STATE OF MICHIGAN

IN THE SUPREME COURT

SKANSKA USA BUILDING, INC.,

Plaintiff,

SC No. 159510
COA No. 340871; 341589
L.C. No. 13-009864-CK

v

M.A.P. MECHANICAL CONTRACTORS, INC.,
AMERISURE INSURANCE COMPANY AND
AMERISURE MUTUAL INSURANCE COMPANY,

Defendants,
_____/

DEFENDANTS-APPELLEES AMERISURE'S BRIEF ON APPEAL

*** * * ORAL ARGUMENT REQUESTED * * ***

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COUNTER-STATEMENT OF APPELLATE JURISDICTION

Defendants-Appellees Amerisure Insurance Company and Amerisure Mutual Insurance Company (collectively "Amerisure") agree with Plaintiff-Appellant Skanska USA Building, Inc. ("Skanska") that this Court has jurisdiction pursuant to its October 10, 2019 Order granting Skanska's application for leave to appeal the March 19, 2019 opinion of the Court of Appeals.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

Whether the definition of "occurrence" in *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369; 460 NW2d 329 (1990) ("*Hawkeye*"), remains valid under the terms of the commercial general-liability policy at issue here?

Skanska answers "no."
Amerisure answers "yes."
The Court of Appeals answered "yes."

II.

Whether Skanska has shown a genuine issue of material fact as to the existence of an "occurrence" under the policy terms?

Skanska answers "no."
Amerisure answers "no."
The Court of Appeals answered "no."

III.

Whether this Court should overturn *Hawkeye*?

Skanska seems to answer "yes."
Amerisure answers "no."
The Court of Appeals presumably would answer "no."

IV.

If the Court overturns *Hawkeye*, should it nevertheless affirm, apply its holding prospectively only, or remand for analysis of all potentially applicable exclusions?

Skanska presumably answers "no."
Amerisure answers "yes."
The Court of Appeals did not answer.

COUNTER-STATEMENT OF FACTS

I. Introduction

This is an appeal on leave granted from a Court of Appeals decision that applied a longstanding, correct principle of Michigan jurisprudence, namely *Hawkeye's* holding that defective workmanship, standing alone, does not constitute an "occurrence" defined as an "accident" in a standard commercial general liability policy. Skanska, asserting status as an additional insured on a policy Amerisure issued to Skanska's subcontractor, M.A.P. Mechanical Contractors, Inc. ("MAP"), argues that this principle does not apply to the language of the Amerisure policy, which Skanska claims is materially different from the policy language at issue in *Hawkeye*. Skanska is quite clearly wrong; nothing in the change in policy language has any impact on the applicability of *Hawkeye*'s holding or analysis.

Consequently, Skanska now seems to argue in its brief that *Hawkeye* was wrongly decided and should no longer be followed. But Skanska is wrong on this point as well. *Hawkeye* rendered a correct ruling consistent with this Court's jurisprudence defining the term "accident." Skanska gives this Court no reason to depart from this correct, well-settled Michigan jurisprudence—which also happens to reflect the majority approach across the country, the apparent modern trend, and the better reasoned rule.

If the Court nevertheless wishes to change course and overturn *Hawkeye*, an affirmance is still in order because the instant case is distinguishable from *Hawkeye* in a way that favors Amerisure. In this case, unlike in *Hawkeye,* coverage is sought under the liability policy issued to the very party that performed the defective work—not to a party whose performance was rendered defective by virtue of the defective workmanship of another subcontractor or supplier.

In addition, the "your work" exclusion precludes coverage, contrary to Skanska's argument that it does not. If the Court reaches this point by overturning *Hawkeye* and by finding that the defective workmanship in this case constitutes an "occurrence," the Court should either enforce the exclusion or remand to the Court of Appeals for that court's initial consideration of all potentially applicable exclusions.

Finally, if the Court does overturn *Hawkeye*, it should do so prospectively only. Parties have entered into liability insurance contracts in Michigan for 30 years based on the assumption that defective workmanship does not constitute an "occurrence." That includes the parties in this case. This Court should not disrupt the contractual understandings and expectations of these parties, or allow an incalculable number of insureds to be afforded coverage for the cost of repairing or replacing their own defective work, caused by their own defective workmanship, for which they never paid premiums.

II. Substantive facts.

A. The underlying claim.

The material substantive facts of this case are undisputed for purposes of Amerisure's motion for summary disposition. Skanska entered into a construction contract with Mid-Michigan Medical Center Midland to build an energy center to supply power and heat. (See Skanska/MAP contract at Appellee's Appendix ("Apx.") 1b). Skanska is a large construction and project development company with worldwide operations in residential development, commercial property development, infrastructure development, and construction.

Skanska subcontracted with MAP to install piping and the components of the steam heating system. (*Id*). MAP completed its work in 2009, according to a claim submitted to

Amerisure on MAP's behalf dated March 2, 2012. (3/2/12 Notice at Appellant's Appendix ("App.") 113a). The boiler system was put into use in November 2010, according to Skanska's brief. (Skanska's brief, p. 5).

As described in a summary of events prepared by Skanska, problems with one of the expansion joints installed in the system were discovered on December 16, 2011. (See Skanska Notes at Apx. 58b). Investigation showed that MAP had installed the expansion joints backwards. (*Id.*). Skanska notified MAP of the problem on March 1, 2012. (*Id.*). Skanska then began working to replace the boiler system. (*Id.*). As is noted in Skanska's summary of events, "[t]he remediation work started on May 7th [2012] with the commencement of the steam pipe system redesign." (Apx. 59b).

Thereafter, Amerisure received its first notice that Skanska sought coverage under the Amerisure policy issued to MAP; Zurich, which issued a CGL policy to Skanska, sent a letter on June 6, 2012 to a MAP representative and to an Amerisure representative demanding that Skanska receive coverage under the Amerisure policy issued to MAP. (Zurich Letter at Apx. 60b).[1]

[1] Amerisure strenuously disputes section D. of Skanska's statement of facts, in which Skanska discusses the notice of the claim. Amerisure did receive timely notice of the claim from its named insured, MAP. It did not receive notice of Skanska's request for coverage under the Amerisure policy until after Skanska had already committed itself to paying to replace the boiler system. In criticizing Amerisure for not issuing Skanska a reservation of rights letter, Skanska does not tell the Court that there was never any lawsuit against it that Amerisure was asked to defend; Amerisure instead was asked to pay the costs that Skanska obligated itself to incur before even seeking coverage from Amerisure. Amerisure argued in both lower courts that violations of policy conditions preclude coverage. But since those issues were not addressed by the Court of Appeals and are not relevant to the issues on appeal to this Court, a more detailed factual background in this regard is omitted.

A company named PermaPipe, Inc. performed an analysis for Skanska and concluded that (1) expansion joints in the piping had been installed backwards; (2) brackets were not installed or attached properly; and (3) expansion joints did not work properly. (Perma Pipe March 1, 2012 Report at App. 103a-104a).[2] These are the problems that allegedly caused a malfunction requiring the boiler system to be replaced. (*Id.*). As Skanska states in its brief, Skanska believed the work had to be redone. (Skanska's brief, p 8).

It is undisputed that the entire boiler system was within the scope of MAP's work as subcontractor and also within the scope of Skanska's overall duties as general contractor.

B. The Amerisure policy to MAP.

Amerisure issued a policy to MAP that was in place during the relevant timeframe. The Amerisure policy contains standard terms as follows:

> **1. Insuring Agreement.**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies.
>
> * * *
>
> b. This insurance applies to . . . "property damage" only if: (1) The . . . "property damage" is caused by an "occurrence."

(App. 23a).

The policy defines occurrence as follows:

> 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

[2] MAP has refuted the cause of the problems in this case. For purposes of Amerisure's motion for summary disposition, Amerisure accepted the facts as reported by PermaPipe.

(App. 36a).

The policy contains several relevant exclusions, as follows:

> This insurance does not apply to:
>
> * * *
>
> **a. Expected Or Intended Injury**
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
>
> * * *
>
> **k Damage To Your Product**
>
> "Property damage" to "your product" arising out of it or any part of it.
>
> **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."
>
> 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.

(App. 24a, 27a).

Skanska is an additional insured on the Amerisure policy by virtue of a requirement in the Skanska/MAP contract and an endorsement in the Amerisure policy called "Contractor's Blanket Additional Insured Endorsement," which states in pertinent part:

> The insurance provided to the additional insured is limited as follows:
>
> * * *

> (b) Your ongoing operations performed for that additional insured, unless the written contract or agreement or the certificate of insurance requires "your work" coverage (or wording to the same effect) in which case the coverage provided shall extend to "your work" for that additional insured.

(App. 49a).

III. Pertinent proceedings

With this lawsuit, Skanska sued both MAP and Amerisure. Skanska's claim against Amerisure seeks coverage as an additional insured under the Amerisure policy issued to MAP. Skanska did not sue Zurich, its own liability insurer for the project.

As Skanska correctly notes, Amerisure filed a motion for summary disposition, followed by a renewed motion for summary disposition supported by additional facts garnered through additional discovery in the interim. The trial court denied both motions.

Amerisure sought leave to appeal in the Michigan Court of Appeals, which granted leave on April 10, 2018, and also granted Skanska's application for leave to appeal in the same order. The appeal was fully briefed and argued. On March 19, 2019, the Court of Appeals issued its unanimous opinion, reversing and ordering summary disposition be granted in favor of Amerisure. The Court of Appeals found that the defective workmanship does not constitute an "occurrence" and found it unnecessary to address the policy exclusions.

Thereafter, Skanska filed its application for leave to appeal to this Court, which the Court granted in its October 18, 2019 Order.

COUNTER-STATEMENT OF STANDARD OF REVIEW

Amerisure agrees with Skanska that a trial court's decision regarding a motion for summary disposition is reviewed *de novo* by this Court.

ARGUMENT

I. The change in the CGL form does not render *Hawkeye*'s analysis or holding inapplicable.

In its October 18, 2019 Order granting leave, the first issue the Court ordered the parties to address is "whether . . . the definition of 'occurrence' in [*Hawkeye*] remains valid under the terms of the commercial general-liability policy at issue here." Tellingly, Skanska does not get around to addressing that issue until page 21 of its brief, ten pages into its argument. There Skanska argues that "in 1986, the ISO revised the definition of 'occurrence' slightly, and dramatically revised the 'your product' and 'your work' exclusions." (Skanska's brief, p. 21). Skanska is right about the first part, but wrong about the second, at least as applied to Skanska's claim for coverage as an additional insured under the Amerisure policy. The revisions to the definition of "occurrence" and the "your product" and "your work" exclusions quite clearly have no impact on the analysis in *Hawkeye*, as Amerisure demonstrates below.

A. The alteration in the definition of "occurrence" does not implicate *Hawkeye's* analysis.

The policy at issue in *Hawkeye* defined "occurrence" as follows:

> *"Occurrence" means 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, 185 Mich App at 373 (emphasis added). The ISO CGL form as revised in 1986, which is used in the Amerisure policy, merely removes the latter part of this definition from the definition and puts it into an exclusion. The Amerisure policy defines "occurrence" as:

> *"Occurrence" means an accident*, including continuous or repeated exposure to substantially the same general harmful conditions.

(Amerisure Policy at App. 36a) (emphasis added).[3]

Thus, as Skanska concedes, the alteration to the definition of "occurrence" was slight. More importantly, the alteration clearly does not impact the applicability of *Hawkeye* to this case. That is because the court in *Hawkeye* confined its entire analysis of the "occurrence" issue to the italicized portion of the above-quoted language, which has not changed.

The *Hawkeye* court began its analysis of the "occurrence" issue by quoting the definition of "occurrence" from the policy language at issue in that case. *Hawkeye*, 185 Mich App at 373. The court then focused its analysis entirely on the meaning of the term "accident." *Id.* at 374-378. The court found that defective workmanship did not constitute an "accident," based on the very definition of the word "accident" that this Court has

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[3] The "expected or intended" language was moved into Exclusion 2.A., which provides:

> This insurance does not apply to:
>
> a. Expected Or Intended Injury
>
> "Bodily injury" or "Property damage" expected or intended from the standpoint of the insured. . . .

(App. 24a). The only other change was to replace "conditions" with "substantially the same general harmful conditions," which is not a material change for purposes of this case.

adopted and adhered to in several decisions. *See, e.g., Allstate Ins Co v McCarn*, 466 Mich 277; 645 NW2d 20 (2002).[4] Because the court in *Hawkeye* found that defective workmanship, standing alone, did not constitute an "accident" as that term is defined under Michigan law, the court did not need to, and did not, proceed to analyze the modifying clause "which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

Because *Hawkeye's* definition of "occurrence" was based solely on the meaning of "accident," and not in any way on the modifying clause at the end of the definition, the removal of that modifying clause from the definition of "occurrence" in the 1986 ISO form does nothing to impact the applicability of *Hawkeye's* analysis. Skanska does not, and cannot, proffer any argument to the contrary, which likely explains why Skanska relegates its argument on this issue to the latter part of its brief.

This also likely explains why the Court of Appeals applied *Hawkeye's* holding to the very policy language at issue in this case in *Radenbaugh v Farm Bureau General Ins Co of Michigan,* 240 Mich App 134; 610 NW2d 272 (2000)—and saw no need to explain why it did so through a discussion of an irrelevant distinction. Skanska suggests that *Radenbaugh* applied *Hawkeye's* holding to the revised policy language only because the court did not analyze whether *Hawkeye's* holding should apply. The more likely explanation why *Radenbaugh* applied that holding to the revised policy language without discussing the change is because *the relevant language is unchanged*, and nothing about the change in policy language impacts the applicability of *Hawkeye's* analysis.

[4] This point is discussed in greater detail in section III.

Indeed, the Court of Appeals later made this very point in *Liparoto v Gen Shale Brick,* 284 Mich App 25, 38, 39; 772 NW2d 801 (2009), when it explicitly recognized that the definition of "occurrence" at issue in *Radenbaugh* was "not significantly different in substance" from the definition at issue in *Hawkeye*.

B. The alteration in the 'your work' exclusion does not implicate *Hawkeye's* analysis.

Skanska contends that the 1986 ISO form "dramatically revised the 'your product' and 'your work' exclusions," and that this somehow renders *Hawkeye's* analysis inapplicable to the language of the Amerisure policy. But Skanska does not develop this point in its argument, and the reason why is obvious: it is completely without merit.

The policy at issue in *Hawkeye* included the following exclusions:

> This insurance does not apply:
>
> * * *
>
> (n) to property damage to the named insured's products arising out of such products or any part of such products;
>
> (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;

Hawkeye, 185 Mich App at 383.

The Amerisure policy includes the same basic exclusions:

> This insurance does not apply:
>
> * * *
>
> **k Damage To Your Product**
>
> "Property damage" to "your product" arising out of it or any part of it.

> **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."
>
> 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.

(App. 27a).

As can plainly be seen, the language of these exclusions is fairly similar, and there is no change that impacts the issue of whether there is an "occurrence." While the newer form replaces "the named insured" with "your," the first page of the coverage form in the Amerisure policy specifically states that the words "you" and "your" refer to the Named Insured. (App. 23a). And, while the new version removes the concept of work performed "on behalf of the named insured," and adds an exception that preserves coverage if the work is done by the named insured's subcontractor, that change has nothing to do with the requirement of an "occurrence."[5]

Skanska's argument as to how the changes in the named insured's product/work exclusions render *Hawkeye's* analysis and holding inapplicable is less than clear. Its argument, set forth on pages 18 and 19 of its brief, seems to be that *Hawkeye* erred by failing to recognize that it is only the named insured's work exclusion that precludes coverage when the only damage is damage to the insured's work, not the requirement of an

[5] The addition of the subcontractor exception also does nothing to help Skanska in this case with regard to this exclusion. Skanska seeks coverage, not under its own policy for faulty work of its subcontractor, but as an additional insured under the subcontractor's policy. This point is discussed in section IV.C.

"accident," and, therefore, *Hawkeye's* holding that defective workmanship, standing alone, is not an "accident" is wrong. But that is an argument that *Hawkeye* was wrongly decided; not an argument that *Hawkeye's* analysis is inapplicable to the Amerisure policy language by virtue of any difference in policy language.

It cannot be—and is not—seriously contended that the language of the Amerisure policy is materially different from the policy language at issue in *Hawkeye,* whether the focus is on the definition of "occurrence" or on the named insured/your product or work exclusions. The language has not changed in a way that renders *Hawkeye's* holding as to an "occurrence," or its supporting analysis, inapplicable to the Amerisure policy.

Skanska's argument that *Hawkeye* was wrongly decided is wholly without merit, as set forth in section III. But to answer the Court's first question in its Order granting leave, the definition of "occurrence" in *Hawkeye* unquestionably remains valid under the terms of the Amerisure policy at issue.

II. Skanska has not shown a genuine issue of material fact as to the existence of an "occurrence" under *Hawkeye.*

The second question the Court asked the parties to address is whether Skanska has shown a genuine issue of material fact as to the existence of an "occurrence" under the terms of the Amerisure policy. Skanska does not address this issue in its brief, and has never suggested that there is a question of fact as to the existence of an "occurrence." Indeed, Skanska has repeatedly emphasized that the facts are undisputed, and argues only that the Court of Appeals erred in holding that the defective workmanship does not constitute an "accident" under Michigan's established definition of that term. As set forth below, Skanska is wrong. But the answer to the Court's second question in its Order

granting leave is that the parties agree there is no material fact as to the existence of an "occurrence."

III. This Court should not overturn *Hawkeye*.

Amerisure submits that there is no cause for this Court to revisit the fundamental holding in *Hawkeye*, a decision that was issued 30 years ago, has been cited in at least 100 cases, and has never been questioned or criticized by this Court. Because *Hawkeye's* definition of "occurrence" remains valid under the terms of the Amerisure policy, as discussed in section I, and because no one suggests there is a question of fact about it, as set forth in section II, this Court should proceed no further. The Court should either affirm the Court of Appeals judgment or vacate the Court's October 18, 2019 Order granting leave and deny Skanska's application. *See, e.g., Hastings Mut Ins Co v Mosher, Dolan, Cataldo & Kelly, Inc*, 480 Mich 928 (2007).

If this Court nevertheless prefers to reexamine this settled Michigan law, there is no basis whatsoever to overturn it. *Hawkeye* was correctly decided. It effectuates the fundamental purpose of general liability coverage, correctly applies this Court's longstanding definition of "accident," and reflects the majority approach among jurisdictions that have addressed this issue. Furthermore, the foundations of this Court's stare decisis strongly counsel against overruling *Hawkeye.*

A. *Hawkeye* was correctly decided.

1. Accident insurance was never intended to serve as a warranty for the insured's work product.

Commercial general liability insurance is accident insurance. It is not, and never was, intended to guarantee the quality of work or products of its insureds, or to provide a warranty for that work or product. This is perhaps the single most fundamental

characteristic of CGL insurance. As one commentator has put it, "Coverage under a commercial general liability insurance policy is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or work is not that for which the damaged person bargained." 9A Couch on Ins § 129:17. (Apx. 63b).[6]

To hold otherwise, i.e., to hold that CGL policies require the insurer to pay for the cost of replacing or repairing the insured's own defective work, would, as courts have recognized, effectively transform the policy into something akin to a performance bond. *See, e.g., Certain Underwriters at Lloyd's London v Metro Builders, Inc*, ___Ill App 3d___, No. 1-19-0517, 2019 WL 6893267, at *4 (Ill App Ct, December 18, 2019) (citations omitted) (Apx. 67b). See also *L-J, Inc v Bituminous Fire & Marine Ins Co*, 366 SC 117, 124, 621 SE2d 33 (2005) (Apx. 83b) ("If we were to hold [that defective workmanship constitutes an accident], the CGL policy would be more like a performance bond, which guarantees the work, rather than like an insurance policy, which is intended to insure against accidents."); *Essex Ins Co v Holder*, 370 Ark 465, 261 SW3d 456, 459–60 (2007) (Apx. 88b) ("Faulty workmanship is not an accident; instead, it is a foreseeable occurrence, and performance bonds exist in the marketplace to insure the contractor against claims for the cost of repair or replacement of faulty work.")

This Court has long recognized that the vehicle for assuring performance of a contractor in compliance with plans and specifications is a performance bond, not a general

[6] Normally Amerisure would not include in its appendix published articles and authorities from other jurisdiction. But because Skanska did so in its appendix, Amerisure has done so in its appendix.

liability policy. *See, e.g., U S Fid & Guar Co v Black*, 412 Mich 99, 107; 313 NW2d 77 (1981) (performance bond assures lender and owner of project that construction will be completed by surety if contractor fails to complete it); *Hardware Dealers Mut Ins Co v RH Hidey, Inc*, 349 Mich 490, 510; 84 NW2d 795, 798 (1957) (performance bond assured construction of project "in accordance with the plans and specifications").

In demanding coverage under the Amerisure policy, Skanska seeks to recover that for which commercial general liability policies were never intended to provide recovery, namely the cost of repairing and replacing the insured's own defective workmanship—over which the insured has total control. This request runs afoul of the fundamental purpose of CGL coverage, "which is intended to insure against *accidents*." *L-J, Inc,* 366 SC at 124 (emphasis added).

2. The CGL policy's purpose of insuring only accidents is implemented by the requirement of an "occurrence," defined as an *accident*.

Contrary to Skanska's and its amici's strained arguments, the source of a CGL policy's limitation of that coverage to accidents is set forth, not in an exclusion, but in the insuring agreement. It is set forth in the provision stating that the insurance applies to "'property damage' only if . . . 'property damage' is caused by an 'occurrence,'" and by the definition of "occurrence" to mean an "*accident*." While it is true that the "your products" and "your work" exclusions preclude coverage of damage to the insured's own work or product, that has nothing to do with the independent requirement that there must be an "accident" in order for coverage potentially to exist in the first place. And it is, of course, well settled "that exclusionary clauses never grant coverage, but rather limit the scope of the [coverage granted in the insuring agreement]." *Fresard v Michigan Millers Mut Ins Co*,

414 Mich 686, 697; 327 NW2d 286, 290 (1982). *See also Crouchman v Motor City Elec Co,* 474 Mich 987; 707 NW2d 595, 596 (2005) ("Coverage cannot be based on the language in [an exclusion in] the policy, because the language of that provision excludes coverage and does not create coverage").

As set forth below, self-damaging work from faulty workmanship that requires its own repair or replacement is not an accident under Michigan's well-established definition of the term "accident," as *Hawkeye* correctly held.

3. An "accident" requires more than mere unintentional or unusual poor workmanship; it requires *fortuity*, which poor workmanship, without more, does not involve.

a. Michigan rules of insurance contract construction control.

Michigan's rules of insurance contract construction are well established. Under Michigan law, an insurance policy is treated the same as any other contract; the Court will determine what the agreement was and effectuate the parties' intent. *Auto-Owners Ins Co v Churchman,* 440 Mich 560, 566; 489 NW2d 431 (1992). In Michigan, "insurance policies *are* subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co,* 473 Mich 457, 461; 703 NW2d 23 (2005) (emphasis in original).

"The primary goal in the construction or interpretation of a contract is to honor the intent of the parties[.]" *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003). Like other contracts, insurance contracts are viewed as a matter of agreement between the parties, and courts will determine what the agreement was and enforce it accordingly. *Churchman*, at 566. An insurance company cannot be found liable for a risk it did not assume. *Group Ins Co v Czopek*, 440 Mich 590, 597; 489 NW2d 444 (1992).

Any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy. *Raska v Farm Bureau Ins Co,* 412 Mich 355, 361-362; 314 NW2d 440 (1982). "An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy." *Heniser v Frankenmuth Mut Ins Co,* 449 Mich 155, 161; 534 NW2d 502 (1995). An insurance company may not be held liable for a risk it did not assume. *Citizens Ins Co v Pro–Seal Serv Group, Inc,* 477 Mich 75, 82; 730 NW2d 682 (2007). And Michigan construes ambiguities against the drafter only as a last resort, when all other means of ascertaining the parties' intent from the language fail. *Klapp,* 468 Mich at 471.

Skanska's curiously impassioned assertion that the Court of Appeals opinion has somehow deprived the parties of their fundamental right to freedom of contract is misplaced. Indeed, it is especially strange given Skanska's objective in this case, which is to recover repair and replacement costs under an insurance contract despite the fact that it never paid Amerisure a dime in premium for such coverage.

The Court of Appeals ruling did nothing more than construe the word "accident" consistent with this Court's definition of that term and with *Hawkeye's* application of that definition in the precise context of defective workmanship. Skanska has not been deprived of the freedom of contract in any way. To the contrary, the Court of Appeals' enforcement of the terms of the Amerisure insurance contract provides Skanska exactly that to which it is entitled as an additional insured, namely enforcement of the policy's terms in accordance with their plain meaning.

b. An "accident," as this Court defines it, requires not just an unintended, unexpected event, but one that is "a happening by chance" and "fortuitous"—which implies a *lack of control*.

Skanska correctly recognizes that this Court has repeatedly relied on the following definition of "accident" in the context of a CGL policy's use of "occurrence," defined in pertinent part as "an accident":

> [W]e 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." (emphasis added)

Allstate Ins Co v McCarn, 466 Mich at 281, quoting *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999). *See also Nabozny v Burkhardt*, 461 Mich 471, 477; 606 NW2d 639, 642 (2000); *Arco Ind Corp v American Motorists Ins Co*, 448 Mich 395, 404-405; 531 NW2d 168 (1995); *Auto Club Group Ins Co v Marzonie*, 447 Mich 624, 631; 527 NW2d 760 (1994); and *Metropolitan Property & Liability Ins Co v DiCicco*, 432 Mich 656, 670; 443 NW2d 734 (1989).

There is an important aspect of this Court's definition of "accident" that is lost on Skanska: the use of the word "and," as opposed to "or," which means that all eight descriptors must be present in order for there to be an "accident." Indeed, the descriptors themselves prove that they are not intended as alternative synonyms for "accident," but are instead independent *components* of the definition. For example, the mere fact that something is "unusual" or "not anticipated," without more, clearly is not enough to declare that it constitutes an "accident."

At a minimum, these eight descriptors invoke three independent, fundamental components that are required in order for something to constitute an "accident": the event must (1) be unusual; (2) be unintended and unexpected; and (3) involve fortuity. While

there is a bit of overlap, each of the eight descriptors focuses primarily on one of these three components. Three focus primarily on the requirement that the event be unusual: "something out of the usual course of things"; "unusual"; and "not naturally to be expected." Two focus primarily on the requirement of unintended and unexpected: "an undesigned contingency," and "not anticipated." Three focus primarily on the requirement of fortuity: "a casualty"; "a happening by chance"; and "fortuitous."

Notably, these three fundamental requirements of an "accident" embodied by the eight descriptors adopted by this Court have been understood by this Court to be the components of an accident for more than 60 years. In *Nichols v Central Crate & Box Co*, 340 Mich 232; 65 NW2d 706 (1954), this Court, in assessing whether an injury sustained by a workman's compensation claimant constituted an accident, said this: "The mere fact that he had expected the log to move and that it failed to do so was not such an *unusual, unexpected* or *fortuitous* event as to constitute an accident." *Id.* at 237 (emphasis added).

The Court's adoption of, and consistent adherence to, a definition of "accident" that requires these three pillars—unusualness, lack of intent or expectation, and fortuity—makes perfect sense. To remove any of the three is to destroy the definition. At a minimum—and of particular importance here—to remove the requirement of fortuity would destroy it, as fortuity is probably the single most important component. The mere fact that an event is "an undesigned contingency," "something out of the usual course of things, unusual," "not anticipated, and not naturally to be expected" does not, in and of itself, make it an accident.[7]

[7] Any number of hypotheticals would suffice to make this point. Suppose, for example, a high school student with straight As neglects to prepare for a test and fails. The student's
(cont'd next page)

Indeed, if anything, the fortuity component is more central to the concept of an "accident" than lack of intent, since lack of intent is specifically addressed in the policy exclusions. The fact that the Amerisure policy, like any standard CGL policy, contains an exclusion for property damage "expected or intended from the standpoint of the insured," if anything, signals that the intent/expectation component is not to be the main focus in construing the intended meaning of "accident." Instead, the main focus should be on fortuity.

Different contexts implicate different components of the Court's definition of "accident." The Court's decisions in *McCarn, Masters,* and *Nabozny* all involved a similar scenario: an intentional act that caused unintentional harm. In that context, the key component of the definition of "accident" was lack of intent/expectation. Consequently, the Court appropriately focused its analysis on the concept of lack of intention or expectation—as opposed to unusualness or fortuity. But it is the component of fortuity, not unusualness or lack of intent or expectation, that is implicated in the context of self-damaging defective workmanship. Indeed, fortuity *is* lacking in this context, which is why defective workmanship, without more, does not constitute an "accident."

Courts that have addressed the requirement of an "accident" in the context of defective workmanship have recognized that it is the fortuity component of the meaning of

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protestation to his or her parent that such performance was an "accident" would rightly be met with incredulity. That failing performance would not be an "accident," because—and only because—it would lack the component of fortuity. The mere fact that the student did not intend or expect to fail, and did not usually fail exams, would not make that particular performance an "accident" under the ordinary definition of that term—or under this Court's definition, which requires "a happening by chance" and "fortuit[y]."

accident that is missing. An illustrative example is *Cincinnati Ins Co v Motorists Mut Ins Co*, 306 SW3d 69 (Kent 2010) ("*Cincinnati*") (Apx. 92b). In that case, the Supreme Court of Kentucky addressed the issue of whether a claim of defective construction against a home builder was a claim for property damage caused by an "occurrence," defined as an "accident" exactly as it is in the Amerisure policy. The Kentucky Court of Appeals had found that the defective workmanship did constitute an "accident" because "the damage was undoubtedly accidental in the sense that it was not intentional." *Id.* at 72. The Kentucky Supreme Court disagreed and reversed, based on its recognition that "[i]nherent in the plain meaning of 'accident' is the doctrine of fortuity." *Id.* at 74.

The court even stressed, "Indeed, '[t]he fortuity principle is central to the notion of what constitutes insurance . . . .'" *Id.* at 74, citing 46 CJS Insurance § 1235 (2009) and 16 Eric Mills Holmes, *Holmes' Appleman on Insurance* 2d § 116.1B (2000) ("Fortuity is perhaps the most fundamental principle of insurance and insurance law . . . the fortuity principle is central to understanding what constitutes insurance.").

The court proceeded to note that "fortuity consists of two central aspects: intent, which we have discussed in earlier opinions, and control, which we have not previously discussed." *Id.* at 74. As the court reasoned, while the insured almost undoubtedly did not intend to engage in defective workmanship, the undisputed fact was that the insured had *control* of the process, which precluded a finding that the insured's poor performance could meet the requirement of fortuity. *Id.* at 74-75. After pointing out that its holding reflected the majority view, the court noted that the minority approach, holding that defective workmanship does constitute an "occurrence," represents "an overly broad interpretation

of accident that fails to take into account the full nature of the concept of fortuity." *Id.* at 76 (punctuation and citations omitted).

The court concluded with this apt explanation why focusing merely on intent does not resolve the issue of whether defective workmanship is an accident:

> So focusing solely upon whether Elite intended to build a faulty house is insufficient. Rather, a court must also focus upon whether the building of the Mintmans' house was a chance event beyond the control of the insured. Or, in other words, a court must bear in mind that a fortuitous event is one that is beyond the power of any human being to bring to pass or is within the control of third persons. . . . It is abundantly clear, therefore, that the issue of control is encompassed in the fortuity doctrine.

Id. at 76 (citations and internal punctuation omitted).

The Kentucky Supreme Court's analysis of the doctrine of fortuity, and the fact that fortuity encompasses the issue of control, is exactly right—and is consistent with this Court's definition of "accident" to require "fortuit[y]" and "a happening by chance."

The Court of Appeals in *Hawkeye* likewise focused, correctly, on the concept of fortuity. Granted, the court did not unpack the fortuity concept in as great detail as was done in *Cincinnati*, and, of course, it was not required to do so. But the court appropriately relied on, and quoted from, a decision from the New Hampshire Supreme Court, which said this:

> The fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship . . .

Hawkeye, 185 Mich App at 378, quoting *McAllister v Peerless Ins Co,* 124 NH 676, 680; 474 A2d 1033 (1984) (Apx. 102b). The *Hawkeye* court agreed with "both the reasoning and the conclusion as expressed by the *McAllister* court," which was correct.

Hawkeye also quoted the very definition of "accident" that this Court would go on to adopt and adhere to in the several cases cited above—although one would never know this from reading Skanska's criticisms of *Hawkeye*. The *Hawkeye* court quoted from *Frankenmuth Mut Ins Co v Kompus,* 135 Mich App 667, 678; 354 NW2d 303 (1984) as follows:

> In other words, 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.

Hawkeye, 185 Mich App at 374, quoting *Kompus*. Again, this is the very definition of "accident" that this Court employs. Consequently, any suggestion that *Hawkeye* did not base its holding on this Court's definition of "accident" from *McCarn, Masters, Nabozny, etc.,* is simply wrong. The Court of Appeals in *Hawkeye* might not have known that this Court would repeatedly adhere to that definition as it has done, but the court nevertheless applied that very definition—including the requirement of "fortuity," which rightly was the court's focus in the context of defective workmanship.

In its brief, Skanska ignores—literally—the portion of this Court's definition of "accident" that requires that something be "a happening by chance" and "fortuitous." Skanska argues:

> 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 MAP *purposefully* installed the expansion joints backwards. The parties affected by MAP'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.

(Skanska's brief, p 16 (emphasis added)). Skanska further argues, citing this Court's definition of "accident" from *McCarn*:

> 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 "accident," and hence, an "occurrence," as a matter of law.

(Skanska's brief, pp. 16-17). Conspicuously absent from Skanska's brief is any argument that the defective workmanship was "a happening by chance" or "fortuitous," which are also required by this Court's definition of "accident." Skanska focuses entirely on whether the defective workmanship was intentional/expected or unusual. But those are not the only components of the definition. Indeed, they are not the most important components in this context. Fortuity is the key component in this context, as *Hawkeye, Cincinnati,* and other decisions (discussed below) have correctly recognized.

Skanska's failure even to argue that the defective workmanship was "a happening by chance" or "fortuitous," as required by this Court's definition of "accident," speaks volumes. Skanska must recognize that any such argument lacks merit, since MAP (and Skanska as general contractor), like Vector in *Hawkeye* and Elite in *Cincinnati,* was in complete *control* of the defective workmanship.

That Skanska would prefer to remove the requirement of fortuity from this Court's definition of "accident" is hardly a reason to find that the Court of Appeals in *Hawkeye* erred by refusing to do so. It is *Hawkeye*, not Skanska, that correctly applies this Court's definition of "accident" in the context of defective workmanship.

c. Cases holding that defective workmanship is not an "accident" appear to represent the majority approach and the modern trend, and are better reasoned than cases holding to the contrary.

i. The majority view, and the modern trend, is that defective workmanship, standing alone, is not an "occurrence," defined as an accident.

In *Cincinnati*, after acknowledging that some courts have held to the contrary, the court said that "the majority viewpoint, however, appears to be that claims of faulty workmanship, standing alone, are not 'occurrences' under CGL policies." *Cincinnati*, 306 SW2d at 73. That statement was made in 2010, citing a 2009 opinion from the Colorado Court of Appeals, *General Sec. Indem Co of Arizona v Mountain States Mut Cas Co,* 205 P3d 529, 535 (Colo Ct App 2009) (Apx. 106b).[8] More recent opinions, including one issued in 2016, have noted that this continues to be the majority view.[9]

In its brief, Skanska cites cases from seven jurisdictions that purportedly followed Skanska's preferred approach, but does not suggest that that represents the majority rule. Skanska's amici claim that Skanska's position represents the majority approach, but only by creating a false dichotomy. The amicus brief submitted by Turner Construction

[8] The *General Sec. Indem Co of Arizona* decision collected cases and also cited Christopher Burke*, Construction Defects and the Insuring Agreement in the CGL Policy—There is no coverage for a contractor's failure to do what it promised,* Prac L Inst: Litig No. 8412, Insurance Coverage 2006: Claim Trends and Litigation, 73, 82 (May 2006), who observed that "[c]ourts from no less than 25 states have adopted the position that there is no coverage [under CGL policies] for construction defect claims."

[9] In *Nat'l Sur Corp v Westlake Inv, LLC,* 880 NW2d 724 (Iowa, 2016), the dissenting opinion, though it did not carry the day, pointed out that the "majority of courts in other jurisdictions hold poor-workmanship claims are not covered under CGL policies." *Id.* at 745. The dissenting opinion compiled a list of decisions from Alabama, Arkansas, Kentucky, New Hampshire, Ohio, Oregon, Pennsylvania, South Carolina, New York, Colorado, and North Carolina that had so held as of 2016. See *id.* at 747-748 (citations omitted).

Company and Gilbane Building Company in support of Skanska's application compiles a list of cases from various jurisdictions for the proposition that damage "from defective construction *can involve* an 'occurrence.'" (Turner Construction Company and Gilbane Building Company's Amicus Brief, p 11-12, fn 3 (emphasis added)). But the issue is not whether damage from defective construction "can involve" an "occurrence." The issue is whether self-damaging defective workmanship *itself constitutes* an occurrence. Indeed, several states included in amici's list have clearly held that it does not, including Alabama, Arkansas, New Hampshire, and South Carolina.

On the specific issue of whether self-damaging defective workmanship constitutes an "occurrence," defined as an accident, the majority view appears always to have been, and to continue to be, that it does not.[10]

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[10] Some of these cases are discussed in this brief. *See also*, *e.g., Big-D Const Corp v Take It For Granite Too,* 917 FSupp2d 1096, 1107-08 (D Nev 2013) (Apx. 123b) ("[t]he majority of courts that have addressed the issue have found faulty workmanship itself is not an accident and therefore not an occurrence under a CGL policy."); *Burlington Ins Co v Oceanic Design & Constr, Inc,* 383 F3d 940, 948 (9th Cir 2004) (Apx. 145b) (under Hawaii law, "[g]eneral liability policies ... are not designated to provide contractors and developers with coverage against claims their work is inferior or defective"); *Auto-Owners Ins Co v Home Pride Cos*, 684 NW2d 571, 578 (Neb 2004) (Apx. 160b) ("standard CGL policy does not provide coverage for faulty workmanship that damages only the resulting work product"); *Oak Crest Constr Co v Austin Mut Ins Co,* 998 P2d 1254, 1257 (Or 2000) (Apx. 170b) ("[T]here can be no 'accident,' within the meaning of a commercial liability policy, when the resulting damage is merely a breach of contract."); and *US Fid & Guar Corp v Advance Roofing & Supply Co*, 788 P2d 1227, 1233 (Ariz Ct App 1989) (Apx. 176b) ("[M]ere faulty workmanship, standing alone, cannot constitute an occurrence as defined in the policy, nor would the cost of repairing the defect constitute property damages."). *See also French v Assurance of America,* 448 F3d 693 (4th Cir 2006) (Maryland law) (Apx. 184b); *Employers Mut Cas Co v Bartile Roofs, Inc*, 618 F3d 1153, 1175 (10th Cir 2010) (Wyoming *and* Utah law) (Apx. 197b); *Lyman Morse Boatbuilding, Inc v Northern Assur Co of America,* 772 F3d 960 (1st Cir 2014) (Maine law) (Apx. 220b); *Nat'l Union Fire Ins Co of Pittsburgh, PA v Turner Constr Co,* 119 Ad3d 103 (2014) (New York law) (Apx. 229b).

In addition to constituting the apparent majority rule, the rule that defective workmanship, standing alone, does not constitute an occurrence appears also to be the modern trend. This rule was recently affirmed in Illinois in *Certain Underwriters* on December 18, 2019.

The Supreme Court of Alabama also reaffirmed Alabama's adherence to that rule in 2019, in *Nationwide Mut Fire Ins Co v David Group, Inc*, ___ So3d ___ No. 1170588, 2019 WL 2240382, at *3 (Ala, May 24, 2019) (Apx. 116b). The court in that case recognized that "faulty workmanship itself is not property damage caused by or arising out of an occurrence." *Id.* at *3 (citations and internal punctuation omitted). As the court surmised, "This concept is consistent with the idea that the purpose of a CGL policy is to protect the insured contractor from tort liability, not to insulate it from its own faulty work." *Id.*

Pennsylvania also reaffirmed its adherence to this rule in 2019, in *Pennsylvania Manufacturers Indem Co v Pottstown Indus Complex LP*, 215 A3d 1010, 1015 (PA Super Ct, 2019, re-argument denied (September 16, 2019)) (Apx. 235b). The court reiterated Pennsylvania's longstanding rule that "[f]aulty workmanship itself does not constitute an 'occurrence.'" *Id.* at 1015.

The Ohio Supreme Court reached the same result in 2018, in *Ohio N Univ v Charles Constra Services, Inc,* 155 Ohio St3d 197; 120 NE3d 762 (2018) (Apx. 244b). Indeed, that case involved the exact same scenario as *Hawkeye*: the insured was a general contractor who sought coverage under its own CGL policy for property damage caused by its subcontractor's faulty workmanship. *Id.* at 197. Citing the requirement of fortuity, the Ohio Supreme Court held that the subcontractor's defective workmanship was not an "occurrence":

> Property damage caused by a subcontractor's faulty work is not an "occurrence" under a CGL policy because it cannot be deemed fortuitous. Hence, the insurer is not required to defend the CGL policyholder against suit by the property owner or indemnify the insured against any damage caused by the insured's subcontractor.

Id. at 197-198. The court recognized that its holding was contrary to results reached in cases from other jurisdictions. *Id.* at 205. The court nevertheless said, without trying to ascertain which view represented the majority approach, "Regardless of any trend in the law, we must look to the plain and ordinary meaning of the language used in the CGL policy before us." *Id.* at 206.

Like the Court of Appeals in *Hawkeye,* these recent decisions all correctly recognized that the concept of an accident requires fortuity—which is different than the mere absence of intent.

ii. Cases holding that defective workmanship constitutes an "accident" erroneously fail to acknowledge the fortuity component of "accident."

In contrast to the cases adopting the majority approach, the cases reflecting Skanska's view, like Skanska itself, generally fail to acknowledge the requirement of fortuity within the definition of accident—or they are from jurisdictions that have defined accident not to require fortuity.

For example, the main case on which Skanska relies is *K&L Homes, Inc v Am Family Mut Ins Co*, 829 NW2d 724 (ND 2013) (See Skanska's brief, pp. 19-20). The court in *K&L Homes* said this:

> We conclude faulty workmanship may constitute an "occurrence" if the faulty work was "unexpected" and not intended by the insured, and the property damage was not anticipated or intentional, so that neither the cause nor the

> harm was anticipated, intended, or expected. This is consistent with our definition of "accident" for purposes of a CGL policy.

Id. at 736. The North Dakota court thus completely ignored the requirement of fortuity, and focused solely on whether the faulty workmanship and its resulting damage was intended, anticipated, or expected. That reasoning reflects either a misunderstanding of the common, ordinary meaning of "accident," or an understanding of "accident" that is different than Michigan's. Regardless, because this Court's definition of "accident" requires fortuity, *K&L Homes* does nothing to advance the ball for Skanska.

Another case on which Skanska relies, *Lamar Homes, Inc v Mid-Continent Cas Co*, 242 SW3d 1 (Tex 2007), makes the same mistake. The court in that case mentioned fortuity, but erroneously deemed that concept to constitute the same thing as intent. The court said that "an 'occurrence' depends on the fortuitous nature of the event, that is, whether the damage was expected or intended from the standpoint of the insured." *Id.* at 16. With due respect to the *Lamar* majority, the "fortuitous nature of the event" is *not* the same inquiry as whether the damage was "expected or intended." This Court, unlike *Lamar,* got it right in adopting its definition of "accident," which correctly recognizes that the concept of fortuity is separate and independent of the question whether damage is expected or intended.

The majority in *Lamar* also reasoned that "a deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly." *Lamar*, 242 SW3d at 8. This reasoning is inherently wrong and, at a minimum, is contrary to Michigan law, which defines the term "accident" to require not merely lack of intent, but "fortuit[y]" and "a happening by chance."

In fact, this formulation from the *Lamar* majority reads the requirement of an accident right out of the definition of "occurrence," effectively replacing "accident" with "any act." There is no such thing as a *non*deliberate act done with an intended or expected result. Consequently, under *Lamar, every act* constitutes "a deliberate act, performed negligently, . . . if the effect is not the intended or expected result," except a) acts performed non-negligently, in which case there can be no liability; and b) acts for which coverage either exists or is excluded by the expected-or-intended exclusion.[11] Under *Lamar,* a CGL policy's requirement of an "occurrence" defined as an "accident" *has no effect*.

As Skanska acknowledges, "it is a fundamental rule of [Michigan] contract law . . . that every word, phrase, and clause be given effect[,] and interpretations that render any part of the contract surplusage or nugatory should be avoided." (Skanska's brief, p 19, citing *Klapp*). By effectively reading the term "accident"—perhaps the most important word in the entire policy—right out of the definition of "occurrence," the majority opinion in *Lamar* is contrary to this fundamental principle of Michigan law, in addition to also being contrary to Michigan's definition of "accident." Indeed, *Lamar* is a perfect illustration of the problem with focusing solely on intent/expectation, and ignoring the crucial component of fortuity, in defining "accident" in this context.

Another decision Skanska cites that follows this erroneous approach is *Nat'l Sur Corp v Westlake Inv, LLC,* 880 NW2d 724 (Iowa, 2016). The majority in that decision relied on *Lamar's* erroneous formulation that "a deliberate act, performed negligently, is an accident if the effect is not the intended or expected result," and held that a subcontractor's

[11] The "Expected Or Intended Injury" exclusion in a standard CGL policy applies to 'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured.

defective workmanship constituted an accident under Iowa law. Also, and notably, Iowa's definition of "accident" does not require the presence of fortuity, and focuses solely on whether a result is expected or intended.[12]

In short, the decisions that have found defective workmanship constitutes an accident represent the minority, are contrary to Michigan law's requirement of "fortuity," and are poorly reasoned—because they fail to give the term "accident" its proper meaning. Indeed, in the case of *Lamar*, *Westlake*, and any other opinions that have followed *Lamar*'s reasoning, they fail to give the term "accident" any meaning whatsoever.

d. Requiring liability carriers to pay repair and replacement costs of an insured's defective workmanship will guarantee more defective workmanship and have a detrimental economic impact.

The dissenting opinion in *Lamar*[13] begins with this poignant observation:

> *Selling* damaged property is not the same as *damaging* property. Among other differences, only the latter begets a claim for property damage. When the homebuyers here sued their builder for construction defects, they did not claim the builder damaged their property; instead, they alleged broken promises and breached duties connected with the sale. Those were not property damage claims, and thus were not covered by the builder's CGL policy.

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[12] Despite this difference between Iowa and Michigan law, there was a strong dissenting opinion in *Westlake*. The dissent opined that defective workmanship does not constitute an "accident" even under Iowa's broader definition of "accident," and would have followed the Eighth Circuit's holding, applying Iowa law, that defective workmanship is not an "accident," in *Liberty Mut Ins Co v Pella Corp*, 650 F3d 1161, 1175–76 (8th Cir.2011). *Westlake*, 880 NW2d at 744 (dissenting opinion).

[13] *Westlake, Lamar* and *K&L Homes* each had strong dissenting opinions, if not several. By contrast, the decisions of the Kentucky Supreme Court in *Cincinnati,* as well as the recent decisions of the Ohio Supreme Court in *Ohio N Univ*, the Alabama Supreme Court in *Nationwide Mut v David Group,* and the Illinois and Pennsylvania appellate courts in *Metro Builders* and *Pottstown* were all unanimous.

> The Court's conclusion to the contrary turns the construction industry on its head. Instead of builders standing behind their subcontractors' work and making necessary repairs, the Court shifts that duty to insurance companies. Every crack, stain, dent, leak, scratch, and short-circuit arising from a subcontractor's work (which will be most of them) must be repaired by the builder's insurer, who may have to pay the builder to repair its own home. Why should builders avoid unqualified subcontractors if their insurers (and other policyholders) will pay the consequences? No one really believes this is what the parties intended—that for a $12,005 annual premium the insurer agreed to repair all damage to every home Lamar Homes had ever sold (at the rate of almost $3 million annually). As that is precisely what the Court holds today, I respectfully dissent.

Lamar, 242 SW3d at 20 (dissenting opinion (emphasis in original)) (App. 287a).

That is exactly right. Adoption of the view espoused by Skanska and its amici would wreak havoc in the construction industry in Michigan—because it would remove all incentive for builders to take care in their performance. In fact, the problem is worse in the context of the instant case than in the context presented in *Lamar*. In *Lamar*, the general contractor sought coverage under its own CGL policy for its subcontractor's defective workmanship. In the instant case, Skanska seeks coverage, not under its own CGL policy, but as an additional insured under the policy issued to its subcontractor, MAP. The view of Skanska and its amici is that damage to a named insured's own work caused by its own faulty workmanship must be repaired or replaced at the cost of the liability carrier.

If adopted into Michigan law, Skanska's approach would remove all incentive for any contractor or subcontractor to take care with its own work, since the cost of repairing or replacing any of its work would be borne by its liability carrier. Whereas in *Lamar*, the moral hazard consisted of removing the incentive for builders to avoid unqualified subcontractors, in the instant case the moral hazard is more severe: it removes the

incentive for *anyone* performing construction work of any kind to exercise care in its performance. Coupled with the fact that Skanska's argument is contrary to the plain meaning of the term "accident" adopted by this Court, the moral hazard accompanying its position mitigates heavily against overturning Michigan law.

As one of Skanska's amici, Michigan Infrastructure Transportation Association, pointed out, this Court's interpretation will have a significant impact on the "more than ten billion dollar construction industry in Michigan." (MITA's Amicus Brief in Support of Skanska's Application, p. 2). A decision that removes all incentive for every contractor and subcontractor to take care in performing their work, while perhaps beneficial to unqualified and careless contractors and subcontractors, would have a very detrimental impact on everyone else impacted by that large industry, including buyers, insurers, and competent, careful contractors and subcontractors.

The detrimental effects of Skanska's approach would be widespread, and would not be limited to the obvious effect of assuring more careless work by insured contractors and subcontractors. Fewer carriers will offer CGL coverage to contractors and subcontractors, and for those that do, coverage will be restricted. Reinsurance for carriers providing such coverage will also become more expensive, which will result in higher premiums charged by insurers. Many would-be insureds will be unable to obtain coverage in the normal insurance markets. And the unwillingness of authorized insurers to offer CGL coverage to contractors and subcontractors will, in turn, result in growth in the excess and surplus lines market. Insurers in that market are not subject to requirements that govern rates and forms of other insurers, *see Royal Prop Group, LLC v Prime Ins Syndicate, Inc,* 267 Mich App 708, 724-725; 706 NW2d 426, 438 (2005), which means Michigan insureds would operate

at the mercy of surplus lines insurers over whom the Michigan Insurance Commissioner has little or no authority.

The increased cost and decreased availability of CGL coverage assured by adoption of Skanska's position would, of course, increase the cost of doing business in Michigan, and would do so in several ways, as can plainly be seen.

The many harmful consequences of adopting Skanska's approach of effectively converting CGL coverage into coverage akin to a performance bond would warrant adherence to *Hawkeye* even if it had been wrongly decided. Because *Hawkeye*'s holding is correct and is required by this Court's definition of "accident," the Court is not faced with a difficult choice. It can, and should, adhere to *Hawkeye*'s holding, both because it is correct and because doing so will avoid the deleterious fallout that would accompany a departure from this longstanding precedent.

e. Skanska's heavy reliance on the "your work" exclusion to define "occurrence" is misplaced.

The heart of Skanska's and its amici's argument is that adhering to *Hawkeye* would render meaningless the "your products" and "your work" exclusions. As Skanska puts it, *Hawkeye* "interpreted the term 'occurrence' in a way that made the 'your product' and 'your work' exclusions in the controlling policy completely useless." (Skanska's brief, p. 12). According to Skanska, the Court cannot interpret the term "accident" in a way that renders a policy exclusion nugatory, and, therefore, *Hawkeye*'s approach of interpreting "accident" as this Court has defined it, without focusing on exclusions, must be rejected. The vigor with which Skanska and its amici assert this argument is curious, since it is easily shown to be without merit—for two reasons.

i. Skanska's argument is self-defeating.

As discussed in subsection ii., the premise of Skanska's argument, that to interpret "accident" not to encompass defective workmanship would render the "your work" exclusion nugatory, is incorrect. But for present purposes, the Court can assume that that premise is correct. Skanska's position is still without merit. Indeed, it is disproven by Skanska's own argument—in two ways.

First, as Skanska acknowledges, "to properly analyze coverage under a commercial general liability 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." (Skanska's brief, p 22). That is correct. As this Court has consistently recognized, policy exclusions do not create coverage and are not to be considered unless and until coverage is found to exist based on the insuring agreement. *Crouchman,* 474 Mich at 987; *Fresard*, 414 Mich at 697. Under this fundamental rule of insurance contract construction, Skanska's argument based on the "your work" exclusion never even gets off the ground.

Second, and even setting aside that fatal impediment to its argument, Skanska apparently fails to recognize that *its* interpretation of "accident" renders a policy exclusion meaningless, namely the expected-or-intended exclusion—if not the very requirement of an "accident."[14] Skanska vigorously argues that any act constitutes an "accident" as long as the actor did not expect or intend the consequences. (Skanska's brief, pp 15-17). Under Skanska's interpretation of "accident," the expected-or-intended exclusion, to borrow

[14] See the discussion of the *Lamar* majority's erroneous interpretation of "accident" *supra*, at pp. 29-30.

Skanska's phrase, is "completely useless." It seems Skanska is oblivious to the fact that it is the pot calling the kettle black.

Thus, the fundamental foundation of Skanska's entire argument, that "accident" cannot be construed in a way that renders a policy exclusion nugatory, ultimately gets Skanska nowhere, even assuming arguendo that Skanska is correct that *Hawkeye*'s holding renders the "your work" exclusion nugatory. Because both sides' interpretations render a policy exclusion nugatory even accepting Skanska's premise, this entire exercise sheds no light on how best to interpret "accident."

It must also be emphasized that even if it were the case that affording the term "accident" its ordinary meaning nullified or greatly diminished the reach of the "your product" or "your work" exclusion, that is not a reason not to enforce the insurance contract language. As Skanska passionately points out, this Court should not interfere with parties' freedom to contract as they see fit. This Court agrees; it has consistently stated that it will not attempt to apply an abstract notion of "justice" in deciding whether to enforce contract language, *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 213; 737 NW2d 670, 674 (2007), or examine the wisdom of private contracts in order to enforce only those contracts it deems prudent. *Terrien v Zwit*, 467 Mich 56, 69–70; 648 NW2d 602, 610 (2002).

ii. *Hawkeye*'s interpretation of "accident" does not render the "your work" exclusion meaningless.

In fact, Skanska's premise is not correct. While Skanska's interpretation of "accident" does indeed render a policy exclusion nugatory, *Hawkeye*'s and Amerisure's does not. Skanska's suggested definition of "accident" is a mirror image of the expected-or-intended exclusion, which renders that exclusion completely devoid of purpose. The same

is not true as regards the "your work" or "your product" exclusion under *Hawkeye's* and Amerisure's definition. It is not and never has been Amerisure's position that there can never be an "accident" in the context of defective workmanship. It is Amerisure's position (and that of the majority) that defective workmanship, standing alone, does not constitute an "accident."

Human beings are fallible and sometimes cause accidents through inadvertence. Inadvertence is not the same thing as faulty *workmanship*, which is what was at issue in *Hawkeye* and is at issue here. "Workmanship" is defined in pertinent part as "the art or skill of a workman; craftsmanship." *Merriam Websters New College Dictionary,* (9th Ed.). Failing to install three expansion joints, and brackets, correctly is not mere inadvertence; it is faulty workmanship, i.e., a failing of the requisite art or skill of a workman. Commercial general liability coverage provides accident coverage. It is not, and never has been, intended to guarantee the quality of the purchased work, i.e., to reimburse an insured for the cost of repairing or replacing its own work simply because the work was poorly performed.[15]

Thus, Skanska's and its amici's impassioned argument based on the "your work" exclusion is much ado about nothing—even setting aside the several problems with it described in subsection i.

[15] The distinction can also be illustrated by revisiting the hypothetical A student who failed the exam (see fn 7, pp. 19-20). Had the student's failure been due to the student mistakenly filling out the wrong answer sheet, that might be considered an accident. But failure due to poor performance is not.

B. Stare decisis considerations counsel against departure from the longstanding rule.

Setting aside that *Hawkeye* was correctly decided, stare decisis principles counsel against overturning that decision. As this Court has appropriately recognized, "stare decisis is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), quoting *Hohn v United States,* 524 US 236, 251, 118 S Ct 1969, 141 L Ed 2d 242 (1998). In fact, as this Court has also said, "stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Dean v Chrysler Corp*, 434 Mich 655, 664 n 11; 455 NW2d 699 (1990) (internal punctuation and citation omitted).

Consequently, "the mere fact that 'a case was wrongly decided, by itself, does not necessarily mean that overruling it is appropriate.'" *In re Ferranti,* 504 Mich 1, 25; 934 NW2d 610 (2019), quoting *Coldwater v Consumers Energy Co*, 500 Mich 158, 173; 895 NW2d 154 (2017). In deciding whether to overrule a precedential decision, this Court generally considers these principles:

> (1) Whether the decision defies practical workability;
>
> (2) Whether reliance interests would work an undue hardship were the decision to be overruled;
>
> (3) Whether changes in the law or facts no longer justify the decision.

Id.

Application of these factors mitigates strongly against overruling *Hawkeye* even if *Hawkeye* were considered wrongly decided.

The first factor counsels against overruling *Hawkeye*, since *Hawkeye* does not defy practical workability in any way, shape, or form.

The second factor counsels very strongly against overruling *Hawkeye*, since reliance interests absolutely would work an undue hardship were *Hawkeye* to be overruled. In the 30 years that *Hawkeye* has been on the books, it has been followed by at least 17 Court of Appeals decisions.[16] More importantly, an utterly inestimable number of CGL policies have been entered into between insurers and their insureds in that 30-year period based on the understanding that defective workmanship does not constitute an "occurrence" under Michigan law. To now hold to the contrary would invade the contractual rights of countless parties, and would afford coverage to countless insureds that they never paid for. It is

[16] In addition to *Radenbaugh* and *Liparoto*, which were published, its holding has also been followed in *Z&R Electric Service, Inc v Cincinnati Ins Co*, Docket No. 226605 (Mich App, June 5, 2001) (Apx. 253b) (holding that insured's faulty workmanship that damages its own work is not an "occurrence"); *Auto-Owners Ins Co v Longs Tri-County Mobile Home, Inc*, Docket No. 252580 (Mich App, June 28, 2005) (Apx. 257b) (same); *Mark E Reenders Const Co, Inc v Cincinnati Ins Co,* Docket No. 256592 (Mich App, January 24, 2006) (Apx. 260b) (same); *Hastings Mut Ins Co v Mosher, Dolan, Catalado & Kelly, Inc,* Docket No. 265621 (Mich App, May 18, 2006) *leave denied* 480 Mich 928 (2007) (Apx. 262b) (same); *Groom v Home-Owners Ins Co,* Docket No. 272840 (Mich App, April 19, 2007) (Apx. 268b) (same); *James Prokes, as subrogee of Water-Tite, Co v Auto-Owners, Ins Co,* Docket No. 278321 (Mich App, September 25, 2008), *leave denied* 483 Mich 1032 (2009) (Apx. 273b) (same); *Hometowne Building Co, LLC v Amerisure Mut Ins Co*, Docket No. 287336 (Mich App, October 13, 2009) (Apx. 277b) (same); *Ahrens Const Inc v Amerisure Ins Co*, Docket No. 288272 (Mich App, February 9, 2010) (Apx. 281b) (same); *Kent Companies, Inc v Wausau Ins Co*, Docket No. 295237 (Mich App, May 3, 2011) (Apx. 284b) (same); *Christman Co v Renaissance Precast Indust,* Docket No. 296316 (Mich App, June 21, 2011) *leave denied* 490 Mich 912 (2011) (Apx. 287b) (same); *Heaton v Pristine Home Builders,* Docket No. 305305 (Mich App, October 25, 2012) (Apx. 290b) (same); *Dave Cole Decorators v Westfield Ins Co,* Docket No. 313641 (Mich App, March 25, 2014) (Apx. 293b) (same); *Michigan Ins Co v Channel Road Construction*, Docket Nos. 315837, 315859 (Mich App, October 21, 2014) *leave denied* 498 Mich 865 (2015) (Apx. 295b) (same); *Auto-Owners v Kelley,* Docket No. 319641 (Mich App, July 21, 2015) (Apx. 298b) (same); *Employers Mut Cas Co v Mid-Michigan Solar,* Docket Nos. 325082, 326553 (Mich App, April 19, 2016) *leave denied* 500 Mich 922 (2016) (Apx. 303b) (same).

difficult to imagine a more compelling example of reliance interests than those that are presented in the context of this particular precedent.

In *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503; 821 NW2d 117 (2012), Justice Cavanagh dissented from the majority's decision to overturn Court of Appeals precedent that had been in place for 15 years, citing the fact that "insurers and insureds alike have rightfully conformed their conduct in reliance on" that precedent for those 15 years. *Id.*, at 546. The majority was unpersuaded, but only because it disputed the premise; the majority believed Justice Cavanagh was mistaken, and that its decision "does not at all affect the parties' contractual rights." *Id.,* at 536–37.

There can be no disputing that overturning *Hawkeye* would affect the rights of insurers and insureds alike, who "have rightly conformed their conduct in reliance on" *Hawkeye*'s holding, not for 15 years, but for 30 years. Those reliance interests weigh heavily against departing from this precedent, to put it mildly.

Finally, the third consideration, whether changes in the law or facts no longer justify the decision, simply does not apply. There has been no change in Michigan law and no change in any facts that could be deemed to "no longer justify" *Hawkeye*. If anything, the recent trend in holding that defective workmanship is not an occurrence by courts in other states, such as Ohio, Alabama, Pennsylvania, and Illinois, presents a trend in the law that further justifies the *Hawkeye* decision.

Inasmuch as all the factors this Court considers in applying stare decisis mitigate in favor of *not* overruling *Hawkeye*, this Court should decline to overrule *Hawkeye* even it is of the view that *Hawkeye* was wrongly decided.

IV. If the Court overturns *Hawkeye*, it should still affirm, apply its holding prospectively only, or remand for analysis of all potentially applicable exclusions.

A. Amerisure's argument is stronger than Hawkeye's because the coverage sought in this case, unlike in *Hawkeye*, is for the insured's own defective workmanship.

As Skanska correctly concedes, the holding in *Hawkeye* that defective workmanship is not an "occurrence," if applied here, requires affirmance of summary disposition in favor of Amerisure. It is not true, however, that a refusal to adhere to *Hawkeye's* holding on this point necessarily precludes summary disposition in favor of Amerisure. *Hawkeye* is distinguishable from this case in a way that makes Amerisure's position stronger than Hawkeye's.

In *Hawkeye*, the insured contractor sought coverage under its own policy for the defective workmanship of a subcontractor/supplier of concrete on the project, Boichot. *Hawkeye,* 185 Mich App at 374. The court's holding that defective workmanship is not an "occurrence" was held to control the outcome even though it was not the insured's own defective workmanship at issue. Were this Court to overturn *Hawkeye's* holding and conclude that the rule it established should apply only where the defective workmanship is that of the insured itself, Amerisure would still be entitled to summary disposition.

In its brief, Skanska largely ignores the fact that it is seeking coverage, not under its own CGL policy purchased for itself, but under the CGL policy issued to its subcontractor, MAP, as an additional insured. Skanska's amici seem completely oblivious to this important point. The amicus brief filed by Michigan Infrastructure Transportation Association in support of Skanska's application focuses entirely on the argument that coverage ought to extend to a contractor when the work was performed by its

subcontractor—as if the policy at issue in this case were the policy issued to Skanska, not its subcontractor.

Skanska's coverage as an additional insured on the Amerisure policy issued to MAP is limited, as is typical of additional-insured coverage. The relevant endorsement states:

> The insurance provided to the additional insured is limited as follows:
>
> * * *
>
> (b) Your ongoing operations performed for that additional insured, unless the written contract or agreement or the certificate of insurance requires "your work" coverage (or wording to the same effect) in which case the coverage provided shall extend to "your work" for that additional insured.

(App. 49a). Thus, the coverage Skanska receives under the Amerisure policy, at best, can apply only to the extent of MAP's work for Skanska.[17] The coverage Skanska seeks as an additional insured on the policy issued to MAP is tied to MAP's own defective work—not the defective work of a subcontractor of MAP. As such, even if *Hawkeye* were modified to apply only to defective workmanship by the insured itself, while that might entitle Skanska to coverage under its own policy with Zurich, Skanska still would not be entitled to coverage under the Amerisure policy.

Indeed, most of the cases on which Skanska relies for the proposition that defective workmanship can constitute an occurrence involve a general contractor seeking coverage from its own insurer for the defective workmanship of its subcontractor. Thus, even in those cases, which generally focus on whether the defective workmanship was expected or

[17] "You" and "your" are defined in the policy to refer to MAP, the Named Insured. (App. 14a, 23a).

intended from the standpoint of the insured (rather than on fortuity), the courts could justify their conclusions on the grounds that an insured general contractor did not expect or intend defective workmanship from its subcontractor.

This was the setting in *Lamar, Cypress Point Condo Ass'n v Adria Towers, LLC,* 226 NJ 403; 143 A3d 273 (2016); *US Fire Ins Co v JSUB, Inc,* 979 So2d 871 (Florida 2007); *The Travelers Indem Co of America v Moore & Assoc,* 216 SW3d 302 (Tenn 2007); and *Am Family Mut Ins Co v Am Girl, Inc,* 268 Wis 2d 16, 25; 673 NW2d 65, 70 (2004) (See Skanska's brief, p 20). In relying on these cases, Skanska does not tell the Court that they each involved a claim by a general contractor against its own insurer for its subcontractor's defective workmanship. Even setting aside their status as reflecting the minority view, and the flawed reasoning in their interpretation of the word "accident," these cases do not address the issue presented in this case, given Skanska's decision to sue Amerisure, MAP's insurer, rather than its own general liability insurer.

This case, unlike most of the cases on which Skanska's argument is based, presents the textbook context in which CGL coverage was *never* intended to apply: a request for reimbursement of the cost of repairing the insured's own work based on its own defective workmanship. To not only overturn *Hawkeye,* but also hold that *that* cost is covered under the insuring agreement as an "occurrence," would represent a major departure from Michigan jurisprudence, would place Michigan at the far end of the spectrum nationally, and would turn CGL coverage on its head. Even if this Court elects to overturn *Hawkeye* as applied to the context of that case (which it should *not* do, for all the reasons set forth in section III), it should not adopt the extreme approach of requiring a CGL insurer to guarantee the quality of its own insured's work.

B. If the court reverses as to "occurrence" it should do so only prospectively.

If this Court elects to overturn *Hawkeye* as to all defective workmanship, even by the insured itself, it should not apply that ruling in this case. Any such ruling should be applied prospectively only. In *Placek v City of Sterling Hts*, 405 Mich 638, 662; 275 NW2d 511, 520 (1979), this Court observed that

> [a] new rule can be (1) made applicable to all cases in which a cause of action has accrued and which are still lawfully pending and all future cases, (2) made applicable to the case at bar and all future cases or (3) made to exclude the case at bar but be made applicable to all cases to be filed hereafter or after an arbitrary control date specified herein.

Id., at 662, citing *Myers v Genesee County Auditor*, 375 Mich 1; 133 NW2d 190 (1965).

As the Court has also recognized, "[a]lthough the general rule is that judicial decisions are given full retroactive effect, . . . a more flexible approach is warranted where injustice might result from full retroactivity." *Pohutski v City of Allen Park*, 465 Mich 675, 695–96; 641 NW2d 219, 232–33 (2002). (citation omitted). As the Court noted in *Placek*, "In each such instance [when prior precedent was overruled,] the Court must take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change." *Placek,* 465 Mich at 695-696, quoting *Williams v Detroit*, 364 Mich 231, 265–266; 111 NW2d 1 (1961).[18]

The Court has adopted, from *Linkletter v Walker*, 381 US 618, 85 S Ct 1731, 14 LEd2d 601 (1965), three factors to be weighed in determining when a decision should not have retroactive application: (1) the purpose to be served by the new rule, (2) the extent of

[18] After taking into account the entire situation confronting it in *Pohutski,* the Court held that that its decision would have only prospective application.

reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971). In the civil context, a plurality of this Court noted that *Chevron Oil v Huson*, 404 US 97, 106–107, 92 S Ct 349, 30 LEd2d 296 (1971), recognized an additional threshold question: whether the decision clearly established a new principle of law. *Riley v Northland Geriatric Center (After Remand*), 431 Mich 632, 645–646; 433 NW2d 787 (1988) (Griffin, J.).

The same compelling reliance interests that counsel against overturning *Hawkeye* warrant a prospective-only application of such a ruling. Countless parties have entered into insurance contracts with premiums based on the understanding that defective workmanship, in and of itself, is not covered. To now hold that it is covered would represent upheaval regarding those parties' expectations, and would require insurers to provide coverage of enormous repair and replacement costs for which those insurers never received a dime in premium. It is no wonder Skanska and its amici want free coverage for the predictable consequences of defective workmanship. But no principle of Michigan law supports such an unjust result.

While Amerisure stresses that the Court should never reach this issue for all the reasons set forth above, if the Court does reach this issue, this context presents a quintessential example of one where such a holding should have only prospective application.

C. If the Court reverses as to "occurrence" it should allow the "your work" exclusion to be asserted and enforced.

If the Court changes longstanding law and reverses the grant of summary disposition in favor of Amerisure, at a minimum it should allow Amerisure to raise all potentially applicable exclusions, including the "your work" exclusion, either in this appeal

to this Court or on remand to the Court of Appeals. While it is true that Amerisure did not argue this exclusion in the Court of Appeals, the rule regarding preservation of arguments "is not inflexible." *Dation v Ford Motor Co*, 314 Mich 152, 160; 22 NW2d 252 (1946).

This Court has recognized two exceptions to the general rule: (1) "when consideration of a claim sought to be raised is necessary to a proper determination of a case, such rule will not be applied"; and (2) where the issue "is one of law and the facts necessary for the resolution of the issue have been presented." *Id.* at 160-61; *McNeil v Charlevoix Co,* 484 Mich 69, n 8; 772 NW2d 18 (2009).

If this Court overturns the 30-year-old precedent that required summary disposition in favor of Amerisure, this case would become one where consideration of a claim sought to be raised is necessary to a proper determination of the case. And it already is one where the law and the facts necessary for the resolution are presented, particularly given Skanska's argument that the "your work" exclusion does not apply.

Contrary to Skanska's position, the "your work" exclusion absolutely precludes coverage, assuming arguendo coverage exists in the first instance because there has been an "occurrence." The "your work" exclusion states as follows:

> **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."
>
> 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.

(App. 27a).

Skanska's argument that the subcontractor exception to this exclusion applies fails to understand that Skanska is seeking coverage as an additional insured under the policy issued to MAP, the subcontractor. The exception does not apply because the work was not performed on MAP's behalf by a subcontractor, it was performed by MAP itself.

The court in *Double AA Builders, Ltd v Preferred Contractors Ins,* 755 Ariz 304, 386 P3d 1277 (2016) (Apx. 310b) addressed this very issue. In that case, like this one, a general contractor sought coverage as an additional insured on the subcontractor's policy for defective workmanship by the subcontractor. The court skipped over the issue of whether there was an "occurrence," and held that coverage was or would be precluded by the "your work" exclusion, which was identical to the exclusion in the Amerisure policy. As the court correctly recognized, "you" and "your" refer to the named insured. The court held, "Put simply, the exclusion applies because the case relates only to Anchor's [the subcontractor] defective work. The exception does not apply because the work was performed by Anchor acting as a subcontractor, not by a subcontractor acting on Anchor's behalf." *Id.* at 306.

The same is true here; the subcontractor exception to the "your work" exclusion in the MAP policy does not apply because the work was performed by MAP, not by "a subcontractor acting on" MAP's behalf. *Id.*

The Court of Appeals did not address this issue, having resolved the appeal by applying the longstanding rule that the defective workmanship was not an "occurrence" in the first place. But, since Skanska has raised the issue in its brief to this Court, Amerisure submits this Court can adjudicate this issue if the issue is reached. Alternatively, if this

Court reverses and remands the case to the Court of Appeals, it should permit Amerisure to raise this exclusion, especially given its clear, straightforward application in this case.

RELIEF

For the reasons set forth herein, Amerisure requests that this Court either affirm the judgment of the Court of Appeals or vacate this Court's grant of leave and deny Skanska's application. Alternatively, Amerisure requests that this Court remand to the Court of Appeals for further proceedings, including analysis of all potentially applicable exclusions. Amerisure further requests any and all other relief to which it is entitled.

Respectfully submitted,

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