. ¶ 5; Andrew Decl. ¶ 6.

[1] Plaintiff identified Utah Public Adjusters as a non-retained expert in its Initial Expert Disclosures but did not disclose a report or provide a disclosure of testimony on the report deadline

12. Travelers retained a Structural Engineer to evaluate the materials provided by Utah Public Adjusters. Exhibit E.

RESPONSE: Admit that Travelers retained a structural engineer as an expert witness in this lawsuit in late 2021 after the close of fact discovery, but deny any implication this was done during the claims handling prior to Traveler's denial of the claim that led to this litigation or that the structural engineer's conclusions were correct or well-founded. In addition, Plaintiff objects to the submission of the report as an Exhibit to the Motion, as it is not proper summary judgment evidence. "[U]nsworn expert reports are not competent evidence on summary judgment." *Peak ex rel. Peak v. Cent. Tank Coatings, Inc*., 606 F. App'x 891, 895 (10th Cir. 2015).

13. The engineer concluded that the damage at issue was the result of age-related deterioration and a number of other factors and that the damage in question occurred over a long period of time. *Id.*

RESPONSE: Denied. Plaintiff objects to the submission of the report as an Exhibit to the Motion, as it is not proper summary judgment evidence. "[U]nsworn expert reports are not competent evidence on summary judgment." *Peak ex rel. Peak v. Cent. Tank Coatings, Inc*., 606 F. App'x 891, 895 (10th Cir. 2015). Also, the engineer never inspected the property, indicated in the report that "a physical inspection of the property would help corroborate the conclusions" and was merely speculating that the damage observed in photographs, taken almost a year and a half after the Ice Dams formed, "**likely** occurred over a long period of time (years) rather than a single sudden event was most likely due to age-related deterioration of the concrete, freeze/thaw cycles, expansion/contraction, and shrinkage of the concrete." Ex. E to Def.'s Mtn. at p. 3. Even if the unsworn report were potentially admissible, this is inadmissible speculation and conclusory statements. The report does not state how or why he concluded that it was likely it was damage

that occurred over a long period of time. An expert's opinion can be rejected on summary judgment if it is conclusory. *Mattiesen v. Banc one Mortgage Co*., 173 F.3d 1242, 1247 (10th Cir. 1999). The report also does not explain or account for the fact that the photos he analyzed and upon which he based opinions were taken in June, 2021, almost one and one-half years after the Ice Dams caused the damage.[2]

But Andrew saw the damage occurred within a few weeks of the Ice Dams forming. Decl. of Andrew ¶ 7. It was not a result of damage occurring over a long period of time, but rather was a result of a single event—the ice damming. Andrew Decl. ¶ 8. Cox Decl. ¶ 6.

ADDITIONAL FACTS

14. The Policy states:

SECTION 1-PROPERTY COVERAGES

COVERAGE A-DWELLING

1. We cover:

    a. The dwelling on the "residence premises" show in the Declarations, including structures attached to the dwelling . . .

See Ex. A to Mtn.

15.The residence premises in the declarations page of the Policy is 1527 Homestead Cir, Centerville, Utah 84014 (the Dwelling"). Ex. A. to Mtn.

The decks at issue are part of the Dwelling. Andrew Decl. ¶ 9.

The Policy states:

SECTION 1-PERILS INSURED AGAINS

COVERAGE A-DWELLING AND COVERAGE B—OTHER STRUCTURES

[2] Page one of his report reflects that the photos were taken on June 29, 2020 and the date of loss was February 29, 2019.

1. We insure against risk of direct physical loss to property described in Coverages A and B.

Ex. A to Mtn.

16.The Policy then lists exclusions for perils that are not covered. *Id.*

On February 29, 2019, ice dams (the "Ice Dams") formed on two decks of the Property. Andrew Decl. ¶ 9.

17.Prior to the Ice Dams., the decks were in good shape, not damaged, and showed no signs of cracking nor any damage. *Id*. ¶ 10.

18.Within two weeks of the Ice Dams forming, Andrew noticed, for the first time, damage to the edges of the decks at the Property. *Id*. ¶ 11.

19.In May, 2019, Andrew filed a claim for damage to the decks caused by the Ice Dams (the "Deck Claims"). *Id*. ¶ 12.

20.Decks and patios are not synonymous. Id. ¶ 13.

21.The Policy differentiates between decks, pavement, and patios, as stated on page 8 of the Policy (in a section dealing with collapse), which states "[l]oss to an awning, fence, patio, deck, pavement . . ." Ex. A to Mtn.

22.Defendant's own website refers to "paving" as being part of streets and roads. See Traveler's Website re Highway, Street & Road Contractors Insurance, attached hereto as Exhibit 1.

23.Defendant's own engineer, on page 2 of the report attached as exhibit E to Defendant's Motion, defines the decks as "porches" rather than "patios."

24.Defendant's own adjuster, Landon Webb, defined the structures at issue as decks rather than patios. Andrew Decl. ¶ 15.

24.Defendant's adjuster Landon Webb originally went to the Property to evaluate a hail damage claim. Id. ¶ 16.

26.While there, Andrew asked Mr. Webb about the damage to the decks and had him inspect it. Id. ¶ 17.

27.Andrew explained that there was ice damming on the decks on February 29, 2019 that caused the damage to the decks. Id. ¶ 18.

28.Landon Webb then stated policies don't typically cover patios around a pool or on the ground, but because the decks are elevated and built into the structure, they would be covered. Id. ¶ 19.

29.Landon Webb then went to his vehicle to review a handbook or manual addressing patios and policy exclusions, and then confirmed to Andrew that just patios on the ground were excluded, not decks. Id. ¶ 20.

30.Andrew then filed a claim for the Ice Dam damage to the decks. Id. ¶ 21.

31.Defendant's own claim notes and documents refer to the structures as "decks" as follows:

a. "WATER FROZE UNDERNEATH DECK, EXPANDED AND DAMAGED THE DECK." See THMI00052 (Capitalized in original);

b. "WATER FROZE UNDERNEATH DECK, EXPANDED AND DAMAGED THE DECK." See THMI00054 (Capitalized in original);

c. "WATER FROZE UNDERNEATH DECK, EXPANDED AND DAMAGED THE DECK." See THMI00060 (Capitalized in original);

d. "…his deck… the deck…the deck…decks or patios…..patio/deck…" See TMHI 0000061

e. "You presented a claim cracking (sic) on of (sic) the deck or patio." June 24, 2020 denial letter attached as C to the Motion.

The claim notes are attached hereto as Exhibit 2.

32.Defendant did not have an adjuster or anyone else physically inspect the decks in person other than Landon Webb. Andrew Decl. ¶ 22.

33.On June 3, 2019, Defendant closed the file on the Deck claim. See Claim Notes at THMI000058, attached hereto as Ex. 2.

34.On that same day, Defendant sent a denial letter to Andrew that indicated that the claim was being denied because the claim was for cracking and damage to a "patio," which Defendant claimed excluded from coverage, relying on the following exclusion:

COVERAGE A – DWELLING AND COVERAGE B OTHER STRUCTURES

1. We insure against risk of direct physical loss to property described in Coverages A and B.

2. We do not insure, however, for loss:

c. Caused by:

(2) Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:

(a) Fence, pavement, patio or swimming pool;

35.Defendant's internal claim notes dated June 3, 2019 referring to the basis for the denial even state that the structures are a "patio/deck" and that the claim was being denied because it involved a patio as follows:

Coverage reviewed for cause of loss.

Claim is for a patio/deck damage by freezing and expanding of water.

Policy is an HO-3 (10/06)

> Under this policy there is an exclusion for freezing, thawing, pressure, or weight of water or ice, whether driven by wind or not, to a fence, pavement, patio or swimming pool.
>
> Full denial of claim
>
> No other conditions or exclusions apply

THMI000061 (claim notes).

36.Defendant provided no reasoning for why Defendant had determined that the decks were "patios" rather than decks. Andrew Decl. ¶ 24.

37.Andrew called at least four times to attempt to get this explanation, and each time he was told that Defendant would look into it and call back with substantive information. Andrew Decl. ¶ 25.

38.But each time Defendant failed to call back, causing Andrew to call again. Andrew Decl. ¶ 26.

39.Defendant also failed and refused to conduct an onsite inspection. Andrew Decl. ¶ 27.

40.It took over a year to obtain a substantive response from Defendant. Andrew Decl. ¶ 28.

41.After Andrew's persistence, in June, 2020, Defendant sent a second letter that avoided the patio vs. deck issue altogether. Andrew Decl. ¶ 29-30.

42.In that letter, without having conducted an additional inspection or investigation of the claim, and after having marked in its claim notes that "no other conditions or exclusions apply" other than the "freezing, thawing, pressure or weight of water or ice . . . to a . . . patio …" exclusion, Defendant now claimed that the damage was Loss caused by either:

> (4) Constant or repeated seepage or leakage of water or steam, the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more . . .
> [or]
> (6) Any of the following:

(a) Wear and tear, marring, deterioration;
(f) Settling, shrinking, bulging or expansion, including resultant cracking, of bulkheads, pavements, patios, footings, foundations, walls, floor, roofs or ceilings."

43.But even to this day Defendant has never explained how it reached a conclusion that any of these exclusions apply or why any of these exclusions apply. Id. ¶ 31.

44.The Policy also provides for coverage to repair or remediate rot:

ADDITIONAL COVERAGES

. . .

The following coverages are additional insurance …

16. Limited "Fungi", Other Microbes or Rot Remediation
a. If a loss caused by a peril Insured Against results in . . . rot, we will pay for:
(1) Remediation of the … rot. This includes payment for the reasonable and necessary cost to:
(A) Remove the …rot from covered property or to repair, restore or replace that property; and
(B) Tear out and replace any part of the building as needed to gain access to the …rot…"

See Policy, attached as Ex. A to Def's Mtn.

45.After this second denial, Plaintiff hired a public adjuster, James Cox of Utah Public Adjusters. Cox. Decl. ¶ 7.

46.Mr. Cox concluded that the damage to the decks was caused by Ice Dams. Id. ¶ 8.

47.Mr. Cox conducted a visual inspection of the Property. Id. ¶ 9.

48.Mr. Cox considered other potential causes of loss, including long term water seepage, wear and tear, deterioration, mechanical breakdown, latent defect, or any quality in property that causes it to damage to destroy itself and concluded that these were not the causes of the loss. Id. ¶ 10.

49.Andrew, through his own personal observation, also observed the damaged was caused by the Ice Dams. Id. ¶ 11.

50.Mr. Cox's report is attached as Ex,. D to Def,'s Mtn.

51.Defendant, in its discovery responses, asserted that the components of the property at issue are "stamped concrete paving" and adjacent stairs and railing" as follows:

> **REQUEST FOR ADMISSION NO. 1**: Admit that component of the property at issue in the claim is a deck.
>
> **RESPONSE**: Denied. Plaintiff alleges damage to stamped concrete paving and adjacent stairs, and railing.

See Def's Responses to Pl.'s 1st Set of Combined Discovery attached hereto as Ex. 3.

ARGUMENT

A. Summary Judgment Standard

A party is entitled to summary judgment only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1039 (Utah 1991), as cited in *First American Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834 (Utah 1998). "Because summary judgment is a harsh remedy which deprives a person of a full trial of his case, [courts] will review the facts in the light most favorable to the party against whom summary judgment [is sought]." *Larson v. Wycoff Co.*, 624 P.25 1151, 1153 (Utah 1981). When reviewing a motion for summary judgment, the court must "view the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party." *Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993). "[S]ummary judgment should be granted when it clearly appears that there is no reasonable possibility that the party moved against will prevail." *Snyder v. Merkley*, 693 P.2d 64 (Utah 1984).

In *Jones v. Farmers Insurance Exchange*, 20112 UT 52, 286 P.3d 301 the Utah Supreme Court admonished that the factual-issue-as-to-the-claim's-validity standard for demonstrating

that an insurance claim is "fairly debatable" must be strictly applied at the summary judgment stage. *See id*. at 304. The Utah Supreme Court cautioned that the fairly-debatable defense is all but precluded on summary judgment where the alleged factual dispute as to coverage is premised not on conflicting evidence, but on the *quality* of the insured's claim, which by extension implicates the insurer's reasonableness in denying coverage. *See id.* at 304-05.

Under the insurer's implied covenant to act in good faith in its performance of the insurance contract, the insurer will "at the very least . . . investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim." Pugh v. N. Am. Warranty Servs., 2000 UT App 121, ¶ 2, 1 P.3d 570 (citing *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801 (Utah 1985)). "Whether the implied covenant of good faith performance was breached . . . is a fact-intensive inquiry, ordinarily left for the fact-finder. Id. at ¶ 23 (citing *Brown v. Weis*, 871 P.2d 552, 564-65 (Utah Ct. App. 1994)).

B. Burden of Proof and Standards Applicable to this Insurance Policy Interpretation Issue

The Policy at issue is an "all-risk" or "open perils" policy under which all perils are covered other than those that are excluded. Defendant therefore has a steep hill to climb to establish that it should prevail on summary judgment and has mis-stated the applicable burden by asserting that Andrew has to prove coverage. It is undisputed that the decks are covered under the Policy. The issue in this case is where there is a policy exclusion that takes them out of coverage.

An "insurer may exclude certain losses from coverage if it uses language which **clearly and unmistakably** communicates to the insured the specific circumstances under which the expected coverage will not be provided." *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1275 (Utah 1993) (emphasis added). "As with the provisions of the policy as a whole, so also with the

exceptions to the liability of the insured, the language must be construed so as to give the insurer the protection which he reasonably had a right to expect; and to that end any doubts, ambiguities and uncertainties arising out of the language used in the policy must be resolved in his favor." *LDS Hosp. v. Capitol Life Ins. Co*, 765 P.2d 857, 859 (Utah 1988)(internal citations omitted).

Defendant has the burden to establish the applicability of any exclusions to coverage. *Id*. "The policy should be interpreted in accordance with the way it would be understood by the average person purchasing insurance." *Id*. "Insurance contracts must be liberally construed in favor of policyholder or beneficiary thereof." *Id*. at n. 5 (citing 1A J. Appleman & J. Appleman, Insurance Law & Practice, § 360 (1981); *see also id*. vol. 13 at § 7401. "[P]rovisions that limit or exclude coverage should be strictly construed against the insurer." *USF&G v. Sandt*, 854 P.2d 519, 523 (Utah 1993).

There is nothing clear and unmistakable about how Defendant is attempting to construe the exclusions in the Policy. Even Defendant has not consistently asserted the applicable terms to the decks that were damaged. Defendant initially called them decks. Defendant's own adjuster looked at his handbook and told Andrew they were decks, not patios. Defendant's claim notes also refer to "decks." But then when Defendant decided to decline coverage, it referred to these structures as "patios" in an attempt to shoehorn them into an inapplicable exclusion.

Subsequently, after over a year of Andrew pestering Defendant for an explanation as to why they are patios and not decks, Defendant decided to start calling them "paving", a term that does not even exist in any of the Policy's exclusions, and started asserting that damage was caused by "years of exposure to the elements."

The inability and failure of Defendant to use a consistent term (rather than molding and

changing its terminology about the building components at issue at different points to meet the policy exclusions terminology for the particular exclusion that Defendant had decided to apply at that point in time) as well as Defendant's inability and failure to consistently cite a policy exclusion and state why it applies demonstrates that Defendant has not used language in its exclusions that "clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided." *Alf*, supra. If it were so clear and unmistakable, Defendant would not have abandoned the exclusion dealing with freezing and thawing water damage to patios and then take a "shotgun" approach of asserting numerous other exclusions, all of which would not be applicable simultaneously. Even in its motion, Defendant is unable to land on an exclusion that it asserts applies. It refers to the various exclusions (numbering in the tens if not over a hundred different potential combinations),[3] but provides no analysis for which exclusion applies. If the application of an exclusion were "clear and unmistakable," Defendant would and could have settled on one and sought to apply it. It has not done so, and because of that, Defendant's own arguments and characterizations demonstrate there is no exclusion that clearly and unmistakably" excludes the loss.

For example, was it freezing, thawing, pressure or weight of water or ice? Which one? And then did that one item damage a patio? Pavement? Something else? Likewise, was it wear and tear or deterioration? Those are not the same thing. If so, which one and why? Was it constant seepage? Constant leakage? Repeated seepage? Repeated leakage? Why is ice melting and freezing leakage? Why is ice melting and freezing seepage? What makes it repeated versus constant? Did water start leaking at some point and, if so, what did it leak from? Did water seep at some point and, if so, what did it seep from? Was it a mechanical breakdown? Or a latent

[3]

defect? Or perhaps an inherent vice? What about these caused the building components to damage or destroy themselves? Was it settling, shrinking, bulging, or expansion? Those are mutually exclusive.

It is not Andrew's obligation or the Court's obligation to guess as to which one may apply and how, This shotgun approach does not work in the realm of attempting to apply policy exclusions—particularly on summary judgment. Defendant has show there is no exclusion that clearly and unmistakably applies, both by its lack of analysis and also by its assertion of mutually exclusive and numerous exclusions that could not all apply—while ignoring that the clear exclusion that could potentially apply about freezing and thawing ice does not apply to the decks because they are not patios.

C. **The Policy Exclusion Cited in the First Denial Letter Is Inapplicable as a Matter of Law, or Alternatively, There is a Disputed Issue of Fact Regarding Its Applicability**

Defendant's denial, as stated in the First Denial Letter, dated June 3, 2019, is based on the structures being patios rather than decks. Defendant cited the following exclusion in its reference to the damage being to patios:

> **COVERAGE A – DWELLING AND COVERAGE B OTHER STRUCTURES**
>
> **1.** We insure against risk of direct physical loss to property described in Coverages A and B.
>
> **2.** We do not insure, however, for loss:
> **c.** Caused by:
>
> **(2)** Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:
>
> **(a)** Fence, pavement, patio or swimming pool;

In order to make this exclusion apply, Defendant has to establish that the building damaged building components are a "patio."

These are not patios. Defendant has abandoned the patio exclusion, as reflected by its discovery responses:

> **REQUEST FOR ADMISSION NO. 1**: Admit that component of the property at issue in the claim is a deck.
> **RESPONSE**: Denied. Plaintiff alleges damage to stamped concrete paving and adjacent stairs, and railing.
>
> **INTERROGATORY NO. 7:** State whether you contend the component of the property at issue is a deck or a patio and why you assert it is the one rather than the other.
> **ANSWER**: Travelers objects to this Interrogatory as vague, ambiguous, and unrelated to the claims and defenses asserted in this matter. The term Deck does not appear within the Policy. Further, the damage in question is to concrete pavement. The damage alleged by Plaintiff is not covered for the reasons set forth in Travelers denial letter dated June 24, 2020 which is incorporated by reference herein.

So even though Defendant based the denial on the damage being to "patios," it has now pivoted in this lawsuit to the damage being to "pavement." Defendant has never used the term "pavement" in its claim notes or its moving documents (other than a passing citation to this entire exclusion). Defendant does not even use the term "pavement" in its discovery responses, instead referring to "concrete paving." Likewise, in its denial letters, Defendant does not assert that it is pavement at issue. In the Initial Denial Letter, Defendant refers to "patios." In the Second Denial Letter, Defendant refers to "deck or patio." Defendant's expert report refers to "stamped concrete." There is no reference to "pavement" in any of these materials in order to bring this exclusion into application. It is the Defendant's burden to establish the applicability of an exclusion, and yet Defendant has not provided any support (or even analysis) in the summary judgment record for a finding that the materials at issue are "pavement."

Further, the property components at issue are not pavement. The damaged components of the decks are wood, metal, and a decorative composite surface material. The only component

discussed by Defendant is the decorative top coating, which Defendant describes in differing terms as "concrete" and "concrete paving." The Policy does not include the term "concrete" in the exlcusions asserted by Defendant.

Although there is no provided analysis, it may be possible Defendant is now trying to assert the decks are pavement (or at least the top coating it—it is unclear because Defendant never develops this assertion with any detail). But pavement is something that can be driven or parked on, such as a street or driveway. Utah statutes treat the term pavement in this same manner. *See, e.g.* Utah Code Ann. § 41-a-305(5)(b): "Any stop required shall be made at a sign or marking on the highway pavement indicating where the stop shall be made, but, in the absence of any sign or marking, the stop shall be made at the signal."; Utah Code Ann. § 17B-1-103(3); Utah Code Ann. § 41-60-102(29): "'Island' means an area between traffic lanes or at an intersection for control of vehicle movements or for pedestrian refuge designated by: (a) pavement markings, which may include an area designated by two solid yellow lines surrounding the perimeter of the are…"); Utah Code Ann. § 72-7-705(3)(c)(i)(A) ("[S]igns may not be located on an interstate highway or limited access highway on the primary system within 500 feet of an interchange, or intersection at grade, or rest area along the interstate highway or freeway from the sign to the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way."

The American Concrete Institute defines "pavement" as "a layer of concrete on such areas as roads, sidewalks, canals, playgrounds, and those used for storage or parking."[4] Likewise, Utah case law interprets "pavement" in this same manner. *See, e.g., Booth v. Midvale City*, 55 Utah 220, 184 P. 799 (Utah 1919("City had the power to enter into a contract with a county for

[4] https://www.concrete.org/topicsinconcrete/topicdetail/Pavement,%20Concrete?search=Pavement,%20Concret

the pavement of a street whereby they would jointly construct the pavement, with the city paying one-third of the cost of improvement and the county the remaining expense."). Common sense dictates that the decks are not pavement, but this is supported by Utah statutes, case law, and authorities on the definition of concrete vs. pavement.

If Defendant wanted to exclude decks from coverage for losses caused by freezing and thawing water, it could and should have included decks in the policy exclusion (just like it did in the "collapse" exclusion of the Policy. It likewise could have excluded damages to all components of the property for freezing and thawing water. It drafted the policy and chose to only exclude the enumerated items. g

Finally, and in the alternative, there is a disputed issue of fact regarding whether the damage was to "pavement." Andrew has submitted affidavits asserting that the materials involved in the loss were not pavement. And it is undisputed that the damaged wood and metal are not pavement. Therefore, there is also a disputed issue of material fact precluding summary judgment if the Court found that the decorative composite topping were pavement.

C. The Policy Exclusion Cited in the Second Denial Letter Is Inapplicable as a Matter of Law, or Alternatively, There is a Disputed Issue of Fact Regarding Its Applicability

The exclusions asserted by Defendant in the Second Denial Letter (and in its motion) do not support summary judgment for three reasons: (1) Defendant is precluded from asserting new exclusions not cited in its Initial Denial Letter; (2) these exclusions do not apply to Andrew's claim; or (3) there is a disputed issue of fact regarding the applicability of the exclusions.

i. Defendant Is Precluded from Asserting New Exclusions Not In the Initial Denial Letter

Defendant is not entitled to rely on new exclusions that it did not include in its initial denial letter (which was only based on the structures being patios). Utah Admin. Code § R590-190-10, titled "Minimum Standards for Prompt, Fair and Equitable Settlements," states:

> (2) Within 30-days after receipt by the insurer of a properly executed proof of loss, the insurer shall complete its investigation of the claim and the first party claimant shall be advised of the acceptance or denial of the claim by the insurer unless the investigation cannot be reasonably completed within that time. If the insurer needs more time to determine whether a first party claim should be accepted or denied, it shall so notify the first party claimant within 30-days after receipt of the proofs of loss, giving the reasons more time is needed. If the investigation remains incomplete, the insurer shall, within 45-days after sending the initial notification and within every 45-days thereafter, send to the first party claimant a letter setting forth the reasons additional time is needed for the investigation, unless the first party claimant is represented by legal counsel or public adjuster. **Any basis for the denial of a claim shall be noted in the insurers claim file and must be communicated promptly and in writing to the first party claimant. Insurers are prohibited from denying a claim on the grounds of a specific provision, condition, or exclusion unless reference to such provision, condition or exclusion is included in the denial.**

Utah Admin. Code § R590-190-10(2) (emphasis added). The only exclusion included in the Initial Denial Letter when it made its claims decision was the "patio" exclusion discussed above, which Defendant has acknowledged does not apply.

ii. The "Constant or Repeated Seepage or Leakage of Water" Exclusion Does Not Apply

Defendant now attempts to apply the following exclusion:

> 2. We do not insure, however, for loss:
>
> C. Caused by:
>
> (4) Constant or repeated seepage or leakage of water or steam, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more . . .

Defendant presets no admissible evidence that there was constant or repeated seepage or leakage that damaged the decks. Where did water leak from? Where did it seep from? Again, this has to be damage caused by water or steam. Defendant presents no evidence that water or steam

damaged the decorative composite topping. So what is Defendant's theory for how water caused that topping to be damaged? There is no analysis or evidence in the summary judgment record to support this exclusion.

Defendant's only potential evidence about this is its inadmissible unsworn expert report that opines in uncertain language that the damage in the photographs (presumably to the composite topping) was "most likely due to age-related deterioration of the concrete, freeze/thaw cycles, expansion/contraction, and shrinkage of the concrete." This does not say anything about leakage or seepage. Indeed, Defendant's expert's report about damage being caused by freeze/thaw cycles undermines Defendant's arguments, as damage caused by freezing and thawing is only excluded for patios.

Likewise, even if this exclusion applied, it only applies to damage caused after the initial 14 days of leakage or seepage. Andrew has presented evidence that the ice caused damage that evidenced within less than 14 days. For example, in *Hicks v. American Integrity Insurance Company*, No. 5D17-1282 (Fla. 5th DCA Feb. 23, 2018), the court ruled that the policy language did not preclude coverage for damage caused during the first thirteen days of a leak. In *Hicks*, the insured was out of town when the leak occurred, and he did not discover it until he returned to the property weeks later. He filed a claim under his "all-risks" policy with American Integrity Insurance Company of Florida ("American Integrity"), but his claim was denied based on American Integrity's expert opinion that the leak had been present for five weeks or more. The insured sued American Integrity for breach of contract. The insured provided a report prepared by a forensic general contractor that reflected the amount of damage that was believed to have been caused within the first thirteen days of the leak. The trial court ruled in favor of American Integrity, stating to the insured, "basically, you're asking [this court] to say whether the policy

covered the loss in the first 13 days…It might, but I'm not so sure that the time frame of these particular facts would allow for that determination."

The insured appealed the trial court's determination, and the appellate court reversed, stating that an insurance policy excluding losses caused by constant or repeated leakage or seepage over a period of fourteen days of more did, "not unambiguously exclude losses caused by leakage or seepage over a period of thirteen days or less." Since ambiguous language in insurance policies is interpreted in the light most favorable to the insured, it must be interpreted in favor of coverage for the loss. The appellate court further remarked that once an insured demonstrates that a loss is within the policy terms, the burden shifts to the insurer to prove that a loss arose from an excluded cause.[3]

The appellate court instructed the trial court to enter partial summary judgment in favor of the insured on the sole issue of coverage within the first thirteen days of the leak, with the extent of the damage to be determined at trial. The appellate court also determined that for damage occurring after the first thirteen days, the burden was placed on American Integrity to prove that specific damage was sustained after the thirteenth day, and therefore excluded by the language of the policy.

Defendant has not provided this analysis or evidence, and therefore its summary judgment motion on this exclusion fails.

iii. The "Wear and Tear, Marring, Deterioration" Exclusion Does Not Apply

Defendant also attempts to apply the following exclusion:

4. We do not insure, however, for loss:

C. Caused by:

(5) Any of the following:

(a) Wear and tear, marring, deterioration . . .

Defendant never explains how wear and tear caused the loss. Wear and tear, in this instance, is a potential condition of the deck, not a cause of the loss. Defendant must distinguish between the condition of the property post-loss versus the cause of the loss.

iv. The "Mechanical Breakdown, Latent Defect, Inherent Vice, or Any Quality in Property That Causes It To Damage or Destroy Itself" Exclusion Does Not Apply

Defendant also attempts to apply the following exclusion:

4. We do not insure, however, for loss:

C. Caused by:

(5) Any of the following:

(b) Mechanical breakdown, latent defect, inherent vice, or any quality in property that causes it to damage or destroy itself;

. . .

Defendant never explains what mechanical breakdown, latent defect, inherent vice, or any quality in the property that caused it to damage or destroy itself. Defendant must distinguish between the condition of the property post-loss versus the cause of the loss, but has failed to do so.

v. The "Settling, Shrinking, etc." Exclusion Does Not Apply

Defendant also attempts to apply the following exclusion:

4. We do not insure, however, for loss:

C. Caused by:

(5) Any of the following:

…

(f) Settling, shrinking, bulging or expansion, including resultant cracking, of bulkheads, pavements, patios, footings, foundations, walls, floors, roofs or ceilings

Defendant never articulated which of these mutually exclusive causes caused damage. Defendant's expert report refers to "expansion/contraction" or shrinkage in the concrete, but does not say what expanded or contracted or how it expanded or contracted or how he concluded that there was shrinkage. He merely looked at photos that were taken a year and a half after the loss. This statement in the expert report is completely conclusory and speculative.

Further, the expansion or contraction or shrinking has to be the cause of damage. But Defendant's expert has only stated that there was a condition of deterioration (again, a condition, not a cause of damage). And Defendant's report is completely silent as to what damaged anything other than the decorative composite topping. Ice freezing and thawing caused the damage. A deteriorated state is the result of the damage caused by the ice freezing and thawing.

vi. The Ensuing Loss Provision Applies Even if the Asserted Exclusions Applied

> The Policy, after the exclusions referenced, states:
>
> Under items 1.b and c, any ensuing loss to property described in Coverages A, B and C not excluded by any other provision in this policy is covered.

Ex. A to Mtn. Even if the decorative composite topping were not covered under the exclusions cited by Defendant, the resulting damage to the sub-stricture would be covered under this provision.

D. Defendant Has Not and Cannot Meet Its Summary Judgment Burden on Plaintiffs' Second Cause of Action for Breach of Duty of Good Faith and Fair Dealing Based on Defendant's Fairly Debatable Defense

Defendant failed to provide evidence to support its position that its decision for Plaintiff's loss was reasonable when decided. The fairly debatable standard is evaluated in the context of the information the insurance company had at the time it made the claim decision. Defendant has presented no evidence of the information it had in hand (or what it did to evaluate or adjust the claim) leading up to its initial claims decision. Defendant is attempting to justify its claim

decision based on its trial expert's report, which is not proper.

Wheeler v. Allstate Insurance, 687 F. App'x 757, 774-75 (10th Cir. 2017) discussed a situation highly analogous to the case before this court as follows:

> Allstate asserts that the "fairly debatable" defense bars Mr. Wheeler's bad faith claim because, at the very least, the evidence presented here "create[s] a factual issue as to the validity of [Mr. Wheeler]'s water loss claim." *See also Prince*, 56 P.3d at 535 ("[I]f the evidence presented creates a factual issue as to the claim's validity, there exists a debatable reason for denial, . . . eliminating the bad faith claim." (alteration in original) (internal quotation marks omitted)). But Allstate misapprehends the Utah precedent addressing the fairly-debatable defense.
>
> In *Jones v. Farmers Insurance Exchange*, the Utah Supreme Court admonished that the factual-issue-as-to-the-claim's-validity standard for demonstrating that an insurance claim is "fairly debatable" must be strictly applied at the summary judgment stage. *See* 286 P.3d at 304. *Jones* involved a plaintiff who submitted a claim to his insurer seeking $14,000 in dental treatment for an injury allegedly sustained in a car crash that occurred four years earlier. *Id.* at 302-03. The plaintiff's dentist sent the insurer a report in which the dentist attributed the plaintiff's injury (cracked teeth) to the car crash. *Id.* The insurer, after noting that the plaintiff's emergency-room report showed no facial trauma at the time of the accident and that the insurer "would have expected multiple fractured teeth to cause some pain or discomfort during the 4 years," denied the claim. *Id.* at 303. The plaintiff sued, and the insurer moved for summary judgment on the plaintiff's bad faith cause of action, arguing that the plaintiff's insurance claim was fairly debatable. *Id.* The trial court granted the insurer's motion, but the Utah Supreme Court reversed.
>
> The court cautioned that the fairly-debatable defense is all but precluded on summary judgment where the alleged factual dispute as to coverage is premised not on conflicting evidence, but on the *quality* of the insured's claim, which by extension implicates the insurer's reasonableness in denying coverage. *See id.* at 304-05. In such situations, summary judgment is proper only where "reasonable minds could not differ as to whether the insurer's conduct measured up to the required standard of care." *Id.* at 305. The Utah Supreme Court explained that to justify application of the fairly-debatable defense at the summary judgment stage, there must be a legitimate factual dispute on which coverage under the insurance policy hinges and on which the insurer *actually possessed* conflicting evidence when it denied the claim. *See id.* at 305-06. The *Jones* court identified *Prince* and *Callioux v. Progressive Insurance Co.*, 745 P.2d 838 (Utah Ct. App. 1987), as cases in point.
>
> Comparing the facts of these cases to the facts here, we do not believe Mr. Wheeler's insurance claim was "fairly debatable" as a matter of law, so as to

> justify summary judgment on the bad faith claim. While we agree with Allstate that coverage under the policy hinges on a genuine dispute of fact on which the parties have submitted evidence, none of that evidence was in hand *at the time the claim was denied*. Thus, unlike the insurers in *Prince* and *Callioux*, both of which denied insureds' claims *after* receiving expert reports indicating there was no coverage, *see Prince*, 56 P.3d at 529; *Callioux*, 745 P.2d at 839, 842, Allstate did not have any objective evidence indicating there was no coverage at the time it denied the claim. Thus, *Jones* instructs that summary judgment is not appropriate unless "reasonable minds could not differ" on whether Allstate complied with its duties of diligent investigation, fair evaluation, and reasonable and prompt disposition. 286 P.3d at 305. And as discussed above, we cannot conclude the evidence on these questions is so lopsided that they may be determined as a matter of law.

The claim being fairly debatable is an affirmative defense on which Defendant has the burden of proof. But it has not presented any evidence that its coverage position was fairly debatable. On that basis alone, Defendant's motion fails.

An insurance company must do more than merely deny a claim to establish that a claim is fairly debatable. Otherwise, every denied claim would be fairly debatable and there would be no need to prove this defense, since the defense would be established by any disagreement with the insured. The disagreement must be reasonable, and Defendant has provided no basis upon which the Court can assess the reasonableness of the Defendant's position, much less that this issue is undisputed for purposes of summary judgment. Because Defendant has not submitted any admissible evidence to establish this defense, and because the evidence it did submit fails to establish this defense, Defendant's fairly debatable defense fails on summary judgment.

Indeed, the only evidence in the summary judgment record is the following:

(1) Defendant's own adjuster acknowledged that the loss was to decks, not patios;

(2) Defendant's own claim notes refer to the structures as decks, not patios, and yet Defendant continued to attempt to apply the patio exclusion;

(3) For over a year, Defendant failed and refused to explain why the structures were

being considered patios and not decks;

(4) Defendant failed to respond to numerous, repeated inquiries.

(5) Defendant failed to conduct an in person inspection; and

(6) The report upon which the motion is based indicates the expert did not inspect or evaluate anything other than photos of the decorative composite surface, i.e there has been no review of the other building components and damage to them.

In summary, Defendant has not submitted evidence to establish that its claims was fairly debatable, and therefore its motion on this defense must be denied. Alternatively, there is a disputed issue of material fact regarding whether the claims decision was fairly debatable (starting with the undisputed fact that Defendant's own adjuster found covered damage).

E. Defendant Breached the Implied Covenant of Good Faith and Fair Dealing, or There Is at Least a Disputed Material Fact Regarding Its Breach

Defendant improperly attempts to conflate a coverage decision with its duty to properly and diligently investigate the facts to enable it to determine whether a claim is valid, fairly evaluate the claim, and thereafter act promptly and reasonably in rejecting or settling the claim. Defendant's position is that if it has a reasonable basis for its coverage decision (which is disputed and should be the subject of a disputed issue of fact), there can be no breach of the implied covenant of good faith and fair dealing, regardless of whether it diligently investigates the facts to enable it to determine whether a claim is valid, fairly evaluates the claim, and thereafter acted promptly and reasonably in rejecting or settling the claim. This is contrary to Utah law.

Defendant violated basic claims handling laws in its handling of the Plaintiff's claim. Utah Admin. Code. § R590-190 provides the "minimum standards for the investigation and disposition of property . . . claims arising under contracts or certificates issued to residents of the

State of Utah . . . These standards include fair and rapid settlement of claims, protection for claimants under insurance policies from unfair claims adjustment practices and promotion of professional competence of those engaged in claim adjusting." Utah Admin. Code § R590-19-2. While this code provision does not create a private cause of action based on strict liability, it does establish standards that should not be violated when a claim is being handled. Defendant breached these standards, as well as general claim handling standards based on the declaration submitted with this opposition by Plaintiff's public adjuster.

Utah Public Adjusters is a licensed public adjuster in the State of Utah that assists insureds with property damage claims. Utah Public Adjusters inspected the property and determined that the decks had been extensively damaged by ice. Utah Public Adjusters personally and physically inspected the property. Because of the difference in how Utah Public Adjusters conducted its inspection compared to how Defnedant conducted its inspection (a superficial, virtual review), Utah Public Adjusters reviewed areas of the Property not inspected by Defendant. Utah Public Adjusters presented a detailed photo report (the "UPA Report") to Bear River showing the damage to the decks.

Defendant refused to conduct another inspection based on the new information and evidence damage presented by Utah Public Adjusters. Defendant also refused to provide a substantive response to the information presented by Utah Public Adjusters. Defendant refused to indicate why the damage depicted in the photos in the UPA Report was not covered.

When an insurance company is presented with new claim information, it has an obligation to substantively evaluate and respond to that new information. When an insurance company is presented with new claim information, it has an obligation to evaluate and substantively respond to the insured about that information within 15 days in the State of Utah.

Utah Admin. Code §§ R590-190-6; R590-190-9(16). Defendant did not comply with this standard of care, as it failed to provide any substantive response to the UPA Report (or the Andrew's repeated inquiries). An insurance company is required provide a substantive response to a claimant whenever a response has been requested within 15 days in the State of Utah. Utah Admin. Code §§ R590-190-6; R590-190-9(16).

No reasonable adjuster would conclude the structures at issue are patios—even Defendant has abandoned this theory that it asserted for more than a year. Finally, the most egregious breach of the duty of good faith and fair dealing is Defendant's adjuster reviewing the Property, concluding there was covered damage, and then Defendant taking a different position and refusing to explain it to Andrew. SO not only is there a complete lack of evidence that the claim was fairly debatable, but the only evidence in the record establishes that it was not fairly debatable.

CONCLUSION

For these reasons, Plaintiff respectfully requests that the Court deny Defendant's Motion for Summary Judgment.

DATED this 25th day of March, 2022.

SAGE LAW PARTNERS, LLC

/s/ Ryan M. Nord
Ryan M. Nord
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2022, a true and correct copy of the foregoing document was filed with the Court via notice of electronic service and served by the method indicated below, to the following:

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