

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

LISBETH L. CHERRINGTON,

Plaintiff,

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,

And

THE PINNACLE GROUP, INC.,
a West Virginia corporation, ANTHONY
MAMONE, JR.,

Third Party Plaintiffs,

v.

GLW CONSTRUCTION, INC.,

Third Party Defendant,

And

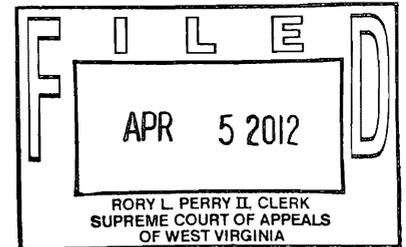
THE PINNACLE GROUP, INC.,
a West Virginia corporation, ANTHONY
MAMONE, JR.,

Third Party Plaintiffs,

v.

NAVIGATORS INSURANCE COMPANY
And ERIE INSURANCE PROPERTY AND
CASUALTY COMPANY,

Third Party Defendants.



**BRIEF OF APPELLANTS, THE PINNACLE GROUP, INC.,
ANTHONY MAMONE, JR., AND LISBETH L. CHERRINGTON**

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I. ASSIGNMENTS OF ERROR

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO COVERAGE UNDER THE POLICIES AT ISSUE:

- 1. THE COURT ERRED IN FINDING THAT THERE WAS NO PROPERTY DAMAGE CAUSED BY AN OCCURRENCE UNDER THE POLICY.**
- 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.**
- 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.**
- 4. THE COURT ERRED IN FINDING THAT THE HOMEOWNERS POLICY DID NOT PROVIDE COVERAGE BECAUSE THERE IS COVERAGE FOR ACTS AS A SALESMAN**
- 5. THE COURT ERRED IN FAILING TO INTERPRET THE AMBIGUOUS INSURANCE POLICIES CONSISTENT WITH THE REASONABLE EXPECTATIONS OF THE INSURED**

II. STATEMENT OF THE CASE

On or about July 2004, the plaintiff entered into a cost plus contract with The Pinnacle Group, Inc. (hereinafter referred to as “Pinnacle”), for the construction of a house at Lot #11 Traveler’s Hill, The Greenbrier Sporting Club at White Sulphur Springs. The plaintiff asserted that the defendants failed to build according to plan and billed the plaintiff for more than permissible under the contract. In addition, there were allegations asserted that defendants Pinnacle and Anthony Mamone (hereinafter “Mamone”) were negligent in the construction of said home by altering the design; negligently pouring and finishing the concrete floor in the

house and in the garage apartment;¹ in the finishing and painting of the house; in placing and securing the foundation; in failing to properly install the support beam², in improperly laying the backfill, in failing to prepare the sub grade under the house and the garage,³ in failing to properly construct the home in an economical manner; and for misrepresenting that they were billing properly for the costs, expenses, and services rendered and construction. Moreover, plaintiff's alleged that defendants breached their fiduciary responsibility owed to the plaintiff for failing to use reasonable diligence in securing the best prices for the best available products and services in constructing the home; for failing to keep accurate books and records of all purchases, receipts, and payments to third party providers of labor and material, including contractors and subcontractors; and for failing to provide accurate billings to plaintiff with accompanying records and receipts.

Plaintiff further alleged that defendants Pinnacle and Mamone committed fraud upon which the plaintiff relied. Mrs. Cherrington asserted that she relied upon the defendants to provide accurate and complete records and to use reasonable diligence in securing quality labor and materials at a reasonable price and to bill her only for actual prices paid to third parties and that defendants did not and represented otherwise.

Plaintiff also asserted that defendants Pinnacle and Mamone undertook to provide furnishings to plaintiff's home through a third party, Old White Interiors, LLC, which was also a business interest of Mamone's. (See Appx. Ex 7, Deposition of Mamone, at pp. 28,30, Exhibit B to brief below.) Plaintiff alleges that Pinnacle and Mamone negligently and wrongfully entered

¹ Defendants filed a third party action against their subcontractor, GLW Construction for the negligence in pouring and forming the cement. See Appx. Ex. 2.

² According to defendant GLW's engineer, Sam Wood. See Appx. Ex. 7, Deposition of Sam Wood at p. 31, Exhibit I to brief below.

³ According to defendant GLW's engineer, Sam Wood. See Appx. Ex. 7, Deposition of Sam Wood at p. 84, Exhibit I to brief below.

into an arrangement with Old White Interiors, LLC to sell furnishings to plaintiff for her home. Plaintiff asserted that Pinnacle, acting in concert with Old White Interiors, charged plaintiff excess charges for said furnishings sold to her and plaintiff was damaged thereby.

Elizabeth Cherrington asserts that she was significantly damaged by misrepresentations, fraud, negligence and breach of Pinnacle and Mamone and their agents, servants, employees and contractors in that her property is damaged and will need repaired, and the fair market value of her home has been and is substantially diminished. Plaintiff claims that she paid excess moneys to defendants above the amount actually owed, was wrongfully and falsely overcharged for furnishings, and she has been subjected to emotional distress as a result. (See Appx. Ex. 1, Plaintiff's First Amended Complaint.) Plaintiff asserted that certain aspects of defendants' conduct were reckless, intentional and willful misconduct that entitles Mrs. Cherrington to punitive damages.⁴

This action was commenced on February 1, 2006 against The Pinnacle Group, Inc. and Old White Interiors, LLC. Later added as defendant was operator of Pinnacle, Anthony Mamone, Jr. (See Appx. Ex. 1.)

During discovery, the defendants asserted that a substantial portion of the work at issue on the plaintiff's home was performed by subcontractors. (See Appx. Ex. 7, March 11, 2010 letter from Mamone Counsel Sheatsley to Erie Counsel Piziak, Exhibit K to brief below.) The concrete floor, the foundation, and the framing, all were done by subcontractors. On or about March 5, 2009, defendants filed a motion for and were granted leave to file a third party complaint against a subcontractor, GLW Construction, Inc., who installed the concrete floors for the project. (See Appx. Ex. 2.)

⁴ The CGL policy in this case has an endorsement that covers an award of punitive damages. See Appx. Ex. 7, Erie Ultraflex Policy, Coverage for Punitive Damages Endorsement at p.1, Exhibit C to brief below.

During the relevant policy period, Pinnacle and Mamone were and are named insureds covered under a general commercial liability policy, called an Ultraflex policy, with Erie Property and Casualty Insurance (hereinafter “Erie”). (See Appx. Ex. 7, Erie Ultraflex policy, Exhibit C to brief below.) In addition, Mamone is a named insured covered under an Erie Insurance homeowner’s policy, called a Home Protector policy, and an Erie umbrella policy, called a Personal Catastrophe policy. (See Appx. Ex. 7, Erie Home Protector policy, Exhibit D to brief below, and Erie Personal Catastrophe policy, Exhibit E to brief below.)

On or about October 19, 2009 defendants were granted leave to file a third party complaint against defendants’ insurance companies, Erie and Navigators Insurance Company.⁵ Defendants’ third party complaint against the insurance companies asserted that the Erie policies provided coverage under the facts of this case and sought a declaration of the duties and obligations of said insurance companies to the defendants and requested that the court require said companies to indemnify the defendants and provide a defense to the plaintiff’s claims. (See Appx. Ex. 3.)

Both parties named experts with regard to the insurance coverage issues. The plaintiff Cherrington and third party plaintiffs, Pinnacle and Mamone, proffered insurance expert Marshall Reavis. MBA, PhD, to testify. Dr. Reavis has an MBA with a specialty in insurance. His PhD in business administration has a specialty in insurance, which was the subject of his dissertation. (See Appx. Ex. 7, CV of Marshall Reavis, Exhibit F to brief below.) He has been a chartered property and casualty underwriter since 1961, licensed to sell insurance since 1961, carried an agency and broker’s license, is certified by practically every insurance certification there is, worked as a sales manager for Consolidate Underwriters, was in charge of the Insurance

⁵ Navigators was later dismissed.

School of Chicago, has taught insurance courses to the insurance industry at the college level and graduate level at multiple institutions, and has published a wealth of instructional materials, including peer reviewed. (See Appx. Ex. 7, CV of Marshall Reavis, Exhibit F to brief below.) His work historically has been about 60% plaintiff insured, 40% defendant insurance companies, but during the past four or five years he has been hired more by insurance companies. (See Appx. Ex. 7, 6-16-2010 deposition of Dr. Reavis at pp 22-26, Exhibit G to brief below.)

Dr. Reavis provided an analysis of how the insurance industry views and interprets the various policies at issue in this case. (See Appx. Ex. 7, report of Dr. Reavis, Exhibit H to brief below.) At hearing, Dr. Reavis explained the history and development of the CGL and other policies. (See Appx. Ex. 12, at pp 28-29.) Dr. Reavis explained that, according to the history of the development of CGL policies and insurance industry practice and standards, the policies at issue provide coverage. (See Appx. Ex. 12, at pp. 31, 54-55, and Appx. Ex. 7, report of Dr. Reavis, Exhibit H to brief below.)

After discovery, Erie Insurance filed a Motion for Summary Judgment on or about July 14, 2010 relating to the three policies it had issued to defendants Pinnacle and Mamone, including a commercial general liability policy with a punitive damages endorsement, a home owner's policy and an excess liability policy. (See Appx. Ex. 6.) A hearing was held on said motion on December 1, 2011. (See Appx. Ex. 12.) At the hearing, the Court refused to allow the request of the plaintiff and defendants to present non-expert, factual testimony. However, the Court allowed the plaintiff, defendants and Erie Insurance to present testimony from experts in the insurance industry.

At the conclusion of said hearing, the court below granted Erie Insurance's Motion for Summary Judgment as to the three policies at issue. (See Appx. Ex. 12.) The Court requested

that Erie Insurance prepare a proposed order for the court's consideration. On or about December 5, 2011, Erie Insurance e-mailed a proposed order to the judge for his consideration, pursuant to trial court rule 24.01(c), which allowed the plaintiff five days to file any objections to said order. The Court signed Erie Insurance's proposed order on December 6, 2011, and the same was entered by the clerk on December 7, 2011, prior to the expiration of the five day period required by the trial court rules. (See Appx. Ex. 11.) Plaintiff filed her objections to the proposed order on December 9, 2011, prior to receiving the order of the court. The December 6, 2011 order of the court finds that there is no just reason for delay of appellate review of this matter and enters judgment for Erie Insurance. (See Appx. Ex. 11.)

Defendants and third party plaintiffs, Pinnacle and Mamone, and plaintiff Cherrington respectfully request that this Court reverse the Order of the Circuit Court of Greenbrier County granting summary judgment to Erie Insurance, find that the policies provide coverage for defendant appellants.

III. SUMMARY OF ARGUMENT

The court below erred in finding that none of the policies of defendants Mamone and Pinnacle provided coverage for the plaintiff's claims. The defendant's commercial liability policy provides coverage because there was property damage in this case which constituted an "occurrence" under the policy. There was an "occurrence" because there was damage to tangible physical property that was neither expected nor intended by the insured, which is the standard provided in the applicable law. Therefore, the court below erred in finding that there was no "occurrence" under the policy.

The exclusions asserted by Erie Insurance for "your work" and "impaired property or property not physically injured," do not apply to the facts of this case. This is because those

exclusions do not apply to the conduct and negligence of the subcontractors pursuant to an express exception to the exclusion in the policy for the work of subcontractors. These exclusions further do not apply because the property was physically injured, and there was property damaged in addition to any defective work of the subcontractors, and so any exclusion for “impaired property” or “property not physically injured” is inapplicable. Therefore, the court below erred in finding that those exclusions precluded coverage.

In addition, defendant Mamone’s homeowner’s policy, while excluding coverage for business pursuits, has a specific exception to this exclusion for the acts of defendant Mamone as a salesman. The policy language does not limit coverage for acts as a salesperson. Since Mr. Mamone was acting as a salesperson during the allegations of misrepresentation, the homeowner’s policy provides coverage.

At the very least, the various policy provisions are ambiguous. Therefore, the court below should have interpreted the policies consistent with the reasonable expectations of the insured to provide coverage.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in this case because (1) the parties have not waived oral argument; (2) the appeal is meritorious; (3) the dispositive issues have not been authoritatively decided; and (4) petitioners believe the Court’s decisional process would be significantly aided by oral argument. Because this case involves issues that have not been squarely addressed by this Honorable Court, the Appellants believe it should be set for Rule 20 argument.

V. ARGUMENT

A. STANDARD OF REVIEW

The appellate court reviews a circuit court's order interpreting an insurance contract *de novo*. Syl. Pt. 2, *Riffe v Home Finders Associates, Inc.*, 205 W.Va. 216, 517 S.E.2d 313 (1999).

B. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO COVERAGE UNDER THE POLICIES AT ISSUE.

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

a. The Circuit Court's analysis of what is an "occurrence" was flawed.

During the relevant policy period, Pinnacle and Mamone were and are named insureds covered under a general commercial liability policy, called an Ultraflex policy, with Erie Insurance. (See Appx. Ex. 7, Erie Ultraflex policy, Exhibit C to brief below.) The insuring agreement in that policy states:

1. Insuring Agreement

a. We will pay for those sums that the insured becomes legally obligated to pay as damages, including punitive or exemplary damages to the extent allowed by law, because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result [.]

...

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 . . .

(See Appx. Ex. 7, Erie Ultraflex Policy, Coverage for Punitive Damages Endorsement p.1, Exhibit C to brief below.)

"Property damage" is defined in the policy as follows:

"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 shall be deemed to occur at the time of the “occurrence” that caused it.

(See Appx. Ex. 7, Erie Ultraflex policy, Coverage for Punitive Damages Endorsement p.12, Exhibit C to brief below.)

Bodily injury is defined in the policy as:

“Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

(See Appx. Ex. 7, Erie Ultraflex policy, Coverage for Punitive Damages Endorsement p.10, Exhibit C to brief below.)

Finally, “occurrence” is defined in the policy as follows:

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

(See Appx. Ex. 7, Erie Ultraflex policy, Coverage for Punitive Damages Endorsement p.11, Exhibit C to brief below.)

The circuit court found that there was no “occurrence” under the policy. The court below primarily relied upon and cited *Groves v. Doe*, 333 F. Supp. 2d 568 (N.D.W. Va. 2004) as authority for its decision. The *Groves* court held that, negligence cannot be an “occurrence” because the policy defined “occurrence” as an “accident” and, according to *Groves*, negligence is not covered because it is foreseeable, and therefore, cannot be an accident. Respectfully, the *Groves* analysis and decision is flawed. The practical application of *Groves* would mean that all negligence is not covered by a liability policy because negligence is not an accident. The same reasoning could be applied to auto claims, for example, for negligence causing an auto accident. Furthermore, it negates the entire purpose for buying *liability* coverage. If a commercial policy

excludes coverage for intentional acts and coverage for negligent acts, what acts are left covered? None. The court below erred in relying on the *Groves* decision as its basis for denying coverage.

b. The court erred in finding that the plaintiff did not allege property damage caused by an occurrence.

“As a general rule, an insurer's duty to defend is tested by whether the allegations in the plaintiff's complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy.” *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 194, 342 S.E.2d 156, 160 (1986). Plaintiff asserted, *inter alia*, property damage to her home from improper construction performed, in great part, by subcontractors. In her complaint, the plaintiff asserts that defendants were negligent in the construction of her home. Specifically, plaintiff's expert witnesses determined, *inter alia*, that the concrete floor on the lower level is uneven and ground moisture may be infiltrating through the floor slab, the roof leaked at the chimney causing damage to the ceiling and walls, that there is a lack of water diversion, that wood components are in direct contact with soil, that there are issues with the roof seams, and that there is inadequate or missing flashing, caulking and/or paint.

Plaintiff submitted evidence, which included the testimony of the expert of the third party defendant, that defendants, through the acts of subcontractors, were negligent in pouring and finishing the concrete floor in the house and in the garage apartment; in the finishing and painting of the house; in placing and securing the foundation; in failing to properly install the support beam⁶, in improperly laying the backfill, and in failing to prepare the sub grade under the

⁶ Third party defendant's expert testified that the improper beam installation caused the damage to the floor and the cracking in the walls that later developed. See Appx. Ex. 7, deposition of Sam Wood at p. 31, Exhibit I to brief below.)

house and the garage.⁷

Plaintiff asserted damages to property caused by the negligence of the defendants, including their subcontractors, including cracks in the interior walls; cracks in the block and foundation; unlevel and sagging floors; an inability to close or lock certain doors; settlement cracks visible in several locations of the house, cracks in the drywall partitions of the interior living spaces, and other structural defects. Defendants Pinnacle and Mamone maintain that, other than some of the trim work and siding work, all the work was performed by subcontractors.

Plaintiff claimed damages in that her home's fair market value is substantially diminished; she paid excess moneys to Pinnacle above the amount actually owed and agreed upon; she sustained property damage that needs repaired; she has lost the full use and enjoyment of her property, has been subjected to emotional distress and has otherwise been damaged. Moreover, plaintiff claims that defendants' conduct was intentional and willful misconduct that entitles plaintiff to punitive damages.

The facts and issues in this case, are substantially identical to the case of *Simpson-Littman Const., Inc. v. Erie Ins. Property & Cas. Ins. Co.*, Slip Copy, 2010 WL 3702601, S.D.W.Va.,2010, wherein the U.S. District Court for the Southern District of West Virginia analyzed substantially similar policy language at issue here under the same factual scenario and found against Erie on each relevant issue.⁸ (See Appx. Ex. 7, Slip Opinion, Exhibit A to brief below.) **The Southern District court found that the Erie general commercial liability policy**

⁷ Third party defendant's expert testified that the improper laying of the backfill, improper preparation of the subgrade caused settlement which caused the cracking in the floors and walls and the uneven floors. (See Appx. Ex. 7, Deposition of Sam Wood at p. 84, Exhibit I to brief below.)

⁸ The *Simpson-Littman* court also had before it the issue of whether the acts occurred during the policy period, something that is not at issue in this case. The Southern District court noted that before the question of timing was addressed, however, the Court must review the coverage provided in the policy to determine whether, if it occurred during the policy period, the property damage complained would be covered under the insurance contract. *Id.* at p.5.

covered the damage caused by the subcontractors' negligent work, finding that the same constituted an "occurrence" under the policy language, because it was neither expected nor intended by the insured contractor, and was covered under the "exception to the exclusion" for damages caused by the work of a subcontractor.

In *Simpson-Littman*, the plaintiff Bush sued contractor Simpson-Littman for negligence and breach of contract in the construction of his home. While building the Bush home, Simpson-Littman engaged the services of two subcontractors to prepare the home-site and lay the foundation. One subcontractor performed work related to the preparation and construction of the home-site, including general dozer, backhoe, excavation, and soil preparation services. Another subcontractor performed work related to the building of the home's foundation, including the supply, delivery, and laying of block. At some time after plaintiff Bush moved into his new home, he noticed damage to the residence. He noticed **cracks in the interior walls**; cracks in the brick exterior; **cracks in the block and foundation**; gaps and separation between the walls and floors; **uneven and sagging floors**; **an inability to close or lock certain doors** and windows; and **other structural defects**. *Id* at p. 1. [Emphasis added.] The court noted that settlement cracks were visible in the brick veneer in several locations along the front and side exterior elevations of the house, as well as **cracks in the drywall partitions of the interior living spaces** and that the interior cracks in the drywall partitions are associated with settlement of the footings, as well as **framing deficiencies** and oversights on the part of the contractor for original construction.⁹ *Id* at p. 1. [Emphasis added.]

Erie denied coverage to the contractor in *Simpson-Littman* for the same reason it denied coverage to Pinnacle and Mamone here: that the policy did not provide coverage for "improper

⁹ All of the bold terms are defects discovered in the Cherrington home.

workmanship” and that “the claim being asserted against [Simpson-Littman] did not arise out of an occurrence of property damage that took place during the policy period, and as defined by the policy.” Id at p. 2.

The Southern District court had before it the issue of whether Defendant Erie Insurance Property and Casualty Insurance Company was obligated to defend and indemnify Simpson-Littman in that negligence and breach of contract action under a general commercial liability policy with the substantially similar language of that in the Pinnacle policy at issue before this Court:

We will pay for damage because of **bodily injury** or **property damage** for which the law holds **anyone we protect** responsible and which are covered by **your** policy. We cover only **bodily injury** and **property damage** which occurs during the policy period. The **bodily injury** or **property damage** must be caused by an **occurrence** which takes place in the covered territory.

Id at p.1 (Compare Appx. Ex. 7, Pinnacle policy, Coverage for Punitive Damages Endorsement p.1, Exhibit C to brief below.)¹⁰

In addition, the definition of property damage was the same as the case before this Court:

“Property damage” means:

1. physical injury to or destruction of tangible property including loss of its use. All such loss of use shall be deemed to occur at the time of the physical injury that caused it;
2. loss of use of tangible property which is not physically injured or destroyed. All such loss of use shall be deemed to occur at the time of the **occurrence** that caused it. *Ins. Policy* (Doc. 17-4), at 6 (emphasis in original).

Id at p.7 (Compare Appx. Ex. 7, Erie Ultraflex policy Commercial General Liability Coverage Form at p. 12, Exhibit C to brief below.)¹¹

¹⁰ The Pinnacle policy also includes coverage for punitive or exemplary damages : “We will pay those sums that the insured becomes legally obligated to pay as damages, **including punitive and exemplary damages, ...**” Otherwise, the language is substantially the same.

The Southern District court noted that “It is undisputed that there is property damage to Bush's home, as defined in Policy No. Q33 6520012. Further, the parties agree that the structural defects to Merlin Bush's home, which are complained of in the Underlying Action, constitute “physical injury to or destruction of tangible property.” Id at p. 7.

The Southern District Court then undertook the analysis of what is an “occurrence” under the policy language, again identical to the policy language at issue before this Court:

Next, the Court looks to the question of whether an “occurrence,” as defined by the policy, exists. The definitions section of Policy No. Q33 6520012 reads as follows:

“**Occurrence**” means an accident, including continuous or repeated exposure to the same general, harmful conditions. *Ins. Policy* (Doc. 17-4), at 6 (emphasis in original).

Id at p.7, and Appx. Ex. 7, Erie Ultraflex policy Commercial General Liability Coverage Form Exhibit C at p. 11.¹²

The Southern District court noted that “accident” was not defined in the CGL policy.¹³ “However, controlling West Virginia case law provides a definition for “accident” in the context of a standard CGL policy. In *State Bancorp, Inc. v. U.S. Fid. & Guar. Ins. Co.*, 199 W.Va. 99, 483 S.E.2d 228, 233 (W.Va.1997), the West Virginia Supreme Court of Appeals held:

Ordinarily, “accident” is defined as “an event occurring by chance or arising from unknown causes.” *Webster's New Collegiate Dictionary* 7 (1981). An “accident” generally means an unusual, unexpected and unforeseen event.... An accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces the damage.... To be an accident, both the means and the result must be unforeseen, involuntary, unexpected, and unusual. *State Bancorp*, 483 S.E.2d at 234 (quoting

¹¹ The language in the Pinnacle policy varies in some immaterial wording only.

¹² The Pinnacle policy language varies in only one aspect that is immaterial to the issues in this case: ““Occurrence” means an accident, including continuous or repeated exposure to *substantially* the same general harmful conditions.” Appx. Ex. 7, Commercial General Liability Coverage Form at p. 12, Exhibit C to brief below.

¹³ Just as the term “accident” is not defined in the Pinnacle CGL policy.

Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Group, 681 P.2d 875, 878 (1984)); *see also Corder v. William W. Smith Excavating Co.*, 210 W.Va. 110, 556 S.E.2d 77, 82 n. 12 (W.Va.2001) (quoting *State Bancorp* and applying the same definition for “accident” in the context of an occurrence-based CGL policy)

Simpson-Littman at p. 7. In both *State Bancorp* and *Corder*, an “occurrence” in the CGL policy at issue was defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” *Id* at p. 7, citing *State Bancorp*, 483 S.E.2d at 232; *Corder*, 556 S.E.2d at 81. The *Simpson-Littman* and Pinnacle policies use the same language.

Based on the definition of “accident” provided in *State Bancorp*, the relevant question in *Simpson-Littman*, as in the case before this Court, is whether the damage to the plaintiff’s home was caused by an event that was unusual, unexpected, and unforeseen. The Southern District court noted that damage to the plaintiff’s home was caused by the negligence of subcontractors. As a result, the more specific issue the Southern District court addressed was whether the settlement of soil and fill (the result) and the faulty performance of the subcontractors (the means) were unforeseen, involuntary, unexpected, and unusual. *Id* at p.7.

The Southern District court acknowledged the cases of *Corder* and *Erie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W.Va. 506, 526 S.E.2d 28 (1999), both relied upon by Erie before that court and before the court below in its motion for summary judgment. The Southern District court found coverage consistent with those cases:

Several West Virginia cases have examined whether and when faulty workmanship may result in an “occurrence” sufficient to trigger coverage under a CGL policy. As a general rule, “[p]oor workmanship, standing alone, does not constitute an ‘occurrence’ under the standard policy definition of this term as an ‘accident including continuous or repeated exposure to substantially the same general harmful conditions.’ “ *Corder*, 556 S.E.2d at Syl. Pt. 2; *see also Webster Co. Solid Waste Auth. v. Brackenrich & Assocs., Inc.*, 617 S.E.2d 851, 857 (W.Va.2005) (same). CGL policies are liability policies, and “[a] liability insurance policy, unlike a builder's risk policy, is designed to indemnify the

insured against damage to other persons or property caused by his work or property and is not intended to cover damage to the insured's property or work completed by him.” *Erie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement, Inc.*, 526 S.E.2d 28, 31 (W.Va.1999)

...
In the instant case, the property damage complained of in the underlying complaint includes cracks in the interior walls of Merlin Bush's home; cracks in the brick exterior; cracks in the block and foundation; gaps and separation between the walls and floors; unlevel and sagging floors; an inability to close or lock certain doors and windows; and other structural defects. According to Professional Engineer Robert L. Wolfe, this damage “is the obvious result of construction errors on the part of the original contractor for construction,” because “the fill material in this instance was not placed as ‘engineered fill’ or compacted in accordance with certain engineering principles available through consulting engineering services.” *Wolfe Report* (Docs. 21-1 & 17-3). Put simply, a failure to use “engineered fill” (the means) caused the settling of the soil and fill material below his foundation (the result), which in turn has caused the damage to Merlin Bush's home. **Therefore, for liability purposes, the important question is whether this result (the soil settlement) and the means (subcontractor negligence) were unforeseen, involuntary, unexpected, and unusual from the perspective of Simpson-Littman. In other words, taken together, do they constitute an “accident” necessary to establish the “occurrence” required for coverage?**

This Court finds, conclusively, that the answer to this question is yes. The settlement of the soil and fill below Merlin Bush's home, which is (and was) caused by Smith Construction and/or Tri-State Masonry's negligence, is an “occurrence” under [CGL] Policy No. Q33 6520012.

Id at p.8-9 [Emphasis added.] Thus the Southern District court explained that neither the cause nor the harm was intended from the perspective of the insured contractor.

In support of its decision, the Southern District Court cited with approval the case of *American Family Mutual Insurance Company v. American Girl, Inc.*, 673 N.W.2d 65 (Wis.2004). In that case, the damage to a warehouse occurred as a result of the continuous, substantial, and harmful settlement of the soil underneath the building. The subcontractor's inadequate site-preparation advice was a cause of this exposure to harm. The court held that neither the cause nor the harm was intended, anticipated, or expected and concluded that the

circumstances of that claim fell within the policy's definition of "occurrence." *American Family*, 673 N.W.2d at 76.

In response to the insurer's argument that the claim did not stem from an "occurrence" as defined in the policy because the claim was for breach of contract, and the insurer argument that the CGL was not intended to cover contract claims arising out of the insured's defective work or product, the Supreme Court of Wisconsin stated, **"there is nothing in the basic coverage language of the current CGL policy to support any definitive tort/contract line of demarcation for purposes of determining whether a loss is covered by the CGL's initial grant of coverage. 'Occurrence' is not defined by reference to the legal category of the claim."** *American Family*, 673 N.W.2d at 77. The Wisconsin court explained that, **"[i]f, as [the insurer] contends, losses actionable in contract are never CGL 'occurrences' for purposes of the initial coverage grant, then the business risk exclusions are entirely unnecessary.** The business risk exclusions eliminate coverage for liability for property damage to the insured's own work or product-liability that is typically actionable between parties pursuant to the terms of their contract, not in tort." *Id.* at 78.

In quoting the above language, the Southern District in *Simpson-Littman* explained that "this reasoning is applicable here because West Virginia courts, like many states, are explicit in that pure contract claims are not covered by CGL policies. **However, as stated in *American Family* there is nothing in the language of Policy No. Q33 6520012¹⁴ that precludes coverage here. Moreover, the existence of a "your work" exclusion suggests a loss actionable in contract has the potential to qualify as an 'occurrence'.**" *Simpson-Littman* at p. 9.

¹⁴ Again, the Pinnacle CGL policy language is identical.

The Southern District court concluded that, **just as neither the cause nor the harm in *American Family* were intended, anticipated, or expected, neither the subcontractors' negligence nor the sinking of plaintiff's home were intended, anticipated, or expected here. Thus, taken together, the negligence and the settling constitute an "occurrence" under the CGL policy.** Id at p. 10.¹⁵

The Southern District explained that "There is no evidence that the structure or walls of Merlin Bush's home were defective upon completion. Moreover, there is no evidence that either the cause, or the harm to Merlin Bush's home, was expected or intended by Simpson-Littman. As a result, "this Court finds that the settlement of the soil and fill material under Merlin Bush's home, caused by subcontractor negligence, is an "accident," and thus an "occurrence," under Simpson-Littman's CGL policy." Id at p. 11.

The Southern District noted that its conclusion is consistent with the West Virginia Supreme Court's decision in *Corder*. In *Corder*, the State court held that coverage for claims based on faulty performance on the part of an insured were not compensable because such claims were, effectively, for breach of contract. Therefore, there was no "accident" or "occurrence" under a standard CGL policy. Despite finding no coverage, however, the *Corder* court explained when and how coverage may be provided under a CGL policy in the case of faulty workmanship. According to the Supreme Court, "[t]he key to determining the existence of an 'occurrence' is whether a separate act or event or happening occurred at some point in time that lead to the [property damage] or whether the [property damage] is tied to the original acts of repair performed by [the insured]." Id at p. 11 citing *Corder*, 556 S.E.2d at 84. Said differently, the

¹⁵. The Southern District court noted that its determination is supported by the Fourth Circuit's decision in *French v. Assurance Company Of America*, 448 F.3d 693 (4th Cir.2006).

Corder court explained that an “occurrence” under a CGL policy would require something more than simple negligence on the part of the contracting party. It requires there be an extra, unintended, or unexpected act in the chain of causal events. In *French v. Assurance Company Of America*, 448 F.3d 693 (4th Cir.2006), that unexpected act was the moisture intrusion suffered by the non-defective structure and walls. In *American Family*, that act was the sinking of the soil and fill underneath the warehouse. The Southern District court explained that the same unexpected and unintended act (the settlement of soil and fill) existed in that case, thus, an “occurrence” was present.” *Id* at p. 11.

The analysis and conclusions are the same here: the subcontractor’s negligence and faulty performance (the means) and the property damage it caused, i.e., cracks in the interior drywall of walls, cracks in the floors and foundation walls of the home and garage, separation of the hardwood floor, uneven and unlevel floors, (the results) were neither expected nor intended by Pinnacle or Mamone. Therefore, it constitutes an “occurrence” within the meaning of the CGL Ultraflex policy.¹⁶

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.

The “your work” exclusion provides:

1. 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.

¹⁶ Erie also argued that the plaintiff did not claim damages for property damage or loss of use. However, a large portion of the discovery in this case revolved around the cost to repair the damages, including replacement cost of the cement flooring.

The defendant petitioners maintain that the majority of the work at issue was performed by subcontractors. Erie did not present evidence otherwise. Therefore, the Court erred in finding that the exclusion for “damage to your work” applies because there is an express exception to the exclusion that covers property damage for the work of the subcontractors.

Erie argued to the court below that, even if the plaintiff’s claims constituted an occurrence, the exclusion for “your work” precluded coverage. This argument is incorrect. The *Simpson-Littman* policy and the policy at issue in this case have substantially similar language:

“We do not cover under ... Property Damage Liability (Coverage E) ... 5. **property damage to your work** arising out of **your work** or any portion of it but only with respect to the **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**”. . .(emphasis in original). “**‘Your work’** means: 1. work or operations performed by you or on your behalf; 2. materials, parts or equipment furnished in connection with such work or operations. **Your work** includes: 1. warranties or representations made at any time with respect to the fitness, quality, durability, or performance of your work; and 2. the providing of or failure to provide warnings or instructions.”

Simpson-Littman, at p.5 (Compare Appx. Ex. 7, Erie Ultraflex Policy Commercial General Liability Coverage Form at pp. 1, 4, 12, Exhibit C to brief below.) The Southern District court next analyzed the “your work” exclusion and the subcontractor exception to that exclusion¹⁷ and found that the “your work” exclusion precluded coverage for faulty workmanship on the part of

¹⁷ “We do not cover under ... Property Damage Liability (Coverage E) ... 5. **property damage to your work** arising out of **your work** or any portion of it but only with respect to the **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**”. . .(emphasis in original). “**‘Your work’** means: 1. work or operations performed by you or on your behalf; 2. materials, parts or equipment furnished in connection with such work or operations. **Your work** includes: 1. warranties or representations made at any time with respect to the fitness, quality, durability, or performance of your work; and 2. the providing of or failure to provide warnings or instructions.”

Id at p.5, and Appx. Ex. 7, Erie Ultraflex policy Commercial General Liability Coverage Form at pp. 1, 4, 12, Exhibit C to brief below.

the contractor, **however, because it contains a subcontractor exception, it did not preclude coverage for damage arising out of faulty workmanship on the part of subcontractors.** *Simpson-Littman* at p. 12.¹⁸ The Southern District court noted that, prior to 1986, the “on behalf of” language used in the definition of “your work” in the standard CGL policy “was interpreted to mean that no coverage existed for damage to a subcontractor's work, or for damage resulting from a subcontractor's work.” *French*, 448 F.3d at 701. “Many contractors were unhappy with this state of affairs, since more and more projects were being completed with the help of subcontractors.” *French*, 448 F.3d at 701 (quoting *American Family*, 673 N.W.2d at 82-83). As a result, “beginning in 1976, an insured under the 1973 ISO CGL policy form could pay a higher premium to obtain a broad form property damage endorsement ... which effectively eliminated the ‘on behalf of’ language and excluded only coverage for property damage to work performed by the named insured.” *Id.* The subcontractor exception was added directly to the body of the “your work” exclusion, in the form ISO CGL policy, in 1986. *French*, 448 F.3d at 701. Consistent with the 1986 revisions to the form ISO CGL policy, the “your work” exclusion in Policy No. Q33 6520012 is expressly subject to a subcontractor exception.¹⁹ The Southern District explained, as a result, so long as the property damage for which coverage is sought is otherwise covered under the general grant of coverage in the policy (i.e., it is caused by an “occurrence” and occurs during the policy period), damage to or arising out of a subcontractor's work is compensable under the CGL policy. *Simpson-Littman* at p. 12-13. The Southern District concluded that, “Accordingly, because the damage to Merlin Bush's home was caused by an

¹⁸ Interestingly, the Southern District analysis in *Simpson-Littman* is the same as that of the plaintiff's expert, Dr. Reavis, in his explanation of the industry standards, and consistent with the admissions of Erie's expert, Peter Kensecki. See Appx. Ex. 12 at pp. 76-77.

¹⁹ Erie's insurance evaluator, Dr. Kensecki, admitted that, if there was a finding that there was an occurrence under the policy, then the subcontractor exception to the exclusion would provide coverage for the actions of the subcontractors. See Appx. Ex. 12 at pp. 76-77.

“occurrence,” so long as this damage occurred during the policy period, by operation of the subcontractor exception to the “your work” exclusion, there will be coverage for the damage under [CGL]Policy No. Q33 6520012.” *Simpson-Littman* at p. 12-13.

The Southern District discussed with approval a Kansas case which explained: **‘If the policy's exclusion for damage to the insured's work contains a proviso stating that the exclusion is inapplicable if the work was performed on the insured's behalf by a subcontractor, it would not be justifiable to deny coverage to the insured, based upon the absence of an occurrence, for damages owed because of property damage to the insured's work caused by the subcontractor's work.’** ... Id at p. 13 citing *Lee Builder's, Inc. v. Farm Bureau Mut. Ins. Co.*, 33 Kan.App.2d 504, 104 P.3d 997, 1003 (2005) and *French*, 448 F.3d at 705-06. The Southern District concluded that **“Applying the same reasoning articulated in *French*, the existence of the subcontractor exception in Policy No. Q33 6520012 supports the conclusion that the damage to Merlin Bush's home, arising out of the subcontractors' negligence, is the result of an “occurrence” under the policy.”** Id at p. 13.

The analysis is the same here, the exclusion for “your work” is inapplicable because there is an exception to the exclusion which provides coverage for the work performed on Pinnacle’s and Mamone’s behalf by the subcontractors. This interpretation is consistent with Dr. Reavis’ analysis of how the insurance industry views the policy terms and consistent with the Southern District’s analysis of the law. As explained in *Simpson-Littman*, it is consistent with the cases cited and relied upon by Erie in its motion for summary judgment. Therefore, summary judgment should be denied and coverage should be found to exist under the CGL Ultraflex policy.

There are other causes of action pleaded by the plaintiff including breach of fiduciary duty, misrepresentation, negligent accounting and record keeping and overcharging her for items and work. None of these causes of action is excluded under the language of the CGL policy, even if they are intentional acts.²⁰ Pinnacle and Mamone maintain that none of the acts which lead to the causes of action pleaded were intentional. Upon questioning, Erie's insurance evaluator, Dr. Kensecki, admitted that the commercial general liability policy is a type of insurance one would procure to cover these causes of action. Therefore, there is coverage for the remaining pleaded causes of action.

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.

The relevant portions of the policy on impaired property are 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.

n. Recall of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- 1) 'Your product';
- 2) 'Your work';
- 3) 'Impaired property';

²⁰ The coverage section of the Pinnacle policy also includes coverage for punitive or exemplary damages: "We will pay those sums that the insured becomes legally obligated to pay as damages, including punitive and exemplary damages, ..." See Appx. Ex. 7, Erie Ultraflex policy, Coverage for Punitive Damages Endorsement, p.1, Exhibit C to brief below. Since punitive damages are awarded in cases of intentional wrongdoing, intentional acts exclusions are not applicable to this policy.

If such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

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

The Court's order did not include analysis of why these exclusions applied to the facts of this case. However, the Court erred in relying upon this exclusion when the language conflicts with the express provision providing coverage for the negligence of subcontractors. Second, impaired property exclusions do not apply when there is physical injury to tangible property and, in this case, there is physical injury to tangible property, including cracks in the cement floors, cracks in the walls, sagging of the floor/ceiling, and damage to the drywall, so the exclusion for impaired property does not apply here. Further, loss of use of property that results from physical injury to work done by a contractor or its subcontractors is not excluded under the impaired property exclusion because, if the property that is not physically injured or impaired has to be removed to repair the damaged property, then the owner has lost the use of the uninjured, unimpaired property and to get the use back, the uninjured property has to be replaced. Finally, the exclusion for "impaired property and property not injured" is ambiguous and conflicts with the definition of "occurrence." Therefore, the circuit court erred in finding that the impaired property exclusions applied to the facts of this case.

First, the Court should not have applied the exclusion for impaired property at all under the facts of this case because doing so directly conflicts with and eliminates coverage expressly provided for the subcontractors in the policy. Erie's policy provides coverage for damage to "your work" if it is performed on your behalf by a subcontractor. This coverage becomes completely meaningless if the next section excludes coverage for the subcontractors because the

property is “impaired,” as defined by Erie and the Court. The specific language covering the subcontractor work should not be negated by ambiguous, confusing and non-specific language elsewhere in the policy.

In any event, the “implied property and property not physically injured” exclusion does not apply to the facts of this case. An example to explain the concept: Suppose defective roof insulation work of one contractor causes corrosion damage to the ceiling tiles installed by another contractor, thus necessitating the replacement of the roof insulation *and* the ceiling tiles. The impaired property exclusion is not applicable because the resulting corrosion damage to ceiling tiles cannot be eliminated through the repair, removal or replacement of the defective roof insulation. See Malecki, Donald, *Commercial General Liability, Claims Made and Occurrence Forms, Sixth Edition*, National Underwriter Company, at pp 61-62.

To analogize to the facts of this case, the third party defendant’s expert asserted that defective installation of the support beam caused the extensive cracking in the drywall. The impaired property exclusion is not applicable because the resulting cracks in the drywall cannot be eliminated through the repair, removal or replacement of the support beam. Likewise, third party defendant’s expert testified that cracks in the cement floor poured by one subcontractor were caused by inadequate preparation of the subgrade and placement of the foundation by another subcontractor(s). The replacement of the subgrade, if even possible without tearing out the floors, and the replacement of the foundation would not eliminate the cracks in the cement floor. Therefore, the impaired property exclusion does not apply.

The testimony of Erie’s expert in this case confirms this explanation:

As I understand it, you said that if you put crooked tiles up, that’s poor workmanship and that’s not considered an occurrence, or that’s not covered under the CGL policy.

A. I said it’s not covered, correct.

Q. But you said that if the tile should fall off and hit somebody on the head, covered?

A. The injury to the person would be covered. The putting the tile back up and fixing the tile would not be covered.

Q. What if that tile causes a leak, which then runs out to another area of the house and damages somebody else's work.

A. I'm not sure I understand the example – the tile falls on a pipe and springs a leak?

Q Or that they put the tiles on there crooked, and it leaks, the water leaks—you're in a shower and it leaks, runs out, runs out through the house, damages somebody else's work?

A. I would say the falling of the tile that caused the leak would be an occurrence at that point, yes. The important thing here is it doesn't matter when the negligence occurred it's when the damage occurs.

Q So to the extent that the crooked tile caused other damage, covered, correct?

A. To the extent that the falling tile caused other damage, yes. To the extent that it caused damage because it was laying there on the wall, no.

(See Appx. Ex. 12, at pp. 74-75.)

Erie's expert also confirmed that the "impaired property or property not physically injured" exclusion does not apply where there is actual property damage from the defective workmanship. Erie's expert's example was, if a person put in faulty wiring, the faulty wiring would not be covered. However, if the faulty wiring started a fire, and caused fire damage, the impaired property exclusion would not apply. (See Appx. Ex. 12 at pp.77-78.) In this case there was alleged damage to property: cracking and sagging of the floors from improper preparation of the subgrade, cracks in the walls from improper placement of the support beam, water damage from a leaking chimney from improperly installed roof.

The relevant literature discusses the limitations of the "impaired property or property not physically injured" exclusions. The commentary acknowledges the confusing and ambiguous language: "[T]he impaired property exclusion's track record in the courts thus far is not very encouraging from the insurer's perspective. Part of the problem may be that it is cited by insurers far more often than it should be, or it may be too difficult to understand." Id at 62.

Erie relied on *Groves*, which held the impaired property exclusion applied in that case. However, the *Groves* court simply cited the exclusion and, essentially, said it applied to the case.

Just like the court below in this case, the *Groves* court did not provide any thorough analysis of the exclusion or why it applied.

Corder briefly discusses the impaired property exclusion. However, it did so under different facts²¹ and it did not find, one way or the other, whether the exclusion applied to those facts. In addition, *Corder* explained “The risk intended to be insured 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*, and for which the insured may be found liable. [Emphasis added.] *Corder*, at 210 W.Va. at 116. As a result of this and other policy language, this Court in *Corder* reversed an order granting summary judgment in favor of the insurance company and remanded the case. In this case, there is damage to property, other than the work of the particular subcontractor.²² Therefore, exclusion M does not apply.

Moreover, the exclusion for impaired property is confusing and ambiguous. This was acknowledged in the case of *Serigne v. Wildey*, 612 So.2d 155 (La.App. 5th Cir 1992). In that case the owners of a concrete marina brought action against the contractor and its commercial general liability insurer after the marina collapsed into a bayou. The Louisiana Court of Appeal found that coverage existed, holding that: (1) the marina's collapse into the bayou was a covered “occurrence” within the meaning of the policy, which defined an occurrence as an accident, including continuous or repeated exposure to substantially the same general harmful conditions,

²¹ In that case a company sought coverage where that company damaged a sewer line while trying to repair it. The damages sought were a delay in the ability to develop the property.

²² See also *Indian Harbor Insurance Co. v. Transform, LLC*, 2010 WL 3584412, 6 (W.D.Wash.), which held: “Impaired property exclusions do not apply when there is physical injury to tangible property.” It is clear that there was physical injury to tangible property in this case: cracks in the walls and floors, sagging of the floor/ceiling, and damage to the drywall, so the exclusion for impaired property does not apply here.

and (2) exclusions from coverage for property damage to the contractor's product or work, and for impairment of other property caused by the contractor's product or work were ambiguous and conflicted with policy's definition of "occurrence."

In addition, if the property that is not physically injured or impaired has to be removed to repair the damaged property, then the owner has lost the use of the uninjured, unimpaired property. To get the use back, the uninjured property has to be replaced. In that situation, the exclusion for "property not physically injured" does not apply.²³ To illustrate in this case, it would be impossible to repair the support beam without tearing up the ceiling below it and floor above it.²⁴ Therefore, the plaintiff would lose the use of the floor above the beam. Likewise, to repair the subgrade, nearly the entire cement floor, even the parts that are not cracked or sagging, would likely have to be torn out. Thus, the exclusion for "property not physically injured" does not apply.

It is also clear that the exclusion n. for recalled products, work or impaired property does not apply. This provision is commonly referred to as the "sistership" exclusion. See Malecki, Donald, *Commercial General Liability, Claims Made and Occurrence Forms, Sixth Edition*, National Underwriter Company, at p.64. It derives its name from occurrences in the aircraft industry where enormous loss of use claims resulted from the grounding of all airplanes of the same type because one of the planes crashed and its "sister ships" were suspected of having a common defect. The purpose of the exclusion is to preclude coverage for the costs incurred because the "sister" products or work have to be recalled or withdrawn from the market or from use because of a known or suspected defect. This "recall" exclusion clearly has no applicability to the facts of this case.

²³ Such was the holding in *Clear v. American Foreign Insurance*, 2008 WL 818978 (U.S. Dist Ct. Alaska 2008).

²⁴ The support beam is between floors.

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.²⁵ 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. Therefore, based upon the exception to the exclusion, Mamone would be covered for his business pursuits

²⁵ Anthony Mamone was employed by Pinnacle.

as a salesperson. (See App. Ex. 7, report of Dr. Reavis, Exhibit H to brief below, and 8-18-2010 deposition of Dr. Reavis at pp. 10-14, Exhibit G to brief below.)

The reasoning in *Simpson-Littman* applies equally to the Home Protector policy here: if business pursuits did not constitute an “occurrence” under the policy, then there would be no need for an exclusion for business pursuits and an exception to the exclusion for business pursuits as a salesperson.

The defendant Mamone acted as a salesman for Pinnacle. In fact, that was a primary duty of Mamone. In this case, the evidence shows that he travelled to the plaintiff’s home in Hilton Head for the purpose of selling his company’s services to the plaintiff and talking her out of using his competition. See App. Ex. 7, Deposition of Mamone, at pp. 35, 38, Exhibit B to brief below, and Deposition of Cherrington, at p. 78, Exhibit J to brief below. During his sales pitch, and he essentially admits it was a sales pitch,²⁶ and plaintiff claims that he made at least negligent representations about the cost of the house and what he would charge for his services. Specifically, Mamone sold to the plaintiff a house to be built for the cost of materials and labor plus a percentage commission for Pinnacle. (See app. Ex. 7, 9-21-2007 Deposition of Cherrington, at p. 43, Exhibit J to brief below.) Mamone stated that the house would cost \$1.1 million to build. This did not occur. (See Appx. Ex. 7, 9-21-2007 Deposition of Cherrington, at p. 43, Exhibit J to brief below. The plaintiff paid 1.3 million dollars and had to pay an additional \$35,000 for landscaping. (See Appx. Ex. 7, 9-21-2007 Deposition of Cherrington, at p. 80, Exhibit J to brief below.) In addition, as part of his sales pitch, Mamone told the plaintiff that the materials used would be of the type in a house he showed her nearby. They weren’t. (See Appx. Ex. 7, 9-21-2007 Deposition of Cherrington, at p. 65, Exhibit J to brief below.)

²⁶ See Appx. Ex. 7, deposition of Anthony Mamone, at p. 35, 38, Exhibit B to brief below.

Further, Mamone sold the plaintiff furniture using his other company, Old White Interiors. (See App. Ex. 7, Deposition of Mamone, at pp.29-31, Exhibit B to brief below.) Plaintiff asserts that he charged her far more for the furniture than was reasonable based upon his cost. So for this conduct as a salesperson, Mamone has coverage under the Home Protector policy.

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

“Whenever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous.” *Hamblic v. Doe*, 201 W.Va. 615, 499 S.E.2d 619 (1997) at Syl. Pt. 5 (internal citation omitted). In West Virginia, insurance policies “are to be strictly construed against the insurer.” *Burr v. Nationwide Mut. Ins. Co.*, 178 W.Va. 398, 359 S.E.2d 626, 630-31 (1987). A West Virginia court is “obliged to give an insurance contract that construction which comports with the reasonable expectations of the insured.” *Burr*, 359 S.E.2d at 631. This means “that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored [.]” Syl. Pt. 9, *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1 (1998)

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 policies²⁷ were modified to create express coverage for subcontractors. The expert testimony is supported by the relevant literature:

[P]erhaps more significant difference between the 1973 exclusion and the

²⁷ The relevant portions of the Erie policies follow the form policies in material part. See Appx. Ex. 12 at p. 29.

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 explained that, because of the specific change to cover subcontractor negligence, that 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.

VI. CONCLUSION

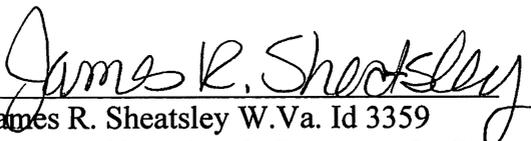
There was property damage in this case which constituted an "occurrence" under the policy because there was damage to tangible physical property that was neither expected nor intended by the insured. The exclusions for "your work" and "impaired property or property not physically injured," do not apply 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 losses, for their fees and costs associated with this motion, and for such other relief as is proper and just.

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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 "Brief of Appellants, The Pinnacle
Group, Inc., Anthony Mamone, Jr., and Lisbeth L. Cherrington" and "Appendix" were
served upon:

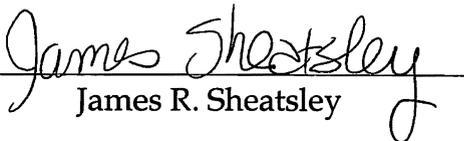
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in envelopes properly addressed, stamped and deposited in the regular course of the
United States Mail, this 5th day of April, 2012.


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