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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
DOCKET NO. 12-0036

LISBETH L. CHERRINGTON,
Petitioner, Plaintiff below,

v.

Civil Action No. 06-C-27(J)
Greenbrier County Circuit Court

THE PINNACLE GROUP, INC.,
a West Virginia corporation, ANTHONY
MAMONE, JR., individually, and
OLD WHITE INTERIORS, LLC,
a West Virginia limited liability company,
Defendants below,

And

THE PINNACLE GROUP, INC.,
a West Virginia corporation, ANTHONY
MAMONE, JR.,
Petitioners, Third Party Plaintiffs below,

v.

GLW CONSTRUCTION, INC.,
Third Party Defendant,

And

THE PINNACLE GROUP, INC.,
a West Virginia corporation, ANTHONY
MAMONE, JR.,
Petitioners, Third Party Plaintiffs below,

v.

NAVIGATORS INSURANCE COMPANY
And
Third Party Defendant,

ERIE INSURANCE PROPERTY AND
CASUALTY COMPANY,
Respondent, Third Party Defendant below.

REPLY BRIEF OF PETITIONERS, THE PINNACLE GROUP, INC., ANTHONY MAMONE, JR., AND LISBETH L. CHERRINGTON

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I. ASSIGNMENTS OF ERROR

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II. ARGUMENT

1. THE COURT ERRED IN FINDING THAT THERE WAS NO PROPERTY DAMAGE CAUSED BY AN OCCURRENCE UNDER THE POLICY.

The CGL Ultraflex policy insuring clause covers bodily injury and property damage if it is caused by an "occurrence". An "occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Accident is not defined in the policy, but has been defined by this Court as an unusual, unexpected and unforeseen event. See *State Bancorp, Inc. v. U.S. Fid. & Guar. Ins. Co.,* 199 W.Va. 99, 483 S.E.2d 228, 233

(W.Va.1997). *Simpson-Littman Const., Inc. v. Erie Ins. Property & Cas. Ins. Co.*, Slip Copy, 2010 WL 3702601, at p. 8, (S.D.W.Va.2010) explained that a subcontractor's faulty workmanship in combination with a separate event that is unforeseen from the perspective of the insured constitutes an occurrence.[1] *Erie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement, Inc.*, 526 S.E.2d 28, 33 (W.Va.1999), holds that CGL policies "insure personal injury or property damage arising out of the work."

Erie argues here that the damage to the plaintiff's home was a result of solely poor workmanship, and poor workmanship, standing alone, is not an occurrence triggering coverage and that *Simpson-Littman* does not apply because Petitioners do not point to any separate event that caused the damage. However, the disputed facts contain an opinion that there was a separate event that constitutes an occurrence which triggers coverage. As explained in Petitioner's brief, the third party defendant's expert, Mr. Wood, testified that the damage to the concrete floors in the house and the garage, and walls in the garage, was caused by improper preparation of the subgrade, which caused settlement (the separate event), which caused the cracks and damage to the floors. Therefore, there are disputed facts to show a separate event. These alleged facts are strikingly similar, if not identical, to those in *Simpson-Littman*, where those same facts were determined to constitute an "occurrence." Likewise, third party defendant's expert testified that improper beam installation caused sagging to develop (a separate event) that led to cracks and damage to the walls and drywall. Improper roof installation caused water intrusion (a separate event) into the home, which damaged the ceiling and walls. Therefore, there is an "occurrence" and there should be coverage under the Erie Ultraflex policy.

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[1] Erie argues that the Petitioners cited *Simpson- Littman* only for the premise that the "your work" exclusion did not apply to this case. Not true. Petitioners cited *Simpson-Littman* for the premise that there was an "occurrence" under the facts of this case.

Furthermore, different witnesses claim the damages were caused by different events and circumstances. For example, there is testimony that it was the failure of subgrade work causing settlement which caused the floor and foundation walls to be damaged. There is evidence that the backing of trucks next to the wall before the concrete cured caused the foundation wall to crack. Obviously, these events are covered by these insurance policies.

Property damage is defined in the policy as physical injury to tangible property, including resulting loss of use, and loss of use of tangible property that is not physically injured. Erie argues that there was no assertion of property damage because the plaintiff only alleges economic losses[2], i.e., loss of the fair market value of the home. Erie's argument simply ignores the facts of the case. The plaintiff asserted a wealth of property damage, including cracks in foundation and floors in the house and garage, damage to the inside walls from a leaking roof, cracks all over the walls in the house and room over the garage, and other damage. [3] At the very least, while the Respondents may dispute that there was property damage, for example that there were no cracks in the foundation walls in the home, the jury may well determine that property damage did occur. For that reason alone, summary judgment was improper.

Erie argues that, in *Simpson-Littman*, where Erie was the defendant, it did not dispute that there was property damage, but in this case Erie does dispute it, as if this makes *Simpson-Littman*

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[2] In addition, the case respondent relies upon in its argument about economic loses is not factually similar to this case. In *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W.Va. 498, 625 S.E.2d 260 (2005) this Court interpreted a homeowners policy, not a commercial general liability policy, and further held that damages for economic loss caused by failing to disclose defects in the home are not property damage. Plaintiff asserted much more than the facts alleged in *Aluise*.

[3] Respondent further argues the Illinois case of *Viking Constr. Mgt. v. Liberty Mut. Ins. Co.*, 358 Ill.App.3d 34, 831 N.E.2d 1 (2005), which held that, in a claim of breach of warranty, cost of repair or replacement of a contractor's defective work is not covered. Erie argues that, because the plaintiff seeks money to repair or replace the damaged property, there is no property damage. Under Erie's argument, any time someone sought money to repair property damage, it would result in no coverage for the property damage. It is akin to arguing that because someone asks for money to repair their vehicle damaged in a car wreck, there is no property damage or there is no coverage. This is an absurd argument that negates the coverage entirely, whatever the Illinois cases say. Ask yourself, what property damage would be covered under Erie's argument?

inapplicable. Not true. In *Simpson-Littman*, Erie conceded that the nearly identical types of damage alleged therein constituted property damage. What is different about this case? The difference is that, in this case, Erie is attempting to avoid the obvious property damage in its attempt to get around the sound analysis in *Simpson-Littman*, which found that an "occurrence" existed under almost identical facts and that there was coverage for plaintiffs' claims. Likewise, Erie argues that, in *Simpson-Littman,* it did not argue the impaired property exclusion, but Erie did so here. The impaired property exclusion was presumably an available exclusion in the *Simpson-Littman* case, but Erie did not assert it. In fact, in the initial brief to the trial court in this case, the impaired property exclusion was not given much consideration by Erie. It was not until *Simpson-Littman* was presented to the trial court in response to summary judgment did Erie switch gears in this case to attempt to avoid the obvious applicability to the facts of this case. Erie cannot avoid the fact that, in the most factually similar case of all of the cases cited by both parties, an *in state court* found coverage against the same insurance company with the same material policy language. None of the other West Virginia cases or other cases relied upon by defendants are as factually similar as *Simpson-Littman.*

The fact that Erie tries to float different exclusions and different meanings of policy provisions in different cases with substantially similar facts lends credence to Petitioners' argument that the policies are ambiguous. If the impaired property exclusion is so clear and unambiguous and so clearly applicable to the facts of this case, why didn't Erie assert it in *Simpson-Littman*? Perhaps it wasn't so clear to Erie then. It is no clearer now.

2. THE COURT ERRED IN FINDING THAT THE "YOUR WORK" EXCLUSION PRECLUDED COVERAGE BECAUSE THERE IS AN EXCEPTION TO THE EXCLUSION THAT PROVIDES COVERAGE FOR THE ACTS OF SUBCONTRACTORS.

From its brief, it appears that Erie voluntarily concedes for purposes of this appeal that the "your work" exclusion need not be addressed as applicable to this case,[4] and asserts that the trial court did not find that this exclusion applied in the Court's order. However, Erie prepared the order for the Court and did not clearly address that point. Erie concedes that its order finds that exclusion "M," the "impaired property or property not physically injured" exclusion applies, and not the "your work" exclusion. Nor does Erie substantively argue in its brief to this court that the "your work" exclusion applies. Therefore, the Petitioners will not address it further in this reply.

3. **THE COURT ERRED IN FINDING THAT THE EXCLUSION FOR "IMPAIRED PROPERTY OR PROPERTY NOT PHYSICALLY INJURED" EXCLUDED COVERAGE BECAUSE THERE IS PHYSICAL INJURY TO TANGIBLE PROPERTY AND BECAUSE THERE WAS ADDITIONAL PROPERTY DAMAGE CAUSED BY THE IMPAIRED PROPERTY, WHICH IS COVERED BY THE POLICY.**

While the impaired property exclusion is difficult to understand even by those with legal and insurance training, the impaired property exclusion states as follows:

> **m. Damage To Impaired Property Or Property Not Physically Injured**
> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
> 1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
> 2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

(See Appx. Ex. 7, Erie Ultraflex policy, Commercial Liability Coverage Form at p. 4, Exhibit C to brief below.)

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[4] See Respondent's brief at p 28, fn11

Impaired property is defined as:

Tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

a. The repair , replacement, adjustment or removal of "your product" or "your work"; or

b. Your fulfilling the terms of the contract or agreement.

See Appx. Ex. 7, Erie Ultraflex policy, CGL Coverage Form at p. 10, [emphasis added].

For example, defendant builds a defective or poor quality cog and puts it in a machine he did not build and the machine shorts out and, as a result, the entire machine will not work. The costs related to the machine are not covered only if the repair of his cog will restore the full use of the machine. If repairing the cog does not make the machine work, then it is not "impaired property" according to the definition because the ***property cannot be restored to use by repairing defendant's cog.*** Therefore, the exclusion for impaired property would not apply.

Even if there is impaired property or property not physically injured, there is another hurdle contained in the exception to the exclusion which states the exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use. So, for example, defendant's poorly constructed cog causes a fire to the machine. The machine is covered.

To apply the example to the allegations in this case, the subgrade under the floor is the cog and the cement floor is the machine. Repairing the subgrade (the cog) will not correct the cement floor (the machine) problems (the cracks and sagging). Therefore, it is not impaired property under the definition in the policy and, if it does not meet the definition of impaired property, the impaired property exclusion does not apply.

Likewise, the situation here does not meet the definition of "property not physically injured." The "property not physically injured" section of the exclusion is not defined in the policy and, therefore, must be interpreted according to its ordinary meaning. Taking the same example, defendant's poor quality cog is put in the machine he did not build and the machine just does not run. There is no damage to the machine. If, and only if, there is no physical injury to the machine, there would not be coverage for the machine. If there was physical damage to the machine, the machine would be covered. Here, allegations show there is property that is physically injured. Specifically, for example, allegations of cracks, dips and slopes in the cement floors from settlement, and cracks in the drywall from a beam that sagged after installation, damage to ceiling and walls from a leaking roof. As there is "physical injury to property," the "property not physically injured" exclusion does not apply. This is true whether the work is performed by the defendants or by their subcontractors.[5]

The exception to the exclusion prohibits its application here, as well. The exclusion does not apply if you lose the full use of the floor, house, or walls, because of accidental injury to "your work" after it has been put to use. Here, as discussed in relation to the law of "occurrence by accident," the alleged accidental injury is the settlement of the subgrade, sagging of the beam resulting in full loss of use of the floor and walls, and leaking water causing damage to the ceiling and walls (other property), so the exception to the exclusion applies here, as well. Regardless, this court need never get to the exception to the exclusion because the facts of the case do not meet the definition of impaired property or property not physically injured.

Erie and the trial court primarily relied upon and cited *Groves v. Doe*, 333 F. Supp. 2d 568 (N.D.W. Va. 2004), to argue that the impaired property exclusion applies in this case. Aside

[5] "Your work" is defined in the policy generally as work or operations performed by you or on your behalf, including materials furnished therewith. See Appx. Ex. 7, CGL Coverage Form at p. 12.

from the flawed logic of *Groves* discussed in the Petitioners' initial brief, a careful reading of the *Groves* case shows that there was no allegation of damage caused in addition to the poor workmanship. Not so here. There are allegations of damage to the concrete floors in addition to and allegedly caused by the improper subgrade work. There are allegations of damage to the walls from the improper beam work. Therefore, the facts of *Groves* are entirely distinguishable from the facts of this case.

4. THE COURT ERRED IN FINDING THAT THE HOMEOWNERS POLICY DID NOT PROVIDE COVERAGE BECAUSE THERE IS COVERAGE FOR ACTS AS A SALESMAN

Defendant and third party plaintiff Mamone purchased a homeowner's policy which excluded business pursuits. However, there was an exception to the exclusion for the acts of a salesman. There is no language in the policy that limits coverage for acts of the insured as a salesman. The plaintiff and Mamone state that Mamone acted as a salesman when he convinced the plaintiff to use his services instead of his competitors and when he made representations to the plaintiff in the course of the sale of Pinnacle's services and in the sale of furnishings to the plaintiff. Therefore, Mamone should be covered under his homeowner's and umbrella policy for his acts as a salesman.

The homeowner's policy, called the Home Protector policy, contains language that says that it covers the named insured for conduct as a salesman:

> We do not cover under Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury Liability Coverage and Medical Payments to Others Coverage:
>
> . . .
>
> 2. Bodily injury, property damage or personal injury arising out of business pursuits of anyone we protect.
>
> . . .

> **We do cover:**
>
> . . .
>
> b. **business pursuits of salespersons**, collectors, messengers and clerical office workers employed by others.[6] We do not cover installation, demonstration and servicing operations.

(See Appx. Ex. 7, Erie Home Protectors Policy, at p. 15, Exhibit D to brief below.) Erie argues in relation to other policies, that the policy provisions are unambiguous and should be applied as written. Accordingly, the exception to the exclusion should be applied as written. It says we do cover *business* pursuits of a *salesperson*. It is not ambiguous and it is not qualified. Therefore, it should be applied. Even if the policy were ambiguous, as Erie implies in its argument, then the ambiguity is interpreted in accordance with the reasonable expectations of the insured and in favor of coverage.

Erie argues that Mamone was not working as a salesperson when the alleged misrepresentations occurred. Plaintiff and Mamone say he was a salesperson for Pinnacle. At the very least, that is a factual issue, not a legal one and should be decided by a jury.

5. THE COURT ERRED IN FAILING TO INTERPRET THE AMBIGUOUS INSURANCE POLICIES CONSISTENT WITH THE REASONABLE EXPECTATIONS OF THE INSURED

Expert testimony explained the history of the CGL policy. (See Appx. Ex. 12 at pp 28-30.) The expert explained that years ago the CGL policies attempted to exclude coverage for negligence of subcontractors. Contractors complained and, as a result, the industry form policies[7] were modified to create express coverage for subcontractors. The expert testimony is supported by the relevant literature:

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[6] Anthony Mamone was employed by Pinnacle.

[7] The relevant portions of the Erie policies follow the form policies in material part. See Appx. Ex. 12 at p. 29.

> [P]erhaps more significant difference between the 1973 exclusion and the current one is that the current one is clearly stated not to apply if the damaged work or the work out of which the damage arises was performed by a subcontractor. Thus, with respect to completed operations, if the named insured becomes liable for damage to work performed by a subcontractor---or for damage to the named insured's own work arising out of a subcontractor's work--- the exclusion should not apply to the resulting damage. **Neither, apparently, should any exclusion apply to the named insured's liability for damage to a subcontractor's work out of which the damage to other property arises.**

Malecki, Donald, *Commercial General Liability, Claims Made and Occurrence Forms, Sixth Edition,* National Underwriter Company, at 58. It is important that the text explains, because of the specific change to cover subcontractor negligence, no other exclusion should apply to subcontractor negligence. Even if the treatises, prepared by the insurance industry for teaching the insurance industry, are not binding on this Court, the rationale contained therein comports with the reasonable expectations of Mamone and Pinnacle. The policy language as a whole is confusing and ambiguous. This is compounded by looking at the language indicating that the work of the subcontractors is covered, without qualification. Therefore, the policy should have been construed by the court below according to the reasonable expectations of the insured and to provide coverage. The court below erred because it interpreted the policy liberally in favor of the insurance company.

The Respondents argue that the policy should not be read as whole, but instead, the exclusions are to be read in isolation[8] and, if the part of one of the exclusions is clear, it must be upheld even if it is contradictory or unclear when reading the other parts of the policy. Erie bases this premise upon one case from Illinois. See *Johnson v. State Farm*, 346 Ill.App.3d 90 (2004). Respondents are incorrect because West Virginia law holds that the policy must be read in total, not in discrete parts or in isolation, to determine whether there is ambiguity: "Our

[8] See Respondent's brief at p. 31.

primary concern is to give effect to the plain meaning of the policy and, in doing so, **we construe all parts of the document together**." *Payne v. Weston*, 195 W.Va. 502, 597, 466 S.E.2d 161, 166 (1995)[9]

Defendant relies on *North American Precast, Inc. v. General Cas. Co. of Wis.*, 2008 WL 906327 (S. D. W.Va. 2008) in its argument that the impaired property exclusion is not ambiguous. However, that court actually held: "Inasmuch as plaintiffs *have not pointed to an ambiguity* that would merit invocation of the reasonable expectations doctrine, it has no application here." Id at p. 9. In other words, the plaintiffs in *North American* did not identify any ambiguity in the policy in that case, so the court did not consider it. Not so here. The *North American* court did not make any substantive analysis of the ambiguity of the policy provisions at issue.

Importantly, the impaired property exclusion relied upon by Erie is not clear. It has general language that is not understandable unless you are an insurance expert. If Erie's argument about the impaired property exclusion was correct, then the negligence of the subcontractors is never covered because it would always constitute "impaired property or property not physically injured." If that is true, then why did the policy need to mention the coverage for the negligent work of the subcontractors at all? To mislead the insured into thinking he had coverage for the work of the subcontractors so he would buy the expensive commercial "Ultraflex" policy that is practically worthless to him in his business? Tony Mamone paid very good money to have coverage for the work of the subcontractors, because the policy said so. Erie's reliance on another, general exclusion, with confusing language, creates an

[9]In its brief, Respondent comments that Petitioners misunderstand the well settled law, but then cities only out of state cases to support the criticisms. Erie then goes on to misstate West Virginia law in interpreting insurance policies above.

ambiguity in the policy for any reasonable man. Reasonable man is the standard, not reasonable insurance executive, reasonable insurance expert, or reasonable person with a law degree.

In addition, the *North American* court looked at the CGL policy where defective work related to concrete planks caused the plank to collapse and damage walls and floors. The court held that 1) the damage constituted property damage that met the definition of an occurrence; and 2) the impaired property or property not impaired exclusion did not apply to the damage to the walls and the floor. Id at 7, 8.

What is also interesting about *North American* is that the court independently analyzed each type of damage asserted and found that some of the damage was covered, i.e., the damage to the concrete floor and walls, and some of it was not covered, i.e., the concrete planks. What is clear from the respondent's brief is that they are arguing for an all or nothing determination, which is what the trial court ordered. In other words, Erie argues, as it did below, that all of the damage was not covered. In this factually complex case, if the jury believes one expert over another expert, then at the very least, certain aspects of the damage would trigger coverage. For example, the floor repairs could be covered, but not the drywall cracks, or vice versa, or the cement floor could be covered, but not the subgrade repair. The trial court plainly erred when it, in effect, decided these issues of fact and held that none of the damage was covered.

6. AT THE VERY LEAST, THE SUMMARY JUDGMENT ORDER RELIES UPON DETERMINATIONS OF DISUPTED FACTUAL ISSUES THAT SHOULD HAVE BEEN DETERMINED BY A JURY, NOT THE COURT.

In its brief, the Respondent makes several factual arguments in order to avoid coverage:

1. That the damage to the plaintiff's home was a result of poor workmanship alone. See Respondent's brief at p. 8.

2. That there was no separate event to trigger coverage. See Respondent's brief at p. 25.
3. That there was no occurrence because a breach of contract (poor workmanship) caused the property damage. See Respondent's brief at p20-21.
4. That Mamone was not a salesperson. See Respondent's brief at p. 35.

This begs the question: Is it settlement that caused the damage to the cement floors or is it the improper installation of the floors itself, or is it both, or is it none of the above? These are issues of fact meant to be decided by a jury, and will be decided by the jury in this case. At the very least, these issues of fact should not have been decided by the Court to deny coverage. Defendant cites *Corder v. William W. Smith Excavating Co.,* 210 W.Va. 110, 556 S.E.2d 77, (W.Va.2001), several times in support of its position. However, in *Corder*, this Court found remand necessary to determine the cause of the failing sewer pipe. At the very least, the same is necessary here.

What if the jury determines at trial that the third party defendant's expert is correct and the improper preparation of the subgrade caused settlement, which was the cause of the damage to the floors? Should a jury make that determination, then the events triggering coverage exist, but there would be no coverage because the judge effectively determined otherwise in his summary judgment order. This is improper.

What becomes clear from a reading of the brief of the respondent and the record is that there is a factual dispute among the parties and the experts about the cause of the damage to the plaintiff's home. It is further clear that a determination of those disputed facts was necessary in order for the judge to grant summary judgment. In making a decision to grant summary judgment for Erie, the trial court refused to allow factual testimony and, in effect, made a

determination of the ultimate facts of the case.[10] Those ultimate factual determinations should have been made by a jury, not the judge.

III. CONCLUSION

There was property damage in this case which constituted an "occurrence" under the policy because there was damage to tangible physical property that was neither expected nor intended by the insured. The exclusions for "your work" and "impaired property or property not physically injured," do not apply to the facts of this case for the conduct and negligence of the subcontractors, and because the property was physically injured and because there was property damaged in addition to the product of the subcontractor. At the very least, the various policy provisions are ambiguous and should have been interpreted consistent with the reasonable expectations of the insured to provide coverage.

For the reasons set forth above, defendants, Anthony Mamone and Pinnacle Group Inc. and plaintiff, Lisbeth Cherrington, respectfully request that this Court reverse the order granting summary judgment to Erie Insurance Company, and hold that Erie commercial liability, homeowner's and umbrella policies provide coverage to the defendants for the plaintiff's loses, for their fees and costs associated with this motion, or remand the case to the trial court to allow a jury to determine the many issues of fact, and for such other relief as is proper and just.

ANTHONY MAMONE and
PINNACLE GROUP INC.

By Counsel

[10] While the judge did not make any of the necessary express factual findings in its order, the conclusion of no coverage required factual determinations.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0036

LISBETH L. CHERRINGTON, Plaintiff Below, and
THE PINNACLE GROUP, INC., a West Virginia
corporation, and ANTHONY MAMONE, JR., an
individual, and OLD WHITE INTERIORS, LLC,
a West Virginia limited liability company,
Defendants Below,

Petitioners,

v.

(Civil Action No. 06-C-27(P))
(Greenbrier County Circuit Court)

ERIE INSURANCE PROPERTY AND
CASUALTY COMPANY, Third-Party
Defendant Below,

Respondent.

CERTIFICATE OF SERVICE

I, James R. Sheatsley, counsel for Petitioners Pinnacle and Mamone, do hereby certify that true and exact copies of the foregoing "Reply Brief of Petitioners, The Pinnacle Group, Inc., Anthony Mamone, Jr., and Lisbeth L. Cherrington" and "Appendix" were served upon:

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in envelopes properly addressed, stamped and deposited in the regular course of the United States Mail, this 24th day of May, 2012.

James Sheatsley
James R. Sheatsley