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

SKANSKA USA BUILDING, INC.,
A Delaware Corporation,

Plaintiff,

v

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

Defendants.

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

APPELLANT SKANSKA USA BUILDING INC.'S

REPLY TO AMERISURE'S RESPONSE TO ITS BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This case gives the Court the opportunity to prune an errant branch from Michigan's canon of contract law. Even though commercial general liability ("CGL") insurance policies are merely contracts between private parties, and despite the fact that courts must enforce the unambiguous terms of a contract as written unless a traditional defense applies, lower courts in Michigan have failed to follow these basic principles of contract law when faced with claims for insurance coverage for construction defects. Beginning with *Hawkeye-Security Ins. Co v Vector Construction Co.*, 185 Mich App 369; 460 NW2d 329 (1990), and culminating with the "principle of law" announced by the Court of Appeals in this case, the Michigan lower courts have been enforcing their own misconceptions of coverage instead of enforcing the actual language of the contract of insurance as written. This is error, and to protect one of our most important and fundamental rights – freedom of contract – this Court must correct it.

The rule of law advocated by Amerisure would extend the errant branch created by *Hawkeye* and would allow Amerisure to dodge the bargain it has struck with M.A.P. Mechanical ("M.A.P.") and Skanska and with countless other insureds across the state. Of all the arguments Amerisure makes to support its position, two merit a reply: Amerisure's flawed substitution of the word "fortuity" for the term "accident"; and Amerisure's disregard for the basic rules of contract construction.

ARGUMENT

I. A "fortuity" is not required for an "occurrence" under the CGL policy.

A standard CGL policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general conditions." The term "accident" is

not defined by the policy, and therefore courts look beyond the policy to find its meaning. In doing so, however, Michigan courts have developed two separate veins of jurisprudence based upon the *same* policy language and the *same* word, "accident." One vein concerned contractors such as Skanska, and the other non-contractors. Both veins ostensibly define an accident the same way – *compare, Allstate Insurance Co. v McCarn*, 466 Mich 277, 281; 645 NW2d 20 (2002) with *Hawkeye Security v Vector Construction Co*, 185 Mich App 369; 460 NW2d 329(1990). Where the two tracks of jurisprudence diverge is in which standard they apply (objective or subjective) to determine whether an "accident" and therefore an "occurrence" has actually taken place.

McCarn and the balance of the non-contractor track of cases apply a subjective standard in analyzing whether the outcome of an insured's actions were intended from the standpoint of the insured. Conversely, and inexplicably, the standard applied to contractors, and *only* contractors by *Hawkeye* and its following case law is an objective standard, highlighting and relying primarily on the term "fortuitous" in the definition of "accident" to justify the position. This has resulted in a legal fiction under Michigan law that all faulty workmanship is always intentional and therefore does not meet the definition of an "occurrence" under the terms of the standard CGL policy.

By enhancing the emphasis on "fortuity," Amerisure increases the bifurcation in this state's jurisprudence. While the Court has included the word "fortuitous" in the definition of accident, the Court has never established fortuity as an individual element that must be met. Instead, the Court has held the "the appropriate focus of the term 'accident' must be on both 'the injury-causing act or event and its relation to the resulting property damage or personal

injury." *McCarn, supra*, at 282 citing *Frankenmuth Mut. Ins. Co. v. Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999).

More importantly, as stated above, the policy itself defines an "occurrence" with the word "accident," not "fortuity." This choice is important because the words "accident" and "fortuity" have different connotations. While both terms connote unintentional results, the term accident can also convey concepts of fault and responsibility in ways fortuity does not.

Human beings routinely cause "accidents" while acting with intent and control. A backyard chef may grill chicken with both intent to cook it and control over the grill, but still burn it by accident. Or to use an example from this Court's jurisprudence, a boy may intentionally shoulder a firearm and point it with control, but still shoot someone by accident, as happened in *McCarn*. While there is an element of bad luck, or fortuity, in both of these examples, the actors initiated the sequence of events with both intent and control, and both events are properly considered accidents. However under Amerisure's analysis neither event would be considered a fortuity.

Indeed, a human actor's initiation of a sequence of events and his or her control over them are the touchstone of liability under our law. We do not impose legal responsibility for fortuities; we only impose it for breaches of duty that proximately cause harm. As this Court wrote when relieving a utility company of liability for the burning death of a seven year old boy, "[t]he accident was most distressing, but defendant cannot be held responsible for it except for negligence in failing to perform a legal duty." *LeDuc v Detroit Edison Company*, 254 Mich 86, 91; 235 NW2d 832 (1931). Likewise, in *Ray v Swager*, this Court noted "only a human actor's breach of duty can be a proximate cause." 501 Mich 52, 74; 903 NW2d 366

(2017). In fact, both the majority and the dissent in *Ray* recognize that before a person can be liable for an injury, he or she must somehow be responsible for the factual cause of it.

By arguing an insured only has insurance coverage for fortuitous events over which it lacked intent and control, Amerisure seeks to eviscerate insurance coverage extended by a CGL policy. If each accident must be purely fortuitous, an insured would only have coverage for events it cannot be held legally responsible for under cases such as *LeDuc* and *Ray*. An actor's negligence would not be covered. Instead, the covered circumstances would be narrowed to those in which the insured is found liable for bodily injury or property damage arising out of only dumb luck. This is the nonsensical conclusion which results from following Amerisure's logic. Furthermore, because this Court's ruling would apply not only to construction defects, but to all commercial general liability policies in the State of Michigan, the rule urged by Amerisure would have significant and wide ranging effects.

Nevertheless, the facts of this case present liability arising out of a fortuitous event for which Amerisure would grant coverage under its new test. There is no dispute M.A.P., not Skanska, initiated and controlled the means and methods by which the steam expansion joints were installed. There is likewise no dispute three of the six expansion joints were installed backward, and no dispute there is no pattern in the joints' orientation: they were not all oriented with the flow of the steam and condensate, and they were not all oriented with the anchor blocks. Instead, they were random, as if M.A.P.'s crew bolted them down in whichever direction they were pointing when lowered into the manholes. It is fortuitous M.A.P.'s crew got three of them right.

Amerisure attempts to defend its position by claiming the majority of courts in states across the country support the narrow interpretation of a CGL policy it is presenting in this

case. This is simply not true. The majority of state supreme courts which have examined the issue have found faulty work did constitute an "accident" and therefore an "occurrence" and extended coverage under the subcontractor exception, while only four have expressly rejected coverage for faulty work. *Defective Construction CGL Coverage: The Subcontractor Exception*, 7 Mich. Bus. & Entrepreneurial L. Rev. 159, at 185 (2017) (002a-034a, **Exhibit 1**); see also, *Revisiting Construction Defects as "Occurrences" Under CGL Insurance Policies*, U. of Pennsylvania Journal of Business Law [Vol. 19.1 2016] (036a-080a, **Exhibit 2**).[1]

II. Michigan contract law applies.

Michigan law is well settled that in analyzing the scope of insurance policy coverage, the traditional principles of contract and insurance law apply. *Rory v Continental Ins. Co.*, 473 Mich. 457, 461, 703 N.W.2d 23 (2005). In its response, Amerisure makes several arguments that call for an abandonment of these well-settled principles.

i. *Additional Insured Status*

This Court must reject Amerisure's additional insured argument for both procedural and substantive reasons. Procedurally, Amerisure raised the issue for the first time in its response brief, and the issue is therefore not before this Court. *Henderson v Department of* Treasury, 307 Mich App 1, 7-8, 858 NW2d 733 (2004); *Cove Creek Condominium Association v Vistal Land & Home Development, LLC et al*, 2019 WL 6971502, at 4 (2019).

Substantively, Amerisure is simply wrong. Exhibit "G" to Skanska's subcontract with M.A.P. requires Skanska and the project Owner to be named as additional insureds with

[1] Skanska finds this article particularly instructive in its overview of the evolution of the ISO standard form CGL policy, how it has been interpreted by courts historically, and the current national trend whereby state supreme courts are finding that a subcontractor's faulty work does constitute an "accident", and therefore an "occurrence" under the terms of the current CGL policy language.

M.A.P.'s insurance as "primary and non-contributory" and with coverage for "ongoing and completed operations." The controlling policy secured by M.A.P. and at issue here states in its opening paragraphs:

> Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations *and any other person or organization qualifying as a Named Insured under this policy*. … *The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured*. (Emphasis added).
> (091a, **Exhibit 3**)

This particular policy incorporated form CG 20 10 11 85, as required by the contract, and which states:

> WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but *only with respect to liability arising out of "your work" for that insured by or for you*. (117a, **Exhibit 3**) (Emphasis added)

Coverage under M.A.P.'s CGL policy was extended to Skanska via CG 20 10 11 85 as Skanska was listed as an additional insured in the controlling policy's schedule. (134a, **Exhibit 4**). The only limitation to Skanska's coverage under the controlling policy beyond those limitations placed on M.A.P.'s coverage, is detailed in the paragraph above in stating Skanska's coverage is limited to "liability arising out of 'your work' for that insured by or for you." Furthermore, there is nothing which requires Skanska's claims against the policy to be predicated on vicarious liability as Amerisure implies. It is clear from a plain reading of the policy language that Skanska is entitled to make a direct claim against the policy. These provisions are clear and unambiguous, and therefore must be enforced as written. *Rory*, *supra*, at 468. In applying the policy language to the facts of this case, the property damage for which Skanska seeks coverage was the result of work carried out by M.A.P. for Skanska,

as its subcontractor. Therefore, pursuant to a plain reading of the policy, coverage for Skanska as an additional insured is clearly extended.

Moreover, if Amerisure wanted to place further restrictions on this coverage, it should have drafted narrower restrictions on additional insured coverage. Amerisure elected not to do so, therefore, given that fact, and the fact that the policy language is clear and unambiguous, it must be enforced as written. *Masters, supra,* at 11. See also *Wilkie v Auto-Owners Insurance Company,* 469 Mich 41, 47, 664 NW2d 776 (2003).

ii. *Warranty v. Performance Bond*

Amerisure also argues that Skanska is asking this Court to effectively convert the commercial general liability policy into a performance bond. However, by making this argument Amerisure conflates two distinct instruments and implicitly raises the "reasonable expectations" issue this Court rejected in *Wilkie v Auto-Owners Insurance* Company, 469 Mich 41, 664 NW2d 776 (2003).

First, a CGL policy and a performance bond spread risk differently. As the Supreme Court of Texas in *Lamar Homes v Mid-Continent Casualty Company,* succinctly stated when rejecting the argument advanced by Amerisure, an "insurance policy spreads the contractor's risk while a bond guarantees its performance. An insurance policy is issued based on an evaluation of risks and losses that is actuarially linked to premiums; that is, losses are expected. In contrast, a surety bond is underwritten based on what amounts to a credit evaluation of the particular contractor and its capabilities to perform its contracts, with the expectation that no losses will occur. Unlike insurance, the performance bond offers no indemnity for the contractor; it protects only the owner." *Lamar Homes, Inc.,* 242 S.W.3d at 10 & n.7, (2007).

Second, to ignore the plain language of the policy because of a perceived notion of what a commercial general liability insurance policy "is for" is to elevate a party's expectations above the actual language of the contract. In this case, (setting plausibility aside) Amerisure may not have expected to cover property damage caused by an occurrence when the occurrence is also a departure from plans and specifications. Amerisure may have believed the contract of insurance it issued "is for" liability arising in tort only. But that is not what the contract says. As this Court wrote in *Wilke*, "[t]he rights and duties of parties to a contract are derived from the terms of the agreement." 469 Mich at 62. "The rule of reasonable expectations clearly has no application when interpreting an unambiguous contract." *Id*. The coverage provided by the contract of insurance "is for" whatever liability falls under the insuring agreement and is not barred by one of the exclusions. Whether Amerisure expected something different is irrelevant.

Finally, whether a performance bond may also address a liability that is covered by the contract of insurance is also irrelevant. Both contractual instruments cover a broad spectrum of events. A party with recourse under both instruments cannot be denied coverage because the party has mitigated a risk in two ways, unless one of the contractual instruments says so. Furthermore, a party is free to contract for as much protection for whatever it choses, via whichever instrument it chooses. *Wilkie, supra,* at 47. To hold otherwise would be to significantly infringe upon an individual's freedom to contract. *Id.*

iii. *Intentional Act Exclusion*

This is yet another issue Amerisure presents in its response which is not before the Court. See *Henderson, supra* and *Cove Creek, supra.* There is no evidence, nor any arguments made in any of the discovery, or proceedings below that M.A.P.'s backward

expansion joints were intentional. As a result, based upon the factual record in this case, there is nothing to support Amerisure's argument that this exclusion applies in this case. To the extent that Amerisure's erroneous inclusion of the issue in its brief requires a response, given the definition of an accident established by this Court in *McCarn*, *supra*, whether the intentional acts exclusion is in fact nugatory may be something this Court needs to examine when the appropriate situation arises. However, that is not the issue before the Court in this case and it would be inappropriate to brief it here.

iv. *Genuine Issue of Material Fact as to the Existence of an Occurrence*

It is obvious from the voluminous briefing in this case that the question of whether an "occurrence" has been established under the controlling policy is the crux of the issue before this Court. As outlined in Skanska's initial brief, and in Amerisure's response brief, key to the determination of whether an event qualifies as an "occurrence" under the policy is whether an "accident" has taken place. Therefore, this argument is nothing more than another red herring to distract from the issue at hand, namely, whether Skanska's claim for damages caused by M.A.P.'s faulty work on the project qualifies as an "accident" and therefore an "occurrence" under the controlling policy. As previously stated in Skanska's initial brief, and elsewhere in this brief, under a plain reading of the policy documents as a whole, and giving effect to each provision according to their ordinary and plain meanings, it is clear there was an "accident" giving rise to an "occurrence" triggering coverage under the policy because M.A.P.'s backward installation of the expansion joints was an accident, which neither it, nor Skanska intended.

CONCLUSION

Time and again this Court has affirmed "the utmost liberty of contracting" granted to the men and women of this state. *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). This case gives the Court the opportunity to make this affirmation once more, and to end an erroneous offshoot in the state's jurisprudence in the process. No valid "principle of law" prevents insurance coverage for construction defects. Rather, the applicable principle of law requires enforcement of the unambiguous contract of insurance issued by Amerisure to M.A.P. and to M.A.P.'s additional insured, Skanska.

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

Respectfully submitted,

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/s/ R. Edward Boucher
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Dated: March 6, 2020

PROOF OF SERVICE

Lindsey Pfund certifies that on the 6th day of March, 2020, she served Skanska U.S.A. Building's Reply to Amerisure's Response to Its Brief on Appeal and this Proof of Service, in accordance with the Court's Electronic Guidelines. Notice of Electronic Filing of these documents will be sent to all parties by operation of the Court's electronic filing system.

/s/ Lindsey Pfund