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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZURICH AMERICAN INSURANCE
COMPANY; AMERICAN GUARANTEE
AND LIABILITY INSURANCE
COMPANY,

Plaintiffs-Appellants,

v.

IRONSHORE SPECIALTY INSURANCE
COMPANY,

Defendant-Appellee.

No. 18-16937

D.C. No.
2:15-cv-00460-JAD-PAL

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Jennifer A. Dorsey, District Judge, Presiding

Submission Deferred April 14, 2020
Submitted January 18, 2022**
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: BERZON and IKUTA, Circuit Judges, and LEMELLE,^{***} District Judge.

Plaintiff insurance companies (collectively, “Zurich”) appeal the district court’s grant of summary judgment in favor of Ironshore Specialty Insurance Company (“Ironshore”). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.¹

Ironshore’s insurance contract with eight subcontractors included an exclusion providing (among other things) that the policy did not apply to any property damage for the subcontractors’ work “performed prior to policy inception.” *Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 964 F.3d 804, 807 (9th Cir. 2020). This exclusion was subject to an exception, which stated that the exclusion provision did not apply to property damage that “is sudden and

^{***} The Honorable Ivan L.R. Lemelle, United States District Judge for the Eastern District of Louisiana, sitting by designation.

¹ We decide this appeal (referred to as *Zurich I*) concurrently with an appeal raising substantially identical issues, *Zurich American Insurance Co. v. Ironshore Specialty Insurance Co.*, ___ Fed. Appx. ___ (2022) (*Zurich II*).

accidental and takes place within the policy period.” *Id.*² After the eight subcontractors were sued for work they had performed, Zurich defended and indemnified the subcontractors, and then brought an action against Ironshore in district court seeking contribution and indemnification for defense and settlement costs on the ground that the exception to the exclusion in Ironshore’s policy applied. *Id.* at 808–09. The district court granted summary judgment in favor of Ironshore on the grounds that (1) all construction work at issue had been completed before the inception of Ironshore’s policy, (2) none of the complaints against the subcontractors alleged that sudden and accidental damage had occurred after the inception of Ironshore’s policy, and (3) Zurich failed to carry its burden of showing that the exception to the exclusion was applicable, potentially or otherwise. *Id.* Zurich appealed, arguing that the district court erred by placing the

² The relevant exclusion provision states:

This insurance does not apply to any “bodily injury” or “property damage”:

1. which first existed, or is alleged to have first existed, prior to the inception of this policy. “Property damage” from “your work”, or the work of any additional insured, performed prior to policy inception will be deemed to have first existed prior to the policy inception, unless such “property damage” is sudden and accidental and takes place within the policy period

Id.

burden of proof regarding the applicability of the exception to the exclusion on Zurich. *Id.* at 810.

In order to adjudicate this appeal, we certified two open questions of state law to the Nevada Supreme Court. *See Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 964 F.3d 804, 806 (9th Cir. 2020), *certified questions answered*, 497 P.3d 625 (Nev. 2021). In response, the Nevada Supreme Court held that (1) the burden “of proving the applicability of an exception to an exclusion for coverage in an insurance policy” falls on the insured, and (2) the insured “may rely on any extrinsic evidence that was available to the insurer at the time the insured tendered the defense to the insurer.” *Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 497 P.3d 625, 626 (Nev. 2021).

In light of this ruling, we reject Zurich’s argument that the lack of any evidence that sudden and accidental property damage occurred after the inception of Ironshore’s policy is sufficient to carry Zurich’s burden of proving that the exception to the exclusion is applicable, potentially or otherwise. Instead, we affirm the district court’s ruling that Zurich failed to carry its burden of proving the applicability of the exception to the exclusion in Ironshore’s policy. Zurich does not ask for an opportunity to present evidence to the district court that was available to the insurer when the defense was tendered and that shows that sudden

and accidental property damage occurred after the inception of Ironshore's policy. Therefore, Ironshore is entitled to summary judgment as a matter of law.

AFFIRMED.