

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**No. 2021-0280**

**CINCINNATI SPECIALTY UNDERWRITERS INSURANCE  
COMPANY**

**v.**

**BEST WAY HOMES, INC.**

**AND**

**RUSSELL BLODGETT**

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**RULE 7 MANDATORY APPEAL FROM THE HILLSBOROUGH  
COUNTY SUPERIOR COURT NORTH**

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**REPLY BRIEF OF THE APPELLANT, RUSSELL BLODGETT**

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## SUMMARY OF ARGUMENT

Cincinnati Specialty Underwriters Insurance Company (CSU) argues throughout its brief that the policy unambiguously excludes coverage for all claims in the underlying lawsuit. CSU relies on the undisputed fact that Best Way Homes, Inc. (Best Way) never obtained written contracts with its subcontractors and argues that the failure to obtain written contracts precludes coverage for Best Way in the underlying lawsuit. However, CSU's conclusory statements regarding the "unambiguous" requirements of the independent contractor endorsement ignore clear language in the endorsement that the written contract requirement likely applies only to contractors and subcontractors in force at the time of the injury (emphasis added).

Since there is no dispute that at the time of Mr. Blodgett's injury no contractors or subcontractors were working for Best Way at Mr. Hall's residence, at best, the endorsement is ambiguous as to the written contract requirements. As such, the ambiguity must be construed in favor of the insured. *Brickley v. Progressive N. Ins. Co.*, 160 N.H. 625, 627, 7 A.3d 1215 (2010) ("If more than one reasonable interpretation is possible, and an interpretation provides coverage, the policy contains an ambiguity and will be construed against the insurer").

## ARGUMENT

### **I. The “Independent Contractors Limitations of Coverage” Endorsement is Ambiguous Because it Can Be Interpreted as Requiring Written Contracts Only with Contractors in Force at the Time of the Injury.**

There is no dispute that Best Way did not obtain a written contract with Bob Wood Construction in 2012. Likewise, it is undisputed that the injury occurred approximately 5 years after the completion of the construction project at Mr. Hall’s home, and at that time neither Best Way nor any of its subcontractors were working at Mr. Hall’s property. The endorsement requires that the formal written contracts be obtained with independent contractors and subcontractors in force at the time of the injury (emphasis added), not with the independent contractors and subcontractors at the time of construction or prior to the start of construction. The independent contractor endorsement provides as follows:

#### 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 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.**

[Blodgett's App. p. 146; p. 263]

The "Independent Contractors Limitations of Coverage" endorsement does not preclude coverage because the written contract requirement of section 1 only applies to "...independent contractors **in force at the time of the injury or damage**..." (emphasis added). Bob Wood Construction was not a subcontractor "in force" at the time of Mr. Blodgett's injury. Section 2 of the endorsement only refers to a "written contract". It is a reasonable interpretation that section 2 is referring to the written contract referenced in section 1, specifically, the written contract with contractors and subcontractors "in force" at the time of the injury or damage. Likewise, section 3 refers to "the contract" which, once again, is reasonable to infer is referencing the written contract in section 1.

It is settled law in New Hampshire that the burden of proving that no insurance coverage exists rests squarely with the insurer. *Curtis v. Guaranty Trust Life Ins. Co.*, 132 N.H. 337, 340, 566 A.2d 176 (1989). While an insurer has a right to limit the extent of its liability, it must do so "through clear and unambiguous policy language." *Id.* Here, CSU could have written its endorsement in a manner that made it clear to its insured when and from whom the written contracts had to be obtained, but it chose not to do so. Instead, one section states that the written contracts must be obtained from independent contractors and subcontractors "in force at the time of the injury," one section refers to "a formal written contract," and one section refers to the "the contract". Contrary to CSU's position, a fair and reasonable interpretation is that the endorsement was intended to provide additional coverage during the period in which the work was

ongoing and there were independent contractors and subcontractors at the worksite. This interpretation is further supported by the requirement in section 3 that completed operations coverage be maintained for a minimum of two years, not indefinitely.

At best, the language in the independent contractor endorsement is ambiguous. Ambiguity exists if “reasonable disagreement between contracting parties” leads to at least two interpretations of the language. *Int'l Surplus Lines Ins. Co. v. Mfgs. & Merchants Mut. Ins. Co.*, 140 N.H. 15, 20, 661 A.2d 1192 (1995); *Trombly v. Blue Cross/Blue Shield*, 120 N.H. 764, 771, 423 A.2d 980 (1980). In determining whether an ambiguity exists, the court will look to the claimed ambiguity, consider it in its appropriate context, and construe the words used according to their plain, ordinary, and popular definitions. If one of the reasonable meanings of the language favors the policyholder, the ambiguity will be construed against the insurer. *Colony Ins. Co. v. Dover Indoor Climbing Gym*, 158 N.H. 628, 630, 974 A.2d 399, 401 (2009).

### **CONCLUSION**

CSU bears the burden to show that there is no coverage. CSU has failed to show how Best Way’s failure to obtain written contracts with subcontractors in 2012, when the construction project took place at the Hall residence, violates to the endorsement requirement that the written contracts be obtained with subcontractors in force “at the time of the injury”. At best, the subject endorsement is ambiguous and such ambiguity must be interpreted in favor of the insured, Best Way.

**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,

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By and Through Counsel,

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Dated: December 21, 2021

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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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