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IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
HON. DAVID H. SAWYER, PRESIDING JUDGE

SKANSKA USA BUILDING, INC.,
A Delaware Corporation,

Plaintiff,

v

M.A.P. MECHANICAL CONTRACTORS, INC., a Michigan Corporation, AMERISURE INSURANCE COMPANY, a Michigan property and casualty insurer; AMERISURE MUTUAL INSURANCE COMPANY, a Michigan property and casualty insurer; and AMERISURE PARTNERS INSURANCE COMPANY, a Michigan property and casualty insurer,

Defendants.

MCS No. 159510-1
COA Docket Nos. 341589 and 340871
Trial Ct. Case No. 13-9864-CKB

APPELLANT SKANSKA USA BUILDING INC.'S

BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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December 13, 2019

RECEIVED by MSC 12/13/2019 3:52:07 PM

TABLE OF CONTENTS

Index of Authorities iii

Statement of Jurisdiction v

Questions Presented vi

Index of Exhibits vii

Standard of Review ix

Statement of Error & Relief Sought 1

Statement of Facts 3

A. The Parties and the Project 3

B. The ISO Policy Changes 3

C. M.A.P.'s defective work caused post-completion property damage which was not discovered until February 28, 2012 4

D. Amerisure had timely notice of the Loss Event, and therefore an "occurrence" under the terms of the policy, but refused to adjust the claim 7

E. The investigation revealed irreparably damaged steam pipe 8

Procedural History 10

Analysis 12

A. Summary of Analysis 12

B. This Court has Recognized a Fundamental Right to Freedom of Contract 13

C. The Insuring Agreement was triggered because backward expansion joints are "unusual" and "not anticipated"; because broken concrete, bent steel, and one thousand five hundred feet of ruined pipe are a "casualty"; and because $1.4 million worth of property damage is an "undesigned contingency" constituting an "occurrence" 14

D. The lower courts erroneously ignored important parts of the contract when they failed to give effect to the exclusions 17

E. The 1986 insurance contract revisions extended coverage to the property damage that occurred in this case 21

1. The "your product" exclusion does not apply to this case 22

2. The "your work" exclusion does not apply to this case 24

F. The 1986 policy revisions mean *Hawkeye-Security* can no longer be binding precedent 26

Conclusion 31

RECEIVED by MSC 12/13/2019 3:52:07 PM

INDEX OF AUTHORITIES

Page(s)

Cases

Allstate Insurance Company v Freeman,
432 Mich 656, 443 NW2d 734 (1989) 14, 17
Allstate v McCarn,
466 Mich 277 (2002) 7, 15, 16, 17
American Family Mutual Ins. Co. v American Girl, Inc.,
268 Wis 2d 16, 673 NW2d 65 (2004) 20, 29
Besic v Citizens Ins Co of the Midwest,
290 Mich App 19, 800 NW2d 93 (2010) 14, 17
Bundy Tubing Co. v Royal Indemnity Co.,
298 F2d 151 (CA 6, 1962) 29
Calvert Insurance Company v Herbert Roofing and Insulation Company,
807 FSupp 435 (ED Mich, 1992) 28
Cherrington v Erie Insurance Property and Casualty Company,
231 WVa 470; 745 SE2d 508 (2013) 20
Cypress Point Condominium Assoc., Inc. v Adria Towers, LLC,
226 NJ 403; 143 A3d 273 (2016) 20, 31
Guerdon Industries, Inc. v Fidelity & Cas. Co. of New York,
371 Mich 12, 123 NW2d 143 (1963) 16
Hawkeye-Security Ins. Co. v Vector Construction Co.,
185 Mich App 369; 460 NW2d 329 (1990) .... passim
Hunter v Pearl Assurance Co.,
292 Mich 543, 291 NW 58 (1940) 19, 25
In re Nestorovski Estate,
283 Mich App 177, 769 NW2d 720 (2009) 27, 30
In re Sprenger's Estate,
337 Mich 514, 60 NW2d 436 (1953) 27, 30
K & L Homes, Inc. v American Family Mutual Insurance Company,
829 NW2d 724 (2013) 19
Klapp v United Ins. Group Agency, Inc.,
468 Mich 459, 663 NW2d 447 (2003) 13, 14, 24, 25
Lamar Homes, Inc. v Mid-Continent Casualty Company,
242 SW3d 1 (2007) 20
Lamp v Reynolds,
249 Mich App 591, 645 NW2d 311 (2002) 27, 30
McAllister v Peerless Ins. Co., 124NH 676, 680;
474 A2d 1033 (1984) 18
Mondou v Lincoln Mut. Cs. Co.,
283 Mich 353, 278 NW 94 (1938) 19, 25
Morris v Alexander,
208 Mich 387; 175 NW 264(1919) 23
National Surety Corporation v Westlake Investments, LLC,
880 NW2d 724 (2016) 20

National Union Fire Insurance Company of Pittsburgh, PA v Structural Systems Technology, Inc.,
756 FSupp 1232 (ED MO, 1991) 23
Policemen & Firemen Ret. Sys. v City of Detroit,
270 Mich. App. 74, 78, 714 N.W.2d 658, 660 (2006) 8
Radenbaugh v Farm Bureau General Ins. Co. of Michigan,
240 Mich App 134; 610 NW2d 272 (2000) 28, 29
Rory v Continental Insurance Company,
473 Mich 457; 703 NW2d 23 (2005) .... passim
Scottsdale Insurance Company v Tri-State Insurance Company of Minn.,
302 FSupp2d 1100 (D ND, 2004) 23
Smith v Glove Life Ins. Co,
460 Mich 446, 597 NW2d 28 (1999) 8
Terrien v Zwit,
467 Mich 56; 648 NW2d 602 (2002) 13
Travelers Indemnity Company of America v Moore & Associates, Inc.,
216 SW3d 302(2007) 20
US Fire Ins. Co v J.S.U.B, Inc.,
979 So2d 871 (2007) 4, 8
Wayne County v William G and Virginia Britton Trust,
454 Mich 608, 563 NW2d 674 (1997) 23
Weedo v Stone–E–Brick, Inc.,
81 N.J. 233, 405 A.2d 788 (1979) 31
Wilkie v Auto-Owners Ins. Co.,
469 Mich 47, 664 NW2d 776 (2003) 13

Statutes

MCL 500.2006(3) 7
MCL §600.6304 27
Mich. Const. 1963, Art VI, § 4 6

Rules

MCR 2.116(C)(10) 10
MCR 2.116(I)(2) 2, 8, 10, 32
MCR 7.303(B)(1) 6

Other Authorities

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50 Neb. L. Rev 415, 441 (1971) (1971) 18
Stemple and Knutsen on Insurance Coverage,
4th ed., vol. 2 §14.13[D], p. 14-269 .... 4, 25, 31

RECEIVED by MSC 12/13/2019 3:52:07 PM

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STATEMENT OF JURISDICTION

On October 10, 2019, this Court granted Skanska USA Building Inc.'s Application for Leave to Appeal from the Court of Appeals opinion dated March 19, 2019. Accordingly, this Court has jurisdiction pursuant to MCR 7.303(B)(1) and Mich. Const. 1963, Art VI, § 4.

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QUESTIONS PRESENTED

1. Should a case that construes a standardized insurance contract be given precedential effect when the dispositive provisions in that contract have since been materially changed?

Skanska says:	No.
Amerisure says:	Yes.
Trial Court said:	I am bound by *stare decisis* to apply the old, inapplicable case.
Court of Appeals said:	The old case established a principle of law that cannot be overcome by a change in the standard contract.

2. Should the court enforce the plain language of a contract, or should the court apply a holding from a different case that had different facts and different contractual language?

Skanska says:	Enforce the plain language of the contract.
Amerisure says:	Ignore the contract and apply the different case.
Trial Court said:	I am bound by *stare decisis* to apply the different case.
Court of Appeals said:	The different case established a principle of law that cannot be overcome by contractual language.

3. When the undisputed and uncontested facts indicate a party did not intend an act and did not intend the consequences of that act, should the trial court have found the act to be an "accident," as *Allstate v McCarn*, 466 Mich 277 (2002) would require?

Skanska says:	Yes.
Amerisure says:	No.
Trial Court said:	This is a question of fact.
Court of Appeals said:	We did not even consider *Allstate*.

STANDARD OF REVIEW

A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Smith v Glove Life Ins. Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

A trial court properly grants summary disposition under MCR 2.116(I)(2) if the court determines the opposing party, rather than the moving party, is entitled to judgment as a matter of law. *Policemen & Firemen Ret. Sys. v City of Detroit*, 270 Mich. App. 74, 78, 714 N.W.2d 658, 660 (2006).

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STATEMENT OF ERROR AND RELIEF SOUGHT

Skanska USA Building Inc. appeals the March 19, 2019 opinion issued by the Michigan Court of Appeals. (App. 002a-012a, **Exhibit 1.**) The Court of Appeals held *Hawkeye-Security Ins. Co. v Vector Construction Co.*, 185 Mich App 369; 460 NW2d 329 (1990) established a "principle of law" that an "occurrence" under a commercial general liability insurance policy cannot include damages for the insured's own faulty workmanship. However, this "principle of law" undermines another one of this Court's core principles, namely, that unambiguous agreements are enforced as written under basic rules of contract law. *Rory v Continental Insurance Company*, 473 Mich 457; 703 NW2d 23 (2005) (Exhibit 1, 011a).

The method of contractual analysis employed by the *Hawkeye-Security* court does not meet the standard set by *Rory, supra*. Stated briefly, *Hawkeye-Security* announced a definition of "occurrence" that differs from, and does not give effect to, the actual words of the insurance contract that was before it. In the instant case, the Court of Appeals repeats this methodological mistake by following *Hawkeye Security*'s erroneous definition of "occurrence" as a "principle of law."

Moreover, the insurance contract that was examined in *Hawkeye-Security* is different than the insurance contract being examined today. *Hawkeye-Security* involved a claim under the 1973 Insurance Services Office "comprehensive general liability" insurance policy. However, in 1986 the Insurance Services Office significantly revised the document and renamed it the "commercial general liability" insurance policy. (App. 070a-090a, **Exhibit 4.**) These revisions are at issue in this case. They include a change to the "your product" exclusion, such that the exclusion no longer applied to real property (App. 088a, **Exhibit 4.**);

and a change to the "your work" exclusion, such that it no longer applied to work performed by the insured's subcontractor. (*Id.*). The net effect of these revisions – indeed, the purpose of them – was to provide insurance coverage for property damage caused by construction defects in certain circumstances. (*Id.*).

When reading the plain language of the parties' contract *in this case*, and when examining it under the facts of *this case*, not the facts that were in front of the court in *Hawkeye-Security*, it is clear the property damage at issue is covered. The Michigan Court of Appeals nevertheless denied coverage on the basis of *Hawkeye-Security*, without considering the actual language of the contract between the insured and the insurer as it reads today. This failure resulted in an erroneous decision below. Worse, by announcing its decision as a "principle of law," the Court of Appeals has ensured its error will be repeated unless this Court corrects it. Skanska therefore requests this honorable Court to reverse the Court of Appeals' March 19, 2019 opinion and to instruct the Court of Appeals to remand this matter to the trial court for an order of partial summary disposition on liability in Skanska's favor under MCR 2.116(I)(2).

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STATEMENT OF FACTS

A. The Parties and the Project.

In June of 2008, Appellant/Cross-Appellee Skanska USA Building Inc. ("Skanska") worked as construction manager on a project to expand and renovate the Mid-Michigan Medical Center (the "Medical Center") in Midland, Michigan.[1] M.A.P. Mechanical Contractors, Inc. ("M.A.P.") was Skanska's mechanical subcontractor on the Energy Center portion of the project ("Project"), and Appellee/Cross-Appellant Amerisure Insurance Company ("Amerisure") provided commercial general liability insurance to M.A.P., as primary insured, and to Skanska and the Medical Center as additional insureds. (App. 014a, 049a-050a, **Exhibit 2.**).

B. The ISO Policy Changes.

One of the most important facts in this case occurred years before the beginning of the Project. In 1986, the Insurance Services Office ("ISO"), which drafts and publishes standard form insurance policies used throughout the insurance industry, replaced the "comprehensive general liability" policy (App. 062a-068a, **Exhibit 3.**) with a new "commercial general liability" policy (App. 070a-090a, **Exhibit 4.**). This 33 year-old revision is relevant because the primary case which Amerisure, and the lower courts relied upon – *Hawkeye-Security Insurance Company v Vector Construction Company*, 185 Mich App 369; 460 NW2d 329 (1990) – interprets the pre-1986 policy.

The 1986 policy incorporated several significant revisions. Two revisions in particular were designed to extend coverage to certain types of construction defects –

---

[1] Skanska and Amerisure separately sought leave to appeal the trial court's denial of their cross-motions for summary disposition. The Court of Appeals' April 10, 2018 orders granted both applications and consolidated them. Thus, Skanska is the appellant in one matter and the appellee in the other.

including the defects at issue in this case. The ISO made these changes to satisfy policyholders who wanted broader coverage, and insurers who wanted to sell more policies:

> [T]he insurance and policyholder communities agreed that the CGL policy should provide coverage for defective construction claims so long as the allegedly defective work had been performed by a subcontractor rather than the policyholder itself. This resulted both because of the demands of the policyholder community (which wanted this sort of coverage) and the view of insurers that the CGL was a more attractive product that could be better sold if it contained this coverage.
>
> *US Fire Ins. Co v J.S.U.B, Inc.*, 979 So2d 871, 879 (2007), citing *See* 2 Jeffrey W. Stempel, *Stempel on Insurance Contracts* § 14.13[D] at 14–224.8 (3d ed. Supp.2007) (App. 220a, **Exhibit 17.**); *See also*, *Stemple and Knutsen on Insurance Coverage*, 4th ed., vol. 2 §14.13[D], p. 14-269 (App. 415a, 430a, **Exhibit 29.**).

The ISO published a circular on July 15, 1986 confirming that the revisions specifically "cover[ed] damage caused by faulty workmanship to other parts of work in progress; **and damage to,** or caused by, **a subcontractor's work** after the insured's operations are completed." *Id., citing*, ISO Circular, Commercial General Liability Program Instructions Pamphlet, No. GL–86–204 (July 15, 1986) (*emphasis added*). Similarly, an ISO document comparing the pre- and post-1986 policies indicates that under the 1986 Policy the "your product" exclusion (relied upon by Amerisure as a basis of denial) does not apply to real property. The ISO circular states: "Real property is specifically eliminated from the definition of 'your product' so that the broad form coverage for work and completed operations clearly applies." (App. 088a, **Exhibit 4.**)

As mentioned, M.A.P. purchased this post-1986 ISO form commercial general liability insurance policy from Amerisure, covering M.A.P. as the named insured and Skanska as an additional insured.

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C. M.A.P.'s defective work caused post-completion property damage which was not discovered until February 28, 2012.

The basic facts surrounding the Loss Event are not in dispute. Pursuant to its subcontract with Skanska, M.A.P. installed the hospital's primary heating system. This entailed putting a boiler in the hospital's Energy Center on the north end of the site, installing underground steam piping which extended from the boiler and ran into the hospital in the center of the campus, and installing condensate piping running from the hospital back to the boiler. This system heated a new wing of the hospital, which Skanska built under a separate contract with the Medical Center and a portion of the old hospital, which Skanska did not build.

The steam and condensate running through the underground pipe is extremely hot, sometimes in excess of 1,000 degrees Fahrenheit. As a matter of physics, the pipe heated by the steam and condensate expands. Accordingly, the pipe requires specially fabricated joints to accommodate this expansion. M.A.P. installed expansion joints in two manholes (sometimes referred to as steam pits or steam vaults) located in the parking lot between the two buildings. Unfortunately, M.A.P. accidentally installed three of the six expansion joints backwards. However, the backward expansion joints were not immediately discovered because the expansion joints were covered with insulation shortly after they were installed.

M.A.P. completed its work in April of 2009. Once Skanska completed work on the Medical Center operating rooms in November of 2010, the Medical Center cranked up its new boiler to regular operating power for the first time. Witnesses described a loud "boom" immediately thereafter. Everyone attributed the boom to water hammer, a relatively common event when boilers are first started. Skanska's Colin Martin explained:

So when you have that kind of noise the assumption was – At that point we thought everything was installed correctly, so the assumption was the only thing that can make that kind of noise is a large water hammer, and therefore the mechanic must have turned the valve too quick. So that's how that went for a long period of time, and that poor man got blamed for something he didn't do.

(Deposition of Colin Martin, pp. 436-437, App. 101a, **Exhibit 5.)**

The two manholes experienced a series of problems over the next year. Excessive steam in the manholes melted light fixtures, melted one manhole's sump pump controller, and caused the other manhole's sump pump overload to fail. Excessive groundwater was also able to enter the manholes, overwhelming the sump pumps and causing them to fail a second time. The Medical Center paid to address these problems, as everyone believed the Medical Center's architect or boiler mechanic was responsible.

On December 16, 2011, while working on these issues in one of the manholes, a subcontractor noticed a crack in the wall adjacent to an expansion joint support beam. (Deposition of Colin Martin, App. 099a, **Exhibit 5.**) For safety reasons, Skanska closed the manholes and brought in a temporary boiler so the steam system could be shut down and an investigation into the problem could begin. (*Id.*) This was not an easy task. It took two months to procure a temporary boiler, pipe a gas line to it, and run steam and condensate into the hospital's steam distribution system.

February 28, 2012 was the first day anyone was able to re-enter the manholes. When the insulation was removed from the steam and condensate lines, Skanska learned it was not water hammer, but backward expansion joints that had been causing the problems:

Q. Right. So how can you say that there was a determination made —

A. Because I can tell you that when we discovered that the — **After the insulation was stripped off the expansion joints and they were found to be backwards all the problems associated with the steam**

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system, now a big light bulb came on in everybody's head, this is the root cause of all these failures.

(Deposition of Colin Martin, App. 100a, **Exhibit 5**.)(*Emphasis added.*)

In fact, the "boom" was the sound of the 14-inch concrete manhole wall, the thrust blocks, the structural steel supports, and the pipe casing breaking as the superheated steam caused the underground pipes to expand into the backward expansion joints. M.A.P.'s improper installation of the expansion joints was the catalyst causing catastrophic damage to the entire steam system once the boiler was turned up to full power ("Loss Event"). The May 14, 2012 letter from the piping system's manufacturer to Skanska summarizes the damage caused by the 700,000 and 250,000 pound forces being exerted on the piping system during the Loss Event. (App. 103a, **Exhibit 6.**) Photographs taken after the Loss Event occurred depict some of the damage to the concrete and steel. (App. 106a-108a, **Exhibit 7.**)

D. Amerisure had timely notice of the Loss Event, and therefore an "occurrence" under the terms of the policy, but refused to adjust the claim.

Amerisure had notice of the Loss Event three days after it was discovered by Skanska. (App. 118a, **Exhibit 9.**) As previously mentioned, Skanska is an additional insured under the Amerisure policy. (App. 049a-050a, **Exhibit 2.**) By March 6, 2012 Amerisure had assigned the Loss Event a claim number, as evidenced by its Notice of Occurrence/Claim form. (App. 118a, **Exhibit 10.**) Amerisure also knew M.A.P. had installed expansion joints backward and knew some resulting structural damage had occurred (at the hospital). (App. 114a-115a, **Exhibit 10.**) But rather than investigate the claim and render a timely assessment of coverage, Amerisure stonewalled. Over the next three months, Skanska and Amerisure engaged in a volley of correspondence in which Skanska requested Amerisure's participation in the investigation and in which Amerisure resisted the request. Throughout the process, Amerisure never sent Skanska a written statement specifying exactly what materials it

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considered a satisfactory proof of loss, in clear violation of MCL 500.2006(3). Furthermore, Amerisure never issued Skanska a written reservation of rights or any other document identifying the clauses in the insurance policy that it believed restricted or negated coverage for the Loss Event.

E. The investigation revealed irreparably damaged steam pipe.

Following the discovery of the Loss Event, Skanska learned that three quarters of the underground steam pipe installed on its behalf by its subcontractor M.A.P. had been irreparably damaged by the backward installation of the expansion joints. As mentioned above, the "boom" heard by witnesses after the boiler cranked up to full power was the sound of breaking pipe casing and breaking concrete. These fractures allowed groundwater to seep into the insulating layer of the steam pipe, completely destroying it. (App. 103a-104a, **Exhibit 6.**) While M.A.P. replaced the backward expansion joints, Skanska was forced to replace the damaged pipe and bear the resultant cost alone, as M.A.P. and Amerisure refused to do so. Unfortunately, the pipe was buried under a parking lot amongst sewer lines and other utilities, which made replacing it a complicated and expensive process. The final cost came to $1,463,666.23.

Nearly four and a half months after receiving notice of the Loss Event, Amerisure offered to pay $36,000 to settle the claim – a claim in excess of $1.4 Million – because Amerisure felt "there appear to be some damages that are not directly related to the work performed by" M.A.P. Mechanical. (App. 148a-149a, **Exhibit 11.**) Amerisure said this offer took into account its "defenses of late notice, spoliation of evidence, design deficiencies, and improper mitigation of damages on behalf of Skanska." (App. 148a-149a, **Exhibit 11.**) Yet the letter extending this offer made no reference to any provision in the insurance policy that

could justify Amerisure's position. Amerisure's letter said nothing about an "occurrence," nor did it say anything about the potential applicability of policy exclusions or conditions to the Loss Event. (App. 148a-149a, **Exhibit 11.**) To the contrary, Amerisure's letter suggested the claim was covered by the policy, but coverage was limited because some of the damages may not have been caused by M.A.P.'s backward installation of the expansion joints.

Amerisure also sent Skanska's primary insurer, Zurich, a letter on July 12, 2012. (App. 151a-152a, **Exhibit 12.**) This letter also failed to dispute the qualification of the Loss Event as an "occurrence" under the terms of the policy or raise the exclusion defenses that Amerisure subsequently raised in the trial court proceedings. (App. 151a-152a, **Exhibit 12.**) Follow-up correspondence sent by Amerisure to Zurich the following April again denied liability, but similarly failed to cite any provision in the policy that would support a denial of coverage for the Loss Event. (App. 154a-155a, **Exhibit 13.**)

With understandable frustration, Skanska began this litigation soon after it received Amerisure's July 12, 2012 correspondence. (App. 154a-155a, **Exhibit 13.**)

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PROCEDURAL HISTORY

Skanska filed its complaint on June 13, 2013 in the Midland County Circuit Court. On April 29, 2014, Amerisure filed a motion for summary disposition under MCR 2.116(C)(10) in which it erroneously argued its insurance policy did not cover the damage caused by the backward installation of steam expansion joints. The trial court initially denied Amerisure's motion because questions of material fact precluded the relief Amerisure sought; however on April 6, 2015, the trial court issued a ruling on Amerisure's motion for reconsideration in which it partially granted Amerisure's motion for summary disposition. On May 8, 2017, Amerisure filed a renewed motion for summary disposition. Skanska's response included a request for partial judgment on liability in Skanska's favor under MCR 2.116(I)(2). On October 10, 2017, the trial court denied both parties' requests for summary disposition. (App. 157a-166a, **Exhibit 14.**)

On October 31, 2017, Amerisure filed an application for leave to appeal with the Court of Appeals, and Skanska filed a motion for reconsideration with the trial court, which was denied on November 28, 2017. Skanska filed an application for leave to appeal on December 19, 2017. Thus the parties both found error in the trial court's October 10, 2017 order, albeit on different grounds.

The Court of Appeals granted both Skanska and Amerisure's applications for leave to appeal on April 10, 2018 and consolidated the two cases. On March 19, 2019, after briefing and oral argument, the Court of Appeals issued a per curiam opinion reversing the trial court's failure to grant Amerisure summary disposition. (App. 002a-012a, **Exhibit 1.**)

The briefs Skanska submitted to the Court of Appeals included an explanation of the change in contract language when the *comprehensive* general liability policy was replaced

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with the *commercial* general liability policy. Skanska also cited the actual language of the insurance contract at issue. However, the Court of Appeals refused to address the language of the contract. Instead, the court held:

> The matter is well-settled. We hold that the trial court properly applied *Hawkeye* to this case. It is an established principle of law that an "occurrence" cannot include damages for the insured's own faulty workmanship.
>
> (App. 011a, **Exhibit 1.**)

By resting its opinion on a "principle of law" rather than on an examination of the actual language of the contract, the Court of Appeals erred. Worse, by announcing its decision as a "principle of law," the Court of Appeals made clear that it will not consider the actual language of the contract in future cases either. Unless this Court reverses this decision, private parties are powerless to contractually allocate the risk of a construction defect. Furthermore, the Court of Appeals' decision below negates well-settled principles of freedom of contract in the context of commercial general liability policies, thereby impairing the sacred right of parties to obtain, and be held to, the benefit of their bargain.

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ANALYSIS

A. Summary of Analysis.

Freedom of contract is supported by fundamental rules of contract law. The most basic of these rules require enforcement of unambiguous terms as written and interpretation of contracts in a way that does not render words, phrases, and clauses nugatory.

The pertinent parts of the insurance policy in this case are the initial insuring clause and two of the exclusions. The unambiguous terms of the initial insuring clause grants coverage of the property damage caused by the backward expansion joints. Installation of them backward was undisputedly accidental, and the calamitous event that resulted constitutes an "occurrence," as the term is defined by the policy.

But rather follow the contract, and next determine whether an exclusion negates insurance coverage, the Court of Appeals followed *Hawkeye Security*. The decision in *Hawkeye Security* was based on flawed methodology because it interpreted the term "occurrence" in a way that made the "your product" and "your work" exclusions in the controlling policy completely useless. Unfortunately, the holding flowing from this flawed methodology became the "principle of law" that the Court of Appeals relied on below, and which Skanska asks this Court to reverse.

Additionally, the contract at issue in *Hawkeye Security* and the contract at issue here are different. *Hawkeye Security* involved the 1973 comprehensive general liability policy. However, in 1986 the Insurance Services Office revised the "your product" and "your work" exclusions such that construction defects by the insured's subcontractors were covered. The Court of Appeals did not consider the impact of these changes – both in the instant case and in all other cases on this issue that have come before it. Instead, the Court of Appeals

considered *Hawkeye Security* to have articulated a "principle of law." This is clear error, and it must be reversed.

B. This Court has recognized a fundamental right to freedom of contract.

This case calls upon the Court to reiterate and enforce fundamental rules of contract law.

This Court has recognized the fundamental right to freedom of contract. *Rory v Continental Insurance Company*, 473 Mich 457, 461; 703 NW2d 23 (2005). *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002) ("competent persons shall have the utmost liberty of contracting and their agreements voluntarily made shall be held valid and enforced in the courts"); As stated in *Wilkie v Auto-Owners Ins. Co*., 469 Mich 47, 53; 664 NW2d 776 (2003) "[t]he notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable." Moreover, as *Wilkie* artfully articulated, "[o]ne does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made." *Id*., citing 15 Corbin, Contracts (Intrim Ed.) ch 79, §1376, p. 17. These are not idle words. And like our other democratic freedoms, liberty of contract requires vigilance.

This Court has established rules of contract interpretation to safeguard this fundamental right. *Id.* at 468. These rules include the requirement to "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459, 453; 663 NW2d 447 (2003). They also include examination of the language of the instrument to give "it its ordinary and plain meaning if such would be apparent to a reader of

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the instrument." *Rory* at 461. Finally, and most importantly, these rules require the Court to "construe and apply unambiguous contract provisions as written." *Id.*

An insurance policy is simply another expression of two parties' right to contract freely and is "subject to the same contract principles that apply to any other species of contract." *Rory* at 461. Although each insurance policy must be read under its own terms, the manner in which a commercial general liability insurance policy is organized invites the court to employ a two-step test to determine whether an insured is entitled to coverage. First, the court reviews the insuring agreement. If that clause extends coverage, the court then determines the applicability of an exclusion. *Allstate Insurance Company v Freeman*, 432 Mich 656, 668; 443 NW2d 734 (1989) ("we agree with plaintiff that the proper construction of a contract requires that we fist determine whether coverage exists, and then whether an exclusion precludes coverage.") *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 24-25; 800 NW2d 93 (2010) (describing two-part test). In each stage of this analysis, the court must enforce unambiguous language exactly as written. *Rory* at 468.

In the instant case, upon a plain reading of the policy, it is clear that the insuring agreement has been triggered and no exclusion applies. The damages flowing from the Loss Event constitute a covered claim under the express language of the contract of insurance.

C. The Insuring Agreement was triggered because backward expansion joints are "unusual" and "not anticipated"; because broken concrete, bent steel, and one thousand five hundred feet of ruined pipe are a "casualty"; and because $1.4 million worth of property damage is an "undesigned contingency" constituting an "occurrence."

Section I, paragraph 1 of the CGL contract lays out the initial insuring agreement, which says the insurance applies to "property damage" only if it is caused by an "occurrence." The pertinent parts read:

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1. Insuring Agreement

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies…
>
> ***
>
> b. This insurance applies to "bodily injury" and "property damage only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(App. 023a, **Exhibit 2.**)

The CGL contract defines "property damage" as "Physical injury to tangible property, including all resulting use of that property" and "Loss of use of tangible property that is not physically injured." (App. 037a, **Exhibit 2.**) There is no dispute the broken concrete, bent steel, and saturated pipe meets this definition of "property damage."

Instead, Amerisure defended Skanska's claim by focusing on subparagraph b.(1) of this clause, which states the insurance only applies if the "'property damage' is caused by an 'occurrence.'" The CGL contract then says, "Occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."
(App. 036a, **Exhibit 2.**)

The CGL insurance contract does not define "accident." However, this Court has said "when the insurance policy defines an occurrence as an accident, without defining accident, we have examined the common meaning of the term. In such cases, we have repeatedly stated that 'an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected."*Allstate Insurance Company v McCarn*, 466 Mich 277, 281-282; 645 NW2d 20 (2002).

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In *Allstate*, the insured fired a gun that was pointed directly at a person at point blank range. The Court found the ensuing death to be an accident. The *Allstate* Court wrote "the appropriate focus of the term 'accident' must be on both 'the injury-causing *act* or *event* and its relation to the resulting property damage or personal injury." *Allstate* at 282. "An insured need not act unintentionally for the act to constitute and 'accident' and therefore an 'occurrence.'" *Id.* If the consequences were unintended, "the act does constitute an accident." *Id*. at 282-283.

There is no legitimate dispute that installing steam expansion joints backward constitutes an "accident" as the term is commonly understood. The trial court itself wrote in its October 10, 2017 Opinion, "There is no indication M.A.P. purposefully installed the expansion joints backwards. The parties affected by M.A.P's negligence did not anticipate, foresee, or expect backward expansion joints or property damage to the entire length of the underground steam and condensate lines." Furthermore, no reasonable juror would believe Skanska intended its subcontractor to install the expansion joints backwards.

Under *Allstate,* the commonly understood definition of the term "accident" should end the inquiry under the CGL policy's insuring agreement with a finding that coverage extends to the Loss Event. In fact, the same is true under the analysis of every single one of this Court's decisions addressing the meaning of the term "accident" stretching back 56 years to *Guerdon Industries, Inc. v Fidelity & Cas. Co. of New York*, 371 Mich 12, 18; 123 NW2d 143 (1963). Because backward expansion joints are "unusual" and "not anticipated"; because broken concrete, bent steel, and a thousand feet of ruined pipe are a "casualty"; because $1.4 Million worth of property damage is "an undesigned contingency" and "something out of the usual course of things," the lower courts should have found an

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"accident," and hence, an "occurrence," as a matter of law. Stated differently, the CGL policy's insuring clause has been triggered. Under *Freeman, supra, Besic, supra*, and *Rory, supra*, the lower courts should then have examined the CGL policy's exclusions to determine whether one of them barred coverage for this particular accident and should have enforced the contract accordingly.

D. The lower courts erroneously ignored important parts of the contract when they failed to give effect to the exclusions.

Unfortunately, the lower courts failed to follow the method of analysis required by *Freeman, supra*, and *Besic, supra,* and failed to enforce the plain language of the contract, as required by *Rory, supra*. Instead of accepting the (inescapable) fact that backward expansion joints had caused an "accident," and hence an "occurrence," and proceeding with an analysis of the policy's exclusions, the lower courts erroneously contend defective construction is only an "accident" if and when the insured's faulty work damages the property of another. This error results from applying *Hawkeye Security* as a principle of law to the incident for which coverage is sought, rather than applying the express language of the agreement bargained for by the parties. Nothing in the contractual definition of "occurrence" or in the commonly understood meaning of the term "accident" makes ownership of the injured property dispositive of the initial grant of insurance coverage.

The insured in *Hawkeye Security* sought insurance coverage for defective concrete it had procured from a supplier and subsequently installed on a waste water treatment plant construction project. The applicable insurance policy defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." (*Hawkeye-Security, supra,* at p. 373) Even though this definition makes no reference to

workmanship or any other particular type of property damage, the court concluded that defective concrete did not constitute an "occurrence." "The "fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship." *Hawkeye Security* at 378, *citing, McAllister v Peerless Ins. Co.,* 124NH 676, 680; 474 A2d 1033 (1984).

Importantly, *Hawkeye Security* concerned the 1973 edition of the comprehensive general liability policy. This policy contained exclusions for "property damage to the insured's products arising out of such products or any part of such products" and for "property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts, or equipment furnished in connection therewith." (App. 063a, **Exhibit 3.**) These "your product" and "your work" exclusions expressed the era's prevailing philosophy that the "risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or 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." Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations – what Every Lawyer Should Know*, 50 Neb. L. Rev 415, 441 (1971). (App. 381a, 441a, **Exhibit 28.**) Economic loss without physical damage was not covered. *Id.* at 441-445.

It is apparent the court in *Hawkeye Security* arrived at its expansive definition of "occurrence" by judicially infusing it with this philosophy. Rather than determining an "occurrence" under the language of the contract and subsequently determining the applicability of a contractual exclusion, the court inappropriately looked at the owner of the damaged property as dispositive:

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> In the instant case Vector seeks what amounts to recovery for damages done to its own work product, and not damage done to the property of someone other than the insured.
>
> * * *
>
> Accordingly, we hold that the defective workmanship of Vector, standing alone, was not the result of an occurrence within the meaning of the insurance contract.
>
> *Hawkeye Security, supra* at 377-378.

Hawkeye Security's method of analysis violates a fundamental rule of contract law – namely, that every word, phrase, and clause be given effect and interpretations that render any part of the contract surplusage or nugatory be avoided. *Klapp, supra.* The comprehensive general liability policy at issue in *Hawkeye Security* addressed the nature of the damaged property in the "your product" and "your work" exclusions, rather than in the definition of the term "occurrence." To conclude damage to the insured's work and products was not an "occurrence" was to render those exclusions nugatory. The "your product" and "your work" exclusions serve no purpose if property damage to your product or work does not fall within the initial grant of coverage. Thus, *Hawkeye Security* does not meet the analytical standard for contract interpretation set by this Court. *Hunter v Pearl Assurance Co., Ltd,* 292 Mich 543, 545; 291 NW 58 (1940)("'A court by an interlineation may not write a new clause into a policy. * * * A contract will be construed so as to give effect to every word or phrase as far as practicable.'") *quoting, Mondou v Lincoln Mut. Cs. Co.*, 283 Mich 353, 358-359; 278 NW 94 (1938).

To base the existence of an "occurrence" on the exclusions is to judicially re-write the contract in violation of *Rory*. Indeed, the Supreme Courts of multiple states have criticized the approach to the definition of "occurrence" that has now been ensconced as a "principle of law" by the Court of Appeals. For example, the Supreme Court of North Dakota recently

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wrote, "This focus on the nature of the property damage to define whether there has been an 'occurrence' has been criticized by courts and commentators…":

> If the definition of "occurrence" cannot be understood to include an insured's faulty workmanship, an exclusion that exempts from coverage any damage the insured's faulty workmanship causes to its own work is nugatory. If, on the other hand, the definition of 'occurrence' does include an insured's faulty workmanship, such an exclusion functions as a meaningful "limitation or restriction on the insuring clause."
>
> *K & L Homes, Inc. v American Family Mutual Insurance Company*, 829 NW2d 724, 735-736 (2013) (*internal citations omitted*)(App. 178a, **Exhibit 15.**)

"Why would the insurance industry exclude damage to the insured's own work or product if the damage could never be considered to have arisen from a covered 'occurrence' in the first place?" *American Family Mutual Ins. Co. v American Girl, Inc.*, 268 Wis 2d 16, 41; 673 NW2d 65 (2004) (App. 197a, **Exhibit 16.**). [2]

Courts have likewise found the determination of an "accident," and thereby an "occurrence," by reference to the nature of the property damaged as lacking a foundation in logic. "The CGL policy… does not define an 'occurrence' in terms of the ownership or character of the property damaged by the act or event. Rather, the policy asks whether the injury was intended or fortuitous, that is, whether the injury was an accident:

> **[N]o logical basis within the "occurrence" definition allows for distinguishing between damage to the insured's work and damage to some third party's property.**
>
> *Lamar Homes Inc. v Mid-Continent Casualty Company*, 242 SW3d 1, 9 (Tex. 2007) (*emphasis added*). (App. 281a, **Exhibit 20.**)

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[2] *See also*, *United States Fire Ins. Co., supra,*(Florida)*; Cypress Point Condominium Assoc., Inc. v Adria Towers, LLC*, 226 NJ 403; 143 A3d 273 (2016)(New Jersey); *National Surety Corporation v Westlake Investments, LLC*, 880 NW2d 724 (2016)(Iowa); *Lamar Homes, Inc. v Mid-Continent Casualty Company*, 242 SW3d 1 (2007)(Texas); *The Travelers Indemnity Company of America v Moore & Associates, Inc.*, 216 SW3d 302(2007)(Tennessee); *Cherrington v Erie Insurance Property and Casualty Company*, 231 WVa 470; 745 SE2d 508 (2013)(West Virginia) (App. 212a-334a, **Exhibits 17-22.**).

In sum, under the contract before the trial court (and in use across the State of Michigan and the United States today), the insuring agreement is triggered when an "accident" causes "physical injury to" or "loss of use of" tangible property. Period. Contrary to the lower courts' rulings, nothing in the express language of the insuring agreement limits coverage to property owned by a third party. Yet, the lower courts effectively re-wrote the insuring agreement by looking at the owner of the damaged property to determine whether an "occurrence" had taken place. This was erroneous methodology in *Hawkeye Security*'s day, and is reversibly erroneous under *Rory* now.

E. The 1986 insurance contract revisions extended coverage to the property damage that occurred in this case.

In changing its standard form commercial liability policy in 1986, the ISO revised the definition of "occurrence" slightly, and dramatically revised the "your product" and "your work" exclusions. It also renamed the document "Commercial General Liability Coverage Form." The Amerisure policy at issue in the instant case is the 1986 form policy. The *Hawkeye Security* court may have reached the right result, despite using flawed methodology, because the 1973 versions of the "your property" and "your work" exclusions, if applied, would have barred coverage anyway. But, as previously stated, those exclusions were significantly changed in 1986, such that *Hawkeye Security* concerns a materially different contract than the one at issue in this case.

In addition to employing the flawed methodology established by *Hawkeye-Security*, the Court of Appeals compounded its error by blindly relying on that case without considering the impact of the re-written exclusions. In fact, very few cases in this state, in

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this vein of jurisprudence, even mention them. This is where the lower courts run off the rails: they follow a case, rather than the parties' contract.

This Court must correct the error made below and return this vein of jurisprudence it to its proper track. As stated above, to properly analyze coverage under a commercial general liability insurance policy, the court must first review the insuring agreement. If that clause has been triggered, the court must then test the claim against the policy's exclusions. *Besic, supra.* Thus, a contractor who unintentionally causes "property damage" (to its own or to someone else's property) has triggered the insuring agreement but is not entitled to coverage unless all of the exclusions have been ruled out. This gauntlet includes the business risk exclusions which – if properly applied – may or may not allow coverage for a contractor's workmanship.

The exclusions are found in Section I, part "a" through "q" of the policy. (App. 024a-028a, **Exhibit 2.**) They include an exclusion for certain liabilities assumed by the insured in a contract, an exclusion for certain liquor liabilities, one for pollution, and so on. The most important ones to this vein of jurisprudence are the "your work" and "your product" exclusions. These are the business risk exclusions that have historically been pivotal when determining coverage for a contractor's own workmanship. These are also the exclusions that changed in 1986, and which the Court of Appeals erroneously fails to analyze each time it considers coverage for a construction defect.

1. The "your product" exclusion does not apply to this case.

In 1986 the ISO removed real property from the definition of "your product" in order to cover certain types of construction defects. By revising the definition, the exception was

narrowed and insurance coverage broadened. Now, the definition of "your product" states in pertinent part:

> 21. "Your Product":
>
> a. Means:
>
> (1) Any goods or products, <u>**other than real property**</u>, manufactured, sold, handled, distributed or disposed of by [you].
>
> (App. 037a, **Exhibit 2.**)

The damaged steam lines at issue in this case are fixtures and are therefore considered real property under Michigan law. They were buried underground as a permanent, useful adjunct to the purpose the land was being put, namely supplying heat to the hospital. The photos of the two manholes make this abundantly clear. (App. 110a, **Exhibit 8.**) Accordingly, the steam and condensate lines are real property and the "your product" exclusion does not apply to this particular case. *See*, *Wayne County v William G and Virginia Britton Trust*, 454 Mich 608, 610; 563 NW2d 674 (1997)("We reaffirm the three-part test enumerated in *Morris v Alexander*, 208 Mich 387; 175 NW 264(1919), for determining what constitutes a fixture. Property is a fixture if (1) it is annexed to the realty, whether the annexation is actual or constructive; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty.")

The courts of other states have employed a similar analysis to decide whether the "your product" exclusion applies to a construction defect. *See e.g., National Union Fire Insurance Company of Pittsburgh, PA v Structural Systems Technology, Inc.*, 756 FSupp 1232 (ED MO, 1991), *modified on other grounds*, 764 FSupp 145 (ED MO, 1991) (your product exclusion did not apply to cellular tower because it was a fixture) (App. 357a-370a, **Exhibit 26.**); *Scottsdale Insurance Company v Tri-State Insurance Company of Minn.*, 302

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FSupp2d 1100 (D ND, 2004) (your product exclusion did not apply to modular units affixed to foundation because they were fixtures.) (App. 372a-379a, **Exhibit 27.**) However, in its March 19, 2019 opinion, the Court of Appeals dismissed the cases of other jurisdictions as irrelevant. This was done in error as Michigan has no cases that discuss the ISO's 1986 revisions to the general liability policy's exclusions – in part because the Court of Appeals has been analyzing these insurance policies incorrectly.

2. The "your work" exclusion does not apply to this case.

The most important exclusion to the vein of jurisprudence Skanska asks this Court to correct is the "your work" exclusion. As with the "your product" exclusion, the Court of Appeals has rarely cited or analyzed it. Amerisure (correctly, and perhaps craftily) did not offer it as a defense to Skanska's claim, but the exclusion so imbues the "principle of law" the Court of Appeals relied upon to reach its decision in this case, and in the many others like it, that this Court must look at it in weighing its decision in this case.

The 1973 version of the comprehensive general liability policy excluded coverage for the insured's own work. The exclusion read, "This insurance does not apply:

> (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts, or equipment furnished in connection therewith;
>
> (App. 063a, **Exhibit 3.**)

In 1986 the ISO wrote an exception into this exclusion for work performed on the insured's behalf by a subcontractor. The current, commercial general liability policy now reads, "This insurance does not apply to:

> l. Damage to Your Work
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

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> **<u>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 sub-contractor.</u>**
>
> (App. 027a, **Exhibit 2.**) (*Emphasis added.)*

The effect of the new language is to continue coverage for the error in workmanship at issue in this case, and at issue in scores of other cases like it. Under standard rules of contract interpretation, this new language must be given effect. This Court has said repeatedly that contracts must be "'construed so as to give effect to every word or phrase as far as practicable.' " *Klapp v United Group Ins. Agency*, 468 Mich 459, 467; 663 NW2d 447 (2003), *citing*, *Hunter v Pearl Assurance Co., Ltd,* 292 Mich 543, 545; 291 NW 58 (1940), *quoting, Mondou v Lincoln Mut. Cs. Co.*, 283 Mich 353, 358-359; 278 NW 94 (1938). In their treatise on insurance law, Professors Jeffrey W. Stemple and Erik S. Knutsen remarked, "the insurance industry through ISO in 1986 began specifically providing coverage for claims arising out of allegedly faulty workmanship by subcontractors of the policyholder… [w]ith this action, the insurance industry essentially agreed to cover a huge portion of faulty workmanship claims, particularly those arising out of home building or other construction."

> The subcontractor exception to the Your Work exclusion continues in the standard ISO CGL policy. We are not aware of any sentiment within ISO or the insurance community to change or eliminate this exception. The logical conclusion is that the insurance industry as a whole has considerable appetite for certain sorts of business risks and that insurers continue, as was the case at the dawn of the CGL form, to intend that the CGL policy provide broad coverage. Insurers continue to market the CGL policy as a product providing broad coverage for businesses.
>
> *Stemple and Knutsen on Insurance Coverage*, 4th ed., vol. 2 §14.13[D], p. 14-269 (App. 415a, 430a, **Exhibit 29.**).

If one were revising the standard general liability policy to allow coverage for errors in workmanship performed on the insured's behalf, the logical place to make the revision is

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not in the definition of "occurrence," to which the Court of Appeals confined its analysis, but in the exclusion for "your work." And that is exactly where ISO made the change. But by holding Skanska (and every other general contractor in Michigan) is not entitled to coverage for its subcontractor's error because "an 'occurrence' cannot include damages for the insured's own faulty workmanship," the Court of Appeals has violated the fundamental maxim of contract law summarized in *Klapp, supra*. The contract of insurance would not need an exception for work performed on the insured's behalf if none of the insured's work was covered in the first place. Stated differently, the "principle of law" the Court of Appeals announced in this case wrongfully renders this clause nugatory and violates the most basic statements this Court has made about contract interpretation.

F. The 1986 policy revisions mean *Hawkeye-Security* can no longer be binding precedent.

In this case, the trial court's decision that an "occurrence" is a question of fact, rather than a contractual prerequisite, satisfied by the backward installation of the expansion joints, was based on the trial court's erroneously perceived obligation to follow *Hawkeye-Security* as gospel. The court wrote:

> This Court is bound by, and must follow, the precedent set by *Hawkeye-Security*, because it has not been overruled or otherwise found to be inaccurate case law interpreting the insurance provision presented in this case.
> (App. 162a, **Exhibit 14.**)

However, *Hawkeye-Security* can no longer be binding precedent because the contract on which the decision rests is no longer in effect. In fact, this Court's decision in *Rory v Continental Insurance, supra,* required the lower courts to reject *Hawkeye-Security* and apply the unambiguous language of the insurance contract that Amerisure issued to M.A.P. and

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Skanska. *See, Rory* at 461 ("We hold, first, that insurance policies are subject to the same contract construction principles that apply to any other species of contract. Second, unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written.")

This Court has instructed the bench and bar that appellate decisions lack precedential effect when the facts of the case are different. *In re Sprenger's Estate*, 337 Mich 514, 523; 60 NW2d 436 (1953)("the rule of stare decisis has reference to principles or points of law and not to factual situations existent in case where such principles apply.") The facts of this case are different than the facts of *Hawkeye-Security*: namely in that the language of the contract at issue in this case and the language of the contract at issue in *Hawkeye-Security* are different. Apples to oranges, they are different insurance policies.

By analogy, appellate rulings on statutes have no precedential effect when the Legislature amends the statute. *Lamp v Reynolds*, 249 Mich App 591, 604; 645 NW2d 311 (2002)("Because the Legislature amended MCL §600.6304 after *Hickey*, and did not include this 'intentional exception,' it appears that the doctrine of stare decisis is inapplicable."), *In re Nestorovski Estate*, 283 Mich App 177, n. 6; 769 NW2d 720 (2009)("The doctrine of stare decisis lacks applicability when the Legislature has amended the statutory underpinnings of a Supreme Court decision."). Just as appellate interpretations of statute are no longer binding when the Legislature re-writes the statute; appellate interpretations of contract are no longer binding when the parties re-write the contract.

Unfortunately, it appears no one has ever informed the courts of this state of the revisions made to the business risk exclusions when the standard insurance form changed

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from the _comprehensive_ general liability policy to the _commercial_ general liability policy in 1986. Instead, the Court of Appeals' opinions either continue the inapplicable description of coverage enunciated by *Hawkeye-Security*, or they grant coverage without mentioning the changes because, by chance, the damage falls within the "principle of law" established by that case.

In particular, four opinions illustrate the inconsistent jurisprudence on this topic.

Radenbaugh v Farm Bureau General Ins. Co. of Michigan, 240 Mich App 134; 610 NW2d 272 (2000) appears to be the Court of Appeals' first construction defect case decided under the new commercial general liability policy. *Radenbaugh* unsurprisingly looked to *Hawkeye-Security*, but also relied extensively on *Calvert Insurance Company v Herbert Roofing and Insulation Company*, 807 FSupp 435 (ED Mich, 1992). Indeed, *Radenbaugh's* quotation from *Calvert* runs for more than three pages in the reporter, and the *Radenbaugh* court wrote, "We agree with the reasoning of the *Calvert* court and hereby adopt its analysis as our own." 240 Mich App at 148. Unfortunately, *Calvert,* like *Hawkeye-Security,* concerns coverage under the old, comprehensive policy, not the new commercial one. By adopting *Calvert*, the *Radenbaugh* court adopted reasoning applicable to a contract of insurance that differed from that actual agreement of the parties before it. Notwithstanding that fact, *Radenbaugh* reached the right result. The 1986 revisions expanded coverage, and by finding in favor of the insured, the court achieved the correct outcome.

With *Radenbaugh*, the conflation of "occurrence" with the pre-1986 business risk exclusions became an erroneous principle of common law that subsequent panels of the Court of Appeals felt obligated to follow. For example, in *Z&R Electric Service, Inc. v Cincinnati Ins. Co.*, unpublished decision of the Court of Appeals, Docket No. 226605, June 5, 2001

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(App. 336a-341a, **Exhibit 23.**), the court acknowledged the damage at issue fit within the commonly understood meaning of the word "accident":

> With these definitions and proper perspective in mind, there really is no debate in the record that Z&R did not expect the motor it purchased from Louis Allis to malfunction soon after installing it, constituting the sort of unforeseen event resulting in damage that fits the ordinary definition of an "accident." (App. 339a, **Exhibit 23.**)

However, the Court of Appeals refused to analyze the new exception to the "your work" exclusion and, instead, rested its opinion on *Radenbaugh* and its predecessors – all of which rely on the outdated insurance form: "The *Radenbaugh* Court gave a lengthy synthesis of *Calvert*, *Vector*, and *Bundy*,[3] making it unnecessary for us to repeat that effort here." (App 339a, **Exhibit 23.)**

Likewise, in *Groom v Home-Owners Ins. Co*., unpublished decision of the Michigan Court of Appeals, Docket No. 272840, April 19, 2007 (App. 343a-349a, **Exhibit 24.**), the Court of Appeals analyzed cases from multiple other jurisdictions and concluded the plain language of the commercial general liability insurance policy did not preclude construction defects from being an "occurrence." However, the court felt duty-bound to follow *Hawkeye-Security* and deny coverage:

> **Were we writing on a clean slate, we would** follow the reasoning of *American Girl*[4] and **apply the general coverage provisions of the CGL policy according to its plain and ordinary meaning.** Hence, we would conclude the faulty workmanship constitutes an occurrence within the meaning of the CGL policy as long as the insured did not intend for the damage to occur. **However we are not writing on a clean slate.**
>
> (App. 346a, **Exhibits 24,** *Emphasis added*.)

[3] *Bundy Tubing Co. v Royal Indemnity Co*., 298 F2d 151 (CA 6, 1962).
[4] *American Family Mutual Ins. Co. v American Girl, Inc.*, 268 Wis2d 16; 673 NW2d 65 (2004) (App. 186a, **Exhibit 16**.)

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The Court of Appeals' decision in *Heaton v Pristine Home Builders, LLC*, unpublished decision of the Michigan Court of Appeals, Docket No. 305305, October 25, 2012 (App. 351a, **Exhibit 25.**) provides yet another example. The court acknowledged the harsh result its jurisprudence inflicted on contractors, but said it was bound to follow precedent. Furthermore, the court suggested contractors negotiate for more coverage:

> Plaintiffs may be correct that the precedent of this state has harshly left general contractors open to personal liability without coverage. However, we are bound by this precedent. And the answer to this problem lies in potential insurance purchasers negotiating the type of coverage they need and passing on policies that so broadly preclude liability protection.
> (App. 354a, **Exhibit 25.**)

Ironically, "negotiating the type of coverage they need" is exactly what contractors did back in 1986, when contractors negotiated revisions to the business risk exclusions! The fact that the Court of Appeals did not discuss the 1986 revisions indicates it was not even aware of them. It also indicates the Court of Appeals made its decision by looking at case law, rather than looking at the words used by the parties to express their contractual agreement.

In sum, the lower courts, erred by following *Hawkeye–Security* without considering the materially different provisions in the contracts before them. Not only do *In re Sprenger's Estate*, *Lamp*, and *In re Nestorovski* give them permission to make their own decisions on the insurance contract at issue in this case, but this Court, in *Rory*, commands them to do so. Had the trial court not been under the misguided belief that it had to follow *Hawkeye-Security*, the trial court would have concluded the insuring clause in the CGL contract of insurance had been triggered because the backward expansion joints are an "occurrence" that gave rise to Skanska's legal obligation to pay sums as damages for "property damage." Unfortunately, the

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Court of Appeals has exacerbated this error and now elevated *Hawkeye-Security* to a "principle of law." (App. 011a, **Exhibit 1.**)

Finally, illustrative of the folly of resting on *Hawkeye*, one of the cases cited by *Hawkeye Security – Weedo v Stone–E–Brick, Inc*., 81 N.J. 233, 248, 405 A.2d 788 (1979) – was recently revisited by the New Jersey Supreme Court and its holding was restricted to pre-1986 ISO policies. *See, Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C*., 226 NJ 403; 143 A3d 273 (2016) (App. 246a, **Exhibit 18.**). The *Weedo* decision is widely regarded as seminal in the jurisprudence addressing insurance coverage for construction defects. *See*, *Stemple and Knutsen on Insurance Coverage* at App. 429a-430a, **Exhibit 29**. But if a significant part of the foundation for *Hawkeye Security (i.e. Weedo's* assessment of the pre-1986 ISO policy) is no longer applicable, the lower courts should not have relied on *Hawkeye Security* for a decision in the instant case, and the Court of Appeals should not have elevated it to a "principle of law."

CONCLUSION

By declaring the methodology employed by the court in *Hawkeye-Security* as a "principle of law," the Court of Appeals has nullified long-standing principles of contract interpretation and enforcement established by this honorable Court. The Court of Appeals has also broadly denied insurers and prospective insureds the ability to freely negotiate and agree upon policy terms that best suit their needs and appetites for risk. This flies in the face of basic, long-held freedoms at the foundation of our democracy. The flawed *Hawkeye-Security* methodology has erroneously been applied for too long given the fact that the language of the standard form CGL policy changed 33-years ago. Furthermore, by pronouncing its holding in this matter as a "principle of law," the Court of Appeals has

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guaranteed that this will continue unless this Court steps in and corrects it.

WHEREFORE, Skanska USA Building Inc. requests this honorable Court to reverse the Court of Appeals' March 19, 2019 opinion, and to instruct the Court of Appeals to remand trial court's denial of partial summary disposition on liability in Skanska's favor under MCR 2.116(I)(2).

Respectfully submitted,

KOTZ SANGSTER WYSOCKI P.C.

/s/ R. Edward Boucher

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PROOF OF SERVICE

Lindsey Pfund certifies that on the 13th day of December, 2019, she served Skanska U.S.A. Building's Brief on Appeal and this Proof of Service, in accordance with the Court's Electronic Guidelines. Notice of Electronic Filing of these documents will be sent to all parties by operation of the Court's electronic filing system.

/s/ Lindsey Pfund

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