IN THE SUPREME COURT OF OHIO

Ohio Northern University,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 2017-0514
v.	:	
	:	On Appeal from the Hancock
Charles Construction Services Inc.,	:	County Court of Appeals,
	:	Third Appellate District
Defendant-Appellee,	:	(No. 05-16-01)
	:	
v.	:	
	:	
The Cincinnati Insurance Company,	:	
	:	
Intervenor-Appellant.	:	

BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL CONTRACTORS OF OHIO, OHIO CONTRACTORS ASSOCIATION, AND AMERICAN SUBCONTRACTORS ASSOCIATION IN SUPPORT OF APPELLEES

Richard M. Garner (0061734) (Counsel of Record)
David W. Orlandini (0064850)
COLLINS, ROCHE, UTLEY & GARNER, LLC
655 Metro Place South, Suite 200
Dublin, Ohio 43017
Telephone: (614) 901-9600
Facsimile: (614) 901-2723
Email: rgarner@cruglaw.com
dorlandini@cruglaw.com
Counsel for Intervenor-Appellant
The Cincinnati Insurance Company

Allen L. Rutz (0069388) (Counsel of Record)
Mitchell A. Tobias (0084833)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 E. Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614) 464-5644
Facsimile: (614) 719-4992

- and -

Thomas P. Kemp (0004878)
EASTMAN & SMITH LTD
510 S. Main Street
Findlay, Ohio 45840
Telephone: (419) 424-1977
Facsimile: (419) 424-1988
Counsel for Plaintiff-Appellee
Ohio Northern University

David P. Kamp (0020665) (Counsel of Record)
Jean Geoppinger McCoy (0046881)
WHITE, GETGEY & MEYER CO., L.P.A.
1700 Fourth & Vine Tower
One West Fourth Street
Cincinnati, Ohio 45202
Telephone: (513) 241-3685
Email: dkamp@wgmlpa.com
jmccoy@wgmlpa.com
Counsel for Defendant-Appellee Charles Construction Services Inc.

Kristen L. Sours (0082212)
Ohio Home Builders Association
17 South High Street
Suite 700
Columbus, Ohio 43215
Telephone: (614) 228-6647
Facsimile: (614) 228-5149
Email: kklaus@ohiohba.com
Counsel for Amicus Curiae Ohio Home Builders Association and Building Industry Association of Central Ohio

Gregory E. O'Brien (0037073)
Cavitch, Familo & Durkin, Co., LPA
Twentieth Floor
1300 East Ninth Street
Cleveland, Ohio 44114
Telephone: (216) 621-7860
Facsimile: (216) 621-3415
Email: gobrien@cavitch.com
Counsel for Amicus Curiae, Ohio Insurance Institute

Terry W. Posey, Jr. (0078292) (Counsel of Record)
THOMPSON HINE LLP
10050 Innovation Drive, Suite 400
Miamisburg, Ohio 45342-4934
Telephone: (937) 443-6857
Facsimile: (937) 443-6635
Email: Terry.Posey@ThompsonHine.com

-and –

Daniel M. Haymond (0062152)
THOMPSON HINE LLP
3900 Key Center, 127 Public Square
Cleveland, Ohio 44114
Telephone: (216) 566-5500
Facsimile: (216) 566-5800
Email: Dan.Haymond@ThompsonHine.com
Counsel for Amicus Curiae Associated General Contractors of Ohio, Ohio Contractors Association, and American Subcontractors Association

Amanda M. Leffler (0075467) (Counsel of Record)
P. Wesley Lambert (0076961)
Lucas M. Blower (0082729)
Alexandra V. Dattilo (0086444)
Christopher T. Teodosio (0089316)
388 South Main Street, Suite 500
Akron, Ohio 44311
Telephone: (330) 535-5711
Facsimile: (330) 253-8601
Email: aleffler@brouse.com
wlambert@brouse.com
lblower@brouse.com
adattilo@brouse.com
cteodosio@brouse.com
Counsel for Amici Curiae Associated Buildings and Contractors, Inc., Associated Builder and Contractors, Inc., Central Ohio Chapter, Associated Builders and Contractors, Inc., Ohio Valley Chapter, and Associated Builders and Contractors, Inc., Northern Ohio Chapter

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES/OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Associated General Contractors of Ohio ("AGC"), Ohio Contractors Association ("OCA") and American Subcontractors Association ("ASA") provide services to and advocate on behalf of commercial builders and trades to improve the quality of construction and protect the public interest. Like Defendant-Appellee Charles Construction Services, Inc. ("Charles"), AGC, OCA, and ASA and their members have an interest in seeing that the language in commercial general liability policies be given its plain and ordinary meaning, without resorting to the use of judicial interpretation in attempts to alter that plain meaning. It is the custom and practice in the construction industry to rely upon the coverage provided by the plain language of commercial general liability policies for defective workmanship by a subcontractor.

STATEMENT OF THE CASE AND FACTS

This is an insurance coverage dispute between Intervenor-Appellant Cincinnati Insurance Company ("CIC"), Charles, and Plaintiff-Appellee Ohio Northern University ("ONU") relating to the work performed in constructing the Inn at ONU. Charles served as the general contractor for the work performed, and CIC was the insurer under a commercial general liability ("CGL") policy purchased by Charles.

AGC, OCA, and ASA adopt the Statement of the Case and the Statement of the Facts presented by Charles and ONU. AGC, OCA, and ASA would like to make clear, however, that the insurance contract interpretation dispute discussed and resolved in *Ohio N. Univ. v. Charles Constr. Servs.*, 3d Dist. Hancock No. 5-16-01, 2017-Ohio-258 (the "Opinion"), is a universal one that the amici's members engage with frequently, on a CGL policy form that has not significantly changed since 1986.

This case is only about whether Charles' CGL policy covers defective workmanship performed by Charles' subcontractor. The focus therefore, is on the CGL policy. As detailed in paragraphs 28 through 30 of the Opinion, this path is winding, but clear.

The relevant analysis of the CGL policy begins with the coverage:

The policy covers "property damage" (Section I(A)(1)) if the "'property damage' is caused by an 'occurrence'…." Opinion, ¶ 28.

"Occurrence" is a defined term, meaning "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.*

"Property damage" is also a defined term, meaning "Physical injury to tangible property, including all resulting loss of use of that property."

The analysis then moves to the exclusions:

Section I(A)(2)(j)(5) excludes coverage for property damage to "that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations…." Opinion, ¶ 29. This excludes coverage for property damage when the work is being actively performed. *See Black & Veatch Corp. v. Aspen Ins. (UK) Ltd.*, 882 F.3d 952, 960 (10th Cir. 2018) (discussing the *CGL Coverage Guide*, App. B: 1986 Occurrence Form, at 298).

Section I(A)(2)(j)(6) excludes coverage for property damage to "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." Opinion, ¶ 30. This excludes coverage for property damage when it is a result of "your work" being incorrectly performed.

There is an exception to the exclusion contained in Section I(A)(2)(j)(6) – that that exclusion "does not apply to 'property damage' included in the 'products-completed operations hazard." *Id.*, ¶ 30.

Section I(A)(2)(l) excludes coverage for property damage to "'your work' arising out of it or any part of it and included in the 'products-completed operations hazard." *Id.*, ¶ 33. **But, there is another exception to the exclusion:** "This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." *Id.*

This takes us to the definitions in Section V of the CGL policy:

"Products-completed operations hazard" is defined in Section V(19)(a) and includes all "'property damage' occurring away from premises you own or rent and arising out of [] 'your work.'" *Id.*, ¶ 30.

"Your work" is defined in Section V(26), and is defined as "work or operations performed by you or on your behalf; and [] materials, parts or equipment in connection with such work or operations." *Id.*

ARGUMENT REGARDING PROPOSITIONS OF LAW

CIC'S PROPOSITION OF LAW NO. 1 *Westfield Ins. Co. v. Custom Agri Systems, Inc.*, 133 Ohio St.3d 476, 2012-Ohio-4712 remains applicable to claims of defective construction or workmanship by a subcontractor included within the "products-completed operations hazard" of commercial general liability policy.

This Court has repeatedly stated that the purpose of a court in analyzing an insurance policy is to give effect to the intent of the parties to the agreement. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11; citing *Hamilton Ins. Servs. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999) and *Employers' Liab. Assur. Corp. v. Roehm*, 99 Ohio St. 343, 124 N.E. 223, syllabus (1919). The Court is to examine

the insurance contract **as a whole** and presume that the intent of the parties is reflected in the language used in the policy. *Kelly v. Med. Life Ins. Co*., 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus (1987). This occurs through examination of the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph two of the syllabus (1978). However, under the doctrine of *contra proferentem*, "where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co*., 35 Ohio St.3d 208, 209, 519 N.E.2d 1380 (1988).

A. *Custom Agri* should be overruled pursuant to *Galatis*.

CIC identified the continued applicability of *Custom Agri* as the "elephant in the room" (Brief, 21) and proactively argued that it should not be overruled under the *Galatis* standards. However, it is inappropriate to maintain the holding announced in *Custom Agri*. Based on its procedural posture and overbroad holding, *Custom Agri* should be overruled pursuant to *Galatis*. The decision was wrongly decided, defies practical workability, and no undue hardship would occur from abandoning the precedent.

1. *The background of Custom Agri.*

Custom Agri was a certified question of state law from the United States Court of Appeals for the Sixth Circuit. In that case, the insured itself was seeking coverage under a CGL policy for its own allegedly defective work.[1] 133 Ohio St.3d at 477. The insurer received summary judgment, and the matter was on appeal to the Sixth Circuit Court of Appeals. *Id.*

[1] CIC makes a significant effort to demonstrate that the *Custom Agri* decision was presented on identical facts (i.e., the insured is claiming an "occurrence" through "property damage" as a result of a subcontractors work). Merits Brief, 13-16. Regardless, the *Custom Agri* opinion did

At that point, the insurer filed a Motion to Certify a Question of State Law, which the insured did not oppose. *Id.*

The Sixth Circuit ultimately certified two questions to this Court:

> (1) Are claims of defective construction/workmanship brought by a property owner claims for "property damage" caused by an "occurrence" under a commercial general liability policy?
>
> (2) If such claims are considered "property damage" caused by an "occurrence," does the contractual liability exclusion in the commercial general liability policy preclude coverage for claims for defective construction/workmanship?

Id. at 478.

This Court agreed to answer both questions. *Id.*

The insured then did not file a brief and was consequently ineligible to participate at oral argument. *See* Online Docket for Case No. 2011-1486, available at http://sc.ohio.gov/Clerk/ecms/#/caseinfo/2011/1486 (last visited April 5, 2018); S.Ct. Prac. R. 17.03 (then S.Ct.Prac.R. 9.03). As a result, the Court was only presented with the insurer's presentation of the issues.

In such a circumstance, *stare decisis* does not apply with the same force. *Hohn v. United States*, 524 U.S. 236, 251, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) (the court is "less constrained to follow precedent where…the opinion was rendered without full briefing or argument"); citing *Gray v. Mississippi*, 481 U.S. 648, 651, n. 1, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987); *see also* 23 Ohio Jurisprudence 3d, Courts and Judges, Section 396.

---

not reflect that: "all of the claims against which Westfield is being asked to defend and indemnify Custom relate to Custom's work itself, i.e., the alleged defective construction of and workmanship on the steel grain bin." *Custom Agri*, 133 Ohio St.3d at 481. Moreover, the merits brief filed by Westfield in that case does not make note of this point, and definitely does not raise the "Your Work" exception interpretation analysis or the products-completed operations coverage critical to the Third District in the Opinion.

The Court concluded generically that a claim for faulty workmanship was not "fortuitous" and therefore not an "occurrence" under the CGL policy. 133 Ohio St.3d at 482. The Court justified its conclusion based on an Arkansas case, *Essex Ins. Co. v. Holder*, 370 Ark. 465, 261 S.W.3d 456 (2007). However, that case had already been abrogated by statute in 2011. *See* Ark. Code Ann. § 23-79-155 (2017); *J-McDaniel Constr. Co. v. Mid-Continent Cas. Co.*, 761 F.3d 916, 917, fn. 2 (8th Cir.2014). Ultimately, this Court issued a very broad and generic syllabus: "[c]laims of defective construction or workmanship brought by a property owner are not claims for 'property damage' caused by an 'occurrence' under a commercial general liability policy." 133 Ohio St.3d at 476.

2. *Custom Agri* was wrongly decided.

The first *Galatis* factor requires a demonstration that the prior precedent was wrongly decided. 100 Ohio St.3d 216, syllabus ¶ 1. There is ample evidence that this is the case. Ignoring the fact that there was no presentation of argument from the insured, case law from other jurisdictions have reached the direct opposite holding, including Alaska, Kansas, Mississippi, North Dakota, Texas, and West Virginia.[2] Moreover, courts that have considered the issue since

[2] *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W.Va. 470, 483, 745 S.E.2d 508 (W.Va. 2013) ("[D]efective workmanship causing bodily injury or property damage is an 'occurrence' under a policy of commercial general liability insurance."); *K & L Homes, Inc. v. Am. Family Mut. Ins. Co.*, 2013 ND 57, 829 N.W.2d 724 (finding damage to house caused by faulty workmanship related to the house's foundation was a covered occurrence); *Architex Assn. v. Scottsdale Ins. Co.*, 27 So.3d 1148, 1162 (Miss. 2010) ("[T]he term 'occurrence' cannot be construed in such a manner as to preclude coverage for unexpected or unintended 'property damage' resulting from negligent acts or conduct of a subcontractor, unless otherwise excluded or the insured breaches its duties after loss."); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 9 (Tex. 2007) (concluding that damage to the insured's work, as well as damage to a third party's property, can result from an occurrence as defined in the CGL policy, but that no basis exists in the definition of occurrence to distinguish between the two); *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 281 Kan. 844, 855, 137 P.3d 486, 493 (Kan. 2006) ("[D]amage occurring as a result of faulty or negligent workmanship constitutes an occurrence as long as the insured did not intend for the damage to occur."); *Fejes v. Alaska Ins. Co.*, 984 P.2d 519, 522-23 (Alaska 1999)

have reached "near unanimity" that "construction defects *can* constitute occurrences and contractors have coverage under CGL policies at least for the unexpected damage caused by defective workmanship done by subcontractors." *Black & Veatch Corp.*, 882 F.3d at 966; quoting Christopher C. French, Revisiting Construction Defects as "Occurrences" Under CGL Insurance Policies, 19 U. Pa. J. Bus. L. 101, 122-23 (2016); Thomas E. Miller, et al., Section 6.02, Third Party Coverage, Handling Construction Defect Claims: Western States 123 (2018).

There is also well-settled Ohio law to demonstrate that *Custom Agri* was wrongly decided (or at least, as discussed below, significantly overbroad). Under "well-settled" Ohio law, it is presumed that words and provisions are used for a particular purpose, and will not be construed in a way that render them superfluous (also known as the "rule against surplusage"). *Wohl v. Swinney*, 118 Ohio St.3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, ¶ 22, citing *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 50.

Here, the "Your Work" exception to the exclusion provides that it covers the insured's work "performed by a subcontractor." As noted in *Black & Veatch Corp.*, "there would be no reason for the Policy to state that it covers damages to the insured's work when 'the damaged work . . . was performed . . . by a subcontractor' if the basic insuring agreement does not encompass these damages." 882 F.3d at 964. Because the direction of each court interpreting an insurance policy is to give effect to all provisions, the *Custom Agri* opinion is overbroad, and as literally stated, writes some of the policy's provisions out of existence.

Wishing to avoid an examination of the insurance policy as a whole (as is required by Ohio law) as well as the rule against surplusage, CIC argues that you cannot look to the

---

(finding that the subcontractor's defectively installed septic system was a covered occurrence under the contractor's CGL policy where the defective septic system was replaced rather than repaired).

exclusions to determine the scope of the definition of "occurrence." Merits Brief, 23. Such an argument does not attempt to harmonize the "Your Work" exception language in line with the coverage provided by the CGL policy. When one does attempt to harmonize the different provisions of the insurance policy when examining it as a whole, only one reasonable conclusion can be reached in accordance with the rule against surplusage; that is, an "occurrence" must include defective workmanship in order to provide any meaning to the "Your Work" exclusion.

Ultimately, the *Custom Agri* holding is inconsistent with the law of other states considering identical policies, and it is inconsistent with Ohio law, as the general holding renders superfluous existing coverage in the CGL policy. The Court in *Custom Agri* was forced to interpret the meaning of the word in an insurance policy ("accident") that was not otherwise defined in the policy. If the Court had been presented with a full opposition that included (1) sound Ohio law on contract interpretation principles that had been briefed and litigated through the lower Ohio courts; (2) the history of the development of commercial insurance policies and the "Your Work" exclusion (as detailed in the briefs of other *amici* and in *Black & Veatch Corp.*, 882 F.3d at 959-961); and (3) accurate and complete information on the national trend and not just a single decision from Arkansas that the Arkansas legislature had in fact already disavowed, it would not likely have issued the broad pronouncement contained in the Syllabus of the Court that "[c]laims of defective construction or workmanship brought by a property owner are not claims for 'property damage' caused by an 'occurrence' under a commercial general liability policy." 133 Ohio St.3d at 476. *Custom Agri* was wrongly decided and should be overruled.

3. *Custom Agri* defies practical workability.

The second *Galatis* factor requires that the challenged precedent defy practical workability. 100 Ohio St.3d 216, syllabus ¶ 1. As identified in *Galatis*, the practical workability

element can be satisfied by the rapidly coalescing opposition by other state supreme courts. *Id.*, 100 Ohio St.3d at 228-29. As a consequence, Ohio has become an outlier on a common contractual interpretation issue.

As identified by French, the Supreme Courts of Alabama, Alaska, Connecticut, Florida, Georgia, Indiana, Iowa, Kansas, Minnesota, Mississippi, Montana, New Jersey, North Dakota, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin have all held that construction defects can constitute "occurrences." French, 19 U. Pa. J. Bus. L. at 122 (collecting cases). Arkansas, Colorado, Hawaii, and South Carolina have all passed statutes to this effect. *Id.* For a uniform insurance contract that has not significantly changed since 1986, Ohio is now a non-uniform place to do business.

As a result, Ohio courts have been making an effort to expand exceptions to *Custom Agri*. For example, in *Cincinnati Ins. Cos. v. Motorists Mut. Ins. Co.*, 2014-Ohio-3864, 18 N.E.3d 875, ¶ 20 (9th Dist.), a fire occurred as a result of defective electrical wiring work. Cognizant of *Custom Agri*, the Ninth District held that the fire, not the defective workmanship that caused the fire, was the "occurrence" triggering coverage. *Id.*, 2014-Ohio-3864, ¶ 21. Such efforts by the lower courts to create patch-work exceptions to *Custom Agri* will only continue if *Custom Agri* is not overruled.

Moreover, the *Custom Agri* holding has had a significant impact in the construction industry. Insurers who are providing a defense under a CGL policy like the one here now have no incentive to settle claims – because under the *Custom Agri* syllabus, they will have no liability for the underlying losses incurred. This drives up the expense of litigation and decouples the interest of providing an effective defense in light of the possible costs of settlement.

Because Ohio is now an outlier, lower courts are adjusting their interpretation to avoid the *Custom Agri* holding, demonstrating that the holding defies practical workability. The second *Galatis* factor is satisfied.

4. No hardship would be imposed by overruling *Custom Agri*.

The last *Galatis* factor examines the hardship imposed by the change in precedent. 100 Ohio St.3d 216, syllabus ¶ 1. In evaluating this factor, "'The Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations.'" *Galatis*, 100 Ohio St.3d 216, ¶ 58; quoting *Robinson v. Detroit*, 462 Mich. 439, 466, 613 N.W.2d 307 (2000).

Custom Agri has existed since 2012. There is no evidence that the CGL policy form (in existence since 1986) has been modified as a result of the holding.[3] The only entities relying on the decision in *Custom Agri* are the insurers benefiting from the overly broad holding that arose out of a limited and improperly presented factual scenario. It would not be a hardship to return to the coverage that insureds believed they were purchasing. As explained, by 1986, insurance carriers and policyholders agreed that CGL policies should cover defective construction claims "so long as the allegedly defective work had been performed by a subcontractor rather than the policyholder itself." French at 108 (quoting 2 Jeffrey W. Stempel, Stempel on Insurance Contracts § 14.13[D], at 14-224.8 (3d Ed. Supp. 2007)).

[3] In its Merit Brief In Support of Appellant (at p. 3), Amicus Curiae Ohio Insurance Institute argues that the insurance market will produce products to cover the defective workmanship that is not covered by a CGL policy under the *Custom Agri* holding. The problem, however, is that such products will only be provided when asked for by a sophisticated buyer, and at an additional premium cost. Also, the availability of such a product in the future does not cure the problems caused by *Custom Agri's* broad pronouncement for the thousands of CGL policies that are currently active.

The Merit Brief of Amicus Curiae Ohio Insurance Institute states that *Custom Agri* has "restored logic and sanity to the adjusting and settling of construction defect insurance claims." (p. 2). Nothing could be further from the truth. What it has done is give the insurance industry a "Deny" rubber stamp in order to strip contractors of the value of the CGL policy that they have purchased. There is simply no more adjusting and settling of construction defect insurance claims. Only categorical denial of such claims, leading to increased litigation of the underlying disputes.

Overruling *Custom Agri* would merely reinstate the proper status quo. No hardship exists. *Custom Agri* should be overruled as all three *Galatis* factors are met.

B. In the alternative, *Custom Agri* should be limited to when the work was performed by the insured, not subcontractors.

As discussed by Charles and ONU (and each amici in support), the strict application of the *Custom Agri* holding as presently written would obviate the "Your Work" exception to the exclusion. CIC does not attempt to explain how this provision of the CGL policy is to be read and given effect within the whole of the policy.

Given that Ohio law adopts both *contra proferentem* in construing insurance policies against the drafter (the insurer) and the rule against surplusage, the subcontractor exception to the "Your Work" exclusion has to be providing some coverage. *King*, 35 Ohio St.3d at 209, 519 N.E.2d 1380; *Wohl*, 118 Ohio St.3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, at ¶ 22. To the extent CIC argues that *Custom Agri* should control, it should be modified to address this distinction not raised or argued in that case.

Indeed, while the Court's Syllabus pronouncement in *Custom Agri* is broad, it is clear from the Court's opinion that the Court did not intend its decision to indicate defective work of an insured's subcontractor was not an occurrence, and the Court was only considering the issue

of whether the insured's own work could constitute an occurrence. *See, Custom Agri* at 133 Ohio St.3d at 480 ("the policies are not intended to insure the risks of an insured causing damage to the insured's own work. In other words, the policies do not insure an insured's work itself"), quoting *JTO, Inc. v. State Auto Mut. Ins. Co.*, 194 Ohio App.3d 319, 2011-Ohio-1452, 956 N.E.2d 328, ¶ 32 (11th Dist.) ("the key issues are whether the contractor controlled the process leading to the damages"). Modifying the broad pronouncement of the *Custom Agri* Syllabus to make it clear that the *Custom Agri* ruling does not apply when the defective work is performed by an insured's subcontractor would be consistent with the actual logic and language expressed in the Court's *Custom Agri* opinion.

For the same reasons as discussed in *Black & Veatch Corp.* (882 F.3d at 964), at a minimum, *Custom Agri* should be limited in its applicability to circumstances where the defective work is performed by the insured, not subcontractors. This would bring Ohio in line with the "near unanimity" of state supreme courts deciding the issue regarding the **exact same policy**. French, 19 U. Pa. J. Bus. L. at 122 (citing the 20 states that have permitted claims for coverage under a CGL policy as result of defective work performed by a subcontractor).

C. Lastly, *Custom Agri* does not apply when completed-operations hazard coverage is in effect.

Again, and for the same reasons as stated above, the Third District in the Opinion found that coverage existed because the reference to "products-completed operations hazard" must be meaningful in order to avoid the rule against surplusage. Opinion, ¶¶ 35-36. As detailed in ONU's brief, the "products-completed operations coverage" was a separate election, with an additional premium premised on the actual value of completed products.

In fact, treatises identify that "products-completed operations hazard" coverage is used to cover this exact scenario: defective work performed by a subcontractor over which the prime

contractor had no direct control. As stated in the Appleman treatise: "[p]ursuant to the 'subcontractor exception,' an insured general subcontractor now has coverage (assuming no other policy provision precludes coverage) for 'property damage' arising out of defective work performed by subcontractors." 3-18 New Appleman on Insurance Law Library Ed., Section 18.03; *see also* Construction Insurance, A Guide for Attorneys and Other Professionals, edited by Stephen D. Pauly, American Bar Association, at p. 90 (citing Maureen McClendin, et al., Commercial Liability Insurance (IRMI 2003)).

Custom Agri does not address this coverage at all. Moreover, as noted by the Third Appellate District, the Court in *Custom Agri* relied on the Arkansas Supreme Court case of *Essex Ins. Co. v. Holder*, 370 Ark. 465, 261 S.W.3d 456 (2008), which involved a claim that arose **"before construction of the home was completed."** Opinion, at p. 20, fn. 2. To the extent CIC argues that *Custom Agri* controls, it should be modified to at least address the existence of this negotiated and paid for completed-operations hazard coverage.

> CIC'S PROPOSITION OF LAW NO. 2 The contractual liability exclusion in the general liability policy precludes coverage for claims of defective construction/workmanship.

CIC has declined to pursue this proposition of law.

CONCLUSION

The primary argument relied upon by CIC is the broad holding in *Custom Agri*. However, as discussed, *Custom Agri* was not fully briefed by adverse parties. A full review of the law interpreting this universal CGL policy shows that *Custom Agri* was wrongly decided. It also defies practical workability because it is in opposition to the law of numerous other states, and ultimately, would not work a hardship if it were reversed. Under the *Galatis* factors, the holding in *Custom Agri* should be completely reversed.

CIC's position is contrary to longstanding Ohio law regarding insurance policies. Policies are always construed against the insurer in the event of any ambiguity or question. Moreover, Ohio law requires that each provision of a contract be given effect. If *Custom Agri* is not fully reversed, it must be modified. The case did not present either of the factual differences presented here: the "Your Work" subcontractor exception, as well as the products-completed operation hazard coverage. In order to do justice to the actual agreement between the parties, both of these issues provide coverage under the CGL policy. At a minimum, *Custom Agri* should be significantly limited to the facts presented in that case, and this Court should fully describe the rights of parties in the particular (but common) circumstances of this case.

Respectfully submitted,

/s/Terry W. Posey, Jr.
Terry W. Posey, Jr. (#0078292) (Counsel of Record)
THOMPSON HINE LLP
10050 Innovation Drive
Suite 400
Miamisburg, Ohio 45342-4934
Telephone: (937) 443-6857
Facsimile: (937) 443-6635
Email: Terry.Posey@ThompsonHine.com

Daniel M. Haymond (0062152)
Thompson Hine LLP
3900 Key Center, 127 Public Square
Cleveland, Ohio 44114
Telephone: (216) 566-5500
Facsimile: (216) 566-5800
Email: Dan.Haymond@ThompsonHine.com

Counsel for Amicus Curiae Associated General Contractors of Ohio, Ohio Contractors Association, and American Subcontractors Association

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2018, a true copy of the foregoing document was served by ordinary U.S. Mail, postage paid, upon the following:

Richard M. Garner
David W. Orlandini
Collins, Roche, Utley & Garner, LLC
655 Metro Place South, Suite 200
Dublin, Ohio 43017

David P. Kamp
Jean Geoppinger McCoy
White, Getgey & Meyer Co., L.P.A.
1700 Fourth & Vine Tower
One West Fourth Street
Cincinnati, Ohio 45202

Allen L. Rutz
Mitchell A. Tobias
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008

Thomas P. Kemp
Eastman & Smith LTD
510 S. Main Street
Findlay, Ohio 45840

Kristen L. Sours
Ohio Home Builders Association
17 South High Street
Suite 700
Columbus, Ohio 43215

Gregory E. O'Brien
Cavitch, Familo & Durkin, Co., LPA
Twentieth Floor
1300 East Ninth Street
Cleveland, Ohio 44114

Amanda M. Leffler
P. Wesley Lambert
Lucas M. Blower
Alexandra V. Dattilo
Christopher T. Teodosio
388 South Main Street
Suite 500
Akron, Ohio 44311

/s/Terry W. Posey, Jr.
Terry W. Posey, Jr.

4839-4425-7633.4