NOT FOR PUBLICATION

FILED

OCT 16 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INDUSTRIAL PARK CENTER LLC, an Arizona limited liability company doing business as Mainspring Capital Group, Plaintiff - Appellant, v. GREAT NORTHERN INSURANCE COMPANY, a foreign insurer, Defendant - Appellee.	Nos. 24-4788 25-295 D.C. No. 2:22-cv-01196-MTL MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Michael T. Liburdi, District Judge, Presiding

Argued and Submitted October 23, 2025
Submission Withdrawn December 23, 2025
Resubmitted October 16, 2026
Phoenix, Arizona

Before: GRABER, TALLMAN, and BADE, Circuit Judges.

These consolidated appeals arise from an insurance coverage dispute over damage to a commercial building. Plaintiff-Appellant Industrial Park Center,

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

L.L.C. d/b/a Mainspring Capital Group (Mainspring), appeals the district court's grant of summary judgment in favor of Defendant-Appellee Great Northern Insurance Company (Great Northern) on Mainspring's breach of contract and bad faith claims, the denial of Mainspring's motion for summary judgment on its breach of contract claim, and the award of attorney's fees to Great Northern.

We have jurisdiction under 28 U.S.C. § 1291, and we vacate the grant of summary judgment in favor of Great Northern, the denial of Mainspring's motion for summary judgment, and the award of attorney's fees to Great Northern. We remand to the district court for further proceedings consistent with this disposition and the Arizona Supreme Court's Opinion in Answer to Certified Question, *Indus. Park Ctr., LLC v. Great N. Ins. Co.*, 595 P.3d 1195 (Ariz. 2026).[1]

1. ***Fortuity.*** Under Arizona law, fortuity is a requirement for coverage under an all-risk insurance policy. *See Pac. Indem. Co. v. Kohlhase*, 455 P.2d 277, 278 n.1 (Ariz. Ct. App. 1969) ("Under 'all risks' coverage, recovery is allowed for all fortuitous losses not resulting from misconduct or fraud of the insured unless the policy contains a specific provision expressly excluding the particular loss from coverage."). An insured must show that the loss was fortuitous to "establish a

[1] This case was removed to federal court based on diversity of citizenship. 28 U.S.C. § 1332. Therefore, we apply Arizona law to determine the substantive issues of insurance law.

prima facie case." *Id.* at 279. Once this showing is made, the burden shifts to the insurer to show "that the loss was within a policy exclusion." *Id.*

The district court applied the objective reasonable-foreseeability test that we formulated in *Ingenco Holdings, LLC v. Ace American Insurance Co.*, 921 F.3d 803, 815 (9th Cir. 2019) (predicting how the Washington Supreme Court would interpret the fortuity requirement). *See Indus. Park Ctr., LLC v. Great N. Ins. Co.*, No. CV-22-01196-PHX-MTL, 2024 WL 3553113, at *3 (D. Ariz. July 26, 2024). Applying that standard, the district court concluded that Mainspring's loss was not fortuitous because the loss was "reasonably foreseeable and almost certain to occur" as a result of the tenant's longstanding business practices and Mainspring's failure to implement measures to prevent water damage to the building. *Id*. at *3–4.

We certified a question to the Arizona Supreme Court to determine the standards under Arizona law for deciding whether Mainspring's loss was fortuitous. *See* Ariz. Rev. Stat. § 12-1861; *Indus. Park Ctr., LLC v. Great N. Ins. Co.*, 162 F.4th 1021 (9th Cir. 2025). The Arizona Supreme Court accepted the certified question, and held:

> [A] fortuitous loss is one that, so far as the parties to the contract are aware, is dependent on chance. A loss is non-fortuitous only when the insured knew, at the time coverage attached, that the loss-causing event had already occurred, was already in progress, or was certain to occur because no material contingency remained between the facts known to the insured and the loss-causing event.

Indus. Park Ctr., 595 P.3d at 1196. The court adopted this definition of fortuity from the RESTATEMENT (FIRST) OF CONTRACTS § 291 cmt. A (A.L.I. 1932), *id*. at 1198, and explained that it is "a subjective standard that focuses on the insured's knowledge at the time of contracting," *id*. at 1201. The court explicitly rejected *Ingenco*'s objective reasonable-foreseeability test. *Id*. at 1200.

Because the Arizona Supreme Court rejected the definition of fortuity that the district court applied, we vacate both the grant of summary judgment in favor of Great Northern on Mainspring's breach of contract claim and the denial of Mainspring's motion for summary judgment on the breach of contract claim. We remand to the district court for further proceedings consistent with the Arizona Supreme Court's opinion defining fortuity.

2. ***Policy Exclusions.*** The all-risk property policy that Great Northern issued to Mainspring included various exclusions, including the wear-and-tear exclusion and the settling exclusion. In its initial decision denying Mainspring's claim, Great Northern relied, in part, on the wear-and-tear exclusion and the settling exclusion to deny the coverage. On reconsideration, Great Northern again cited the wear-and-tear exclusion to deny the claim.

Because the district court concluded that Mainspring's loss was not fortuitous, it did not determine whether policy exclusions applied to preclude coverage for Mainspring's claim. *Indus. Park Ctr.*, 2024 WL 3553113, at *7. If

the district court determines on remand that Mainspring's loss was fortuitous, and thus that it has "establish[ed] a prima facie case" of coverage, *Kohlhase*, 455 P.2d at 279, the burden will shift to Great Northern to show "that the loss was within a policy exclusion," *id.* Because it would be premature to consider the policy exclusions before fortuity is determined, we remand to the district court to determine in the first instance whether these policy exclusions apply.

3. ***Bad Faith.*** The district court granted summary judgment to Great Northern on Mainspring's bad faith claim. *Indus. Park Ctr.*, 2024 WL 3553113, at *5–7. Mainspring alleged that Great Northern breached its duty of good faith and fair dealing as an insurer by failing to act reasonably in processing Mainspring's claim and repeatedly raising invalid coverage defenses. The duty of good faith is violated "when the insurer 'intentionally denies, fails to process or pay a claim without a reasonable basis.'" *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 276, 279 (Ariz. 2000) (quoting *Noble v. Nat'l Am. Life Ins. Co.*, 624 P.2d 866, 868 (Ariz. 1981)). "An insurer may defend a fairly debatable claim, but in doing so, it must exercise reasonable care and good faith." *Tritschler v. Allstate Ins. Co.*, 144 P.3d 519, 530 (Ariz. Ct. App. 2006); *see also Zilisch*, 995 P.2d at 280 ("[Although] fair debatability is a necessary condition to avoid a claim of bad faith, it is not always a sufficient condition."). "An insurer's belief in fair debatability is generally a question of fact for the jury." *Tritschler*, 144 P.3d at 530.

After initially citing other reasons for denying the claim, Great Northern ultimately denied Mainspring's claim, in part, based on the wear-and-tear exclusion and the settling exclusion. Although the district court did not determine whether Great Northern appropriately invoked those exclusions, it granted summary judgment to Great Northern on Mainspring's bad faith claims. *Indus. Park Ctr.*, 2024 WL 3553113, at *7. The district court concluded that there were no disputed facts from which reasonable jurors could have concluded that Great Northern knew that its conduct was unreasonable. *Id*. On remand, the district court's analysis of fortuity may require it to consider whether Great Northern acted reasonably in invoking the wear-and-tear and settling exclusions, which in turn may affect its analysis of Mainspring's bad faith claim. We therefore vacate the grant of summary judgment to Great Northern on Mainspring's bad faith claim.

4. ***Attorney's Fees.*** The district court awarded attorney's fees to Great Northern as the successful party in an action arising out of a contract. Ariz. Rev. Stat. § 12-341.01(A)–(B); *see also Sparks v. Republic Nat'l Life Ins. Co.*, 647 P.2d 1127, 1142 (Ariz. 1982) ("[A]n action alleging insurer's bad faith is one 'arising out of a contract' within the meaning of [section] 12-341.01(A)."). As the parties agree, because we are vacating the award of summary judgment in favor of Great Northern on the breach of contract claim, Great Northern may not be the successful party. Although "[a]n adjudication on the merits" is not strictly necessary for a

party to recover attorney's fees under the statute, *Fulton Homes Corp. v. BBP Concrete*, 155 P.3d 1090, 1096 (Ariz. Ct. App. 2007), because we are vacating the award of summary judgment the calculus relevant to determining which party was successful may change substantially. *See Esmark, Inc. v. McKee*, 578 P.2d 190, 193 (Ariz. Ct. App. 1978) ("Because of our resolution of the issues herein, there is as yet no successful party in the action below and the award of attorneys fees is premature."). Therefore, we vacate the award of attorney's fees to Great Northern and remand for the district court to determine in the first instance whether attorney's fees are still warranted in light of the changed circumstances. *See Med. Protective Co. v. Pang*, 740 F.3d 1279, 1284 (9th Cir. 2013) (remanding to district court so it could "determine in the first instance" whether fees were warranted under section 12-341.01).

VACATED AND REMANDED.