No. 129087

In the

Supreme Court of Illinois

ACUITY, a mutual insurance company,

Plaintiff-Appellant,

v.

M/I HOMES OF CHICAGO, LLC,

Defendant-Appellee.

On Appeal from the Illinois Appellate Court,
First Judicial District, No. 1-22-0023.
There Heard On Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 19 CH 00237.
The Honorable **Allen P. Walker**, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT

JOSEPH P. POSTEL
(jpostel@lpplawfirm.com)
LINDSAY, PICKETT & POSTEL, LLC
200 West Madison Street
Suite 3850
Chicago, Illinois 60606
(312) 800-6008

GLENN F. FENCL
(fenclg@jbltd.com)
GARRETT L. BOEHM, JR.
(boehmg@jbltd.com)
JOHNSON & BELL, LTD.
33 West Monroe Street, Suite 2700
Chicago, Illinois 60603
(312) 372-0770

Counsel for Plaintiff-Appellant
Acuity, a mutual insurance company

E-FILED
5/3/2023 9:57 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

COUNSEL PRESS · (866) 703-9373

PRINTED ON RECYCLED PAPER

ARGUMENT

There are three issues this Court must decide: (1) Does the underlying complaint make a claim for "damage to other property" to trigger Acuity's duty to defend M/I Homes as an additional insured on the policy issued to H&R? (2) In the underlying suit, does the Church Street Townhome Association have standing to sue under the Common Interest Community Association Act for "damage to other property," besides the townhomes that M/I Homes constructed and sold to it? (3) Does Acuity have a duty to defend M/I Homes despite the economic loss rule? If the answer to any of these three question is "no," then this Court must decide in Acuity's favor.

I.
"Damage to Other Property"

M/I Homes accuses Acuity of advocating a "heightened pleading requirement" for purposes of the duty to defend. (M/I Homes' brief at pp. 9-10, 12-13.) On the contrary, however, M/I Homes advocates a "lowered" pleading standard, where the insurer has a duty to defend even where the complaint's allegations are conclusory and bereft of facts, so that the court cannot determine whether a potentially covered claim is actually being asserted. This is not the duty-to-defend standard under Illinois law.

Only the affirmative allegation of facts triggers a duty to defend, not the omission of facts. *See G.M. Sign, Inc. v. State Farm Fire & Cas. Co.*, 2014 IL App (2d) 130593, ¶¶ 32-33 (rejecting plaintiff's contention

that "the vagueness of its amended complaint is the very virtue that triggered State Farm's duty to defend" and stating that "deliberately and strategically leaving [the] complaint so bereft of factual allegations that myriad unpleaded scenarios could fall within its scope" "renders meaningless a court's duty to compare the 'facts' alleged in the complaint to the relevant policy language"). M/I dismisses *G.M. Sign* as "inapposite" but fails to meaningfully address its holding that strategic omissions are no substitute for pled facts in analyzing the duty to defend.

M/I Homes' proposed minimalist pleading standard – which endorses a rule that would elevate factual omissions, conclusions, and vague references over the actual facts as pled – must be rejected. Rejecting that approach is particularly called for here where, by M/I Homes' own admission, the Townhome Association's complaint does not allege a potentially covered claim, but only the conclusory, fact-free allegation of "damage to other property."

At pp. 14-16 of its brief, M/I Homes seeks to distinguish *Westfield Ins. Co. v. West Van Buren*, 2016 IL App (1st) 140862, on the basis that the complaint in that case did not seek recovery for damage to personal property, whereas in this case, the Townhome Association does seek recovery for "damage to other property." In point of fact, the underlying complaint in *West Van Buren* did allege that "individual unit owners experienced damage to personal *and other property* as a result

of the water infiltration," so it is not distinguishable on that basis. *Id.* at ¶¶ 6, 20-22 (emphasis supplied).

The issue in both *West Van Buren* and this case is whether the plaintiff is actually making a *claim* for property damage to this undisclosed property, simply describing a tangential background fact, or cynically attempting to trigger insurance coverage where none would otherwise exist, by misleading the reader. The complaint here does not require the reader to engage in a leap-of-faith conclusion that the "other property" belonged to the Townhome Association, the unit owners, neighbors, business invitees, or other persons. Without knowing who owned the "other property" or what the "other property" actually consists of, it cannot be assumed that the Townhome Association is making either a direct or a representative claim for any damage to any property beyond the townhomes themselves.

The complaint in this case fails to identify the owner of the alleged "other property," distinguishing it from *Certain Underwriters at Lloyd's London v. Metro. Builders, Inc.,* 2019 IL App (1st) 190517, ¶ 81, a case upon which M/I Homes heavily relies. There, the court rejected the insurer's contention that the complaint was too vague because it did not adequately describe the property damaged, but found the complaint sufficient because it identified the owner of the damaged property. *See, id.* at ¶ 81 ("while we may not know much about this personal property, we do know to whom it belonged—the property owner"). In contrast, in

this case, the complaint gives no indication at all who owns the property. That omission is critical and dispositive where the complaint otherwise seeks recovery only for non-covered damages. It is simply not reasonable to impose a duty to defend on an insurer based only on the nondescript "damage to other property" allegation.

Alternatively, M/I Homes contends that covered "other property" should include portions of the townhome project outside of the work performed by H&R Exteriors (M/I Homes' subcontractor and Acuity's named insured). M/I Homes is incorrect. M/I Homes contends that *Westfield Ins. Co. v. Nat'l. Decorating Serv., Inc.*, 147 F. Supp. 3d 708 (N.D. Ill. 2015), *aff'd*, 863 F.3d 690 (7th Cir. 2017) (hereafter *National Decorating*), supports the notion that damage beyond the scope of H&R Exterior's work is an "occurrence." M/I Homes brief at pp. 19-20. Contrary to M/I Homes' contention, *National Decorating* is completely inconsistent with *Travelers Ins. Co. v. Eljer Mfg., Inc.,* 197 Ill. 2d 278, 301 (2001), and its extensive progeny. *See* M/I Homes' brief at p. 20.

Prior to the appellate court's opinion in this case, no Illinois state reviewing court had *ever* found a developer or general contractor entitled to a defense under a subcontractor's CGL policy where the complaint alleged damage to the construction project as a whole, though beyond the subcontractor's work. Indeed, as recently as 2019, the appellate court, in an opinion authored by the same Justice who authored the opinion below, specifically stated that under decades of

well-settled Illinois law, the developer or general contractor *would not be* entitled to a defense under a subcontractor's policy, because from its perspective, damage to the project would not be an "occurrence." *Acuity Ins. Co. v. 950 W. Huron Condo Ass'n*, 2019 IL App (1st) 180743, ¶ 43 ("We agree with these cases and *Larsen* that, when an underlying complaint alleges that a subcontractor's negligence caused something to occur to a part of the construction project outside of the subcontractor's scope of work, this alleges an occurrence under this CGL policy language, *notwithstanding that it would not be an occurrence from a general contractor or developer's perspective*") (emphasis supplied). Thus, contrary to M/I Homes' contention, the holding in *National Decorating* contradicts decades of Illinois case law.

M/I Homes then abruptly concludes that "anyone named as an additional insured *receives the same coverage as the named insured,*" citing *Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Glenview Park Dist.,* 158 Ill. 2d 116, 127 (1994), but neglects to disclose the fact that the quoted statement is from the *dissenting* opinion, which itself cites no authority for this proposition. M/I Homes' contention is misguided.

M/I Homes also cites *W. Am. Ins. Co. v. J.R. Const. Co.*, 334 Ill. App. 3d 75, 85 (1st Dist. 2002), but that case only concerned whether the party was an additional insured or not, and did not consider the *scope* of coverage provided – the Court's holding in that case was clearly

not intended as a general statement about the scope of CGL policy coverage for "property damage," because it was instead based upon an underlying *bodily injury* claim. *See id.* ("Because we have already concluded the blanket endorsement is not what provides J.R. Construction coverage, we reject West American's argument on this ground. Thus, we conclude that J.R. Construction has the same coverage as the primary policyholder, in this case, Altra").

Proceeding from the flawed premise that coverage for general contractors is automatic where there is coverage for the named insured subcontractor, M/I Homes concludes that "M/I Homes stands in the shoes of H&R for purposes of its CGL policy. That being the case, the scope of M/I Homes' 'project' vis-à-vis H&R's CGL policy is the same as H&R's, which renders this case no different than other Illinois cases finding a duty to defend where a subcontractor's scope of work caused damage to other parts of a building beyond the subcontractor's area of responsibility." M/I Homes' brief at p. 23, citing *950 West Huron* and *Milwaukee Mut. Ins. Co. v. J.P. Larsen, Inc.*, 2011 IL App (1st) 101316. Again, however, both of those cases addressed coverage for a *named insured subcontractor*, not an additional insured developer as this case does. Plainly, nothing in the completed townhome development was outside the scope of M/I Homes' "product," regardless of whether that is true for H&R.

As previously mentioned, the appellate court in *950 West Huron* specifically distinguished between coverage for a subcontractor and coverage for a developer or general contractor on this very basis, stating that the latter would not be covered even if the former were covered. Thus, contrary to M/I Homes' argument, it is simply not true that an additional insured enjoys the same coverage as the named insured under a CGL policy. Indeed, in many regards, the additional insured receives less. *See generally, American Country Ins. Co. v. Cline*, 309 Ill. App. 3d 501, 509 (1st Dist. 1999) (explaining that additional insureds "only receive coverage for a narrow class of claims," as compared to the named insured, based upon the assumption that the additional insured "would have its own general liability coverage.")

Furthermore, as Acuity argued in its opening brief at pp. 23-24 and 35, *950 W. Huron* and *J.P. Larsen* were wrongly decided, because they failed to regard the completed construction project as an integrated whole, and instead regarded each subcontractor's scope of work as a "discrete "project," for purposes of the economic loss doctrine. This was error because this court in *Trans State Airlines v. Pratt & Whitney Canada, Inc.*, 177 Ill. 2d 21 (1997), rejected the contention that the defective engine in that case was a separate "product" from the non-defective airframe which it damaged after it became attached, for purposes of determining whether the damage constituted an "economic loss." The court rejected the contention that the defective engine in

that case was a separate "product" from the non-defective airframe which it damaged, for purposes of determining whether the damage constituted "economic loss." *See,* Acuity's brief at pp. 23, 24, and 35. Similarly, a newly-constructed building can only be viewed as an integrated whole from the purchaser's perspective – *any* defect in the building which merely damages another part of the building would constitute an economic loss, whether the claim is asserted against a developer, a general contractor, or a subcontractor.

At p. 26 of its brief, M/I Homes tries to distinguish *Stoneridge Dev. Co. v. Essex Ins. Co.*, 382 Ill. App. 3d 731 (2nd Dist. 2008), on the basis that the insured whose coverage was in question in that case was the general contractor responsible for the entire construction project, whereas in this case, the named insured, H&R, was not responsible for the entire townhome project. Based on this purported distinction, M/I Homes argues that damage to portions of the townhome project beyond H&R's work constitutes non-economic loss meeting the definition of "property damage" caused by an "occurrence." M/I Homes brief at p. 27.

M/I Homes' argument confuses the issues. H&R's coverage is not at issue in this case; at issue here is M/I Homes' coverage. The correct comparison, therefore, is between the general contractor in *Stoneridge* and the developer in this case, M/I Homes—which were both responsible for the entire project. Accordingly, any damage to any part

of the townhome project is a warranty or contract claim for repair or replacement of defective work - for economic loss - not for "property damage" which is "caused by an 'occurrence,' or "accident." M/I Homes simply wants Acuity to re-build its shoddily-constructed townhomes, and this was not the basis of the bargain for this standard-form CGL policy.

II.

Standing under the Common Interest Community Association Act

If the Townhome Association lacks standing under the Common Interest Community Association Act to make any claim that could theoretically be covered, then any such "other property" should not even be taken into account in analyzing the duty to defend. The issue of standing is not relegated to the underlying case, as explained *Westfield Ins. Co. v. W. Van Buren, LLC*, 2016 IL App (1st) 140862, ¶ 23:

> In an effort to save itself, the Developer appears to argue that Westfield Insurance should have raised the issue of "standing" as an affirmative defense in the underlying lawsuit by the Condo Association. Had there been a duty to defend, the Developer's argument might make sense. *** As there was no duty to defend, we must disregard this circular argument. Moreover, the analysis above makes clear that the issue does not necessarily involve standing but the more nuanced consideration of whether the underlying complaint sufficiently raised a theory of recovery together with supporting facts that trigger potential coverage under the insurance policy.

Plainly, any determination of the duty to defend must take account of the identity of the plaintiff in relation to the claims asserted

in the complaint. Injuries to non-parties are consistently disregarded in determining the duty to defend. *ISMIE Mut. Ins. Co. v. Michaelis Jackson & Assoc., Inc.*, 397 Ill. App. 3d 964, 971 (5th Dist. 2009); *Crawford Laboratories, Inc. v. St. Paul Ins. Co. of Illinois*, 306 Ill. App. 3d 538, 542 (1st Dist. 1999); *Monticello Ins. Co. v. Wil-Freds Const., Inc.*, 277 Ill. App. 3d 697, 704-05 (2nd Dist. 1996); *Diamond State Ins. Co. v. Chester-Jensen Co., Inc.*, 243 Ill. App. 3d 471, 473-78 (1st Dist. 1993); *Bituminous Casualty Corp. v. Gust K. Newberg Constr. Co.*, 218 Ill. App. 3d 956, 964 (1st Dist. 1991); *Sentry Ins. Co. v. S & L. Home Heating Co.*, 91 Ill. App. 3d 687, 690 (1st Dist. 1980).

The appellate court had applied this rule uniformly, until the present case. A contrary rule would mean that there is essentially no standard at all for determining the duty to defend, because any plaintiff could easily invoke the damages of *others* in order to trigger valuable insurance coverage for an otherwise non-covered claim.

The duty to defend is based not upon facts alone, but upon the nature of the plaintiff's *claim*, as framed by the complaint which the insurer is being asked to defend. *See e.g., William J. Templeman Co. v. Liberty Mut. Ins. Co.*, 316 Ill. App. 3d 379, 386 (1st Dist. 2000) ("[i]t is not sufficient that the facts alleged could have been framed in a different proceeding to cover a cause of action which would fall within the policy"). The Townhome Association is not making a claim for damage to property outside the townhomes themselves, but rather

attempting to create the illusion that it might be making such a claim, simply in order to fund its repair bills with insurance money. The Court "cannot read into the complaint something that is not there." *Pekin Ins. Co. v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055, 1063 (1st Dist. 2010).

The case that M/I Homes cites for the contrary proposition, *Frankenmuth Mut. Ins. Co. v. Hodsco Constr., Inc.*, 191 F. Supp. 3d 863, 874 (N.D. Ill. 2016), relied on the *dissenting* opinion in *West Van Buren*, and is thus contrary to the majority holding on standing in that case. The fact that M/I Homes is free to raise the Townhome Association's lack of standing in the underlying suit is not a bar to Acuity raising lack of standing in this coverage case.

M/I Homes' and the Association are *aligned* on the standing issue, so it would never be raised in the underlying case. This is their principal argument for obtaining third party funding to resolve their dispute. The suggestion that Acuity should defend an otherwise categorically non-covered claim simply to establish that the plaintiff lacks standing to make a claim that it clearly is not actually making, only in order to advance its own coverage position, is incomprehensible. Acuity rightly declined to defend and sought a declaratory judgment, and has every right to argue that the Townhome Association could not even in theory state a covered claim on these facts, according to the statute which gave rise to its existence and which circumscribes its right to make representative claims on behalf of its unit owners.

There is no dispute that the Townhome Association has standing under the Common Interest Community Association Act to sue for property damage to the common areas or to more than one unit. But the dispute here concerns whether the Townhome Association has standing to sue for damage to *other property*. The statute simply does not confer standing to sue for damage to other property. This Court should not accept the invitation to dramatically expand the scope of the statute simply to suit the desires of real estate developers to receive a free defense from their insurers for suits which seek nothing more than the repair and replacement of their defective work. The developer should be financially responsible for repairing its own product, which damages nothing other than itself.

M/I Homes contends that "[d]amage to other property under the Act could include *personal property* (or real property) 'involving' the owners of 'more than one unit,' 'as their interests may appear.'" M/I Homes brief at p. 32, citing *J.P. Larsen* at ¶ 20 (emphasis added). To the extent that *J.P. Larsen* held that the duty to defend can be triggered by an allegation of damage to unit owner personal property without an allegation of standing by the association to sue for such damages, that holding was properly rejected in *West Van Buren*:

> Third, in reaching the above-stated conclusions, we must reject the Developer's argument that the underlying complaint triggered a duty to defend because the complaint alleged actual physical harm to personal property. While construction defects that damage something other than

> the project itself can constitute an occurrence and property damage (citation omitted), they do not in this case. We agree with the trial court that these allegations were meant to simply bolster the contention that water infiltration generally occurred and caused damages. They do not trigger potential coverage under the policy.

West Van Buren at ¶ 20. The insurer simply did not raise standing in *J.P. Larsen*. In contrast, in *West Van Buren*, standing was squarely raised and explicitly decided by the appellate court. There is no merit to M/I Homes' assertion that damage to personal property, which is not even alleged in the complaint, is a claim for which M/I Homes has standing to seek recovery in the first place. What the Townhome Association does have standing to seek recovery for is damage to the construction project itself. But as discussed at length, that is not covered because it is M/I Homes' work.

III
Damage to the Townhomes is non-covered Economic Loss.

The brief of the policyholder *amici* contains a plethora of references to out-of-state judicial decisions and extrinsic evidence purporting to trace the history of the various editions of the CGL policy form over many decades. Those references are improper and should be disregarded. M/I Homes never made these arguments, and the *amici* should not be permitted to essentially initiate an entirely new piece of litigation, under an entirely new theory.

Foreign Authority

The policyholder *amici* concede that that their argument is based on foreign authority contrary to settled Illinois law. *Amici* brief, p. 13 ("Illinois law regarding the 'occurrence' issue is currently based on a deeply flawed analysis that fails to apply the actual terms of the modern day CGL policy"). Resort to foreign authorities, however, is only "appropriate where Illinois authority on point is lacking or absent." *Rhone v. First Am. Title Ins. Co.*, 401 Ill. App. 3d 802, 812 (1st Dist. 2010), citing *Carroll v. Curry*, 392 Ill. App. 3d 511, 517 (2nd Dist. 2009) and *People v. $111,900, United States Currency*, 366 Ill. App. 3d 21, 30 (1st Dist. 2006).

As this court has put it, "decisions from our sister state courts are not binding on the courts of this state," and furthermore, "they are not persuasive because they do not reflect Illinois law." *In re Scarlett Z.-D.*, 2015 IL 117904, ¶ 55. "[I]t is only in the absence of Illinois authority on the point of law in question that we are to look to the law of other jurisdictions." *K & K Iron Works, Inc. v. Marc Realty, LLC*, 2014 IL App (1st) 133688, ¶ 47. There is a wealth of controlling Illinois authority which forecloses a real estate developer from seeking CGL coverage for the disappointed expectations of the purchasers of its product, such as the Townhome Association, so there is no need to consider the law of other jurisdictions here.

There is no single rule of law which can reconcile all of the various approaches taken by each of the states on the issue of insurance coverage for construction defect claims, nor is it this court's responsibility to do so. In any event, needless to say, there are numerous jurisdictions which follow the Illinois *Eljer* rule, such as *Ohio Northern University v. Charles Constr. Servs., Inc.,* 2018-Ohio-4057, 155 Ohio St. 3d 197, 120 N.E.3d 762 (Ohio 2018), discussed in Acuity's opening brief.

Plainly, the policyholder *amici* are seeking to dramatically expand the scope of CGL coverage, which is most typically applied to satisfying bodily injury claims. The policyholder *amici* are not shy about the fact that they are essentially asking this court to order the insurance industry to confer an enormous windfall upon their members, but they never acknowledge the impact that such a paradigm shift would have on the premiums that their members would have to pay for such policy benefits. Such an expansion of coverage for the ubiquitous CGL policy, carried by nearly every business, would impose a hidden tax on essentially every citizen of the State.

Acuity submits that if the policyholders of Illinois are to be required to purchase this new and expensive form of product-replacement coverage, and effectively prohibited from purchasing basic CGL coverage, that is an issue which should be decided by the General Assembly, not in a common law civil proceeding, under the guise of

contract interpretation. *Cf.* 215 ILCS §5/143a-2 (requiring that uninsured motorist coverage be "included in an amount equal to the insured's bodily injury liability limits" in an auto liability policy). Under the separation of powers doctrine, the regulation of the insurance industry is for the legislature. *Sun Life Assur. Co. of Canada v. Manna*, 227 Ill. 2d 128, 136-46 (2007); *Cramer v. Ins. Exch. Agency*, 174 Ill. 2d 513, 526 (1996); 215 ILCS 5/448.

The policyholder *amici's* lengthy history lesson in the development of the CGL form nationwide, moreover, fails to accept the economic reality that premiums are set based upon loss history, or claims actually paid. Claims are paid based upon the law as interpreted by the courts. As set forth herein and in Acuity's Brief of Appellant, the premiums for the CGL policy at issue here, as well as every other CGL policy issued in Illinois for the last several decades, was based upon the strong and consistent line of authority from this court and the appellate court that repair and replacement of the insured's own work is not "property damage" which is "caused by an 'occurrence.'"

Contractors should be given a choice whether to purchase this expensive new form of coverage. If this court affirms, moreover, it should provide that the new rule is prospective only, so as not to inequitably shift the basis for the bargain in all of the CGL policies which have previously been issued. *Board of Com'rs of Wood Dale Pub. Library Dist. v. Du Page Cnty.*, 103 Ill. 2d 422, 426 (1984).

Extrinsic Evidence

Resort to extrinsic evidence such as the drafting history of the CGL policy form to establish what Acuity's policy means is improper unless the language is first determined to be ambiguous on its face. Neither M/I Homes nor the policyholder *amici* contend that any of the relevant language in Acuity's policy is ambiguous. Thus, the *amici's* historical analysis of CGL policy language is unnecessary and unhelpful to this court's decision-making process.

The parol evidence rule forecloses consideration of extrinsic evidence. *Travelers Ins. Co. v. Eljer Mfg., Inc.,* 197 Ill. 2d 278, 301 (2001) ("…it is unnecessary for this court to consider extrinsic evidence of the policy's purported meaning"); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 107-08 (1992) (holding that if the terms of the policy are clear and unambiguous, they must be given their plain and ordinary meaning); *accord, Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill. 2d 23, 52-53 (1987); *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999); *River's Edge Homeowners' Ass'n v. City of Naperville*, 353 Ill. App. 3d 874, 879 (2nd Dist. 2004); *Westfield Insurance Co. v. FCL Builders, Inc.*, 407 Ill. App. 3d 730, 736 (1st Dist. 2011); *Mutlu v. State Farm Fire & Cas. Co.*, 337 Ill. App. 3d 420, 434 (1st Dist. 2003).

"[I]f the language of an agreement is facially unambiguous, then the trial court interprets the contract as a matter of law without the use

of extrinsic evidence." *River's Edge*, 353 Ill. App. 3d at 878, citing *Air Safety*, 185 Ill. 2d at 462. "In applying this 'four corners rule,' a court initially looks to the language of the agreement alone." *Id.* "If the language is unambiguous, then the trial court interprets the agreement without resort to parol evidence." *Id.*; *see also, State Farm Mut. Auto. Ins. Co. v. Rodriguez*, 2013 IL App (1st) 121388, ¶¶ 33-38 (holding that "[b]ecause extrinsic evidence cannot be used to interpret the policy, it cannot be used to manufacture an ambiguity"); *Lease Mgmt. Equip. Corp. v. DFO Partnership*, 392 Ill. App. 3d 678, 686 (1st Dist. 2009) ("We conclude that each of the trial courts erred in allowing the presentation of parol evidence prior to finding that the contract language was ambiguous.")

Recent decisions, contrary to the appellate court's decision in this case, have held that CGL policies do not cover the costs associated with repairing and replacing defective work and products, which are economic losses. *See Korte & Luitjohan Contractors, Inc. v. Erie Ins. Exch.*, 2022 IL App (5th) 210254, ¶ 22; *Metro. Builders,* 2019 IL App (1st) 190517, ¶ 52; *Acuity Ins. Co. v. 950 W. Huron Condo. Ass'n*, 2019 IL App (1st) 180743, ¶ 29. Those are the only categories of damages that have been factually pleaded here. In the absence of factual allegations of damage to other property beyond the townhomes themselves for which M/I Homes was responsible in their entirety, the economic loss doctrine applies in this case.

CONCLUSION

This court should affirm the circuit court's summary judgment and vacate or reverse the appellate court's judgment.

The precedent of this State preceding and following *Eljer* is sound concerning the scope of coverage afforded by CGL policies in construction defect cases. That precedent should be reinforced here to avoid any confusion harbored by the appellate court. Additionally, this court should clarify that an association suing in a representative capacity under the Common Interest Act lacks standing to sue for damages to personal property of an individual owner or for damage to property owned by the association itself.

Respectfully submitted,
LINDSAY, PICKETT & POSTEL, LLC

By: */s/ Joseph P. Postel*
Joseph P. Postel, Attorney for Acuity, a mutual insurance company

Joseph P. Postel
jpostel@lpplawfirm.com
ARDC # 6189515
312-800-6008
Lindsay, Pickett & Postel, LLC
200 West Madison Street, Suite 3850
Chicago, IL 60606
Fax: 312-629-9404

Glenn F. Fencl
(fenclg@jbltd.com)
Garrett L. Boehm, Jr.
(boehmg@jbltd.com)
Johnson & Bell, Ltd.
33 W. Monroe St., Ste 2700
Chicago, Illinois 60603
Tel: 312-372-0770

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 315(h) and 341(b). The length of this brief is 19 pages, excluding pages and words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service, and those matters to be appended to the brief under Rule 342(a).

/s/ Joseph P. Postel
JOSEPH P. POSTEL, Attorney for
Acuity, a mutual insurance company

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

ACUITY, a mutual insurance company, *Plaintiff-Appellant,*	)	
v.	)	No. 129087
M/I HOMES OF CHICAGO, LLC, *Defendant-Appellee.*	)	

The undersigned, being first duly sworn, deposes and states that on May 3, 2023, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Appellant. On May 3, 2023, service of the Reply Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Jeffrey S. Youngerman
Stephen D. Sharp
Flaherty & Youngerman, P.C.
jyoungerman@fylegal.com
ssharp@fylegal.com

Eric P. Sparks
Alison L. Constantine
Patrick J. Johnson
Gould & Ratner, LLP
esparks@gouldratner.com
aconstantine@gouldratner.com
pjohnson@gouldratner.com
mhuerta@gouldratner.com
mspinner@gouldratner.com

Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Reply Brief bearing the court's file-stamp will be sent to the above court.

/s/ Joseph P. Postel
Joseph P. Postel

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Joseph P. Postel
Joseph P. Postel