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

SKANSKA USA BUILDING, INC., a Delaware Corporation,

Plaintiff-Appellant,

v.

M.A.P. MECHANICAL CONTRACTORS, INC., a Michigan Corporation; AMERISURE INSURANCE COMPANY, a Michigan Property & Casualty Insurer; AMERISURE MUTUAL INSURANCE COMPANY, a Michigan Property & Casualty Insurer; and AMERISURE PARTNERS INSURANCE COMPANY, a Michigan Property & Casualty Insurer.

Defendants-Appellees.

MSC Nos. 159510 and 159511

COA Nos. 340871 and 341589

Trial Ct. No. 13-9864-CKP

BRIEF OF *AMICI CURIAE*, TURNER CONSTRUCTION COMPANY AND GILBANE BUILDING COMPANY, IN SUPPORT OF SKANSKA USA BUILDING INC.'S APPEAL

DENEWETH DUGAN & PARFITT, P.C.
Ronald A. Deneweth (P27680)
Deborah S. Kaleta (P70290)
Attorneys for Turner Construction Company
and Gilbane Building Company
1175 W. Long Lake Road, Suite 202
Troy, MI 48098
Phone: 248-290-0400
rdeneweth@ddp-law.com

In consultation with:

David G. Jordan (Conn. Bar No. 417695)
Jeffrey J. Vita (Conn. Bar No. 402820)
Saxe Doernberger & Vita, P.C.
Co-Counsel for Turner Construction Company
and Gilbane Building Company
35 Nutmeg Drive, Suite 140
Trumbull, CT 06611
203.287.2100
dgj@sdvlaw.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATEMENT OF QUESTIONS PRESENTED

1. Does the definition of "occurrence" as interpreted in *Hawkeye-Security Ins. Co. v Vector Construction Co*., 185 Mich App 369 (1990), remain valid under the terms of the commercial general-liability policy at issue?

   Court of Appeals said: Yes

   Skanska says: No

   Amerisure says: Yes

   Amici Curiae say: No

2. Has the Appellant shown a genuine issue of material fact as to the existence of an "occurrence"?

   Court of Appeals said: No

   Skanska says: Yes

   Amerisure says: No

   Amici Curiae say: Yes

STATEMENT OF BASIS OF JURISDICTION

Amici Curiae respectfully submit this brief in accordance with this Court's order dated October 18, 2019.[1]

[1] **Required Disclosure Pursuant to MCR 7.312(H)(3):** No counsel representing any party authored this brief in whole or in part. No monetary contribution was made by any party or counsel for any party intended to fund the preparation or submission of this brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Turner Construction Company ("Turner") provides general contracting and construction management services on a global scale, with extensive business performed domestically, including numerous construction projects in the State of Michigan. In terms of volume, it is one of the largest construction companies in the United States. Representative Michigan projects include the Microsoft Technology Center (Southfield, MI), Comerica Park (Detroit, MI) and The Arctic Ring of Life and National Amphibian Conservation Center (Royal Oak, MI).

Gilbane Building Company ("Gilbane") is also one of the largest construction companies in the United States and, like Turner, has undertaken a significant number of large projects in the State of Michigan (in the role of General Contractor/Construction Manager). Examples of Michigan projects undertaken by Gilbane include the University of Michigan Biomedical Science Research Building (Ann Arbor, MI), University of Michigan Ross School of Business (Ann Arbor, MI), and the Schoolcraft Memorial Hospital, Critical Access Hospital (Manistique, MI).

Both Turner and Gilbane have a keen interest in the core issue before this Court: whether property damage to construction project work caused by a subcontractor's faulty/defective construction can be considered an "occurrence" as the term is defined under a standard-form commercial general liability ("CGL") insurance policy.

The current state of Michigan appellate law concluding that damage to project work caused by a contractor's negligence is not an "occurrence" as set forth by the Michigan Court of Appeals adversely impacts contractors, such as Turner and Gilbane, performing work in this state. This issue has not yet been addressed by the Michigan Supreme Court but has been resolved by many state supreme courts across the country.

ARGUMENT IN SUPPORT OF SKANSKA'S APPEAL

A. Unintended Damage to Project Work Is an "Occurrence"

As noted in the case of *Black & Veatch Corp. v Aspen Ins. Ltd.*, 882 F3d 952 (CA 10, 2018), "State supreme courts that have considered the issue since 2012 have reached 'near unanimity' that 'construction defects *can* constitute occurrences and contractors have coverage under CGL policies at least for the unexpected damage caused by defective workmanship done by subcontractors.'" *Id.* at 966 (internal citations omitted). The Michigan Supreme Court should follow this trend and adopt a common-sense meaning of the word "occurrence."

The term "occurrence" is defined under a standard CGL policy, including the policy at issue, as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Appellant's Appx.* 014a – 068a, at 036a ¶13. The policy does not further define "accident" or place any qualifications upon the type of conduct that is considered "accidental."[2] In the absence of any such restrictions upon the meaning of the word "accident," the law of Michigan, like the law of many states, requires a plain-meaning application of the term, from the standpoint of the average policyholder. *See Rory v Continental Ins. Co.,* 473 Mich 457, 468; 703 NW2d 23 (2005) (holding that terms of an insurance policy shall be interpreted based upon their plain meaning and shall be enforced as written.); *Adkins v Home Life Ins. Co.*, 143 Mich App 824, 830, 372 NW2d 671, 674 (1985) ("Unambiguous policy language should be given its plain and ordinary meaning"); and *Wertman v Michigan Mutual Liability Co.,* 267 Mich 508, 510, 255 NW 418 (1934). Insurance policies must be read with the

[2] Significantly, the insuring conditions of the standard CGL policy do not contain any language stating that an "occurrence" cannot involve unintended and unforeseen damage to an insured's own project work. Nor are there any restrictions on the type or nature of the property that is damaged. Rather, all that is required under the CGL "occurrence" definition is the existence of an "accident."

meaning which ordinary laymen would give to their words. *Bowman v Preferred Risk Mutual Ins. Co.,* 348 Mich 531, 547, 83 NW2d 434 (1957).

A plain meaning of the word "accident," as contemplated by policyholders, is simply an unfortunate event that was unintended or unforeseen. This common-sense understanding was recognized by the Michigan Supreme Court in *Allstate Ins. Co. v Freeman*, 432 Mich 656, 670, 443 NW2d 734, 741 (1989) ("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.)"[3] Given this definition, it is simply not credible to assert, as Appellees contend, that unintended damage to project work caused by a contractor, or its subcontractor(s), cannot involve an "occurrence"/"accident." To the contrary, recognition that a party preforming construction work can cause unintended or unanticipated damage to the project does not require an exceptional stretch of the imagination, nor does it result in a forced construction of the policy terms. It is intuitive that contractors, like members of any other profession, are subject to human foibles and thus are capable of making mistakes that cause damage to their own work, and/or damage other project work. If the damage was unintended or unforeseen, under existing Michigan Supreme Court authority, it cannot be possibly considered anything other than an accident.

[3] Appellees argue that the definition of "accident" provided by the *Allstate* Court is in fact an eight-part standard, requiring the insured to satisfy each of the adjectives listed. *See Appellee Brief at 18.* "[T]he descriptors themselves prove that they are not intended as alternative synonyms for 'accident,' but are instead independent components of the definition." *Id.* This interpretation is preposterous. The Michigan Supreme Court has not stated that assessing the existence of an "accident" requires an examination of eight separate conditions, all of which must be present. Such a reading would certainly not conform with plain meaning standard called for under *Rory*, nor would the average layperson procuring a CGL policy ever contemplate that the undefined word "accident" involves eight separate elements. More likely, the *Allstate* Court was providing a list of terms (or adjectives) to describe the meaning of "accident," each of which separately connotes an accident.

Michigan law further indicates that the focus of an "occurrence" analysis is not the intent of the conduct in question, but rather whether the resulting consequences were intended. Thus, even if the conduct in question was intended, the claim nevertheless constitutes an "occurrence" if the adverse consequences of such conduct were unintended. As set forth in *Allstate Ins. Co. v Freeman*, 432 Mich at 670, "we find that ascertaining the insured's 'intent' may determine whether the insured's actions constituted an 'accident, but it does not necessarily follow that an insured must act unintentionally for an act to be an 'occurrence.'" (Concluding that a knife-stabbing incident may have constituted an occurrence under facts where the insured purportedly waived around a knife with the intent to scare the victim but not intending to stab the victim.). Accordingly, the fact that a contractor intends to perform construction work and is in control of the work performed, does not equate to intending or foreseeing all damages that result from errors in such work.

Applying the aforementioned standard to the facts before the Court reveals the existence of events that should be considered an "occurrence." There is no dispute that Skanska's subcontractor MAP was retained to install expansion joints, had inadvertently installed some of these expansion joints backwards and, as a result, had caused damage to the project. It is also not disputed that MAP did not intend to install the joints backwards and, more importantly, did not intend the damage that ultimately occurred. As noted by the trial court: "No one has suggested MAP purposefully installed the expansion joints backward. All the parties agree the negligent installation was an unforeseen occurrence and not anticipated by any of the parties to the construction project." *Appellant's Appx.* at 004a. The trial court similarly concluded that "[t]here 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." *Appellant's Appx.* at 006a. Only under the most draconian interpretation of the word "occurrence" would the damage in question be considered to fall outside the scope of the term. Such a narrow reading of the word "occurrence" is not in conformity with the plain meaning standard recognized in *Rory*,[4] and certainly does not meet the requirement that "the present coverage provision must be broadly construed" as stated in *Allstate.*[5]

B. Appellees' Arguments, Ignoring the Plain Meaning of the Word "Occurrence," Are Rooted in Fallacy

Appellees respond to Skanska's interpretation of "occurrence" with arguments that have been raised by insurance companies countless times before in the ongoing effort to persuade courts that unintended damage to project work caused by a contractor somehow do not involve an "accident." Among these specious arguments are (1) the claim that the contractor is in control of its work and should not be insured for its mistakes, (2) the claim that an "occurrence" only applies to property of a third-party, and (3) the claim that a CGL policy is not a substitute for a performance bond. *See Appellees' Brief* at 14 -15. Each of these arguments is logically flawed.

1. The "Control of the Project Work" Fallacy

Appellees incorrectly argue that defective work is not an "occurrence" because the insured contractor is in control of its work and should not be insured for damages that stem from carelessness. "Skanska seeks to recover that for which a commercial general liability policy [was] 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." *Appellees' Brief* at 15. This argument is fundamentally flawed.

---

[4] *Rory v Continental Ins. Co.,* 473 Mich at 468
[5] *Allstate Ins. Co. v. Freeman*, 432 Mich at 672 and 766.

If it were true, as Appellees contend, that an event is not "accidental" under facts where the party that causes unintended damage could have prevented such outcome by acting more carefully (due to his/her control over the situation), then this would eliminate a wide variety circumstances that are routinely (and intuitively) considered accidents from the common definition of the term. For example, at-fault drivers involved in motor vehicle collisions would not be considered to have caused "accidents" because they had the ability to avoid such results if they chose to drive more safely. (Imagine if automobile policies were construed in such a manner.) Likewise, many sports injuries would not be considered accidental because the athletes that hurt themselves would be considered to be in control of their bodies and to have chosen to risk their health and safety when competing. To further illustrate the point, the sinking of the *Titanic* would not have been considered an accident under the Appellees' faulty rationale because the ship's engineers could have designed the ship safer/better and the ship's pilots could have acted more carefully, sailing the ship at a slower speed and paying more attention to icebergs looming in the dark of night.

Contrary to Appellees' irrational viewpoint, the very nature of the term "accident" contemplates circumstances where people commit errors that result in otherwise avoidable damage (due to a lapse in judgment or due to carelessness). Anyone that has ever hit their thumb when hammering a nail knows this fact.

2. The "'Occurrence' Only Concerns Damages to a Third Party" Fallacy

The idea that an "occurrence" only concerns damage sustained to third-parties (and not the project itself) suggests that the assessment of "occurrence" has less to do with the state of mind of the party causing the damage (intentional vs. unintentional), and more to do with the ownership of the property that is damaged. Appellees raise this irrational argument in their brief,

stating: "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." *Appellees' Brief* at 14. Here again, the Appellees make arguments that are not based upon the language of the CGL policy but are instead based upon what they want the CGL policy to mean – seeking to limit the meaning of "occurrence" by inserting new qualifications as to the nature of the property that suffers damage. Nowhere in the standard CGL Policy definition of "occurrence" (i.e. "accident") does it state that unintended damage to the project work itself cannot be accidental. To infer such a requirement in the CGL Policy is contrary to Michigan law which provides that terms and conditions of an agreement must be expressed. *See Klat v Chrysler Corp*., 285 Mich 241, 248; 280 NW 747, 750 (1938) ("[W]e may not read into the contract terms not agreed upon by the parties.")

Furthermore, the argument that the existence of an "occurrence" is dictated by the nature of the property that is damaged defies common sense. "Occurrence" or "accident" concerns the intent, or state-of-mind, of the party that committed the mishap; not whether the damage involved this property over here or that property over there. It is nonsensical to deem one unintended consequence an "occurrence" or "accident" because it involves a third-party's property, and another unintended consequence to be intentional (not an "occurrence") simply because the damage happened to be to the insured's own work.

To illustrate this point, consider a scenario where a series of bricks had fallen from the façade of a building under construction, due to problems with the mortar work, damaging property located at the construction project and also damaging neighboring property, courts which subscribe to the reasoning that the ownership/location of the damaged property determines

whether there is an "occurrence" would hold that the former damage was intended but that the latter was accidental. Yet, in this scenario, the act which gives rise to both the project damage and the third-party damage (the insufficient/faulty mortar) is one in the same. Thus, the insured's state of mind (or intent) when the negligent work occurred is also *exactly* the same. The damage to both the project property and the neighboring property was equally accidental. The Texas Supreme Court amplifies upon this flaw in logic, stating:

> The CGL policy . . . does not define an "occurrence" in terms of the ownership or character of the property damaged by the act or event. Rather, the policy asks whether the injury was intended or fortuitous, that is, whether the injury was an accident. . . . ***[N]o logical basis within the "occurrence" definition allows for distinguishing between damage to the insured's work and damage to some third party's property.***

Lamar Homes, Inc. v Mid-Continent Cas. Co., 242 SW3d 1, 9 (Tex, 2007) (emphasis added). Accordingly, this Court should not ascribe to the argument that the determination of "occurrence" hinges upon whether the damage is to project work or to property of a third-party.

3. The "CGL Policy Is Not a Performance Bond" Fallacy

Appellees raise the additional incorrect argument that damage to project work caused by faulty construction is not an "occurrence" because a CGL Policy is not a substitute for a performance bond. *Appellees' Brief* at 14–15. In making this argument, Appellees attempt to draw the Court's attention away from what the CGL policy actually says that it covers (liability for property damage and bodily injury caused by an "occurrence") and instead focus its attention upon what some other type of insurance product (a performance bond) may cover. This argument is flawed in several respects.

First, the argument ignores applicable law that requires an assessment of insurance coverage by examining the four corners of the policy (and not by examining the terms and

conditions of some other unrelated document). "Insurance policies, like other contracts, are to be construed as a whole. The intent of the parties is to be gathered from the four corners of the instrument." *Rogers v Great N. Life Ins. Co.,* 284 Mich 660, 667; 279 NW 906, 908 (1938); *See also, Prestige Cas. Co. v Michigan Mut. Ins. Co*., 99 F3d 1340 (CA 6, 1996) (Under Michigan law, intent of parties to insurance policy is to be gathered from four corners of instrument). The terms of a performance bond are not found with the four corners of the CGL policy.

Second, the argument assumes, without any legal support or any relevant contract language, that certain risks that happen to be covered under a performance bond cannot also be covered under a CGL policy. To the contrary, there is no rule to be found anywhere which states that the two instruments must be treated as mutually exclusive, such that any risk covered by a general liability policy cannot also be protected in any way under a performance bond (and vice versa). Such a position is entirely unsubstantiated. As noted by the Texas Supreme Court:

> Any similarities between CGL insurance and a performance bond under these circumstances are irrelevant, however. The CGL policy covers what it covers. No rule of construction operates to eliminate coverage simply because similar protection may be available through another insurance product.

Lamar Homes, 242 SW3d at 10.

Third, the Appellees' argument suggests that a performance bond is an instrument that a contractor can obtain to protect against the risk of damage to project work. This is not true. Performance bonds are issued to project owners, not contractors. "[U]nlike an insurance policy, a performance bond benefits the owner of a project rather than the contractor . . . Further, a surety, unlike a liability insurer, is entitled to indemnification from the contractor." *U.S. Fire Ins. Co. v J.S.U.B., Inc.,* 979 So 2d 878, 887-88 (Fla, 2007). The Connecticut Supreme Court has also commented upon this fact:

> [T]here are important differences between performance bonds and commercial general liability contracts. The obligation of a surety is an additional assurance to the one entitled to the performance of an act that the act will be performed. The purpose of a performance bond is to guarantee the completion of the contract upon default by the contractor. Accordingly, suretyship is properly viewed as "a form of credit enhancement" in which premiums charged in consideration of the fundamental underwriting assumption that the surety will be protected against loss by the principal. . . . Importantly, the surety, unlike the insurer, may seek indemnification from the contractor, as principal, when the bond is invoked to benefit the owner-obligee. ***While a performance bond may, in the appropriate case, cover the costs to remedy property damage under a commercial general liability contract, its main purpose is to benefit the owner upon the default by a general contractor.***

Capstone Bldg. Corp. v Am. Motorists Ins. Co., 308 Conn 760, 791–92, 67 A3d 961, 985 (2013) (emphasis added)(internal quotations and citations omitted). Thus, the proclamation that a contractor can otherwise protect itself from unintended yet defective work through the procurement of a surety or performance bond is erroneous.

C. Principles of *Stare Decisis* Do Not Justify a Misapplication of the Term "Occurrence" under CGL Policies

Appellees suggest that the holding reached in *Hawkeye-Security Ins. Co. v Vector Construction Co*, 185 Mich App 369; 460 NW2d 329 (1990) and its progeny should be affirmed under principles of *stare decisis*, indicating that the rule of law applied in such case should continue, even if it were wrongly determined. *Appellees' Brief* at 38–39. This Court should not countenance such an argument for a variety of reasons.

First, while the "occurrence" issue has been addressed on several occasions at the appellate level, it is a matter of first impression before the Michigan Supreme Court. Thus, as to those parties with a legitimate interest in this issue, including contactors and insurers, there

always should have been an expectation that the highest court in the state may weigh in on the issue at some point and reach a different conclusion.

Second, as noted previously, overturning *Hawkeye* would result in a decision that is consistent with the majority of the highest state courts in sister jurisdictions that have examined this issue in the construction context. *See supra, Black & Veatch*, 882 F3d at 966 ("State supreme courts that have considered the issue since 2012 have reached 'near unanimity' that 'construction defects *can* constitute occurrences . . .'").

Third, as mentioned above, rejecting the flawed reasoning of *Hawkeye* and its progeny would result in an interpretation of "occurrence" that is not based upon notions of what insurers would like the word to mean to best benefit them by inserting conditions upon what can be considered "accident" that are not listed in the CGL policy, but is instead based upon a plain meaning of such term, consistent with Michigan's Supreme Court's longstanding precedent as to how terms of an insurance policy are to be construed. *See, e.g. Rory v Cont'l Ins. Co*., 473 Mich at 468.

Fourth, the idea that the *Hawkeye* precedent should stand because it creates a rule that insurers and insureds alike have grown comfortable with in Michigan, and that a reversal would disrupt conformity (*Appellees' Brief* at 39-40), should be readily rejected. This is not a circumstance where most of the impacted parties are happy with the status quo. Most telling is the fact that no less than eight separate entities consisting of construction industry leaders and key trade organizations have sought to file briefs in this case that are supportive of Skanska's fundamental position that damage to project work can involve an occurrence, namely: Turner Construction Company, Gilbane Building Company, AGC of America, AGC of Michigan, Michigan Infrastructure and Transportation Association, Construction Association of Michigan,

Michigan Homebuilders Association, and Associated Builders and Contractors of Michigan. This overwhelming display of support of Skanska's efforts uniformly rejects any notions that construction policyholders are accepting of, have gotten used to, or wish to continue to conform with, the strained interpretation of "occurrence" set forth under *Hawkeye.*

Finally, the Michigan Supreme Court should not adhere to a logically-flawed interpretation of a key insurance policy term simply because such interpretation has been applied over a long period of time. As stated by Supreme Court Justice Clarence Thomas "it is never too late to 'surrende[r] former views to a better considered position.'" *South Dakota v Wayfair, Inc.,* 138 S Ct 2080, 2100, 201 L Ed 2d 403 (2018) (Thomas, J, concurring). This is exactly what a number of high courts have done when examining the "occurrence" issue – abandoning antiquated viewpoints. For example, the Supreme Court of West Virginia in the case of *Cherrington v Erie Ins. Prop. & Cas. Co.,* 231 W Va 470, 479, 745 SE2d 508, 517 (2013), finding that a CGL policy provides coverage for defective workmanship, abandoned its prior, opposite, holdings rendered in three prior cases, stating:

> While we appreciate this Court's duty to follow our prior precedents, we also are cognizant that *stare decisis* does not require this Court's continued allegiance to cases whose decisions were based upon reasoning which has become outdated or fallen into disfavor. ***Although we fully understand that the doctrine of stare decisis is a guide for maintaining stability in the law, we will part ways with precedent that is not legally sound***. . . . With the passage of time comes the opportunity to reflect upon the continued validity of this Court's reasoning in the face of juridical trends that call into question a former opinion's current soundness. ***It has been said that wisdom too often never comes, and so one ought not to reject it merely because it comes late***.

(Emphasis added, internal citations and quotations omitted).

The Indiana Supreme Court similarly reversed course on the "occurrence" issue, adopting the majority view that such term can encompass faulty construction work. *See Sheehan Const.*

Co. In. v Continental Cas. Co. 935 NE2d 160 (Ind. 2010) (abrogating decisions from the Indiana Court of Appeals which found that defective construction work could not involve an "occurrence"). The *Sheehan* Court stated:

> Our Court last broached the subject in *Indiana Insurance Co. v. DeZutti,* 408 N.E.2d 1275 (Ind.1980). We examine *DeZutti* today because language appearing in that decision has provided the bases for at least two Court of Appeals opinions declaring in part that the risk intended to be insured by a CGL policy is "the possibility that the goods, products, or work of the insured, once relinquished or completed, will cause bodily injury or damage to property *other than* to the product or completed work itself."

Sheehan Const. Co. v. Cont'l Cas. Co., 935 NE2d 160, 165 (Ind, 2010), *opinion adhered to as modified on reh'g*, 938 NE2d 685 (Ind, 2010)(additional internal citations omitted).

More recently, the New Jersey Supreme Court, in the case of *Cypress Point Condominium Assoc., Inc. v Adria Towers, LLC*, 226 NJ 403, 143 A3d 273 (2016) held that defective construction work can involve an "occurrence," distinguishing itself from the well-renowned case of *Weedo v Stone-E-Brick Inc*., 81 NJ 233, 405 A2d 788 (1979), which was routinely cited by insurers and courts nationwide as the key case supporting the notion the defective work cannot be an "occurrence." The *Cypress Point* court noted that the reasoning of *Weedo* did not comport with the language of the modern CGL policy:

> This Court first addressed the issue of whether a standard CGL policy covers construction defects in *Weedo, supra,* which is regularly cited by both state and federal courts as the leading case on the issue. . . . ***Weedo and its progeny were decided based upon exclusions contained within the pre–1986 CGL policy, rather than an interpretation of the policy's terms granting coverage in the first instance***. . . .In any event, under our interpretation of the term "occurrence" in the policies, consequential harm caused by negligent work is an "accident."

Cypress Point 143 A3d at 282, 288 (2016) (emphasis added).

Like the courts of West Virginia, Indiana and New Jersey, this Honorable Michigan Supreme Court should decline to adhere to logically flawed and outdated viewpoints that are based upon historical caselaw interpreting discarded policy language different from the CGL policy language at issue in this case.

D. Skanska Has Shown a Genuine Issue of Material Fact as to the Existence of an "Occurrence" under the Policy

As stated previously, it has not been disputed that Skanska's subcontractor, MAP Mechanical, did not intend to install expansion joints backwards, and did not intent the property damage the property damage that resulted from such errant backwards installation. *See supra* discussion on pgs. 6-7 of this Brief. This set of circumstances is a textbook example of an "accident" under a plain meaning of the term. The loss involved an honest mistake, and nothing more. However, even if the Appellees disputed the depiction of the relevant events described above, and as more particularly described in Appellant's Brief, at minimum there is a genuine material fact to what Skanska and/or its subcontractor knew when it installed the expansion joints and whether it intended or anticipated that damage that eventually did occur.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, *Amici Curiae*, Turner Construction Company and Gilbane Building Company, support Skanska's appeal and urge the Court to adopt an interpretation of the term "occurrence" that is consistent with its plain meaning, thus finding that unintended damage to project work that is due to construction error is an "occurrence" under a CGL policy.

Respectfully submitted,

/s/ Ronald A. Deneweth

Ronald A. Deneweth (P27680)
Deborah S. Kaleta (P70290)
DENEWETH DUGAN & PARFITT, P.C.
Attorney for Turner Construction Company
and Gilbane Building Company
1175 W. Long Lake Road, Suite 202
Troy, MI 48098
Phone: 248-290-0400
rdeneweth@ddp-law.com
dkaleta@ddp-law.com

Dated: March 6, 2020

In consultation with :

/s/ David G. Jordan

David G. Jordan (Conn. Bar No. 417695)
Jeffrey J. Vita (Conn. Bar No. 402820)
Saxe Doernberger & Vita, P.C.
Co-Counsel for Turner Construction
Company and Gilbane Building Company
35 Nutmeg Drive, Suite 140
Trumbull, CT 06611
203.287.2100
dgj@sdvlaw.com

Dated: March 6, 2020