NO. 1120764

SUPREME COURT OF ALABAMA

OWNERS INSURANCE COMPANY,
Appellant,

vs.

JIM CARR HOMEBUILDER, LLC, PAT JOHNSON, THOMAS JOHNSON,
Appellees.

ON APPEAL FROM
THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA
CIVIL ACTION NO.: CV-09-900247

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS

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ORAL ARGUMENT IS NOT REQUESTED

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Statement of the Issues

I. Whether this Court was correct in deciding that faulty workmanship that causes or results in damage to a contractor's work can be considered "'property damage' 'caused by' or 'arising out of' an 'occurrence.'"

II. Whether the unusual products-completed operations provision in the policy at issue, which excludes injury or damage arising out of products or operations for which a "classification" is shown on the Declarations Page, eliminates the applicability of the "Your Work" exclusion because the damage is therefore not "included" in the products-completed operations hazard of the policy.

Summary of the Argument

Within the past year alone, five State Supreme Courts have ruled that faulty workmanship can constitute a covered "occurrence" under the standard-form Commercial General Liability policy. Those are the North Dakota Supreme Court, the West Virginia Supreme Court of Appeals, the Connecticut Supreme Court, the Georgia Supreme Court, and this one. Three of those Courts, including this one, arrived at their decisions by correcting prior precedent that had found that faulty workmanship by a contractor can never be an "accident." Currently, eighteen State high courts have ruled that faulty workmanship can be a covered "occurrence." Only three have ruled otherwise (and several others have had their decisions overturned by subsequent acts of state legislatures). The three minority jurisdictions are truly outliers on this issue.

The exclusion for "Your Work" that appears in the policy at issue in this case does not apply to preclude coverage of the damages arising from the allegedly faulty workmanship. This is because there are anomalies in the language and structure of the policy that, when construed in favor of the insured in accordance with settled Alabama law, make it clear that the insurer intended to cover this policyholder for claims of injury and damage from faulty construction to its completed projects. Specifically, the policy at issue has an unusual section 3(b) provision in the products-completed operations hazard definition that excepts bodily injury and property damage for completed operations whenever there is a "classification" set forth in the Declarations of the policy for products-completed operations. The Declarations page of this policy contains such a classification. Thus, bodily injury and property damage is not "within" the products-completed operations hazard. Yet, the "Your Work" exclusion provides that the damage at issue must come within the products-completed operations hazard, otherwise, the exclusion is simply inapplicable.

It was the carrier that wrote this unique provision into the definition of products-completed operations and should not now be heard to complain when courts apply the provision as written. And because the policy is unusual in this respect, there is no concern that the decision in this case will in any

way affect the broader insurance market in Alabama or that it will hurt other insurers. In fact, unless Owners, itself, has sold this uncommon coverage to other general contractors in Alabama, it is unlikely that the circumstances of this case will ever replicate themselves.

Argument

I. THIS COURT'S DECISION THAT FAULTY WORKMANSHIP CAN CONSTITUTE A COVERED "OCCURRENCE" IS CONSISTENT WITH THE OVERWHELMING -- AND GROWING – MAJORITY OF DECISIONS BY STATE SUPREME COURTS ACROSS THE COUNTRY.

All five of the State high courts, including this one, that have considered the issue presented on this motion in the past twelve months have concluded that a contractor's faulty workmanship can be accidental, so as to fall within the definition of "occurrence" in the standard-form Commercial General Liability insurance policy sold to most business policyholders.[1] These Supreme Courts join thirteen others to form an overwhelming majority of state high courts to have ruled in this way.[2] There are only three outlier Supreme Courts

[1] The other four are: *Capstone Building Corp. v. American Motorists Ins. Co.*, 67 A.3d 961 (Conn. 2013); *Taylor Morrison Services, Inc. v. HDI-Gerling America Ins. Co.*, 293 Ga 456, 467 S.E.2d 587 (2013); *K&L Homes v. American Family Mut. Ins. Co.*, 829 N.W.2d 747 (N.D. 2013); *Cherrington v. Erie Ins. Property & Cas. Co.*, 231 W.Va 470, 745 S.E.2d 508 (2013).

[2] *See Fejes v. Alaska Ins. Co.*, 984 P.2d 519 (Alaska 1999); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007); *Sheehan Constr. Co. v. Cont'l Cas. Co.*, 935 N.E.2d 160 (Ind. 2010), *modified on other grounds*, 938 N.E.2d 685; *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486, 493 (Kan.

(Kentucky, Nebraska and Pennsylvania) that have yet to reconsider and correct their mistaken decisions on this issue.

In addition, Arkansas, Colorado, Hawaii and South Carolina have enacted statutes that have overturned judicial precedent in those states and mandated that faulty workmanship be deemed an "occurrence." ARK. CODE ANN. § 23-79-155(a) (Supp. 2011); COLO. REV. STAT. § 13-20-808(3) (2010); HI. REV. STAT. § 431-1 (2011); Act of May 17, 2011, No. 26, § 1, 2011 S.C. Acts at 88-89.

As the West Virginia Supreme Court of Appeals aptly observed in the *K&L Homes* decision last year, "While we appreciate this Court's duty to follow our prior precedents, we also are cognizant that *stare decisis* does not require this Court's continued allegiance to cases whose decisions were based upon reasoning which has become outdated or fallen into disfavor." *Cherrington v. Erie Ins. Property & Cas. Co.*, 231 W.Va 470, 745 S.E.2d 508, 517 (2013). This Court's decision on this issue was plainly correct, is in line with the present

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2006); High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474 (N.H. 1994); Wanzek *Constr., Inc. v. Emp'rs Ins. of Wausau*, 679 N.W.2d 322 (Minn. 2004); *Architex Ass'n v. Scottsdale Ins. Co.*, 27 So.3d 1148 (Miss. 2010); *Crossman Cmties. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, No. 26909, 2011 WL 3667598 (S.C. Aug. 22, 2011); *Corner Constr. Co. v. U.S. Fid. & Guar. Co.*, 638 N.W.2d 887 (2002); *Travelers Indem. Co. of Am. v. Moore & Assocs.*, Inc., 216 S.W.3d 302 (Tenn. 2007); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007); *Great Am. Ins. Co. v. Woodside Homes Corp.*, 448 F. Supp. 2d 1275 (D. Utah 2006); *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 268 Wis. 2d 16 673 N.W.2d 65 (2004).

state of the law all across the country, and should not be disturbed.[3]

II. THE UNUSUAL LANGUAGE AND STRUCTURE OF THE POLICY AT ISSUE REQUIRES PRECISELY THE CONSTRUCTION AND INTERPRETATION THIS COURT GAVE TO IT.

The policy at issue in this case is an unusual one in two key respects. First, the definition of "products-completed operations hazard" contains an uncommon provision that says that the definition does "not include 'bodily injury' or 'property damage' arising out of: . . . (3) Products or operations for which the classification, shown in the Declarations, states that products-completed operations are included." And, of course, there is such a classification shown in the Declarations. Second, the "Your Work" exclusion does not include the "subcontractor exception" that has routinely appeared in these policies since the 1986 insurance-industry revision of the CGL that expanded the coverage for construction defects. *See* Jeffrey W. Stempel, *Stempel on Insurance Contracts*, § 14.13[D], 14-224.8 (3rd Ed. 2007 Supp.)(discussing expansion of coverage under 1986 revision because "the insurance and policyholder community agreed that the CGL policy should provide coverage for defective construction claims so long as the allegedly defective

[3] For a very thorough survey of the entire judicial landscape on this issue, *see* French, "*Construction Defects: Are they Occurrences?*" Gonzaga L. Rev., Vol. 47:1 (2011).

work has been performed by a subcontractor rather than by the policyholder itself"). The combination of these two unusual aspects of the policy, and the way in which those provisions work together in the policy, make it plain that this Court's decision was absolutely correct. Here is why.

There is no dispute that Jim Carr Homebuilder purchased $2 million worth of bodily-injury and $2 million worth of property-damage coverage for products-completed operations. The limits for that coverage are set forth on the Declarations page of the policy. By removing the "subcontractor exception" from the "Your Work" exclusion in this policy, the carrier rendered the products-completed operations hazard coverage illusory unless some other provision in the policy were to operate to restore the coverage. This is because, in the absence of the subcontractor exception, coverage for a general contractor's faulty work (which is otherwise provided by the products-completed operations provision) is precluded by the "Your Work" exclusion.

The "Your Work" exclusion is applicable to the general contractor's faulty work if, and only if, the damage is within the products-completed operations hazard. By providing in § 3(b) of the products-completed operations hazard definition that bodily injury and property damage is not part of the products-completed operations hazard when there is a classification for

it in the Declarations -- and then by actually setting that classification forth in the Declarations -- the carrier is making it clear that, for this particular policyholder, the "Your Work" exclusion does not apply to preclude coverage.

In other words, where very nearly all CGL policies sold to general contractors preclude coverage for the general contractor's own faulty workmanship (through the "Your Work" exclusion), but then restore coverage for damage arising from the faulty workmanship of subcontractors (through operation of the subcontractor exception to that exclusion), this policy is structured in such a way that the faulty workmanship of the general contractor, itself, is covered.

This is a highly unusual policy in that respect. It does not appear from the record why Owners sold a policy to Jim Carr with these distinct characteristics, but the fact of the matter is that it did. It should not now be heard, after it has collected the policyholder's premiums, to argue that there is no coverage, after all. Incidentally, the fact that this policy is unusual in its provisions and structure also makes it clear that the sky is not falling as a result of this Court's decision in this case. Most general contractors do not have the kind of coverage afforded by this policy to Jim Carr Homebuilder. Unless Owners, itself, has sold a great many of these policies to other general contractors in Alabama, it is most unlikely

that the courts of this State will see other cases like this one because it would be surprising if this kind of policy has been issued by any other insurers to other Alabama policyholders.

Finally, we respectfully suggest that this Court can comfortably dispense with the argument that is often made in these kinds of cases that finding coverage for faulty workmanship in a CGL policy would turn the policy into a performance bond. This argument has no merit whatsoever.

A performance bond is something completely different from a CGL policy and there is simply no way to "turn" one of them "into" another. The insured under a performance bond is the property owner. The insured under a CGL policy is the contractor. A performance bond insures the project owner against the risk that the contractor will not deliver a quality project on time. The CGL policy insurers the contractor against, among other things, claims that its negligence has resulted in injury or damage to others. The two kinds of policies insure different parties for different risks at different times and for completely different purposes. *See, generally*, *Couch on Insurance*, § 1:15, n.4 (discussing distinction between performance bond and liability policy).

Moreover, while a surety/insurer under a performance bond will pay the owner for the contractor's failure to deliver as promised, the surety almost always has an indemnity agreement

that permits it to seek recovery for such a payment from the contractor. Thus, the purpose of the performance bond is to protect the owner at the contractor's expense, while the purpose of the CGL policy is to protect both the owner and the contractor at the insurer's expense. *Id.*

One could no sooner "turn" a CGL policy "into" a performance bond by finding that it covers faulty workmanship than one could "turn" a dog "into" a canary by placing it in a bird cage.

Conclusion

For all of these reasons, the application for rehearing should be denied in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing instrument has been served by placing a copy of same in the United States Mail, postage prepaid and properly addressed to:

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