STATE OF WISCONSIN
SUPREME COURT

ACUITY, a mutual insurance company,

Plaintiff-Appellant,

APPEAL No. 2009AP002432

VPP GROUP, LLC,

Involuntary Plaintiff,

v.

SOCIETY INSURANCE, a mutual company,

Defendant-Respondent-Petitioner,

RON STOIKES d/b/a RS CONSTRUCTION &
TERRY LUETHE d/b/a FLINT'S CONSTRUCTION,

Defendants.

BRIEF OF DEFENDANT-RESPONDENT-PETITIONER SOCIETY INSURANCE

An appeal from the Circuit Court for Monroe County
The Hon. Michael J. McAlpine, Presiding
(Trial Court Case No. 2008CV249)

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ISSUES PRESENTED FOR REVIEW

1. When a claim falls within the economic loss doctrine, and therefore may only be brought as a breach of contract, is there coverage under a standard general liability insurance policy for the breach of contract claim?

ANSWERED BY THE TRIAL COURT: Raised, but not answered by the trial court because the lawsuit was dismissed on other grounds.

ANSWERED BY THE COURT OF APPEALS: Yes.

2. If "faulty workmanship" is not an "occurrence" under a general liability insurance policy, may an occurrence nevertheless be found solely from the bad result caused by the faulty workmanship?

ANSWERED BY THE TRIAL COURT: No; there is no occurrence when damage is caused by faulty workmanship.

ANSWERED BY THE COURT OF APPEALS: Yes; the property damage itself is a sufficient "occurrence" to support coverage.

3. Is the standard exclusion in a general liability policy, precluding coverage for damage to property on which the insured is performing operations, limited solely to the specific part of the property on which work is being performed at the time of the damage, or does the exclusion apply to all of the property within the insured's control and responsibility?

ANSWERED BY THE TRIAL COURT: Issue raised, but not answered because the trial court found no "occurrence" and dismissed the lawsuit.

ANSWERED BY THE COURT OF APPEALS: Limited to the specific property on which work is being performed at the time of the damage.

STATEMENT OF THE CASE

This is an action for construction damages to a building owned by Plaintiff VPP Group, LLC. VPP's insurer, Acuity, paid the bulk of the damages and then sued the two contractors which allegedly caused the damage: Ron Stoikes d/b/a RS Construction and Terry Luethe d/b/a Flint's

Construction. Society insures both contractors, under policies which, for purposes of this appeal, are identical in coverage. (R.33-34).

The two contractors were to remove and replace the south wall of a building that VPP owned, known as the "Engine Room". They entered into a written contract with Acuity's insured in the form of a Bid Memo dated May 21, 2006 in which they agreed to remove and replace an entire 49x22 foot masonry wall and replace it for $8,500. They also agreed to perform "shoring and related work". (R.1, p. 11; Pet.App. p. 45). Because removing one wall of a four-sided structure is akin to removing one leg of a four-legged stool, the contractors had to shore up the building to make sure it didn't collapse when the wall was removed.

After the wall was removed, on June 12, 2006, while one of the contractors was excavating along the foundation for new footings, he undercut the foundation, causing much of the building to partially collapse. The damages that ensued are set forth in greater detail in the Trial Court's Decision:

> "The trenching undermined the Engine Room first floor slab causing it to crack and buckle. With the failure of the first floor concrete slab the shoring was compromised and the structural integrity of the Engine Room portion of the building was significantly affected. The second floor sagged down but was otherwise undamaged. The second floor did not have to be

> replaced. The roof dropped down, cracked and was necessarily replaced." (R.67; Pet.App. pp. 24-25).

Acuity, as the property insurer, paid the claim and then commenced this subrogation action for the damages caused by the contractors' faulty workmanship. (R.1).

Society moved to bifurcate and stay the underlying action until the insurance coverage issues were resolved, and the matter was presented to the trial court on a summary judgment motion for insurance coverage. A number of coverage arguments were raised by Society, but the trial court agreed that because the claim was solely for faulty workmanship and faulty workmanship is not an "accident" or "occurrence" under either of the Society general liability policies, there was no coverage. (Pet.App. pp. 23-33).

Acuity and VPP appealed, and in a written decision dated January 5, 2012 (Pet.App. pp. 1-22) the Court of Appeals reversed, concluding that there was coverage. In doing so, it rejected the trial court's conclusion that there was no "occurrence" and also rejected several other coverage arguments raised by Society as additional grounds for affirmance.

INTRODUCTION

This case presents the opportunity to clarify or develop an important area of insurance coverage law that, at present, is subject to confusing, and sometimes contradictory, language from various decisions.

The economic loss doctrine has always been described as a doctrine which limits recoveries to claims based on breach of contract, and precludes tort recoveries. *See,* for example, *Vogel v. Russo*, 2000 WI 85, 236 Wis.2d 504, 613 N.W.2d 177, ¶15; and *Linden v. Cascade Stone Co., Inc.*, 2004 WI App 184, 276 Wis.2d 267, 687 N.W.2d 823 (Ct.App. 2004).

Additionally, this Court and the Court of Appeals have held that breaches of contract or warranty are not covered "occurrences" under a general liability policy. *See*, for example, *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis.2d 235, 593 N.W.2d 445 (1999); *Linden, supra*; and *Midwest Motor Lodge v. Hartford Insurance Group*, 226 Wis.2d 23, 36, 593 N.W.2d 852 (Ct.App. 1999), fn. 2.

Yet, despite these two relatively clear statements of law, the decision in *American Family Mutual Insurance Co. v. American Girl, Inc.*, 2004 WI 2, 268 Wis.2d 16, 673 N.W.2d 65 rather confuses the entire issue by stating that economic loss doctrine has nothing to do with insurance coverage,

since the same conduct which gives rise to a breach of contract may also give rise to a tort. Consequently, what had once been relatively clear statements of law, leading to findings of no coverage for economic losses, has now been thrown into confusion resulting in more litigation over what is covered, and in inconsistent decisions in the lower courts.

Society, therefore, is respectfully asking this Court to clarify this apparent inconsistency and to hold that when claims are subject to the economic loss doctrine and may only be brought as a breach of contract, they are not covered under a general liability policy, because breaches of contract are neither accidents nor occurrences.

Another area of seeming inconsistency, and therefore apparent confusion, arises from what was thought to be the clear statement of the Court of Appeals that faulty workmanship is **not** an accident or occurrence. *See*, for example, *Glendenning's Limestone & Readi-Mix Company, Inc. v. Reimer*, 2006 WI App. 161, 295 Wis.2d 556, 721 N.W.2d 704:

> "We therefore conclude that faulty workmanship in itself is not an 'occurrence' – that is, 'an accident' – within the meaning of the CGL policy." ¶39.

This was precisely the reasoning of the Court of Appeals (District III) which found no coverage for damages caused by defective workmanship in the unpublished decision, *Yeager v. Polyurethane Foam*

Insulation LLC et al., Appeal No. 2010AP2733 (Pet.App. pp. 34-44), which was discussed at length in Society's Petition for Review.

How then can damage caused by faulty workmanship be covered under a general liability policy which requires an "accident" **causing** "property damage", when faulty workmanship is not an accident?

All insurance policies require an "accident" or "occurrence" which **causes** property damage. This Court has made it clear that the "accident" and the "property damage" are two separate concepts: a **cause** and an **effect**. One cannot look to the resulting property damage (the effect) and call it the cause:

> "A result, though unexpected, is not an 'accident'; rather it is the causal event that must be accidental for the event to be an accidental occurrence." *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 311 Wis.2d 492, 753 N.W.2d 448, ¶40.

Estate of Sustache v. American Family Mutual Insurance Company, 2008 WI 87, 311 Wis.2d 548, 751 N.W.2d 845, ¶46, confirmed that **both** elements are necessary.

Yet the Court of Appeals in this case, again relying on *American Girl*, said that the result **could** be the accident, thus conflating the two separate concepts, contrary to the cases cited above.

Society, therefore, requests this Court to clarify that there must be an "accident" **causing** property damage, which appeared to have been clear prior to the *American Girl* decision. Society also requests this Court to rule that, because faulty workmanship cannot constitute the "accident", one of the two necessary requirements for insurance coverage is missing, and therefore there can be no coverage.

Finally, Society will ask this Court to overrule the decision of the Court of Appeals on the scope of the standard exclusions in the Society policy which, Society submits, were interpreted far too narrowly, contrary to policy language and contrary to mainstream American law.

ARGUMENT

I. There is no insurance coverage for claims which fall within the economic loss doctrine.

Society respectfully requests that this Court clarify its language in *American Girl* and hold that there is no insurance coverage for claims which fall within the economic loss doctrine.

That doctrine was meant to clear up the fuzzy distinction that existed between tort and contract claims. It was intended to preserve "the

traditional distinction between tort and contract law and leaving the purchaser to his contract remedies." *Vogel v. Russo*, *supra*, at ¶15.

In this case, the relationship between the Plaintiff VPP and its contractors arose out of a written contract. The damages claimed were purely economic losses arising out of their failure to perform that contract. There was no damage to third parties. There were no personal injuries. When the relationship is contractual:

> "A party's deficient performance of a contract does not give rise to a tort claim. 'The negligent performance of a duty created by contract . . . cannot, without more, create a separate cause of action [in tort].'" *Atkinson v. Everbrite, Inc.*, 224 Wis.2d 724, 729, 592 N.W.2d 299 (Ct. App. 1999).

It is implicit in every construction contract that the contractor will make a good faith effort to perform and to substantially comply with its obligations. Failure to do so is a breach of the contract. *Nees v. Weaver*, 222 Wis. 492, 269 N.W.2d 266 (1936). The parties to a contract may, of course, negotiate additional warranties or conditions, but they are limited to those contract remedies when a breach occurs.

This Court has previously held that tort claims against contractors for deficient construction are thus barred by the economic loss doctrine.

Linden v. Cascade Stone Co., 2005 WI 113, 283 Wis.2d 606, 699 N.W.2d 189.

The Court of Appeals in this case ignored the effect of the economic loss doctrine, relying on *American Girl, supra*, for the proposition that the same facts and circumstances which give rise to a breach of contract claim may also give rise to a tort claim. It is respectfully submitted that this misses the point.

The point is: if the economic loss doctrine applies, then **only** contract remedies may be pursued. If only contract remedies may be pursued, then is there insurance coverage for a pure breach of contract? This Court has repeatedly held there is not, but the Court of Appeals failed to consider those cases.

In *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis.2d 235, 593 N.W.2d 445 (1999), this Court clearly stated that contract claims for economic damages are not covered under a standard general liability policy:

> "Since we have already determined that Wausau Tile's negligence and strict liability claims against Medusa are barred by the economic loss doctrine, Travelers can have no duty to defend Medusa on those claims . . . the Travelers' policy covers claims which allege 'bodily injury' or 'property damage' arising out of an 'occurrence'. As we have already explained, Wausau

> Tile seeks only economic loss, which is not 'bodily injury' or 'property damage' under the plain language of the policy . . . in addition, **it is undisputed that the breach of contract or warranty is not a covered 'occurrence' under the Travelers policy. Accordingly, we hold the Travelers has no duty to defend any of Wausau Tile's tort or contract claims.**" *Wausau Tile, supra*, at 266-269. [Emphasis supplied].

This was also the holding of the Court of Appeals:

> "As we recently held, coverage under CGL policies 'exists for tort damages but not for economic loss resulting from contractual liability.' *Jacob v. Russo Builders*, No. 97-3736 slip op. at 4 (Wis. Ct. App. Jan. 13, 1999, ordered published Feb. 23, 1999). Costs incurred in accessing, replacing and repairing Hunzinger's product, the sewer system, would be an economic loss to Midway based on Hunzinger's contractual liability and **is not covered under the Hartford CGL policy**." *Midwest Motor Lodge v. Hartford Ins. Group*, 226 Wis.2d 23, 36, 593 N.W.2d 852, fn. 2, (Ct. App. 1999). [Emphasis supplied.]

Those decisions were in accord with an earlier decision that also precluded insurance coverage for breach of contract. In *Wisconsin Label Corporation v. Northbrook Property & Casualty Insurance*, 221 Wis.2d 800, 586 N.W.2d 29 (Ct. App. 1998), the Court of Appeals specifically held that such claims are not covered under a general liability policy:

> "The lost profits for which Wisconsin Label seeks recovery in its complaint are economic losses for its failure to comply with the terms of its contract with PPC. Economic losses are not property damage within the 'physical injury' provision of the definition of property damage. *See*, *Qualman v. Bruckmoser*, 163 Wis.2d 361, 366-68, 471 N.W.2d 282, 285-286 (Ct. App. 1991) (Breach of contract and misrepresentation

> case stating that economic losses do not constitute 'physical injury . . . to tangible property')." At 809.

Anderson's *Wisconsin Insurance Law* (6th Edition) is also in accord:

> "A general rule of insurance construction is that a breach of contract is not an 'occurrence' as that term is used in a CGL policy. If all the claims are within the economic loss doctrine, the plaintiff is limited to liability based on breach of contract. The economic loss doctrine precludes a purchaser from employing negligence or tort liability theories to recover for a loss that is solely economic (contract) losses. *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis.2d 235, 245-46, 593 N.W.2d 445 (1999). *But see infra* §5.29 (discussing *American Girl*). The defendant-insured's insurer may then argue that breach of contract was not an occurrence and, therefore, there is no insurance coverage for the claim against the insured. Wisconsin case law has held that a breach of contract or warranty is not an 'occurrence' as defined in a CGL policy. *Wausau Tile*, 226 Wis.2d at 269; *see also Heil Co. v. Hartford Accident & Indem. Co.*, 937 F.Supp. 1355, 1362 (E.D. Wis. 1996); *Atlantic Mut. Ins. Co. v. Badger Med. Supply Co.*, 191 Wis.2d 229, 243, 528 N.W.2d 486 (Ct.App. 1995); *infra* §5.175 (discussing a contractually assumed liability exclusion, which does not exclude breaches of contract)." §5.27, p. 40.

In the years since *American Girl* was released, some trial courts are beginning to find insurance coverage for economic damages. These decisions are based on *American Girl*'s unfortunate language that the economic loss doctrine has nothing to do with insurance coverage, since the same conduct which gives rise to a breach of contract claim, may also give rise to a tort claim. However, as the two dissents in *American Girl* (Justices Roggensack and Crooks) pointed out, the economic loss doctrine **cannot** be

ignored when looking at coverage. It is directly implicated in the coverage decision because general liability policies are intended to cover **tort** liability to **third parties**, not contractual liability to another contracting party.

There is confusion in the trial courts resulting from this suggestion that the economic loss doctrine is irrelevant. It should not be. As Justice Roggensack's dissent pointed out:

> "Additionally, while the economic loss doctrine is not *directly* applicable to the insurance policy Renschler purchased from American Family, it is implicated in the coverage question because through the operation of the economic loss doctrine, Renschler cannot become 'legally obligated to pay' Pleasant for a tort claim." At ¶114.

Justice Crooks' dissent also points out the inconsistency of holding that a breach of contract between two parties should be covered by a policy that was only intended to protect against tort liability to third parties:

> "The majority states that there are some circumstances where a breach of contract or warranty may constitute 'property damage' under a CGL policy. Majority op., ¶36. The majority summarily holds this to be such a circumstance, but does not clearly explain why what happened here constitutes such an exception to our holdings in previous opinions of this court. Its decision departs from the authorities previously cited by this court that CGL policy 'coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss.' *Vogel v. Russo*, 2000 WI 85, ¶17, 236 Wis.2d 504, 613 N.W.2d 177. CGL policies exist to protect the insured from tort

> damages resulting from personal injury or harm to property other than the product itself. *Wausau Tile Inc.*, 226 Wis.2d at 248, 593 N.W.2d 445." At ¶94.

Justice Roggensack's dissent goes on to point out that a failure to confront the application of the economic loss doctrine results in coverage where it was never intended:

> "Additionally, this analysis fits squarely within the purpose of a CGL policy. It is written to cover the risks of injury to third parties and damage to the property of third parties caused by the insured's completed work. It is not written to cover the business risk of failing to provide goods or services in a workmanlike manner to the second party to the contract." At ¶121.

Finally, her dissent accurately predicted what is now occurring: more and more CGL policies are being interpreted as performance bonds, contrary to previous Wisconsin decisions, and to mainstream American law:

> "In my view, this court correctly interpreted the reasonable expectation of an insured under a CGL policy in *Vogel*, where we acknowledged the differing expectations that an insured has in purchasing a CGL policy and a performance bond. We explained:
>
> A CGL policy's sole purpose is to cover the risk that the insured's goods, products, or work will cause bodily injury or damage to property *other than* the product or the completed work of the insured . . . . A CGL policy, therefore, is not a performance bond.
>
> *Vogel*, 236 Wis.2d 504, ¶17, 613 N.W.2d 177 (emphasis in original) (additional citations omitted). The majority tries to limit the usefulness of *Vogel* by saying it should not 'be read for the conclusion that a loss actionable in

> contract rather than tort can never constitute a covered "occurrence" under a CGL policy.' Majority op., ¶43. But, its statement misses the heart of *Vogel*, which was based on long-standing precedent that has held that faulty workmanship is not covered under a CGL policy. [Citations omitted]. And finally, this interpretation is not just the opinion of the dissent, but it is also the opinion of the majority of courts that have addressed this question." At ¶125.

Society respectfully requests this Court to clarify that a claim – which may **only** be brought as a breach of contract – is not covered under a general liability policy.

Illinois has followed this rule for some time. They adopted the economic loss doctrine in *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443 (1982). Since then, their Supreme Court has extended the holding to a variety of situations in the construction industry. In *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 441 N.E.2d 324 (1982), it was applied to a claim for construction defects in a building; and in *Foxcroft Town Home Owners Association v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 449 N.E.2d 125 (1983), the rule was extended to bar claims of negligence for construction defects in a condominium.

Their appellate courts have now turned their attention to whether breach of contract claims are covered under a CGL policy – precisely the issue here. In *Viking Construction Management, Inc. v. Liberty Mutual*

Insurance Company, 358 Ill.App.3d 34, 831 N.E.2d 1 (Ct.App. 2005), their Court of Appeals held that there was no insurance coverage for collapse of a masonry wall due to inadequate shoring or bracing (surprisingly similar to the allegations in this case):

> "It has generally been held that a 'CGL policy will not cover a general contractor's suit for breach of contract' and 'there is no "occurrence" when a subcontractor's defective workmanship necessitates removing and repairing work.' 30 Tort & Insurance L. J. at 789. . . . Similarly, a breach of contract claim does not constitute 'property damage,' 'since it does not result from a fortuitous event.' 30 Tort & Insurance L. J. at 789." *Ibid.*

And:

> "'[I]f a contractor uses inadequate building materials, or performs shoddy workmanship, he takes a calculated business risk that no damage will take place. If damage does take place, it flows as an ordinary and natural consequence of the contractor's failure to perform the construction properly or as contracted [and] [t]here can be no coverage for such damage.' . . . '[a]llegations of breach of contract typically are viewed as falling outside the scope of coverage of a general liability policy.' . . . Thus, courts have held that 'such claims are not an "accident" or an "occurrence" covered by the CGL policies which, in their view, are written to cover tort claims.' . . . 'Illinois considers construction defects to not constitute an accident or occurrence necessary to trigger coverage under CGL policies.'" At 7-8; citations omitted.

These holdings were affirmed by the federal court in the Southern District of Illinois in *Lyerla v. AMCO Insurance Company*, 2007 WL 2229867 (2007):

> "Illinois courts typically view allegations of breach of contract 'as falling outside the scope of coverage of a general liability policy.' . . . Under this definition, 'there is no "occurrence" when a subcontractor's defective workmanship necessitates removing and repairing work.'" At 3.

They were more recently affirmed in *Stoneridge Development Company, Inc. v. Essex Insurance Company*, 382 Ill.App.3d 731, 888 N.E.2d 633 (Ct.App. 2008):

> "However, regardless of how the insured describes the property damage, 'CGL policies are not intended to cover breaches of contract.' . . . Notably, in *Viking*, which contained the same definition of 'property damage' as the instant case, the court commented that the definition did not include breach of contract claims, because such claims are not the result of fortuitous events." At 653.

Just as Justices Roggensack and Crooks predicted in their dissents to *American Girl*, one **cannot** ignore the economic loss doctrine when considering questions of insurance coverage. If the doctrine truly means what it says – that claims for economic loss such as this may only be brought as breach of contract claims – and if it is equally clear that breaches of contract are not accidents or occurrences within the meaning of a CGL policy, then it follows inexorably that there cannot be coverage for claims which fall within the economic loss doctrine. Since the claim of Acuity is

solely for the repair of the defective work of the Defendants, it is an economic loss and cannot be covered under Society's policy.

II. All general liability insurance policies require two elements – a cause and effect, an accident and resulting property damage – as a precondition to coverage; if faulty workmanship cannot be the accident, there is no coverage.

The Court of Appeals in the unpublished *Yeager* decision (Pet.App. pp. 34-44) got it right:

> "Yeager's claims against PFI do not allege property damage caused by an 'occurrence,' as the CGL policy defines that term. We have previously held that faulty workmanship, in and of itself, is not an 'occurrence' and therefore does not give rise to coverage under a standard CGL policy, like the one Society issued in this case"; ¶14, [citing *Glendenning's*, *supra*.]

The trial court also very correctly concluded that Society's policies were not even triggered because what happened here was, indisputably, only faulty workmanship. Faulty workmanship is not an "accident".

The Court of Appeals in this case, however, ignored that prior law and found coverage, based on *American Girl* and its definition of "accident", stating that the unfortunate result was the occurrence. (*See* Pet.App. p. 7, at ¶13).

This logic, however, conflates the requirement of two separate elements for coverage in a standard liability policy such as Society's.

All insurance policies (Society's included) insure against "property damage", but only if it is **caused** by an "occurrence"[1]:

> "**A. Coverages**
>
> **1. Business Liability**
>
> *** * ***
>
> **b.** This insurance applies:
>
> **(1)** To 'bodily injury' and 'property damage' **only if**:
>
> **(a)** The 'bodily injury' or 'property damage' **is caused by an 'occurrence'** . . . ." (Society Policy, R.33, emphasis supplied.).

Thus, under the policy, an "accident" must **cause** the "property damage". The property damage is **not** the accident; it is the unfortunate

[1]The Society policy – and in fact all general liability policies – defines "occurrence" as an "accident":

> "**13.** 'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (*Ibid*, A.App. p. 34).

result. The result cannot also be the cause. Cause and effect are two, separate concepts.

If property damage is not caused by an accident or occurrence, it is not covered under the policy. One of the elements required by the policy for coverage is missing. This beginning point for the coverage analysis was correctly observed by the trial judge.

Was there an "accident" which **caused** this property damage? To say that the property damage (*i.e.*, the collapse of the building) was the "accident" is both logically incorrect and contrary to Wisconsin law. The result cannot be the cause.

In fact, Wisconsin law **requires** these two separate concepts:

> "As we have explained, the ordinary meaning of the word 'accident,' as used in accident insurance policies is 'an event which takes place without one's foresight or expectation. **A result, though unexpected, is not an 'accident'**; **rather it is the causal event that must be accidental** for the event to be an accidental occurrence." *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 753 N.W.2d 448 (2008), ¶40, [emphasis supplied].

This was affirmed in *Estate of Sustache v. American Family Mutual Insurance Company*, 311 Wis.2d 548, 751 N.W.2d 845 (2008):

> "In concluding that the misrepresentations to the homeowners were not accidental, and therefore not covered as an 'occurrence' under WSGI's CGL policy, this court consulted dictionary definitions and past decisions in *Doyle*, *Everson*, and *American Girl* and

> concluded that an 'accident' 'is an event or condition occurring by change or one that arises from unknown causes, and is unforeseen and unintended.' . . . The court approvingly cited *American Girl's* definition of an 'accident': '"an event which takes place without one's foresight or expectation. **A result, though unexpected, is not an accident**;" **rather, it is the causal event that must be accidental** for the event to be an accidental occurrence.'" At 569-570, [emphasis supplied].

The trial court correctly noted that Acuity was required to show that there was an "accident" which caused the property damage. However, as the Court of Appeals noted in *Yeager*, faulty workmanship cannot be the accident.

What then was the "accident"? The trial court began its analysis by first looking at the definition of "accident", as it appears in recent decisions. It quoted from *American Girl*, from *Glendenning's*, and from *Stuart*, each of which defined accident as:

> "[A]n accident is an event or condition occurring by chance or one that arises from unknown causes, and is unforeseen and unintended." *Stuart*, *supra*, at ¶24.

The trial court then correctly noted that the cause of the property damage did not occur by chance; it was not an unknown cause; it was not unforeseen. Acuity agreed and made this abundantly clear in its brief to the Court of Appeals: The cause was the obvious result of faulty workmanship

excavating too close to the foundation, undercutting it, and causing the foundation to collapse:

> "Flint's was excavating a trench adjacent to the wall location when the first floor slab cracked and deflected downward . . . . The **faulty workmanship** involved the negligent and improper excavation and trenching techniques employed by the defendant contractors." (App. Brief, , Court of Appeals, p. 5, 16-17)

This suit is for faulty workmanship. It is the only claimed cause of the collapse. As the trial court correctly noted, faulty workmanship is neither something that occurs by chance nor from an unknown cause. This is a risk that is present whenever a contractor undercuts a foundation. (*See* Trial Court Decision, p. 9; Pet.App. p. 31). The contractor purposely excavated there and collapse is a foreseeable risk when one undercuts a foundation.

Because **only** faulty workmanship is alleged, it does not meet the definition of an accident under Wisconsin law. The Court of Appeals, two years after *American Girl*, made this abundantly clear:

> "We therefore conclude that faulty workmanship in itself is not an 'occurrence' – that is, 'an accident' – within the meaning of the CGL policy. An 'accident' may be caused by faulty workmanship, but every failure to adequately perform a job, even if that failure may be characterized as negligence, is not an 'accident' and thus not an 'occurrence' under the policy." *Glendenning's Limestone & Ready-Mix Company, Inc. v. Reimer*, 2006 WI App. 161, 721 N.W.2d 704 (Ct.App. 2006), ¶39.

Since the only causal event was faulty workmanship, and since faulty workmanship is not an accident, there was simply no accident **causing** property damage. Therefore coverage was not even triggered under the Society policy. That was the precise syllogism that the trial court used, and it is legally and logically correct.

This was also the holding of the Superior Court of Pennsylvania in *Millers Capital Insurance Company v. Gambone Brothers Development Co., Inc.*, 941 A.2d 706 (Sup.Ct. Penn. 2007). A contractor built a home with allegedly defective stucco exterior, windows, and seals which allowed water infiltration and damage to the interior. Only faulty workmanship was alleged; the court held this was not an accident:

> "The *Kvaerner* [*Metals v. Commercial Union Insurance Co.*, 589 Pa. 317, 908 A.2d 888 (2006)] Court held the terms 'occurrence' and 'accident' in the CGL policy at issue contemplated a degree of fortuity that does not accompany faulty workmanship. ('We hold that the definition of "accident" required to establish an "occurrence" under the policies cannot be satisfied by claims based upon faulty workmanship. Such claims simply do not present the degree of fortuity contemplated by the ordinary definition of "accident" or its common judicial construction in this context.')." At ¶25.

The Supreme Court of Arkansas agrees:

> "[O]ur case law has consistently defined an 'accident' as an event that takes place without one's foresight or expectation – an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and

> therefore not expected. . . . Faulty workmanship is not an accident; instead, it is a foreseeable occurrence, and performance bonds exist in the marketplace to insure the contractor against claims for the cost of repair or replacement of faulty work." *Essex Insurance Company v. Holder*, 370 Ark. 465, 261 S.W.3d 456, 460; citation omitted.

Illinois courts have adopted a definition of accident which incorporates this notion of the foreseeable consequences of faulty workmanship, and thus avoids the inconsistency created by *American Girl*.

The Illinois courts' definition of accident explains that if a person engages in conduct which has, as a natural consequence, the propensity to cause damage, it is not an accident. Thus, a person who engages in faulty workmanship does not do something "accidental" and has therefore not committed an occurrence. The *Viking* decision, *supra*, discussed this in significant detail, and began by noting the general rule of no coverage for faulty or defective workmanship:

> "It has generally been held that a 'CGL policy will not cover a general contractor's suit for breach of contract' and 'there is no "occurrence" when a subcontractor's defective workmanship necessitates removing and repairing work." [Quoting 30 Tort & Insurance L. J. at 789].

The Court explained that if a contractor performs shoddy workmanship, construction defects of the type involved here are a natural and probable consequence:

> "[I]f a contractor uses inadequate building materials, or performs shoddy workmanship, he takes a calculated business risk that no damage will take place. If damage does take place, it flows as an ordinary and natural consequence of the contractor's failure to perform the construction properly or as contracted [and] [t]here can be no coverage for such damage." [Quoting Yang, *No Accident: The Scope of Coverage for Construction Defect Claims*, 690 Practicing Law Institute, Litigation and Administrative Practice Course Handbook, at 36-37].

They went on to hold that the damages for the collapse of the wall of a building because of improper bracing were not covered because they were the "ordinary and natural consequence" of faulty workmanship:

> "Here, the collapse of the wall and section of the building was the ordinary and natural consequence of improper bracing, *i.e.*, faulty construction work, which resulted from, at least in part, Viking's breach of its contractual duties to insure proper construction methods were employed." At 15-16.

In *Stoneridge Development Company*, *supra*, their Court of Appeals defined accident to include this concept of natural and probable consequences, by adopting the definition from a United States Supreme Court case, *United States Mutual Accident Association v. Barry*, 131 US 100, 9 S.Ct. 755 (1889):

> "'Under the rule promulgated in *Barry case* [*sic*], if an act is performed with the intention of accomplishing a certain result, and if, in the attempt to accomplish that result, another result, unintended and unexpected, *and not the rational and probable consequence of the intended act,* in fact, occurs, such unintended result is deemed to be caused by accidental means.'" At 121.

The *Stoneridge* decision found no coverage for defective construction of a home which led to cracks in the walls and foundation:

> "Applying these principles to the instant case, we conclude that the damage to the Walskis' home did not constitute an 'occurrence' or 'property damage.' The cracks that developed in the Walskis' home were not an unforeseen occurrence that would qualify as an 'accident,' because they were natural and ordinary consequences of defective workmanship, namely, the faulty soil compaction." At 654.

That is, of course, precisely what happened in this case. Acuity's insured, VPP, hired two inexpensive contractors to do a job that should have been done by professional engineers. The two contractors did not shore the building up properly and then undercut the foundation, causing the collapse. If the insured wanted to take a chance on hiring inexpensive contractors, they were certainly free to do so, but they cannot expect an insurance company to pay for the calculated risk of employing cheap labor. To require a general liability insurance carrier to pay to correct faulty workmanship is to not only reward the faulty workmanship, but also turn the policy into a performance bond – something which is clearly improper.

The public policy behind this was explained by the Supreme Court of Minnesota in *Knutson Construction Company v. St. Paul Fire and Marine Insurance Company*, 396 N.W.2d 229, 234-235 (1986):

> "However, in addition to and apart from those risks, the contractor likewise has a contractual business risk that he may be liable to the owner resulting from failure to properly complete the building project itself in a manner so as to not cause damage to it. This risk is one the general contractor effectively controls and one which the insurer does not assume because it has no effective control over those risks and cannot establish predictable and affordable insurance rates. Nonetheless, appellant urges us in this case to hold that by the purchase of a CGL policy, a contractor shifts to the insurer this business risk which it effectively controls. Unlike the surety on a performance bond, a CGL insurer has no recourse against a contractor for the employment of defective materials or shoddy workmanship on the construction project.
>
> Even though it cannot be conclusively demonstrated that adoption of appellant's proposed holding would promote shoddy workmanship and the lack of exercise of due care, undoubtedly it would present the opportunity or incentive for the insured general contractor to be less than optimally diligent in these regards in the performance of his contractual obligations to complete a project in a good workmanlike manner. To accept the appellant's contention would be to provide the contractor with assurance that notwithstanding shoddy workmanship, the construction project would be properly completed by indemnification paid to the owner by the comprehensive general liability insurer. In and of itself, the incentive for the contractor to fairly and accurately bid a contract in order to secure the job would be removed. Even if such result would not always be inevitable, the possibility of such consequences, in our view, is incompatible with the general public policy concerning the relationship between contractors and owners." At 234-235.

The courts of other states agree. In Illinois;

> ". . . CGL policies '"are not intended to pay the costs associated with repairing and replacing the insured's defective work and products, which are purely economic losses."' . . . Specifically, according to the court, '[f]inding coverage for the cost of replacing or repairing

> defective work would transform the policy into something akin to a performance bond.' . . ." *Viking*, *supra*, at 17; citations omitted.

In Florida:

> "It is well established that the purpose of comprehensive liability insurance coverage is to provide protection for personal injury or property damage caused by the product only and not for the replacement or repair of the product. The policy reasons for this result are obvious. If insurance proceeds could be used to pay for the repairing and/or replacing of poorly constructed products, a contractor or subcontractor could receive initial payment for its work and then receive subsequent payment from the insurance company to repair and replace it. Equally repugnant on policy grounds is the notion that the presence of insurance obviates the obligation to perform the job initially in a workmanlike manner." *Centrix Homes Corp. v. Prestressed Systems*, 444 So.2d 66 (Fla.App. 1984), at 66-67.

Performance bonds and errors and omissions insurance are available if contractors want to purchase them. When they choose not to, the risks and costs of their faulty workmanship should not be passed along to the general liability insurer. This was probably stated most persuasively by the Illinois Court of Appeals in *Monticello Insurance Co. v. Wil-Freds Construction, Inc.*, 661 N.E.2d 451, 277 Ill.App.3d 697 (1996):

> "Indeed, as numerous courts have noted, if insurance proceeds could be used to pay for the repair or replacement of poorly constructed buildings, a contractor could receive initial payment for its work and then receive subsequent payment from the insurance company to repair or replace it. . . . This 'would transform the [CGL] policy into something akin to a performance bond.' . . . To hold that a CGL policy is

> the effective equivalent of a performance bond would cause injustice to the CGL insurer who, unlike the surety on a performance bond, has no recourse against a contractor for the use of defective materials or poor workmanship." At 709; citations omitted.

The confusion caused by *American Girl* can be avoided, of course, if there is adherence to the doctrine that faulty or defective workmanship is not an accident. In this case, the collapse of the building was an expected and natural result of failing to properly shore the building and of undercutting the foundation. Without an accident, there cannot be an accident causing property damage. Without an accident causing property damage, there can be no coverage under a CGL policy. The CGL policy is not, and should not be, a performance bond.

III. The standard exclusions in the Society policy, which would have precluded coverage for this claim, were construed too narrowly by the Court of Appeals.

As the Court of Appeals correctly noted, their opinion represents the first published decision in Wisconsin construing the scope of two standard exclusions in a general liability policy. However, they adopted a very narrow construction of the exclusions, and in doing so fell outside of what Society considers to be mainstream law.

The two exclusions at issue read as follows:

> "**B. Exclusions**
>
> * * *
>
> This insurance does not apply to:
>
> * * *
>
> **k. Damage to property**
>
> 'Property damage' to:
>
> * * *
>
> **(5)** That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the 'property damage' arises out of those operations.
>
> **(6)** That particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." (Society policy, R.33-34)

There is no doubt that the collapse occurred while the contractors were actively engaged in their work. Acuity has already admitted that the cause of the property damage was improperly excavating too close to the foundation, causing it to collapse. Acuity has to concede that the damages arose out of the contractor's operations.

The question which was decided adversely to Society by the Court of Appeals was whether these exclusions apply to the entire area where the insured was working, or apply solely to that isolated area where the damage occurred. In this case, the Court of Appeals limited the applicability of the exclusion to the south wall. However, the south wall wasn't even damaged – it was already gone by the time the collapse occurred.

The Court of Appeals noted that the contractors were required by contract to shore up the building to prevent such a collapse. The integrity of the building thus was their responsibility. When one removes one of a building's four walls, it is similar to removing one of four legs from a stool: if one doesn't brace the remainder, a collapse may occur. To say that the exclusion only applies to that limited, specific area where the insured was working at the time of the collapse – even though that area was no longer in existence – is contrary to common sense. It emasculates an exclusion which is to preclude coverage for faulty or defective workmanship. If faulty workmanship causes damage to any part of a building for which the insured is responsible, public policy should require the insured be responsible for it and not pass it on to its liability carrier.

The Court of Appeals felt the exclusion should be limited solely to damage to the absent south wall because of the word "particular". However, in doing so it ignored the thrust of the exclusion which applies to any real property on which the insured "is performing operations, if the 'property damage' arises out of those operations." The insured was obviously performing operations on other parts of the Engine Room, because it was required to shore up the Engine Room. To require a trial court to determine precisely where the insured was working at the time of the incident, and to confine the exclusion solely to that area, is to impose a requirement on trial courts that will be difficult, time-consuming and unnecessary.

It also unrealistically limits the exclusion. If an electrician is hired to wire in a kitchen fan and negligently drives a staple through a wire, causing a short circuit and fire to the house, is the exclusion limited to damage to the staple? To the wire? The damages to **any** particular real estate arising out of the insured's operations are excluded by the clear language of the exclusion.

If this is not clear from Exclusion k.(5), *supra*, it is abundantly clear in reading Exclusion k.(6) because k.(6) applies to "**any** property that must be restored, repaired or replaced." [Emphasis added].

Society cited to the Court of Appeals numerous decisions from around the country that hold the exclusion is applicable to **any** real property as long as the damage arises out of the insured's operations. This philosophy is squarely consistent with the public policy that the quality of an insured's work is solely its responsibility, because it has exclusive control of it.

One of the leading cases on this point is *William Crawford, Inc. v. Travelers Insurance Company*, 838 F.Supp. 157 (S.D.N.Y.1993). It involves the identical exclusion (identified as exclusion (j)(5) in the decision). The insured was renovating an expensive, 7,000 sq. ft. apartment on Manhattan's Upper East Side. The renovations were to take three years and cost $15,000,000. In the course of that work, the insured placed a humidifier in the entry foyer and several fans around it to distribute humidified air. One of the fans caught fire, damaging not only the entrance foyer, but causing smoke damage throughout the entire apartment. The insurance company contended that the loss was not covered because it arose

out of the insured's "operations". The insured admitted the exclusion applied, but said it only applied to that part of the apartment where it was actually doing work, namely the foyer. The Federal Court reviewed the law of other states and held that the exclusion was unambiguous, precluding coverage for **all** of the damage caused by the insured's operations, throughout the entire apartment:

> "The case is governed by New York law and there are apparently no New York cases interpreting the language of Section (j)(5) or comparable provisions. However, courts in other states have uniformly rejected Crawford's position. *See, e.g., Jet Line Servs. Inc. v. American Employers Ins. Co.*, 404 Mass. 706, 537 N.E.2d 107 (1989) ('that particular part of any property . . . upon which operations are being performed' referred to entire tank which the insured had been retained to clean, not merely to the bottom of the tank which it was cleaning at the moment of explosion); *Goldsberry Operating Co. v. Cassity, Inc.*, 367 So.2d 133 (La.Ct.App.1979) ('that particular part of any property . . . upon which operations are being performed by . . . the insured at the time of the property damage' covered explosion damage to an oil and gas well at depth of 6900 feet even though the area of the well that the insured had been retained to perforate was at 8000 feet); *Vinsant Elec. Contractors v. Aetna Casualty & Sur. Co.*, 530 S.W.2d 76 (Tenn.1975) ('that particular part of any property . . . upon which operations are being performed' was not limited to 'precise and isolated spot' upon which work was being done); *Vandivort Constr. Co. v. Seattle Tennis Club*, 11 Wash.App. 303, 522 P.2d 198 (1974) ('that particular part of any property . . . upon which operations are being performed by . . . insured' was not limited to that part of real property where work was being performed).
>
> * * *

> There is an implication in Crawford's presentation that Section (j)(5) cannot mean what it says because such an interpretation would leave a construction company unprotected against the risks of its own malfeasance in the area of its own operations. The analysis is incorrect because, as Travelers points out, insurance is indeed available to cover this risk under a builders risk policy which Crawford did not purchase.
>
> In sum, Section (j)(5) is not ambiguous and precludes Crawford's recovery under its insurance policy from Travelers for the costs incurred repairing the damage to the Bass apartment." At 158-159.

Exactly the same result was reached by the Appellate Court of Illinois in *Pekin Insurance Company v. Willett,* 301 Ill.App.3d 1034, 704 N.E.2d 923 (Ct.App. 1998). In that case, the defendant Willett was servicing, painting, cleaning, and preparing an in-ground swimming pool for summer use. In doing so, they emptied the pool, painted it, and were to fill it with water and chemicals. After Willett had painted the pool, and before he filled it with water, a heavy rainstorm caused the pool to push up out of the ground. His insurance carrier (Pekin) argued that there was no coverage since the damage arose out of the insured's operations, citing exactly the same exclusion as is in the Society policy. The Court of Appeals agreed, and rejected the claim by the insured that exclusions applied only to the area of the pool that was being worked on. The

Court held, quite properly, that the exclusions applied to the entire property:

> "In a related argument, Willett and Simmons claim that Pekin owed a duty to defend because the underlying complaint did not allege that Willett's work on the surface of the pool damaged the pool. We find this argument without merit. Exclusions j(5) and j(6) are not drafted as narrowly as the defendants claim. The exclusions do not exclude coverage for damage done only to the precise area of the property being worked on. Rather, the exclusions apply to property damage caused by poor workmanship." At 926.[2]

The Federal Court in Texas reached exactly the same conclusion in *Southwest Tank v. Mid-Continent Casualty Company*, 243 F.Supp.2d 597 (E.D.Tex.2003). In that case, Southwest Tank was hired to make modifications to a large steel storage tank. While cutting a hole in the tank, a fire broke out, the tank exploded, and the entire tank was a total loss.

[2] Exactly the same type of damage occurred in *American Equity Ins. Co. v. Van Ginhoven*, 788 So.2d 388 (Ct.App.Fla., 2001). There the insured was hired to make minor repairs to the surface of their customer's swimming pool. In order to do that, they had to drain the pool, and as a result water table pressure popped the pool out of the ground. The Florida Court again agreed that the damage to the entire pool was not covered – the exclusion was not limited to the particular area being worked on:

> "Fernandez and Van Ginhoven argue that even if the exclusions are not ambiguous, the modifying terms 'that particular part of' would only exclude coverage for damage to the property Van Ginhoven contracted to work on, namely, only the specified tiles and spot repairs, but not the entire pool. This argument is untenable. At the time the damage occurred, Van Ginhoven was not working, or performing operations on, the spots subject to repair, but was draining the entire pool. We agree with American Equity that these exclusions are clear, unambiguous and do not violate public policy." At 391.

The insured argued that even though the exclusion was applicable, its effect should be limited to solely that area where he was working. The Federal Court disagreed, holding that the entire tank was the property being worked on, and therefore all of the damage was excluded[3]:

> "The tank was a self-contained, collective unit, which constituted a single item of property. This single item of property was damaged while Southwest was performing its work on it.
>
> * * *
>
> The Court has not found any Texas cases interpreting exclusion j(6) or addressing the meaning of '[t]hat particular part.' However, the majority of other jurisdictions that have interpreted this phrase have held that '[t]hat particular part' includes the entire piece of property on which the insured was working at the time of the accident. *See, e.g., Jet Line Servs., Inc. v. Am. Employers Ins. Co.*, 404 Mass. 706, 537 N.E.2d 107, 111 (1989) ('"that particular part of any property" refers to the entire tank and not just to the bottom of the tank that Jet Line personnel were cleaning at the moment of the explosion'); *Am. Equity Ins. Co. v. Van Ginhoven*, 788 So.2d 388 (Fla.App.2001) (insured hired to perform spot repairs; damage to entire pool excluded); *Goldsberry Operating Co., Inc. v. Cassity, Inc.*, 367 So.2d 133 (La.App.1970) (insured perforating well at one depth; damage to entire well excluded); *cf. Vinsant Elec. Contractors v. Aetna Cas. Surety Co.*, 530 S.W.2d 76 (Tenn.1975) (insured replacing circuit breakers; damage to entire switchboard excluded); *William Crawford, Inc. v. Travelers Ins. Co.*, 838 F.Supp. 157 (S.D.N.Y.1993) (applying New York law) (fan to humidify plaster in living room caught fire; fire and smoke damage to entire apartment excluded).

[3]The exclusion involved in the *Southwest Tank* case was (6), and not (5); nevertheless the applicable language is identical in both exclusions, so the Court's determination is equally applicable to Society's Exclusion k(5).

> * * *
>
> The Court cannot construe this provision to limit the exclusion to the precise and isolated spot upon which the work was being done-where the holes were being cut.
>
> * * *
>
> The entire tank was being worked on by Southwest. Under the factual situation in this case, the Court finds that the tank, in its entirety, or as a unit, is '[t]hat particular part of any property.' Accordingly, the Court finds that exclusion j(6) of the Policy excludes coverage in this case and, therefore, Mid-Continent does not have a duty to defend Southwest Tank in the underlying lawsuit." At 603-604.

There are a plethora of other cases from around the country holding exactly the same thing. They are summarized below:

1. New York

Flynn v. Timms, 199 A.D.2d 873, 606 N.Y.S.2d 352 (1993). Insured constructed retaining walls on boundary line of plaintiff's property. One wall partially collapsed and rendered plaintiff's entire property unusable. All property damage excluded:

> "A court will not strain to find an ambiguity where words have a definite and precise meaning, nor will it create policy terms by implication to rewrite a contract . . . . Here, the policy terms are clear and although plaintiffs attempt to tailor the circumstances of their loss to circumvent the exclusions, the actual facts to which policy provisions are applied remain disputed.
>
> . . .

> Clearly, the exclusion applies to the damaged retaining wall and plaintiffs' damages are due to the loss of use of the wall." At 874. [Citation and footnote omitted].

2. Illinois

Auto-Owners Insurance Company v. Chorak & Sons, Inc., 2008 WL 3286986 (N.D.Ill. 2008). Insured was replacing a 2" x 6" "sill plate" at the location where plaintiff's house joined the foundation. In order to do this, insured raised the house off the foundation. The entire house slid off the foundation resulting in "catastrophic damage to the home's structure". Exclusion applied to all damage, not just damage to sill plate where insured was working:

> "Even if the home sliding off of its foundation constitutes 'property damage' resulting from an 'occurrence,' Auto-Owners is not obligated to defend or indemnify Defendants for the resulting damage because any such damage fell under exclusions j(5) and j(6) to the policy. Exception j(5) excluded damage to the 'particular part' of property on which Chorak was 'directly or indirectly' performing operations if the damage arose from those operations, and exclusions j(6) excluded damage to the 'particular part' of property that must be restored because Chorak's work was incorrectly performed on it.
>
> * * *
>
> . . . [T]he structure on which Chorak was working was the entire house. Chorak was tasked with replacing the sill plate. This required work on the entire house; that is, Chorak had to raise the entire house in order to complete the assigned task. . . . Chorak, who raised the entire house, cannot now argue that it was responsible only for the sill plate. Chorak's work was

> allegedly incorrectly performed, and that incorrect performance caused damage to the house. Thus, the damage to the house caused by the operations is excluded from coverage under the Auto-Owner's policy."

3. Florida

Oak Ford Owners Association v. Auto-Owners Insurance Company, 510 F.Supp.2d 812 (M.D.Fla. 2007). Insured hired to dredge a creek. In doing so, it deposited dredged material along banks of the creek belonging to third party. Dredging was done without permits and ruled improper. Insured contended exclusion applied only to area of creek where he was working. Court said exclusion applied to all damages:

> "As an initial matter, the Court notes that Florida courts have held that exclusions 2j(5) and 2j(6) are not ambiguous and are therefore enforceable according to their terms. . . . Exclusion 2j(5) therefore applies to damage to those areas arising from the dredging . . . ." At 818-821.

Amerisure Mutual Insurance Company v. American Cutting & Drilling Co., Inc., 2009 WL 700246 (S.D.Fla. 2009). Insured hired to chip access holes in concrete floors. As part of its work, insured cut cables unrelated to the work. Court held that damage to all property – not just where insured was working – was excluded:

> "Florida courts have consistently held that the exclusionary language at issue is unambiguous. . . . The Court agrees and will enforce the exclusions

> according to their terms. . . . Putting all of the alleged facts together, exclusion j(5) applies because American Cutting was chipping concrete (performing operations) on areas of the concrete floor that included embedded cable (that particular part of real property) and damage to the cable (property damage) resulted from American Cutting's concrete chipping (operations). As a result, there is no coverage and no duty for Amerisure to defend American Cutting in the State Court Action."

4. Georgia

Sapp v. State Farm Fire & Casualty Company, 486 S.E.2d 71 (1997). Insured negligently installed hardwood flooring, causing damage to other portions of the home. All damages excluded:

> "The language of exclusions 11.e., 11. f., 12, 13, 14, and 15 is clear and unambiguous, and such exclusions are what are generally known as 'business risk' exclusions that are designed to exclude coverage for defective workmanship by the insured builder causing damage to the construction project itself." At 74.

Continental Graphic Services, Inc. v. Continental Casualty Company, 681 F.2d 743 (11th Cir. 1982). Insured installed a defective gear in a printing press, causing damage to the entire press. Court held that all damages were excluded:

> "CGS, however, seeks to avoid the unambiguous language of the exclusion clauses by arguing that the exclusions only relate to the defective gear which caused the damage, rather than to the entire press as the district court found. CGS's argument is without merit. Operations were being performed on the printing press. In clear terms the policy excludes from coverage damage to the press itself." At 744.

Bituminous Casualty Corporation v. Northern Insurance Company of New York, 548 S.E.2d 495 (2001). Insured was repairing leaks on a slate deck which it had installed. While in the course of repair, protective sheeting blew away causing $165,000 damages to house. All damages excluded.

5. North Dakota

Grinnell Mutual Reinsurance Company v. Lynne, 686 N.W.2d 118 (2004). Insured agreed to construct new foundation on home and lifted house from foundation. Supporting timbers rolled over and house fell off jacks into the basement. All damage to the house was not covered:

> "The district court concluded the insurance policy in this case was not ambiguous and exclusion 2(j)(5) precluded coverage for Lynne's claim. . . . The language of the policy indicates '[t]hat particular part of real property' on which Lynne was working is subject to the exclusion. The particular part of real property on which Lynne was working was the house. Thus, damage to the house resulting from Lynne's work will not be covered by the policy due to the exclusions included in the policy." At 125-126.

Ernst v. Acuity, 704 N.W.2d 869 (2005). Insured improperly installed hardwood flooring in plaintiff's house. Damage not covered and exclusion unambiguous:

> "We conclude that exclusion k(5) expressly and unambiguously precludes coverage for the claimed

> damages, and summary judgment dismissing Ernst's claim against Acuity was appropriate." At 874.

6. Massachusetts

Jet Line Services, Inc. v. American Employers Insurance Co., 404 Mass. 706, 537 N.E.2d 107 (1989). Insured was in the business of cleaning large petroleum tanks and, while working on a tank, an explosion occurred, substantially damaging the entire tank. Insured contended that the exclusion referred only to the bottom of a tank where personnel were cleaning at the moment of the explosion. Trial court said the damage applied to the entire tank:

> "We conclude that the words 'that particular part of any property . . . on which operations are being performed' refers to the entire tank and not just to the bottom of the tank that Jet Line personnel were cleaning at the moment of the explosion. . . . The restrictive view that the trial judge and Jet Line have taken of the scope of the exclusion involved in this case is inconsistent with the position that courts elsewhere have taken. . . . Even in cases in which damage occurred to property on only part of which the insured was retained to work, courts have held that the exclusion applies to the entire property." At 711.

7. Louisiana

Goldsberry Operating Company, Inc. v. Cassity, Inc., 367 So.2d 133 (La. 1979). Insured was hired to perforate the wall of a well at a depth of 8,000 feet. While a gun was being lowered into the well, it prematurely

exploded at 6,900 feet, causing damage to the well. Insured contended exclusion only applied to area of the well at 8,000 feet where insured was supposed to work; insurer contended the exclusion applied to all damage to the well. Court held that the exclusion applied to all of the well:

> "We hold that the particular part of the property upon which Cassity was performing its operations was the entire part of the well where the gun and line traversed and through which the electricity would have passed to detonate the gun if the gun had reached the desired depth, and for this reason, the exclusion in the insurance policy precludes coverage on the damages sustained to the well when it prematurely exploded at the 6,900 foot depth." At 135.

8. Kansas

Utility Maintenance Contractors, Inc. v. West American Insurance Company, 866 P.2d 1093 (Kan. 1994). Insured hired to clean out clog in sewer, 115 feet from entrance to sewer. Insured caused damage to entire 115 feet prior to clog site. Insured contended exclusion applied only to area of sewer where clog existed. Court held that exclusion applied to entire damage along the sewer:

> "The general rule that exclusionary provisions should be strictly construed in favor of the insured is not applicable in this case. . . . We conclude that section 2.J.(5) excludes coverage for the 115 feet of sewer between manhole 17 and the clog site." At 1097.

American Mercury Insurance Group v. Urban, 2001 WL 1723734 (D.Kan. 2001). The insured was hired to install grain bins, dryer, grain pit and related components. One of the concrete pads on which one of the bins was to sit suddenly tilted causing damage to the complete system. The insurer contended damage to the entire system was excluded, not that area where the concrete shifted. Court agreed:

> "Kansas law supports a finding that under the terms of the contract that 'particular part' of the real property upon which MGC performed work actually encompasses the 'grain-handling facility' as a whole."

9. Ohio

LISN, Inc. v. Commercial Union Insurance Companies, 615 N.E.2d 650 (Ohio 1992). Insured's business was to remove nonfunctional and abandoned telephone cable from telephone systems. While in the course of its work, it accidentally cut a functioning cable, causing damage. Court held that all damage caused, including that to the functioning cable, was excluded:

> "When LISN failed to protect the functioning cable and cut the functioning cable, LISN's work was incorrectly performed and the damage done to the functioning cable was excluded under the plain and unambiguous provisions of Sections 2(j)(6) and VI(A)(2)(d)(iii)." At 654.

10. New Jersey

School Alliance Insurance Fund v. Fama Construction Company, 801 A.2d 459 (N.J. 2001). Plaintiff (SAIF) sought to recover for wind damage to six concrete block walls under construction. Court held that the exclusion was clear and unambiguous, precluding recovery from insurer of contractor:

> "Therefore, although SAIF could have proceeded against Potomac to recover money, it is nevertheless barred in light of the clear exclusion contained in Potomac's policy. Summary judgment is therefore granted against SAIF." At 467.

11. Washington

Vandivort Construction Co. v. Seattle Tennis Club, 522 P.2d 198 (Wash. 1974), Insured contracted to construct a concrete building housing six tennis courts. An earthslide damaged the site, resulting in the re-design of one of the walls and of the entire building to compensate. Court held no coverage for any of the work performed by the insured:

> "U.S. Fire, relying upon the insuring provisions, exclusions and conditions of the policies, correctly denied coverage. There is no liability for damages to property Vandivort works on, nor is there any liability for damage to property which arises out of structural injury due to excavation." At 202.

12. Tennessee

Vinsant Electrical Contractors v. Aetna Casualty & Surety Company, 530 S.W.2d 76 (Tenn. 1975). Insured was hired to install two circuit breakers in a switchboard. One of its workers dropped a socket wrench which caused a short and caused the entire switchboard to burn and blow up. Insured contended exclusion was limited only to that area where the circuit breakers were to be installed. The Court held that the entire switchboard was the property being worked on by the insured and all damage was excluded:

> "Under the factual situation in this particular case, we hold that the switchboard, in its entirety, or as a unit, is 'that particular part' of the property 'upon which operations are being performed.' We cannot so construe this provision as to limit the exclusion to the precise and isolated spot upon which work was being done. Such a construction would lead to illogical and absurd results and would completely nullify the intent of the endorsement. An exclusion so limited could well result in being, in practical effect, no exclusion at all. Such would abort the whole purpose of the exclusion." At 78.

Society's insureds were performing operations on a building, which is real property. That building collapsed because of their faulty and improper work. To try and limit the exclusion solely to the specific area where the insureds were working is contrary to case law from around the country, contrary to common sense, violates the language and spirit of the

exclusion, and would force trial courts into a detailed and torturous fact-finding process to determine precisely and exactly where the insured was performing specific work when damage occurs.

It is undisputed that the contractors were working on the Engine Room. Not only had they already removed the south wall, they had shored up both its second floor and its roof. They were then working on the foundation when, it is alleged, they undercut it, causing the slab to crack, their shoring to fall down, and the second floor and roof to come with it. The damage to the second floor, the roof, and the related structures that all collapsed is the "property" that must be "restored, repaired, or replaced" because of their allegedly faulty and incorrect work.

CONCLUSION

Society respectfully requests this Court reverse the decision of the Court of Appeals and affirm the judgment of the trial court, finding no coverage under either of the Society policies for the Plaintiffs' claims in this action.

Respectfully Submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify that:

This Brief conforms to the rules contained in s.809.19(8)(b) and (c) for a document produced with a proportional serif font. The length of this Brief is 10, 866 words.

I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of s.809.19(12). I further certify that:

This electronic Brief is identical in content and format to the printed form of the Brief filed as of this date.

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James W. Mohr, Jr.
State Bar No. 1015241

STATE OF WISCONSIN
SUPREME COURT

ACUITY, a mutual insurance company,

Plaintiff-Appellant,

APPEAL No. 2009AP002432

VPP GROUP, LLC,

Involuntary Plaintiff,

v.

SOCIETY INSURANCE, a mutual company,

Defendant-Respondent-Petitioner,

RON STOIKES d/b/a RS CONSTRUCTION &
TERRY LUETHE d/b/a FLINT'S CONSTRUCTION,

Defendants.

APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER SOCIETY INSURANCE

An appeal from the Circuit Court for Monroe County
The Hon. Michael J. McAlpine, Presiding
(Trial Court Case No. 2008CV249)

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APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

January 5, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2432

Cir. Ct. No. 2008CV249

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

ACUITY, A MUTUAL INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

VPP GROUP, LLC,

INVOLUNTARY-PLAINTIFF,

V.

SOCIETY INSURANCE, A MUTUAL COMPANY,

DEFENDANT-RESPONDENT,

RON STOIKES D/B/A RS CONSTRUCTION AND TERRY LUETHE D/B/A FLINT'S CONSTRUCTION,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Monroe County: MICHAEL J. MC ALPINE, Judge. *Reversed and cause remanded for further proceedings.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. This case arises out of damages suffered by VPP Group, LLC, stemming from construction work being performed by contractors on a building owned by VPP. VPP was insured by Acuity. Acuity paid the damage claims filed by VPP arising out of the construction work. Acuity then filed a subrogation action against the contractors and their insurer, Society Insurance. Society moved for summary judgment. The circuit court granted the motion and declared that Society's CGL policies did not provide coverage for damages caused VPP by the contractors because there was no "occurrence" within the meaning of the policies under the facts of this case.[1] Because we conclude that the damages suffered by VPP are a result of an "occurrence," the economic loss doctrine does not bar coverage and no business risk exception in the policy applies, we conclude there is coverage under Society's policy. We therefore reverse the circuit court's order for summary judgment and remand to the circuit court for further proceedings.

BACKGROUND

¶2 VPP, Ron Stoikes d/b/a RS Construction (RS), and Terry Luethe d/b/a Flint's Construction (Flint) entered into a contract to remove and reinstall a

[1] While there are two Society CGL policies at issue in this case, because they are identical in terms of the language relevant to this appeal, for ease of understanding, we will refer to the policies in the singular throughout the rest of this opinion.

concrete wall on the south side of the "engine room" building which provided refrigeration and necessary utility services to VPP's entire animal processing plant. The contract, in the form of a "Bid Memo," was dated May 21, 2006, and set forth the following terms: "Bid to include labor for Removal & installation of 49' x 22' h concrete wall[;] Also include shoring & related work." The total contract price was $8500.

¶3 The work contracted for was limited to removal and replacement of the engine room's south wall. VPP supplied all materials; RS and Flint provided all labor. RS and Flint began work in late May 2006. RS first shored up the engine room and removed the existing wall to grade level. The VPP processing plant continued at full operation during this phase of the work.

¶4 On June 12, 2006, during Flint's excavation of a trench adjacent to the south wall site, the soil began to erode from under the concrete slab of the first floor of the engine room. As a result, the engine room's first floor slab cracked and a portion deflected downward. The part of the building above the compromised floor, including the second floor and roof, likewise deflected downward. The engine room's masonry walls adjacent to the south wall also sustained damage. As a result of this damage to the engine room, the utility service to the rest of the processing plant was disrupted, including electrical service, anhydrous ammonia, and the refrigeration functions of the engine room's roof top condenser. Also, the roof top condenser was disabled because the water required to run it was too heavy for the damaged roof. Due to this damage, the entire processing plant's refrigeration capacity was reduced by twenty-five percent. In addition to the engine room itself, an adjacent building which shared a common wall incurred large cracks in the cooler housed inside it, which impaired its ability to cool processed beef.

¶5 Beef being processed must be rapidly cooled, and the processing is monitored by United States Department of Agriculture (USDA) on-site inspectors during all processing shifts. Because of the reduced refrigeration capacity, VPP had to change its processing schedule, adding an extra animal "kill" day, to ensure that it could fill its customer orders. Because of the need to add another "kill" day, VPP incurred costs for additional personnel hours, additional USDA inspectors' hours, extra freight and fuel charges, and other expenses in the amount of approximately $380,000.

¶6 VPP repaired the engine room by replacing that portion of the first floor concrete slab that had cracked, jacking up the second floor level to its original level and replacing portions of the roof slab that had cracked. Only after these repairs were made was RS able to complete the original job of rebuilding the south wall.

¶7 VPP contacted its insurer, Acuity, following the loss. After adjusting the losses, Acuity paid a total of $636,466.39 to VPP in final settlement of the loss claims, which amount included the $380,000 claimed for the extra expenses and the remainder representing the damages relating to repairs to the building. Not included in this amount were the costs to VPP related to replacing the south wall.

¶8 Acuity commenced this subrogation action against RS and Flint and their insurer, Society Insurance, seeking to recover damages arising from the engine room collapse, and alleging breach of contract and negligence. The applicable policy language states:

> **1. Business Liability.**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of ... "property damage" ... to which this insurance applies.
>
> ....
>
> **b.** This insurance applies:
>
> (1) to ... "property damage" only if:
>
> (a) The ... "property damage" is caused by an "occurrence" that takes place in the "coverage territory" ....

The policy defines "Property damage" as:

> **a.** Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> **b.** Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

¶9 The policy also includes two exclusions which Society contends bars coverage:

> This insurance does not apply to:
>
> ....
>
> **k. Damage To Property**
>
> "Property damage" to:
>
> **(5)** That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the "property damage" arises out of those operations; or
>
> **(6)** That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

¶10 Society moved for summary judgment, asserting that based on the above language of the CGL policy it issued to RS and Flint, there was no liability coverage for VPP's loss. The circuit court granted Society's motion for summary judgment, finding there was no "occurrence" under Society's policy. Acuity appealed. Additional facts, as necessary, are set forth in the discussion below.

DISCUSSION

¶11 The issue on appeal is whether there is coverage for VPP's claims under Society's CGL policies issued to RS and Flint. We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). "We draw all reasonable inferences from the evidence in the light most favorable to the non-moving party." ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781.

¶12 The interpretation of an insurance contract presents a question of law, which we also review de novo. ***Glendenning's Limestone & Ready-Mix Co. v. Reimer***, 2006 WI App 161, ¶19, 295 Wis. 2d 556, 721 N.W.2d 704. "Judicial interpretation of a contract, including an insurance policy, seeks to determine and give effect to the intent of the contracting parties." ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65. "The language in an insurance contract should be given its ordinary meaning—the meaning a reasonable person in the position of the insured would give the terms." *Kalchthaler v. Keller Constr. Co.*, 224 Wis. 2d 387, 393, 591 N.W.2d 169 (Ct.

App. 1999). We do not interpret insurance policies, however, "to provide coverage for risks that the insurer did not contemplate or underwrite and for which it has not received a premium." ***American Girl, Inc.***, 268 Wis. 2d 16, ¶23.

I. There is an "occurrence" under Society's CGL policy.

A. VPP's claimed damages from the collapse of the engine room constitute "property damage" caused by an "occurrence" under Society's CGL policy.

¶13 Acuity argues that the partial collapse of the engine room that resulted from faulty excavation techniques by Flint constitutes an "occurrence" under the CGL policy. Society contends that the circuit court correctly found that there was no "occurrence" under the policy. We agree with Acuity that the partial collapse of the engine room was an "occurrence" under Society's CGL policy.

¶14 To determine whether a claim is covered by a liability insurance policy, courts use a three-step process. *See* ***id.***, ¶24. "First, we examine the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage." ***Id.*** "If an initial grant is triggered, we look to see if any exclusions apply." ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶8, 304 Wis. 2d 750, 738 N.W.2d 578 (quoting ***State Farm Fire & Cas. Co. v. Acuity***, 2005 WI App 77, ¶8, 280 Wis. 2d 624, 695 N.W.2d 883). "We strictly construe exclusions against the insurer." ***Id.*** Finally, if an exclusion applies, "we then look to see whether any exception to that exclusion reinstates coverage." ***American Girl, Inc.***, 268 Wis. 2d 16, ¶24. Neither party contends that any exception to the exclusions applies, nor do we find one; accordingly, our analysis is limited to the first two steps.

¶15 We begin with the policy language and then examine the factual pleadings to determine whether there is an initial grant of coverage. Under the

CGL policy, to trigger coverage, there must be "property damage" caused by an occurrence. "Property damage" is defined within the policy as "physical injury to tangible property, including all resulting loss of use of that property." The damage to the engine room, the roof, and the resulting damage to the equipment is plainly "physical injury to tangible property." Society appears to concede that property damage occurred.

¶16 The parties' dispute focuses on what constitutes an "occurrence" under the CGL policy. An "occurrence" is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." The supreme court in ***American Girl*** looked to the following dictionary definitions in defining "accident" as that term is not defined in the policy. *Id.*, ¶37. They found in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE the term "accident" defined as "an event or condition occurring by chance or arising from unknown or remote cause." ***American Girl***, 268 Wis. 2d 16, ¶37 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 11 (2002)). BLACK'S LAW DICTIONARY defined "[t]he word 'accident,' in accident policies, [to] mean[] an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental." ***American Girl***, 268 Wis. 2d 16, ¶37 (quoting BLACK'S LAW DICTIONARY, 15 (7th ed. 1999)).

¶17 We conclude the factual pleadings in the amended complaint allege "property damage" caused by an "occurrence" within the meaning of Society's CGL policy. The amended complaint alleges that Terry Luethe of Flint was in the process of excavating a trench adjacent to the south wall of the engine room when the excavation undermined the subgrade soil, such that the soil under the south

side of the engine room unexpectedly eroded. This caused the first floor concrete slab, on which shoring columns had been placed to stabilize the building, to crack and buckle, resulting in the collapse of a portion of the building, including the second floor and roof structures, and damage to equipment and an adjacent building. It is clear that this damage was caused by the accidental soil erosion that occurred because of faulty excavation techniques. Accordingly, the "property damage" was caused by an "occurrence" within the meaning of the CGL policy.

¶18 Our conclusion that the soil erosion is an "occurrence" under the CGL policy is supported by ***American Girl***, ***Glendenning's***, and ***Kalchthaler***.

¶19 In ***American Girl***, the Pleasant Company entered into a contract with Renschler Company for the design and construction of a distribution warehouse. ***American Girl***, 268 Wis. 2d 16, ¶11. Due to the condition of the construction site, Renschler hired a soils engineer to provide a soil conditions analysis. ***Id.***, ¶12. The engineer concluded that the soil conditions were poor and recommended a methodology for preparing the soil. ***Id.*** The recommendation was carried out by Renschler and the warehouse was constructed. ***Id.***, ¶13. After the Pleasant Company took occupancy, the warehouse began to sink, causing damages to it as a result of the settlement. ***Id.***, ¶¶13-14. The Pleasant Company then claimed that negligence on the part of the soils engineer caused its damages and, as a result of that negligence, Renschler had breached its contract with the Pleasant Company. ***Id.***, ¶17. American Family, Renschler's insurer under a CGL policy, asserted that there was no "occurrence" under the policy. ***Id.***, ¶¶14, 39.

¶20 In concluding that there was an "occurrence" within the meaning of the CGL policy, the ***American Girl*** court specifically distinguished between what could be considered "faulty workmanship" and what was the "accident." ***Id.***, ¶¶5,

38. Specifically, the court held that it was not the soil engineer's inadequate site-preparation advice that was a cause of this exposure to harm; rather, it was the soil settlement itself (which as the cause of the harm was not intended, anticipated or expected) that constituted the "occurrence." *See id.*

¶21 We applied the ***American Girl*** reasoning in our analysis of a substantially identical insurance clause relating to property damage resulting from an "occurrence" in ***Glendenning's***. In ***Glendenning's***, owners and tenants of a dairy facility sued their general contractor for breach of contract and implied warranty arising out of various subcontractors' alleged negligent improvements to the facility. ***Glendenning's***, 295 Wis. 2d 556, ¶¶2, 4. The plaintiffs alleged various deficiencies in the subcontractors' work and various items of damages, including damage by a manure scraper to improperly installed rubber mats. ***Id.***, ¶6.

¶22 In analyzing whether this was an "occurrence" under the insurance policy, we relied on the analysis in ***American Girl***. Based on this analysis, we concluded that while faulty workmanship itself is not an "occurrence," where improperly installed mats incurred damage from the normal use of a manure scraper to clean them, this "damage" "was caused by an accident in that the damage was not intended or anticipated." ***Glendenning's***, 295 Wis. 2d 556, ¶¶26-27 (quoting ***American Girl***, 268 Wis. 2d 16, ¶¶39, 42). It therefore constituted an "occurrence" under the policy. ***Id.***, (citing ***American Girl***, 268 Wis. 2d 16, ¶38).

¶23 In ***Kalchthaler***, this court determined that there was a covered "occurrence" where the parties agreed that the subcontractor's faulty work resulted in windows that leaked, causing water damage to the interior of a residence. *See*

Kalchthaler, 224 Wis. 2d at 391. In determining what constituted an "occurrence" under the policy, we stated:

> Property damage, as defined by the policy, means physical injury to tangible property. Here, water entering leaky windows wrecked drapery and wallpaper. This is physical injury to tangible property. An occurrence, as defined by the policy, is an accident. An accident is an "event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes producing an unfortunate result." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11 (1993). Here, the parties have stipulated that fifty percent of the damages were due to [the subcontractors'] negligence. Furthermore, there is no question that an event occurred: the window leaked. This is an accident. So we have property damage caused by an occurrence and the policy applies.

Id. at 397. In short, the "occurrence" in ***Kalchthaler*** was the leaking of the windows; it was not the faulty workmanship.

¶24 The lessons of ***American Girl***, ***Glendenning's***, and ***Kalchthaler*** are that while faulty workmanship is not an "occurrence," faulty workmanship may cause an "occurrence." That is, faulty workmanship may cause an unintended event, such as soil settling in ***American Girl***, the leaking windows in ***Kalchthaler***, or, in this case, the soil erosion, and that event—the "occurrence"— may result in harm to other property.

¶25 We understand Society's argument to be that there was only one act—the faulty excavation—that led to the engine room collapse and because faulty workmanship cannot constitute an "occurrence," there was no "occurrence" under the policy. To support that position, Society cites two intentional tort cases for the proposition that there must be two acts—a cause and an effect— and it is the effect that is the "occurrence." *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, 311 Wis. 2d 492, 753 N.W.2d 448; ***Estate of Sustache v.***

American Family Mut. Ins. Co., 2008 WI 87, 311 Wis. 2d 548, 751 N.W.2d 845. Society argues that if the engine room collapse was the "occurrence," there needs to be another act bringing it about, and the only act is the faulty workmanship. We disagree.

¶26 Neither ***Stuart*** nor ***Sustache*** support Society's argument. Both cases addressed intentional acts: in ***Stuart***, a volitional misrepresentation made to induce another to enter into a contract, 311 Wis. 2d 492, ¶40; and in ***Sustache***, an assault intended to cause bodily harm, 311 Wis. 2d 548, ¶¶52-53. In both cases, the court concluded that these intentional acts did not constitute occurrences within the meaning of the insurance policies because they were not accidents, that is, they did not occur by chance. ***Stuart***, 311 Wis. 2d 492, ¶45; ***Sustache***, 311 Wis. 2d 548, ¶¶52-53. Because the court's analysis in both cases focuses on the intentional nature of the alleged conduct, these cases do not provide guidance in this case, where the alleged conduct is negligent work.

¶27 Society appears to argue that the court in ***Stuart*** and ***Sustache*** employed a definition of "accident" that is more favorable to Society's position than that employed in ***American Girl*** and ***Glendenning's***, which relied on ***American Girl***. However, we see nothing in either ***Stuart*** or ***Sustache*** indicating that the court was adopting a new definition of "accident" for purposes of determining whether there was an "occurrence" within the meaning of the CGL policy. Indeed, the court in both cases refers to the definition of "accident" in ***American Girl*** and applies that in its analysis. ***Stuart***, 311 Wis. 2d 492, ¶40; ***Sustache***, 311 Wis. 2d 548, ¶¶46-47. Thus, rather than establishing a new definition of "accident" that supposedly supports Society's position here, the court in ***Stuart*** and ***Sustache*** reaffirmed the definition of "accident" employed in ***American Girl***.

B. The Economic Loss Doctrine does not apply.

¶28 Society offers an alternative reason for why its CGL policies provide no coverage to its insureds, RS and Flint, for VPP's damage claims. Society's argument may be summarized in the following way. The economic loss doctrine applies to this case because the "predominant purpose" of the construction contract between VPP and RS and Flint was for a *product*, a new wall for a building. And because the economic loss doctrine bars tort claims against subcontractors when the subcontractors supply a portion of a finished product, here the wall, the economic loss doctrine bars VPP's negligence claims in this case. Consequently, according to Society, VPP may sue only for breach of contract. This is significant, in Society's view, because "pure breach of contract claims" are not "occurrences" within the meaning of the CGL policy here, and therefore there is no coverage. We reject this argument.

¶29 The court in ***American Girl*** has explained why Society's argument fails. The economic loss doctrine, when it applies, "restrict[s] contracting parties to contract rather than tort remedies for recovery of economic losses associated with the contract relationship." ***American Girl***, 268 Wis. 2d 16, ¶35. This doctrine is a "remedies principle" and "determines how a loss can be recovered—in tort or in contract/warranty law." ***Id.***, ¶35. The economic loss doctrine "does not determine whether an insurance policy covers a claim, which depends instead upon the policy language." ***Id.*** As was the case in ***American Girl***, the question here is "not whether [a party] is confined to a contract rather than tort remedy in its claim ..., but whether [the insurance policy] covers the loss." *See* ***id.***, ¶36 n.4.

¶30 As did the court in ***American Girl***, we will assume without deciding that the economic loss doctrine bars tort recovery here and that VPP's only viable

claim is for breach of contract. *See id.*, ¶36 & n.4. Society's argument that there is no coverage for this breach of contract claim rests on its assertion that this claim is not an "occurrence" within the meaning of the CGL policy. A similar argument was made and rejected in ***American Girl***. *See id.*, ¶¶39-49. In addition to explaining why case law did not support this proposition, the court analyzed the policy language:

> [T]here 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. The term "tort" does not appear in the CGL policy.

Id., ¶41.

¶31 Society has pointed to no difference in its policy language that requires a different analysis than that in ***American Girl***. Accordingly, we conclude that, even assuming the economic loss doctrine bars VPP's negligence claim, based on the allegations of the amended complaint, there was property damage caused by an "occurrence" within the meaning of Society's CGL policy.

¶32 In sum, we conclude there was an "occurrence" under the CGL policy issued by Society and therefore there is an initial grant of coverage.

II. Neither "business risk" exclusion k.(5) nor k.(6) applies.

¶33 Society argues the business risk exclusions k.(5) and k.(6) preclude coverage for property damage to the engine room building. The circuit court did not reach this issue because it ruled there was no "occurrence" and therefore no coverage. Because we have determined that there was an "occurrence" within the meaning of the insurance policy and therefore an initial grant of coverage, we

address the business risk exclusions to determine whether they preclude coverage. Because both exclusions share the same issue, what is the meaning of "that particular part," we consider the exclusions together.

¶34 The general intent of the "business risk" exclusions is to prevent recovery by an insured-contractor for faulty workmanship. ***Kalchthaler***, 224 Wis. 2d at 395. Exclusions k.(5) and k.(6) contain the following language:

> **B. Exclusions**
>
> ....
>
> This insurance does not apply to:
>
> ....
>
> **k. Damage To Property**
>
> "Property damage" to:
>
> ....
>
> **(5)** That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the "property damage" arises out of those operations; or
>
> **(6)** That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

The dispute in this case focuses on what constitutes "[t]hat particular part" of the property on which work was being performed.

¶35 Although the business risk exclusions "have generated substantial litigation," *see* ***American Girl***, 268 Wis. 2d 16, ¶29, no published case in Wisconsin has specifically interpreted the k.(5) exclusion at issue here, nor has a Wisconsin court construed and applied the phrase "that particular part" as used in both the k.(5) and k.(6) exclusions. The k.(5) exclusion, however, is commonly

found in CGL policies written after 1986 and courts from other jurisdictions have construed its precise terms in other policies. We therefore look to two cases from other jurisdictions that have construed these exclusions and the phrase "that particular part" for guidance.

¶36 In ***Acuity v. Burd & Smith Construction, Inc.***, 721 N.W.2d 33 (N.D. 2006), the insured was a construction company that had contracted with the owners of an existing apartment building to replace the building's roof. ***Id.***, ¶2. The building owners claimed that during the roof replacement, the insured contractor had failed to protect the building from rainstorms, leading to extensive water damage to the interior of the building, including damage to personal property belonging to two tenants. ***Id.*** Acuity, the contractor's insurer, commenced an action, seeking a declaration that the insured's CGL policy did not provide coverage for the claimed damages. ***Id.***, ¶4.

¶37 The CGL policy in ***Acuity*** contained property damage exclusions that are identical to the exclusions at issue in this case, and provided in the policy there as k.(5) and k.(6) exclusions. Citing to a list of cases addressing similar exclusions, the ***Acuity*** court concluded the exclusions did not bar coverage in that case, and offered the following explanation:

> [O]ther courts have generally construed those property damage exclusions to exclude coverage when the property damage is to the property on which the insured has contracted to perform operations and not to exclude coverage when the property damage is to property that the insured was not performing operations on. Some courts have specifically recognized that facts in each case are determinative of the particular part of property on which an insured is performing its operations and that buildings may be divided into parts in attempting to determine which part or parts are the object of the insured's work product. *A common thread deciding whether there is coverage for*

> *property damage is the scope of the insured's contract [with the property owner].*

Id., ¶24 (citations omitted and emphasis added). Applying this approach to construing the exclusions in ***Acuity***, the court concluded that any "damages to the interior of the apartment building" were not included in that "particular part" and were therefore not excluded under either exclusion k.(5) or k.(6). *Id.*, ¶27.

¶38 In ***Fortney & Weygandt, Inc. v. American Manufacturers Mutual Insurance Co.***, 595 F.3d 308, 311 (6th Cir. 2010) (applying Ohio law), the court interpreted the phrase "that particular part" included in a k.(6)-type exclusion:

> The opening words of the exclusion—namely, "[t]hat particular part"—are trebly restrictive, straining to the point of awkwardness to make clear that the exclusion applies only to building parts on which defective work was performed, and not to the building generally. And we also agree that "part," as used in this exclusion, means the "distinct component parts" of a building—things like the "interior drywall, stud framing, electrical wiring," or, as here, the foundation.

¶39 One commentator has pointed out that "[t]he use of the word 'particular' suggests that the exclusion only applies to the smallest unit or division of the work in question." SCOTT C. TURNER, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES § 32:5 (2011). In the commentator's words, "[t]his coverage approach is often called the 'component parts' approach," and "'part' as used in this exclusion, means the 'distinct component parts' of a building." *Id.*

¶40 We are persuaded that the phrase "that particular part" in the k.(5) and k.(6) exclusions applies only to those parts of a building on which the defective work was performed, which is determined based on the scope of the construction agreement. Our reading of "that particular part" is consistent with the

unambiguous language of the policy and cases from other jurisdictions construing similar exclusions in other CGL policies.[2]

¶41 We therefore turn to the construction contract between VPP and RS and Flint to determine the scope of the work contracted. The scope of work is set forth in a "Bid Memo" submitted by RS Construction and Flint's Construction, dated May 21, 2006. The bid was for labor to remove and install a 49' x 22' high concrete wall, including shoring and "related work." Dennis Rauscher, the business manager for VPP at the time the work was contracted, avers that the intent of the agreement was to repair the south masonry wall of the masonry block building, sometimes referred to as the "engine room" by removing and replacing the south wall. The work entailed shoring up the building. From this, we conclude the scope of the contracted work was to remove and replace the south wall of the "engine room."

¶42 Applying our reading of "that particular part" in the business risk exclusions to the scope-of-work we have identified above, we conclude that the

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[2] ***Mid-Continent Cas. Co. v. JHP Dev., Inc.***, 557 F.3d 207 (5th Cir. 2009) (policy exclusion did not apply to water damage to inside of individual condominiums caused by inadequate waterproofing of the exterior of the building); ***Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.***, 538 F.3d 365 (5th Cir. 2008) (where contract was to install entertainment center in airplane, damage to other aspects of plane, including loss of use, were not excluded under CGL policy); ***Acuity v. Burd & Smith Constr., Inc.***, 721 N.W.2d 33 (N.D. 2006) (contract was for roof replacement only, damage to interior of apartment building from rainstorms was other damage, and not excluded under CGL policy); ***American Equity Ins. Co. v. Van Ginhoven***, 788 So. 2d 388 (Fla. App. 2001) (where contract was for maintenance and repair of swimming pool, damage to the patio, deck, electrical, plumbing and the residence was not excluded under CGL policy); ***William Crawford, Inc. v. Travelers Ins. Co.***, 838 F. Supp. 157 (S.D.N.Y. 1993) (where contract was for renovation of one apartment, fire damage to other portions of apartment building not excluded under CGL policy).

k.(5) exclusion does not apply and that damage to the engine room building and the equipment in that building is covered under the policy.[3]

¶43 Society argues that the phrase "that particular part of real property on which you [are] ... performing operations" is intended to distinguish damage to "the building" on which work is being performed from damage to other buildings that may be on the same real property. Society provides the following example: "VPP had a number of buildings on its property. If the insured had caused a fire, and sparks flew to another building on which the insured was not working, igniting that, the exclusion would not apply." Society's reading of the k.(5) exception is broader than a reasonable reading of the language permits. Its construction of this exclusion is also in conflict with how courts from other jurisdictions have construed "that particular part" in CGL policies with similar exclusions. *See* ***Acuity***, 721 N.W.2d 33, ¶24; ***Fortney & Weygandt, Inc.***, 595 F.3d at 311; *supra* note 2.

¶44 Society argues the phrase "that particular part" applies to the entire engine room building and all equipment located in that building.[4] Society argues

[3] Acuity does not dispute that damage to the work being performed by the contractors—i.e., work on the south wall—is excluded under the business risk exclusions. In other words, there is no coverage under Society's CGL policy for the work contracted between VPP and RS and Flint.

[4] In its appellate brief, Society surveys a number of cases which, in its view, supports its position in this case. Our review of those cases, however, leads us to conclude that none of these cases helps Society: The cases are either distinguishable from this case on their facts or the holdings in the cases actually cut against Society. *See, e.g.,* ***Pekin Ins. Co. v. Willett***, 704 N.E.2d 923 (Ill. App. 1998) (the court specifically noted that the contract was for work on the swimming pool, and that there was *no demand for any damages outside of the damage to the pool*); ***American Equity Ins. Co. v. Van Ginhoven***, 788 So. 2d 388, 391 (Fla. App. 2001) (contract to conduct repairs and cleaning required draining of swimming pool; damage claim for pool was excluded, however, court found coverage under CGL policy for damages to other property, including the "plumbing, electrical, deck work, patio, screen enclosure or the residence"); ***Jet Line Servs., Inc. v. American Emp'rs Ins. Co.***, 537 N.E.2d 107, 109, 111 (Mass. 1989) (continued)

this is so because the contract called for the removal and reconstruction of the entire south wall of the building, which required shoring up the rest of the building as part of the necessary work, and consequently, the contract's "work" included the entire engine room. Society asserts that the k.(5) exclusion applies because the contractors worked in and had control of the entire engine room building, not just one "small area of the footing where Flint was excavating." Thus, Society argues, damages arose out of work being performed as part of the contractor's operations and therefore, exclusion k.(5) applies.

¶45 Society's argument rests on the inaccurate assertion that RS and Flint were contracted to work on the entire engine room building, not just the south wall. The Bid Memo did not call for work to be performed on the entire engine room building. The scope of the contracted work was limited to the south wall of the engine room. Society is also wrong in representing that the work entailed shoring up the entire engine room. According to diagrams detailing how the south wall was to be shored-up and photographs taken after the shoring of the wall, it is readily apparent that only the south wall was shored, not the entire engine room. This makes sense because the south wall was the only wall being removed and replaced. Moreover, nothing in the submissions indicates that the south wall supported the concrete slab first floor, or the east and north walls of the engine room. In any event, the defect was the soil erosion caused by faulty excavation and the damages to the second floor, the roof, and the related structures

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(contractor's business was to clean large petroleum storage tanks and while cleaning a tank for the U.S. Air Force, the tank exploded; court found the CGL policy exclusions applied because the contract was for cleaning the entire tank).

and mechanicals constitutes damage to property other than "that particular part" on which the work was being performed.[5]

¶46 Society further argues that, regardless whether exclusion k.(5) applies, exclusion k.(6) bars coverage because the policy excludes coverage for property damage to "**any property** that must be restored, repaired or replaced because 'your work' was incorrectly performed on it," which, in Society's view, includes the entire property the insured was working on and is not limited to the area where the property damage was initiated.

¶47 In response, Acuity argues that Society's reading of the k.(6) exclusion is unreasonable because it reads out the words "that particular part" from the exclusion. We agree. We cannot ignore the plain language of the insuring agreement. The exclusion plainly states that coverage under the policy is excluded for "property damage" to "*[t]hat particular part* of any property that must be restored ...."

¶48 There is a more fundamental problem with Society's construction of the k.(6) exclusion. In the phrase "any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it," work "performed on *it*" refers back to "any property." Thus, the plain meaning of this language limits application of the exclusion to property that was damaged by "your work"

[5] There is another reason why Society's contention that RS and Flint were in control of the entire engine room building is flawed. The "occurrence" was erosion of the soil adjacent to the south wall of the engine room. Thus, even if the contractors were responsible for the entire building and the mechanicals, damage to the building would not be excluded under our reading of both "business risk" exclusions. By way of example, even if the south wall itself collapsed, there would be no coverage for the south wall itself; but damage to other parts of the building, such as a failure of the second floor part of the structure along the south wall line, would be covered.

performed on "that particular part" of the building that the contractors were working, which was the south wall of the engine room.

CONCLUSION

¶49 For the reasons stated above, we conclude that there was an "occurrence" within the meaning of the CGL policies issued to RS and Flint, that the economic loss doctrine does not bar coverage and that neither exclusion k.(5) nor k.(6) in the policies apply.[6] We therefore reverse the circuit court's grant of summary judgment in favor of Society, and remand this case for further proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

Recommended for publication in the official reports.

[6] Because we conclude that Society has a duty to potentially indemnify RS and Flint, Society also has a duty to defend them. *See* ***1325 North Van Buren, LLC v. T-3 Group, Ltd.***, 2006 WI 94, ¶66 n.17, 293 Wis. 2d 410, 716 N.W.2d 822.

STATE OF WISCONSIN | CIRCUIT COURT | MONROE COUNTY

ACUITY, A MUTUAL INSURANCE COMPANY
Plaintiff

DECISION AND ORDER

And

VPP GROUP, LLC,
Involuntary Plaintiff

Vs.

Case No. 08 CV 249

SOCIETY INSURANCE, A MUTUAL COMPANY; RON STOIKES, INDIVIDUALLY AND D/B/A RS CONSTRUCTION; SOCIETY INSURANCE, A MUTUAL COMPANY; and TERRY LUETHE, INDIVIDUALLY AND D/B/A FLINT'S CONSTRUCTION
Defendant/Respondent

Society Insurance, A Mutual Company (Society) seeks summary judgment "finding and declaring that it provides no coverage to the Defendant Stoikes d/b/a RS Construction or to the Defendant Terry Luethe d/b/a Flint's Construction" for plaintiffs' claims. Society additionally seeks an order determining it has no further duty to defend Defendants Stoikes and/or Defendant Luethe. Society's motion is granted.

This action arises from a structural collapse at a meat packing facility in Norwalk, Wisconsin on June 12, 2006. The meat packing facility is owned by VPP Group, LLC ("VPP Group"), a business entity formally known as Valley Pride Pak. VPP Group hired Defendants Stoikes and Luethe for the "removal and installation of a 49' by 22' h concrete wall" in its Engine Room. Defendants Stoikes and Luethe further agreed to provide "shoring and related work". The "Bid Memo" submitted by Defendants Stoikes and Luethe, accepted by VPP Group, was only for labor associated with the identified work.

The Engine Room was successfully shored up and the "old wall" removed. In the process of preparing to install the new wall, Defendant Luethe excavated a four foot trench adjacent to where the "old wall" previously stood. As Defendant Luethe was about to complete the trench, one where new footings would be placed to support the new wall, the adjacent concrete floor failed. The trenching undermined the Engine Room first floor slab causing it to crack and buckle. With the failure of the first floor concrete slab the shoring was compromised and the structural integrity of the Engine Room portion of the building was significantly affected. The second floor sagged down but was otherwise undamaged. The second floor did not have to be replaced. The roof dropped down, cracked and was necessarily replaced.

VPP Group repaired the damages over the next several months. During the repair period VPP Group's production decreased because of the damages to the Engine Room portion of the plant, although the plant remained in operation.

VPP Group and its insurer, Acuity, A Mutual Insurance Company ("Acuity") resolved VPP Group's claim for the damages to its physical plant and production losses. In this action, VPP Group and Acuity seek to recover from the defendants their losses associated with the asserted construction partial collapse.

Defendants Stoikes and Luethe had each acquired a Contractors Businessowners Policy (Commercial General Liability – CGL) from Society. Society policy number CBP 434865 was issued to Ronald J. Stoikes DBA RS Construction with an inception date of 07/13/05 and an expiration of 07/13/06. The policy issued to Terry Luethe DBA Flint's Construction, policy number CBP 443575, had an inception date of 08/18/05 and an expiration date of 08 /18/06. Certified copies of each of the policies have been filed with the court. While the business relationship between Defendants Stoikes and Luethe, if any, is an issue in this lawsuit, their business relationship, if any, does not have a bearing upon whether either or both of the aforementioned policies issued by Society might cover the losses claimed by the plaintiffs.

Acuity's complaint states three (3) claims. First, Acuity alleges Breach of Contract – one based on the assertion Defendants Stoikes and Luethe "failed to

perform the contract in a good and workmanlike manner". Second, Acuity claims negligence – one based on the assertion Defendants Stoikes and Luethe "were negligent in performing masonry construction services". The third claim, one alleging Concerted Action, has been amended to that of Joint Venture in Acuity's Amended Complaint.[1]

No material facts appear in dispute. Both the issues of policy coverage and duty to defend are appropriate to resolve by summary judgment.

The initial issue is whether Society's CGL policies provide coverage to Defendants Stoikes and Luethe given the events leading to the partial collapse and resulting damages. The policies' Businessowners Liability Coverage Form, Section A – Coverages provides:

> 1. BUSINESS LIABILITY
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of ... "property damage"... to which this insurance applies. ...
>
> ***
>
> b. This insurance applies:
>
> (1) To ... "property damage" only if:
>
> (a) The ... "property damage" is caused by an "occurrence" that takes place in the "coverage territory."

Society's policies define the term "occurrence" in SECTION F – LIABILITY AND MEDICAL EXPENSES definitions as:

[1] Acuity's Amended Complaint was filed June 11, 2009 after all of the summary judgment submissions and arguments were presented to the court. The Amended Complaint's new Joint Venture claim does not affect the summary judgment motion outcome.

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

The policies define "property damage" to mean:

17. "Property damages" means:
    a. Physical injury to tangible property including all resulting loss of use of that property. ...
    b. Loss of use of tangible property that is not physically injured. ...

Acuity's complaint alleges at ¶16:

> On or about June 12, 2006 Defendants Stoikes and Luethe were in the process of excavating a trench adjacent to the south wall of the building as they continued with their work. In doing so, the defendants undermined the subgrade supporting the first floor slab on which shoring columns had been placed in order to stabilize the building. When the subgrade was undermined, the first floor slab was no longer able to carry the load of the building and the first floor slab cracked and buckled under the load, resulting in a partial collapse of the entire building including the second floor and roof structures.

Understandably Acuity and Society disagree on what the "occurrence" was causing the property damage. Acuity contends the "occurrence" was "...the sudden and unexpected building collapse on 6/12/06 ...". Acuity's position is expressed as it's impression of a concession being made by Society in it's initial brief. One only has to read Society's reply brief to appreciate it makes no such concession. Society has argued the "occurrence" was rather the faulty

workmanship involved in the excavation of the trench for the new footings. Each argument finds a degree of support in Wisconsin caselaw.

My analysis begins with what constitutes an "accident", for by definition an "occurrence" is an "accident". "Occurrence" is further defined in the CGL policies to mean "...including continuous or repeated exposure to ...harmful conditions." Neither the complaint nor any of the parties' submissions support the notion a harmful condition existed but for a brief period following the excavation (trenching) completed immediately prior to the collapse. It is therefore the term "accident" I need to examine to assist in determining what the "occurrence" was.

"Accident" has been defined in several ways. Dictionary definitions have been the source of the definitions adopted by our courts of review. The Wisconsin Supreme Court made the following observation defining the term "accident" in *Doyle v. Engelke,* 219 Wis.2d 277, 580 N.W.2nd 245 (1998):

> While the term "accident" is not defined further by the Policy, we must give words used in an insurance contract their common, everyday meaning. *See Schmidt v. Luchterhand,* 62 Wis. 2d 125, 133, 214 N.W.2d 393 (1974). Turning then to the common definition, we discover that "accident" is defined as "[a]n unexpected, undesirable event" or "an unforeseen incident" which is characterized by a "lack of intention." *The American Heritage Dictionary of the English Language* 11 (3rd ed.1992). Id., at p. 289

Subsequent to *Doyle*, the Wisconsin Supreme Court, using two (2) additional dictionary definitions of "accident", stated in *American Family Mutual Insurance Co. v. American Girl, Inc.*, 2004 WI 2, 268 Wis.2d 16, 673 N.W.2d 65:

> Liability for "property damage" is covered by the CGL policy if it resulted from an "occurrence." "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" is not defined in the policy. The dictionary definition of "accident" is: "an event or condition occurring by chance or arising from unknown or remote causes." *Webster's Third New International Dictionary of the English Language* 11 (2002). Black's Law Dictionary defines "accident" as follows: "The word 'accident', in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental." *Black's Law Dictionary* 15 (7th ed. 1999). Id., at p.37

Wisconsin's 4th District Court of Appeals thoroughly analyzed the then existing law to examine the relationship between an "occurrence", i.e. an "accident", and faulty workmanship in *Glendenning's Limestone & Ready Mix v. Reimer*, 2006 WI App. 161, 295 Wis.2d 556, 721 N.W.2d 704. The Court of Appeals stated:

> We therefore conclude that faulty workmanship in itself is not an "occurrence" – that is, "an accident" – within the meaning of the CGL policy. An "accident" may be caused by faulty workmanship, but every failure to adequately perform a job, even if that failure may be characterized as negligence, is not an "accident", and thus not an "occurrence" under the policy. Id., at p.39

The Court of Appeals went on to invite the Wisconsin Supreme Court to provide further clarity:

> We recognize that there are other approaches that are supported by a different reading of *American Girl* and by other case law. This court, circuit courts, insurance companies, insured, and other litigants would benefit from clarification by the supreme court on this point. Id., at ¶40

The Wisconsin Supreme Court most recently defined "accident" in *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 311 Wis.2d 492, 735 N.W.2d 766, with the following statement:

> The plain test of the American Family CGL policy unambiguously defines "occurrence" as an "accident." The meaning of "accident" itself is similarly unambiguous; we need look no farther than the common and ordinary meaning of the word as understood by a lay person. *See Cieslewicz*, 84 Wis.2d at 97-98. To determine the common and ordinary meaning of a word, we often rely upon definitions from recognized dictionaries. *See, e.g., State v. Polashek,* 2002 WI 74, ¶19, 253 Wis. 2d 527, 646 N.W.2d 330, *Webster's Third New International Dictionary* defines an accident as "1.a. an event or condition occurring by chance or arising from unknown or remote causes … b. *lack of intention or necessity* … "(emphasis added). *Webster's Third New International Dictionary* 11 (3rd ed. 1986). Therefore, applying the common and ordinary meaning that "accident" would have in the mind of a lay person, **we conclude that an accident is an event or condition occurring by chance or one that arises from unknown causes, and is unforeseen and unintended.** Id., at p. 24 (emphasis added)

The definition of "accident" pronounced in *Weisflog* (WSGI) was again recognized by the Wisconsin Supreme Court in it's decision in *Estate of Sustache*

v. American Family Mutual Insurance Co., 2008 WI 87, 311 Wis.2d 548, 751 N.W.2d 845:

> ...this court consulted dictionary definitions and past decisions in *Doyle, Everson,* and *American Girl* and concluded that an "accident" "is an event or condition occurring by chance or one that arises from unknown causes, and is unforeseen and unintended." Id., ¶24; *see id.* ¶¶ 24 and 13, 29-34, 40. The court approvingly cited *American Girl's* definition of an "accident": "'an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; rather, it is the causal event that must be accidental for the event to be an accidental occurrence." *Id.*, ¶40 (quoting *Am. Girl,* 268 Wis. 2d 16, ¶37). Id., at ¶46

From the decisions I have cited, I conclude an "accident" is: "...an event or condition occurring by chance or one that arises from unknown causes, and is unforeseen and unintended". See *WSGI,* 311 Wis.2d 86, ¶24. How then is this definition applied to the facts before the court? How does the application of the definition comport to the Glendenning's court's decision "...that faulty workmanship in itself is not an ...accident"?

The collapse occurred neither by chance nor arose from an unknown cause. The collapse occurred because the trenching activities "undermined the subgrade supporting the first floor slab", as Acuity alleges in its pleading. While surely the result was unintended, the nature of the work (trenching adjacent to the concrete floor) would allow one to reasonably conclude had the work not been properly performed, the structure was subject to damage. Here, the "causal event" was

faulty workmanship. The faulty workmanship causing the collapse is therefore not an "occurrence" within the meaning of the policies. Society's policies do not provide coverage for the property loss incurred by VPP Group.

The parties have thoroughly presented their views on the applicability of policy exclusions found in SECTION-B. The exclusions become legally significant once coverage is first established. As I have concluded coverage is unavailable under the policies, my examination of the exclusions is unnecessary.

> Only after concluding that coverage exists does the court examine the policy's exclusions to determine whether they preclude coverage. *Am. Girl,* 268 Wis.2d 16, ¶24. In other words, when a court determines that there is no coverage in the policy for the allegations in the complaint, it is not necessary to interpret the policy's exclusions. *See Smith,*226 Wis.2d at 806 ("Upon close examination, however, we are convinced that [the defendant] does not have coverage under his policies. Consequently, it is unnecessary ... to interpret the exclusion clause in circumstances where coverage does not exist."). *Estate of Sustache,* 311 Wis.2d at 561-562.

See also *Sass v. Acuity,* 209 WI App. 32, ¶5, ___ Wis.2d ___, 765 N.W.2d 582.

Having determined coverage is unavailable under the policies, I also conclude Society does not have a duty to defend.

> The insurer's duty to continue to defend is contingent upon the court's determination that the insured has coverage if the plaintiff proves his case.

* * *

> Since the plaintiffs' suit was not brought against the Mathewses for damages "caused by an occurrence to which th[e] policy

applies," American Family has no duty to continue to defend. *Estate of Sustache,* 311 Wis. 2d at 564 and 576.

The parties have also very thoroughly briefed the applicability of the economic loss doctrine to the allegations of plaintiff's pleadings. The conclusion coverage is unavailable eliminates the need to address these arguments with respect to Society's summary judgment motion. Only if Society's policies had provide coverage, and no exclusion applied, would the economic loss doctrine issue raised by Society be of potential significance.

CONCLUSION

The alleged faulty workmanship associated with the trenching necessary to set new footings caused the first floor failure and resulting partial collapse. The facts alleged and presented in the parties' submissions do not constitute an "occurrence" under society's policies. Thus the policies provide no coverage for the asserted losses.

IT IS HEREWITH ORDERED Society's motions are granted. Society is dismissed as a party to this action. Furthermore, Society has no duty to defendant Defendants Stoikes and Luethe.

Dated this 13th day of July, 2009.

BY THE COURT:

Michael J. McAlpine
Circuit Court, Br. II

COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2733 Cir. Ct. No. 2009CV341

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

MARK YEAGER,

PLAINTIFF-APPELLANT,

V.

POLYURETHANE FOAM INSULATION, LLC AND BIOBASED INSULATION, LLC,

DEFENDANTS,

SOCIETY INSURANCE,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Oneida County: MARK MANGERSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Mark Yeager appeals a summary judgment granted in favor of Society Insurance. The circuit court determined that a commercial general liability policy Society issued to Polyurethane Foam Insulation, LLC (PFI) did not provide coverage for Yeager's claims against PFI. The court also held that Society had no further duty to defend PFI under an errors and omissions endorsement after Society deposited the endorsement's $10,000 limit with the court. We affirm.

BACKGROUND[1]

¶2 In October 2004, Yeager began construction of a new home in Sugar Camp. In December 2007, Yeager hired PFI to insulate the home's exterior walls using a spray-in foam insulation product manufactured by BioBased Insulation, LLC. About one week after PFI finished its work on the house, Yeager became concerned that the insulation had not been installed correctly. He subsequently sued both PFI and BioBased Insulation. With respect to PFI, Yeager alleged breach of contract, negligent breach of contract, and breach of warranty. He contended PFI "failed to install the insulation according to the specifications of the contract" and "negligently install[ed] the insulation."

¶3 At his deposition, Yeager described the alleged problems with PFI's work. First, he claimed that PFI sprayed the insulation unevenly, causing "frost

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[1] Yeager's brief contains no citations to the record; instead, Yeager only cites to his brief's appendix. We admonish Yeager that WIS. STAT. RULES 809.19(1)(d) and (e) require appropriate citations to the record on appeal, and references to a brief's appendix are not in conformity with the rules. *See* ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

pockets" to form in some places on the insulation's surface. Second, he contended that PFI allowed liquid resin to leak from a spray hose, staining the floors on the house's first and second stories and leaving behind an oily residue. Third, Yeager alleged that PFI "oversprayed" the insulation, depositing foam on windows, exposed beams, two ladders, a work light, a ceiling fan, and a chimney. Fourth, Yeager claimed that PFI spilled fuel oil in the house during the insulation process. Fifth, Yeager alleged that PFI failed to remove staging material it used while installing the insulation. Sixth, Yeager contended that, because of PFI's failure to install the insulation properly, condensation built up on the house's windows, causing gray staining and water damage.

¶4 Society, which had issued a commercial general liability (CGL) policy to PFI, moved to intervene, and the circuit court granted its motion. The court then granted Society's motion to bifurcate and stay, ruling that it would determine whether Society's policy provided coverage for Yeager's claims against PFI before reaching the merits of Yeager's claims.

¶5 Society's CGL policy provided, in relevant part:

> **A. Coverages**
>
> **1. Business Liability**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies ....
>
> **b.** This insurance applies:
>
> (1) To "bodily injury" and "property damage" only if:
>
> (a) The "bodily" injury or "property damage" is caused by an "occurrence"

> that takes place in the "coverage territory[.]"

The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

¶6 Society had also issued PFI a "Contractors Errors and Omissions" endorsement, which provided that Society would pay "those sums that [PFI] becomes legally obligated to pay for damages covered by this insurance because of 'contractors errors and omissions' to which this insurance applies." However, Society's limit under the endorsement was $10,000. The endorsement also stated that Society's "right and duty to defend end when we have used up that amount in the payment of judgments or settlements for 'contractors errors and omissions.'"

¶7 Society moved for summary judgment. Society conceded that the contractor's errors and omissions endorsement provided coverage for Yeager's claims against PFI. However, Society argued there was no other coverage for the claims under the CGL policy. Society contended the CGL policy did not provide an initial grant of coverage because Yeager had not alleged any property damage caused by an "occurrence," as the policy defined that term. In the alternative, Society argued that certain exclusions in the CGL policy applied.

¶8 Society also asked the court to declare that it had no further duty to defend PFI. Society argued that, because the CGL policy did not provide coverage, Society could not have a duty to defend under that policy. Society conceded that it had a duty to defend PFI under the contractor's errors and omissions endorsement. However, Society offered to pay the endorsement's $10,000 limit to the court "in fulfillment of Society's obligation under that form."

Society argued that, under the language of the endorsement, once Society paid the endorsement's limit, it had no further duty to defend PFI.

¶9 The circuit court granted Society's summary judgment motion, holding that the CGL policy did not provide coverage for Yeager's claims because "the exclusions apply here." The court also ruled that Society, having paid $10,000 to the clerk of court, had no further duty to defend PFI under the contractor's errors and omissions endorsement. The court therefore dismissed Society from the case.

DISCUSSION

¶10 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Smaxwell v. Bayard***, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

I. Coverage for Yeager's claims under the CGL policy

¶11 The interpretation of an insurance policy is a question of law that we review independently. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. In doing so, we give the policy language its ordinary meaning—that is, "'what the reasonable person in the position of the insured would have understood the words to mean.'" *Id.*, ¶17 (quoting ARNOLD P. ANDERSON, WISCONSIN INSURANCE LAW § 1.1(C) (4th ed. 1998)).

¶12 We employ a three-step procedure to determine whether an insurance policy provides coverage for a claim. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. "First,

we examine the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage." *Id.* If the claim triggers an initial grant of coverage, we next examine the exclusions in the policy to determine whether they preclude coverage of the claim. *Id.* Lastly, if an exclusion applies, we look for an exception to that exclusion that would reinstate coverage. *Id.*

¶13 Here, we need only reach the first step of this process because we conclude that, aside from the errors and omissions endorsement, Society's CGL policy does not make an initial grant of coverage for Yeager's claims.[2] The CGL policy provides that Society will pay "those sums that [PFI] becomes legally obligated to pay as damages because of ... 'property damage[.]'" The policy further states that the insurance only applies if the property damage "is caused by an 'occurrence[.]'" The term "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

¶14 Yeager's claims against PFI do not allege property damage caused by an "occurrence," as the CGL policy defines that term. We have previously held that faulty workmanship, in and of itself, is not an "occurrence" and therefore does not give rise to coverage under a standard CGL policy, like the one Society issued in this case:

> We therefore conclude that faulty workmanship in itself is not an "occurrence"—that is, "an accident"—within the

[2] The circuit court concluded there was no coverage for Yeager's claims because certain exclusions in the policy applied. On review of summary judgment, we may affirm based on a theory or reasoning different from that relied upon by the circuit court. *See* ***Bence v. Spinato***, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995).

> meaning of the CGL policy. An "accident" may be caused by faulty workmanship, but every failure to adequately perform a job, even if that failure may be characterized as negligence, is not an "accident," and thus not an "occurrence" under the policy.

Glendenning's Limestone & Ready-Mix Co. v. Reimer, 2006 WI App 161, ¶39, 295 Wis. 2d 556, 721 N.W.2d 704.

¶15 All of Yeager's claims against PFI are for faulty workmanship. He contends that PFI improperly installed the spray-in foam insulation, causing frost pockets and condensation; that PFI's equipment leaked liquid resin and fuel oil during the insulation process; that PFI oversprayed insulation onto windows, beams, ladders, light fixtures, and a chimney; and that PFI failed to remove some staging materials from the home. These claims all arise from PFI's failure to install the foam insulation in a professional, workmanlike manner. We agree with Society that

> [w]hen a contractor comes into a house to spray insulation and sprays more than he should, does not protect the areas where he is spraying, allows his hoses to leak, does not properly fill the voids in the wall, or sprays the material on too thin, these are all simply examples of faulty or defective workmanship. ... [T]he allegations state that PFI did not do what a careful contractor would have done.

¶16 Yeager contends that, because PFI's conduct led to unexpected or accidental property damage, PFI's conduct must have constituted an occurrence under the CGL policy. However, an unexpected or accidental bad result does not qualify as an "occurrence" for purposes of insurance coverage; instead, it is the act which causes the bad result that must qualify as an "occurrence" or "accident" under the policy. The supreme court has explained:

> [T]he ordinary meaning of the word "accident," as used in accident insurance policies, is "an event which takes place without one's foresight or expectation." *A result, though*

> *unexpected, is not an "accident"; rather it is the causal event that must be accidental for the event to be an accidental occurrence.*

Stuart v. Weisflog's Showroom Gallery, Inc., 2008 WI 86, ¶40, 311 Wis. 2d 492, 753 N.W.2d 448 (emphasis added).

¶17 Thus, the mere fact that Yeager can point to an unexpected bad result or unexpected property damage does not mean that an "occurrence" has taken place. Instead, the event that caused the damage—here, PFI's conduct—must be an occurrence. PFI's conduct constitutes faulty workmanship, and faulty workmanship is not an "occurrence" for purposes of a standard CGL policy like the one in this case. *See* ***Glendenning's***, 295 Wis. 2d 556, ¶39. Consequently, Yeager has not alleged any property damage caused by an "occurrence." The CGL policy therefore does not provide coverage for his claims.[3]

II. Society's duty to defend under the contractor's errors and omissions endorsement

¶18 Yeager also contends the circuit court erred by holding that Society had no further duty to defend PFI after Society deposited $10,000—the coverage limit of the contractor's errors and omissions endorsement—with the clerk of court. However, we conclude Yeager does not have standing to challenge the circuit court's ruling on Society's duty to defend PFI. "A right to appeal from a

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[3] Yeager cites ***1325 North Van Buren, LLC v. T-3 Group, Ltd.***, 2005 WI App 121, ¶¶28-29, 284 Wis. 2d 387, 701 N.W.2d 13, *aff'd in part, rev'd in part on other grounds by* 2006 WI 94, 293 Wis. 2d 410, 716 N.W.2d 822, and ***Kalchthaler v. Keller Construction Co.***, 224 Wis. 2d 387, 396-97, 591 N.W.2d 169 (Ct. App. 1999), two cases that held that bad results caused by contractors' faulty workmanship could constitute occurrences under standard CGL policies. However, these cases were decided before ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶40, 311 Wis. 2d 492, 753 N.W.2d 448, which reflects our supreme court's current view that the causal event, not the bad result, must be the occurrence for coverage purposes.

judgment or order, irrespective of statute, is confined to parties aggrieved in some appreciable manner by the court action." ***Tierney v. Lacenski***, 114 Wis. 2d 298, 302, 338 N.W.2d 522 (Ct. App. 1983). In other words, "the judgment or order appealed from must bear directly and injuriously upon the interests of the appellant; he must be adversely affected in some appreciable manner." ***Id.***

¶19 Yeager has not been adversely affected by the circuit court's ruling that Society had no further duty to defend PFI under the contractor's errors and omissions endorsement. Under the endorsement, Society owed a duty of defense only to its insured, PFI, and the duty to defend benefits PFI alone. Yeager was not a party to the insurance contract, and, to the extent he argues he is a third-party beneficiary of that contract, we reject his contention:

> In the absence of express provisions in the policy or statutory provisions which can be read into the policy, a standard liability policy does not make the injured party a third-party beneficiary. The general rule on third-party beneficiaries in Wisconsin is that one claiming such status must show that the contract was entered into by the parties directly and primarily for his benefit. The benefit must be more than merely incidental to the agreement.

Mercado v. Mitchell, 83 Wis. 2d 17, 28, 264 N.W.2d 532 (1978) (footnotes omitted). Yeager does not argue that Society and PFI entered into an insurance contract directly and primarily for his benefit, nor does he contend that any benefit to him was more than merely incidental to the agreement.

¶20 Yeager nevertheless argues that he was adversely affected by the circuit court's decision because it "will affect [his] ability to recover from PFI." We disagree. Before the court ruled that Society had no further duty to defend PFI under the contractor's errors and omissions endorsement, the court had already determined that Society's CGL policy, aside from the endorsement, did not cover

Yeager's claims against PFI. Because of the court's ruling that there was no coverage under the CGL policy, the most Society would have had to pay for Yeager's claims was $10,000—the limit of the errors and omissions endorsement. Society conceded coverage under the endorsement and deposited $10,000 with the clerk of court to fulfill its obligation to indemnify PFI. The circuit court's ruling on Society's duty to defend PFI has not adversely affected Yeager's ability to recover the $10,000 that Society concedes it is obligated to pay on PFI's behalf. Yeager therefore lacks standing to challenge the circuit court's ruling on Society's duty to defend.

¶21 Moreover, even if Yeager had standing, we would conclude that, under the language of the endorsement, the court properly relieved Society of its duty to defend PFI. The endorsement provides that Society will pay no more than $10,000 for damages for "contractors errors and omissions." Society's duty to defend ends "when [Society has] used up that amount in the payment of judgments or settlements for 'contractors errors and omissions.'" Here, Society sought summary judgment on the coverage issues and asked the circuit court for a judgment declaring that the endorsement's $10,000 limit was the only coverage available to PFI for Yeager's claims. The court granted Society's motion, and the summary judgment "declar[es] that the policy of insurance issued by Society does not provide coverage for the claims asserted in this action, with the exception of $10,000.00 in coverage under the policy endorsement for 'Contractors Errors and Omissions' ...." Society deposited $10,000 with the clerk of court in payment of this judgment. Society therefore "used up" the endorsement's $10,000 limit in payment of a judgment for contractor's errors and omissions. Accordingly, Society had no further duty to defend PFI under the endorsement.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

BID MEMO

BID NO. | DATE May 21, 2006

JOB
LOCATION Valley Pride Pack – Rick Stewart
19081 Hwy 71 Norwalk WI 54648
FIRM RS Construction + Flint's Const. | PREPARED BY JS
ADDRESS 17384 Kermit Ave Norwalk 54648 | APPROVED BY RS
TYPE OF WORK | PHONE cell 377-0166

WORKLOAD INCLUDED	AMOUNT OF BID
Bid to include labor for	
Removal + installation of 49' x 22' h	
Concrete wall	
Also to include shoring + related work	
Payment as follows: OK Pay 5/26/06	
May 26, 2006 RS Construction	#1,000.00
May 26, 2006 Flint's Construction OK 5/26/06	1,000.00
June 2, 2006 RS Construction	1,000.00
June 2, 2006 Flint's Construction	1,000.00
June 9, 2006 RS Construction	1,000.00
June 9, 2006 Flint's Construction	1,000.00
June 16, 2006 RS Construction	1,250.00
June 16, 2006 Flint's Construction TOTAL BID	1,250.00

EXCLUSIONS AND QUALIFICATIONS

Total Bid #8,500.00

Thank You – RS Construction

FILED
MONROE COUNTY, WI
MAY 21 2008
CAROL THORSEN
CLERK OF COURTS

ACKNOWLEDGEMENT OF ADDENDA
DELIVERY
TAX
RECEIVED

EXHIBIT "A"
Blumberg No. 5119

APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. §809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;

(2) the findings or opinion of the circuit court;

(3) a copy of any unpublished opinion cited under Wis. Stat. §809.23(3)(a) or (b); and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Date: 6/13/12

James W. Mohr, Jr.
State Bar No. 1015241

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2009-AP-2432

Acuity, a mutual insurance company,

Plaintiff-Appellant,

VPP Group, LLC,

Involuntary-Plaintiff,

vs.

Society Insurance, a mutual company,

Defendant-Respondent-Petitioner,

Ron Stoikes d/b/a RS Construction &
Terry Luethe d/b/a Flint's Construction,

Defendants.

APPEAL FROM THE CIRCUIT COURT
FOR MONROE COUNTY
HONORABLE MICHAEL J. MCALPINE PRESIDING
(TRIAL COURT CASE NO.: 2008-CV-249)

BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF ISSUES

1. Should the court review and overturn its decision in American Girl, holding that the Economic Loss Doctrine is a remedies principle which does not determine whether an insurance policy covers a claim?

ANSWERED BY THE COURTS BELOW:

The trial court did not address this issue. The court of appeals answered "no."

2. Where faulty excavation techniques resulted in the erosion and undermining of soils supporting an existing building, and the soil erosion caused a partial building collapse and tangible property damage, does the event qualify as an "occurrence" within the meaning of a CGL policy?

ANSWERED BY THE COURTS BELOW:

The trial court answered "no." The court of appeals reversed, holding that the event qualified as an "occurrence."

3. Where a CGL policy excludes liability coverage for property damage to "that particular part" of property on which the insured is performing operations, is the scope of the exclusion limited to property damage to the particular property on which the defective work was performed?

ANSWERED BY THE COURTS BELOW:

The trial court did not address this issue. The court of appeals answered "yes," holding that the scope of the exclusion was limited to "that particular part."

STATEMENT OF FACTS

The court of appeal's Decision adequately sets forth the material facts. Certain facts will be emphasized in the argument which follows.

ARGUMENT

I. THERE IS NO BASIS TO RECONSIDER AMERICAN GIRL'S MANDATE THAT, DEPENDING ON THE FACTS AND POLICY LANGUAGE, A BREACH OF CONTRACT CLAIM MAY QUALIFY FOR COVERAGE UNDER A CGL POLICY.

In American Family Mutual Insurance Co. v. American Girl, Inc., 2004 WI 2, 268 Wis.2d 16, 673 N.W.2d 65, this Court recognized that the economic loss doctrine (ELD) is a remedies principle. Id., at ¶35. It determines whether a loss can be recovered under tort or contract/warranty law. Id. It does not determine whether an insurance policy covers a claim, which depends on the policy language. Id. A claim based on breach of contract may qualify as an "occurrence" under the insuring clause of the CGL policy, with liability coverage subject to the business risk exclusions. Id. at ¶39, 43.

Society argues that American Girl was wrongly decided and that this Court should adopt the position advocated by the dissenting opinions of Justices Roggensack and Crooks. Society does not argue that the court of appeals misread or misapplied the mandate of American Girl in this case. It truly seeks review and

reversal of the holding in American Girl. However, Society's argument flies in the face of the doctrine of stare decisis.

This Court follows the doctrine stare decisis scrupulously because of its abiding respect for the rule of law. Johnson Controls v. Employer's Ins. of Wausau, 2003 WI 108, ¶94, 264 Wis.2d 60, 665 N.W.2d 257. "A court's decision to depart from precedent is not to be made casually. It must be explained carefully and fully to insure that the court is not acting in an arbitrary or capricious manner. A court should not depart from precedent without sufficient justification." Id., quoting State v. Stevens, 181 Wis.2d 410, 442, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring). The full rationale for the doctrine and the criteria for overturning prior cases are thoroughly discussed in Johnson Controls, *supra*, ¶94-101. See also, Bartholomew v. Patients Comp. Fund, 2006 WI 91, ¶31-34, 293 Wis.2d 38, 717 N.W.2d 216; Progressive Northern Ins. Co. v. Romanshek, 2005 WI 67, ¶41-44, 281 Wis.2d 300, 697 N.W.2d 417.

Society does not present a developed or cogent argument as to why the Court should consider overturning American Girl under the standards and criteria set forth above. The rationale of American Girl is both sound in principle, and workable in practice, and there have been no changes or developments in the law which undermine that rationale. See, Bartholomew, *supra*, at ¶33. The bottom line is that American Girl was correctly decided based on the long-standing recognition

that insurance coverage is not determined by labels or legal theories but by facts, considered in light of the policy language. See, Bankert v. Thresherman's Mut. Ins. Co., 110 Wis.2d 469, 480, 329 N.W.2d 150 (1983).

At the outset, Acuity submits that the economic loss doctrine does not apply in this case. The contract at issue was a service contract where the contractors agreed to provide "labor only" to remove and replace the south building wall. All materials were provided by VPP. The case is governed by Insurance Co. of North America v. Cease Electric, Inc., 2004 WI 139, 276 Wis.2d 361, 688 N.W.2d 462, holding that the doctrine does not apply to a contract for labor or services. Contracts for products or goods enjoy the benefit of well-developed remedial law under the U.C.C. Id. at ¶35. However the U.C.C. does not apply to service contracts and its built-in warranty provisions do not apply to a contract for services. Id. The single page Bid Memo in this case makes it clear that the contractors' services were "labor only."

Under the ELD, "economic loss" is "the loss in a product's value which occurs because the product is 'inferior in quality and does not work for the general purposes for which it was manufactured and sold.'" Wausau Tile, Inc. v. County Concrete Corp., 226 Wis.2d 235, 246, 595 N.W.2d 445 (1999)(quoting Northridge Co. v. W.R. Grace & Co., 162 Wis.2d 918, 925-26, 471 N.W.2d 179 (1991)). "Economic loss may be either direct or consequential. Direct economic loss is loss

in value of the product itself. All other economic loss caused by the product defect, such as lost profits, is consequential economic loss." Wausau Tile, Inc., *supra* at 246. "Economic damages do not include losses due to personal injury or damage to other property." Linden v. Cascade Stone Co., 2005 WI 113, ¶6, 283 Wis.2d 606, 699 N.W.2d 189.

Not only is this a service contract, but there is damage to "other property" within the meaning of the ELD. The damage resulting from the events in question extended far beyond the alleged product itself. In the context of an $8,500 "labor only" construction contract, VPP suffered over $630,000 in hard damages. As noted by the court of appeals, the engine room's adjacent walls sustained physical damage and the utility service to the entire processing plant was disrupted, including electrical service, anhydrous ammonia, and the refrigeration functions of the rooftop condenser. (Decision, ¶4). The rooftop condenser was disabled and the entire plant's refrigeration capacity was reduced. Id. An adjacent building which shared a common wall with the engine room incurred large cracks in the cooler housed within it, which impaired its ability to cool processed beef. Id. There was physical damage to "other property" and the ELD does not apply.

In addition, the losses sustained by VPP go beyond the concept of purely "economic loss." VPP had an existing building which was an important component of the entire plant operations. The south wall had deteriorated, and

VPP consulted with the defendants, masonry contractors, to obtain their advice and expertise. The contractors developed the plan for the removal and replacement of the south masonry wall and prepared a bid proposal representing fair compensation for their services.[1] Because of malfeasance in the performance of the work, there was unexpected physical damage to VPP's other property and mechanical systems. The damage extended far beyond the contractors' work and does not represent "economic loss" within the meaning of the doctrine.

Therefore, the court should conclude that the ELD does not apply in this case. Society is really asking this court to issue an advisory opinion under circumstances where the economic loss doctrine is not squarely presented as an issue in the case. This is all the more reason to follow the doctrine of stare decisis and the clear holding of American Girl.

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[1] At page 26 of its Brief, Society argues:

> "Acuity's insured, VPP, hired two inexpensive contractors to do a job that should have been done by professional engineers. The two contractors did not shore the building up properly and then undercut the foundation, causing the collapse. If the insured wanted to take a chance on hiring inexpensive contractors, they were certainly free to do so, but they cannot expect an insurance company to pay for the calculated risk of employing cheap labor."

This is a self-serving mischaracterization of the record. The contractors inspected the building at VPP's request, provided repair recommendations, and proposed to perform the work for $8,500. There is absolutely no evidence or inference that the owner was getting a cheap fix. Acuity is not expecting Society to pay for the cost of doing the job right. Acuity expects Society to pay for the substantial consequential damages flowing from the contractor's methods, which are precisely the types of damages that fall outside the "business risk" concept. See, Bulen v. West Bend Mut. Ins. Co., 125 Wis.2d 259, 261-62, 371 N.W.2d 392 (Ct. App. 1985).

In American Girl, this Court assumed, without deciding, that the economic loss doctrine would apply to limit the plaintiff to a breach of contract/warranty theory. 2004 WI 2, ¶17, fn.4. In the present case, the court of appeals assumed, without deciding, that the ELD could apply to bar tort recovery. (Decision, ¶30). Even if the ELD is deemed to apply here, the court of appeal's analysis was entirely proper. It summarized the American Girl mandate as follows:

> "The court in American Girl has explained why Society's argument fails. The economic loss doctrine, when it applies, 'restrict[s] contracting parties to contract rather than tort remedies for recovery of economic losses associated with the contract relationship.' American Girl, 268 Wis.2d 16, ¶35. This doctrine is a 'remedies principle' and 'determines how a loss can be recovered - in tort or in contract/warranty law.' Id. at ¶35. The economic loss doctrine 'does not determine whether an insurance policy covers a claim, which depends instead upon the policy language.' Id. As was the case in American Girl, the question here is 'not whether [a party] is confined to a contract rather than tort remedy in its claim . . . , but whether [the insurance policy] covers the loss.' See, Id. at ¶36n.4."

Decision, ¶29.

Society also fails to mention 1325 North Van Buren, LLC v. T-3 Group, Ltd., 2006 WI 94, 293 Wis.2d 410, 716 N.W.2d 822 which closely followed American Girl. The case involved the renovation of an existing industrial warehouse into a 42-unit condominium building. This Court first determined that the predominant purpose of the contract was to provide a completed condominium complex, rather than to provide construction management services. Therefore, the ELD applied, and tort remedies were precluded.

Westport Insurance argued that the plaintiff's breach of contract claim did not fall within the initial grant of coverage under the insurance policy. Id. at ¶54. The court noted that a breach of contract claim can arise from negligent acts, errors or omissions, and "we have repeatedly rejected the argument that insurance coverage is dependent upon the theory of liability." Id. at ¶57-58. The court went on to discuss and quote extensively from American Girl, and stated:

> "We first held that although the economic loss doctrine may limit a party to contract rather than tort remedies, it does not determine insurance coverage. Id. ¶35, 673 N.W.2d 65. Insurance coverage depends upon the policy language, not the theory of liability. Id."

Id. at ¶59. Holding that the plaintiff's breach of contract claim was covered by the Westport policy, the court concluded:

> "We find this reasoning of American Girl persuasive to this case. As an 'occurrence' in the CGL policy of American Girl was not defined by a tort claim, so too 'wrongful act' in Westport's professional liability policy is not defined by a tort claim. Under Westport's policy, at most a 'wrongful act' is a 'negligent act' but this is entirely different from a claim of negligence. It is entirely possible that one could do a negligent act, which would form the basis for a breach of contract claim. It would be an easy matter to have the insurance policy state that it does not cover facts that arise out of what is a breach of contract, if that was indeed Westport's intention."

Id. at ¶62.

Justice Bradley issued a dissenting opinion in 1325 North Van Buren, in which Chief Justice Abrahamson and Justice Butler joined. However the dissent only addressed the majority's application of the economic loss doctrine. The doctrine was directly applicable in 1325 North Van Buren and the unanimous court

followed American Girl in holding that the breach of contract claim qualified for coverage under the Westport policy.

Contrary to Society's suggestions, American Girl and 1325 North Van Buren provide a proper legal framework to determine whether a particular event qualifies for coverage under a CGL policy. Insurance coverage is not dependant upon the theory of liability. Coverage is determined based on a consideration of the underlying facts in light of the insurance policy language. A rigid rule holding that a claim based on breach of contract can never qualify as an "occurrence" would be bad policy, and would eviscerate the liability coverage and corresponding duty of defense which insureds throughout the State of Wisconsin reasonably expect and depend upon. This court should follow existing precedent and refuse to overturn or modify American Girl.

II. THE COURT OF APPEALS PROPERLY APPLIED EXISTING PRECEDENT IN CONCLUDING THAT THERE WAS PROPERTY DAMAGE CAUSED BY AN OCCURRENCE UNDER THE CGL POLICIES.

Wisconsin courts have developed a body of law dealing with the issue of whether an event qualifies as an "occurrence" under a CGL policy. The Court of Appeal's Decision in this case represents a careful and proper application of this Court's decision in American Family Mut. Ins. Co. v. American Girl, Inc., 2004 WI 2, 268 Wis.2d 16, 673 N.W.2d 65 and its progeny, including Glendenning's Limestone & Ready-Mix Co. v. Reimer, 2006 WI App. 161, ¶21, 295 Wis.2d 556,

721 N.W.2d 704. The facts and evidence presented establish "property damage" caused by an accidental "occurrence" within the meaning of the Society policy. To hold otherwise would negate the broad application of the policy's insuring clause and render the various "business risk" exclusions as mere surplusage in determining the nature and scope of liability coverage afforded by the CGL policy.

The question of what qualifies as an accident or occurrence under a CGL policy has become unduly complex. American Girl instructs that the courts will employ an expansive view of what constitutes an accident, and property damage caused by an occurrence. Otherwise, the numerous business risk exclusions would be unnecessary. Id. at ¶47; 1325 North Van Buren, 2006 WI 94, ¶64. There are at least eight reported cases in Wisconsin that cite dictionary definitions of the term "accident" in reviewing insurance coverage disputes. The problem is not understanding the definition of the term, but in properly applying the concept to the facts presented. As the Pennsylvania Supreme Court poignantly observed:

> "What is an accident? Everyone knows what an accident is until the word comes up in court. Then it becomes a mysterious phenomenon, and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of twelve world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled and it must be reheard in an appellate court. An accident, simply stated, is merely an unanticipated event; it is something which occurs not as the result of natural routine but as the culmination of forces working without design, coordination or plan. And the more disorganized the forces, the more confusedly they operate, the more indiscriminately haphazard the clash and intermingling, the more perfect is the resulting accident."

Brenneman v. St. Paul Fire & Marine Ins. Co., 411 Pa. 409, 192 A.2d 745, 747 (1963).

Society argues that the Court of Appeals was incorrect in concluding "that the property damage (*i.e.*, the collapse of the building) was the 'accident.' . . . The result cannot be the cause." (Petitioner's Brief, pg. 20) This is not what the Court held. It stated:

> ". . . The amended complaint alleges that Terry Luethe of Flint was in the process of excavating a trench adjacent to the south wall of the engine room when the excavation undermined the subgrade soil, such that the soil under the south side of the engine room unexpectedly eroded. This caused the first floor concrete slab, on which shoring columns had been placed to stabilize the building, to crack and buckle, resulting in the collapse of a portion of the building, including the second floor and roof structures, and damage to equipment and an adjacent building. It is clear that this damage was caused by the *accidental soil erosion that occurred because of faulty excavation techniques*. Accordingly, the 'property damage' was caused by an 'occurrence' within the meaning of the CGL policy."

Decision, ¶17. (emphasis added).

Acuity has no quarrel with Society's argument that to trigger coverage, there must be an accident that causes, or results in, property damage, although the cause and effect may occur simultaneously, or very closely in time. However Society incorrectly accuses the Court of Appeals of confusing the property damage, the building collapse, with the "accident" in this case. The Court of Appeals properly concluded that the soil erosion was the accidental event which caused property damage to the building.

Kalchthaler v. Keller Const. Co., 224 Wis.2d 387, 591 N.W.2d 169 (Ct. App. 1999) provides the most succinct analysis of the facts presented, and a blueprint for the later decisions. There the court stated:

> "The policy applies to property damage caused by an occurrence. Property damage, as defined by the policy, means physical injury to tangible property. Here, water entering leaky windows wrecked drapery and wallpaper. This is physical injury to tangible property. An occurrence, as defined by the policy, is an accident. An accident is an 'event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result.' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11 (1993). . . . [T]here is no question that an event occurred: the windows leaked. This is an accident. So we have property damage caused by an occurrence and the policy applies."

Kalchthaler, 224 Wis.2d at 397.

The faulty work in Kalchthaler involved the installation of windows. The faulty work was a cause of an accident/event: the windows leaked. The leakage was not expected or intended by the contractor. The leakage caused property damage to drapes and interior wall surfaces. There was property damage caused by an occurrence, and the policy applied.[2]

The same logic was followed in American Girl, which discussed Kalchthaler with approval. See, 2004 WI 2, ¶48. The soils engineer evaluated the site but provided inadequate site-preparation advice. The faulty advice was the cause of an accident: substantial soil settlement underneath the completed building. The soil settlement was not expected or intended by the engineer or general contractor. The soil settlement caused structural property damage to the

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[2] Society argues that Yeager v. Polyeuerathane Foam Insulation, LLC, Appeal No.: 2010-AP-2733 was correctly decided. However, the sixth alleged construction defect in that case appears to qualify as an "occurrence" which is very similar to Kalchthaler. Faulty methods in applying foam insulation caused unexpected condensation on windows (the accident) with gray staining and water damage (property damage). Id. at ¶3. These allegations qualify as an "occurrence."

building. There was property damage caused by an occurrence and the policy applied.[3]

In Glendenning's, the contractor's faulty methods resulted in concrete dairy stalls with inadequate slopes. The court properly held that the faulty work itself, the inadequate slopes, was not an accident or "occurrence." The distinction is important here. Where the contractor improperly set the forms and poured concrete, resulting in improper slopes, the faulty work did not result in an accidental "occurrence." But where the faulty work caused the barn scraper to unexpectedly damage rubber mats in the barn stalls, the event or consequence caused by the faulty work qualified as an "occurrence." Glendenning's, 2006 WI App 161, ¶42.[4] Glendenning's makes it clear that while faulty workmanship in itself is not an accident, an accident may be caused by faulty workmanship. 2006 WI App 161, ¶39.

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[3] The pre-American Girl cases relied on by Society were considered and rejected by this Court. See, American Girl, 2004 WI 2, ¶43-46. See also, Glendenning's, 2006 WI App 161, ¶25, fn.7.

At page 11 of its brief, Society quotes from Midwest Motor Lodge v. Hartford Ins. Group, 226 Wis.2d 23, 36, 593 N.W.2d 852, fn.2, (Ct. App. 1999), in arguing that economic loss and contractual liability are not covered under the CGL policy. However Society's quote omits the punch line, where the court went on to say:

> "On the other hand, there is the right to recover economic losses when Hunzinger's defective work inflicts physical damage to other tangible property or the loss of use of other tangible property." Id.

[4] It seems apparent that the inadequate concrete slopes caused the barn scraper to contact and damage the rubber mats. This was a consequence of the faulty work.

In the case before this Court, the contractors were hired to remove and replace the south masonry wall and footing.[5] After the south wall was removed, the contractors employed faulty excavation methods in digging a trench to reach the footing.[6] The faulty methods caused an accident and an event occurred: the soils beneath the first floor slab were eroded. No one contends that the erosion of the soils was expected or intended by the contractors. The erosion of the soils, the accident, caused property damage in the form of partial collapse of the building. Just as in the reported cases, there was property damage caused by an occurrence and the policy applies.

The Court of Appeals also correctly distinguished Society's reliance on Stuart v. Weisflog's Showroom Gallery, Inc., 2008 WI 86, 311 Wis.2d 492, 735 N.W.2d 766, and Estate of Sustache v. American Family Mut. Ins. Co., 2008 WI 87, 311 Wis.2d 548, 751 N.W.2d 845. Society's quotation from Stuart is actually a restatement of the definition of "accident" quoted by the Court in American Girl. See, Petitioner's Brief, p.7, 20; Stuart at ¶40; American Girl, at ¶37. Stuart involved a home improvement contractor's volitional misrepresentations which did

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[5] Shoring columns were placed immediately adjacent to the south wall location and were anchored to the first floor slab in order to carry the load as the south wall was removed. Thankfully, the shoring design was proper and avoided a total building collapse.

[6] The excavation traversed the entire 49 foot length of the south wall which resulted in erosion of the soils supporting the first floor slab. The soils sloughed out from under the slab, and into the excavated trench. Without soil support, the slab cracked and deflected downward. Acuity contends that the excavation should have been accomplished in sections or stages which would have maintained the integrity of the supporting soils.

not qualify as an accidental "occurrence." Sustache involved an alleged intentional assault and battery which was simply not "accidental." In the context of cases involving volitional acts, it is understandable that the Court would emphasize that an "accident" occurs by chance or arises from unknown causes, as opposed to intentional causes. But these cases provide limited guidance in defining an "occurrence" in the context of a construction case involving unintentional damage.

The current state of the law is really framed by the court of appeal's decision in Glendenning's. The case was certified to the Supreme Court but this Court denied review. The Glendenning's court concluded that in American Girl, it was not the inadequate soil preparation advice that was the "occurrence." Id. ¶27. Rather, the inadequate advice was a cause of the "occurrence"- the soil settlement beneath the building. Id. After reaching this conclusion, the court discussed Kalchthaler and read the case to hold that the "occurrence" was the leaking of the windows; it was not the faulty work that resulted in the window leak. Id. ¶28-29.

The Glendenning's court then returned to American Girl and referred to specific language, in that:

> "The American Girl court does not say in the first sentence quoted above that faulty workmanship *can be the 'occurrence'* that gives rise to property damage, but says instead that faulty workmanship '*can give rise to property damage caused by an "occurrence".... '* Id. (emphasis added). We understand this to mean that faulty workmanship may cause, or be a cause of, an 'occurrence,' such as the leaking of windows or the settling of soil under a building; we do not read

> it to say that faulty workmanship in itself is an 'occurrence.'" (emphasis in original).

Id. ¶30.

The Glendenning's court next considered its own decision in 1325 North Van Buren LLC v. T-3 Group, Ltd., 2005 WI App 121, 284 Wis.2d 387, 701 N.W.2d 13, *rev'd in part, aff'd in part on other grounds,* 2006 WI 94, 293 Wis.2d 410, 716 N.W.2d 822, where it held that the property damage was caused by an "occurrence," since it was caused by an event that was not an expected part of the contractor's performance of the work. Id. ¶32. This led the court to say:

> "In short, in neither American Girl as we read it, nor Kalchthaler, nor 1325 North Van Buren, 284 Wis. 2d 387, was faulty workmanship in itself the "occurrence." We recognize, however, that there is some support for the Kenkhuises' position in another case, Doyle v. Engelke, 219 Wis. 2d 277, 580 N.W.2d 245 (1998)."

Id. ¶33.

The court then embarked on its consideration of Doyle, where this Court concluded that the alleged negligent supervision of employees causing emotional distress to the plaintiff qualified as an accidental "event" triggering liability coverage. Referring to dictionary definitions, the Doyle court emphasized an "unintentional occurrence leading to undesirable results". Doyle, 219 Wis.2d at 289-90. Glendenning's noted that while American Girl had considered Doyle in the context of whether an "occurrence" could only be based on tort theory, it had not discussed Doyle in the context of whether an "occurrence" was alleged, or

what event constituted the "occurrence." Id. ¶36. This caused the Glendenning's court to say:

> "Since, as American Girl establishes, we are to look at the factual circumstances of the claim to decide whether there is an 'occurrence' under the policy and since, under Doyle, a negligent act is accidental within a policy's definition of 'event' that is the same definition as 'occurrence' in West Bend's policy, then it may reasonably be argued that a subcontractor's negligence, which forms the basis for a breach of contract claim against the contractor, is an 'occurrence.' Under this reasoning, the 'occurrence' is the faulty or negligent workmanship itself, and there is no requirement that the faulty or negligent workmanship must cause an event that constitutes the 'occurrence.'"

Id. ¶37.

At that point, the Glendenning's court had reached a number of preliminary conclusions. American Girl held that soil settlement was the "occurrence" causing property damage; it was not the faulty soils advice. Kalchthaler and 1325 North Van Buren had determined that the faulty work had been the cause of an unintended consequence that qualified as an "occurrence." Doyle could be read to hold that the negligent or faulty workmanship itself was the "occurrence," and that there was no requirement that the faulty work must cause an event that constitutes the "occurrence." Deciding that it should not adopt the reasoning of Doyle, the court stated:

> "Ultimately, we are persuaded that we should not adopt this reasoning in this case for the following reasons. First, although Doyle may seem to establish a rule that all negligent acts are 'accidents' for purposes of CGL policies that define 'occurrence' or 'event' as an 'accident,' the supreme court has more recently declined to apply its reasoning in Doyle to negligent misrepresentation, thus indicating this reasoning is not uniformly applicable to all acts that are characterized as negligent. Everson v. Lorenz, 2005 WI 51, ¶¶15-20, 280 Wis. 2d 1, 695 N.W.2d 298. Second, and more significant, although the court in American Girl discussed Doyle for other purposes, it did not rely on its

> reasoning in Doyle to conclude that the 'occurrence' was the soil engineer's negligence. Instead, as we have explained above, it concluded that the 'occurrence' was the soil settling beneath the building. . . . [O]ur decisions in Kalchthaler and 1325 North Van Buren are consistent with the American Girl analysis and do not provide support for adopting the approach of Doyle."

Id. ¶38.

The Glendenning's court's analysis (which was legally and academically correct) led to two alternatives:

(a) The court could adopt its reading of American Girl. The faulty work must cause an unexpected event (the accident) for an "occurrence" to be found. In American Girl, the accident was the settlement of soils beneath the building; or,

(b) The court could follow the Doyle rationale and expand the circumstances that qualify as an "occurrence." Whether the plaintiff alleges negligence, faulty workmanship (*i.e.* negligence), or a breach of contract (based on negligent performance of contract), the question is whether there was an unintentional occurrence leading to undesirable results. If so, this constitutes an "occurrence" and so long as "property damage" is alleged or shown, the general grant of coverage is triggered.

The Glendenning's court opted for the more restrictive approach in sub (a) above. For the reasons it stated, it was not willing to apply the more expansive test

based on Doyle and sub (b) above. This led to the court's ultimate conclusion and its oft-quoted statement of law:

> "We therefore conclude that faulty workmanship in itself is not an 'occurrence'—that is, 'an accident'—within the meaning of the CGL policy. An 'accident' may be caused by faulty workmanship, but every failure to adequately perform a job, even if that failure may be characterized as negligence, is not an 'accident,' and thus not an'occurrence' under the policy."

Id. ¶39.[7]

So where does this leave the present appeal? The present case falls squarely within the more restrictive test adopted in Glendenning's. The faulty excavation methods caused an accidental event: the erosion of soils beneath the first floor slab. This "occurrence" triggers the grant of coverage. The "occurrence" caused property damage in the form of physical damage to tangible property and loss of use.

Glendenning's properly recognized that where the faulty work *is itself* the property damage, there is no "occurrence." Where the only damage consists of correcting the faulty work itself, there is no "occurrence." The contractor may not have intended to improperly set the forms and pour the concrete at an improper slope. But the cost of rectifying the slope does not represent property damage caused by an accidental event. On the other hand, physical damage to rubber mats

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[7] Society does not discuss or analyze these Wisconsin authorities, other than to side with the dissenters in American Girl. It quotes this passage from Glendenning's in arguing that faulty workmanship is a breach of contract, which can never qualify as a covered "occurrence". This is not what American Girl or Glendenning's held. An accident may clearly be caused by faulty workmanship.

caused by utilizing the barn scraper on the improper slope is property damage caused by an accidental "occurrence."

The real question for this Court is whether Glendenning's properly construed American Girl in defining the standard of "occurrence," or whether this Court intends to follow Doyle and its broader standard of an "unintentional occurrence leading to undesirable results." Under either test, the present case clearly involves property damage caused by an "occurrence." The better policy, as recognized by this Court in American Girl and 1325 North Van Buren, is to apply a broad standard of what constitutes an "occurrence" so that the limitations of the business risk exclusions can be given full consideration and proper effect.

III. RECENT CASES FROM MULTIPLE JURISDICTIONS SUPPORT AMERICAN GIRL AND REVEAL A GROWING TREND TO BROADLY CONSTRUE THE TERM "OCCURRENCE" AND APPLY THE BUSINESS RISK EXCLUSIONS TO DEFINE AND LIMIT THE EXTENT OF COVERAGE.

We urge the court to carefully consider the decision of the United States Court of Appeals for the 10th Circuit in Greystone Const., Inc. v. National Fire & Marine Ins. Co., 661 F.3d 1272 (10th Cir. 2011), applying Colorado law. The facts of the case are similar to American Girl. Greystone was a general contractor which employed subcontractors to perform all of the work on new home construction. The homes in question were built on soils containing expansive clays. Over time, soil expansion caused the homes' foundations to shift, resulting

in extensive damage to the homes' living areas including upper-level living areas, porch, patio, garage, and driveway. The plaintiffs sued Greystone contending that the house was damaged due to a subcontractor's negligent design and construction of the house's soil-drainage and structural elements. Id. at 1276.

Greystone tendered the defense to multiple insurers and National Fire denied that it was obligated to defend or indemnify the claims. Relying on the recent decision in General Security Indemnity Co. of Arizona v. Mountain States Mutual Casualty Co., 205 P.3d 529 (Colo. App. 2009), the district court granted summary judgment to National Fire, holding that the plaintiffs' complaints did not allege accidents that would trigger covered "occurrences" under National's policies. On appeal, the 10th Circuit certified the question to the Colorado Supreme Court which declined to consider the issue. Then, in response to General Security, the Colorado legislature enacted a statute designed to clarify that in construction cases, courts shall presume that property damage to the work itself or other work is an accident unless the property damage is intended or expected by the insured.[8] Id.

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[8] It is interesting to note that in addition to Colorado, the legislatures in Arkansas, South Carolina and Hawaii have recently enacted statutes designed to establish that faulty workmanship qualifies as an "occurrence" under the CGL policy. See, Stern and La Londe, Legislating Construction Accidents: The Trend of "Occurrence" Statutes to Create Insurance Coverage for Construction Defect Lawsuits, 2012 WL 697235; See also, Eyerly, The Battle Over Coverage for Construction Defects, 16-MAR Haw. B.J. 4(2012). One of the headings in this article reads, "American Girl" Leads the Way by Determining That Construction Defects Arise From An Occurrence."

at 1279. The 10th Circuit first determined that the Colorado statute would not be applied retroactively to the claims against Greystone. Id. at 1280.

Addressing the issue of whether damage caused by faulty workmanship is an "occurrence" under the standard CGL definition, the court refused to follow General Security, concluding that the Colorado Supreme Court would construe the term to encompass "unforeseeable damage to nondefective property arising from faulty workmanship." Id. at 1281. It began its analysis by considering cases from other jurisdictions on both sides of the issue. It noted that "a strong recent trend in the case law interprets the term 'occurrence' to encompass unanticipated damage to nondefective property resulting from poor workmanship," citing 12 recent cases supporting the trend, including American Girl. Id. at 1282-83. It also acknowledged that a handful of cases support the view that damage to a contractor's work arising from defective construction can never constitute a covered occurrence. Id. at 1283. However some of those jurisdictions allow recovery when the faulty workmanship injures a third-party or results in damage to property other than the work itself. Id.

The court concluded that "injuries flowing from improper or faulty workmanship constitute an occurrence so long as the resulting damage is to nondefective property, and is caused without expectation or foresight." Id. at 1284.

> "In assessing whether damage caused by poor workmanship was foreseeable, we ask whether damages would have been foreseeable if the builder and his subcontractors had completed the work properly. Any other approach renders the doctrine illogical. This is because, by definition, only damage caused by purposeful neglect or knowingly poor workmanship is foreseeable; a correctly installed shingle does not ordinarily fall, and a correctly installed window does not ordinarily leak. . . CGL policies are meant to cover unforeseeable damages-a category that encompasses faulty workmanship that leads to physical damage of nondefective property."

Id. at 1285-86. (citations omitted).

The court distinguished between damage to nondefective work, and damage to defective work itself. The logic of CGL policies required a conclusion that the damage to the living quarters of the homes was covered, while damage to the soil-drainage and structural elements was not. Id. at 1286. The obligation to repair defective work is not unexpected or unforeseen, but where "faulty workmanship causes unexpected property damage to otherwise nondefective portions of the builder's work, the policies provide coverage. In this scenario, there is simply no anticipation that damage will occur." Id. at 1286.

> ". . . The defective-nondefective principle flows from the recognition that the faulty workmanship, standing alone, is not caused by an accident - but that damage to *other* property caused by the faulty workmanship (including both the nondefective work product of the contractor and third-party property) *is* the result of an accident."

Id. at 1287. (emphasis in original).

The court proceeded to address the evolution of CGL policy language and the expansion of coverage over time. Quoting from Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007), it concluded that providing

coverage for a contractor's faulty workmanship does not transform the CGL policy into a performance bond:

> "[A]n insurance policy spreads the contractor's risk while a bond guarantees its performance. An insurance policy is issued based on an evaluation of risks and losses that is actuarially linked to premiums; that is, losses are expected. In contrast, a surety bond is underwritten based on what amounts to a credit evaluation of the particular contractor and its capabilities to perform its contracts, with the expectation that no losses will occur. Unlike insurance, the performance bond offers no indemnity for the contractor; it protects only the owner."

Lamar Homes, 242 S.W.3d at 10, n.7.

The Greystone court also considered the definition of "occurrence" in light of business risk exclusions. It quoted from American Girl, and noted that the "your work" exclusion would be illusory if damages to the contractor's nondefective work were not covered in the first place. Greystone, 661 F.3d at 1289. Under the rationale of General Security, "the 'your work' exclusion does no work at all." Id. at 1289.

The decisions cited by the Greystone court in support of its conclusions are persuasive and compelling. There are recent decisions from the supreme courts of Georgia, Indiana, Mississippi, South Carolina, Florida, Texas, Kansas, and Alaska.[9] There are federal court decisions from the 4th Circuit applying Maryland law, the 7th Circuit applying Indiana law, and a district court applying Utah law.

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[9] See also, Travelers Indem. Co. of America v. Moore & Assoc., Inc., 216 S.W.3d 302 (Tenn. 2007), a consistent case decided by the Tennessee Supreme Court which cited and followed American Girl.

Many of the cases cite and discuss American Girl with approval and is clear that Wisconsin is at the forefront of the development of the law on these issues. A number of the cases represent major efforts by state supreme courts to thoroughly analyze the state of the law in concluding that the term "occurrence" encompasses unanticipated damage to nondefective property resulting from poor or faulty workmanship. And even on the other side of the issue, the cases generally recognize that an "occurrence" will be found when the faulty workmanship injures a third-party or results in damage to property other than the work itself.

Society appears to place strong reliance on case law from Illinois. It cites Viking Construction Management, Inc. v. Liberty Mutual Ins. Co., 831 N.E.2d 1 (Ill. App. 2005) where Viking agreed to provide construction management services with respect to the design and construction of a new middle school. During the course of the work, portions of a masonry wall collapsed due to inadequate temporary bracing. The plaintiff's complaint was based on breach of contract and alleged that the wall collapsed "under normal, foreseeable and expected conditions." Id., 831 N.E.2d at 3. Plaintiff alleged damages for the fair and reasonable cost to repair and replace the damaged section of the building; there was no allegation of damage to other property. Id. The court recognized that in Illinois, a CGL policy generally does not cover claims for faulty workmanship or breach of contract and noted that the underlying complaint did not include a claim

for damage to property other than the building itself. Id., at 11. The court distinguished Illinois cases finding an occurrence where the defective work caused damage to something other than the contractor's work. Id., at 12. Thus, in Pekin Ins. Co. v. Richard Marker Assocs., 682 N.E.2d 362 (Ill. App. 1997), water pipes burst resulting in property damage to the plaintiff's carpeting, drywall, antique furniture, clothing, personal momentos and pictures. This constituted an "occurrence" because there was damage to property other than the work performed. The same distinction was drawn in Stoneridge Development Co., Inc. v. Essex Ins. Co., 888 N.E.2d 633 (Ill. App. 2008).

However, see, Country Mut. Ins. Co. v. Carr, 867 N.E.2d 1157 (Ill. App. 2007). Plaintiffs brought suit to recover for damage to their basement walls when the contractor negligently placed backfill and operated heavy equipment near the walls. Citing a number of Illinois Supreme Court decisions, the court stated:

> "The Supreme Court of Illinois has stated a court should not determine whether something is an accident by looking at whether the actions leading to the damage were intentionally done. According to the court, the real question is whether the person performing the acts leading to the result intended or expected the result. If the person did not intend or expect the result, then the result was the product of an accident."

Id. at 1162.

It therefore appears that Illinois law is not as rigid as Society would contend, although Illinois law is inconsistent with American Girl, and its progeny. The Illinois courts have a real problem finding CGL coverage for a pure breach of

contract claim. However if unintended results occur or there is damage to property other than the work itself, an "occurrence" can be found under Illinois law.

To the extent that Wisconsin law needs clarification or development, this court can utilize the Greystone decision as a segway to its holdings in American Girl and 1325 North Van Buren. Greystone properly holds that where faulty work results in property damage that was unintended and unanticipated, the faulty workmanship, standing alone, without damage to other property, is not caused by an accident. However "damage to *other* property caused by the faulty workmanship (including both the nondefective work product of the contractor and third-party property) *is* the result of an accident." Greystone, 661 F.3d at 1287. This holding is entirely consistent with American Girl as interpreted by Glendenning's and represents a fair and workable standard for both insurers and insureds in determining whether liability coverage is triggered in the first instance. The court can then consider the various business risk exclusions in defining the nature and extent of the damages that may be covered by the CGL policy.

Acuity suggests the following test:

(a). Did the faulty workmanship cause an unintended and unanticipated event? (either simultaneously with the faulty work or as a later consequence of the work), and

(b). If so, did the unintended event cause "property damage" (physical injury or loss of use) to property other than the faulty work itself?

If these conditions are met, there is an "occurrence" which triggers the insuring clause. Of course, if the only damage relates to the defective work itself, coverage is excluded by the business risk exclusions. But damage to nondefective work and damage to other property caused by faulty workmanship is covered, subject to the reach of the business risk exclusions.

IV. THE COURT OF APPEALS PROPERLY APPLIED THE K(5) AND K(6) EXCLUSIONS IN THE CGL FORM IN CONCLUDING THAT THE EXCLUSIONS DO NOT APPLY TO DENY LIABILITY COVERAGE.

Society relies on exclusions k(5) and k(6), which state:

"This insurance does not apply to: . . .

k. Damage To Property

'Property damage' to: . . .

(5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the 'property damage' arises out of those operations; or

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

Paraphrasing exclusion k.(5), the liability insurance coverage does not apply to "property damage" (physical injury or loss of use) **to** "that particular part" of real property **on** which the insured **is** performing operations. Any "property damage"

(physical injury or loss of use) other than **to** "that particular part" of real property **on** which the insured **is** performing operations falls outside the scope of exclusion k.(5). Otherwise the terms "to", "that particular part," "on" and "is" would have no meaning. Therefore, k.(5) is in the present tense, and its scope is limited to property damage **to** "that particular part" of property **on** which the insured **is** performing operations at the time of loss.

Exclusion k(6) is similar but applies to "that particular part of any property" that must be restored, repaired or replaced because "your work" was incorrectly performed "on it". Its application is not limited to real property. The inclusion of the words "on it" requires that the particular part in question be damaged because of incorrect performance of "your work" on that particular part. See, Cincinnati Ins. Co. v. Federal Ins. Co., 166 F.Supp.2d 1172, 1184 (E.D. Mich. 2001). Therefore, the scope of k(6) is limited to property damage **to** "that particular part" of property that must be repaired or replaced because "your work" was incorrectly performed on "it", *i.e.*, on the "particular part".

Acuity submits that "that particular part" is limited to the excavation of the south building wall and footing. Society argues that "that particular part" includes the entire engine room building, and all of the damages suffered by VPP. But at the outset, the contractors were clearly not performing operations on the roof top condenser, or the mechanical and utility services provided by the engine room

building. VPP's extra expense and loss of use damages are not excluded from coverage. Under the k(5) exclusion, there is no basis to conclude that these damages constitute "property damage" **to** "that particular part" of real property **on** which the insured **is** performing operations. Under k(6), such damages do not represent "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed **on it**." The contractors were not performing work or operations on the roof top condenser or mechanical services. The k(5) and k(6) exclusions do not by their terms exclude VPP's loss of use damages.

Society argues that the court of appeals applied the exclusions too narrowly. Society's view on the breadth of the exclusions is illustrated by the example offered at page 32 of petitioner's brief.

> "If an electrician is hired to wire in a kitchen fan and negligently drives a staple through a wire, causing a short circuit and fire to the house, is the exclusion limited to damage to the staple? To the wire? The damages to **any** particular real estate arising out of the insured's operations are excluded by the clear language of the exclusion."

Of course, Society would argue that the negligence of the electrician represents faulty workmanship which never qualifies as an "occurrence" in the first place. But with the respect to the exclusions, is it fair and reasonable to think that the homeowner who hired the electrician and who lost his house in the ensuing fire has no recourse against the Comprehensive General Liability policy issued to the contractor? Society's proposed construction is irrationally broad and has no

sensible stopping point. If Society is correct, Wisconsin contractors may as well save their premium dollars because, contrary to the insured's reasonable expectations, the CGL policy would afford no protection whatsoever.

The court of appeals properly adopted the rationale of the North Dakota Supreme Court in Acuity v. Burd and Smith Construction, Inc., 721 N.W.2d 33 (N.D. 2006). The contractor was hired to replace the roof on an apartment building. In performing the work it was obviously important to protect the balance of the building from the elements. The owners alleged that while replacing the roof, the contractor failed to protect the building from rainstorms which caused extensive water damage to the interior of the building. Citing American Girl, the court first determined that the incident qualified as an "occurrence" under the CGL policy. Id., at ¶13. Turning to the exclusions, the court reviewed numerous decisions and agreed with the rationale of American Equity Ins. Co. v. Van Ginhoven, 788 So.2d 388 (Fla. Ct. App. 2001).

The Burd and Smith court stated:

> "We disagree with ACUITY'S argument that the entire apartment building is the insured's work product or project because that argument ignores the limiting language 'particular part of real property' in exclusion k(5) and 'particular part of any property' in exclusion k(6). The ordinary meaning of 'particular' is 'of, relating to, or being a single person or thing,' and 'one unit or element among others.' *Merriam-Webster Collegiate Dictionary 903* (11th ed.2005). The same source defines 'part' as 'one of the often indefinite or unequal subdivisions into which something is or is regarded as divided and which together constitutes the whole.' Id. at 902-903. Those definitions limit 'particular part' to a single unit or piece of property which together constitute the whole property. . . ."

Id. at ¶26.

The court noted that in reviewing the specific facts of a case, "buildings may be divided into parts in attempting to determine which part or parts are the object of the insured's work product." Id. at ¶24. It determined that the roof was the "particular part" of the real property on which the insured was performing operations. Damages for repair of the defective roof were excluded from coverage, but damages to the interior of the apartment building were covered. Id. at ¶27.

The Burd and Smith case has definite parallels to the present appeal. In Burd and Smith, the contractors worked on the roof but were negligent in failing to protect the existing building from the elements during the course of the operations. The "particular part" was the roof, and not the entire building. In the present case, RS and Flint contracted to remove and replace the south building wall, and its footing. This required that they exercise reasonable care to protect the existing building from foreseeable hazards posed by their work. The "particular part" on which the contractors were performing operations at the time of loss was the south wall and footing. Under exclusion k(5), damage to the south wall is excluded, but damage to the rest of the existing building is covered.

See also, Columbia Mut. Ins. Co. v. Schauf, 967 S.W.2d 74 (Mo. 1998). Schauf contracted to paint, stain or lacquer all interior and exterior surfaces of a new home. After spraying lacquer on kitchen cabinets, he was cleaning his spray equipment inside the house when his pump generator started a fire which caused

extensive damage. The CGL carrier denied coverage on the grounds that the entire home was "that particular part of real property" on which the contractors were performing operations. The trial court agreed and granted summary judgment.

In a thorough and well-reasoned decision, a unanimous Missouri Supreme Court reversed. It considered the general intent of CGL policies "to protect against the unpredictable, potentially unlimited liability that can be caused by accidentally causing injury to other persons or their property," citing Weedo v. Stone-E-Brick, Inc., 81 NJ 233, 405 A.2d 788, 791-92 (1979).[10] It recognized that the business risk exclusions are based on the simple premise that general liability coverage is not intended as a guarantee of the quality of the insured's work or product. Columbia Mutual, 967 S.W.2d at 77. It traced the history and development of exclusion k(5) and its predecessors, including the "care, custody and control" exclusion. After concluding that the exclusion applied to Schauf's operations, the court considered its scope and stated:

> "The exclusion bars coverage only for the *particular part* of the real property on which the insured is performing operations. By using the words *particular part*, the provision evidences the intent to narrow the scope of the exclusion as much as possible. In other words, the subject of the insured's work is defined with great specificity."

Id. at 80. (emphasis in original).

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[10] Wisconsin adopted the Weedo v. Stone-E-Brick, rationale in Bulen, 125 Wis.2d 259, 261-62, 371 N.W.2d 392 (Ct. App. 1985).

Noting that both the insurer and insured offered reasonable interpretations of the scope of the exclusion, the court was compelled to adopt the more narrow construction, and it stated:

> ". . .The exclusion bars coverage for damage to '[t]hat particular part of real property on which [the insured] *is performing operations,'* not on which the insured *did perform operations, will perform operations, or has contracted to perform operations.* The exclusion applies to the 'property *on* which [the insured] is performing operations,' not to the area *in* which the insured is performing operations."

Id. at 81. (emphasis in original).

The court held that since the cleaning of the spray equipment was the last step in the job of lacquering the kitchen cabinets, the kitchen cabinets were the "particular part" of the real property that was subject to the operations at the time of damage. Coverage for damage to the kitchen cabinets was excluded, but the balance of the damages were covered by the CGL policy. Id. at 81.

A similar construction was applied in Transportation Ins. Co. v. Piedmont Construction Group, 301 Ga. App. 17, 686 S.E.2d 824 (2009). Piedmont entered into a contract to substantially renovate a historic building on a college campus. During the work, a plumbing subcontractor soldering copper pipes in room 143 ignited a fire which completely destroyed the roof and the entire second floor of the building, with extensive damage to the rest of the structure. The CGL carrier argued that the phrase "that particular part of real property" referred to the entire building, since Piedmont was performing renovations throughout the building.

Disagreeing, the Georgia court quoted the trial court's cogent overview of how business risk exclusions should be applied:

> "Georgia courts typically examine the following facts of each case when reviewing business-risk exclusions: First, the type and extent of construction work that the contractor is performing at the time of the accident **and**, second, the extent that the damages resulting from the contractor's accident may exceed the contractor's contractual duties. In short, the court asks itself, 'Will the payment of insurance proceeds effectively cause an insurance company to guarantee the contractor's work?' If the answer is yes, the business-risk exclusions apply and the claim is denied. However, if the court finds that the payment of proceeds results from a negligent act causing damage above and beyond the original contractual obligations or to the other property, the business-risk exclusions do not apply and the insurance company should pay the claim."

Id. at 827.

The court held that the "particular part" referred not to the entire building, but only to the room and the plumbing on which the contractor was working at the time of the fire. Quoting the trial court:

> "[T]he damage to the rest of the building clearly resulted from an unpredictable business accident that consequently created additional work outside the original contractual obligations."

Id. at 827.

In the present case, the court of appeals relied on Fortney & Weygandt, Inc. v. American Mfrs. Mut. Ins. Co., 595 F.3d 308 (6th Cir. 2010), a recent case involving the k(6) exclusion. Fortney contracted to build a new restaurant and when it was nearly completed, soil shifted around the foundation, breaking the building's underground utility lines. It was determined that the foundation was defective and the entire building had to be demolished and rebuilt. The parties

agreed that coverage was excluded for the cost of replacing the defective foundation itself. The court stated the issue as "whether (j)(6) excludes coverage for the cost of replacing building parts on which the insured performed non-defective work, but that were replaced anyway because of the insured's defective work on another part of the building." Following Mid-Continent Casualty Co. v. JHP Development, Inc., 557 F.3d 207 (5th Cir. 2009), the court gave the phrase "that particular part" its intended meaning:

> "The opening words of the exclusion - namely, '[t]hat particular part' - are trebley restrictive, straining to the point of awkwardness to make clear that the exclusion applies only to building parts on which defective work was performed, and not to the building generally. We also agree that 'part,' as used in this exclusion, means the 'distinct component parts' of a building - things like the 'interior drywall, stud framing, electrical wiring,' or, as here, the foundation. . . . The (j)(6) exclusion therefore applies only to the cost of repairing or replacing distinct component parts on which the insured performed defective work."

Id., 595 F.3d at 311.

It is worthy to note that the work in Fortney involved an entire restaurant building, as new construction. The (j)(6) exclusion only applied to "that particular part," the foundation, on which defective work was performed. This was the case even though the entire building was the work and operations of the insured. The present case involves an existing building with the work limited to the removal and replacement of the south building wall. The (j)(6) exclusion is limited to "that particular part", the defective excavation of the trench, and not the entire building.

In Mid-Continent Casualty, *supra*, the agreement called for the construction of a four-story structure divided into five condominium units. A model unit was completed but the remaining units remained partially unfinished until they were sold. Because of the contractor's failure to properly water-seal the exterior finishes and retaining walls, large quantities of water penetrated the interior damaging contiguous building materials and internal finishes including drywall, framing, electrical wiring and flooring. The total cost of repair and completion was over $2,000,000.00 with $438,000.00 attributed to repairs to the non-defective interior finishes and wiring. Applying Texas law, the court addressed the application of exclusions (j)(5) and (j)(6). It first concluded that j(5) did not apply, because the contractor was not actively engaged in construction activities at the time of the water intrusion. Id. at 213.[11]

With respect to (j)(6), the insurer argued that the exclusion applied to all property damage to the project resulting from defective work. The court distinguished Southwest Tank and Treater Manufacturing Co. v. Mid-Continent Casualty Co., 243 F.Supp.2d 597 (E.D. Tex. 2003) on the grounds that the insured had worked on the entire tank that was damaged in that case, rather than on a particular part. Id. at 214. The 5th Circuit relied on its own decision in Gore Design Completions, Ltd. v. Hartford Fire Ins. Co., 538 F.3d 365 (5th Cir. 2008) which

[11] Again, (j)(5) is in the present tense and only applies to exclude coverage for property damage **to** "that particular part" on which the insured **is** performing operations at the time of loss.

involved the defective installation of an in-flight entertainment/cabin management system on a commercial aircraft. A component was mis-wired resulting in physical damage to the aircraft's electrical systems and equipment. The court refused to apply the (j)(6) exclusion to the entire aircraft, finding that the insurer's "reading of the exclusion reads out the words 'that particular part'". Id. at 371.

The Mid-Continent court concluded as follows:

> ". . . The narrowing 'that particular part' language is used to distinguish the damaged property that was itself the subject of the defective work from other damaged property that was either the subject of non-defective work by the insured or that was not worked on by the insured at all. . . .
>
> We find that exclusion j(6) bars recovery only for property damage to parts of a property that were themselves the subject of defective work by the insured; the exclusion does not bar coverage for damage to parts of a property that were the subject of only non-defective work by the insured and were damaged as a result of defective work by the insured on other parts of the property."

Id. at 215.

Mid-Continent also recognized that "even if the exclusion was susceptible to more than one reasonable construction, Texas law would still require that the policy be construed in favor of coverage." Id. at 215. Wisconsin law is in accord. Exclusions are narrowly or strictly construed against the insurer if their effect is uncertain. Cardinal v. Leader Nat'l Ins. Co., 166 Wis.2d 375, 382, 480 N.W.2d 1 (1992). Words or phrases are ambiguous when they are susceptible to more than one reasonable construction. Smith v. Atlantic Mut. Ins. Co., 155 Wis.2d 808, 811, 456 N.W.2d 597 (1990). Conceding, for purposes of argument, that Society's interpretation of the exclusion is facially reasonable, (which is difficult to do), it is

certainly contrary to the 5th Circuit's construction. The phrase "that particular part" either means what it says or, if the effect is uncertain, the exclusion must be strictly construed against the insurer, and in favor of coverage.

V. THE CASES CITED BY SOCIETY DO NOT SUPPORT ITS CONSTRUCTION OF THE K(5) AND K(6) EXCLUSIONS.

Society cites to this Court the same "plethora" of cases which it cited to the court of appeals. After reviewing the cases, the court of appeals commented that "none of these cases helps Society: The cases are either distinguishable from this case on their facts or the holdings in the cases actually cut against Society." (Decision, ¶42, fn.3) The court of appeals proceeded to comment on why a number of the cases were distinguishable. Id.

Society cites William Crawford, Inc. v. Travelers Ins. Co., 838 F.Supp. 157 (S.D.N.Y. 1993) as one of the leading cases involving exclusion k(5). However Society fails to point out that the insurance company in that case agreed that all damage to the apartment building beyond the specific apartment that the contractor was renovating would be covered by the policy. Under the holding of the case, the exclusion only applied to the apartment the contractor was hired to renovate, and it did not exclude coverage for damage to other portions of the building.

Society relies on Pekin Ins. Co. v. Willett, 704 N.E.2d 923 (Ill. App. 1998) but the court of appeals properly noted that while the work involved repairs to a swimming pool, there was no demand for any damages outside of the damage to

the pool itself. (Decision, ¶42, fn.4). Society also cites American Equity Ins. Co. v. Van Ginhoven, 788 So.2d 388 (Ct. App. Fla. 2001) but it fails to mention that the exclusion only applied to damage to the swimming pool which the insured was working on at the time of loss. Since the insured was not working on the plumbing, electrical, deck, patio, screen enclosure or residence, there was coverage for damage to these items.

Society quotes extensively from the federal trial court decision in Southwest Tank v. Mid-Continent Cas. Co., 243 F.Supp.2d 597 (E.D. Tex. 2003). It fails to point out that the rationale of Southwest Tank has twice been rejected by the 5th Circuit in Gore Design Completions and Mid-Continent Cas., *supra*.

Society cites Flynn v. Timms, 199 A.D.2d 873, 606 N.Y.S.2d 352 (N.Y.A.D. 1993) but the case involved completely different policy exclusions which did not include the "that particular part" language.

Society cites Auto-Owners Ins. Co. v. Chorak & Sons, Inc., 2008 WL 3286986 (N.D. Ill. 2008). That case followed Pekin Ins. Co. v. Willett, *supra* which was properly distinguished by the court of appeals in the present case. The contractor in Auto-Owners was clearly working on the entire house.

Society cites several Georgia cases including Sapp v. State Farm Fire & Cas. Co., 486 S.E.2d 71 (Ga. App. 1997). It provides a short quotation to the effect that the "business risk" exclusions are designed to exclude coverage for

defective work and damage to the project itself. Society leaves out an extensive passage by the court that accurately describes the two kinds of risks incurred by a contractor and recognizes that the risk that faulty workmanship will cause injury to people or damage to other property is covered by the CGL form.

Society cites Grinell Mut. Reinsurance Co. v. Lynne, 686 N.W.2d 118 (N.D. 2004), and quotes from that case. There, the contractor worked on the entire house. Society fails to point out that Grinell was specifically distinguished in Acuity v. Burd & Smith, *supra*, a case strongly favoring Acuity's position.

Jet Line Servs., Inc. v. American Emp'rs Ins. Co., 537 N.E.2d 107 (Mass. 1989), was properly distinguished by the court of appeals because the contractor was hired to clean the entire tank which exploded. (Decision, ¶42, fn.4).

Suffice it to say that the authorities cited by Society are distinguishable on various grounds. In many of the cases, the property damage was limited to the insured's work itself and there was no damage to other property. In other cases, the "particular part" on which the insured was working included the entire object suffering a loss, whether it be a tank, a well, a sewer line, or a switchboard.

Under k(5), liability coverage is only excluded for "property damage" **to** "that particular part" of real property **on** which the insured **is** performing defective operations. Under k(6), coverage is only excluded for "property damage" **to** "that particular part" of any property that must be restored or replaced because the

insured's work was incorrectly performed "on it," (*i.e.* defective work on "that particular part.")

The specific terms of the exclusions must be considered and given effect. To the extent, as some courts have held, that the scope of the exclusion is less than clear, it must be construed strictly in favor of liability coverage. The better-reasoned cases support the court of appeal's narrow construction of exclusions k(5) and k(6).

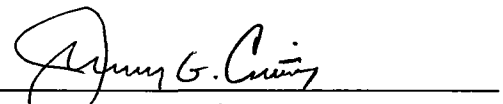
CONCLUSION

Based on the foregoing, respondent Acuity respectfully requests this Court to affirm the decision of the court of appeals in all respects, and to remand this case to the Circuit Court for Monroe County for further proceedings on the liability and damage issues.

Dated this 2 day of July, 2012.

Respectfully submitted,

HALE, SKEMP, HANSON, SKEMP & SLEIK

By 

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CERTIFICATION

STATE OF WISCONSIN)
) SS.
LA CROSSE COUNTY)

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and ©) for a brief produced using the following font:
Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 11142 words.

James G. Curtis

Subscribed and sworn to before me on
7/2/2012
April d. Sera
Notary Public, State of Wisconsin
My commission expires: 5/17/2015

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

James G. Curtis

Subscribed and sworn to before me on
7/2/2012
April d Sera
Notary Public, State of Wisconsin
My commission expires: 5/17/2015

STATE OF WISCONSIN
SUPREME COURT

ACUITY, a mutual insurance company,

Plaintiff-Appellant,

APPEAL No. 2009AP002432

VPP GROUP, LLC,

Involuntary Plaintiff,

v.

SOCIETY INSURANCE, a mutual company,

Defendant-Respondent-Petitioner,

RON STOIKES d/b/a RS CONSTRUCTION &
TERRY LUETHE d/b/a FLINT'S CONSTRUCTION,

Defendants.

REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER SOCIETY INSURANCE

An appeal from the Circuit Court for Monroe County
The Hon. Michael J. McAlpine, Presiding
(Trial Court Case No. 2008CV249)

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This claim arises out of a contract. VPP entered into a written contract with RS and Flint's to remove and replace a wall of its building. Because of poor workmanship, the entire building collapsed. The contractors failed to deliver what they had promised under their contract.

There were no personal injuries. There were no damages to any third parties. It was simply a case of contractors promising to deliver a completed product and failing to do so. The reason for their failure is indisputably faulty workmanship.[1]

The damages claimed are solely to correct the results of this faulty workmanship. The questions presented are whether an insurance policy should pay for this poor workmanship, or whether it should remedy this breach of contract.

I. The economic loss doctrine cannot be ignored.

This Court has spent years developing the economic loss doctrine as part of Wisconsin's common law. That doctrine has now developed to the point where it unquestionably affects issues of insurance coverage. When

[1] Acuity has never denied that this is a claim against the Defendants for faulty workmanship. Indeed, their Brief to this Court is filled with such allegations: "faulty excavation techniques", Acuity Brief, p. 1; "malfeasance in the performance of the work", *Ibid*, p. 6; "faulty excavation methods", *Ibid*, p. 14.

courts are presented with those issues, they should not and cannot ignore the development of the economic loss doctrine.

The contract here was to totally remove and replace one wall of a four-walled building. To do so, the contract required that the entire building be shored up to prevent collapse when one of the four walls was removed. The contract specifically included "shoring and related work". This was not a case of fixing a cabinet or a window, or adding some plumbing. It was the removal of one of the four walls of an entire building. Protection of the remainder of the building was paramount and absolutely necessary.

Of course, the contract did not state "contractors shall not cause the collapse of the rest of the building when they remove one of its walls" but that was certainly expected and implicit in the agreement, especially when "shoring and related work" was included in the bid.

The purpose of the economic loss doctrine is to preserve the distinction between contract and tort law and to avoid "drowning contract law in 'a sea of tort'". *Linden v. Cascade Stone Co., Inc.*, 2005 WI 113, 283 Wis.2d 606, 699 N.W.2d 189, at ¶7.

The *Linden* decision and *1325 North Van Buren, LLC v. T-3 Group, Ltd.*, 293 Wis.2d 410, 716 N.W.2d 822 (2006), both hold that where the predominant purpose of a contract is a finished product, the economic loss doctrine controls. In *Linden,* although there were elements of both service and product, this Court concluded that the primary reason for entering into the contract was to "have a house custom built". Similarly, in *1325*, this Court reviewed a more extensive contract for construction management services but nevertheless concluded that the predominant purpose of the contract was to provide a completed condominium complex.

The predominant purpose of the contract here was to furnish a completed building with a new fourth wall. The building was to be operational, just as it had been prior to the work. The only change was the new south wall.

Thus, although Acuity strenuously argues that the *1325* decision supports their position, it does not. Its holding is that the economic loss doctrine applies when services are rendered, as long as the predominant

purpose of the services is a structure.[2]

Nor can Acuity claim that what occurred here was damage to "other" property, thus taking this case out of the economic loss doctrine. All of the other property that was damaged was to the components of the building which collapsed. Economic loss damages **include** damages not only to the failed product itself, but to other components of an integrated system. *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis.2d 235, 249-250, 593 N.W.2d 445 (1999); *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, 311 Wis.2d 492, 753 N.W.2d 448, ¶106. This building was an integrated system.

This is precisely the type of case for which the economic loss doctrine was developed. It involved parties whose relationship arose by, and is controlled by, a contract. The damages are to a product that was to have been furnished or the components of an integrated system. The damages are all economic. There is no damage to any third party or any personal injury. Why, then, should the economic loss doctrine **not** apply?

[2] Acuity's argument that *1325* also supports a finding of coverage in the instant case is not appropriate. *1325* involved a professional liability policy which provided coverage for "wrongful acts", which were defined to include "negligent act, error or omission in the performance of professional services for others". This Court found coverage under that broad language. Here, the Society policy, a standard CGL policy, provides coverage only for "occurrences" or "accidents", and as has already been noted, faulty workmanship does not meet those defined terms.

> "A party's deficient performance of a contract does not give rise to a tort claim. 'The negligent performance of a duty created by contract . . . cannot, without more, create a separate cause of action [in tort].'" *Atkinson v. Everbrite, Inc.*, 224 Wis.2d 724, 729, 592 N.W.2d 299 (1999).

If the economic loss doctrine is applicable, then it follows inexorably that there is no coverage under a standard CGL policy such as Society's, because breaches of contract are not "occurrences" or "accidents" under a general liability policy. *Wausau Tile*, *supra*, at 266-269; *Midwest Motor Lodge v. Hartford Ins. Group*, 226 Wis.2d 23, 36, 593 N.W.2d 852, fn. 2 (Ct.App. 1999); *Wisconsin Label Corporation v. Northbrook Property & Casualty Insurance*, 221 Wis.2d 800, 809, 586 N.W.2d 29 (Ct.App. 1998).

As the late Arnold Anderson wrote in his treatise, *Wisconsin Insurance Law*:

> "The conclusion that a breach of contract is not an occurrence has substantial support. *Data Specialties, Inc. v. Transcontinental Ins. Co.*, 125 F.3d 909, 911 (5thCir. 1997) (Texas law); *Indiana Ins. Co. v. Hydra Corp.*, 615 N.E.2d 70, 73 (Ill.App.Ct. 1993) (policy providing coverage for 'all sums which the insured shall become legally obligated to pay as damages' did not 'apply to damages arising from an insured's breach of a contractual duty'); *Redevelopment Auth. v. International Ins. Co.*, 685 A.2d 581, 592 (Pa.Super.Ct. 1996); *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 459 S.E.2d 318, 320 (S.C.Ct.App. 1994), *aff'd*, 468 S.E.2d 304 (S.C. 1996) ('A general liability policy is intended to provide coverage for tort liability . . .; it is not intended to provide coverage for the insured's contractual liability, which causes economic losses'); *Action Ads, Inc. v. Great Am. Inc. Co.*, 685 P.2d 42, 43-

44 (Wyo. 1984) ('Courts universally have interpreted liability-coverage provisions [providing coverage for "all sums which the insured shall become legally obligated to pay as damages"] as referring to liability sounding in tort, not in contract'). A breach of contract that causes bodily injury or property damage is not an event that occurs by chance or arises from unknown causes. Therefore, it is not an occurrence. *State Bancorp Inc. v. U.S. Fid. & Guar. Ins. Co.*, 483 S.E.2d 228, 234 (W.Va. 1997). The court in *Hawkeye-Security Insurance Co. v. Davis*, 6 S.W.3d 419, 426 (Mo.Ct.App. 1999) (citation omitted), stated as follows: 'Performance of [the] contract according to the terms specified therein was within [the insured contractor's] control and management and its failure to perform cannot be described as a undersigned or unexpected event.' *See also Structural Bldg. Prods. Corp. v. Business Ins. Agency, Inc.*, 722 N.Y.S.2d 559 (App.Div. 2001) ('The general rule is that a commercial general liability insurance policy does not afford coverage for breach of contract, but rather for bodily injury property damage; to hold otherwise would render an insurance carrier a surety for the performance of its insured's work.') *But see American States Ins. Co. v. Herman C. Kempker Constr. Co.*, 71 S.W.3d 232 (Mo.Ct.App. 2002) (holding that insurer had duty to defend). In *Indiana Insurance Co. v. Hydra Corp.*, 615 N.E.2d 70 (Ill.App.Ct. 1993), damages resulting from breach of a contractual obligation did not constitute an occurrence, because cracks in the floor and loose paint on the exterior of a building were the natural and ordinary consequences of installing defective concrete flooring and applying the wrong type of paint pursuant to the contract. In *Yegge v. Integrity Mutual Insurance Co.*, 534 N.W.2d 100 (Iowa 1995), the insured's alleged failures, which gave rise to claims of breach of contract, breach of express warranty, breach of implied warranty, and fraud, were not accidental. *See also Whitman Corp. v. Commercial Union Ins. Co.*, 782 N.E.2d 297 (Ill.App.Ct. 2002) (holding that insurer had no duty to defend insured against claim for indemnification for expenses incurred for remediating environmental contamination that was contemplated by parties in purchase agreement)." Arnold P. Anderson, *Wisconsin Insurance Law*, 6th Edition, Chapter 5, Pages 45-46.

The economic loss doctrine cannot and should not be ignored when deciding issues of insurance coverage. Certainly, as Acuity argues, it is a remedies doctrine, but it would be folly to ignore the fact that the remedy it allows is solely breach of contract. A breach of contract is not an accident or occurrence. It is not covered under a CGL policy. It is essential that the economic loss doctrine be considered when making a coverage determination; in this case it means there is no coverage.

II. Faulty work was the cause and the building collapse was the effect; there was no intervening "accident".

Acuity strains logic by attempting to insert a miniscule or metaphysical event (calling it the "accident") in between the obvious cause and the obvious effect.

In this case, to an average person, faulty excavation too close to the foundation caused the building to collapse. Acuity, however, wants to add the idea of "soil erosion" in between this obvious cause and effect, calling it the "accident", as if **this** was real cause of the collapse. Frankly, that is metaphysical nonsense. The only reason the building collapsed was because the contractor undercut the foundation. To try and suggest that the undercutting led to unsupported soil, which led to soil breaking down,

which led to soil movement, which led to unsupported sections of the foundation, which led to minor cracking, which led to shifting of the concrete floor, which led to more strain on the walls, which led to roof shifting, is an attempt to create a series of artificial "occurrences" in an attempt to obscure the obvious cause (faulty work) and the obvious result (the collapse).

However, that is not how occurrences are viewed in Wisconsin. Faulty work led to the collapse. There was no break in the chain of causation. Merely because the faulty work undercut the soil, which allowed some of it to fall away from the foundation, does not create two separate "occurrences" or "accidents". This issue was put to rest in *Olsen v. Moore*, 56 Wis.2d 340, 202 N.W.2d 236 (1972) when this Court adopted the rule that an accident or occurrence is viewed from the point of view of the cause (the faulty work) and is but a single event which may lead to a variety of problems or damages:

> "[A] single, uninterrupted cause which results in a number of injuries or separate instances of property damage is yet one 'accident' or 'occurrence'". At 349.

Also:

> ". . . There was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage. We are of the opinion that the contract

> contemplated that the terms, 'accident' and 'occurrence,' included all injuries or damage within the scope of the single proximate cause. . . ." At 346; [quoting *Truck Insurance Exchange v. Rohde*, 49 Wash. 465, 471, 303 P.2d 659, 662 (1956).]

This artificial insertion of events between the cause and the effect, in an attempt to create a separate "accident", is at the heart of several decisions that Society respectfully contends were wrongly decided. Thus, in *Kalchthaler v. Keller Construction Co.*, 224 Wis.2d 387, 591 N.W.2d 169 (Ct.App. 1999), faulty installation of windows allowed water to leak onto drapes and interior walls. The cause was faulty work; the effect was the water leakage on walls and drapes. Notwithstanding this, however, the Court of Appeals artificially said that the accident was not faulty work, but rather the leakage of the windows. When this leakage came to rest on an interior wall or drape, it then constituted the damage. With all due respect, that seems artificial and illogical.

Faulty work was the event which caused the leakage. Similarly, here the faulty work caused the collapse. Those are the cause and effect. Damages flow from the cause to the effect. It does not mean that there is suddenly a second "accident" or second "occurrence". There is but one occurrence in both cases. Intermediate causes or accidents should not be created in an attempt to find coverage. The occurrence is the event which

sets into motion the events that lead to the damage. That is the teaching of *Olsen v. Moore*, *supra.* The occurrence here was indisputably faulty workmanship.

The same problem occurred in the *American Girl* decision (*American Family Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, 268 Wis.2d 16, 673 N.W.2d 65). There, faulty soil preparation caused settlement and failure of a foundation. The cause was faulty workmanship: the failure to properly prepare the soil. The result was the settlement of the soil. The damages that flowed from it were not a separate occurrence.

In this case, the cause was indisputably faulty work – the undercutting of the foundation. The result (the collapse) was not the "accident" or "occurrence". It was the unfortunate result. It was the damage. Nothing in between (*i.e.*, "soil erosion") was a separate "occurrence".

Both the Society insurance policy and Wisconsin law require property damage to be **caused** by an occurrence for there to be coverage. This is the teaching of both *Stuart*, *supra*, and *Estate of Sustache v. American Family Mutual Insurance Company*, 311 Wis.2d 548, 751 N.W.2d 845 (2008). They both hold that the unexpected or unfortunate

result is **not** the accident or occurrence. The event which **causes** the unfortunate result must be the accident. And, as we have seen, faulty work is not an accident. The necessary elements for coverage under the Society policy are simply not present.

It is interesting to note that Acuity points out a number of states which have now enacted statutes to change the definition of "occurrence" to include faulty workmanship. (Acuity Brief, p. 21). If faulty workmanship were an "accident" or "occurrence", these statutory changes would not be needed. Obviously, it is not. Acuity's hope that the faulty workmanship here would be a covered "occurrence" is probably best addressed to the Wisconsin legislature.

III. The Society exclusions cannot be confined to damage to property that did not exist.

The Court of Appeals limited the applicability of the Society k.(5) and k.(6) exclusions to the "south wall of the Engine Room" (Court of Appeals Decision, ¶48; Pet. App., p. 22).

Acuity cites a number of cases from other jurisdictions, contrary to the many cases cited by Society, in which the courts have limited the applicability of the exclusions to precisely that area being worked upon

when the damage occurred. The problem is, of course, that the south wall was not being worked on when the damage occurred. The south wall was gone.[3] It makes no sense to limit, as the Court of Appeals did, the Society exclusion to damage to a wall that was not there. There could not possibly be any damage to a wall that does not exist. Not only is that unfair to Society, it emasculates the exclusion.

To limit an exclusion to damage to property that does not exist is not only unfair, it is logically impossible. This is not a case where a contractor was putting in a window and damaged the window or the wall around it. Rather, this is a case where the contractor removed **an entire wall** of an existing building and was now working on the foundation of that building.

Removing one of four walls of a building renders the rest of the building unstable. It is akin to removing one leg of a four-legged stool. For that reason, the contractors agreed that they would perform "shoring and related work". Indeed, they had shored up the entire building.[4]

[3] Acuity has never argued that the wall was there. In fact, the trial court very properly noted, that the old wall had already been removed before the collapse. (Trial Court Decision, Pet.App., p. 24).

[4] The Court of Appeals noted that the shoring was near the south wall, but there can be no dispute that the shoring was not there to protect a wall which no longer existed, but rather to protect the building which remained.

When the foundation of the building was undercut, the building collapsed; not a surprise. Neither Acuity, nor the Court of Appeals, could argue that work was being done on the south wall. That wall was gone. Both must admit that the work was being done on the foundation. When the foundation was damaged due to faulty work, the building collapsed.

A CGL policy is not meant to protect contractors from the effects of their faulty work. No contractor should expect that it can perform shoddy work and then rely on its insurance company to bail it out. If that were the case, there would be no incentive for a contractor to perform the work correctly in the first place.

Acuity also makes the gratuitous argument that the contractors should have saved their premium dollars and not bought insurance because there is no coverage. That generalization is inappropriate. What we are talking about is the lack of coverage for damages caused by faulty workmanship or for a failure to fulfill the terms of a contract. These are the responsibility of the contractor, not of the insurance company. The insurance company does not and cannot control the quality of the insured's work. The insured has full control over that. They are responsible for it. The contractors were responsible for the integrity of the entire building.

The Society exclusion should not be limited to damage to property that no longer existed.

Society respectfully requests the decision of the Court of Appeals be reversed.

Respectfully Submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify that:

This Brief conforms to the rules contained in s.809.19(8)(b) and (c) for a document produced with a proportional serif font. The length of this Brief is 2,880 words.

I have submitted an electronic copy of this Reply Brief, excluding the appendix, if any, which complies with the requirements of s.809.19(12). I further certify that:

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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2009-AP-2432

Acuity, a mutual insurance company,

Plaintiff-Appellant,

VPP Group, LLC,

Involuntary-Plaintiff,

v.

Society Insurance, a mutual company,

Defendant-Respondent-Petitioner,

Ron Stoikes d/b/a RS Construction &
Terry Luethe d/b/a Flint's Construction,

Defendants.

Appeal from the Circuit Court
for Monroe County
Honorable Michael J. McAlpine presiding
(Trial Court Case No. 2008-CV-249)

AMICUS CURIAE BRIEF OF THE ASSOCIATED GENERAL CONTRACTORS OF WISCONSIN, INC., ASSOCIATED GENERAL CONTRACTORS OF GREATER MILWAUKEE, INC., ASSOCIATED BUILDERS & CONTRACTORS OF WISCONSIN, INC., WISCONSIN BUILDERS' ASSOCIATION, WISCONSIN TRANSPORTATION BUILDERS ASSOCIATION, INC., AND WISCONSIN UNDERGROUND CONTRACTORS ASSOCIATION, INC.

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INTRODUCTION

The Associated General Contractors of Wisconsin, Inc., Associated General Contractors of Greater Milwaukee, Inc., Associated Builders & Contractors of Wisconsin, Inc., Wisconsin Builders' Association, Wisconsin Transportation Builders Association, Inc., and Wisconsin Underground Contractors Association, Inc. ("the Contractors") respectfully submit this *amicus curiae* brief urging the Court to:

(a) affirm the Court of Appeals' decision in all respects; and

(b) adhere to the insurance coverage principles articulated by this Court in *American Family Mutual Insurance Co. v. American Girl, Inc.*, 2004 WI 2, 268 Wis. 2d 16, 637 N.W.2d 65.

INTEREST OF THE CONTRACTORS

The Contractors are the leading professional trade associations for all facets of the commercial, residential, transportation, and underground construction industry in the State of Wisconsin. Their memberships are comprised of large and small contractors of every description, construction industry suppliers, and the many service firms for these

organizations. The Contractors engage in design and construction activity in Wisconsin valued at many billions of dollars annually. The Contractors are dedicated to advancing efficient construction methods, eliminating wasteful and unsafe practices, and providing member services, including safety, environmental, labor, legal, risk management, and legislative services.

On behalf of their members, the Contractors focus on issues that will impact the future of Wisconsin's construction industry. This appeal presents issues of significant importance to Wisconsin's construction industry regarding the scope of insurance coverage available under commercial general liability ("CGL") policies. The Contractors' members have a stake in the outcome of this appeal because most of them, like the Defendant contractors in this appeal, are policyholders with CGL policies containing provisions like those at issue here.

If the positions advocated by Society Insurance ("Society") were adopted by the Court, it would likely have far-reaching negative implications for the construction industry in Wisconsin and the individual members of the Contractors.

ARGUMENT

I. The Court Of Appeals' Interpretation Of The CGL Policy Here Was Consistent With The Reasonable Expectations Of Contractor/Policyholders.

A. The Average Contractor/Policyholder.

Under Wisconsin law, courts must "interpret a policy's language so that it comports with the common and ordinary meaning it would have in the mind of a reasonable lay person in the position of the insured." *Liebovich v. Minnesota Ins. Co.,* 2008 WI 75, ¶ 17, 310 Wis. 2d 751, 751 N.W.2d 764. Courts will, therefore, "interpret undefined words and phrases of an insurance policy as they would be understood by a reasonable insured." *Froedtert Mem'l Luthern Hosp. v. Nat'l States Ins. Co.,* 2009 WI 33, ¶ 41, 317 Wis. 2d 54, 765 N.W.2d 761 (citation omitted). "If the words or provisions of an insurance contract are capable of more than one reasonable construction, they are ambiguous." *Id.* (quotations and citation omitted). When an insurance contract is ambiguous, "it will be construed in favor of the insured" since "[i]nsurers have the advantage over insureds because they draft the contracts." *Id.* (quotations and citation omitted). In other words, insurers must mean what they say when they draft insurance policies, because a reasonable lay person

policyholder will read and understand the policy in plain language.

In the experience of the Contractors, in the event of a third party claim for bodily injury or property damage on a construction project, when there is an occurrence, the search for potential coverage normally begins with the CGL policy. "Liability insurance is an integral part of a construction project." David K. Pharr et al., *Who is the Insured?, in The Reference Handbook on the Comprehensive General Liability Policy* 13 (ABA 2010). A CGL policy for a construction project typically covers the named insured (often the construction company), as well as its officers, directors, employees, and other "additional insureds" with respect to liability falling within coverage under the policy.

In this appeal, the policyholders are two contractors who agreed to remove and replace a masonry wall at a cost of $8,500. As prudent business owners, they held CGL insurance. In the Contractors' experience, it is the rare exception for a contractor *not* to have CGL coverage as a risk management tool. It is the common, and, in fact, expected practice in the construction industry to purchase CGL insurance. The great majority of construction contracts,

whether between owners, contractors, subcontractors, suppliers, or any combination thereof, actually require contractor parties to procure various types and amounts of insurance coverage to protect from losses on a project. This is because where a contractor or subcontractor unexpectedly causes substantial harm and has inadequate coverage, the contractor or subcontractor is likely to suffer a substantial loss, which, if severe, could cause the destruction of its business and the loss of jobs. These ripple effects can reach far and wide.

In 2009, Wisconsin had 14,800 construction firms, of which 94% were small businesses with less than 20 employees. Associated General Contractors of America, *The Economic Impact Of Construction Industry in the United States and Wisconsin* (April 11, 2012), *available at* http://www.agc.org/galleries/econ/WIstim.pdf (last visited July 30, 2012). These construction firms generate important revenue for Wisconsin. In 2010, private residential spending in Wisconsin totaled $3.1 billion. *Id.* Nonresidential starts totaled $4.2 billion in 2010 and $4.5 billion in 2011. *Id.* They also provide important employment opportunities. In February 2012, construction employment in Wisconsin

totaled 92,300 jobs. *Id.* The average construction worker in Wisconsin earns $49,180 annually. *Id.*

Therefore, while the availability of insurance coverage is a critical issue to the average contractor, the availability of coverage can also have implications well beyond the individual contractor/policyholder. The availability of insurance coverage consistent with the policy terms contractor/policyholders pay premiums for is vital in the construction industry to manage risk in the public interest.

B. The Contractor/Policyholders' Reasonable Expectation Is That, Depending On The Facts, "Faulty Workmanship" Can Constitute An "Occurrence."

This Court in *American Girl* provided an easily understood and workable definition of "accident" – a term that insurers did not define in the typical ISO CGL policy. An "accident" is regarded by the reasonable contractor/policyholder as an event that "takes place without one's foresight or expectation." *American Girl,* 2004 WI 2 at ¶¶ 37-38. Accordingly, the Court confirmed in *American Girl* that when property damage is accidentally caused on a construction project, even when due to "faulty workmanship," it may constitute an "occurrence" in appropriate cases.

Society asks the Court to reverse that holding and now rule that "faulty workmanship" can *never* be "the accident." Society's Br. at 18, 21. In support of its request, it presents a doomsday scenario, claiming that allowing coverage would "reward the faulty workmanship" and transform a CGL "policy into a performance bond." *Id.* at 26. Society's argument is based upon: (1) a term ("faulty workmanship") that appears nowhere in the policy; and (2) the flawed assumption that "faulty workmanship" is intentional. The Court should reject Society's attack on the well-established precedent established in *American Girl* for four reasons.

First, Society's new rule would create a broad coverage exclusion for "faulty workmanship" – a term not included anywhere in the policy. It would exclude coverage even where, as in this case, it causes damage to other property. Contractor/policyholders would have no reason to read into their policies a blanket exclusion to coverage that is not stated, explicitly or otherwise, anywhere in the policy.

If insurers wish to exclude coverage for "faulty workmanship," then they have a duty to write a clear policy exclusion that puts their policyholders on notice that they are *not* receiving coverage for "faulty workmanship." In the

insurance industry, the Insurance Services Office ("ISO"), a national insurance policy drafting organization, drafts standard industry forms for core commercial and casualty lines of coverage. Rabeh M.A. Soofi, *The CGL Policy: Introduction and Overview*, *in The Reference Handbook on the Comprehensive General Liability Policy* at 2. ISO "develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms." *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 772 (1993). Even insurers that have drafted their own policy language often use ISO forms as their starting point. ISO, *Company Background*, http://www.iso.com/About-ISO/ISO-Services-for-Property-Casualty-Insurance/Company-Background.html (last visited July 30, 2012). The ISO standard CGL policies do not contain the exclusion Society asks for here, and Society failed to modify the form in its own policies. Nonetheless, Society asks this Court to rewrite its policy to exclude coverage contrary to the reasonable expectations of contractor/policyholders.

Second, contractor/policyholders have relied upon and purchased CGL insurance with the reasonable expectation

that certain consequences of "faulty workmanship" would be covered in appropriate factual situations. For the past decade, *American Girl* has upheld and acknowledged this important principle. Society has provided no compelling justification for the Court to reverse these principles. This Court should adhere to its holding in *American Girl*, because doing so "promotes evenhanded, predictable, and consistent development of legal principles." *Johnson Control, Inc. v. Employer's Ins. of Wausau,* 2003 WI 108, ¶ 95, 264 Wis. 2d 60, 665 N.W.2d 257 (citation omitted).

Here, since CGL policies are overwhelmingly occurrence-based, adhering to the principles governing CGL coverage is necessary to promote predictability. Specifically, an occurrence-based policy applies where the injury itself occurred during the policy period, regardless of when the claim for the injury is made. Because there is a 10 year statute of repose for construction claims (Wis. Stat. § 893.89), CGL policies purchased long ago could still be called upon to respond to claims. Therefore, imposing new "rules" that were not in place when contractor/policyholders purchased CGL coverage would eviscerate their reasonable expectation that

coverage for "faulty workmanship" would not be barred under Wisconsin law.

Society claims there are other insurance products available if "faulty workmanship" is barred from coverage under a CGL policy. Society's Br. at 28. The problem, of course, is that contractor/policyholders would not have had a reason to purchase those other products, because under *American Girl* their CGL policies would, depending on the facts and circumstances, provide coverage for "faulty workmanship." On the other hand, if insurers like Society clearly wanted to exclude coverage for "faulty workmanship" from CGL policies, they could have drafted the policy to make that clear, or, subsequent to *American Girl*, added an endorsement to policies purchased after this Court's decision. Having failed to do so, it is unfair for Society to now suggest that contractor/policyholders can simply purchase different coverage. They would have had no reason to do so, since Society and other insurers never deviated from their standard CGL policies, even after *American Girl*.

Third, the contrived public policy fears that Society relies upon to support the imposition of its "rule" barring coverage for "faulty workmanship" are not only unfounded,

but frankly, deeply insulting to the Contractors. There is no credible risk that contractors, their subcontractors, or suppliers, will intentionally perform or provide shoddy work or materials if they believe they can potentially pass a loss off to their CGL insurer. The construction industry is overwhelmingly comprised of hardworking and conscientious companies and individuals who pride themselves in their work. As in other professions, there can, unfortunately, be faulty workmanship even when a contractor is careful, focused and conscientious. For example, an experienced, professional crane operator can cause a crane to fail resulting in an accident/occurrence covered under a CGL policy. *See Se. Wis. Prof'l Baseball Park Dist. v. Mitsubishi Heavy Indus. Am., Inc.,* 2007 WI App 185, 304 Wis. 2d 637, 738 N.W.2d 87. And, as *American Girl* confirmed, a professional soil engineer can give inadequate site-preparation advice that causes harm, but the resulting property damage can be "clearly not intentional." 2004 WI 2 at ¶ 38. The notion that the availability of insurance coverage under Wisconsin law will somehow cause poor workmanship is unsupported and unsupportable.

Finally, insurers are *already* protected from any risk that a particular contractor will intentionally do shoddy work, because the standard form CGL policy contains an intentional acts and/or expected/intended policy exclusion. As this Court stated in *American Girl*, the CGL policy would not have applied if the property damage there had been caused by intentional conduct. *See id.* at ¶ 38. Therefore, *if* Society's concerns were well-founded (and they are not), the policy *already* protects insurers from having to insure risks that are not fortuitous, such as intentional "faulty workmanship."

C. The Label Of A Claim As One Sounding In Tort Or Contract Is Not Important To The Reasonable Contractor/Policyholder.

Again, relying on terms not contained in the policy, Society asks the Court to adopt another blanket "rule": That there can never be insurance coverage for claims that fall within the proscriptions of the "economic loss doctrine." Society's Br. at 8. The Court should reject such a "rule."

Coverage should be decided upon a full and fair reading of the insurance policy as applied to the underlying claim, rather than by a technical analysis of extra-contractual legal concepts conducted by lawyers, such as the economic loss doctrine. If the facts give rise to a claim covered by the

policy, it should fall within coverage, regardless of the economic loss doctrine. The label attached to a claim as a "tort" or "contract" is not particularly helpful in determining whether a claim is covered.

Further, Society's attempt to impose the economic loss doctrine here, in the face of what is clearly a services contract to which the economic loss doctrine does not apply (*See Insurance Co. of North America v. Cease Electric Inc.,* 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462), demonstrates that adopting Society's rule would simply invite coverage disputes. The economic protection that insurance coverage provides will be depleted, or even destroyed, if contractor/policyholders are forced to pay attorneys to litigate coverage because their insurers are raising defenses to coverage that do not fall within the policy language, such as whether the economic loss doctrine applies. For this reason too, the Court should reject Society's "rule" barring coverage where the economic loss doctrine applies.

D. That "Particular Part" Of Your Work Is Understood By A Reasonable Contractor/Policyholder To Mean The Direct Area Of Work.

Finally, Society contends that exclusions k(5) and k(6), both of which exclude coverage for property damage to "that particular part…" were construed "too narrowly by the Court of Appeals." Society's Br. at 29-30. Again, Society asks for this Court to adopt a "rule" barring coverage "[i]f faulty workmanship causes damage to any part of a building for which the insured is responsible." *Id.* at 31.

It is the well-established rule in Wisconsin that to adhere to the reasonable expectations of the policyholder, courts should narrowly construe exclusions to coverage. *Liebovich,* 2008 WI 75 at ¶¶ 17-18. The Court of Appeals was correct to construe Exclusions k(5) and k(6) narrowly in favor of coverage.

Here, both exclusions are based upon a term nowhere defined in the policy ("that particular part…"). The issue is, therefore, how that term would be construed by a reasonable contractor/policyholder. The "that particular part" language is reasonably understood to be limited to that "particular part" that is actually being worked on by the contractor at the time

the property damage is caused (in this case, the foundation wall that was being removed and replaced by the excavator).

Society wants the Court to broadly construe "that particular part" to mean "the entire area where the insured was working." Society's Br. at 31. Under this interpretation, the exclusion would swallow the initial grant of coverage, because if there were an "occurrence" anywhere at a construction site, it would have occurred "in the area where the insured was working" and, thus, would be barred. The Court should reject this expansive and unsupportable construction of exclusions k(5) and k(6).

If an insurer wishes to exclude coverage for "the entire area where the insured was working" then it has a duty, as the drafter of the policy, to expressly say so. Society failed to do so. To accomplish the reading of the exclusions that Society advocates here, the Court would have to strike the "that particular part" language and insert the language "any part," thus entirely revising the scope and meaning of the exclusions. That position is contrary to the clear policy language as it would be understood by the reasonable contractor/policyholder – the word "particular" has a definite meaning and it means "specific" and not "general" or

"universal." *Webster's Third New Int'l Dictionary* 1646-47 (2002).

Finally, should this Court view Society's interpretation of its exclusions as reasonable, the Court should still use the interpretation advanced by the Contractors and Acuity. "When there are two competing interpretations of a policy which are conflicting but both are reasonable," the Court must "defer to the interpretation of the insured, not the drafter." *Liebovich,* 2008 WI 75 at ¶ 32. The Contractors' interpretation is clearly reasonable, because, as discussed in detail in Acuity's Brief (at pages 28-38), it has been adopted by courts across the country. Accordingly, even if the Court believes that Society's interpretation is reasonable – it should construe the policy in favor of coverage and as construed by the reasonable contractor/policyholder.

CONCLUSION

Insurance coverage should be decided based upon the policy language, as it would be understood by the reasonable contractor/policyholder, and the facts in each particular case. The blanket "rules" advocated by Society here would impose restrictions on coverage that are contrary to the policy language and the expectations of the contractor/policyholder

who pays a premium for the coverage stated in the policy. The Court of Appeals applied these concepts, and this Court's binding precedent in *American Girl,* correctly. The Contractors respectfully ask the Court to affirm the Court of Appeals in all respects and to adhere to the well-established coverage principles stated in *American Girl*.

Dated this 1st day of August, 2012.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that:

This brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font (Times New Roman 13 pt for body text and 11 pt for quotes and footnotes). The length of this brief, including the introduction, interest of amicus curiae, the argument, and the conclusion and excluding other content, is 2,927 words.

The text of the electronic copy of this brief is identical to the text of the paper copy.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 1st day of August, 2011.

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