STATE OF MICHIGAN
IN THE SUPREME COURT

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;
AMERISURE PARTNERS INSURANCE COMPANY,
a Michigan property and casualty insurer,

Defendants.

Supreme Court No.159510

Court of Appeals
Docket Nos: 341589 and 340871

Midland County Circuit Court
Court Case No. 13-9864-CKB

AMICUS CURIAE - CONSTRUCTION ASSOCIATION OF MICHIGAN

BRIEF ON APPEAL

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STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT

The Construction Association of Michigan (CAM) adopts the position of Plaintiff Skanska USA Building Inc., with regard to the basis of jurisdiction.

STATEMENT OF THE 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.

   Ct. of Appeals said: The old case established a principle of law that cannot be overcome by a change in the standard contract.

   CAM says: No.

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.

   Ct. of Appeals said: The different case established a principle of law that cannot be overcome by contractual language.

   CAM says: Enforce the plain language of the contract.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Construction Association of Michigan (CAM) is the oldest and largest construction association in North America. CAM was incorporated in Michigan in 1891. CAM was founded to educate, improve and promote the construction industry in Michigan at the local, regional and state levels. CAM currently has over 2,500 corporate construction companies as members. CAM's membership includes some of the construction industry's largest general contractors and prime contractors some of which have published sales figures in excess of a billion dollars. CAM's membership is comprised of general contractors, prime contractors, developers, mechanical and electrical contractors, steel contractors, glazers, carpenters, concrete contractors, road contractors, bridge builders, equipment suppliers and material suppliers. CAM offers this diverse membership the following services and programs: health, disability and workers compensation insurance, a credit union, investment services, an annual contractors expo, a yearly economic forecast event, operates a government and legislative affairs committee, provides education and safety training, offers contract drafting classes, provides legislative and legal seminars, publishes a monthly magazine, provides members with social events, offers members the use of plan room for estimating and a labor relations service negotiating collective bargaining agreements. As indicated CAM publishes a monthly magazine. CAM's September magazine issue is dedicated to the insurance industry. In said issue CAM advises its members on recent legislative changes in insurance laws and recent caselaw interpreting policy language. Its' magazine routinely publishes articles on contractual and coverage issues arising in the construction industry. CAM is constantly keeping its membership informed regarding changes with safety standards, economic conditions and laws. This information is vitally important to CAM's members as it gives guidance on how to conduct their business within the construction

industry. CAM and its' members have a strong interest in any case that affects how insurance policies are interpreted. Insurance coverage is a part of every single contract that is negotiated within the industry. From limits of coverage, completed operations, umbrellas, sub-guard insurance, and liability coverage, insurance provisions are a major component of every construction contract.

The present case has great significance to the construction industry in Michigan as it directly impacts virtually every insurance contract purchased by CAM members. CAM must seek clarification for its members when judicial opinions cause confusion or uncertainty. CAM's members must be confident that negotiated terms and conditions of their contracts and insurance policies will be fully considered. A Court should look to the four corners of the document when interpreting the parties' agreement. The uncertainty and confusion, caused by the March 19, 2019 opinion by the Michigan Court of Appeals decision, which ruled that an insurance policy cannot provide coverage for the insured's own faulty workmanship as a principle of law, despite the policy language indicating otherwise is simply wrong. Consistent with CAM's purpose, its' members are interested in the correct interpretation and application of statutes and caselaw that pertain to construction industry and insurance coverage. For the foregoing reasons, CAM now files this amicus curiae brief in support of Skanska's leave to appeal. Petitioners SKANSKA USA BUILDING, INC. is not member of CAM. Further, CAM members are not bound by the views taken by CAM as amicus.

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).

STATEMENT OF ERROR AND RELEIF SOUGHT

Skanska USA Building Inc. appeals the March 19, 2019 opinion issued by the Michigan Court of Appeals. The Court of Appeals held that *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 holding that *Hawkeye-Security* creates a "principle of law" undermines another one of this Court's long standing precedents, 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).

The method of contractual analysis and interpretation employed by the *Hawkeye-Security* court does not meet the standard set by *Rory, supra*. Restated, *Hawkeye-Security* announced a definition of "occurrence" that differs and fails to give effect to, the actual words of the insurance policy that was being interpreted. 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 dramatically and materially different than the insurance contract being reviewed today. *Hawkeye-Security* involved in 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. 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 and a change to the "your work" exclusion, such that it no longer applied to work performed by the insured's subcontractor. The net effect of these

revisions was to provide insurance coverage for property damage caused by construction defects in certain circumstances.

A plain reading of the language of the parties' contract in this case, makes it clear that 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 "commercial general liability" contract between the insured and the insurer. This failure resulted in an improper decision. Further, by announcing its decision as a "principle of law," error will be repeated unless this Court corrects it. CAM supports Skanska's position, and 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).

STATEMENT OF FACTS

CAM adopts the Statement of Facts provided by Skanska as set forth in its appeal brief.

ARGUMENT

I. 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 USA Building Inc. ("Skanska") has sought leave to appeal the March 19, 2019 opinion by the Michigan Court of Appeals. A copy of the opinion is attached as Exhibit 1 to Skanska's Brief on Appeal. In said opinion, the Court of Appeals held its earlier opinion in *Hawkeye-Security Ins. Co.* v *Vector Construction Co.*, 185 Mich App 369; 460 NW2d 329 (1990), established a "principle of law" that an insurance policy cannot provide coverage for the insured's own faulty workmanship. (See, Opinion, p. 10, Exhibit 1.).

CAM contends this "principle of law" undermines another one of this Court's core principles: that each contract must be read in its own words and on its own merits. *Rory* v *Continental Insurance Company*, 473 Mich 457; 703 NW2d 23 (2005). If a CAM member specifically negotiates a term of insurance which includes additional coverage it would anticipate that a Court would enforce the term or at least consider it during its interpretation. If the language of a contract or policy is unambiguous the Court should interpret the contract terms according to a plain reading. CAM respectfully contends that the Court of Appeals erred when it declared the holding in *Hawkeye-Security*, as a "principle of law" as to all insurance contracts, rather than examining the language of the contract before it.

II. 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?

A key factual point is that the "Comprehensive General Liability" contract in *Hawkeye-Security* is materially different than the "Commercial General Liability" insurance contract issued by Amerisure in the instant matter and in use across Michigan. Unlike the contract in

Hawkeye-Security, the plain language of the Commercial General Liability policy here does not automatically exclude coverage for defective work. Nevertheless, the Michigan Court of Appeals has continued to apply the "principle of law" begun with *Hawkeye-Security* without ever once considering the actual language of the contract between the insured and the insurer as it reads today.

This ruling is contrary to prior holdings of this Court. It has been the rule in Michigan for well over a century that the first and foremost principle of contract law is that unambiguous contracts are not open to judicial construction and must be enforced as written unless the contract violates public policy. See *Henderson* v *State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999); *Juif* v *State Hwy Comm'r*, 287 Mich 35, 41; 282 NW 892 (1938); *Forbes* v *Darling*, 94 Mich 621, 625; 54 NW 385 (1893).

There are reasons why these fundamental principles have withstood the test of time and have served as a foundation of contract law in this state. Courts adhere to these fundamental rules because doing so respects the freedom of individuals to freely bargain conditions through the terms of a negotiated contract. The Court in *Terrien* v *Zwit*, 467 Mich 56; 648 NW2d 602 (2002) stated: "The general rule of contracts is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts". See *Terrien*, pg. 71.

CAM contends that the Court of Appeals erred when it refused to review and enforce the language of the policy as it is actually written. This Honorable Court must correct this error and bring the state's contract interpretation law back to prior holdings as set forth by this Court over the last hundred years. The uncertainty and confusion caused by the Court of Appeals decision

needs to be corrected. If this appeal is not granted and the decision is not over turned, what will CAM and its' members rely upon, certainly not the written language of the contract.

The Court of Appeal's ruling will have an adverse effect on Michigan's multi-billion-dollar construction industry. As in all industries, parties to a construction contract estimate their price on the allocation of risk. Most general contractors purchase numerous types of insurance policies to lower their risk of operations. Policies such as, the risk of bodily injury or death, subcontractor default or the risk of certain defects, lowers a contractor's cost to construct the project. But parties to a construction contract in Michigan now lack assurances that their purchase of additional coverage may not be respected by the judiciary. The language of the insurance policy sets the parties' expectations about coverage. However, a contractor's expectations may or may not be met if the insurer declines coverage and forces the insured to litigate. The net effect of elevating *Hawkeye-Security* to a "principle of law" is that Michiganders will pay more for construction services because of this unpredictability.

CAM and its' members deserve to know with confidence that negotiated contract terms and conditions will be enforced by the Courts of this state. The decision as pronounced by the Court of Appeals will create uncertainty, increase litigation and drive up the cost to construct projects in this state. Skanska's appeal should be granted. This Honorable Court needs to revisit this opinion and uphold contract law interpretation which has served this State so well over the last 100 years. For the foregoing reasons, this Court should grant the relief requested in Skanska's appeal.

RELIEF REQUESTED

CAM respectfully requests that this Honorable Court should reject the lower courts' ruling wherein it held that the case of *Hawkeye-Security,* that construes an old standardized insurance contract be given precedential effect when the dispositive provisions in the old contract have subsequently been materially modified. This Court should also uphold and restate Michigan contract law by enforcing unambiguous insurance terms through the plain reading the contract. And once again, adhere to fundamental rules of contract interpretation that respects the freedom of individuals to freely arrange their affairs through the terms of a negotiated contract. For the foregoing reasons, this Honorable Court should grant the relief requested in Skanska's appeal.

Respectfully submitted,

FACCA, RICHTER & PREGLER, P.C.

March 6, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2020, I electronically filed the forgoing with the Clerk of the Court using the TrueFiling system, and the same was electronically sent to all attorneys of record.

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