THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2021-0280

CINCINNATI SPECIALTY UNDERWRITERS INSURANCE COMPANY

v.

BEST WAY HOMES, INC.

AND

RUSSELL BLODGETT

RULE 7 MANDATORY APPEAL FROM THE HILLSBOROUGH COUNTY SUPERIOR COURT NORTH

BRIEF OF THE APPELLANT, RUSSELL BLODGETT

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QUESTIONS PRESENTED

I. WHETHER BLODGETT'S CLAIMS AGAINST BEST WAY FOR ITS INDEPENDENT NEGLIGENCE, NEGLIGENT HIRING, AND NEGLIGENT SUPERVISION ARE IMPLICATED BY THE INDEPENDENT CONTRACTOR LIMITATIONS ENDORSEMENT.

This issue was preserved in the Petitioner's Response to Motion for Summary Judgment. Appendix to Brief at 192.

II. WHETHER CINCINNATI SPECIALTY UNDERWRITER INS. CO. MUST ESTABLISH IT WAS PREJUDICED BY BEST WAY HOMES, INC.'S FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE INDEPENDENT CONTRACTOR LIMITATIONS ENDORSEMENT IN ORDER FOR THE COVERAGE EXCLUSION TO BE ENFORCED.

This issue was preserved in the Petitioner's Response to Motion for Summary Judgment. Appendix to Brief at 192.

STATEMENT OF THE CASE

Defendant Russell Blodgett (hereinafter "Blodgett") is a personal injury Plaintiff in a State Court proceeding filed in the Hillsborough County Superior Court North, Docket # 216-2020-CV-00360. The Complaint was filed on April 23, 2020, seeking damages against two Defendants: Best Way Homes, Inc. (hereinafter "Best Way") and William Hall (hereinafter "Hall"). Blodgett brought claims against Best Way on theories of negligence, negligent hiring, and negligent supervision as a result of Best Way's failure to build a reasonably safe stairway and failure to use

reasonable care in the hiring and supervision of individuals involved in the construction.

At the time of this incident, Best Way was insured under a liability insurance policy with Cincinnati Specialty Underwriters Insurance Company (hereinafter "CSU"). The policy terms are set out in the Appendix to Brief (hereinafter "AB") at 67-147. The CSU policy contains an Independent Contractor Limitations endorsement (hereinafter "ICL endorsement"). The ICL endorsement modifies coverage under the Commercial General Liability and provides as follows:

A. Section IV – Commercial General Liability Conditions is amended to include the following language:

1. Obtain a formal written contract with all independent contractors and subcontractors in force at the time of the injury or damage verifying valid Commercial General Liability Insurance written on an "occurrence" basis with Limits of Liability of at least:

   a. $1,000,000 each "occurrence";
   b. $2,000,000 general aggregate, per project basis; and
   c. $2,000,000 Products-Completed Operations aggregate.

2. Obtain a formal written contract stating the independent contractors and subcontractors have agreed to defend, indemnify and hold you harmless from any and all liability, loss, actions, costs, including attorney fees for any claim or lawsuit presented, arising from the negligent or intentional acts, errors or omissions of any independent contractor or subcontractor.

3. Verify in the contract that your independent contractors and subcontractors have named you as an additional insured on their Commercial General Liability Policy for damages because of "bodily injury", "property damage", and "personal and advertising injury" arising out of or caused by any operations and completed operations of any independent contractor or

> subcontractor. Coverage provided to you by any independent contractor or subcontractor must be primary and must be provided by endorsement CG 20 10 (7/04 edition) and CG 20 37 (7/04) edition, or their equivalent. Completed operations coverage must be maintained for a minimum of two years after the completion of the formal written contract.
>
> **This insurance will not apply to any loss, claim or "suit" for any liability or any damages arising out of operations or completed operations performed for you by any independent contractors or subcontractors unless all of the above conditions have been met.** AB, 146.

On October 23, 2020, Plaintiff CSU, filed this Declaratory Judgment action seeking a determination that it owes no duty to defend or indemnify its insured, Best Way, in the underlying litigation. On January 22, 2021, CSU filed a Motion for Summary Judgment contending that, as a matter of law, CSU owes no duty to defend and/or indemnify Best Way for the claims brought by Blodgett because Best Way failed to obtain a formal written contract with the subcontractor, Robert Wood (hereinafter "Wood"), for building the subject stairway. AB, 9-155. Best Way filed an objection to the motion on February 16, 2021. AB, 156-191 Blodgett filed an objection to the motion on February 24, 2021. AB, 192-218. CSU filed replies on February 22, 2021 and March 2, 2021, respectively. AB, 219-268

This appeal arises out of a Petition for Declaratory Judgment filed by CSU against Best Way and Blodgett. Best Way and Blodgett are looking to enforce insurance coverage under the CSU policy. CSU argues that the claims against Best Way are excluded from coverage by the ICL endorsement because Best Way failed to obtain a written agreements with Wood.

Blodgett argues that the ICL endorsement is narrow and specific and only applies to claims arising from the negligence of any independent contractor or subcontractor. Blodgett's independent claims against Best Way for its own negligence as well as negligent hiring and negligent supervision do not invoke the ICL endorsement; therefore, coverage is still afforded under the CSU policy.

Blodgett further argues that even if Best Way failed to obtain a written contract with Wood, CSU suffered no prejudice as a result; therefore, coverage should nonetheless be afforded to Best Way for Blodgett's claims. The ICL endorsement only requires that "[c]ompleted operations coverage must be maintained for a minimum of two years after the completion of the formal written contract." AB, 146. Here, the construction project at issue was completed in 2012. The incident giving rise to Blodgett's Complaint occurred on May 19, 2017, approximately five years after the work was completed. The purpose of the ICL endorsement is to provide Best Way with additional liability coverage for two years past the completion of the project. In this case, that time frame of additional coverage would have ended in 2014. Since Blodgett's claims arose in 2017, well past the additional coverage period, CSU has suffered no prejudice as a result of Best Way's failure to comply with the ICL endorsement and coverage should be afforded to Best Way.

In addition, CSU's conclusory statements alleging prejudice fail to demonstrate actual prejudice and to fail conform with the statutory requirement of NH RSA 491:8-a. The question of prejudice is one of fact, not of law, that should be determined by the jury.

The Superior Court granted CSU's motion for Summary Judgment on June 7, 2021. Addendum to Brief at 24-37. This appeal challenges summary judgment because the trial court erred when it determined that all Blodgett's claims against Best Way are barred by the ICL endorsement. The trial court also erred when it determined that CSU was not required to show prejudice before denying coverage to Best Way for Blodgett's claims.

STATEMENT OF THE FACTS

On May 19, 2017, Blodgett was working in his capacity as a plumber at the home of Hall in Rumney, New Hampshire. Blodgett was moving a hot water heater into the basement when he attempted to utilize an exterior set of stairs. When Blodgett stepped onto the stairs, the entire stairway separated from the deck and fell to the ground, causing Blodgett to fall and suffer injuries.

Unbeknownst to Blodgett, approximately five years earlier (in 2012), Hall had hired Best Way to perform work on his property which included construction of an exterior deck and said stairway. Best Way, acting as Hall's agent, subcontracted with Wood to build the stairway. The agreement between Best Way and Wood was a verbal agreement.

The written agreement between Hall and Best Way required Best Way to supervise and direct any work done at Hall's property, it further required that Best Way inspect and correct any items which needed to the corrected. AB, 37-38. The subject stairway failed to comply New Hampshire's State Building Code in that the top of the stairway was improperly attached to the deck and the entire stairway system was under-supported at the ground footing so that it would restrict shear and thrust

movements. AB, 272. Wood effectively secured the stairway to the deck with some nails. AB, 280-285.

Shortly after the stairway was constructed, Hall noticed a "bounce" to the stairs. Hall informed Best Way, by and through its owner Albert Bell (hereinafter "Bell"), of the bounce. Bell could not explain the bounce but told Hall he would discuss the issue with Wood. However, Bell never addressed the bounce, and the stairway remained in the same condition until the time of Blodgett's fall. AB, 287-288. After Blodgett's fall, the stairs were rebuilt, properly secured, and the bounce no longer existed. AB, 289.

SUMMARY OF ARGUMENT

Blodgett's claims against Best Way for negligence, including failure to warn, inspect, and remedy as well as negligent hiring, and negligent supervision, are not excluded from coverage by the ICL endorsement because they do not arise out of any act or omission of Best Way's subcontractor, Wood, but are instead based on Best Way's independent negligence.

The ICL endorsement only required subcontractors to maintain insurance coverage for two years following the completion of any project. The Hall project was completed in 2012. Therefore, even if Best Way had complied with the requirements of the ICL endorsement, Wood would have only been required to maintain additional insurance coverage for Best Way until 2014. Since this incident occurred in 2017, over three years later, any coverage afforded by Wood would have already expired. Therefore, CSU suffered no prejudice by Best Way's failure to comply with the ICL

endorsement and coverage under the CSU policy should be afforded to Best Way for Blodgett's claims.

CSU's conclusory statements alleging prejudice fail to demonstrate actual prejudice and fail to conform with the statutory requirement of NH RSA 491:8-a. Lastly, the question of prejudice is one of fact, not of law, that should be determined by the jury.

ARGUMENT

A. Blodgett Has Alleged Claims Against Best Way Which Do Not Implicate the ICL Endorsement

Blodgett does not dispute that Best Way failed to obtain a written contract from Wood for his work on the Hall project. However, the ICL endorsement is narrow and specific and only applies to claims arising from the negligence of subcontractor Wood. Blodgett's independent claims against Best Way for negligence, including failure to warn, inspect, and remedy as well as negligent hiring, and negligent supervision, do not invoke the ICL endorsement; therefore, coverage is still afforded under the CSU policy.

An insurer asserting an exclusion of coverage bears the burden of proving that the exclusion applies. *Progressive Northern Ins. Co. v. Concord Gen. Mut. Ins. Co.*, 151 N.H. 649, 653 (2005). Insurance policies are interpreted from the standpoint of the average layman in light of what a more than a casual reading of the policy would reveal to the ordinary intelligent insured. *Bergeron v. State Farm Fire and Casualty Company*, 145 N.H. 391, 393 (2000). It is settled that the objectively reasonable expectations of the insured will be honored, even though painstaking study

of the policy provisions would have negated those expectations. *Coakley v. Maine Bonding*, 136 N.H. 402, 415 (1992).

When interpreting insurance policies, the Court "consider[s] the reasonable expectations of the insured as to its rights under the policy." *Id.* Importantly, "[i]n cases of doubt as to whether the writ against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor." *Id.* This is especially true when the language at issue is part of an exclusionary clause. *Contoocook Valley Sch. Dist. v. Graphic Arts Mut. Ins. Co.,* 147 N.H. 392, 394, 788 A.2d 259 (2001) (Our practice of construing ambiguities against the insurer is particularly applicable when the language at issue is part of an exclusionary clause.) *See Catholic Med. Ctr. v. Executive Risk Indem.,* 151 N.H. 699, 701, 867 A.2d 453 (2005) (If more than one reasonable interpretation is possible, and one of them provides coverage, the policy contains an ambiguity and will be construed against the insurer.) *Philbrick v. Liberty Mut. Fire Ins. Co.,* 156 N.H. 389, 391, 934 A.2d 582, 584 (2007) (For exclusionary language to be considered clear and unambiguous, two parties cannot reasonably disagree about its meaning.)

Public policy seeks to protect the rights of the insured where insurance contracts involve unequal bargaining power. *See N.A.P.P. Realty Tr. V. CC Enters.*, 147 N.H. 137, 140 (2001) ("The standard applied to interpreting an insurance contract arises in part from the inequality in bargaining power."); *Matarese v. N.H. Mun. Ass'n Prop. Liab. Tr., Inc.*, 147 N.H. 396, 401 (2002) quoting *Hoepp v. State Farm Ins. Co.*, 142 N.H. 189, 190 (1997) ("The doctrine that ambiguities in an insurance policy must be construed against the insurer is rooted in the fact that insurers have

superior understanding of the terms they employ."). Additionally, public policy favors the insured because the object of the insurance contract is to protect the insured. *Trombly v. Blue Cross/Blue Shield of New Hampshire-Vermont*, 120 N.H. 764, 771 423 A.2d 980, 984 (1980).

In this case, the ICL endorsement required Best Way to obtain written contracts from subcontractors to address claims "…arising from the negligent or intentional acts, errors or omissions **of any independent contractor or subcontractor**." AB, 146 (emphasis added). Likewise, the ICL endorsement required that Best Way be named as an additional insured on any subcontractor liability policy "for damages because of 'bodily injury', 'property damage', and 'personal and advertising injury' **arising out of or caused by any operations and completed operations of any independent contractor or subcontractor**." AB, 146 (emphasis added). Therefore, the plain language of the ICL endorsement only applies to claims brought against Best Way for Wood's negligence.

In this case, Blodgett has alleged, and there is evidence in the record, that Best Way was negligent for failing to warn, inspect, and remedy as well as in its hiring and supervision of Wood. AB, 6-7. None of these claims arise out of Wood's acts or omissions but rather are direct claims against Best Way as a result of Best Way's breach of independent duties owed to Blodgett. Furthermore, many of these independent duties are specifically enumerated in the contract between Best Way and Hall, for example, it was Best Way's duty to "…supervise and direct the work." AB, 37. It was Best Way's duty to inspect and correct any items before Hall taking possession of the premises. AB, 38.

Had Best Way properly supervised the construction of the stairway, the stairway would have been properly fastened to the deck and properly supported at the footing. Had Best Way properly inspected the stairway, the unreasonably dangerous conditions of the stairway could have been corrected and been properly fastened and properly supported. All these duties that were breached were duties owed by Best Way and breached by Best Way, not Wood. Not only does common law support a finding that the aforementioned claims are independent claims against Best Way, but the contract itself supports such finding.

Any direct claim against Best Way which does not arise from any act or omission on the part Wood is not implicated by the ICL endorsement. This Court has consistently interpreted the phrase "arising out of" as a "…originating from or growing out of or flowing from." *Allstate Ins. Co. v. Crouch,* 140 N.H. 329, 332, 666 A.2d 964 (1995) (quoting *Merrimack School Dist. v. Nat'l School Bus Serv.,* 140 N.H. 9, 13, 661 A.2d 1197 (1995)). This means that "the causal connection between the bodily injury and the tort alleged **must be more than tenuous**." *Philbrick v. Liberty Mut. Fire Ins. Co.*, 156 N.H. 389, 391, 934 A.2d 582, 584 (2007) (emphasis added). Accordingly, summary judgment in favor of CSU as to all claims brought by Blodgett against Best Way was overly broad and improper.

In *Cincinnati Specialty Underwriters Insurance Company v. Preferred Wright-Way Remodeling and Construction*, *et al*, No. 6:18-CV-00161-JDK, 2019 WL 172755 (E.D. Tex. January 10, 2019), reconsideration denied, No. 6:18-CV-00161-JDK, 2019 WL 6699818 (E.D. Tex. June 28, 2019) (AB, 204-208), CSU attempted to use an identical ICL endorsement to deny a defense and indemnity to its

insured. In that case, Wright-Way, CSU's insured, was sued for bodily injury sustained after a kitchen cabinet detached from the wall and injured the plaintiff. Wright-Way had hired a subcontractor to perform the cabinet installation and had also failed to secure a written contract with the subcontractor. However, as in this case, the lawsuit against Wright-Way included claims that Wright-Way failed to warn and failed to instruct tenants about cabinet safety. Wright-Way argued these "are separate and distinct claims, and do not arise from any act or omission on the part of the Independent Contractor, Michael Jennings." *Id.* at *3. The Court agreed and recognized that the claims brought in the underlying lawsuit were "not limited to claims against Wright-Way arising out of operations performed by an independent contractor or subcontractor" but also included claims against Wright-Way for independent negligent including failure "to warn and/or instruct tenants about cabinet safety." *Id.* at *4. Construing the allegations in the light most favorable to the insured, the Court held that the ICL endorsement did not bar coverage for the direct claims against Wright-Way since the claims did not arise out of "operations ... performed for you by any independent contractors or subcontractors." *Id.* at *4. This Court should adopt the same reasoning and hold that the plain language of the ICL endorsement only applies to claims arising from the negligence of subcontractor Wood and any direct claim against Best Way for its independent negligence is not implicated by the ICL endorsement.

Further, as the insurer, CSU bears the burden of proving that the ICL endorsement applies to *all* of Blodgett's claims against Best Way. *Progressive Northern Ins. Co. v. Concord Gen. Mut. Ins. Co.*, 151 N.H. 649, 653 (2005). A reading of the ICL endorsement raises doubt as to

whether the endorsement applies to claims brought against Best Way for breach of Best Way's duty to warn, inspect, hire, and supervise in a reasonable manner. Such doubt must be resolved in the insured's favor. *Id.*

If CSU intended the ICL endorsement to apply to all potential claims brought against a general contractor, including direct claims such as failure to supervise, CSU could have chosen unambiguous contract language to accomplish said objective. For example, in *Certain Interested Underwriters at Lloyd's v. Stolberg*, 680 F.3d 61, 67-69 (1st Cir. 2012), the Court upheld a denial of coverage for claims of negligent supervision as a result of unambiguous policy language stating "[t]his insurance does not apply to 'bodily injury', 'property damage', 'personal and advertising injury' or medical payments arising out of operations performed for you by independent contractors or your acts **or omissions in connection with your general supervision of such operations**." *Id.* at 64 (emphasis added). CSU did not choose to include such language in its policy. Rather, the ICL endorsement is narrow and specifically applies only to claims "arising from the negligent or intentional acts, errors or omissions **of any independent contractor or subcontractor**." A.B. 146 (emphasis added). Insurance policies are entered into to afford coverage. Any ambiguity in the policy should be construed against the insurance carrier and in favor of the insured. Therefore, a narrow rather than broad interpretation of the ICL endorsement to this case is consistent with this objective as well as public policy. *Trombly v. Blue Cross/Blue Shield of N.H.-Vt.*, 120 N.H. at 771.

B. Even If Blodgett's Claims Against Best Way Implicate the ICL Endorsement, Coverage Should Nonetheless Be Afforded Under The CSU Policy Because CSU Has Suffered No Prejudice As A

<u>Result of Best Way's Failure to Obtain a Written Contract with Subcontractor Wood</u>

Even if Best Way had complied with the requirements of the ICL endorsement, Wood would have only been required to maintain additional insurance coverage for Best Way until 2014. Since this incident occurred in 2017, any coverage afforded by Wood would have already expired. Therefore, CSU suffered no prejudice by Best Way's failure to comply with the ICL endorsement, and coverage under the CSU policy should be afforded to Best Way for Blodgett's claims. CSU's conclusory statements alleging prejudice fail to demonstrate actual prejudice and fail to conform with the statutory requirement of NH RSA 491:8-a. Lastly, the question of prejudice is one of fact, not of law, that should be determined by the jury.

This Court has not previously addressed whether an insurer must demonstrate prejudice to successfully deny coverage under an insurance policy. However, this Court has long recognized that "[t]he insured should not forfeit the protection he has paid for in the absence of a substantial breach." *Abington Fire Ins. Co. v. Drew,* 109 N.H. 464, 466, 254 A.2d 829 (1969). For this reason, in New Hampshire, conditions precedent in insurance policies are not favored. *Santos v. Metro. Prop. & Cas. Ins. Co.,* 171 N.H. 682, 688, 201 A.3d 1243, 1249 (2019).

When considering a prejudice requirement, other Courts have generally taken a case-by-case approach to evaluating the substantiality of the asserted harm. Specifically, Courts consider whether the failure to satisfy the required condition prevented the insurer from protecting its interests in a significant way. Examples of harm that meets the prejudice requirement include the loss of a defense in the underlying legal action, a

significant increase in the amount of damages or the settlement value of the legal action, the loss of evidence needed for the insurer to prove that the legal action is not covered, and the extinction of the insurer's subrogation rights in a context in which the insurer would have had a meaningful possibility of recovery pursuant to those rights. *See generally Restatement of the Law of Liability Insurance* § 34 PFD No 2 REV (2018); *see also Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wash. 2d 789, 804, 881 P.2d 1020 (1994) ("An insurer cannot deprive an insured of the benefit of purchased coverage absent a showing that the insurer was actually prejudiced by the insured's noncompliance with conditions precedent."); *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wash. 2d 411, 426, 191 P.3d 866 (2008) (noting that the prejudice must be substantial). *Unigard Ins. Co. v. Leven*, 97 Wash. App. 417, 427, 983 P.2d 1155 (1999) ("To establish actual prejudice, the insurer must demonstrate some concrete detriment, some specific advantage lost or disadvantage created, which has an identifiable prejudicial effect on the insurer's ability to evaluate, prepare or present its defenses to coverage or liability.").

Other Courts have also held that the burden of showing actual prejudice is on the insurer because the insurer is in the best position to establish facts demonstrating that prejudice exists. To hold otherwise would require an insured to prove a negative, a nearly impossible task. *See Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 803 (Ky.1991) ("The insured should not forfeit the protection [it] has paid for in the absence of a substantial breach"); *See also Abington Fire Ins. Co. v. Drew*, 109 N.H. 464, 466, 254 A.2d 829, 831 (1969); *Dover Mills P'ship v. Commercial Union Ins. Companies*, 144 N.H. 336, 339, 740 A.2d 1064, 1066–67

(1999); *Pub. Util. Dist. No. 1 of Klickitat Cty. v. Int'l Ins. Co.*, 124 Wash. 2d 789, 804, 881 P.2d 1020, 1029 (1994).

In support of its Motion for Summary Judgment, CSU presented only conclusory statements by counsel regarding prejudice, such as, "Best Way's failure to comply with the policy requirements is prejudicial to CSU since it leaves Best Way without an express indemnity claim against Bob Wood Construction and prevents CSU from asserting additional insured claims on behalf of Best Way under Bob Wood Construction's liability insurance policy." AB, 31. This Court has held statements and arguments by the opposing party and its counsel summarizing facts and or anticipated testimony by third parties fails to conform to the statutory requirement of NH RSA 491:8-a. *Proctor v. Bank of New Hampshire, N.A.,* 123 N.H. 395 (1983); *Granite State Mgmt. & Res. v. City of Concord*, 165 N.H. 277 (2013) (affidavits containing statements of legal conclusions and expressions of purely personal opinion are insufficient in summary judgment proceedings). CSU's conclusory statement fails to demonstrate actual prejudice and fails conform with the statutory requirement of NH RSA 491:8-a and should be disregarded. Lastly, the issue of prejudice is a question of fact that should be decided by a jury. *Bunten v. Davis*, 82 N.H. 304, 133 A. 16, 20 (1926) (The issue of undue prejudice is one of fact); *Dover Mills Partnership v. Commercial Union Ins. Companies*, 144 N.H. 336 (1999) ([p]rejudice is generally a question of fact).

CONCLUSION AND REQUEST FOR RELIEF

The trial court erred when it determined, as a matter of law, that all of Blodgett's claims against Best Way arise out of subcontractor Wood's

negligence and are therefore implicated by the ICL endorsement and that CSU is not required to show actual prejudice to deny coverage under the endorsement. This Court should find that Blodgett's independent claims against Best Way for negligence, including failure to warn, inspect, and remedy as well as negligent hiring, and negligent supervision, do not invoke the ICL endorsement and therefore reverse the trial court's granting of summary judgment in favor of CSU's coverage position. The Court should further find that CSU must prove actual prejudice in order to deny coverage under the ICL endorsement and therefore reverse the trial court's grant of summary judgment and remand this matter for jury trial.

REQUEST FOR ORAL ARGUMENT OF 15 MINUTES BEFORE THE FULL COURT

This appeal involves, in part, an issue of first impression for the Supreme Court where the Supreme Court has yet to decide whether an insurer must show prejudice before it can deny coverage for its insured's failure to comply with an endorsement requirement.

This case involves a personal injury that occurred approximately five years after the work was completed by a subcontractor and an endorsement that does not require any coverage to be provided by the subcontractor after two years from the time the work was completed.

RULE 16(3)(i) CERTIFICATION

Counsel hereby certifies that the appealed decision is in writing and is hereto addended to this brief.

CERTIFICATION OF WORD LIMIT

Counsel hereby certifies that the total words in this Brief do not exceed the maximum of 9,500 words.

Respectfully Submitted,

RUSSELL BLODGETT

By and Through Counsel,

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Dated: November 5, 2021 By: */s/Cristina Rousseau*

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CERTIFICATE OF SERVICE

I hereby certify that on this date, a copy of the foregoing brief has been provided to counsel for all parties through the Supreme Court's electronic filing system's electronic service or through conventional service, as indicated:

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ADDENDUM TO BRIEF OF APPELLANT, RUSSELL BLODGETT

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Order 24

The State of New Hampshire
Superior Court

Hillsborough-North

Cincinnati Specialty Underwriters Insurance Company

v.

Best Way Homes, Inc. and Russell Blodgett

No. 216-2020-CV-00745

ORDER

The plaintiff, Cincinnati Specialty Underwriters Insurance Company ("CSU"), has brought this action seeking a declaratory judgment that it has no obligation to defend and indemnify defendant Best Way Homes, Inc. ("Best Way") against claims asserted by defendant Russell Blodgett in related litigation. Plaintiff now moves for summary judgment. Defendants object. For the reasons that follow, the plaintiff's motion for summary judgment is GRANTED.

Factual Background

In May 2012, Best Way entered into a construction contract with William Hall for renovation work to be performed on Hall's property at 70 Fletcher Drive in Rumney, New Hampshire. Consolidated Statement of Material Facts (Doc. 23) at ¶ 1. The project included raising the existing building, adding a foundation with a garage, re-siding, and installing a deck on the back with an attached staircase. Id. ¶ 2. In connection with the project, Best Way hired several subcontractors and/or independent

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contractors. Id. ¶ 3. All of the contracts with the subcontractors and/or independent contractors were verbal. Id. ¶ 4.

The construction of the deck and attached stairs was subcontracted to Bob Wood Construction. Id. ¶ 7. Pursuant to the oral agreement, Bob Wood Construction completed construction of the deck and stairs. Id. ¶ 15. The whole project was completed in 2012. Id. ¶ 16.

In April 2020, Blodgett initiated a lawsuit against Hall and Best Way, alleging that he was injured in 2017 while performing plumbing services at the property. Id. ¶ 17. Blodgett alleges that when he was descending the deck stairs, the stairs detached from the deck, causing him to fall and sustain injuries. Id. ¶ 19-20. Blodgett alleges claims against Best Way for negligence—including negligent failure to inspect, warn, and remove hazards—and negligent supervision. Id. ¶ 22.

At the time of Blodgett's injuries, Best Way was the named insured under a Commercial General Liability Policy issued by the plaintiff. Id. ¶ 23. That insurance policy contained the following relevant provision:

> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or suit that may result. . . .

Id. ¶ 24; Pl.'s Mem. Mot. Summ. J. (Doc. 9), Ex. E, CG 00 01 04 13 at 1. Under the policy, the "bodily injury" must be caused by an "occurrence" and must occur during the policy period. Id. The policy also contained the following endorsement:

> A. Section IV – Commercial General Liability Conditions is amended to include the following language:
>
> As a condition to and for coverage to be provided by this policy, you must do all of the following:
>
> 1. Obtain a formal written contract with all independent contractors and subcontractors in force at the time of the injury or damage verifying valid Commercial General Liability Insurance written on an "occurrence" basis with Limits of Liability of at least:
>
> a. $1,000,000 each "occurrence";
>
> b. $2,000,000 general aggregate, per project basis; and
>
> c. $2,000,000 Products-Completed Operations aggregate.
>
> 2. Obtain a formal written contract stating the independent contractors and subcontractors have agreed to defend, indemnify and hold you harmless from any and all liability, loss, actions, costs, including attorney fees for any claim or lawsuit presented, arising from the negligent or intentional acts, errors or omissions of any independent contractor and subcontractor.
>
> 3. Verify in the contract that your independent contractors and subcontractors have named you as an additional insured on their Commercial General Liability Policy for damages because of "bodily injury", "property damage", and "personal and advertising injury" arising out of or caused by any operations and completed operations of any independent contractor or subcontractor. Coverage provided to you by any independent contractor or subcontractor must be primary and must be provided by endorsement CG 20 10 (7/04 edition) and CG 20 37 (7/04 edition), or their equivalent. Completed operations coverage must be maintained for a minimum of two years after the completion of the formal written contract.
>
> **This insurance will not apply to any loss, claim or "suit" for any liability or any damages arising out of operations or completed**

operations performed by you by any independent contractors or subcontractors unless all of the above conditions have been met.

Doc. 9, Ex. E, CSGA 416 04 08.

Best Way did not obtain any formal written contract from Bob Wood Construction required by the endorsement. Id. ¶¶ 9-14. Nevertheless, the defendants maintain that Bob Wood Construction did have a Commercial Liability Policy with limits of at least $1,000,000. Id. ¶¶ 9, 10. The defendants also maintain that Bob Wood Construction orally agreed to indemnify Best Way. Id. ¶ 11.

Analysis

In deciding whether to grant summary judgment, the Court considers the pleadings, affidavits, and other evidence, as well as all inferences properly drawn from them, in the light most favorable to the non-moving party. See Amica Mut. Ins. Co. v. Mutrie, 167 N.H. 108, 111 (2014). In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath sufficient to indicate that a genuine issue of material fact exists." Brown v. Concord Grp. Ins. Co., 163 N.H. 522, 527 (2012). An issue of fact is "material" for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law. Macie v. Helms, 156 N.H. 222, 224 (2007) (quoting VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006)). "If there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the grant of summary judgment is proper." Town of Barrington v. Townsend, 164 N.H. 241, 244 (2012) (quoting Bates v. Vt. Mut. Ins. Co., 157 N.H. 391, 394 (2008)); see also RSA 491:8-a, III.

The plaintiff seeks a declaratory judgment that it has no obligation to defend or indemnify Best Way in the underlying litigation based upon Best Way's failure to comply with the strict terms of the independent contractor endorsement. "The interpretation of insurance policy language, like any contract language, is ultimately an issue of law for the court to decide." Peerless Ins. v. Vermont Mut. Ins. Co., 151 N.H. 71, 72 (2004). "We look to the plain and ordinary meaning of the policy's words in context," and "[p]olicy terms are construed objectively, and where the terms of a policy are clear and unambiguous, we accord the language its natural and ordinary meaning." Id. "We construe the language of an insurance policy as would a reasonable person in the position of the insured based on a more than casual reading of the policy as a whole." Wilson v. Progressive Northern Ins. Co., 151 N.H. 782, 788 (2005).

"Insurers are free to contractually limit the extent of their liability provided that they violate no statutory provision by doing so." Santos v. Metro. Prop. and Cas. Ins. Co., 171 N.H. 682, 686 (2019). "Limitations must be stated in such clear and unambiguous terms, however, that the insured can have no reasonable expectation that coverage exists." Id. "For exclusionary language to be considered clear and unambiguous, two parties cannot reasonably disagree about its meaning." Tombley v. Liberty Mut. Ins. Co., 148 N.H. 748, 751 (2002).

Here, the language in the exclusion is abundantly clear and unambiguous in its requirement that Best Way secure formal written contracts with its subcontractors. Neither defendant contests that Best Way failed to obtain any such written contracts in this case. Instead, they offer separate arguments for why the exclusion should not be enforced. The Court will address each party's arguments in turn.

I. Blodgett

1. Applicability of Exclusion

In his objection, Blodgett first argues that one or more of the claims raised in his underlying cause of action are not covered by the plaintiff's exclusion. Specifically, Blodgett argues that the two claims asserted against Best Way—negligence and negligent hiring and supervision—do not arise from any act or omission on the part of Bob Wood Construction. The plaintiff responds that the endorsement clearly and unambiguously applies to "any loss, claim or 'suit' for any liability or any damages arising out of operations or completed operations performed by . . . by any independent contractors or subcontractors unless all" of the endorsement's conditions are met. (Doc. 9, Ex. E, CSGA 416 04 08.) The plaintiff argues that all claims alleged by Blodgett arise out of Bob Wood Construction's work on the property, and are therefore all subject to the exclusion.

Under New Hampshire law:

> [I]t is well-settled that an insurer's obligation to defend its insured is determined by whether the cause of action against the insured alleges sufficient facts in the pleadings to bring it within the express terms of the policy, even though the suit may eventually be found to be without merit.

White Mountain Cable Constr. Co. v. Transamerica Ins. Co., 137 N.H. 478, 482 (1993). "The duty to defend is triggered even where the complaint contains several causes of action or theories of recovery, but the insurer's duty to defend extends only to those causes of action that would fall under the policy if they were proved true." Id. (citation omitted).

In support of his position, Blodgett cites to Cincinnati Specialty Underwriters Insurance Company v. Preferred Wright-Way Remodeling and Construction, et al., No. 6:18-CV-161-JDK, 2019 WL 172755 (E.D. Tex. Jan. 10, 2019). In that case, the plaintiff was injured when a kitchen cabinet detached from the wall and struck her in the head. Id. at *2. The cabinet had been installed by a subcontractor working for the general contractor, Wright-Way. Id. At the time of construction, Wright-Way was insured by CSU, and the policy contained an endorsement identical to the one at issue in this case. See id. at *1-2. Based on that same endorsement, CSU argued it had no duty to defend or indemnify Wright-Way.

The court found that "Texas courts have defined the scope of the duty to defend broadly, with all doubts to be resolved in favor of the insured." Id. at *3. "If the factual allegations in the claim against the insured potentially support a covered claim, then the duty to defend is triggered." Id. "Furthermore, even if the plaintiff's complaint alleges multiple claims or claims in the alternative, some of which are covered under the policy and some of which are not, the duty to defend arises if at least one of the claims in the complaint is facially within the policy's coverage." Id. The court noted that the complaint "allege[d] that Wright-Way was independently negligent for failing to warn and/or instruct tenants about cabinet safety." Id. at 4. "Construing this allegation in the light most favorable to the insured, . . . the Petition potentially includes a claim against Wright-Way that would not be barred by the Independent Contractors Endorsement" because "[a] claim that Wright-Way failed to warn or instruct tenants about cabinet safety does not arise out of 'operations . . . performed for you by any independent contractors or subcontractors.'" Id.

CSU moved for reconsideration of the court's order, which the court denied. See Cincinnati Specialty Underwriters Ins. Co. v. Preferred Wright-Way Remodeling and Constr., et al., No. 6:18-CV-161-JDK, 2019 WL 6699818, at *1 (E.D. Tex. June 28, 2019). In doing so, the court rejected CSU's argument that the term "arising out of operations" should be read expansively. "Under Texas law, the duty to defend is triggered if at least one of several claims . . . potentially falls within the scope of coverage, even if other claims do not." Id. at *4. The court also noted that one of the claims in the complaint alleged that Wright-Way removed and reinstalled the upper kitchen cabinets negligently, causing injuries to the plaintiff. Id. Therefore, "[e]ven under CSU's more 'expansive' definition of 'arising out of,' the liability resulting from that allegation does not arise out of operations or completed operations performed for Wright-Way by any independent contractors or subcontractors." Id.

The plaintiff argues that Wright-Way is distinguishable for two reasons. First, the complaint in that case alleged that the contractor personally removed and reinstalled the cabinets in question, therefore acting independently of the subcontractor. In this case, Best Way took no part in the construction of the deck and stairs.

Second, the plaintiff argues that the New Hampshire Supreme Court has taken a different view of the phrase "arising out of," citing Philbrick v. Liberty Mut. Fire Ins. Co., 156 N.H. 389 (2007). In Philbrick, the plaintiffs' minor son was sexually molested by a babysitter. Id. at 389. The plaintiffs brought suit against the babysitter, alleging loss of consortium and assault and battery, and against the babysitter's parents, the Carriers, alleging negligent supervision and negligent entrustment. Id. At the time of the incident, the Carriers held a homeowner's insurance policy issued by Liberty Mutual. Id.

Liberty Mutual denied coverage in part on the grounds that the policy excluded coverage for bodily injury "[a]rising out of sexual molestation." Id. In a subsequent declaratory judgment action to determine coverage, the trial court granted summary judgment in favor of the Carriers, finding that the exclusion did not preclude coverage. Id.

The Supreme Court reversed on appeal, finding that it has "consistently interpreted the phrase 'arising out of' as a very broad, general and comprehensive term, which means 'originating from or growing out of or flowing from.'" Id. at 391. Noting that the damages alleged were the bodily injury to the minor child and emotional distress for all plaintiffs, the Supreme Court found that "[t]here can be no doubt that these injuries originated from or grew out of or flowed from the sexual molestation." Id. at 393. "Although it can be argued that these injuries may, in a sense, have been caused by the Carriers' negligent acts, it does not follow that these injuries did not 'arise out of' sexual molestation." Id. "Indeed, there would be no injuries and, therefore, no damages under the negligence claims absent the sexual molestation." Id. "Thus, the alleged bodily injuries did 'arise out of' the excluded act of sexual molestation and, therefore, the exclusion applies to preclude coverage." Id.

Among other cases, the Philbrick Court relied on Preferred National Insurance Co. v. Docusearch, Inc., 149 N.H. 759 (2003). In that case, the administratrix of the estate of a homicide victim sued Docusearch for, among other things, causing the victim's death by negligently disseminating the victim's social security number and place of employment to a third party. Id. at 761. Docusearch's insurance provider argued it had no obligation to defend or indemnify based on a policy provision excluding

coverage for "actions and proceedings to recover damages for bodily injuries . . . arising from . . . assault and battery . . . ." Id. at 761-62. The Supreme Court rejected an argument by Docusearch that the insurer's "obligations under the policy are determined solely by the actions of the insured." Id. at 763. Finding that "[d]amages are an essential part of a negligence claim," the Supreme Court held that "where the damages arise entirely out of an act that would not be covered under an insurance policy, the negligence claim is not one that would be covered under the policy." Id. Because the complaint did not allege any damages arising from the alleged negligence other than the decedent's bodily injury, the administratrix "could not prevail on the negligence claim without proving damages from [the decedent's] murder." Id. at 764. "Thus, because the damages arose out of the assault and battery which is excluded by the assault and battery endorsement, the respondents' negligence claim is excluded as well." Id.

Here, the only damages that Blodgett alleges in the underlying action are physical injuries from the collapse of the stairs, which the subcontractor, Bob Wood Construction, was responsible for constructing. Consistent with the reasoning in Philbrick, there would be no damages under the negligence claims alleged against Best Way absent the alleged negligence of the subcontractor. See 156 N.H. at 393. Therefore, the Court finds that all claims in the underlying action "arise out of" the subcontractor's work, and are all subject to the exclusion.

2. Prejudice

Blodgett next argues that the plaintiff must establish that it was prejudiced by the failure to comply with the endorsement requirements in order for the exclusion to be enforced. However, the cases on which Blodgett relies are almost exclusively from

foreign jurisdictions, specifically Washington, that are not consistent with New Hampshire law. See Blodgett's Corrected Obj. (Doc. 20) at 10.

New Hampshire appears to have recognized the need for an insurer to demonstrate prejudice only in the context of late notice of claims. See, e.g., Bianco Professional Ass'n v. Home Ins. Co., 144 N.H. 288, 295 (1999) ("Generally, if an insured gives late notice, the insurer must show prejudice to deny coverage."); Dover Mills P'ship v. Commercial Union Ins. Cos., 144 N.H. 336, 339 (1999) ("The insured should not forfeit the protection [it] has paid for in the absence of a substantial breach, and as such, we have held that where the insurer was not prejudiced by a delay in reporting, the failure of the insured to timely notify the insured of a claim was not a material breach of the policy which would excuse the company from performance.") (citation omitted). More specifically, the requirement of prejudice is limited to occurrence-based policies. See Bianco, 144 N.H. at 296 ("An insurer must show prejudice to deny coverage under an occurrence policy."). With respect to claims-made policies, "[t]here is no requirement that an insurance company prove it was prejudiced due to lack of notice." Id. (quoting Ins. Placements, Inc. v. Utica Mut. Ins. Co., 917 S.W.2d 592, 597 (Mo. Ct. App. 1996)).

The New Hampshire Supreme Court has also specifically allowed exclusion in other contexts without a showing of prejudice. See Krigsman v. Progressive Northern Ins. Co., 151 N.H. 643, 648-49 (2005) (finding insurer did not need to establish prejudice before denying coverage where insured did not submit to examination under oath as required by policy); Int'l Surplus Lines Ins. Co. v. Mfrs. & Merchs. Mut. Ins. Co., 140 N.H. 15, 22 (1995) (finding no prejudice necessary on exclusion for "certain

foreseeable claims based on acts that occurred prior to the policy's effective date"); Stevens v. Merchants Mut. Ins. Co., 135 N.H. 26, 30 (1991) (holding that "enforcement of the permission to settle clause is not dependent on a showing of prejudice to the insurer"). Some of these cases are directly contrary to the Washington cases on which Blodgett relies. Cf. Public Utility Dist. v. Int'l Ins. Co., 881 P.2d 1020, 1029 (Wash. 1994) (finding enforcement of no-settlement clause, in addition to notice and cooperation clauses, required insurer to show actual prejudice).

Based on the foregoing, the Court finds New Hampshire law does not require the plaintiff to demonstrate actual prejudice as a result of the defendants' failure to comply with the policy.

II. Best Way

Best Way argues that it had a reasonable expectation that Bob Wood Construction's oral agreements complied with the policy's requirements. The Court disagrees. The plaintiff's policy expressly and unambiguously requires a "formal written contract." See Doc. 9, Ex. E, CSGA 416 04 08. Numerous jurisdictions have held that where a policy unambiguously requires a written contract, an oral agreement is not sufficient to comply. See, e.g., Trahan v. Scott Equipment Co., 493 Fed. Appx. 571, 576 (5th Cir. 2012) ("Anything other than written acceptance falls outside the clear terms of the policy."); Liberty Ins. Corp. v. Ferguson Steel Co., 812 N.E.2d 228, 231 (Ind. Ct. App. 2004) ("When one enters into an agreement with the understanding that neither party is bound until a subsequent formal written document is executed, no enforceable contract exists until the subsequent document is executed."); West Am. Ins. Co. v. J.R. Constr. Co., 777 N.E.2d 610, 616 (Ill. App. Ct. 2002) ("[W]hen an insuring

agreement requires a contract in writing to provide coverage to an additional insured, an oral contract is insufficient."). Best Way has cited no law to the contrary.

Best Way also notes that while it did not have a written contract, it was a holder of a Certificate of Liability Insurance issued by Peerless Insurance, Bob Wood Construction's insurer. The Certificate provides the details of the insurance held by Bob Wood Construction for the period of June 2012 to June 2013. Pl.'s Supp. Mot. Summ. J. (Doc. 24), Ex. G. The Certificate specifically provides:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.
>
> IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. . . . A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s). . . . .
> NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES.

Id. The New Hampshire Supreme Court has characterized such certificates as "worthless document[s]" that "do[] no more than certify that insurance existed on the day the certificate was issued." Bradley Real Est. Tr. By & Through Lumbermens Mut. Cas. Co. v. Plummer & Rowe Ins. Agency, Inc., 136 N.H. 1, 4 (1992). Based on the clear disclaimers, the Court finds the Certificate does not serve to satisfy any of the conditions in the plaintiff's policy.

Best Way argues, like Blodgett, that the plaintiff must establish prejudice in order to enforce its exclusion, citing Bianco and other similar cases. However, the cases Best Way relies upon all involve issues of timely notice of claims. As articulated above, New Hampshire does not require a showing of prejudice outside of the late notice context.

Conclusion

The terms of the exclusionary provision in the plaintiff's policy are clear and unambiguous. It is undisputed that Best Way failed to comply with the terms of that provision, and the plaintiff need not demonstrate actual prejudice in order to enforce same. Finally, all claims alleged in the underlying suit arise out of the subcontractor's work, and are therefore all subject to the exclusionary provision. Accordingly, for the foregoing reasons, the plaintiff's motion for summary judgment is GRANTED.

SO ORDERED.

June 7, 2021
____
Date

____
N. William Delker
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 06/07/2021