COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	DATE FILED July 28, 2026 11:33 PM
Colorado Court of Appeals, 2024CA0034, published opinion (2025COA57) by Hon. Schutz (majority), Hon. Kuhn (concurring), Hon. Welling (concurring in part, dissenting in part) Denver District Court, 2021CV30695, Hon. Marie Avery Moses, Hon. Martin F. Egelhoff, Hon. Jon J. Olafson	
Petitioners: Spectrum Retirement Communities, LLC; Anson Operator, LLC; Anthem Operator, LLC; Burr Ridge Operator, LLC; Carmel Operator, LLC; Cary Senior Living, LLC; Cedar Park Operator, LLC; Chandler 2 Operator, LLC; Chandler Operator, LLC; Creve Coeur Operator, LLC; Dougherty Ferry Operator, LLC; Fishers Operator, LLC; Gahanna Operator, LLC; Gilbert Operator, LLC; Green Oaks Operator, LLC; HighPointe Operator, LLC; Hilliard Operator, LLC; Lakeway Operator, LLC; Lakeway Overlook, LLC; Lakeway Townline, LLC; Lincoln Meadows Senior Living, LLC; Lombard Operator, LLC; Lone Mountain Operator, LLC; Mason Operator, LLC; Mesa Operator, LLC; Park Meadows Senior Living, LLC; Peakview Operator, LLC; Peoria Senior Living, LLC; PH Operator, LLC; Pickerington Operator, LLC; Powell 2 Operator, LLC; Reavis St. Holdings, LLC; Reavis St. Operator, LLC; Round Rock Operator, LLC; Santa Fe Operator, LLC; Saxony Operator, LLC; SF Overland Park, LLC; S-K Anson Opportunity II, LLC; S-K Anthem Opportunity I, LLC; S-K Burr Ridge Residential, LLC; S-K Carmel LLC; S-K Cary, LLC; S-K Cedar Park Opportunity II, LLC; S-	▲ COURT USE ONLY ▲

K Chandler 2 Opportunity I, LLC; S-K Chandler Owner, LLC; S-K Crestview, LLC; S-K Creve Coeur Owner, LLC; S-K Dougherty Ferry Owner, LLC; S-K Ellisville, LLC; S-K Fishers, LLC; S-K Gahanna, LLC; S-K Gilbert Residential, LLC; S-K Green Oaks, LLC; S-K HighPointe Owner, LLC; S-K Hilliard Owner, LLC; S-K Lombard Owner, LLC; S-K Lone Mountain, LLC; S-K Lone Mountain Owner, LLC; S-K Mason Opportunity II, LLC; S-K Meridian, LLC; S-K Mesa Opportunity II, LLC; S-K Palos Heights Opportunity II, LLC; S-K Peoria, LLC; S-K Pickerington Opportunity I, LLC; S-K Powell 2 Opportunity I, LLC; S-K Powell Owner, LLC; S-K Round Rock Opportunity I, LLC; S-K Santa Fe Opportunity II, LLC; S-K Saxony Opportunity I, LLC; S-K Shawnee, LLC; S-K Smoky Hill Owner, LLC; S-K South Elgin Opportunity III, LLC; S-K Streamwood Owner, LLC; S-K West Chester Opportunity I, LLC; S-K Westerville Opportunity II, LLC; South Elgin Operator, LLC; Spectrum Park Meadows Land, LLC; Spectrum Retirement of Ohio, LLC; SRC of Arizona, LLC; SRC of Colorado, LLC; SRC of Illinois, LLC; SRC of Indiana, LLC; SRC of Kansas, LLC; SRC of Missouri, LLC; SRC of New Mexico, LLC d/b/a Spectrum Retirement of New Mexico; SRC of Texas, LLC d/b/a Spectrum Retirement of Texas; SRC Rigden Farms, LLC; Streamwood Operator, LLC; West Chester Operator, LLC; Westerville Operator, LLC; and WSPT Hickory View Investors V, LLC v. **Respondent:** Continental Casualty Company.	Case No.: 2025SC433

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REPLY BRIEF

CERTIFICATION OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 25, 28, 32, and 57, including all formatting requirements in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g)(1). It contains 5,618 of a permitted 5,700 words. I acknowledge that my brief may be stricken if it does not comply with any of the requirements of C.A.R. 32 or 53.

/s/ David K. TeSelle
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I. INTRODUCTION

Continental never tried to answer this court's question: does physical loss or damage coverage require *complete* uninhabitability? Continental's policy itself, six decades of Colorado law, the governing standard of *Western Fire*,[1] and Colorado policyholders' reasonable expectations each answer: completeness is not required.

The majority erred in rejecting Spectrum's claims because its property was only *partially, but not completely*, uninhabitable. The policy does not require this: it provides coverage for physical loss or damage, in whole or part. Colorado law does not require this: policies are liberally construed in favor of broad coverage. *Western Fire* does not require this: it confirms coverage existed where only part of the property is unsafe for its intended use.

From before *Western Fire* through to today, Colorado courts have used "uninhabitable" as a fitness-and-safety, not impossibility, standard. Colorado statutes confirm this: property is "uninhabitable"

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[1] *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 53–55 (Colo. 1968). Petitioners are "Spectrum," Respondent is "Continental." The Opinion is *Spectrum Retirement Comms., LLC, et al., v. Continental Cas. Co.*, 2025 COA 57.

when continued occupancy is dangerous (from, among other things, lack of heat or running water), not impossible. When this court described the church in *Western Fire* as "uninhabitable" and "highly dangerous," this is what it meant. The church was structurally intact, it could be physically occupied, but an airborne contaminant rendered its continued congregational use "highly dangerous." It was "uninhabitable" because it was unfit and unsafe for that intended use, not because it could not be used for any purpose at all.

Spectrum's allegations fit squarely within this standard. A dangerous contaminant physically present in the air and on every surface of its property rendered both discrete areas completely unusable and every facility unfit and dangerous for its ordinary and intended purpose: active, communal living by elderly, medically vulnerable residents. Spectrum and its residents lost the use of their community. Spectrum's property was persistently contaminated; its residents (average age 83) were sickened, many died. Spectrum spent millions to mitigate COVID-19 transmission and suffered millions more in business interruption damages. The majority's assumption—that because Spectrum was required to remain open, it suffered no loss—cannot be reconciled with this settled understanding. Open is not the same as habitable; occupied is not the same as safe where the property is dangerously contaminated.

Continental's attempts to reframe this case as a "COVID dispute" (attempts the division below rejected) ignores the fact that affirming the majority's holding would fundamentally narrow all property insurance coverage, regardless of the risk at issue. Continental cannot reframe the issues presented. It cannot write "complete" into *Western Fire*'s standard, where it does not exist; it cannot argue the policy requires complete destruction or deprivation when Continental itself failed to include that coverage limitation. Judge Welling's dissent got it right: the extent of uninhabitability goes to questions of fact and the measure of the loss; it is not a barrier to be imposed at the pleading stage.

Because neither the policy nor Colorado law impose a "complete uninhabitability" limitation on physical loss or damage coverage—and because Spectrum has separately and sufficiently pleaded property damage—the majority's decision below should be reversed.

II. THE ISSUES PRESENTED FOCUS REVIEW ON SPECIFIC ELEMENTS OF THE MAJORITY'S HOLDING

The division broadly and unanimously agreed with Spectrum, with one exception. *Western Fire*, it held, is the "controlling precedent." Opinion, ¶¶ 46, 66.

> In *Western Fire*, the supreme court held that an insurance claim for a direct physical loss does not necessarily have to be based on visible, physical damage to a building, its improvements, or its contents.

Id., at ¶ 18 (further holding "physical loss may result from the existence of airborne materials" without physical damage). However, it erred by requiring that the insured property must be *completely* uninhabitable. *Id.*, at ¶¶ 18, 19, 46-47. It confirmed that its holding was a completeness restriction, not a COVID-19 restriction. *Id.*, ¶ 47.

The Issues Presented frame this court's review with precision. They focus on specific elements of the majority's analysis: its imposition of a complete loss restriction for both direct physical loss and damage; its decision not to address Rule 12.

Continental ignores this, seeking to challenge the unanimous conclusions below and to relitigate issues outside this court's certiorari grant. Jan. 20, 2026, Order of the Court (setting forth issues presented); C.A.R. 53(a)(3) ("Only the issues set forth or fairly comprised therein will be considered."); *Jagged Peak Energy Inc. v. Okla. Police Pension & Ret. Sys.*, 2022 CO 54, ¶ 63 (declining to go outside issues presented); *see also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) (parties cannot smuggle in additional questions after certiorari is granted).

If this court concludes that other, broader questions merit consideration, Spectrum requests notice and the opportunity to address them. *See W. Metal Lath, Div. of Triton Grp., Ltd. v. Acoustical & Constr. Supply, Inc.*, 851 P.2d 875, 877 (Colo. 1993).

III. BRIEF RESTATEMENT OF THE NATURE OF THE CASE

Continental misstates key elements of the parties' dispute, incorrectly claiming, for example, that Spectrum claims losses for "mere operational changes."[2] Spectrum briefly corrects the record.

Spectrum plausibly alleged persistent property contamination

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[2] Continental also incorrectly asserts the division affirmed dismissal of Spectrum's complaint. Not so. It concluded Spectrum pleaded coverage under the policy's Health Care Endorsement (HCE). Opinion, ¶¶ 52-66. Continental did not cross-petition, meaning that regardless of the outcome here, remand of Spectrum's HCE coverage claims is required.

from COVID-19 and massive losses from it and the governmental orders imposed, including expenses and temporal business interruption losses expressly covered by the policy. Opinion, ¶¶ 3, 68 (dissent); CF, pp 1795-1805. COVID-19 contaminated every Spectrum location. *Id.* Even so, Spectrum was ordered to, and did, remain open. Opinion, ¶ 3. Thousands of COVID-19 governmental orders issued during the pandemic, hundreds applied to Spectrum. *Id.*, ¶ 68 (dissent); CF, pp 1795-1805.

At every location, Spectrum was unable to use significant portions of its facilities (more specifically, discrete, defined areas including, without limitation, community halls, salons, restaurants). It could not re-rent residences when they were vacated; it physically reconfigured facilities, moving and rebuilding walls; it limited access; it delivered three meals a day to residents who were required to shelter in place; and it engaged in intensive decontamination efforts. *Id.* Yet there were COVID-19 infections—*and deaths*—at every location. *Id.* Spectrum could not use any of its facilities as intended and, at every location, it could not use parts of its facilities at all.

Also, Spectrum plausibly alleged that COVID-19 physically altered and damaged its property, impairing its use. Its allegations were detailed and well supported: they were based on, and included citations to, scientific literature and public health authorities. *Id.* For example, Spectrum cited to, and attached to its complaint, Colorado public health orders confirming that COVID-19 causes property damage. CF, pp 1796-99, 1906-07, and 1905-32 generally.

When Spectrum submitted its claim under the policy, Continental used a pre-prepared form template to immediately, and without investigation, deny coverage despite Spectrum having paid more than $3 million in premiums (an amount Continental celebrated as "historic").

IV. THE MAJORITY ERRED IN IMPOSING A COMPLETE LOSS RESTRICTION ON COVERAGE

A. Coverage under the Policy Exists for Physical Loss—It Is Error to Require Complete Uninhabitability.

1. The policy, as interpreted by longstanding Colorado law and read by a reasonable insured, does not require complete uninhabitability for physical loss coverage.

The policy is a broad, all-risk policy; its language is not expressly restricted to complete loss. Its insuring agreement provides:

> [T]his policy insures against risks of direct physical loss of or damage to property and/or interests described herein at covered Locations.

CF, p 1829; *Kane v. Royal Ins. Co.*, 768 P.2d 678, 679 n.1 (Colo. 1989) (all-risk policy provides coverage unless risk is expressly excluded); *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1090 (Colo. 1991) (coverage limits must be clear and explicit).

The policy's plain language—the common and ordinary meaning of "physical loss," from both an ordinary insured's perspective and dictionary definitions—is not limited to complete loss. *Simon v. Shelter Gen. Ins. Co.*, 842 P.2d 236, 240 (Colo. 1992); *Hecla Mining Co.*, 811 P.2d at 1091. "Loss" is commonly understood to include partial, not only complete, loss. As defined, it includes *partial loss*. MERRIAM-WEBSTER (available online at www.merriam-webster.com/dictionary/loss) (*partial* deterioration of physical function, *decrease* in amount); WEBSTER'S THIRD NEW INT'L DICTIONARY, 1338 (2002) (deprivation or *deterioration* of quality, *decrease* in amount); BLACK'S LAW DICTIONARY (12th ed. 2024) (disappearance or *diminution*).

Consistent with this meaning, the policy contemplates coverage for *partial* physical losses. CF, pp 1830 (coverage for time needed to remediate impacted "*part* of the property"), 1835 (same), 1836 (leasehold losses covered whether property is "*wholly* or *partially*" untenable or unusable; machinery-related loss does not mean "*total* loss"), 1849 (imposing obligation to mitigate "*further*" loss and inventory "destroyed, damaged, and *undamaged*" property), 1850 (duty to reduce loss through "*complete* or *partial*" resumption of operations of property *whether damaged or not*) (each emphasis added). Continental could have limited coverage to *complete* or *total* loss, but it didn't. *See Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 307 (Colo. 2003) (clear and unequivocal limiting language must be called to insured's attention). The policy does not require complete loss—it expressly covers "partial" loss and Continental cannot retrospectively alter its language.

Continental fails to read the policy as a whole. It claims "loss" requires destruction or deprivation.[3] But it ignores the fact that "loss"

[3] Continental does not defend the majority's atextual complete-loss restriction, arguing it did not add such a requirement. But it did. And Continental (repeating the majority's error of grafting new limitations onto coverage) argues that complete loss is required

includes partial loss and that the policy's language expressly provides for partial losses. This is dispositive: the plain meaning of the policy language expressly provides partial loss coverage.[4]

Colorado law regarding policy interpretation confirms there is no complete loss requirement. *First*, the policy language—its broad grant of coverage, its plain meaning, the absence of express limitations, and the language expressly contemplating partial losses—must be liberally construed in favor of coverage. *Thompson v. Md. Cas. Co.*, 84 P.3d 496, 501 (Colo. 2004). Consistent with Colorado law, "physical loss" cannot be limited to *complete* physical loss. Limitations on coverage, which must be "clear and explicit," *Hecla Mining Co.*, 811 P.2d at 1090, and which cannot be added after the fact, *Cyprus Amax*, 74 P.3d at 299, are not present here.

Second, a reasonable insured expects coverage for partial

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because "loss" is limited to wholesale destruction and physical deprivation (yet these terms do not appear in the policy's coverage grant).

[4] The period of restoration provisions do not support Continental. They are separate from the coverage grant and cannot limit it; they do not limit coverage because they themselves include partial loss language; and regardless, Spectrum engaged in widespread property restoration.

physical loss. *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1048, 1050 (Colo. 2011). Colorado courts apply the policy language's common meaning to ensure ordinary policyholders' reasonable expectations are fulfilled. *Id.*, at 1051. This is a broad all-risk policy, not a limited named-peril policy: coverage for physical loss is all-encompassing unless expressly limited. Continental's policy contains no exclusion for viruses. This exclusion, developed specifically for SARS-based viruses, is present in most commercial property policies but is absent here because Spectrum demanded, and paid millions of dollars in premiums for, a policy without such an exclusion.

Spectrum's expectations are not subjective or unreasonable. The absence of a widely employed virus exclusion is relevant to the reasonable expectations of a policyholder. Where a policy covers all risks of physical loss and does *nothing* to disclaim coverage from viruses, it is an objectively reasonable expectation that there is coverage for physical contamination of insured property, contamination that renders it dangerous to use as intended and that renders portions completely unusable. Opinion, ¶¶ 75-76 (dissent).

Third, Continental's reading of the policy is unreasonable, but if it is considered, at best it makes the policy ambiguous and any ambiguity must be resolved in favor of coverage. *Hecla Mining Co.*, 811 P.2d at 1090-92 (further noting, at n.13, that existence of conflicting authority supports ambiguity determination); *see also N. State Deli, LLC v. Cincinnati Ins. Co.*, 908 S.E.2d 802, 813 (N.C. 2024) (same, further noting insurers cannot use “slippery” language (that is, “direct physical loss”) only to then hide behind undisclosed definitions). Continental’s assertion does not call Spectrum’s reading into question: that “loss” might also include “destruction” does not mean it excludes partial losses. Even if Continental’s reading is considered, the resulting ambiguity must be read in favor of coverage.

Lastly, Continental’s arguments fail. It relies primarily on out-of-state authority, broadly ignoring the policy language and Colorado law.[5] When it does address Colorado law, Continental turns

[5] This appeal centers on an analysis, under Colorado law, of a complete-loss restriction on coverage, not some nationwide COVID-19 scorecard. *Western Fire* is a Colorado precedent and Continental’s argument from other jurisdictions is no reason to ignore Colorado law. Its claimed consensus is unhelpful: its cases are COVID-19 cases; they often do not rely on or misconstrue *Western Fire*; and they involve different facts and policies with different coverages and exclusions (often including virus exclusions).

longstanding canons of policy interpretation upside down. The all-risk policy itself already grants coverage—Continental fails to point to an exclusion (such as a widely used SARS-specific virus exclusion) negating coverage. Continental's argument that interpretive principles cannot "overcome" the policy language is backwards: its claimed coverage limitations are themselves unsupported by the policy language. Spectrum's reasonable expectations are based on the fact that policyholders would objectively expect coverage in these circumstances and (until the majority's complete uninhabitability rule) they have historically been able to rely on partial loss coverage.

2. ***Western Fire*** **confirms coverage: its standard describes the nature of a covered loss in terms of fitness and safety, not completeness.**

Consistent with the policy language and Colorado interpretive principles, *Western Fire* confirms partial loss coverage. It describes the nature, not extent, of a covered loss through language of fitness and safety. Property suffers a direct physical loss when a physical condition renders it "uninhabitable" and "highly dangerous" for its intended use, depriving the insured of that use in whole or in part.

First, Western Fire establishes the nature of a covered physical loss. The facts of *Western Fire* are not limitations on its coverage standard. Continental and the majority are mistaken when they conclude that, because a church *building* was uninhabitable in *Western Fire* (instead of some other portion of the insured property like the sanctuary or fellowship hall), its standard applies only to the loss of use of a *building*.

That was not part of *Western Fire*'s analysis. The analysis would be unchanged had the loss been of, for example, the sanctuary alone. *Western Fire*'s holding—that a physical loss of intended and safe use, without alteration or damage, is a covered physical loss—does not rely on completeness. Discussion of the *extent* of the loss as if it were a limitation on coverage is contrary to *Western Fire*.

Further, complete loss would be an unworkable requirement. Complete loss of what—all insured locations, one location, one building, one wing, one floor, one residence? Any response invites argument and would be artificial: why is one measure the correct measure of "complete"? Why is there a meaningful difference for coverage purposes between any of these—between the loss of use of a building and the loss of use of a floor or residence? There is still a meaningful loss to the policyholder, leaving the extent of the loss to be measured by the factfinder at trial.

Focusing on the extent of the loss as if it is a legal limit on coverage rewards gamesmanship. The insurer may always argue that a measure other than the insured's loss is the proper one. Coverage outcomes would become capricious, based not on the policyholder's loss but on architectural happenstance. Insureds with identical losses but different property configurations, for example a single-building location and a campus-based multi-building location, would have divergent outcomes. If complete loss of a building is required, the campus-based insured would have coverage (for its closed community *building*, salon *building*, restaurant *building*, etc.) where the single-building insured would not, even though their losses, policies, and premiums are materially identical.

Second, Western Fire discusses loss of use in terms of fitness and safety, not completeness or impossibility. The *Western Fire* church was not fit for use by its congregation as a church. It was, as this court held, "uninhabitable" and its continued use was "highly dangerous." *Western Fire* does not require that property be "unsafe and unusable for any and all purposes whatsoever." *Sagome, Inc. v. Cin. Ins. Co.*, 56 F.4th 931, 937 (10th Cir. 2023) (quoting *GPL Enter., LLC v. Certain Underwriters at Lloyd's*, 276 A.3d 75, 87 (Md. Ct. Spec. App. 2022)).[6]

Uninhabitability does not require complete uselessness. They are different and it is error to reduce uninhabitable to useless: "uninhabitable" speaks to fitness; "useless" speaks to impossibility.[7] Stated otherwise, and speaking to the majority's unstated assumption, "occupiable" and "habitable" are also different. Opinion, ¶ 37 (concluding, in error, that because Spectrum's properties remained open, they were habitable). Spectrum's property may have been occupied, but it was not habitable or safe. *It was uninhabitable and highly dangerous.* The structure of the *Western Fire* church was

[6] *Sagome* is inapposite. It is not binding. And its analysis is flawed, based not on *Western Fire*, but an intermediate Maryland state appellate court that itself incorrectly read *Western Fire*. The federal court failed to follow *Western Fire*'s language: it says "uninhabitable," not "unusable"; it says "highly dangerous" not "for any and all purposes."

[7] Without analysis, the majority equated these terms, Opinion, ¶¶ 18, 19, ignoring their differences.

untouched, it remained standing. It was not physically injured nor was it completely useless for any and all purposes. Certainly, it was dangerous to use, but it was not impossible to use. Fitness and safety, not impossibility, are the relevant criteria.

The majority ignores these distinctions, misreading this element of Western Fire. Again, it incorrectly assumed: Spectrum's residents stayed, therefore the property was habitable and not dangerous; Spectrum remained open and did not completely close any buildings, therefore it suffered no loss of use. But as discussed, this assumption is false: uninhabitable does not mean that the entire property cannot be occupied; it does not require complete uselessness for every possible purpose. Spectrum suffered a covered loss of use under *Western Fire*: significant parts of its facilities were completely closed and vacant; it lost the ordinary and intended use of all of its insured property (even if it was not fully closed).

Property can be both *dangerous* and *occupied*. The church could be occupied. Spectrum's property could be occupied. That does not mean it was not highly dangerous to do so—in fact, it was highly dangerous to use its property. And this, *Western Fire* holds, is what causes loss of use: the property cannot be safely used for its intended purpose. The church and Spectrum lost the ordinary and intended safe use of their property. The fact that Spectrum's elderly residents remained does not mean they were not in danger. They were. Infections were widespread and there were deaths at every facility.

That property can be both uninhabitable and occupied is repeatedly confirmed in Colorado law.[8] This court considered "uninhabitability" in detail at the time of *Western Fire*'s publication. In *Mulhern v. Hederich*, 430 P.2d 469 (Colo. 1967), it held that an occupied home was "uninhabitable" when portions could not be used as intended. There was no argument that because the homeowners remained in the home it was not uninhabitable. Instead, because portions could not be used for their ordinary and intended purpose, it was uninhabitable.

More generally, Colorado's own habitability jurisprudence was being established at this time. For example, in *Carpenter v. Donohoe*, 388 P.2d 399 (Colo. 1964), this court held that implied warranties

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[8] Property can be habitable for one purpose (a warehouse) but not another (a community-focused senior living facility).

require that new homes be suitable for habitation. In *Carpenter*, the relevant issue was not whether the family could remain in their new home, but whether it was suitable for residential use where the basement wall was buckling. *Id.*, at 400, 402; *see also Mazurek v. Nielsen*, 599 P.2d 269 (Colo. App. 1979) (warranty of habitability breached where structurally sound, fully occupiable home lacked potable water); *Roper v. Spring Lake Dev. Co.,* 789 P.2d 483 (Colo. App. 1990) ("foul odor" in garage made home uninhabitable). These cases further confirm that uninhabitability encompasses the partial loss of safe use wholly separate from occupancy.

Colorado's statutory warranty of habitability cements the point that occupation and habitability are distinct. For example, the General Assembly declared in Section 38-12-505, C.R.S., that residential premises are uninhabitable when they substantially lack certain health and safety elements (including without limitation functioning heat, drinkable water, weatherproofing, locks). *Id.*, at § 505(1)(b); *see also* C.R.S. §§ 38-12-501(2)(d), 503(2)(a), 505(3)(c) (addressing health and safety characteristic making property "uninhabitable" without being unoccupiable). A resident's continued presence is presupposed by the statutory scheme, for example in its remedial provisions (which includes rent abatement, C.R.S. § 38-12-507(1)(c)).

In sum, Western Fire does not require complete uselessness for coverage. Spectrum has alleged coverage twice over. First, Spectrum completely closed and could not use certain parts of its facilities in any manner. Restaurants, salons, community rooms, specific residences—all were completely closed. Second, Spectrum lost the ordinary and intended use of its facilities generally. Opinion, ¶ 69 (dissent) (Spectrum's property is not mere apartment complex). Both are consistent with *Western Fire*, and both represent significant losses to Spectrum: in both ways, Spectrum lost the physical use of its insured property.

Lastly, the policy itself actively filters out the trivial claims Continental points to, doing so without imposing an atextual complete-loss restriction. The policy includes deductibles, mitigation and loss-minimization requirements, loss-documentation requirements, coverage limits and sub-limits. There are no claims for "every sneeze" or for damage that can be permanently removed by standard cleaning precisely because there are deductibles and other limitations in the policy. And other, less expensive policies might go further and eliminate coverage for virus-related losses or impose additional limits on coverage. The point is the policy is active (and other less comprehensive policies may be even more active) in filtering claims. Every sneeze will not lead to coverage claims—the policy itself addresses these de minimis claims.

B. Coverage under the Policy Exists for Physical Damage—"Damage" Has Independent Meaning, and It Was Error to Require Complete Uninhabitability.

There is no basis for a complete uninhabitability requirement for physical damage—indeed, the majority's error is even starker here, because the majority never construed "damage" at all. Nothing in the policy, Colorado law, Spectrum's reasonable expectations, or *Western Fire* supports a complete loss requirement for physical damage claims. The policy covers "physical loss of or damage to" property and "damage" must be given meaning independent of "loss." *Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 753 (Colo. 1990) (dissent) (citing *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1313 (Colo. 1984)). Yet, after acknowledging that *Western Fire* "interpreted only the 'direct physical loss' provision," Opinion, ¶ 49, the majority resolved Spectrum's damage claim under that loss standard anyway.

The policy language does not require complete loss for physical damage coverage. Its broad coverage grant is not limited in this way. Numerous provisions contemplate coverage for partial damage. CF, pp 1830 ("*part* of the property" that has been damaged), 1835 (same), 1836 (whole or partial unusability of leasehold interest, damage to machinery is not "total" loss), 1849 (duty to protect against "*further*" damage and to inventory "*undamaged property*"), 1850 (duty to reduce loss by "*complete* or *partial* resumption of operations") (each emphasis added)).

This is confirmed by the common understanding of and dictionary definitions of "damage." "Damage" is injury that impairs usefulness. MERRIAM-WEBSTER (available online at https://www.merriam-webster.com/dictionary/damage); WEBSTER'S THIRD NEW INT'L DICTIONARY, 571, 1164 (2002). Further, and as admitted by Continental and as required by the policy, "damage" can be partial. It need not be complete—otherwise it would be "destruction," reading it out of the policy. MERRIAM-WEBSTER (available online at https://www.merriam-webster.com/dictionary/destroy). That damage need not be complete merits reversal on its own.

Colorado law does not support a complete loss requirement for physical damage. Artificially imposing a completeness requirement is contrary to Colorado law that insurance agreements are read broadly to afford liberal coverage and that restrictions must be clear and express. *Thompson*, 84 P.3d at 502; *Hecla Mining Co.*, 811 P.2d at 1090. Further, Colorado policyholders reasonably expect coverage for losses from physical damage short of destruction. Coverage must, consistent with the policy language, align with and honor these objective, reasonable expectations. *Bailey*, 255 P.3d at 1051. And if there were any question remaining regarding coverage, any such ambiguity means that coverage must be determined in Spectrum's favor. *Hecla Mining Co.*, 811 P.2d at 1090-92.

Western Fire does not support the majority's imposition of a complete-loss requirement for physical damage. In *Western Fire*, as discussed above, the extent of the loss (to a building, to a floor, to a residence) is not properly read as a coverage limit. The nature of the loss, a physical loss of use from a physical contaminant, is relevant to coverage; the extent of the loss isn't. A partial loss of the church would have been covered. Similarly, Continental paid Spectrum's Round Rock partial-loss claim. That is, under this exact policy, Continental agreed there was coverage for Spectrum's claim for partial physical damage (from fire, water, and smoke) even though the entire facility was not unusable. This inconsistent application of its own policy calls Continental's interpretation into question.

In the end, Spectrum's property was continuously and physically contaminated, rendering it uninhabitable and dangerous. *See Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 2022 VT 45, ¶¶ 7-11, 41-43 (on Rule 12 review of materially similar factual allegations, concluding policyholder properly alleged physical damage from COVID-19). Coverage for physical damage to part, but not all, of an insured property where it is damaged or its functionality is impaired is commonplace and appropriate. *Western Fire* does not require otherwise, the majority erred, and it should be reversed.

V. THE MAJORITY ERRED BY FAILING TO APPLY STRAIGHTFORWARD RULE 12 PLEADING STANDARDS

Spectrum plausibly stated its claim for direct physical damage: its property was persistently contaminated, physically altered, and damaged by a dangerous airborne toxin. The majority erred by not analyzing Spectrum's claims under Rule 12. Continental fails to address this question, going so far as to not even mention Rule 12. Instead, it seeks to downplay COVID-19's impact on property, mischaracterizing Spectrum's allegations.

A. Spectrum's Well-Pleaded Allegations Meet Colorado's Rule 12 Pleading Standard.

Rule 12 motions are disfavored. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010). "Fair notice" is the standard: a short, plain statement setting out a plausible claim for relief. *See CenturyLink v. Houser*, 2026 CO 20, ¶¶ 49, 51. Facts and inferences are taken as true and are viewed in the light most favorable to the claiming party. *Melat, Pressman & Higbie, LLP v. Hannon Law Firm, LLC*, 2012 CO 61, ¶ 17; *see also Parsons v. Allstate Ins. Co.*, 165 P.3d 809, 814 (Colo. App. 2006).

Spectrum meets this standard: it alleged its property was physically damaged. COVID-19 physically damages, alters, and adheres to property, surfaces, and air.[9] It was physically present at every Spectrum location, consistently contaminating them. It damaged Spectrum's property: it altered it, it impaired its value and usefulness. These allegations are detailed, not conclusory, and are supported by scientific literature and public health authorities, certain of which directly confirm that COVID-19 causes property damage.

The truth of Spectrum's allegations is not "purely a question of law," and the court cannot, after improperly taking on an expert's mantle, assess scientific matters or weigh competing factual inferences *against Spectrum. Colo. Criminal Justice Reform Coal. v. Ortiz*, 121 P.3d 288, 295 (Colo. App. 2005); *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850, 854 (Colo. 1983).

B. Continental's Arguments Fail.

Unable to meet Rule 12's standard, Continental recasts

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[9] Discovery revealed that while the cheaper policies offered by Continental at the time excluded "air," expressly identifying it as "property not covered" (and thus admitting "air" is property), this policy did not.

questions of fact as if they are questions of law. This effort fails.

First, Continental's assertion that COVID-19 can be cleaned and wiped away, or that it self-dissipates, and so there can be no damage fail.[10] This ignores that COVID-19 permeated Spectrum's facilities: contamination and infection were consistent, several COVID-19 strains were circulating, and the air and surfaces at Spectrum's locations were contaminated. And this ignores that courts routinely conclude coverage exists even when damage-causing substances can be cleaned off, or over time dissipate. *See, e.g., Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *3 (D. Or. June 7, 2016) *vac'd by settlement* (smoke dissipated within days); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *3 (D.N.J. Nov. 25, 2014) (gas

[10] Repeating this claim endlessly does not make it true. Easily cleaned and wiped away from what? Removed from every physical surface and from the air at every property? Only to be constantly reintroduced again and again? As we now know, this notion is nonsensical: wiping down surfaces (or, as was then-advised, wiping down everything, even groceries) is unavailing when COVID-19 is present in the air and is consistently reintroduced onto surfaces. Certainly Continental is free to make this (easily disproven) factual argument at trial. But to transform it into a ruling as a matter of law is an invitation this court should decline.

had to dissipate before safe use); *NL Indus., Inc. v. Commercial Union Ins. Co.*, 926 F.Supp. 446, 457 (D.N.J. 1996) (graffiti is "undoubtedly" property damage, can be cleaned off). But more fundamentally, the facts of *how damage is remediated* fails to address *whether there is damage*. Perhaps damage can be straightforwardly and economically remedied; but there is still damage.

Second, "damage" is not limited in the way Continental suggests. Its meaning of "damage" is overly restrictive. That is not what the policy says and is not what is commonly understood by "damage." "Damage" includes injury "impair[ing] usefulness." MERRIAM-WEBSTER (available online at https://www.merriam-webster.com/dictionary/ damage); WEBSTER'S THIRD NEW INT'L DICTIONARY, 571, 1164 (2002) ("damage" is "loss due to injury," applying to "injury involving loss, as of property, value, or usefulness"). Property is damaged when it is less useful. Both the plain meaning and the commonly understood meaning of "damage" bear this out: property is damaged when it is worth less or its function impaired.[11]

Third, these are questions of fact, not law. The assumption that, for example, contamination from COVID-19 can be easily cleaned is precisely the type of factual guesswork that Colorado's pleading rules do not tolerate. Not only that, but Continental's factual arguments are contrary to the facts alleged in Spectrum's complaint. Spectrum alleged COVID-19 persistently contaminated its facilities. It was forced to physically close and physically alter parts of its facilities. Spectrum engaged in intensive, heightened remediation and cleaning procedures "beyond mere cleaning in order to remediate the alleged damage COVID-19 caused to its property." *Huntington Ingalls*, 2022 VT 45, ¶ 43.[12]

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[11] This speaks to the fact that people use property, and property is valuable because people use it in specific, intended ways. Ignoring this, Continental cites this court's tax valuation opinion, *MJB Motels LLC v. Cty. of Jefferson Bd. of Equalization*, 2023 CO 26, for support. But *MJB* is not relevant. Certainly, it may correctly interpret the valuation statute at issue there, C.R.S. § 39-1-104(11)(b)(I), but that is a different question. *MJB* involved questions of statutory interpretation, utilizing different interpretive canons, addressing different language, without reference to *Western Fire*, and without the detailed allegations of physical contamination present here.

[12] Curiously, Continental attaches a Vermont trial court's order on summary judgment, resolving factual disputes on Rule 56. This

In the final instance, the ability of a dangerous airborne contaminant to cause physical damage to property is precisely the kind of scientific question that courts cannot resolve on the pleadings, against plaintiffs, without evidence. Continental's arguments fail.[13]

Lastly, if there were some pleading defect in Spectrum's complaint (which, there is not), amendment, not adverse judgment, is appropriate. Continental's argument, that Spectrum failed to seek amendment, misses the mark. Spectrum had no opportunity to seek amendment and it cannot be faulted for failing to request amendment after the trial court affirmatively held, as a matter of law, that it could not do so. CF, p 7721. Disputes are to be resolved on their merits and, where the deficiency can be corrected, judgment is not proper.

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supports Spectrum's position: fact questions cannot be properly determined on Rule 12.

[13] Continental's period of restoration argument, repeated here, fails again for the reasons above. Continental also, in passing, raises questions specific to civil authority coverage and a microbe exclusion. These are inadequately presented and are thus waived, are irrelevant to the questions presented, their application as argued would be contrary to the policy language and Spectrum's reasonable expectations, and ultimately involve fact questions.

See N. Poudre Irr. Co. v. Hinderlider, 150 P.2d 304, 309 (Colo. 1944).

VI. CONCLUSION

For these reasons, Spectrum respectfully requests that this court reverse the judgment below, vacate the district court's Rule 12(c) order, and remand for further proceedings on Spectrum's claims.

Respectfully submitted this July 28, 2026.

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CERTIFICATE OF SERVICE

I certify that on July 28, 2026, a copy of the above **REPLY BRIEF** was electronically filed and served through the Colorado Courts E-Filing System.

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