NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 22-7136

3534 EAST CAP VENTURE, LLC; MCCULLOUGH CONSTRUCTION, LLC,

Plaintiffs-Appellants,

v.

WESTCHESTER FIRE INSURANCE COMPANY;
ENDURANCE AMERICAN INSURANCE COMPANY,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia in No. 1:19-cv-02946-APM, Amit Priyavadan Mehta, U.S. District Judge

FINAL REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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SUMMARY OF ARGUMENT

The Brief ("Insurers' Br.") of Appellees Westchester Fire Insurance Company and Endurance American Insurance Company (collectively, the "Insurers")[1] fails for multiple fundamental reasons. Among the most salient:

(1) The Insurers avoid their burden of proving that *no* reasonable person would interpret "dampness of atmosphere" to refer to the air outside of a building only (the most common definition of "atmosphere") and not to include the internal air within the building. Apart from embracing the *Blaine* dissent, they primarily rely on a secondary dictionary definition for "atmosphere" to include interior air. That is not enough. Under the principal definition, "atmosphere" is narrower than "air." A reasonable person could read the language and conclude that, by using a term that most commonly means external air enveloping the earth, and not using the broader term that means general air, whether internal or external, the narrower meaning was intended.

(2) The Policies *expressly* cover damage caused by "the accumulation of water from any source on a roof or other surface of a building, dwelling or structure." To exclude this expressly covered and plainly applicable peril, the "dampness of atmosphere" exclusion must be equally clear, with the language

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[1] Unless otherwise indicated, all capitalized terms have the same meanings used in Appellants' opening brief.

construed narrowly in favor of the Insureds. Any ambiguity is fatal. This is an extremely high bar, and the Insurers fail to clear it—they do not show why *no* reasonable person would read the term “atmosphere” so broadly that it *necessarily* includes a less common secondary meaning (interior air) and thus overrides the Policies’ express coverage for damage from accumulation of water.

(3) The Insurers fail to account for the self-evident fact that a reasonable person could read “accumulated water” as referring to “condensation” resulting from a design defect of the building and *not* to mere “dampness of atmosphere” as the proximate cause of the damage. Water can accumulate by condensation without a damp atmosphere, as anyone who has ever had an iced beverage knows, and the parties acknowledged that the water accumulation at issue was caused by the defect (failure to include a vapor barrier). And it is equally undisputed that the installation of the vapor barrier cured the water problem—regardless of subsequent humidity or dampness of the atmosphere. Thus, the Insurers’ strident focus on the Insureds’ use of “condensation” in their early arguments and “accumulation of water” in their later arguments badly misses the mark. They both refer to the same covered peril and proximate cause of the damage at issue.

(4) The record of this case strongly supports the Insureds’ analysis. The parties stipulated as part of their cross-designations of undisputed material facts that the proximate cause of loss in this case was the vapor-barrier defect that

caused the accumulation of water in the roof system from condensation. Accumulation of water in the roof system from condensation is an *expressly* covered peril ("accumulation of water from any source"). Moreover, the Insurers' assertions of undisputed fact confirm this cause. Their defense that the exclusion negates this coverage at most raises a factual dispute (whether "dampness of atmosphere" also was the sole proximate cause of the harm) that must be resolved by trial, not by summary judgment—especially where the Insurers bear the burden of proving the exclusion's applicability.

(5) Similar problems defeat the Insurers' reliance on the ensuing-loss exceptions to the exclusions. They insist that the Policies exclude coverage for faulty work, *see* Insurers' Br., p. 40, when in fact the Polices *cover* damages from faulty work and exclude *only* the costs incurred in fixing the defect. Again echoing the district court, they argue that the weather-based causes are "intertwined" with the missing vapor barrier, so the exception does not apply and the exclusions control. Not only is that argument wrong as a factual matter—the Insureds did *not* seek coverage for any harm resulting from dampness of atmosphere or changes in temperature, proof positive that the sets of losses are not intertwined—but it is plainly incorrect as a matter of law. "Inextricably intertwined" refers to the inseparability of damages where two causes, one unambiguously excluded and one covered, proximately result in the exact same damage. That is not the case here,

where the water damage was caused by liquid water that accumulated due to a lack of a vapor barrier and dampness of the atmosphere caused no direct physical damages at all. The ensuing loss exception plainly applies because the damages claimed are distinct and separable.

The Insurers' expansive approach turns District law requiring narrow construction of policy exclusions on its head. They would have this Court read the Policies' exclusions broadly and the Policies' scope of coverage narrowly, a complete inversion of the black-letter legal standards and an abject negation of the Policies' broad all-risks indemnity for *all* losses, whatever the cause, unless excluded clearly and unambiguously.

To reiterate: the Insurers' arguments were rejected by the *Blaine* majority, in a ruling that has not drawn any criticism or dispute by any court until the ruling below. But even if *Blaine* had not already rejected these arguments as a matter of law, the evidence of causation advanced below, not to mention the parties' agreement regarding that evidence, ought to have been dispositive under the Policies' plain language. In any event, the Insureds are entitled to all reasonable inferences. If any doubt exists as to the reasonable interpretation of the dampness-of-atmosphere, changes-of-temperature, or cost-of-making-good exclusion, that ambiguity *must* be construed *against* the Insurers as the drafters of the Policies.

Like the district court, the Insurers essentially apply the opposite rule, contravening black-letter D.C. law.

ARGUMENT

I. The Insureds Fail to Demonstrate That They Met their Burden of Proving That No Reasonable Person Would Interpret the Dampness-of-Atmosphere or Changes-in-Temperature Exclusions to Supersede Coverage for Water Accumulation Caused by the Missing Vapor Barrier.

Reading the Insurers' brief, one would never understand that the parties *agreed* below that evidence shows that the water damage was caused by failure to install the vapor barrier. Instead, the Insurers mangle the parties' agreement on causation to claim that "the peril here is 'loss or damage caused by dampness of atmosphere,'" Insurers' Br., p. 37, thereby conflating the peril with the exclusion. This blatant sleight of hand speaks volumes. The proximate cause of the claimed property damage cannot be so easily sidestepped, nor can the black-letter burdens of proof and standards of review.

The parties acknowledged in the summary-judgment proceedings below that the damage was caused by the lack of a vapor barrier. This record is clear. In *their* proposed statement of undisputed facts, in proposed fact no. 35, the *Insurers* asked the Insureds to agree that, in depositions, the Insureds' designees had confirmed that the property damage was caused by the failure to install the vapor barrier and

that the water problem was resolved when the vapor barrier subsequently was installed:

> 35. During depositions, Plaintiffs' corporate representatives confirmed that the damage observed to both the underside of the roof deck and the exterior sheathing was caused by the failure to install a vapor barrier and that the installation of the vapor barrier resolved the problem. [Ex. 27, Schaar Tr., pp. 62-64, 87 & 89 and Ex. 28, McCullough Tr., pp. 78-80, 86, 138 & 200]

(JA 1586). The Insurers so admitted and quoted McCullough in response:

> Response: Admitted. McCullough at his deposition was asked:
>
> > Q. So when you said you had "all hands on deck to identify the cause" what was the cause that was identified?
> >
> > A. The cause of the water damage was – there was no vapor barrier designed into the roof assembly, which allowed water to form and damage porous materials.

(JA 1586, *See also* JA 1838). Indeed, elsewhere the Insurers admit in their brief that the damage *was* caused by the missing vapor barrier: "Here, it is undisputed that the building's insulation, sheetrock, and sheathing all were damaged by moisture and condensation resulting from the failure to install a vapor barrier." Insurers' Br., pp. 27-28.

Given this agreement that the missing vapor barrier caused the water accumulation that caused the building damage, the Insurers' focus on alternative or concurrent causes is immaterial under the summary-judgment posture of the case. Whether the liquid water that caused the property damage was itself caused by any humidity or changes in temperature was and is disputed. To the extent the Insurers

contend otherwise, they rely on disputed, inadmissible, objected-to opinion testimony by non-designated witnesses who had financial bias shading their opinions, such as the negligent architect in question, going so far as to call them "the Insureds' experts." *See id.* at 28. This is a gross mischaracterization.

The Insureds repeatedly pointed out to the district court that any theorized alternative or concurrent causes such as humidity or temperature changes were disputed issues of fact, that expert testimony had not yet been designated or presented, and that the cross-motions were presented in the hope that the case could be decided without experts. (JA 1582) (responses to proposed facts nos. 20, 21). They expressly disputed "these blame-shifting accusations, which are not expert opinions as to the cause of loss, but which are preliminary findings of correlation made as part of a multi-party root cause analysis. These paragraphs do not contain undisputed facts concerning the loss because the accusations are not expert opinions made after utilizing a scientific methodology." (JA 1582) Thus, by implicitly resolving these disputed facts in favor of the moving parties' cross-motion and against the non-moving parties with regard to that cross-motion, the district court plainly erred under Rule 56.

The Insurers' broad assertion that "[i]t is undisputed that the condensation at the Project was the result of the failure to install a vapor barrier, combined with 'very cold weather,'" *id.* at 3, thus is wrong. Not only do the Insurers fail to cite to

any allegation in the complaint or any other assertion in any other pleading filed by the Insureds in the district court, they cite to p. 3 of Appellants' opening brief in this Court, *see id.* at 3-4, which nowhere mentions "very cold weather" or any other climactic condition as a cause. At every point in the proceedings below, the Insureds vigorously disputed that weather was a factor, let alone a material and proximate cause, of their loss. For example, they presented the following testimony of Seamus McCullough that any fluctuations in humidity or temperature were ordinary, non-damaging conditions that could not have caused the damage: "Well, I have done ten buildings just like this and every one has Gyp-Crete and every one gets done in the winter, or summer, or extreme conditions and we've never had any water damage as a result of said activities." (JA 1915). Indeed, in its denial of coverage, the Insurers did not rely on any evidence of damages caused by dampness of atmosphere and instead simply equated condensed water with dampness of atmosphere.

The Insurers mischaracterize the evidence presented below and the limited procedural posture of the summary-judgment cross-motions because they had the burden of proving that the proximate cause of the loss was dampness of atmosphere and/or changes or extremes in temperature. They elected to move for summary judgment without any admissible testimony to support that burden, choosing instead to conflate the peril of accumulation of water by condensation

with the peril of dampness of atmosphere or changes in temperature. Now, faced with the task of defending that election, they mischaracterize the record.

To be clear: it was neither stipulated nor undisputed that interior moisture or temperature caused the condensation of water, nor that excess humidity or changes in temperature had occurred in the building at all. The very existence of abnormal humidity or temperature, much less their causal role, much less their proximate causation, were disputed fact issues that were carved out from the cross-motions for summary judgment and saved for subsequent adjudication if the cross-motions failed.

The district court therefore erred in granting summary judgment based upon disputed statements that either the presence of humidity or "extremes or changes in temperature" were additional causes of the accumulation of liquid water. Both sides agreed to proceed to summary judgment cross-motions *without* designating experts, as experts would not be submitted unless and until the court decided that the case could not be resolved based upon the policy language and the undisputed facts.

The Insurers' argument fails for a second reason. They do not demonstrate that any reasonable person would interpret "atmosphere" as referring both to its primary definition, the envelope of gases surrounding the earth, and also to a secondary or tertiary definition that includes indoor air. The mere fact of a

secondary meaning is not enough. "A quick glance at any dictionary confirms that very few words have but a single meaning." *Mississippi Poultry Ass'n, Inc. v. Madigan*, 9 F.3d 1113, 1114-15 (5th Cir. 1993), *on reh'g*, 31 F.3d 293 (5th Cir. 1994). The Insurers offer no reason why, as a matter of law and the particular context of these all-risks policies and the express coverage for harm caused by accumulation of water *from any source*, giving the Insureds all benefit of D.C.'s liberal-construction rules, no reasonable person would read "atmosphere" to refer only to outside air (the primary meaning) and not to include indoor air (a secondary or tertiary meaning).

Atmosphere often refers to the outside air only. The Minnesota Supreme Court has provided the following examples:

> We would not say that the atmosphere in a room is stuffy, but rather that the air is stuffy. We think of atmosphere as the air surrounding our planet, as when Hamlet spoke of "this most excellent canopy, the air." (Act II, scene ii.) So it is that we speak of releasing a balloon into the atmosphere but letting the air out of a tire.

Bd. of Regents of Univ. of Minnesota v. Royal Ins. Co. of Am., 517 N.W.2d 888, 892 (Minn. 1994). Atmospheric temperature does not refer to readings on a thermostat.

The Insurers also fail to account for the adverse case law. As discussed in the opening brief, *Blaine* is one of many cases to determine that "atmosphere" *is* ambiguous as to whether it must include indoor air when used in an exclusion, or

read it so narrowly to mean outside-only. *See, e.g.*, *R.W. Beckett Corp. v. Allianz Glob. Corp. & Spec. SE*, No. 1:19-CV-428, 2020 WL 1975788, at *10 (N.D. Ohio Apr. 24, 2020) (applying Ohio law to conclude "that 'atmosphere' is ambiguous with regard to whether it includes the air in a residential basement."); *R.T. Vanderbilt Co., Inc. v. Hartford Accident & Indem. Co.*, 156 A.3d 539, 634 (Conn. Ct. App. 2017) ("Because the term "atmosphere" reasonably can refer either to the interior air at a particular location or to the earth's natural atmosphere, we conclude that the third element of the pollution exclusion also is ambiguous as applied to the underlying claims"), *aff'd*, 216 A.3d 629 (Conn. 2019); *Cont'l Cas. Co. v. Rapid-Am. Corp.*, N.E.2d 506, 513 (N.Y. 1993) (holding that "differing definitions point toward ambiguity in the meaning of 'atmosphere'" and thus pollution exclusion did not exclude coverage for indoor airborne asbestos); *Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 660 N.E.2d 746, 753-54 (Ohio Com. Pl. 1993) (surveying case law and finding that cases "have ejected such common dictionary definitions in favor of a narrower construction excluding building interiors"); *U.S. Fid. & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926, 933 (1991) ("We find that the term 'atmosphere' is subject to two reasonable interpretations and is, therefore, ambiguous. Consequently, we are required to construe the exclusionary clause strictly against the insurer-drafter and in favor of potential coverage for Wilkin.").

These cases vividly illustrate the reasonableness of the Insurers' reading of the dampness and temperature exclusions as limited to outside air. But this is only one of the ambiguities at issue. The exclusions also are ambiguous because the Insurers' interpretation directly conflicts with the express coverage for "the accumulation of water from any source on a roof or other surface of a building, dwelling or structure." They conflict with the coverage of wet rot, which cannot form in the absence of water. They conflict with the coverage for weather conditions generally. The Policies are not at all clear that condensation following dampness in atmosphere is excluded given that it is expressly covered as a separate peril as the source for accumulating water.

Thus, these exclusions make sense only if they are limited to exclude direct physical loss proximately caused by those perils. Examples include the delamination of the cigars in *Scottsdale Ins. Co. v. Sally Grp., LLC*, No. 4:11-cv-01184, 2012 WL 1144577 (S.D. Tex. Apr. 4, 2012), or the spoilage of food in *Hartford Ins. Co. v. B. Barks & Sons, Inc.*, No. 97-7919, 1999 WL 341972, at * 9 (E.D. Pa. May 27, 1999), or the loss of electronics when a cooling system failed, per *Washington Ins. Co. v. Volpe and Koenig, P.C.*, 396 F. Supp. 2d 542, 544 (E.D. Pa. 2005). At a bare minimum, this inherent conflict between the coverage terms and the Insurers' interpretation of the exclusions creates an ambiguity.

II. The Policies Provide Coverage for Losses Caused by Condensation.

The Insurers further attempt to muddy the waters by insisting that the Insureds "intermittently" took inconsistent positions below, initially referring to the claimed peril as "condensation" or "condensation/drops of water" and later as "water damage." (Insurers' Br., pp. 2, 4, 25-27). This is a semantic distinction without a difference. As the Insureds told the district court:

> The characterization of the damage as being water damage or moisture damage is irrelevant as long as it is clear to this Court that it is undisputed that the damage in this case was caused by liquid water. … [I]n each case where moisture damage is identified it is referring to the damage caused by liquid water. There is no dispute that the damage to the covered building elements was not caused by water in a gaseous state, but by the substantial amount of liquid water that condensed within the insulation cavity of the roof system which soaked and saturated the building elements. Condensation is the formation of liquid water. Damage caused by liquid water constitutes WATER DAMAGE as that term is defined in the policy and as admitted by the corporate designees of the Defendants.

(JA 1575). Thus, the Insureds' position has been consistent throughout. The property damage was caused by the accumulation of liquid water that had condensed due to the missing vapor barrier. Calling this "water damage" as a shorthand description did not change anything.

The Insurers' argument that the Policies exclude "condensation" but not "water damage," Insurers' Br., pp. 11-12, is wrong and rests upon a false distinction. The Policies expressly cover water damage, which they define as including "the accumulation of water from any source on a roof or other surface of

a building, dwelling or structure." The Policies also cover condensation because condensation is not an excluded peril and the Policies are All-Risk policies that cover all risks of direct physical loss in the absence of a plain exclusion. Thus, water accumulation due to condensation clearly is covered because it is an accumulation of water "from any source." It makes no difference whether the peril was variously described as water damage or condensation; both are covered and not named in any exclusion. Coverage for both must be found unless they were proximately caused by "dampness of atmosphere" or "extremes or changes in temperature," which, in turn, must proximately cause the ultimate loss.

Condensation alone does not mean that abnormal humidity or temperature had any causal role. It can result from relatively warmer air contacting a relatively colder surface such as an iced beverage *or* from dampness of the surrounding air. Mere condensation does not prove that either exclusion occurred or that it actually caused the condensation. Under the Insurers' theory, any loss loosely associated with weather-related condensation would be excluded, limiting the Policies' broad coverage to broken pipes, leaks, and the like. This stretches the weather-related exclusions too far, eliminating much of the coverage that the Insurers reasonably thought they were buying and which are routinely covered perils.

In this regard, the Insurers' invocation of the Fifth Circuit's decision in *Aetna Cas. & Sur. Co. v. Yates*, 344 F.2d 941 (5th Cir 1965), is especially

misplaced. The Insurers' claim that *Yates* says, and other courts supposedly agree, that "labeling a loss from dampness of atmosphere a water damage loss would render the 'dampness of atmosphere' exclusion 'practically meaningless.'" *See* Insurers' Br., p. 11. *Yates* does not say this as a categorical pronouncement, and neither do subsequent decisions discussing *Yates*, especially *Blaine*, which discusses and distinguishes *Yates* at considerable length. *See Blaine Constr. Corp. v. Ins. Co. of N. Am.*, 171 F.3d 343, 352-54 (6th Cir. 1999). In any event, this statement *supports* the Insurers' interpretation: water damage *is* a far cry from dampness of atmosphere.

Unlike this case and *Blaine*, *Yates* did not involve actual water damage, *i.e.*, damage resulting from the direct intrusion of water. Instead, the *Yates* policyholders sought coverage for damaged joists, sills, and subflooring that had *rotted from fungi* in a crawlspace with condensation. In *Yates*, the insureds were attempting to shoehorn the damage from the rot and fungi—both expressly named in the policy's exclusion, along with contamination, dampness of atmosphere and extremes of temperature—into the exclusion's ensuing-loss exception for, *inter alia*, water damage. As *Yates* explains, the argument failed because rot from a fungus infestation following condensation is not water damage. The exception did not apply to "this case [in *Yates*], where the rot may have ensued from the presence of water but not from water damage. … In our case the rot may have ensued from

water but not from water damage, and the damage ensuing from the rot was not the damage from the direct intrusion of water conveyed by the phrase 'water damage.'" *Yates*, 344 F.2d at 941.

Yates is a fact-based decision, and the facts there are the polar opposite of those here and in *Blaine*. There was *no* direct water damage, and the damage from rot was far too attenuated in the chain of causation from the initial condensation to constitute water damage. Both *Blaine* and this case, by contrast, address damage "from the direct intrusion of water." But all three cases share another feature that is fatal to the Insurers' argument. All three involve a lack of proximate causation, where the covered or excluded peril at issue had only the most attenuated and remote causal connection (if any) to the damage. Dampness of atmosphere is as remote a cause of the water damage here and in *Blaine* as condensation was to the rotting joists in *Yates*. As *Yates* puts it, only in the "philosophical sense" of remote but-for causation could the damage from fungi rot be considered "water damage."

To be clear, the Property's wood, drywall, and insulation were not directly damaged by dampness of atmosphere. They were damaged by the accumulation of condensed water. The Insureds' opening brief cites multiple cases that identify the difference between covered water that accumulates due to condensation and damage directly caused by dampness of atmosphere, yet the Insurers ignore,

misconstrue, or fail to meaningfully differentiate them. *See* Insurers' Br., pp. 30-31, 37-38. We address those cases that the Insurers do discuss.

First, the Insurers cite *Scottsdale Ins. v. Sally Grp.*, 2012 WL 1144577, because it involved property (cigars) destroyed by excessive humidity and related condensation and was subject to both a condensation and a dampness-of-atmosphere exclusion. *See* Insurers' Br., pp. 22, 30-31. Unlike the situation here, the court found that the insured had conceded that the cigars "were ruined by excessive humidity," pointing out that the leaf wrappers "were delaminating and there was some evidence of mold and mildew." 2012 WL 1144577, at *12. Thus, the case did not involve attenuated causation. Here, by contrast, the damage could not have been caused by humidity or temperature changes because wood, drywall, and insulation can handle humidity and temperature extremes without being destroyed. The Insurers make two additional points about *Sally*, neither of which affects the analysis. First, they point out that the court applied the dampness-of-atmosphere exclusion to indoor damage, but they ignore the fact that the decision does not consider whether "atmosphere" is ambiguous and could be read to mean outside air only. Indeed, it appears that the issue was never even raised by the insured, making it a moot issue: the court's application of an uncontested exclusion is immaterial here. Second, the Insurers point out that condensation also had occurred in *Sally*, but this misses the point as well. The court treated the

condensation and humidity as separate causes of the damage, each subject to its own exclusion; indeed, the exclusions' applicability was so obvious that the court gave no legal analysis. *See id.* at *10-12.

Second, the Insurers contend that *Roger Cleveland Golf Co. v. Affiliated FM Ins. Co.*, No. SACV 08-00453-CJC (PLAx), 2008 U.S. Dist. LEXIS 127058 (C.D. Cal. Oct. 15, 2008), should be limited to the first of the district court's two justifications for its ruling (the placement of mats over flooring that was ruined by moisture seeping from concrete below, which prevented any space for air). (Insurers' Br., p. 29). But the decision went on to say that the "damp atmosphere exclusion is written to exclude damages from atmospheric conditions such as high humidity and fog: those conditions that come from the air and the sky, not water vapor emitting from a concrete slab below." 2008 U.S. Dist. LEXIS 127058, at *10-11. That statement stands unrebutted by the Insurers.

Third, the Insurers' argument that *Andrioff v. Columbus Van & Storage, Inc.*, No. 75AP-38, 1975 Ohio App. LEXIS 8194, at *5-7 (Ct. App. May 6, 1975), shows that the exclusion could be reasonably interpreted to include "the air of a given place or locality," Insurers' Br., p. 18, rather than "the whole mass of air surrounding the earth." This misses the point: for ambiguity, the Insurers have the burden of proving that no reasonable person could interpret "atmosphere" to refer to external air only. *Andrioff* does not address that. Instead, *Andrioff* reversed

summary judgment for the insurer because damage from condensation was not the same as damage from dampness of atmosphere; one was caused by water in its liquid form, and the other was caused by gaseous water vapor. *See* 1975 Ohio App. LEXIS 8194, at *7. *Andrioff* broadly *rejects* the Insurers' view that dampness of atmosphere is the same as condensation. This ruling bears repeating:

> The exclusion of "dampness of atmosphere" refers only to water vapor in the air and not water in liquid form. It makes no difference that water in liquid form may have once been water vapor, nor that water vapor may have once been in liquid form. The essential question is whether the damage is caused by water vapor or by water in liquid form. Accordingly, the term "dampness of atmosphere" means moisture or water vapor in the air. The exclusion does not exclude damage from water in liquid form whatever the origin thereof but, on the other hand, does exclude damage resulting from water vapor in the air whatever may have been the origin thereof.

Id. at *7. This ruling plainly rejects the Insurers' theory of the case by holding that dampness of atmosphere is a completely separate and distinct peril from liquid water.

Fourth, regarding *Boardwalk Condo. Ass'n v. Travelers Indem. Co.*, No. 03cv505 WQH (WMc), 2007 U.S. Dist. LEXIS 48325, at *26-27 (S.D. Cal. July 3, 2007), the Insurers acknowledge that condensation damage was a covered peril but contend that this is immaterial because the policy "did not contain an exclusion for 'dampness of atmosphere.'" (Insurers' Br., p. 38). The Insurers are plain wrong—the policy did have a dampness-of-atmosphere exclusion, and it was an element of

the insurer's denial of coverage, which expressly cites the dampness-of-atmosphere exclusion:

> 2. We will not pay for loss or damage caused by or resulting from any of the following ....
>
> ...
>
> (d) (1) Wear and tear;
>
> (2) Rust, corrosion, fungus, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;
>
> ...
>
> (7) The following causes of loss to personal property:
>
> (a) Dampness or dryness of atmosphere;
>
> (b) Changes in or extremes of temperature;
>
> ...
>
> (d) Evaporation;
>
> ....

No. 3:03-cv-00505-JLS-WMC (S.D. Cal.), ECF 107 at p. 29; *see also id.*, ECF 105-5 (policy), at p. 30. This language is identical to the exclusion terms here, and yet the court ruled that the accumulation of condensation was a separate covered peril despite the exclusion for dampness of atmosphere. *See* 2007 U.S. Dist. LEXIS 48325, at *26-27. The same analysis applies here: dampness in the atmosphere that causes damage is excluded, but liquid water that condenses and accumulates is covered.

Finally, the Insurers briefly address *Dawson Farms, L.L.C. v. Millers Mut. Fire Ins. Co.*, 794 So. 2d 949 (La. App. 2001), but fail to distinguish it meaningfully. The facts are similar: there, as here, accumulation of water was an expressly covered peril. There, as here, the accumulation of water was due to condensation caused by a defective vapor barrier system. Apart from pointing out

that *Dawson* does not mention dampness in the atmosphere and speculating about whether the policy had a dampness-in-the-atmosphere exclusion, the Insurers do not attempt to distinguish it. *See* Insurers' Br., p. 38. The bottom line therefore remains true: where the accumulation of water due to condensation is caused by faulty workmanship, *Dawson* found coverage, and coverage should be found here as well.

The Insurers' argument thus ultimately devolves to an unsupported and improper conflation of condensation and dampness of atmosphere to avoid the express coverage for damage from accumulated water from any source. They even proclaim that "condensation is the loss caused by dampness of atmosphere." (Insurers' Br., p. 45). But that is plainly wrong—condensation is not a "LOSS" under the Policies. Instead, condensation is a peril, a cause of loss, just like fire, wind, tree strike, flood, collapse, war, etc. Here, as a result of the vapor-barrier construction defect, condensation occurred and caused the accumulation of water trapped within an enclosed roof system, which migrated throughout the ceilings and walls of the covered building project damaging wood, insulation, cabinetry, flooring, and drywall. These damages to the project were completely unrelated to the cost of fixing the vapor barrier defect itself. Accumulation of water from any source, including condensation, is expressly covered and is not an excluded peril. To avoid this straightforward application of the Policies' terms, the Insurers resort

to conflating damage caused by "dampness of atmosphere," of which there was none, with damage caused by liquid water that is the stipulated cause of damage. Condensation is a covered peril, and it—and not dampness of atmosphere or changes in temperature—is the direct cause of the water damage at issue.

III. The Ensuing-Loss Exception Applies to the Insureds' Claims.

Here, too, the Insurers misinterpret the "inextricably intertwined" doctrine with respect to ensuing loss and use it to conflate the perils of dampness of atmosphere and changes of temperature with the separate peril of accumulation of water due to condensation. The Insurers suggest that, where an otherwise covered cause of the damage is itself caused by an excluded cause, those causes are "inextricably intertwined" and there is no coverage. (Insurers' Br., p. 32). That is not the rule. *Perils* are not inextricably intertwined when one ensues from another (otherwise the ensuing-loss exception would have no meaning at all). Instead, *damages* are "inextricably intertwined" where two causes of loss, one of which is covered and one of which is excluded, cause the same damages and those damages cannot be separated. *Bethany Boardwalk* provides a paradigm example. In that case, a covered storm damaged a defectively designed roof. Defective design was excluded. Because the two causes were so closely linked (neither was an independent cause), *Bethany Boardwalk* declined to cover the damage to the roof itself: "given that the roof's defects made it susceptible to wind, it is conceptually

impossible to disentangle the damage caused solely by faulty workmanship and that caused solely by the wind." *Bethany Boardwalk Grp. LLC v. Everest Sec. Ins. Co.*, 611 F. Supp. 3d 41, 60 (D. Md. 2020). Yet the court also ruled that interior water damage to the building *was* covered because water damage to property other than the defective roof was separable from the cost of repairing the faulty workmanship. *Id.* ("In addition to the roof, the storm caused interior water damage. … Because these damages are attributable to the storm, which is a covered cause of loss under the Policy, and are distinct from the faulty workmanship, they are covered…."). Thus, the Insurers are wrong: "inextricably intertwined" does not refer to causation. It refers to the separability of damage.

But even if this were not so, the Insurers' argument would fail on the facts. For the reasons above, it is disputed whether dampness of atmosphere or changes of temperature occurred. The Insurers have presented no evidence or disputed the Insureds' testimony that those conditions, even if they were present, would not have physically damaged the insulation, drywall, and structural wood at issue. Indeed, the record evidence is that they do not.

Whether atmospheric dampness or temperature changes contributed to the accumulation of water is irrelevant because all three exclusions contain an ensuing-loss provision. Under that provision, accumulation of water from condensation is a separate, covered, ensuing peril that caused separately identifiable damage to

property other than the defective vapor barrier. And as discussed above, the parties agreed below that accumulation of water in the roof cavity caused the damage.

In sum, the damage caused by water is not inextricably intertwined with the damage caused by dampness of atmosphere or changes of temperature because the latter did not proximately cause that damage. The building elements were damaged by water that accumulated in the roof system and migrated throughout the building.

CONCLUSION

For the foregoing reasons, the district court erroneously rejected settled law interpreting the insurance provisions at issue, as well as a commonsense interpretation that a reasonable person could readily reach. Because water damage is a covered peril not subject to an exclusion, the decision should be reversed and the case remanded to the district court for entry of summary judgment on the Insureds' cross-motion. Alternatively, the case should be remanded for further proceedings.

ORAL ARGUMENT IS RESPECTFULLY REQUESTED

Respectfully submitted,

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