

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
B. Hicks Harwell, Jr., Circuit Court Judge

Trial Court Case No. 2002-CP-10-4390

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S.C. SUPREME COURT

Auto-Owners Insurance Co., Inc.,..... Appellant,

v.

Virginia T. Newman and
Trinity Construction, Inc.,..... Respondents.

**AMICUS CURIAE BRIEF OF
NATIONAL ASSOCIATION OF HOME
BUILDERS AND HOME BUILDERS
ASSOCIATION OF SOUTH CAROLINA**

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Introduction

The National Association of Home Builders (“NAHB”) and the Home Builders Association of South Carolina (“HBASC”) respectfully submit this brief as amicus curiae in support of respondents Virginia T. Newman and Trinity Construction, Inc. (“Newman” and “Trinity” respectively). NAHB represents the nation’s home builders. HBASC represents the home builders of South Carolina. NAHB and HBASC urge the Court to affirm the trial court’s order in favor of Newman and Trinity on the “occurrence” issue. The trial court correctly construed L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 121-24, 621 S.E.2d 33, 35-37 (2005), as holding that inadvertent property damage to another part of the structure caused by a subcontractor’s defective work is caused by an “occurrence” within the meaning of the general contractor’s general liability insurance policy.

The interpretation of L-J by the trial court below is consistent with the thoughtful and well-reasoned opinions of most courts around the country that have recently addressed the “occurrence” issue. These courts have held that a claim against the builder for property damage to the builder’s work caused by a subcontractor is covered by the builder’s general liability insurance policy. These courts have drawn a distinction between faulty work standing alone, and faulty work that causes property damage to another part of the structure. This is the same distinction that was drawn by the Supreme Court of New Hampshire in High Country Associates v. New Hampshire Ins. Co., 648 A.2d 474, 476-77 (N.H. 1994), which was cited with approval by this Court in L-J.

The contrary view that some courts have taken is not the majority view and would render meaningless the policy's "your work" exclusion. This exclusion was amended in 1986 to specifically except from the exclusion property damage to the builder's work that was caused by a subcontractor. The insurer's position that property damage to the builder's work is not caused by an "occurrence" would erroneously deprive builders of insurance coverage for property damage that was caused by the defective work of subcontractors and that was neither expected nor intended by the builder.

Statement of Interest

NAHB and HBASC have a substantial interest in this matter. NAHB is a nonprofit trade association that represents 235,000 builder and associate members organized into approximately 800 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. These affiliated associations include 20 state and local associations in South Carolina. NAHB is the voice of the American housing industry. NAHB's goals are to promote home ownership; foster a healthy and efficient housing industry; and promote policies that will keep safe, decent, and affordable housing a national priority. Its members construct over 80% of the housing in the United States. NAHB's website address is www.nahb.org.

HBASC is the largest association of residential construction entities in South Carolina affected by the Court's decision in this matter. Its website is at www.hbaofsc.com. HBASC has approximately 6,000 members consisting primarily of contractors, subcontractors, developers and other related occupations that build and develop houses, apartments, and condominiums for residential use in South Carolina.

HBASC believes that the vast majority of construction for residential use in South Carolina is performed in whole or in part by its members. HBASC speaks for the homebuilders in South Carolina. HBASC is at the forefront in monitoring legislation and legal developments that affect the home building industry in South Carolina. For example, HBASC works with state and local communities in the implementation of building codes to ensure that the codes provide for safe, affordable housing for the residents of South Carolina.

NAHB and HBASC can offer this Court a broad view of (i) the role that liability insurance plays within the home building industry, (ii) the evolution of the standard general liability policy to include damage to the builder's work caused by subcontractors, (iii) the lack of justification for the retrenchment of coverage that appellant Auto-Owners Insurance Co., Inc. ("the insurer") is seeking in this case, and (iv) the disruptive effect that the insurer's position would have on South Carolina home builders and South Carolina homeowners alike.

Statement of Issues on Appeal

NAHB and HBASC respectfully adopt the statement of issues on appeal as stated in the Final Brief of Respondent.

Statement of the Case

NAHB and HBASC respectfully adopt the statement of the case as stated in the Final Brief of Respondent.

Argument

I. LIABILITY INSURANCE PROTECTS HOME BUILDERS FROM THE RISK OF CLAIMS FOR PROPERTY DAMAGE TO THE BUILDER'S WORK CAUSED BY THE WORK OF SUBCONTRACTORS.

One of the risks faced by a residential builder is that, following completion of construction, the homeowner may assert a claim against the builder for damage to the home caused by an alleged construction defect. One of the ways a builder manages the risk of such construction defect claims is by purchasing comprehensive general liability (“CGL”) insurance. The last major revision of the standard, pre-printed CGL insurance form took place in 1986. The policy at issue in this case is typical of post-1986 CGL insurance policies.

The insuring agreement in a builder’s CGL policy provides a broad grant of insurance coverage, which is then trimmed by the policy’s exclusions, several of which apply specifically to the construction industry. See, e.g., Great Am. Ins. Co. v. Calli Homes, 236 F.Supp.2d 693, 700 (S.D. Tex. 2002) (construction defect claims allege an occurrence, “leaving the coverage to be determined by construction-specific exclusions in the policy”). Accord French, 448 F.3d at 706 (construction defect claims allege an “occurrence,” although exclusions in the policy determine whether there is coverage); American Family Mut. Ins. Co. v. American Girl, Inc., 673 N.W.2d 65, 74, 76 (Wis. 2004) (same).

The policy’s insuring agreement imposes three main requirements for coverage:

- (i) the claim against the builder must be for damages because of “property damage”;
- (ii) the property damage must take place while the policy is in effect; and (iii) the

property damage must be caused by an “occurrence,” which is defined to mean “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

To be caused by an “occurrence,” the property damage must be fortuitous, that is, neither expected nor intended from the standpoint of the insured. See, e.g., French, 448 F.3d at 704; American Family, 673 N.W.2d at 70. Accord Bituminous Cas. Corp. v. Kenway Contracting, Inc., 2007 WL 1790685, at *4-*5 (Ky. June 21, 2007); High Country, 648 A.2d at 478.

Several construction-specific exclusions in a standard CGL policy exclude from coverage certain types of property damage. The principal such exclusion is the “your work” exclusion, which provides;

“This insurance does not apply to: . . . ‘[p]roperty damage’ to ‘your work’ arising out of it or any part of it and included in the ‘products-completed operations hazard.’ This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.” (Emphasis added.)

Hence, even though the property damage is to the builder’s own work, the “your work” exclusion does not apply and the CGL policy provides coverage if the damaged work or the work out of which the damage arises was performed on the builder’s behalf by a subcontractor. French v. Assurance Co. of Am., 448 F.3d 693, 703-05 (4th Cir. 2006) (Maryland law); Limbach Co. v. Zurich American Ins. Co., 396 F.3d 358, 361-63 (4th Cir. 2005) (Pennsylvania law). Accord American Family, 673 N.W.2d at 82; Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648, 653-54 (9th Cir. 1988) (Oregon law); P. O’Connor, Commercial General Liability Coverage, 19 The

Construction Lawyer 5, 6 (April 1999); J. Blute, Analyzing Liability Insurance Coverage for Construction Industry Property Damage Claims, 7 Coverage 1, 17-18 (May/June 1997).

It is important to understand the evolution of the “subcontractor” exception to the “your work” exclusion. Prior to 1986, most CGL policies excluded property damage to the builder’s work (e.g. the house), regardless of whether the damage was caused by work done by the builder or by a subcontractor. In response to builder demand, in 1976 insurers began to offer an endorsement, known as the Broad Form Property Damage (“BFPD”) endorsement, that had the effect of providing coverage for damage to the builder’s work if it was caused by a subcontractor. See French, 448 F.3d at 701. See also Mid-United Contractors, Inc. v. Providence Lloyds Ins. Co., 754 S.W.2d 824, 827 (Tex. App. -- Fort Worth 1988, writ. denied) (construction defect claims against builder based on faulty workmanship are covered by builder’s CGL policy with BFPD endorsement because the faulty work was done by a subcontractor); Fireguard Sprinkler Systems, 864 F.2d at 651-54 (explaining rationale for the development of the BFPD endorsement, which provides coverage for losses caused by the work of subcontractors).

In 1986, the insurance industry incorporated this aspect of the BFPD endorsement directly into the standard CGL policy by inserting the subcontractor exception into the “your work” exclusion. See French, 448 F.3d at 701; Limbach, 396 F.3d at 361-63. In examining the case law regarding insurance coverage for construction defects claims, it is important to bear in mind that cases dealing with the older versions of the “your work” exclusion are no longer applicable to policies containing the modern “your work”

exclusion and its exception for work done by subcontractors. American Family, 673 N.W. 2d at 83.

By incorporating the subcontractor exception into the “your work” exclusion, the insurance industry specifically contemplated coverage for property damage caused by a subcontractor’s defective performance. French, 448 F.3d at 706; Limbach, 396 F.3d at 362-63 (discussing history of the addition of the “subcontractor” exception to the “your work” exclusion); Kalchthaler v. Keller Const. Co., 591 N.W.2d 169, 173-74 (Wis. App. 1999) (reviewing insurance industry publications stating that the subcontractor exception results in coverage if the damaged work or the work out of which the damage arose was performed by the insured’s subcontractor).

II. THE INSURER’S PROPOSED INTERPRETATION OF THE INSURANCE POLICY’S “OCCURRENCE” REQUIREMENT WOULD RENDER MEANINGLESS THE SUBCONTRACTOR EXCEPTION TO THE POLICY’S “YOUR WORK” EXCLUSION.

The facts of this appeal present a straightforward case of property damage that was caused by the work of the builder’s subcontractor and that is covered by the builder’s CGL insurance policy. The requirements of the insuring agreement in Trinity’s insurance policy have been met. As the trial court found, based on the arbitrator’s decision in the underlying action and on evidence submitted during the coverage trial below, Trinity incurred damages because of property damage to the building at issue. The property damage took place during the policy period. And the property damage was caused by an occurrence, i.e. the damage was not expected or intended by Trinity. The “your work”

exclusion, which might apply if Trinity itself had performed the defective work, does not apply because the work was performed by subcontractors.

The insurer's principal argument for denying coverage is that the property damage caused by the subcontractors' defective work was not caused by an "occurrence." Although there is no claim that Trinity expected or intended the damage to the building that resulted from the subcontractors' work, the insurer argues that property damage to the builder's work caused by a construction defect can never be caused by an "occurrence" within the meaning of the builder's insurance policy.

If a claim for damage to the builder's work could never assert property damage caused by an "occurrence," the "your work" exclusion in Trinity's insurance policy -- and the exception for damage caused by subcontractors -- would be rendered meaningless. This would violate the venerable principle that insurance policies are to be construed to give effect to all their provisions so that none will be rendered meaningless. See Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976). The term "occurrence" may not be interpreted so broadly as to obviate the need for one or more of the policy's exclusions. King v. Dallas Fire Ins. Co., 85 S.W.3d 185, 192-93 (Tex. 2002).

But that is exactly what the insurer would have this Court do. The insurer is arguing that property damage to the builder's work can never be caused by an "occurrence" in the first place. If that were the case, however, the "your work" exclusion in the policy would be rendered superfluous. There would be no need for the "your

work” exclusion, because any construction defect claim for property damage to the work itself, to which the exclusion would apply, would never be covered in the first place because the claim would not satisfy the policy’s “occurrence” requirement. French, 448 F.3d at 705-06. Accord American Family, 673 N.W. 2d at 78. In this way, the insurer would eliminate the coverage for construction defects that it added to its policies through the subcontractor exception to the “your work” exclusion.

This result does not “create coverage” based on an exception to an exclusion. Rather, there is coverage under the insuring agreement’s initial grant of coverage, because the complaint alleges property damage caused by an occurrence. Coverage might be excluded by the “your work” exclusion, except that the subcontractor exception to that exclusion makes the exclusion inapplicable to this case, thereby restoring coverage. See, e.g., French, 448 F.3d at 706; American Family, 673 N.W.2d at 83-84.

In addition, coverage for property damage to a builder’s work would not turn the builder’s insurance policy into a performance bond. See Travelers Indem. Co. v. Moore & Associates, Inc., 216 S.W.3d 302, 309 (Tenn. 2007). A performance bond is quite different from liability insurance. The bond protects the owner from the builder’s failure to perform. The bond does not protect the builder. The surety on the bond will seek indemnity from the builder if the owner makes a claim under the bond. In addition, a bond is much broader than liability insurance. For example, it is not restricted to claims for property damage, and the builder’s intent or expectation to cause damage is irrelevant. See, e.g., O’Shaughnessy v. Smuckler Corp., 543 N.W.2d 99, 105 (Minn. App. 1996). Finally, the extent to which a builder’s liability insurance policy coincides with a

builder's performance bond is irrelevant. The terms of the insurance policy control. As one court put it, in explaining its duty to interpret the policy as written: "We have not made the policy closer to a performance bond for general contractors, the insurance industry has." Kalchthaler v. Keller Const. Co., 591 N.W.2d 169, 174 (Wis. App. 1999).

Finally, finding coverage for the builder's cost of repairing property damage caused by a subcontractor's defective work does not somehow exonerate the subcontractor whose work caused the damage. The builder's insurer is able to recover the amount of the loss from the culpable subcontractor through a subrogation action against the subcontractor. O'Shaughnessy v. Smuckler Corp., 543 N.W.2d 99, 102 (Minn. App. 1996) (builder's insurer may bring subrogation action against subcontractor who performed the defective work). The builder has purchased insurance coverage against the risk of loss resulting from property damage caused by a subcontractor, and hence it is appropriate that the builder's insurer -- not the builder -- pursue recovery from the subcontractor.

III. AS THIS COURT AND OTHER COURTS HAVE RECOGNIZED, THERE IS A DISTINCTION BETWEEN DEFECTIVE WORK STANDING ALONE AND DEFECTIVE WORK THAT CAUSES PROPERTY DAMAGE TO THE BUILDER'S WORK.

The trial court below interpreted this Court's opinion in L-J, Inc. v. Bituminous Fire and Marine Ins. Co., 366 S.C. 117, 621 S.E.2d 33 (2005), as holding that a builder's CGL policy does not cover the cost of repairing faulty work as such, but that the policy does cover damages because of property damage caused by the faulty work. Slip Op. at 4. See L-J, 366 S.C. at 123, 621 S.E.2d at 36. A number of federal and state courts have

interpreted L-J as did the trial court below. See, e.g., Pennsylvania Manuf. Association Ins. Co. v. Dargan Const. Co., 2006 WL 2038270, at *4-*5 (D.S.C. July 20, 2006), appeal pending; Okatie Hotel Group, LLC v. Amerisure Ins. Co., 2006 WL 91577, at *5-*6 (D.S.C. Jan 13, 2006); Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co., Case No. 2004-CP-26-84 (opinion filed May 3, 2007); Scottsdale Ins. Co. v. Waterford Const. Co., Case No. 04-CP-26-6203 (opinion filed Nov. 2, 2006), review granted.¹

The trial court's interpretation of L-J is the only logical reading of this Court's reliance in L-J on High Country Assocs. v. New Hampshire Ins. Co., 648 A.2d 474, 477-78 (N.H. 1994). In High Country, the New Hampshire Supreme Court held that the builder was covered for a claim resulting from moisture damage to condominium units caused by the faulty design and construction of the units. Id. at 476-77. As here, the property damage was caused by moisture intrusion through defective siding installed by a

¹ These holdings are also consistent with the three South Carolina decisions cited in L-J, two of which did not address the "occurrence" issue, and one of which held that there was property damage caused by an occurrence. In Century Indemnity Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 565-67, 561 S.E.2d 355, 358-59 (2002), the Court denied coverage based on an exclusion not at issue in this case. In fact, in Century Indemnity the parties stipulated that the claim against the builder was based on property damage caused by an occurrence. 348 S.C. at 563-64, 561 S.E. at 357. In Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 15-16, 459 S.E.2d 318, 319-20 (1994), the Court held that a claim against a termite inspection company was covered because there was property damage (termite damage) caused by an occurrence (a negligent inspection). And in C.D. Walters Constr. Co. v. Fireman's Ins. Co., 281 S.C. 593, 597-98, 316 S.E.2d 709, 712 (1984), the Court denied coverage not for lack of an occurrence but because of two exclusions that are not at issue here. One of the exclusions was the old "your work" exclusion before it was modified by the exception for damage caused by the work of a subcontractor.

subcontractor. In holding that the builder was covered for the homeowner's claim, the New Hampshire Supreme Court expressly distinguished two of its prior decisions on the grounds that in those decisions the underlying suits against the builder "did not allege property damage beyond the improper performance of the task itself." Id. at 477.²

Numerous other courts have recently drawn the same distinction between faulty work standing alone, and faulty work that causes property damage to other parts of the structure. For example, in French v. Assurance Co. of Am., 448 F.3d 693 (4th Cir. 2006), the Fourth Circuit was asked to decide whether property damage to a home caused by a subcontractor's defective work was covered by the builder's CGL policy under Maryland law. The court held that the builder's policy provided coverage for the cost of remedying unexpected and unintended property damage to the home caused by the subcontractor's defective work. Id. at 706. In reaching this conclusion, the Fourth Circuit distinguished Lerner Corp. v. Assurance Co. of Am., 707 A.2d 906 (Md. App. 1998), in which the Maryland Court of Special Appeals had held that the cost of correcting defective construction that did not meet contractual requirements could not be considered "unexpected" and hence was not caused by an occurrence within the meaning of the builder's CGL policy. Id. at 702. The Fourth Circuit observed that the Lerner court had addressed only defective construction as such -- the defective construction had not caused property damage to the structure. Indeed, the Lerner court had opined in dicta

² The two cases distinguished by High Country were McAllister v. Peerless Ins. Co., 474 A.2d 1033 (N.H. 1984), and Hull v. Berkshire Mut. Ins. Co., 427 A.2d 523 (N.H. 1981).

that any damage resulting to property beyond the defective object itself may be covered. Id. at 702.

The distinction that the Fourth Circuit found in Lerner between faulty work and faulty work that causes property damage is the same distinction that this Court drew in L-J, as shown by this Court's citation of High Country. Although the faulty work on the roadway in L-J did not cause damage to property other than the defective work itself, and hence was not covered, the moisture damage to the condominium units in High Country was covered because it constituted property damage to the units caused by the faulty work. L-J, 621 S.E.2d at 36.

Other courts have also distinguished prior precedents that had held that faulty construction alone -- without resulting property damage -- is not covered by a builder's CGL policy. The Supreme Court of Tennessee, the Court of Appeals of Arizona, and the United States District Court for the Eastern District of Missouri have most recently held that damages because of property damage to a builder's work caused by the defective work of a subcontractor are covered by the builder's CGL policy. In so doing, each court distinguished prior precedent holding that faulty workmanship alone is not covered. Travelers Indem. Co. v. Moore & Associates, Inc., 216 S.W.3d 302, 309-10 (Tenn. 2007), petition for review filed, 2007 (property damage caused by subcontractor's defective installation of windows constitutes property damage caused by an occurrence within the meaning of builder's CGL policy, distinguishing prior cases involving faulty workmanship alone); Lennar Corp. v. Auto-Owners Ins. Co., 151 P.3d 538, 545 (Ariz. App. 2007), petition for review filed (cost of repairing wall, tile, and baseboard cracks

and sticking doors caused by subcontractor's defective work was covered by builder's CGL policy, despite precedent that faulty workmanship standing alone is not covered); Amerisure Mut. Ins. Co. v. Paric Corp., 2005 WL 2708873, at *7 (E.D. Mo. Oct. 21, 2005) (moisture damage to hotels caused by subcontractor's defective synthetic stucco siding was covered by builder's CGL policy, distinguishing precedent that installing defective materials into a home, without more, did not constitute covered property damage).

Newman's claim against Trinity involves just such property damage caused by faulty construction. The trial court's finding that the defective stucco siding caused property damage is supported by the arbitrator's decision in the underlying action and by expert testimony in the coverage trial below. The property damage was caused by an "occurrence," i.e. it was accidental because it was not expected or intended from the standpoint of the builder. Accordingly, Trinity is covered for Newman's claim for damages because of property damage. In this case, such damages would include the cost of the necessary removal and replacement of the siding in order to reach and repair the moisture damage caused by the defective siding. See, e.g., Lennar Corp. v. Great American Ins. Co., 200 S.W.3d 615, 678 n.33 (Tex. App. -- Houston [14 Dist.] 2005), petition for review filed (cost to remove stucco to repair underlying water damage is covered as "damages because of property damage").

IV. MOST OF THE RECENT CASES DECIDED BY OTHER JURISDICTIONS HAVE HELD THAT PROPERTY DAMAGE TO THE BUILDER'S WORK CAN BE CAUSED BY AN "OCCURRENCE."

The courts of most other jurisdictions, especially in recent years, have held that property damage caused by inadvertent construction defects can be caused by an occurrence -- even if the damage is limited to the structure itself. These courts have recognized that (i) the insuring agreement in the CGL policy contains no requirement that the property damage be to other property, and (ii) the exclusion for damage to the builder's own work (and its exception for the work of subcontractors) would be rendered meaningless if damage to the builder's work could never be caused by an occurrence in the first place.

For example, as discussed above, the Fourth Circuit held under Maryland law that the builder's CGL policy covered damage to a home caused by defective synthetic stucco siding that had been applied by a subcontractor. French v. Assurance Co. of Am., 448 F.3d 693 (4th Cir. 2006). In so holding, the Fourth Circuit reviewed the history of the "your work" exclusion and the history of its exception, which applies "if the damaged work or the work out of which the damage arises was performed on [the insured contractor's] behalf by a subcontractor." Id. at 701. The court explained that this exclusion, and its exception, would be rendered meaningless if property damage to the builder's work could never be caused by an occurrence in the first place. Id. at 705-06.

The Fourth Circuit cited with approval (at pp. 703-04) the "thoughtful" opinion by the Wisconsin Supreme Court in American Family Mut. Ins. Co. v. American Girl, Inc., 673 N.W. 2d 65 (Wis. 2004). That case has become a seminal decision on the occurrence issue. In a thorough and well-reasoned opinion, the Wisconsin Supreme Court held that

buckling and cracking of a warehouse resulting from a subcontractor's defective soils report was caused by an "occurrence" within the meaning of the builder's CGL policy. Id. at 69-70.

The Fourth Circuit (at p. 706) also relied on the opinion of the Kansas Court of Appeals in Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 104 P.3d 997 (Kan. App. 2005). That decision has since been affirmed by the Kansas Supreme Court. See Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486 (Kan. 2006). The Kansas Supreme Court held that water damage caused by defective windows installed by subcontractors was caused by an "occurrence" and hence was covered by the builder's CGL policy. Id. at 495. In reaching its conclusion, the Kansas Supreme Court observed (as did the Fourth Circuit in French) that the "your work" exclusion, and its subcontractor exception, would be rendered meaningless if property damage to the builder's work could never be caused by an "occurrence." Id. at 493-94.

Courts in numerous other jurisdictions have recently come to the same conclusion and have held that damage to a structure caused by the work of a subcontractor can constitute "property damage" caused by an "occurrence" within the meaning of the builder's CGL policy. See Travelers Indem. Co. v. Moore & Associates, Inc., 216 S.W.3d 302, 308-10 (Tenn. 2007); Lennar Corp. v. Auto- Owners Ins. Co., 151 P.3d 538, 544-48 (Ariz. App. 2007), petition for review filed; Dublin Building Systems v. Selective Ins. Co., 2007 WL 353675, at *3-*4 (Ohio App. Feb. 6, 2007); Great American Ins. Co. v. Woodside Homes Corp., 448 F.Supp.2d 1275, 1281-83 (D. Utah 2006); Valley Forge Ins. Co. v. American Safety Risk Retention Group Inc., 2006 WL 314455, at *6 (D.

Oregon Feb. 9, 2006); Broadmoor Anderson v. National Union Fire Ins. Co., 912 So.2d 400, 405-06 (La. App. 2005); Hoang v. Monterra Homes (Powderhorn) LLC, 129 P.3d 1028, 1034 (Colo. App. 2005), aff'd in relevant part and reversed on other grounds, 149 P.3d 798, 802 (Colo. 2007); Amerisure Mut. Ins. Co. v. Paric Corp., 2005 WL 2708873, at *4-*7 (E.D. Mo. Oct. 21, 2005); J.S.U.B., Inc. v. U.S. Fire Ins. Co., 906 S.2 303, 307-09 (Fla. App. 2005), review granted; Lennar Corp. v. Great American Ins. Co., 200 S.W.3d 615, 663-76 (Tex. App. - Houston [14th Dist.] 2005), petition for review filed.

Of these cases, the opinions by the Tennessee Supreme Court in Travelers, the Arizona Court of Appeals in Lennar, and the Texas Court of Appeals in a different Lennar case, are particularly thorough and instructive.

In L-J, this Court stated that “a majority of other jurisdictions” had held that “faulty workmanship standing alone, resulting in damage only to the work product itself, does not constitute an occurrence under a CGL policy.” 366 S.C. at 121, 621 S.E.2d at 35. If by this statement the Court was referring to faulty workmanship that did not cause damage beyond the defective work itself, the statement would not be applicable to this case, because the trial court found that the defective siding at issue in this case did cause property damage to other parts of Newman’s home.

If the Court, however, meant by this statement that a majority of other jurisdictions had held that property damage to the structure caused by faulty workmanship could not be caused by an occurrence, then the statement is no longer accurate, if it ever was. This is demonstrated by the cases cited at pp. 11-17 above.

In addition, several of the cases cited by the Court in L-J for this statement do not support it. For example, in Iowa the decision in Pursell Constr., Inc. v. Hawkeye-Security Ins. Co., 596 N.W.2d 67 (Iowa 1999), is not on point. Pursell involved only a claim for faulty construction, not property damage resulting from faulty construction. Id. at 68. Significantly, the New Hampshire and Arizona cases on which the court in Pursell relied also did not involve property damage resulting from the faulty work, and those cases were distinguished on that basis by later opinions in those states.³

In Ohio, three subsequent appellate decisions have rejected the reasoning of Heile v. Herrmann, 736 N.E.2d 566 (Ohio App. 1999). See Dublin Building Systems v. Selective Ins. Co., 2007 WL 353675, at *3-*4 (Ohio App. Feb. 6, 2007); National Eng. & Contracting Co. v. USF&G, 2004 WL 1103993, at *4-*6 (Ohio App. May 11, 2004); Erie Ins. Exchange v. Colony Dev. Corp., 736 N.E.2d 941, 947-50 (Ohio App. 1999).

In Illinois, the holdings in State Farm Fire and Cas. Co. v. Tillerson, 777 N.E.2d 986, 992 (Ill. App. 2002), and Monticello Ins. Co. v. Wil-Fred's Constr., Inc., 661 N.E.2d 451, 456 (Ill. App. 1996), are questionable because they are contrary to the Illinois Supreme Court's opinion in USF&G Co. v. Wilkin Insulation Co., 578 N.E.2d 926, 932 (Ill. 1991). In Wilkin, the Illinois Supreme Court held that asbestos contamination of a building constituted property damage caused by an occurrence within the meaning of the

³ As discussed at pages 13-14 above, the Arizona Court of Appeals in Lennar Corp., 151 P.3d at 545, distinguished USF&G v. Advanced Roofing & Supply Co., 788 P.2d 1227 (Ariz. App. 1989), on which Pursell relied. In High Country, 648 A.2d at 477, the New Hampshire Supreme Court distinguished McAllister v. Peerless Ins. Co., 474 A.2d 1033 (N.H. 1984), on which Pursell also relied.

builder's CGL policy. Accord Prisco Serena Sturm Architect, Ltd. v. Liberty Mut. Ins. Co., 126 F.3d 886, 890-91 (7th Cir. 1997). Subsequent Illinois appellate courts have followed Wilkin on the occurrence issue. See Country Mut. Ins. Co. v. Carr, 2007 WL 899486, at *3-*4 (Ill. App. March 19, 2007), petition for review filed April 24, 2007; Pekin Ins. Co. v. Miller, 854 N.E.2d 693, 696 (Ill. App. 2006).

The few other non-South Carolina cases holding that property damage to the builder's work is not caused by an "occurrence" are distinguishable because the courts in these cases did not consider the effect of the subcontractor exception to the "your work" exclusion on their "occurrence" analysis. See Lennar, 200 S.W.3d at 670 (leveling same criticism at insurers' cases). None of these cases analyzed their holdings -- that a builder necessarily "expects" damage to its own work -- in light of the subcontractor exception to the "your work" exclusion. If a builder is always deemed to "expect" damage to the building, the "your work" exclusion for damage to the builder's own work would be superfluous and the subcontractor exception to that exclusion would be rendered meaningless. This Court should not follow these non-South Carolina courts into such a violation of well-settled principles of insurance policy construction.

V. DEPRIVING BUILDERS OF INSURANCE COVERAGE FOR INADVERTENT CONSTRUCTION DEFECTS WOULD HAVE A SIGNIFICANT ADVERSE EFFECT ON THE SOUTH CAROLINA HOME BUILDING INDUSTRY AND ON SOUTH CAROLINA HOMEOWNERS.

If the insurer were to prevail in its argument that property damage to the builder's work resulting from the work of a subcontractor can never be caused by an "occurrence," South Carolina home builders and South Carolina homeowners alike would feel the effects of the Court's holding. Home builders have paid premiums to insurance companies to buy liability insurance to protect themselves, *inter alia*, against claims for unintended and unexpected property damage caused by inadvertent construction defects that can occur in the homes they build. If the property damage results from work performed by the builder's subcontractors, the builder's liability insurance policy provides coverage for the builder's damages resulting from such property damage, including the cost of any judgment or settlement of the homeowners' claims. Builders have bought liability insurance -- and have paid substantial premiums -- to protect against the risk of such losses.

Depriving builders of such valuable insurance protection would disrupt an industry that is a vital part of a healthy economy. Housing is a critical component of local economic development -- creating jobs and demand for goods and services, generating revenues, and providing affordable housing. Given the vital role the housing industry plays in the South Carolina economy, it is important to consider the impact of the insurer's position that a builder's damages because of property damage caused by inadvertent construction defects are never covered by the builder's insurance.

The ability to operate efficiently in the home building industry and to price a home competitively depends on the degree to which the builder's overall costs are certain and predictable. The insurer's position would expose home builders to the uncertainty of additional costs and litigation expenses. This increased exposure by builders to claims of inadvertent construction defects would lead to an increase in the cost of building homes in South Carolina. Builders would have to increase the price of their homes to cover these costs. Increased prices would adversely affect the housing industry, with ripple effects on construction-related industries and the South Carolina economy in general.⁴

Home buyers in South Carolina would also suffer as the result of the insurers' efforts to deny insurance coverage for property damage caused by inadvertent construction defects. Not only would the cost of purchasing a new home increase, but also the homeowner may have no effective remedy for claims of construction defects against small or insolvent builders, or against builders who have ceased doing business by the time the homeowner's claim is litigated. The liability insurance policies that stood behind such builders and remodelers in the past would no longer do so.

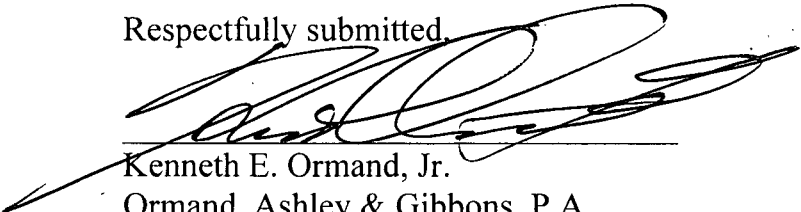
⁴ The impact would be greatest on buyers and builders of low to moderate income housing. Builders with this increased exposure would be forced to raise their prices to cover the increased cost and risk associated with reduced insurance coverage. Consequently, low and moderate income home buyers, who often only marginally qualify for financing necessary for them to buy a house, could be priced out of the market. Accordingly, those who are on the cusp of qualifying for a new home purchase might no longer be able to afford to purchase a new home. Similarly, builders who build affordable housing would be negatively affected -- they would build fewer homes because fewer people would qualify to purchase them.

Conclusion

The National Association of Home Builders and the Home Builders Association of South Carolina, as amicus curiae, respectfully request that the Court affirm the judgment of the trial court.

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The undersigned hereby certifies that this brief complies with Rule 211(b),
SCACR.

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I hereby certify that on this 13 day of November, 2007, a copy of the Amicus Curiae Brief of National Association of Home Builders and Home Builders Association of South Carolina was mailed first class, postage prepaid, to:

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