

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:25-cv-01009-REB-KAS

BWB INVESTMENT COMPANY, LLC,

Plaintiff,

v.

SCOTTSDALE INSURANCE COMPANY,

Defendant.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, BWB Investment Company, LLC (“BWB”), by and through its attorneys, Bradley A. Levin and Gideon S. Irving of LEVIN SITCOFF PC, hereby submits the following Motion for Partial Summary Judgment, and in support thereof, states as follows:

I. INTRODUCTION

Under cover of night, burglars destroyed BWB’s warehouse by breaking into its walls, electrical boxes, and other building equipment, and then severing (and ultimately stealing) the copper contained inside. BWB filed a claim under its commercial property insurance policy issued by Scottsdale Insurance Company (“Scottsdale”). The policy broadly covers “willful and malicious damage to, or destruction of” property. Yet, rather than affording coverage under this provision, Scottsdale deprived BWB of coverage for the warehouse’s substantial destruction by improperly relying on a narrow policy limitation for damage “caused by or resulting from theft.”

Scottsdale’s improper expansion of this “Theft Limitation” plays into BWB’s three legal claims in this matter. This Motion for Partial Summary Judgment presents just one

issue: when properly interpreted, does the policy's Theft Limitation exclude coverage for the property damage to BWB's warehouse? The answer is no.

II. UNDISPUTED FACTS

The Incident

1. During the night of approximately November 4, 2024, unknown burglars damaged BWB's warehouse (the "Incident"). **Ex. 3, BWB Damage Email.**

2. During the Incident, the burglars broke into electrical panels, drywall, ceilings, conduits, wire coverings, drinking fountains, air conditioners, fuse boxes, and other fixtures (both interior and exterior) of the warehouse. **Ex. 3.**

3. During the Incident, the burglars severed substantial amounts of copper from the building, rendering inoperable the building's electrical, HVAC, mechanical, and plumbing systems. **Ex. 3.** As a result, the warehouse became unusable. **Ex. 3.**

4. The burglars ultimately stole substantially all of the severed copper. **Ex. 3.**

The Policy

5. Prior to the Incident, Scottsdale issued an insurance policy to BWB, Policy No. CPS8080139, with effective dates of October 1, 2024, to October 1, 2025 (the "Policy") for a commercial warehouse located at 4595 E. 46th Avenue, Denver, Colorado 80216 (the "Property"). See **Sched. Ord.**, ECF No. 23, at 4.

6. The Policy covers "direct physical loss or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss," including Vandalism, meaning "willful and malicious damage to, or destruction of" the Property. **Ex. 1, Policy** at 91, 119.

The Insurance Claim

7. After BWB promptly instituted an insurance claim, Scottsdale, by letter

dated November 11, 2024, denied coverage for the claim based on the Theft Limitation:

Based on our investigation and review of your policy contract, Scottsdale Insurance Company's opinion is this loss was caused by theft. We must respectfully advise you that your policy number CPS8080139 does not provide coverage for this loss.

Ex. 2, Scottsdale Denial Letter at 1; see **Sched. Ord.**, ECF No. 23, at 3.

8. On November 12, 2024, BWB's representatives provided more information to representatives of Scottsdale, explaining the damage and characterizing it as "the organized destruction of the building." **Ex. 3.**

9. By letter dated December 27, 2024, BWB, through counsel, appealed Scottsdale's coverage decision. **Ex. 4, Appeal Letter.** In response, on January 8, 2025, Scottsdale maintained its "no coverage" position. **Ex. 5, Scottsdale Denial Email.**

III. LEGAL STANDARDS

A. Summary Judgment

The Court may grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Partial summary judgment, by which a party seeks judgment on only part of a claim, is specifically authorized by Fed. R. Civ. P. 56(a). "Under Colorado law, the interpretation of an insurance policy, like any written contract, presents a question of law and, therefore, is appropriate for summary judgment." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Fed. Ins. Co.*, 213 F. Supp. 3d 1333, 1340 (D. Colo. 2016) (quotations omitted).

B. Colorado Law of Insurance Policy Interpretation

In a diversity case like this, "the Court applies Colorado law and interprets

insurance policies as a Colorado court would.” *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 453 F.3d 1281, 1286 (10th Cir. 2006). At their most basic level, insurance policies are contracts that are interpreted according to familiar principles of contract interpretation, giving effect to the plain meaning of words and seeking to harmonize all provisions without rendering any meaningless. *Greystone Const., Inc. v. Natl. Fire & Marine Ins. Co.*, 661 F.3d 1272, 1283-84 (10th Cir. 2011). As is true with other contracts, insurance policies are construed against the insurance companies who draft them. See *Beeson v. State Auto. and Cas. Underwriters*, 508 P.2d 402, 406 (Colo. App. 1973).

However, insurance contracts differ from other contracts in four respects: (1) there is often a disparity in bargaining power between the insurance company and the insured; (2) insurance policies are generally imposed on a take-it-or-leave-it basis; (3) insureds “are generally not highly sophisticated in the art of reading insurance policies;” and (4) insurance is a unique product purchased by insureds to protect themselves against financial calamity rather than to secure commercial advantage. *Bailey v. Lincoln General Ins. Co.*, 255 P.3d 1039, 1049 (Colo. 2011). Because of these disparities, “courts have a heightened duty to scrutinize [insurance policies] closely for provisions that unduly compromise the insured’s interests.” *Id.* (quotation omitted).

To carry out this heightened scrutiny, coverage provisions must be liberally construed in favor of the insured to provide the broadest possible coverage. *Tepe v. Rocky Mountain Hosp. & Med. Servs.*, 893 P.2d 1323, 1327 (Colo. App. 1994). Accordingly, exclusions are strictly construed against the insurer. *J & S Enters., Inc. v. Continental Cas. Co.*, 825 P.2d 1020, 1023 (Colo. App. 1991). At all times, policy terms are to be interpreted from the perspective of an ordinary person, not an expert in law or

insurance. *Simon v. Shelter Gen. Ins. Co.*, 842 P.2d 236, 240 (Colo. 1992); *Allstate Ins. Co. v. Juniel*, 931 P.2d 511, 516 (Colo. App. 1996).

A policy provision is ambiguous if, from the perspective of an ordinary reader, it is reasonably susceptible to more than one meaning. *Bailey*, 255 P.3d at 1051-52. The Court must construe any ambiguities in the policy against the insurer and in favor of coverage for the insured. *Cotter Corp.*, 90 P.3d at 820 (Colo. 2004).

C. Shifting Burdens in Insurance Coverage Disputes

Determining insurance coverage typically involves a three-step, burden shifting process. See *Leprino*, 453 F. 3d at 1287. Initially, the insured bears the burden of demonstrating coverage under the policy. *Rodriguez v. Safeco Ins. Co. of Am.*, 821 P.2d 849, 853 (Colo. App. 1991). The burden then shifts to the insurer to prove the applicability of a limitation or an exclusion from coverage. *Id.* If an insurer carries its burden to show that an exclusion applies, the burden shifts back to the insured to restore coverage by proving the applicability of an exception to the exclusion. *Id.*

IV. ARGUMENT

The Court is being asked to decide whether Scottsdale can properly rely on the Policy's Theft Limitation to deny coverage for the destruction of BWB's warehouse. The dispositive question is: can Scottsdale meet its burden to prove that its interpretation of the Policy's Theft Limitation is the only reasonable one? The answer is no.

A. The Incident's Property Damage is Within the Policy's Vandalism Coverage and is not Excluded by the Policy's Theft Limitation.

1. *The plain language of the Policy's broad Vandalism coverage encompasses the warehouse damage incurred during the Incident.*

BWB bears the initial burden to demonstrate that the Incident's property damage

comes within the Policy’s grant of coverage for damage caused by Vandalism. *Rodriguez*, 821 P.2d at 853. The Policy’s broad Vandalism coverage provides:

A. Covered Causes Of Loss
8. Vandalism, meaning willful and malicious damage to, or destruction of, the described property.

Ex. 1 at 119 (highlight added). BWB meets this burden here.

The Policy’s coverage provisions are construed liberally to afford BWB the broadest possible coverage. *Tepe*, 893 P.2d at 1327. Specifically, undefined language is interpreted according to its plain meaning as understood by an ordinary person and is construed against Scottsdale. *Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 502 (Colo. 2004). In this instance, the plain meaning of Vandalism is best approached in two parts.

First, Vandalism encompasses “damage to, or destruction of, the described property,” which clearly applies to the substantial destruction of BWB’s warehouse. Second, the damage or destruction must have been “willful and malicious,” which may be inferred from the act itself. *Herod v. Colorado Farm Bureau Mutual Insurance Co.*, 928 P.2d 834, 836, 838 (Colo. App. 1996). The intentional, wanton, and unauthorized dismantling of BWB’s warehouse under cover of night is a textbook example of “willful and malicious.” Accordingly, the building damage incurred during the Incident is within the Policy’s broad Vandalism coverage.

2. *Scottsdale cannot meet its heavy burden to show that the narrow Theft Limitation excludes all Vandalism coverage for the Incident.*

Because the Incident falls within the Policy’s broad Vandalism coverage, it’s Scottsdale’s burden to prove the applicability of the Theft Limitation, which provides:

8. Vandalism, meaning willful and malicious damage to, or destruction of, the described property.

We will not pay for loss or damage caused by or resulting from theft, except

Ex. 1 at 119 (highlight added). Scottsdale’s burden here is twofold, it must establish: (1) that the loss is solely and entirely within the Theft Limitation, and (2) that the Theft Limitation isn’t subject to any other reasonable interpretation. *AIMCO*, 593 F. 3d at 1197 (quoting *Cotter*, 90 P. 3d at 829); *Hecla Min. Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1090 (Colo. 1991). It cannot do so.

As with all coverage-limiting language, the Court should take caution when interpreting the Theft Limitation. Standardized insurance agreements, like the Policy, pose distinct risks to the public because they may confusingly or surreptitiously limit coverage such that ordinary customers may “reasonably conclude that [they are] protected against most, if not all, risks,” when in fact they may not be. *Bailey*, 255 P.3d at 1049. Partly because of this danger, “exceptions, limitations and exclusions to insuring agreements require a narrow construction on the theory that the insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations upon that coverage in clear and explicit terms.” *Koncilja v. Trinity Universal Ins. Co.*, 528 P.2d 939, 941 (Colo. App. 1974), *overruled on other grounds*, *Kane v. Royal Ins. Co. of Am.*, 768 P.2d 678 (Colo. 1989).

- (a) According to its plain meaning, the Theft Limitation only applies to stealing personal property, not real property.

“[A]bsent indication by the parties to the contrary, a policy’s language must be construed in accordance with the plain meaning of the words used.” *Greystone*, 661 F.3d

at 1283. Scottsdale didn't define, or otherwise indicate any special meaning of, "theft." Accordingly, "theft" is interpreted according to its plain and ordinary meaning as understood by an ordinary person (and not a lawyer or an expert in insurance). *Simon*, 842 P.2d at 240; *Juniel*, 931 P.2d at 516. One widely-accepted method to ascertain a policy term's plain meaning is to consult a dictionary. See *Thompson*, 84 P.3d 496 at 502.

According to its plain, dictionary meaning, "theft" applies only to personal property, not real property.¹ This plain meaning holds true even if other dictionary definitions were to include real property under the umbrella of "theft," because that would imply ambiguity, which must be resolved in favor of BWB's interpretation. *Cotter Corp.*, 90 P.3d at 820 (Colo. 2004). Plainly, "personal property," which can be thieved, is "property other than real property consisting of things temporary or movable."² Meanwhile, "real property," which cannot be thieved, is "land, including the land itself and any structures, fixtures, and rights associated with it" rather than "personal possessions."³ In short, only movable, personal property, not immovable real property like building structures and fixtures can

¹ *E.g.*, **Theft**, Black's Law Dictionary (12th ed. 2024) ("[t]he wrongful taking and removing of another's personal property with the intent of depriving the true owner of it"); **Theft**, Cornell Law School Legal Information Institute, accessed June 26, 2025, <https://www.law.cornell.edu/wex/theft> ("the taking of another person's personal property with the intent of depriving that person of the use of their property."); **Theft**, Legal Dictionary, accessed June 26, 2025, <https://dictionary.law.com/Default.aspx?selected=2119> ("the generic term for all crimes in which a person intentionally and fraudulently takes personal property of another without permission or consent and with the intent to convert it to the taker's use (including potential sale)."); **Theft**, Merriam-Webster, accessed June 26, 2025, <https://www.merriam-webster.com/dictionary/theft>, ("the act of stealing, *specifically* felonious taking and removing of personal property with intent to deprive the rightful owner of it.") (all underlined emphases added).

² **Personal property**, Merriam-Webster, accessed June 26, 2025, <https://www.merriam-webster.com/dictionary/personal%20property>; see also **Property**, Black's Law Dictionary (12th ed. 2024) ("[a]ny movable or intangible thing that is . . . not classified as real property.").

³ **Real property**, Cornell Law School Legal Information Institute, accessed June 26, 2025, https://www.law.cornell.edu/wex/personal_property; **Real property**, Collins English Dictionary, accessed June 26, 2025, <https://www.collinsdictionary.com/us/dictionary/english/real-property>; accord **Property**, Black's Law Dictionary (12th ed. 2024).

be the object of “theft.” Therefore, because only affixed, real property, *i.e.*, fixtures, equipment, and building system components, was stolen from BWB’s warehouse, no “theft” occurred and the Theft Limitation does not apply to the Incident.

- (b) Even if the Theft Limitation applies, its ambiguous causal language does not exclude coverage for building damage.

If the Theft Limitation applies at all, the Policy’s causal language, “caused by or resulting from theft,” substantially limits its application to only exclude the stolen copper.

Due to the unique nature of insurance contracts, in which insureds with comparatively low bargaining power seek protection against calamity from an insurer who drafts the policy, an insurer must “clearly express” limitations on coverage in the policy. *Ryder Truck Rental Inc. v. Guar. Nat. Ins.*, 770 P.2d 1380, 1382 (Colo. App. 1989). If a limitation is susceptible to more than one reasonable interpretation, it’s ambiguous and must be construed in favor of coverage and against the limitation. *Id.*; *Family Mut. Ins. v. Hansen*, 375 P.3d 115, 120 (Colo. 2016). The insurer bears the burden of establishing the limitation is unambiguous. *Hecla Min.*, 811 P.2d at 1090.

In the Theft Limitation, Scottsdale crucially failed to specify what happens when theft *indirectly* contributes to property damage, or when there are *other causes* of damage in addition to theft, either concurrently or in a chain of events. There is a robust body of case law explaining the problems with the Theft Limitation’s basic causal language, “caused by or resulting from.”

One case stands out as succinctly explaining the salient, controlling points of law. In *Novell v. Am. Guar. and Liab. Ins. Co.*, 15 P.3d 775, 777 (Colo. App. 1999), the insurance policy covered “water damage” from broken pipes but excluded coverage for

losses or damage “caused by or resulting from” the building’s “[s]ettling, cracking, shrinking, or expansion.” The court explained how the settling exclusion’s “caused by or resulting from” language was ambiguous due to the concurrent presence of a covered cause of loss, “water damage”:

With reference to the exclusion for “settling,” **only limited words of causation are included. That is, only losses “caused by or resulting from” the settling are excluded. . . . [T]he exclusion does not incorporate the broader language “caused by, resulting from, contributed to, or aggravated by”** that the court in *Kane* found sufficient to avoid the insured’s claim of ambiguity in use of the term “flood” in that policy exclusion.

Thus, we agree with the trial court’s conclusion that **by failing to use the general language appearing in the policy addressed in *Kane*, the coverage and exclusion provisions are inconsistent and thus ambiguous.**

As a result, and following the analysis in *Kane*, **defendant’s policy must be construed to afford coverage for plaintiff’s loss.**

Id. at 778 (emphasis added).

This very Court has endorsed *Novell’s* approach. See *Arkansas Valley Drilling, Inc. v. Contl. W. Ins. Co.*, 703 F. Supp. 2d 1232, 1241 (D. Colo. 2010) (Blackburn, J.) (reviewing Colorado cases and showing how ambiguous causal language can be avoided through the specific inclusion of anti-concurrent causation language, like “regardless of any other cause or event that contributes concurrently or in any sequence to the loss.”).

The reasoning in *Novell*—adopted by Judge Blackburn in *Arkansas Valley*—applies with equal force here. The Theft Limitation’s “caused by or resulting from” language is ambiguous. Scottsdale’s interpretation of “caused by or resulting from theft” would mean that the presence of any theft, at or around the time and place of willful and malicious property damage, avoids *all* Vandalism coverage for *any* property damage. But the Theft Limitation doesn’t “clearly express” that. *Ryder*, 770 P.2d at 1382. Based on the

language of the Theft Limitation, a reasonable person could think that if a building is destroyed and some things are stolen, the building damage is covered while the stolen property is not. Construing this ambiguity in favor of broad coverage for BWB, as the Court must, the Policy covers the building damage (the Vandalism) that occurred during the Incident—while the Theft Limitation excludes only the value of the stolen copper.

Scottsdale’s interpretation would also add terms to the Policy that aren’t there. Had Scottsdale wished to exclude any damage or loss caused directly or indirectly by theft, regardless of any other cause or event that contributes concurrently or in any sequence, it could have borrowed from the exclusionary language it used elsewhere in the Policy:

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Ex. 1 at 120. But Scottsdale didn’t do so. Reading the Policy as a whole, the Theft Limitation applies in much more limited circumstances and does not exclude coverage for property damage. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 299 (Colo. 2003) (courts read policy provisions as a whole rather than in isolation).

In sum, Scottsdale cannot meet its heavy burden to prove that its interpretation of the Theft Limitation’s causal language is the only reasonable one. An alternative reasonable interpretation, which the Court must adopt because it favors coverage, is that while the Theft Limitation excludes coverage for the value of the stolen copper, it does not negate Vandalism coverage for the copious damage to BWB’s building. See *South Millville Properties LLC v. Westchester Surplus Lines Insurance Company*, 698 F. Supp. 3d 766, 769 (D.N.J. 2023) (copper loss exclusion, including for “loss or damage to the

described premises caused by or resulting from the theft, attempted theft or vandalism of copper,” contained no anti-concurrent or anti-sequential language and plausibly did not bar coverage for property damage caused by fire in course of copper theft).

3. *The Burglars Exception underscores how the Theft Limitation reasonably does not exclude coverage for BWB’s building damage.*

The Theft Limitation contains an exception which restores coverage for building damage caused by burglars:

We will not pay for loss or damage caused by or resulting from theft, except for building damage caused by the breaking in or exiting of burglars.

Ex. 1 at 91 (highlight added). Although the applicability of the “Burglars Exception” is not before the Court, because insurance policies are interpreted as a whole, *Cyprus Amax.*, 74 P.3d at 299, Burglars Exception informs the Court’s interpretation of the Theft Limitation. Principally, the Burglars Exception sheds light on a fundamental doctrine of insurance policy interpretation: the insured’s reasonable expectations.

B. BWB’s reasonable expectations of coverage should be honored.

The Court should honor BWB’s reasonable expectation that the Theft Limitation doesn’t exclude coverage for the warehouse’s property damage.

Because standardized insurance contracts create “significant potential for insurers to take advantage of or mislead insureds” who are seeking to “protect themselves from unforeseen calamities and for peace of mind,” Colorado has adopted the doctrine of reasonable expectations to protect consumers. *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1048-49 (Colo. 2011). Among other applications, this doctrine honors “the reasonable expectations of an insured where an ordinary, objectively reasonable person would, based on the language of the policy, fail to understand that he or she is not entitled

to the coverage at issue.” *Id.* at 1043, 1048-49. The doctrine applies “when policy coverage-provisions may not be ambiguous in a technical sense, and hence subject to the rule that ambiguities must be construed against the drafter, but are ambiguous from the perspective of an ordinary reader.” *Id.* at 1050.

When BWB purchased commercial property insurance from Scottsdale, it paid for protection from financial ruin should its building incur significant damage:

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

a. Building, meaning the building or structure described in the Declarations, including:

- (1) Completed additions;
- (2) Fixtures, including outdoor fixtures;
- (3) Permanently installed:
 - (a) Machinery; and
 - (b) Equipment;

Ex. 1 at 91; see *also* **Ex. 1** at 7, 119. As part of this transaction, BWB paid for protection from willful and malicious property damage, with the proviso that the Theft Limitation would exclude coverage for certain “theft.” This would not mean, to an ordinary reader in BWB’s position, that just because burglars stole something after destroying BWB’s building, the coverage for the building’s property damage would disappear.

BWB’s reasonable expectation of Vandalism coverage in this instance stems from the dual sources of ambiguity in the Theft Limitation, each explained earlier: (1) an ordinary reader wouldn’t expect that real property could be the object of theft and (2) even if so, he or she wouldn’t expect “caused by or resulting from theft” to exclude coverage for *all* interior property damage caused *indirectly* by theft—after acts of Vandalism had already done the damage—and despite Vandalism or burglars being more direct causes.

BWB’s reasonable expectations are further bolstered by the Theft Limitation’s failure to exclude coverage for “attempted theft.” If the Theft Limitation had also excluded

damage caused by or resulting from “attempted theft,” it would have clarified that coverage is excluded when burglars damage the building when motivated by an intent to commit, or in furtherance of, a theft. However, the Theft Limitation only applies to actual thefts committed. It would be absurd for BWB to forfeit its paid-for coverage based simply on consummation of a perfected “theft.” Imagine that the burglars had torn apart and severed the copper from BWB’s warehouse, piling it in a heap on the floor. But before they could remove it from the building, the police arrived to foil their plans. Or imagine that, after tearing apart the warehouse walls, equipment, and other fixtures, the burglars couldn’t actually sever any copper from the warehouse because they brought the wrong tools, resulting in irreparable damage to the copper components, which were left in place. In those instances—where the property damage is *identical* to the Incident—there would be no occasion to apply the Theft Limitation because “attempted theft” is not excluded from coverage. Rather, there would clearly be full coverage for Vandalism, the willful and malicious destruction of property. It’s an unreasonable reading of the Policy to think that coverage for the damage to BWB’s warehouse could persist throughout the destruction of the building but suddenly disappear—after the damage was done—simply because burglars subsequently removed the scrap-value copper from the premises.

These hypotheticals illustrate the absurdity of conditioning coverage for property damage—which would be the same regardless of whether any copper actually ends up stolen—on the burglars’ ability to later successfully commit a theft. The only differentiator between these hypotheticals and the Incident is that BWB’s burglars actually stole the copper; the building’s damage is the same. The reasonable understanding of the Theft Limitation, which only applies to completed “thefts,” isn’t to vitiate coverage for identical

building damage based on subsequent events. Rather, the reasonable understanding is that coverage is only excluded for the damage or loss unique to the theft: the stolen copper. In all cases, the Vandalism damage to the building itself is covered.

Scottsdale’s intentional decision to explicitly restore coverage for the “breaking in and exiting of burglars” confirms this reading. Theft is a crime involving the stealing of (personal) property. Burglary on the other hand, does not require theft (or any other crime) to occur; it requires only the unlawful entry into a building, sub-parts of a building, or “apparatus or equipment” with the intent to commit a crime. C.R.S. §§ 18-4-203(1), 18-4-204(1); *People v. Mondragon*, 217 P.3d 936, 943 (Colo. App. 2009) (subunits and parts of a building); *People v. Lucas*, 232 P.3d 155, 167 (Colo. App. 2009) (guilty of burglary even if intended crime not committed). If theft from BWB’s walls, equipment, and other fixtures did occur, then by necessity a burglary into all areas of BWB’s premises—and Vandalism damage thereto—precipitated the theft. That a theft occurred later does not negate the coverage for building damage caused by burglars in the first place.

This interpretation comports with how Colorado differentiates vandalism and theft. Colorado, like most states, does not recognize an independent crime of “vandalism,” but subsumes acts of vandalism into the crime of criminal mischief. In this context, the Colorado Supreme Court has differentiated theft from vandalism:

The criminal mischief statute, in our view, addresses conduct that is separate and distinct from theft. The gravamen of **[vandalism] is the knowing causation of damage to another’s property** with resulting economic loss to the owner or possessor of the property. The crime of **theft, in contrast, is a crime of misappropriation or wrongful taking with no added element of damage or destruction** to the property taken. **These differences between the two offenses are real and substantial.**

People v. Dunoyair, 660 P.2d 890, 894 (Colo. 1983) (emphasis added). Equally here, the

gravamen of the Vandalism coverage covers property damage, while the narrow Theft Limitation excludes only what is wrongfully taken.

Drilling deeper into the Policy language, it excludes damage “caused by or resulting from” the crime of theft, not all damage caused by thieves in the course of theft. In contrast, it covers damage caused by burglars, *i.e.*, the people who break into any part of a building with intent to commit a theft. When trespassers began breaking into BWB’s warehouse doors, walls, ceilings, conduit, equipment, and other fixtures, they were burglars who had not yet committed a theft—but were committing the willful and malicious destruction of property (Vandalism). Because the Policy covers all Vandalism, including when it’s caused by burglars (people unlawfully present with criminal intent), and excludes only the specific crime of theft (which has no element of property damage), the Policy clearly contemplates that during a criminal episode, like the Incident, building damage is covered and only stolen property is excluded.

Overall, an ordinary person would expect that when burglars vandalize a building and steal copper in the process, the building damage is covered while the value of the stolen copper is not. See *Benson Holding Corp. v. New York Prop. Ins. Underwriting Ass’n*, 478 N.Y.S.2d 570 (N.Y. Civ. Ct. 1984) (finding that a theft limitation didn’t apply to fixtures, because “any forceful or violent severing and removal of property that [has] been affixed to the premises constitutes vandalism and the loss of the property thus removed is not excluded as pilferage, theft, etc.” and the theft limitation “would be generally understood by a lay person to refer only to property that is not attached to the freehold.”). Here, the Court should enforce BWB’s reasonable expectations of coverage for its destroyed warehouse and only apply the Theft Limitation to the stolen scrap copper.

C. The Weight of Legal Authorities Confirms that the Theft Limitation Does Not Exclude the Property Damage to BWB’s Warehouse.

Courts and commentators across the country have grappled with the paradox of coverage for vandalism but limitations for theft, especially when a building’s copper is stolen. The majority of cases follow the reasoning of this Motion to conclude that there is coverage for building damage but no coverage for the value of the stolen copper. Indeed, according to a leading treatise, the general rule is: “[U]nder a policy insuring against vandalism and malicious mischief but generally excluding theft losses, recovery may be had for such vandalism even though some of the property was stolen.” 5 *Appleman Insurance Law and Practice* Sec. 3182.25 p. 591.

1. *The Summit Bank case is distinguishable and would inappropriately re-write key Policy provisions if applied here.*

One unpublished order in this district reached a contrary result. See *Summit Bank & Tr. v. Am. Modern Home Ins. Co.*, No. 12-CV-02395-JLK, 2014 WL 3512770 (D. Colo. July 15, 2014). In *Summit Bank*, a building’s copper was stolen by trespassers and the policy covered vandalism. *Id.* at *3. But that’s where the similarities to our case end. *Summit Bank* is distinguishable from this case for four crucial reasons: (1) the policy had different controlling language; (2) the court did not consider the insured’s reasonable expectations; (3) the court did not consider the plain meaning, or ambiguity, of “theft”; and (4) the court did not consider the policy’s omission of anti-concurrent causation language.

First, and most importantly, the *Summit Bank* policy excluded not just theft, but a much broader category of “pilferage, theft, burglary or larceny.” *Id.* The *Summit Bank* policy’s explicit exclusion for “burglary” is a key distinguishing fact because the thrust of Judge Kane’s holding is that the policy “at issue in this case contains a clear and

unambiguous exclusion for any losses to the Property caused by ‘theft’ and/or ‘burglary.’” *Id.* at 5. This is different than Policy in this matter, which only excludes theft losses, not burglary losses. In fact, the Policy’s only mention of burglary is to explicitly cover damage caused by burglars. This, again, leads to ambiguity as to what’s covered when burglars (covered) cause vandalism (covered) and theft (excluded) damages in a single incident.

To this end, *Summit Bank* and the case it primarily relies on, *General Star Indemnity Co. v. Zelonker*, 769 So.2d 1093, 1094 (Dist.Ct.App. Fl. 2000), are not applicable because they rest on a premise that, if applied here, would grossly re-write the controlling language of the Policy. In *General Star*, the Florida court incorrectly conflated theft with burglary in order to invalidate the vandalism coverage. See *Summit Bank* 2014 WL 3512770, at *4 (discussing and quoting from *General Star*’s legal authorities, “A thief enters a building in order to steal something.”). Respectfully, that’s mistaken. A burglar enters a building, or part thereof, with the intent to commit a crime, like malicious mischief (Vandalism). *Lucas*, 232 P.3d at 167. While conflating the crimes of burglary and theft may have been permissible in *Summit Bank* because the policy explicitly excluded coverage for both, here the Policy only excludes theft damages—and overtly covers “building damage” caused by the people who intend to commit theft: burglars.

Also, contrary to the Policy’s language and Colorado’s definitions of burglary, *General Star* concluded that sub-parts or fixtures of a building cannot be burglarized. Compare *id.* (quoting *General Star*, “[Burglary] does not apply to the breakage of the meter box or electric conduit.”), with C.R.S. § 18-4-204(1) and *Mondragon*, 217 P.3d at 943. *Summit Bank* explicitly relied on this misapprehension. 2014 WL 3512770 at *4. Applying *General Star*’s narrow definition of burglary, as incorporated by *Summit Bank*,

would invalidate the Policy’s language—which doesn’t exclude “burglary”—and violate Colorado law of insurance policy interpretation. See, *TCD, Inc. v. Am. Fam. Mut. Ins. Co.*, 296 P.3d 255, 257–58 (Colo. App. 2012) (coverage provisions in an insurance policy are construed liberally in favor of the insured to provide the broadest possible coverage).

Second, *Summit Bank* did not address the reasonable expectations of the insured, which are key to the present matter. To adopt *Summit Bank*’s holding, which relied on an explicit burglary exclusion not present in the Policy here, would violate Colorado’s public policy of honoring BWB’s reasonable expectations that Vandalism and other building damage caused by burglars was covered, while stolen property was excluded.

Third, although the *Summit Bank* insureds had argued that real property (copper) was incapable of being stolen as “theft,” Judge Kane deemed that argument abandoned and did not consider it. 2014 WL 3512770 at *3 n.2. Here, as explained earlier, the meaning of “theft” is fundamental to whether the Theft Limitation applies at all.

Finally, *Summit Bank* did not consider the omission of anti-concurrent causation language in the policy’s exclusionary language. As explained above, because the Theft Limitation here ambiguously applies only to loss “caused by or resulting from theft,” it doesn’t apply to building damage when read in conjunction with the Vandalism provision and Burglars Exception. Therefore, the *Summit Bank* analysis does not comport with this Policy language and, thus, does not inform the present dispute.

2. *The Court should follow other well-reasoned, analogous cases that have found coverage for property damage incurred during theft.*

Analogous, well-reasoned cases across the country have found that identical or similar insurance policy language excludes coverage for stolen items but covers building

damage incurred in the course of a theft.⁴ These persuasive cases dovetail with a reasonable reading of the Theft Limitation under Colorado law, discussed above, which only excludes the stolen copper but covers the property damage to BWB's warehouse.

V. CONCLUSION

For the foregoing reasons, the Court should hold, as a matter of law, that the Policy's Theft Limitation does not exclude coverage for the property damage to BWB's warehouse incurred during the Incident and, therefore, Scottsdale's denial of coverage in reliance on the Theft Limitation was wrongful. Plaintiff BWB Investment Company, LLC respectfully requests that the Court enter partial summary judgment accordingly.

Dated this 17th day of July 2025.

Respectfully submitted,

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⁴ *E.g.*, *Haas v. Audubon Indem. Co.*, 722 So. 2d 1022, 1027 (La. App. 1998); *Aetna Cas. & Sur. Co. v. Ardizone*, 481 So. 2d 380, 381, 384-85 (Ala. 1985); *Allstate Ins. Co. v. Coin-O-Mat, Inc.*, 202 So. 2d 598, 599 (Fla. App. 1967); *Camacho v. Alliance Ins. Co.*, 13 V.I. 219, 222-23 (V.I. 1977); *Pryor v. State Farm Fire & Cas. Co.*, 74 Cal. App. 3d 183, 188 (1977); *Cresthill Indus. v. Providence Washington Ins. Co.*, 385 N.Y.S.2d 797, 802 (1976); *U.S. Fidel. & Guaranty Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353 (Tex. 1971); *State Auto. Mutual Ins. Co. v. Trautwein*, 414 S.W.2d 587, 589 (Ky. 1967).

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July 2025, a true and correct copy of the foregoing **MOTION FOR PARTIAL SUMMARY JUDGMENT** was electronically filed with the Clerk of the Court using the CM/ECF system and served on the following by the method indicated which will send notification of said filing to the following email addresses:

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