SUPREME COURT OF KENTUCKY

File No. 2008-SC-000293-DG
(2007-CA-000818)
(01-CI-05857)

CINCINNATI INSURANCE COMPANY — APPELLANT

vs.

MOTORISTS MUTUAL INSURANCE COMPANY — APPELLEE

On Review from Court of Appeals No. 2007-CA-000818
Appeal from Jefferson Circuit Court, Division 5
Civil Action No. 01-CI-05857
Hon. Mary M. Shaw, Judge, Presiding

BRIEF FOR APPELLEE

Submitted by:

WILLIAM P. SWAIN
PAUL J. BISHOP
SEAN RAGLAND
PHILLIPS PARKER ORBERSON & MOORE, PLC
716 West Main Street, Suite 300
Louisville, Kentucky 40202
(502) 583-9900

COUNSEL FOR APPELLEE

It is hereby certified that copies of the within brief were served by mail this 8th day of July, 2009 upon: Hon. Michael D. Risley, Stites & Harbison PLLC, 400 West Market Street, Suite 1800, Louisville, Kentucky 40202, Counsel for Appellant; Hon. Mary M. Shaw, Judge, Jefferson Circuit Court, Division 5, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202, Trial Judge; and Samuel Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601.

Wm P Swain
William P. Swain

SUPREME COURT OF KENTUCKY

File No. 2008-SC-000293-DG
(2007-CA-000818)
(01-CI-05857)

CINCINNATI INSURANCE COMPANY — APPELLANT

vs. **BRIEF FOR APPELLEE**

MOTORISTS MUTUAL INSURANCE COMPANY — APPELLEE

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

Kentucky Authorities:

May it Please the Court:

COUNTERSTATEMENT OF THE CASE

On November 14, 1994, Lawrence and Jennifer Mintman (hereinafter "the Mintmans") entered into a construction and purchase agreement with Elite Homes, Inc. for the construction of a residence in Shelby County, Kentucky, for the sum of $282,600.00. (Transcript of Record, 470-73). Elite agreed to supply all materials and labor and complete the residence in a workmanlike manner. Elite also agreed to direct and supervise all construction personnel, including subcontractors, in the performance of their work. Construction was substantially completed on or about June 1, 1995, at which time the Mintmans paid Elite in full. (Complaint, Transcript of Record, 1-19).

In their Complaint against Elite, the Mintmans alleged serious latent structural defects as a result of sub-standard work by Elite and/or its various subcontractors. It was alleged that minor cracks and other defects continued to appear; cracks in the drywall and brick exterior walls; defective windows and doors; sagging floors; the separation of brick veneer from the exterior walls; and continuing development of leaning walls. In fact, the Mintmans alleged that "the home was not saleable" and that "the structure has virtually no value on the open market except perhaps for residential scrap." (Complaint, Transcript of Record, 1-19).

Elite was insured by Motorists under a commercial general liability (CGL) policy for the period of July 1, 1994 through July

1, 1995, and by Cincinnati Insurance Company (hereinafter "CIC") under a similar policy from July 1, 1996.

Elite tendered its defense to both Motorists and CIC under their respective CGL policies for the ongoing deterioration of the residence as a result of poor workmanship.

CIC refused to investigate or defend Elite against the Mintmans' claims and did not even issue its disclaimer letter until 13 days before Motorists settled the Mintmans' claims at mediation. Motorists provided Elite with a defense and indemnified Elite by paying $130,000.00 and taking an assignment from the Mintmans and Elite for their claims against CIC. Motorists then filed the Third-Party Complaint at issue against CIC in order to assert the Mintmans' claims and recover amounts incurred in defending and settling the Mintmans' claims. (Transcript of Record, 274, et seq).

Experts in building construction who examined the home determined that subcontractors hired by Elite to perform framing and foundation work had done their work improperly, thereby causing the problems with the home. (Exhibits 5, 6, and 7 to Memorandum in Support of Motorists' Motion for Summary Judgment, Transcript of Record, 535-49).

In its disclaimer letter to Elite, CIC explained in part the reason for its refusal to defend as follows:

[T]here is a question if all the claims fit

> the definition of property damage in the policy. The allegations do not appear to have arisen from an occurrence as defined in the policy. * * * [T]he above-cited exclusions are on point for the allegations, as the damages are claimed for the house itself and do not involve damage to other property.

(Exhibit 4 to Memorandum in Support of Motorists' Motion for Summary Judgment, Transcript of Record, 530-34) (emphasis added).

The disclaimer which incorporates the CIC policy is attached to this brief as Exhibit 1.

As the Court will observe from the language of the disclaimer set out above, the inference can be drawn that CIC was somewhat hesitant about its position with regard to coverage, and the disclaimer is tantamount to a suggestion of ambiguity in the policy itself.

Motorists' Third-Party Complaint seeks to recover from CIC the amount of $130,000.00, which was paid to the Mintmans on behalf of Elite Homes, and approximately $61,815.00, which represents the fees and costs incurred to that point in its defense of Elite. (Transcript of Record, 357-58).

The CIC policy provided in relevant part as follows:

> SECTION 1 - COVERAGES
>
> COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as

damages because of "bodily injury" or "property damage" to which this insurance applies.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

(2) The "bodily injury" or "property damage" occurs during the policy period.

Exclusions

This insurance does not apply to:

j. Damage to Property

"Property damage" to

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on 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.

* * *

SECTION V - DEFINITIONS

* * *

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

* * *

15. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(Emphasis added).

Motorists and CIC filed cross-motions for summary judgment with respect to the coverage issues raised by the Third-Party Complaint. On behalf of Motorists, we addressed the business risk exclusions contained in the CIC policy and suggested that they were ambiguous. CIC chose not to address the exclusions on the grounds that since there was no coverage under the basic insuring provisions, the exclusions were superfluous. The trial court agreed with CIC and ruled in its favor on the grounds that "the

plain language of the policy regarding coverage does not include the Mintmans' intangible economic loss arising from claims of faulty construction . . . ." In substance, the trial court held as follows:

> After review, the Court agrees with CIC that the plain language of the policy regarding coverage does not include the Mintmans' intangible economic loss arising from claims of faulty construction of their house by Elite. The Court is persuaded by the numerous cases cited by CIC from other jurisdictions which have addressed this issue and found that "property damage" and/or "occurrence" under CGL policies do not extend coverage to protect an insured from liability for faulty workmanship in the work product itself. Instead, the CGL policy extends coverage to the situation where the faulty workmanship causes bodily injury or property damage to something other than the work product. In other words, the policy does not cover an insured from liability for its building flaws or deficiencies but covers the insured from liability for injury incurred by a third party or for damage to property other than the work product, which is caused by such flaws and deficiencies.
>
> * * *
>
> The Court finds that the Mintmans' claims of intangible economic loss are not such as to be an event that qualifies as an "occurrence" causing "property damage" under the clear and unambiguous language of CIC's CGL policy.

(Opinion and Order, 4-5, Transcript of Record, 583-84).

While the case was pending in the Court of Appeals, this Court's decision in Bituminous Cas. Corp. v. Kenway Contracting, Inc., 240 S.W.3d 633, 638 (Ky. 2007) became final. Based in part

upon that decision, the Court of Appeals reversed the trial court and remanded the case for consideration of coverage in light of the exclusions, which were not addressed by the trial court initially, though they were raised and argued by Motorists.

> While Cincinnati's argument is compelling, our view, guided by the decision in *Bituminous*, is that since comprehensive general liability policies are designed to cover broad risks, Motorists has the better argument. The damage to the Mintmans' house was clearly property damage and was caused by an "occurrence" since the damage was undoubtedly accidental in the sense that it was not intentional. Thus, the trial court erred in finding that the damages to the Mintmans' house should not be construed as constituting an "occurrence." However, as the trial court did not consider all of Cincinnati policy's provisions, specifically those exclusions related to Elite's work product, no determination has been made as to whether coverage is otherwise precluded.
>
> Therefore, we vacate the Jefferson Circuit Court's opinion and order and remand this matter to that court for reconsideration in light of all the policy provisions and the Kentucky Supreme Court's opinion in *Bituminous*.
>
> ALL CONCUR.

(Court of Appeals Opinion, 7-8).

This Court has granted discretionary review.

ARGUMENT

(1) THE DAMAGES OCCASIONED BY THE INSURED'S WORK ON THE MINTMANS' HOME WERE PROPERTY DAMAGES RESULTING FROM AN OCCURRENCE OR OCCURRENCES AS CONTEMPLATED WITHIN THE

COVERAGE PROVIDED BY CIC'S COMMERCIAL GENERAL LIABILITY POLICY.

Liability insurance is commonly referred to as third party insurance. The insurer's duty to pay does not run directly to the insured - rather, the insurer has a duty to indemnify its insured for any liability the insured may have to the injured party. The purpose of general liability policies is to safeguard the insured from liability for personal injury or property damage to a third party that could have been caused by the insured's products, operations, or services.

As the appellant has so meticulously pointed out, some jurisdictions do not cover the repair or replacement of faulty work. Contractors in those jurisdictions "are often surprised to learn of this in view of the fact that these costs are often the most significant exposures and expenses at issue in construction disputes." Maniloff, Insurance Coverage: Hot Topics, Morgan Stanley Insurance - Property and Casualty, 6 (September 9, 2004).

The standard commercial general liability insurance policy was originally promulgated in 1940. Since that time, the standard form has undergone five principal revisions, the most recent of which came into use in 1986 and represents the coverage provided in the CIC policy. 9A COUCH, INSURANCE 3d, Section 129:1 (2005). Most modern policies are written on standardized forms that are developed by the Insurance Services Office, Inc. Ibid.

> [C]ommercial general liability insurance policies provide for broad coverage generally. Commercial general liability insurance policies consist of two primary parts: 1) the insuring clauses, which set forth the specific risk or risks covered by the policy; and 2) the exclusions which remove coverage for risks that should otherwise fall within the purview of the insuring clauses.

Ibid.

The clear intent of the policy at issue was to recover for damages arising out of an accidental result of physical injury to tangible property. It applies to property damage caused by an occurrence. "Occurrence" is defined as an accident, and "property damage" as physical injury to tangible property, including loss of use of that property. Certainly, that was the result of the work of Elite's subcontractors on the Mintman property. There is a clear distinction between accidental means and accidental results.

> In making specific interpretations, the courts have construed the word "accident" to mean something unforeseen, unexpected, and unpremeditated; something which does not occur in the usual course of things.
>
> * * *
>
> In construing whether or not a certain result is accidental, it is customary to look at the casualty from the point of view of the insured, to see whether or not from his point of view it was unexpected, unusual, and unforeseen.
>
> * * *

> It is the layman, not the insurance attorney, who is insured; the latter would probably refuse many a policy with the wording now standard in them, knowing the effect which many courts have given thereto.
>
> * * *
>
> While courts originally started out to give liberal constructions to policies of accident insurance, they often either became sidetracked by the possibility of demonstrating acute differences between policy wordings, or were misled as to the desirability of certain results by some writers prominent in this field.

1A APPLEMAN, INSURANCE LAW AND PRACTICE, Section 360 (1981).

As to CIC's suggestion that the central issue is "whether claims of faulty workmanship against an insured constitute claims for 'property damage caused by occurrence' for purposes of a commercial general liability policy," we would refer the Court to 2 WINDT, INSURANCE CLAIMS & DISPUTES (5th ed. 2007), wherein the author states:

> It has been held that "an insured's faulty workmanship is not 'property damage.'" [quoting from Golden Eagle Ins. Co. v. Travelers Companies, 103 F.3d 750, 757 (9th Cir. 1996) (overruled on other grounds by Government Employees Ins. Co. of Dizol, 133 F.3d 1220 (9th Cir. 1998) (California law)] That holding is unjustifiable. If the insured's work physically deteriorates in some way, the work has suffered "property damage."
>
> * * *
>
> In terms of what constitutes a claim for loss of tangible property, clearly a claim for damages because of a physical injury to use

> some tangible property triggers coverage. The loss of use need not be total. The word *use* connotes the idea of some kind of application of the property.

Id. at Section 11:1 (emphasis added).

Insofar as the appellant claims that its argument as it pertains to the lack of an occurrence constitutes the majority rule, commentators do not necessarily agree. Again, in WINDT, supra, Section 11:3, we find:

> [O]ne common definition of occurrence is that it is an accident that results in "bodily injury or property damage neither expected nor intended from the standpoint of the insured." Such policy language has been interpreted by most courts to allow an occurrence to exist even as to intentional acts because the words *not intended* related to the words *injury* or *damage*, not the underlying cause.

(Emphasis added).

Elite Homes and its subcontractors intended to proceed with the construction of the Mintman home in the manner which they adopted. However, the results of the work were certainly not expected or intended. The results, or resulting damage, from all negligent acts and some intentional acts are neither expected nor intended; but this does not relieve the actor's insurer from responsibility for indemnifying the injured party or parties.

Foreign Cases

We will concede that there is a split of authority in

other jurisdictions on the question before this Court and observe that the appellant has carefully pointed out the authorities which support its arguments. Those cases which find coverage are, from our point of view, also worthy of note:

Lennar Corp. v. Auto-Owners Insurance Co., 151 P.3d 538 (Ariz. App. 2007) (While faulty construction does not constitute an occurrence, damage to the property resulting from faulty work may constitute an occurrence.); Federated Mut. Ins. Co. Grapevine Evacuation, Inc., 197 F.3d 720 (5th Cir. 1999) (Texas law) (Parking lot damage resulting from installation of sub-standard fill materials constituted an occurrence.); Kalchthaler v. Keller Construction Co., 224 Wis. 2d 387, 591 N.W.2d 169 (Wis. Ct. App. 1999) (Windows leaking as a result of negligent installation was an occurrence.); High Country Association v. N.H. Ins. Co., 139 N.H. 39, 648 A.2d 474, 478 (N.H. 1994) ("Continuing exposure to moisture seeping through the walls of the units" of a condominium caused by negligent construction was an occurrence.); Erie Ins. Exchange v. Colony Development Corp., 136 Ohio App. 3d 406, 736 N.E.2d 941 (Ohio Ct. App. 1999) (Negligent construction of condominium complex that resulted in property damage constituted an occurrence.); Auto-Owners Insurance Co. v. Home Pride Companies, Inc., 268 Neb. 528, 684 N.W.2d 571 (2004) (A standard commercial general liability policy covered an insured contractor for the faulty workmanship of its subcontractor.); Lee Builders, Inc. v. Farm Bureau Mutual Ins.

Co., 281 Kan. 844, 137 P.3d 486 (2006) (Moisture leakage over time caused by defective materials or workmanship which led to structural damage within a constructed home was an "occurrence" under the CGL policy. The damage was an occurrence because faulty materials and workmanship provided by the insured's subcontractors caused continuous exposure of the home to moisture, which was both unforeseen and unintended.); Same effect: Fidelity & Deposit Co. of Maryland v. Hartford Casualty Ins. Co., 189 F.Supp.2d 1212 (D. Kan. 2002) (applying Kansas law); American Family Mut. Ins. Co. v. American Girl, Inc., 673 N.W.2d 65 (Wis. 2004) (Defective construction constituted an accident as the damage was clearly not intentional and not anticipated by the parties.); Lennar Corp. v. Great American Ins. Co., 200 S.W.3d 651 (Tex. App. 2006); Lamar Homes, Inc. v. Mid-Continent Casualty Co., 242 S.W.3d 1 (Tex. 2007) (Suit for declaration of rights under a GCL policy where insurer refused to defend builder for purchaser's claims arising out of defects in their foundation. Held that allegations of unintended construction defects could constitute an accident or occurrence under a CGL policy and that allegations of damage to the home itself could constitute property damage. Questions addressed by the Texas Supreme Court following certification from the Fifth Circuit in view of inconsistent intermediate court decisions in the state.); United States Fire Ins. Co. v. J.S.U.B., Inc., 979 So.2d 871 (Fla. 2007) (Resolving two decisions in Florida's intermediate

appellate courts, the state Supreme Court found that faulty workmanship that was neither intended nor expected from the contractor's standpoint would constitute an accident, and thus an occurrence, under a post-1986 standard form CGL policy.); The Travelers Indemnity Co. of America v. Moore & Associates, Inc., 216 S.W.3d 302 (Tenn. 2007) (The policy provided coverage for any property damage caused by an event that was foreseeable to the contractor, including continuous exposure to substantially the same generally harmful conditions. Damages caused by faulty workmanship were property damage. Damages caused by faulty workmanship of a subcontractor were covered, and insurer had a duty to defend against a claim that water penetration resulting from the faulty workmanship of a subcontractor caused damage to the contractor's work.); Aten v. Scottsdale Ins. Co., 511 F.3d 818 (8th Cir. 2008) (Minnesota law) (Damage resulting from an improperly-graded basement floor is property damage caused by an occurrence and is covered where subcontractors performed the defective work.); Auto Owners Ins. Co., Inc. v. Newman, 2008 WL 648546 (S.C. 2008) (Water damage to home caused by defective exterior insulation is property damage caused by an occurrence under builder's CGL policy.); Country Mutual Ins. Co. v. Carr, 867 N.E.2d 1157 (Ill. App. 2007) (Allegations regarding movement of basement walls due to inappropriate backfill and negligence in use of earthmoving equipment was sufficient to qualify as property damage and was an

occurrence for purpose of insurer's duty to defend.); Missouri Terrazo Co. v. Iowa National Mut. Ins. Co., 740 F.2d 647 (8th Cir. 1984) (Missouri law) (Diminution in value of building caused by damaged floors is covered.); North American Precast, Inc. v. General Cas. Co. of Wisconsin, 2008 WL 906327 (S.D. W.Va. 2008) (West Virginia law) (Damage to wall and floor caused by defective concrete that collapsed after installation constitutes property damage caused by an occurrence.); Ohio Cas. Ins. Co. v. Hanna, 2008 WL 2581675 (Ohio App. 2008) (Cracked framing which affected structural integrity of the house constituted property damage caused by an occurrence.); Transcontinental Ins. Co. v. Engelberth Construction, Inc., 2007 WL 3333465 (D.C. Vt. 2007) (Vermont law) (Alleged construction defects making hotel uninhabitable were caused by an occurrence under contractor's CGL policy that required insurer to defend.); Web Construction, Inc. v. Cincinnati Ins. Co., 2007 WL 4230751 (D.C. Minn. 2007) (Minnesota law) (Cracks and defects in concrete floor poured by subcontractor was property damage caused by an occurrence under general contractor's CGL policy.)

Kentucky Authorities

Any discussion of Kentucky law relating to the coverage provided by commercial general liability insurance policies must begin with the landmark decision of James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273 (Ky. 1991).

As the Court is well aware, that case involved environmental contamination at the insured's wood-preserving treatment plant.

CIC seeks to distinguish Brown Foundation on the grounds that it fails to "squarely address fortuity." (Brief for Appellant, 22). CIC devotes a substantial part of its argument by suggesting that there is some sort of difference between the terms "fortuity" and "accidental." Respectfully, however, they are synonymous. Merriam-Webster's Collegiate Dictionary (10th ed. 1993) lists "fortuitous" as the first synonym for "accidental." Appellant suggests that the makeup and mindset of this Court has materially changed since its decision in Brown Foundation and that it would be appropriate to overrule it. Naturally, we disagree.

This Court, in Brown Foundation, held in part:

> The insured is entitled to all the coverage he may reasonably expect under the policy. Only an unequivocal, conspicuous and plain and clear manifestation of the company's intent to exclude coverage will defeat this expectation.
>
> * * *
>
> The primary purpose of a comprehensive general liability policy is to provide broad comprehensive insurance. Obviously the very name of the policy suggests the expectation of maximum coverage. * * * All risks not expressly excluded are covered, including those not contemplated by either party.
>
> * * *
>
> The term "occurrence" is more expansive than "accident" . . .. * * * Courts and

> commentators alike are in agreement that the term "occurrence" is to be broadly and liberally construed in favor of extending coverage to the insured.

814 S.W.2d at 277-78.

As we have heretofore pointed out, CIC's disclaimer letter refusing its insured's tendered defense made a conscious concession of uncertainties and ambiguities in the policy. At least, it indicated that there were questions involved. In this regard, the Brown Foundation court held:

> [T]erms of insurance contracts have no technical meaning in law and are to be interpreted according to the usage of the average man and as they would be read and understood by him in the light of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured.

814 S.W.2d at 279.

The Court further recognized that "it cannot be accepted as a fact that the parties in good faith intended to bargain for insurance that paid no benefits." 814 S.W.2d at 279.

In its tardy disclaimer letter to Elite Homes, CIC indicated that its refusal to defend was based upon "a question if all claims fit the definition of property damage in the policy." (Transcript of Record, 530-34) (emphasis added). Brown Foundation recognized that: "When dealing with its insured, the insurance company has the obligation to exercise the utmost good faith." 814 S.W.2d at 280. If an insurer has "questions" about coverage under

its policy, it in good faith must defend the insured and sort out these questions at a later date. The duty to defend is broader than the duty to indemnify. Ibid.

Brown Foundation must not be relegated to the dust heap of jurisprudence.

In Bituminous Casualty Corporation v. Kenway Contracting, Inc., 240 S.W.3d 633 (Ky. 2008), the insureds, Neal and Judy Turner, owned a single-story residential structure with an attached carport which they intended to convert for commercial use. They contracted with Kenneth Allen of Kenway Contracting, Inc. to accomplish the project. Kenway agreed to remove the attached carport, the concrete pad beneath the carport, and an old asphalt driveway. The residential structure was not to be involved in Kenway's work. Dwight McComas, a Kenway employee and heavy-equipment operator, was to meet Kenneth's brother, Jody Allen, at the property at a certain time to assist Allen with removal of the attached carport. When Allen arrived within five to ten minutes late, McComas had commenced the demolition project and mistakenly removed the carport and over half of the residential structure.[1] Kenway had a CGL policy issued by Bituminous. Bituminous took the

[1] On page 12 of the movant's motion for discretionary review, it inadvertently states that in Bituminous the contractor "was hired to tear down a house who instead tore down an attached carport." Actually, the inverse is true. The contractor was hired to tear down the carport and leave the attached residential structure intact. This, however, is a distinction without a difference.

position that the events did not meet the definition of an "occurrence," and further that certain exclusions similar to those in the CIC policy applied.

Kenway filed a declaratory judgment action in which the trial court ruled that the damages fell within the definition of an "accident." The trial court felt that the property damage was "unintended and unexpected" from the standpoint of the insured, Kenway, and that certain exclusions were also applicable. The Court of Appeals affirmed the finding of the trial court that Bituminous was obligated to defend and indemnify Kenway.

On discretionary review, this Court began its analysis by noting that under its decision in James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., supra, an ambiguous policy is construed against the drafter; that "the primary purpose of a comprehensive general liability policy is to provide broad comprehensive insurance"; that "the very name of the policy suggests the expectation of maximum coverage"; that "all risks not expressly excluded [under the CGL policy] are covered, including those not contemplated by either party"; that "the insured is entitled to all coverage he may reasonably expect under the policy"; and "only an unequivocal, conspicuous, and plain and clear manifestation of the company's intent to exclude coverage will defeat this expectation." 240 S.W.2d at 638.

In finding in favor of the insured in Bituminous, this

Court concluded that the policy by its terms applied to property damage caused by an occurrence, which is defined as an accident. As in our policy, the term "accident" was not defined in the Bituminous policy. Bituminous argued that the coverage issue or that the accidental nature of the damage should be viewed from the perspective of the Kenway employee who damaged the structure. However, the Court noted that there was no claim of liability against the employee, but rather against Kenway, his employer. The Court then held that the damage was not intended or expected from the standpoint of Kenway's officers, i.e., the Allen brothers. The Court concluded: "The damage to the Turners' property was unexpected and unintended by the insured. It was not the plan, design, or intent of the insured." 240 S.W.2d at 639. Therefore, the definition of "accident" was met, as an accident satisfied the definition of "occurrence" as set out in the policy.

The Court then looked at two of the business exclusions upon which Bituminous relied and concluded that they were both subject to multiple interpretations and therefore ambiguous.

CIC seeks to distinguish Bituminous on the grounds that the issue in Bituminous was whether a contractor tearing down the wrong structure constituted an occurrence, whereas the issue herein is whether a contractor's poor workmanship constitutes an occurrence. However, in both cases, the result was accidental - or, if the appellant prefers, fortuitous - and the policy in

Bituminous, as well as in the case at bar, covers property damage caused by an occurrence which is defined as an accident. If "tearing down the wrong structure" is not "poor workmanship," we are at a loss to characterize it.

It will be observed that in the case at bar the CIC policy applies to damages to property caused by an occurrence. "Occurrence" is defined as an "accident"; and "property damage" is defined as "physical injury to tangible property, including loss of use, and loss of use of tangible property that is not physically injured." The term "accident" is not defined in the policy. We must therefore look elsewhere for a definition.

In Fryman v. Pilot Life Ins. Co., 704 S.W.2d 205 (Ky. 1986), and Stone v. Kentucky Farm Bureau Mut. Ins. Co., 34 S.W.3d 809, 812 (Ky. App. 2001), an "accident" is defined as "something that does not result from a plan, design, or intent on the part of the insured." (Emphasis added).

The damage to the Mintmans' property was unexpected and unintended by Elite Homes. Therefore, this can only be characterized as an "accident," thereby satisfying the definition of "occurrence" contained in CIC's CGL policy.

In BLACK'S LAW DICTIONARY, (6th ed. 1990), at p. 15, we find the following definition of "accident" in the context of insurance contracts: "A more comprehensive term than 'negligence,' and in its common signification the word means an unexpected happening without

intention or design." Certainly, it cannot be reasonably suggested that the damages which are the subject of this litigation happened with the intent or design of Elite Homes, Inc.

The unfortunate happenstance of the finished product was indeed an accident - and therefore an occurrence. It was also clearly property damage since it was physical injury to tangible property. While the manner of the work was intentional, the resulting damage was neither expected nor intended and was therefore an accident within the definition of "occurrence" in the policy.

(2) THE ALLEGATIONS OF THE MINTMANS' COMPLAINT AGAINST CIC'S INSURED, ELITE HOMES, ARE, AT THE VERY LEAST, POTENTIALLY WITHIN THE COVERAGE TERMS OF THE CIC POLICY, THEREBY IMPOSING A DUTY TO DEFEND UPON THAT INSURER.

We have heretofore addressed the waffling nature of CIC's decision to not defend the claim against its insured. That decision was clearly an erroneous one.

In Kentucky, an insurer has a duty to defend if there is an allegation that potentially, possibly, or might come within the coverage terms of the policy. Pizza Magia International LLC v. Assurance Company of America, 447 F.Supp.2d 766 (W.D. Ky. 2006); Aetna Casualty & Surety Co. v. Commonwealth, 179 S.W.3d 830, 841 (Ky. 2006). The duty to defend is separate and distinct from an obligation to indemnify. In fact, it is a much broader duty.

James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 280 (Ky. 1991).

Should an insurer elect not to defend, it is liable for "all damages naturally flowing from its failure" should coverage later be found. Aetna Casualty & Surety Co., supra, at 841.

The Court of Appeals has remanded this case to the trial court for consideration of the applicability of the exclusions. However, in Bituminous Casualty Corporation v. Kenway Contracting, Inc., 240 S.W.3d 633 (Ky. 2008), this Court reviewed a 1986 version of the ISO's CGL policy and concluded that the exclusions were ambiguous. Since ambiguities in an insurance policy must be construed against the scrivener or insurer, it would seem that the case should be remanded with instructions to enter a judgment in favor of Motorists with respect to all claims, inclusive of property damage and attorney fees.

CONCLUSION

Mindless of metaphors, CIC suggests that should the Leaning Tower of Pisa fall because of defects in its construction, a CGL policy would not cover the damage sustained by the tower itself, but would cover damages to a passing chariot on which it may land. This is not a unique argument, and we will concede that some jurisdictions have made it a part of their law. However, in Kentucky, coverage based upon occurrences which are accidental in nature have not been so narrowly construed. James Graham Brown

Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273 (Ky. 1991); Bituminous Cas. Corp. v. Kenway Contracting, Inc., 240 S.W.3d 633, 638 (Ky. 2007).

CIC remains undeterred by the analysis advanced in these authorities and in effect asks this Court to overrule these two decisions and any others which may defeat coverage in the case at bar.

This Court held in Bituminous that its exclusions were ambiguous and consequently inapplicable. At the trial court level, we argued vigorously to the same effect: that the exclusions in the CIC policy were ambiguous. CIC chose to pass on this question and did not even suggest that they were applicable, asking the trial court to rule only on the coverage provided within the initial insuring agreement. The trial court adopted CIC's position and completely ignored the relevance or irrelevance of the exclusions.

Before the Court of Appeals, and again in this Court, CIC makes no effort to address the relevance of these exclusions, and the issue has not been preserved for appellate review. That aspect of the Court of Appeals decision which remands the case to the trial court for consideration of these exclusions at this late date contravenes the well-established principle against piecemeal litigation.

The only references to the exclusions will be found in

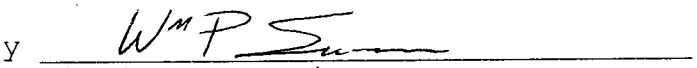
CIC's disclaimer letter to its insured. They were not relied upon at any level during the litigation. If CIC sought solace in the exclusions, it should have preserved their impact, if any, by standing upon them during the litigation. Its failure to do so - coupled with this Court's ruling in Bituminous as to their ambiguity - draws down the curtain.

This case involves a rather dry subject, and we have endeavored to address a substantial amount of law in Kentucky and elsewhere. We apologize for any tediousness. However, the question before the Court is of extreme importance to the economy of the Commonwealth. CIC would have this Court adopt a public policy requiring that in addition to a comprehensive general liability policy providing coverage for all of a contractor's projects, a contractor would be further required to purchase a performance bond for each and every individual undertaking. This is inconsistent with this Court's holdings in Brown Foundation and Bituminous.

It is therefore respectfully submitted that the decision of the Court of Appeals, insofar as it applies Bituminous, should be affirmed, but that on remand the trial court should be instructed to find coverage for the claims which were assigned to Motorists. If the trial court has any further tasks in this case, it should be limited to resolving any factual disputes as to the precise nature and amount of the damages sustained.

Respectfully submitted,

PHILLIPS PARKER ORBERSON & MOORE, P.L.C.

By 

William P. Swain
Paul J. Bishop
Sean Ragland
716 West Main Street, Suite 300
Louisville, KY 40202
(502) 583-9900
FAX: (502) 587-1927

COUNSEL FOR APPELLEE