SUPREME COURT OF NEW JERSEY
DOCKET NO. A-13/14-15 (076348)

Cypress Point Condominium Association, Inc. Plaintiff, v. Adria Towers, L.L.C., Weather-Tite v. Pereira Construction, L.L.C., Evanston Insurance Company, National Indemnity Company, Crum & Forster Specialty Insurance Company, Defendants.	: : : : : : : : : : : :	ON CERTIFICATION FROM THE SUPERIOR COURT APPELLATE DIVISION DOCKET NO. : A-2767-13T1 LAW DIVISION DOCKET NO.: HUD-L-2260-11 SAT BELOW IN THE APPELLATE DIVISION: HON. JOSEPH L. YANNOTTI HON. DOUGLAS M. FASCIALE HON. RICHARD S. HOFFMAN

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS' IN SUPPORT OF RESPONDENT-PLAINTIFF CYPRESS POINT CONDOMINIUM ASSOCIATION, INC.

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I. PRELIMINARY STATEMENT

United Policyholders supports the position of Cypress Point Condominium Association, Inc. ("the Association"). United Policyholders writes separately, as *amicus curiae*, to stress that public policy and the law nationwide supports the Appellate Division's opinion holding that property damage resulting from faulty workmanship can constitute an "occurrence" for which coverage is provided under standard general liability insurance policies.

II. PROCEDURAL HISTORY

United Policyholders adopts the Procedural History contained in the submissions of the Association.

III. STATEMENT OF FACTS

United Policyholders adopts the Statement of Facts contained in the submissions of the Association.

IV. SUMMARY OF THE ARGUMENT

Across the nation, many high courts have addressed the extent to which construction defect claims can arise out of an "occurrence" within the meaning of standard commercial liability insurance policies. In the past ten years, the vast majority of state high courts to consider the issue have held that construction defects can be accidental, and thus constitute an "occurrence."[1] Those courts are unquestionably correct. An occurrence is defined as an

[1] See, e.g., Capstone Bldg. Corp. v. American Motorists Ins. Co., 67 A. 3d 961 (Conn. 2013); U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007); American Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., Inc., 707 S.E.2d 369 (Ga. 2011); Sheehan Constr. Co., Inc. v. Cont'l Cas. Co., 938 N.E.2d 685 (Ind. 2010); Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486 (Kan. 2006) ; Architex Ass'n v. Scottsdale Ins. Co., 27 So.3d 1148 (Miss. 2010); K&L Homes, Inc. v. American Family Mut. Ins. Co., 829 N.W.2d 724 (N.D. 2013) Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 308 (Tenn. 2007); Lamar Homes,

"accident." Under this Court's precedent, "the accidental nature of an occurrence is determined by analyzing whether the wrongdoer intended or expected to cause an injury." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 183 (1992). "If not, then the resulting injury is 'accidental' even if the act that caused the injury was intentional." Id. Here, neither the Association nor its contractor intended to cause injury. That is the end of the inquiry.

This Court's prior decision in Weedo v. Stone-E-Brick, Inc., 81 N.J. 233 (1979), is inapposite. To the limited extent it may be relevant, it supports finding an occurrence in the present case. Weedo is inapposite because it analyzed exclusions to coverage, not the occurrence language. Moreover, the exclusions analyzed in Weedo were *changed* in 1986 to provide *broader* coverage, and the policy at issue here provides that broader coverage. To the extent Weedo is relevant, it supports finding coverage for two reasons. First, the counsel for the insurance company in Weedo *conceded* that, but for the exclusions, there would be coverage. See Weedo, 81 N.J. at 237 n.2. Second, even under the more restrictive 1973 form policy, this Court specifically stated that the lines drawn by the exclusions showed an intention to cover "injury to people and damage to property caused by the faulty workmanship." Id. at 239. In the present case, there is an allegation that the negligent work of the subcontractor caused damage to property beyond the faulty work itself.

In ruling in favor of the Association, the Appellate Division held that "the unintended and unexpected consequential damages caused by the subcontractors' defective work constitute 'property damage' and an 'occurrence' under the policy." Cypress Point Condominium Ass'n,

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Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007); Cherrington v. Erie Prop. & Cas. Co., 745 S.E.2d 508 (W.Va. 2013); but see Cincinnati Ins. Co. v. Motorists Mut. Ins. Co., 306 S.W.2d 69 (Ky. 2010); Kvaerner, Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 897-98 (Pa. 2006).

Inc. v. Adria Towers, L.L.C., 441 N.J. Super. 369, 377 (App. Div. 2015). The Appellate Division correctly noted that the insurance companies did not contend, and the court could not reasonably believe, that the subcontractors either expected or intended for their faulty workmanship to cause physical injury to tangible property. Id. Indeed, it is clear from the record that the Association did not intend for the subcontractors to cause property damage nor did the subcontractors intend to cause any such damage; the property damage was accidental. Thus, it was caused by an occurrence.

V. LEGAL ARGUMENT

(a) The Accidental Nature of an Occurrence is Determined by Analyzing Whether the Wrongdoer Intended or Expected to Cause an Injury.

Under this Court's precedent, "the accidental nature of an occurrence is determined by analyzing whether the wrongdoer intended or expected to cause an injury." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 183 (1992). "If not, then the resulting injury is 'accidental' even if the act that caused the injury was intentional." Id. In so deciding, this Court fully considered countervailing public policy concerns:

> On the one hand, we have long held that public policy denies insurance indemnification for the civil consequences of wrong-doing. On the other hand, we recognize the desire to compensate insurance victims with insurance proceeds to the extent that that compensation will not condone and encourage intentionally wrongful conduct.

Id. at 181 (citations omitted).

In the context of construction defect litigation, the balance of equities weighs heavily in favor of coverage. It is important to compensate homeowners and other victims of shoddy construction, particularly where (as here) that negligent construction causes damage beyond the negligent work product itself. For many condominium owners, their condominiums will be their

largest and most important financial and personal asset. Public policy fully supports compensating those victims to ensure that their homes can be fully and properly repaired. In addition, there is little danger of encouraging intentionally wrongful conduct. Damages to a third-party due to construction defects typically arise from negligence, the precise risk insurance policies are purchased to cover. Intentionally caused harm in construction is extremely rare and would not qualify for insurance coverage. While the insurers contend that quality of construction is completely within the control of the developer and general contractor, that is untrue in the real world. "As a practical matter, it is very difficult for a general contractor to control the quality of a subcontractor's work." Cypress Point, 441 N.J. Super. at 381. No developer or contractor can supervise every worker, every nail, every screw, or every joint. In the real world, real people occasionally make mistakes and those mistakes are why people buy insurance. The risk of these mistakes is why insurers are paid and accept premiums.

(b) The Accidental Nature of an Occurrence is Not Determined by Analyzing Whether One of the Harmed Parties Is the General Contractor or Developer.

The argument against coverage can be boiled down to the following: the developer "built" the condominiums, so when a subcontractor engages in negligent work and that work causes damage to the condominiums, there is no damage beyond the "work" of the general contractor and thus no occurrence. This argument conflates the "occurrence" requirement with the "your work" exclusion. Examining the evolution of commercial general liability reveals the fundamental flaws inherent in the "no occurrence" analysis.

The history of the form commercial general liability policy drafted by the Insurance Services Office ("ISO") has been used by many state high courts to inform the analysis of the intended coverage for construction claims. See, e.g., J.S.U.B., 979 So. 2d at 878 n.5; Lamar, 242

S.W.3d at 5 n.1; Am. Girl, 673 N.W.2d at 65. When this court decided Weedo in 1979, the scope of construction coverage was substantially narrower.

In the first standard-form general liability policy drafted in 1940, a covered event was required to be "caused by accident." The policy excluded "bodily injury or property damage caused intentionally by or at the direction of the insured." Eric Mills Holmes, Appleman on Insurance Law 2d § 117.1 (LexisNexis 2009). In 1966, the standard policy deleted the "caused by accident" language as well as the "intentional injury or damage exclusion." Id. Instead, those concepts were merged into the definition of "occurrence" which was defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Id. The "standpoint of the insured" language was added because some courts considered whether the resulting injury was accidental from the victim's standpoint, rather than the insured's standpoint. Id. The addition of the "occurrence" language was intended to be a broadening of coverage from the prior "accident" language. As explained by New York's highest court, "[t]he insurance industry changed to occurrence-based coverage in 1966 to make clear that gradually occurring losses would be covered so long as they were not intentional." Cont'l Cas. Co. v. Rapid-Am. Corp., 609 N.E.d3 506, 509 (N.Y. 1993).

In 1973, the definition of "occurrence" was amended to "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured." In 1986, the definition of "occurrence" was amended again, this time more significantly, by removing the "neither expected nor intended from the standpoint of the insured" language. Instead, the policy added an exclusion to address intentional injury or damage. The

idea was to clarify the language by "making the negative implied exclusion [in the occurrence definition] into a positive, clearly worded, express exclusion" for injury or damage that is expected or intended from the standpoint of the insured. Eric Mills Holmes, Appleman on Insurance 2d § 117.1 (LexisNexis).

The conscious movement of the "expected or intended" language from the coverage grant to a separate exclusion clarified that the insurance company was to bear the burden of proving expected or intended injury. Indeed, even when the "expected or intended" language was embedded in the "occurrence" definition, courts had ruled that it was exclusionary in nature and, therefore, the insurance company bore the obligation to prove that loss was expected or intended to avoid coverage. United Ins. Co. v. McGuire Co., 281 Cal. Rptr. 375, 378-379 (Cal. Ct. App. 1991). The drafting history supports interpreting the term "occurrence" broadly to include most events, conditions, and happenings, particularly those in which it is questionable whether the damage was intended or expected from the standpoint of the insured. The burden of proving that particular damage or injury was actually expected or intended by each particular insured is intended to be the insurance company's burden to bear.

In tandem with the broadening of coverage from "accidents" to "occurrences," coverage for construction liabilities has broadened over the decades. Before 1976, the standard-form insurance policy excluded the policyholder's liability for property damage to the policyholder's own work. This was accomplished through the "your work" exclusion. Beginning in 1976, however, insurance companies offered a Broad Form Property Damage endorsement that extended coverage for the policyholder's liability for property damage to its own work if that damage was caused by a subcontractor. In 1986, ISO incorporated this aspect of the broad-form endorsement directly into the text of the standard CGL policy by inserting the subcontractor

exception into the "your work" exclusion, thereby specifically contemplating coverage for property damage to a policyholder's own work caused by a subcontractor's defective performance.

When the insurance policy is read as a whole, and in light of its history, it is clear that property damage to a policyholder's own work caused by a subcontractor's defective performance is both covered and intended to be covered by the insurance industry. The drafting history clearly illustrates that an "occurrence" is intended to encompass accidental injury resulting from negligent conduct, even if that conduct may be couched as faulty workmanship. The addition of the subcontractor exclusion conclusively establishes that a subcontractor's faulty workmanship is a covered occurrence. Any other construction impermissibly would render the subcontractor exclusion superfluous. There is no reasonable reading of the policy as a whole that would support a contrary conclusion. The Appellate Division recognized this, as well, when it noted:

> If the parties to the insurance contract did not intend a subcontractor's faulty workmanship causing consequential damages to constitute "property damage" and an "occurrence," as those terms are defined in the policy, then it begs the question as to why there is a subcontractor's exception.

Cypress Point, 441 N.J. Super. at 381.

(c) This Court's Decision in *Weedo* Describes an Insurance Coverage World That Has Not Existed Since 1986.

This Court's decision in Weedo need not be overruled. It accurately describes the scope of insurance coverage mandated by the "business risk" exclusions as they existed under the 1973 ISO policy form. To the extent that an insurance carrier still uses the 1973 ISO policy form, Weedo would remain binding and correct.

Courts have recognized, however, that the policy language construed in Weedo was replaced in 1986 by a new policy form providing Products Completed Operations Hazard ("PCOH") coverage for damage caused by a negligent subcontractor. See, e.g., Lennar Corp. v. Great Am. Ins. Co., 200 S.W. 3d 651, 671 (Tex. App. 2006) (citing and quoting in part Am. Family Mut. Ins. Co. v. Am. Girl, Inc., 268 Wis. 2d 16(2004)) (Holding that in construing the PCOH coverage of the 1986 policy form, many courts have "continually misapplied Weedo to hold that defective construction cannot constitute an occurrence resulting in some 'regrettably overbroad' generalizations about CGL policies."); J.S.U.B., Inc., 979 So.2d at 881-82 (Holding that the outcome in Weedo was "not due to the insuring provisions [of the policy], but because faulty workmanship by a contractor was specifically excluded based on the clear and unambiguous 'business risk' exclusionary clauses" contained in the 1973 policy form.). The Appellate Division in the present case correctly ruled that the Weedo decision analyzed the exclusions in the standard-form 1973 ISO policy, not the "occurrence" language.[2]

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[2] This Court in Weedo cited to a 1971 article by Roger C. Henderson. Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations: What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971). In his article, Professor Henderson addressed the scope of the products hazard and completed operations coverage, as it then existed. In 1971, Professor Henderson explained his understanding of the purpose of the products-completed operations coverage as insuring the possibility that the goods, products or work of the insured, once relinquished and completed, will cause bodily injury or damage to property *other than* to the product or completed work itself, and for which the insured may be found liable. Professor Henderson explained that "[t]he products hazard and completed operations provisions are not intended to cover damage to the insured's products or work project out of which an accident arises." Id. At 441. However, that was not due to the "occurrence" language. Rather, "[t]his limitation on the type of property damage covered was expressed in the policies prior to 1966 by language which excluded coverage for injury to or destruction of 'any goods, products or containers thereof manufactured, sold, handled or distributed or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises.'" Id. Then, the exclusions were modified in the 1966 form to address this issue, specifically through inclusion of the initial versions of the "alienated premises," "your product" and "your work" exclusions. Each of those exclusions has been modified since 1966, most significantly by the addition of the "subcontractor exception" to the "your work" exclusion, which did not exist in the 1966 form or in 1971 when Professor Henderson wrote his article. Accordingly, Professor Henderson's broad statements about the "risk intended to be insured" did not involve an interpretation of the "occurrence" language, but instead were an interpretation of exclusions that have now passed into history. Professor Henderson himself warned in the conclusion of his article that, while he hoped his historical analysis of policy provisions and precedent would be of assistance to the resolution of future disputes under the 1966 form, under which there were "no reported cases" at that time, "[t]here is... no substitute for familiarizing oneself with the details of a particular policy." Id. at 446.

Indeed, this Court in Weedo specifically noted that the coverage limitations it applied "are set forth in the exclusion clauses of the policy, whose function it is to restrict and shape the coverage otherwise afforded." 81 N.J. 237 (1979) (emphasis added). As the Appellate Division in the present case recognized, Weedo does not ask or answer the question of whether defective construction, *i.e.*, faulty, negligent workmanship, can be a covered "occurrence." That issue had been conceded by the insurance company. See Weedo, 81 N.J. 237 n.2. Even under the more restrictive 1973 ISO policy, this Court specifically stated that the lines drawn by the exclusions showed an intention to cover "injury to people and damage to property caused by the faulty workmanship." Id. at 239.

(d) A General Liability Insurance Policy Is Not A Performance Bond.

The insurers incorrectly contend that allowing general liability insurance coverage for property damage arising out of negligent construction will convert a general liability policy into a performance bond. To the contrary, upholding coverage in this case will not transform the insurance policy into a performance bond. As the Appellate Division correctly held:

> "Interpreting 'occurrence' under the policy to include unexpected and unintended consequential damages caused by the subcontractors' faulty workmanship will not convert the policy into a performance bond...A performance bond guarantees the completion of a construction contract if a contractor defaults, and unlike an insurance policy, it benefits the project owner rather than the contractor. ...A surety, unlike a liability insurer, is also entitled to indemnification from the contractor." (citations omitted).

Cypress Point Condo. Ass'n, 441 N.J. Super. at 384

The purpose and effect of a performance bond is far different than an insurance policy. See, e.g., J.S.U.B., 979 So. 2d at 887-888; Moore & Assocs., 216 S.W.3d at 309. A performance bond guarantees performance of a contract upon a default by the contractor. Am. Home Assur. Co. v. Larkin Gen. Hosp., Ltd., 593 So. 2d 195, 198 (Fla. 1992). Performance bonds do not exist

to protect the contractor against legal liability for property damage liability arising out of the contractor's work, as does insurance. Under a performance bond, if the contractor does not perform the construction contract, such as if the contractor were to stop work on a project, then the surety must step in to ensure the completion of the contract for construction. If the surety does so, the surety may seek recovery from the contractor under a separate indemnity agreement, which provides that the contractor will hold the surety harmless from all loss and expenses the surety incurs under the performance bond. For that reason, the performance bond offers no protection to the contractor. Insurance premiums for general liability insurance are much more expensive than the cost of a performance bond because insurance provides real protection for the contractor against losses that can result if its work causes bodily injury or property damage. Any similarities between general liability insurance and a performance bond are irrelevant, in any event, because the "CGL policy covers what it covers." Lamar Homes, 242 S.W. 3d at 10. As explained by the Texas Supreme Court:

> Any similarities between CGL insurance and a performance bond under these circumstances are irrelevant, however. The CGL policy covers what it covers. No rule of construction operates to eliminate coverage simply because similar protection may be available through another insurance product. Moreover, the protection afforded by a performance bond is, in fact, different from that provided by the CGL insurance policy here.

Id.

Courts in other jurisdictions have also recognized the profound differences between performance bonds and liability insurance. Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co., 189 F. Supp. 2d 1212 (D. Kan. 2002) (Rejecting insurer's argument that the damage to the project caused negligent workmanship of subcontractor was not covered because providing coverage for the damage would transform the insurance policy into a performance bond.); Commercial Union Assurance Companies v. Gollan, 394 A.2d 839, 843 (N.H. 1978), ("A

performance bond is a guaranty by the surety that 'the building will be completed within the contract price without extra cost to the owner... [and that] payment will be made by the contractor to subcontractors and to those who furnish labor and materials.'. Our construction of the policy does not create a performance bond, but simply protects the insured if liability arises from work performed as defined.")

(e) The Fundamental Purpose of the Insurance Transaction and the Reasonable Expectations of the Insurance Consumer Are Paramount.

Insurance is both a contractual agreement and a product. As a contractual agreement, one should always keep in mind its fundamental purpose and reason for being. "With respect to the rule of liberal construction, the courts have kept in mind that *the primary purpose of insurance is to insure*, or to provide for indemnity, and have so construed insurance contracts as not to defeat the dominant purpose by technical rules of interpretation." 13 J. Appleman, Insurance Law & Practice, §7403, at 302-03 (1976). Likewise, insurance is a product that is advertised to create an expectation of safety and protection. The reasonable expectations of the policyholder when purchasing the insurance product are an important consideration.

When multiple reasonable interpretations of an insurance policy are possible, the language must be read in favor of coverage. In a different context, the Court of Appeals for the Third Circuit chastised the insurance industry's continued use of a term that caused years of divergent judicial opinions, and on that basis, found the language ambiguous. New Castle County DE v. National Union Fire Ins. Co. of Pittsburgh, Pa., 243 F. 3d 744, 755-756 (3d Cir. 2001). (In holding that the phrase "invasion of the right of private occupancy" must be liberally construed, stating "[a] single phrase, which insurance companies have consistently refused to define, and that has generated literally hundreds of lawsuits, with widely varying results, cannot,

under our application of commonsense, be termed unambiguous."). The insurance industry's continued use of the word "accident" should be subject to similar reprobation or, at a minimum, scrutiny. A major treatise notes that "[t]here are few insurance words that have provoked more controversy and litigation than the word 'accident.'" Eric Mills Holmes, Appleman on Insurance 2d § 116.4 (LexisNexis). This Court's decision in Voorhees provides needed guidance.

In discerning the meaning of insurance policies, where "language of a policy supports two reasonable meanings, one favorable to the insurer and one favorable to the insured, the interpretation supporting coverage will be applied." S.T. Hudson Engineers, Inc. v. Pennsylvania Nat'l Mut. Cas. Co., 388 N.J. Super. 592, 603 (App. Div. 2006), certif. denied, 189 N.J. 647 (2007). Moreover, "[c]overage clauses are interpreted liberally." Id. The policies are read "to find a reasonable meaning in keeping with the express general purposes of the policies" Id. (quoting Royal Ins. Co. v. Rutgers Cas. Ins. Co., 271 N.J. Super. 409, 416 (App. Div. 1994)), and interpreted "to effectuate the reasonable expectations of the insured." Id. (citing Zuckerman v. Nat'l Union Fire Ins. Co., 100 N.J. 304, 320-21 (1985)).

For many policyholders in the construction industry, liability for negligence in construction is the primary risk for which they buy insurance. For homebuilders particularly, the main insured risk under the products-completed operations coverage is that their work, once completed and relinquished, will suffer damage due to the faulty work of subcontractors or due to defects in materials used in construction. Those risks are covered by virtue of exceptions to exclusions. The subcontractor exception to the "your work" exclusion demonstrates an intent to cover damage due to the faulty work of subcontractors. The restoration, repair, or replacement of property because the policyholder's work was "incorrectly performed on it" is, by the terms of the policy, not excluded if the loss falls within the products-completed operations hazard.

Homebuilders often pay a substantial portion of the general liability insurance premium, indeed often a majority of that premium, for products-completed operations coverage. Their reasonable expectations of coverage should be fulfilled.

Those consumers and corporations who do business with construction companies expect that, in the event that the negligence of the contractor or subcontractor causes damage or injury, the contractor or subcontractor will have insurance coverage to pay to repair the property. Indeed, that is why contractors and subcontractors are almost always required to provide a Certificate of Insurance showing that they have CGL coverage. As the Appellate Division aptly noted, it is common practice for the developer to create a single purpose entity for liability and financing purposes, which dissolves at the end of a construction project. The entity is unfunded, leaving homeowners and condominium associations with no recourse against developers. The only avenue for recovery may be the insurance company which accepted premium for the risk that its insured would cause property damage or bodily injury.

VI. CONCLUSION

United Policyholders respectfully urges this Court to affirm the Appellate Division's decision.

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