STATE OF NEW HAMPSHIRE

SUPREME COURT

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 PLAINTIFF/APPELLEE CINCINNATI SPECIALTY UNDERWRITERS INSURANCE COMPANY

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II. WHETHER THE TRIAL COURT CORRECTLY RULED THAT CSU WAS NOT REQUIRED TO ESTABLISH THAT IT WAS PREJUDICED BY BEST WAY'S FALIURE TO COMPLY WITH THE TERMS OF THE "INDEPENDENT CONTRACTORS LIMITATIONS OF COVERAGE" ENDORSEMENT WHICH CLEARLY AND UNAMBIGUOUSLY PROVIDED THAT COVERAGE WOULD NOT APPLY IF BEST WAY DID NOT OBTAIN THE REQUIRED FORMAL WRITTEN CONTRACTS FROM ITS SUBCONTRACTOR CONTAINING THE REQUIRED INDEMNITY AND INSURANCE PROVISIONS?

STATEMENT OF THE CASE

The Defendant/Appellant, Russell Blodgett ("Blodgett"), appeals from the June 7, 2021 decision of the Hillsborough County Superior Court, Northern District (J. Delker), granting summary judgment in favor of the Plaintiff/Appellee, Cincinnati Specialty Underwriters Insurance Company ("CSU"). The trial court ruled that CSU's "abundantly clear and unambiguous" provisions within its "Independent Contractors Limitations of Coverage" endorsement precludes coverage for injuries allegedly sustained by Blodgett due to defective work performed by an independent contractor hired by CSU's insured, Best Way Homes, Inc. ("Best Way"). The procedural history of the case is as follows.

On April 23, 2020, Blodgett filed a civil lawsuit against Best Way and William Hall ("Hall") in the Hillsborough County Superior Court, Northern District, No. 216-2020-CV-00360 ("the underlying litigation"). [Blodgett App. p. 3-8] Blodgett alleged that on May 19, 2017 he was working at Hall's home when an exterior stairway separated from the deck, causing him to sustain personal injuries. The deck and stairs were constructed by Bob Wood Construction, an independent contractor hired by Best Way pursuant to an oral agreement. Blodgett asserted claims against Hall based on negligence (Count I) and against Best Way based on theories of negligence (Count II) and negligent hiring and supervision (Count III).

CSU agreed to defend Best Way in the underlying litigation under a reservation of rights. On October 23, 2020, CSU filed a Complaint for Declaratory Judgment in Hillsborough County Superior Court, Northern District, No. 216-2020-CV-00745 seeking a determination that it had no obligation to defend or indemnify Best Way in the underlying litigation based on the provisions of an "Independent Contractors Limitations of Coverage" endorsement contained within its policy. That endorsement required Best Way to obtain a formal written contract with all independent

contractors and subcontractors containing specific insurance and indemnification provisions which would protect Best Way in the event of any claim arising out of work performed by the independent contractor or subcontractor.

On January 22, 2021, CSU filed a Motion for Summary Judgment together with a Statement of Material Facts, Memorandum of Law and supporting Exhibits. [Blodgett App. p. 9-149] CSU argued that the "Independent Contractors Limitations of Coverage" endorsement in the Commercial General Liability policy it issued to Best Way clearly and unambiguously stated that coverage would not be provided under the policy unless Best Way obtained formal written contracts from its subcontractors containing specific provisions regarding the subcontractors' obligations to defend, indemnify and provide additional insured coverage for Best Way and that it was undisputed that Best Way did not obtain the required formal written contract from Bob Wood Construction. CSU argued that in the absence of a formal written contract complying with the requirements set forth in the endorsement there is no coverage under the policy. Therefore, CSU requested a ruling that it had no obligation to defend or indemnify Best Way against the claims asserted in the underlying litigation.

Blodgett objected to CSU's Motion for Summary Judgment, arguing that the endorsement did not preclude coverage because: (1) his Complaint included claims for negligent hiring and supervision against Best Way; and (2) CSU was not prejudiced by Best Way's failure to obtain the required written contract from Bob Wood Construction because the policy only required that subcontractors maintain completed operations coverage for two years and the construction was completed approximately five years prior to his accident. [Blodgett App. p. 192-218]

Best Way also objected to CSU's Motion for Summary Judgment. [Blodgett App. p. 156-191] However, Best Way did not appeal from the

trial court's decision and the additional issues it separately addressed have not been briefed and are not before this Court.

CSU submitted a Reply to Blodgett's Objection. [Blodgett's App. p. 240-250] CSU argued that there was no claim that Best Way participated directly in the construction of the deck and stairway and that all of the claims in the underlying litigation were based on the alleged defective construction of the deck and stairs by Bob Wood Construction. [Blodgett's App. p. 241] The CSU policy broadly excluded coverage for "any loss, claim or 'suit' for any liability or any damages arising out of operations or completed operations performed for [Best Way] by an independent contractor or subcontractor" unless all of the policy conditions were met. [Blodgett's App. p. 240-241] In New Hampshire the term "arising out of" is given a broad, general and comprehensive construction. [Blodgett's App. p. 242-423] All of the claims, including the claims for negligent hiring and supervision, arose out of the work performed by Bob Wood Construction and, therefore, fell within the exclusion. [Blodgett's App. p. 244-247] CSU also argued that there was no requirement in either the policy or the applicable law that it must prove that it was prejudiced as a result of Best Way's failure to comply with the endorsement requirements. [Blodgett's App. p. 247-248] Instead, Best Way's compliance was a precondition for coverage to apply. [Blodgett's App. p. 248] Furthermore, CSU was in fact prejudiced because Best Way did not obtain the required formal written indemnity agreement from Bob Wood Construction. [Blodgett App. p. 249-250]

On June 7, 2021, the trial court issued its decision granting summary judgment in favor of CSU. [Blodgett Add. p. 24-37] The court found that "the language in the exclusion is abundantly clear and unambiguous in its requirement that Best Way secure formal written contracts with its subcontractors" and it was undisputed that Best Way did not comply with

that requirement. [Blodgett Add. p. 28] The court rejected Blodgett's argument that the negligent hiring and supervision claims did not fall within the scope of the exclusion because Best Way "took no part in the construction of the deck and stairs." [Blodgett Add. p. 31] Furthermore, "all claims in the underlying action 'arise out of' the subcontractor's work, and are all subject to the exclusion." [Blodgett Add. p. 33] The court also ruled that New Hampshire law does not require the insurer to demonstrate actual prejudice as a result of the insured's failure to comply with the policy outside of the context of late notice. [Blodgett Add. p. 35]

In addition, the trial court rejected Best Way's claim that its alleged oral agreement with Bob Wood Construction complied with the policy's requirements, finding instead that the "policy expressly and unambiguously requires a 'formal written contract.'" [Blodgett Add. p. 35] Furthermore, the Certificate of Insurance produced by Best Way was not proof of additional insured coverage and did not satisfy the policy conditions. [Blodgett Add. p. 36-37] As noted above, Best Way did not appeal from the trial court's rulings on these issues nor were they addressed in Blodgett's Notice of Mandatory Appeal or Brief. Therefore, these issues are waived and are not before the Court in this appeal.

The sole issues to be addressed on appeal are: (1) whether the trial court correctly ruled that all of Blodgett's claims fall within the policy exclusion; and (2) whether CSU was required to prove that it was prejudiced as a result of Best Way's failure to comply with the requirements of the endorsement. This Court should affirm the trial court's decision for the following reasons.

STATEMENT OF FACTS

I. THE DECK AND STAIRWAY WERE CONSTRUCTED BY BOB WOOD CONSTRUCTION PURSUANT TO AN ORAL AGREEMENT WITH BEST WAY

In May of 2012, Best Way entered into a construction contract with Hall for renovation work to be performed at a summer home located on Hall's property at 70 Fletcher Drive in Rumney, New Hampshire ("the Construction Project"). [Blodgett's App. p. 14; p. 22; p. 34-42; p. 167; p. 177; p. 179; p. 209; p. 228; p. 251] The Construction Project included raising the existing building, adding a foundation with a garage, re-siding and installing a deck on the back with stairs leading to the lake. [Blodgett's App. p. 167; p. 179-180; p. 209-210; p. 229; p. 252]

Best Way hired several subcontractors and/or independent contractors to perform work on the Construction Project. [Blodgett's App. p. 9; p. 15; p. 47-48 ; p. 168; p. 210; p. 229; p. 252] All of the contracts between Best Way and the subcontractors and/or independent contractors it hired to perform work on the Construction Project were verbal – none of the contracts were in writing. [Blodgett's App. p. 15; p. 49; p. 54; p. 210; p. 229; p. 252]

One of the subcontractors Best Way hired to perform work on the Construction Project was Bob Wood Construction, an independent contractor from Gilford, New Hampshire. [Blodgett's App. p. 10; p. 15; p. 47; p. 54; p. 210; p. 229; p. 253] Best Way hired Bob Wood Construction pursuant to an oral agreement. [Blodgett's App. p. 15; p. 54; p. 168; p. 210; p. 230; p. 253]

Best Way subcontracted the construction of the deck and stairs to Bob Wood Construction. [Blodgett's App. p. 15; p. 168; p. 210; p. 230; p. 253] Best Way did not at any time enter into a formal written contract with Bob Wood Construction related to the work to be performed by Bob Wood

Construction on the Construction Project. [Blodgett's App. p. 15; p. 210; p. 230; p. 254]

Bob Wood Construction built the deck and stairs at the Hall residence under its verbal agreement with Best Way. [Blodgett's Add. p. 25; Blodgett's App. p. 10; p. 17; p. 171; p. 212; p. 234; p. 259] The trial court found that "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" and that "Best Way took no part in the construction of the deck and stairs." [Blodgett's Add. p. 31; p. 33] The Construction Project was completed by Best Way and its subcontractors and put to its intended use by the property owner in 2012. [Blodgett's Add. p. 25; Blodgett's App. p. 10; p. 17; p. 171; p. 212; p. 234; p. 259]

II. BLODGETT ALLEGES THAT HE WAS INJURED WHEN THE STAIRWAY CONSTRUCTED BY BOB WOOD CONSTRUCTION SEPARATED FROM THE DECK

In a Complaint filed with the Hillsborough County Superior Court, Northern District on April 23, 2020, Blodgett alleges that on May 19, 2017, he sustained personal injuries while working as a plumber at 70 Fletcher Drive, Rumney, New Hampshire. [Blodgett's App. p. 60-65]

Blodgett alleges that he was hired by the property owner, Hall, to move a water heater from an upstairs closet to the basement. [Blodgett's App. p. 61] Blodgett alleges that he went out to the deck to descend stairs to the basement and when he stepped onto the first stair, the entire stairway separated from the deck, causing him to fall approximately 10 feet. [Blodgett's App. p. 61-62] Blodgett claims that he suffered severe and permanent injuries as a result of the fall. [Blodgett's App. p. 62]

Blodgett asserted claims against Hall based on negligence (Count I) and against Best Way based on theories of negligence (Count II) and negligent hiring and supervision (Count III).

III. THE POLICY ISSUED BY CSU TO BEST WAY CLEARLY AND UNAMBIGUOUSLY STATED THAT NO COVERAGE WOULD BE PROVIDED FOR CLAIMS ARISING OUT OF THE WORK OF AN INDEPENDENT CONTRACTOR OR SUBCONTRACTOR UNLESS BEST WAY OBTAINED A FORMAL WRITTEN CONTRACT CONTAINING SPECIFIC INDEMNITY AND INSURANCE PROVISIONS

Best Way is the named insured under Commercial General Liability Policy #CSU0011932 issued by CSU for the policy period of 06/29/2016 to 06/29/2017 ("the Cincinnati Policy"). [Blodgett's App. p. 67-147; p. 262]

Under SECTION I – COVERAGES, COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY of the COMMERCIAL GENERAL LIABILITY COVERAGE FORM the Cincinnati Policy contains the following insuring agreement:

> 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. …

The "bodily injury" must be caused by an "occurrence" and must occur during the policy period. [Blodgett's App. p. 85; p. 262]

The Cincinnati Policy contains an "Independent Contractors Limitations of Coverage" endorsement which modifies insurance provided under the COMMERCIAL GENERAL LIABILITY COVERAGE PART 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]

IV. IT IS UNDISPUTED THAT BEST WAY DID NOT COMPLY WITH THE FORMAL WRITTEN CONTRACT REQUIREMENTS OF THE "INDEPENDENT CONTRACTORS LIMITATIONS OF COVERAGE" ENDORSEMENT WHEN IT HIRED BOB WOOD CONSTRUCTION TO BUILD THE DECK AND STAIRS AT THE HALL PROPERTY

Best Way did not obtain from its subcontractors, including Bob Wood Construction, the formal written contracts required by the "Independent Contractors Limitations of Coverage" endorsement. [Blodgett's App. p. 174] Specifically, Best Way did not obtain a formal written contract from Bob Wood Construction:

(1) verifying that Bob Wood Construction had a valid Commercial Liability Insurance Policy with liability limits of at least $1,000,000 [Blodgett's App. p. 55; p. 254];

(2) stating that Bob Wood Construction agreed to defend, indemnify and hold Best Way harmless from any and all liability, loss, actions, costs, including attorney's fees, for any claim or lawsuit arising from the negligent or intentional acts or omissions of Bob Wood Construction in the course of its work on the construction project [Blodgett's App. p. 55; p. 256];

(3) verifying that Best Way has been named an additional insured on Bob Wood Construction's liability insurance policy with respect to bodily injury, property damage and personal and advertising injury arising out of or caused by any operations or completed operations of Bob Wood

Construction on the construction project [Blodgett's App. p. 56; p. 257]; and

(4) requiring that Bob Wood Construction's liability insurance policy 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, with respect to the work performed by Bob Wood Construction on the construction project [Blodgett's App. p. 57; p. 258].

Best Way's demands for defense and indemnity from Bob Wood Construction and its liability insurer for the claims asserted against it by Blodgett have been denied. [Blodgett's App. p. 174; p. 216] CSU agreed to defend Best Way in the underlying litigation under a complete reservation of rights. [Blodgett's App. p. 266]

SUMMARY OF ARGUMENT

In New Hampshire, it is well-established that "[i]nsurers are free to contractually limit the extent of their liability through use of a policy exclusion … provided it violates no statutory provision." Progressive Northern Insurance Co. v. Concord General Mutual Ins. Co., 151 N.H. 649, 653, 864 A.2d 368 (2005). The "Independent Contractors Limitations of Coverage" endorsement included in the policy issued by CSU to Best Way clearly and unambiguously required Best Way to obtain from its subcontractors, including Bob Wood Construction, a formal written contract containing certain indemnity and insurance provisions protecting Best Way from any claims arising out of work performed for Best Way by the subcontractors. As the trial court found, the endorsement language was "abundantly clear and unambiguous" in informing Best Way that no coverage would be provided for any claims for liability or damages arising out of work performed for Best Way by a subcontractor or independent contractor in the event that Best Way failed to comply with the

endorsement's requirements. The endorsement specifically made the insured's compliance a condition of coverage by providing that "[a]s a condition to and for coverage to be provided by this policy", Best Way must comply with all of the listed requirements..

Courts in other jurisdictions have routinely upheld and applied similar provisions to preclude coverage when the insured general contractor has failed to satisfy the requirements of similar endorsements. These courts have construed such endorsements as establishing conditions precedent that must be met in order for coverage to apply.

In this case it is undisputed that Best Way did not obtain any written contract from Bob Wood Construction. It is also undisputed that Bob Wood Construction built the deck and stairway which Blodgett alleges to have caused his accident and the resulting injuries. There is no evidence that Best Way participated in the construction of the deck and stairway.

This Court should affirm the trial court's ruling that the endorsement applies to preclude coverage for all claims asserted by Blodgett against Best Way, including the claims for negligent hiring and supervision. The endorsement by its terms applies to all claims for liability or damages "arising out of" operations performed for Best Way by its subcontractors. This Court has consistently construed the phrase "arising out of" as a very broad and comprehensive term. Blodgett's claims for liability and damages all arise out of the construction of the deck and stairway by Bob Wood Construction and, therefore, they are all excluded due to Best Way's failure to comply with the endorsement requirements.

In addition, this Court should rule that there is no coverage for the claims regardless of whether or not CSU was prejudiced by Best Way's failure to satisfy the indemnity and insurance requirements. Nothing in the policy language indicates that a showing of prejudice is required. Furthermore, this Court has only required insurers to prove prejudice in the

context of the late notice defense. Those cases are distinguishable because at the time of the loss the policy afforded coverage and the insurer is seeking to avoid its coverage obligations based on post-loss conduct by the insured. As courts in several other jurisdictions have held, where, as in this case, the policy establishes conditions precedent that must be met in order for coverage to apply, the insured's failure to satisfy the conditions precedent prior to the loss voids coverage and relieves the insurer from any obligation to defend or indemnify the insured. Due to the insured's breach of the policy provisions there is no coverage at the time of the loss and no requirement that the insurer prove prejudice.

However, even if a showing of prejudice was required, such prejudice has been established based on the inability of Best Way and CSU to pursue Bob Wood Construction based on either additional insured status or express contractual indemnity. The result is that CSU would bear the full and primary obligation to indemnify Best Way against Blodgett's claims in the event that this Court finds that coverage otherwise applies.

Thus, for the foregoing reasons as addressed more fully below, this Court should affirm the well-reasoned decision of the trial court.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing the trial court's grant of summary judgment, this Court will consider the evidence and all inferences properly drawn from it in the light most favorable to the non-moving party. Camire v. The Gunstock Area Commission, 166 N.H. 374, 376, 97 A.3d 250 (2014). "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." Godbout v. Lloyd's Ins. Syndicates, 150 N.H. 103, 105, 834 A.2d 360

(2003). The Court will review the trial court's application of the law to the facts *de novo.* Yager v. Clausen, 169 N.H. 1, 5, 139 A.3d 1127 (2016).

In this case, the material issues of fact are not in dispute. The parties do not dispute that the deck and stairs which are alleged to have caused Blodgett's injury were constructed by Bob Wood Construction and that Best Way hired Bob Wood Construction to perform the work pursuant to an oral agreement. They do not dispute the terms of the CSU policy's "Independent Contractors Limitations of Coverage" endorsement. Nor do they dispute the fact that Best Way did not obtain a formal written agreement from Bob Wood Construction as required by the endorsement. Thus, the issues before the Court are solely issues of law subject to *de novo* review.

II. BLODGETT'S CLAIMS FOR LIABILITY AND DAMAGES ARE ALL EXCLUDED FROM COVERAGE UNDER THE "INDEPENDENT CONTRACTORS LIMITATION OF COVERAGE" ENDORSEMENT BECAUSE THEY ALL AROSE OUT OF THE COMPLETED OPERATIONS PERFORMED FOR BEST WAY BY BOB WOOD CONSTRUCTION PURSUANT TO AN ORAL AGREEMENT

A. The CSU Policy Clearly and Unambiguously Excludes Coverage for All Claims for Liability and Damages Arising Out of Operations and Completed Operations Performed By a Subcontractor or Independent Contractor When the Insured Fails to Comply With the Formal Written Contract Requirements

The CSU policy's "Independent Contractors Limitations of Coverage" endorsement amends Section IV – Commercial General Liability Conditions to add provisions requiring Best Way to obtain a formal written contract from all independent contractors and subcontractors. The endorsement contains very specific requirements regarding the provisions that must be included within the formal written

contract and specifically states that coverage is conditioned on the insured's compliance. The endorsement also expressly states in bold that coverage *will not apply* to claims "for any liability or any damages" arising out of work performed by an independent contractor or subcontractor unless the insured has complied with the formal written contract requirements.

"The purpose of an endorsement is, by definition, to change the terms of the policy to which it is attached." Santos v. Metropolitan Property & Casualty Ins. Co., 171 N.H. 682, 689, 201 A.3d 1243 (2019). It is the general rule that the provisions contained in an endorsement "will prevail over those contained in the body of the policy." Id. at 689, *quoting* National Union Fire Ins. Co. v. Lumbermens Mut., 385 F.3d 47, 55 (1st Cir. 2004).

In New Hampshire, "[i]nsurers are free to contractually limit the extent of their liability through use of a policy exclusion … provided it violates no statutory provision." Progressive Northern Insurance Co. v. Concord General Mutual Ins. Co., 151 N.H. at 653. "Such language must be so clear, however, as to create no ambiguity that might affect the insured's reasonable expectations." Contoocook Valley School District v. Graphic Arts Mutual Ins. Co., 147 N.H. 392, 393, 788 A.2d 259 (2001). Policy terms create an ambiguity only when the parties may reasonably differ about the interpretation of the language. Id. at 393-94. Ultimately, the court will interpret exclusion language to mean "what a reasonable person would construe it to mean." Progressive N. Ins. Co. v. Concord Gen. Mut. Ins. Co., 151 N.H. at 653.

This Court's analysis "begins with an examination of the insurance policy language." Peerless Ins. v. Vermont Mutual Ins. Co., 151 N.H. 71, 72, 849 A.2d 100 (2004). "The interpretation of insurance policy language, like any contract language, is ultimately an issue of law for the court to decide." Id. The Court must "look to the plain and ordinary meaning of

the policy's words in context." Id. "Policy terms are construed objectively, and where the terms of a policy are clear and unambiguous, [the court will] accord the language its natural and ordinary meaning." Id. Where the policy language is clear, the Court will not create an ambiguity simply to construe the policy against the insurer. International Surplus Lines Ins. Co. v. Manufacturers Merchants Ins. Co., 140 N.H. 15, 20, 661 A.2d 1192 (1995). The ambiguity rule "will not be applied so as to create coverage where it is clear that none is intended." Robbins Auto Parts v. Granite State Ins. Co., 121 N.H. 760, 764, 435 A.2d 507 (1981).

The "Independent Contractors Limitation of Coverage" endorsement contains the following clear and unambiguous exclusion in bold writing:

> **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] It is undisputed that Best Way did not obtain the required formal written contract from Bob Wood Construction. Thus, as long as Blodgett's claims for liability or damages "ar[ose] out of" the completed operations performed by Bob Wood Construction for Best Way, there is no coverage under the policy.

B. All of Blodgett's Claims Arose Out of the Completed Operations Performed by Bob Wood Construction for Best Way

Blodgett's position that some of the claims do not fall within the policy exclusion is erroneous as a matter of both fact and law. Specifically, Blodgett argues that his claims that Best Way negligently inspected the deck and stairway, failed to warn of hazardous conditions and negligently hired and supervised Bob Wood Construction, are separate and distinct claims that do not arise from any act of omission on the part of Best Way's independent contractor. However, Blodgett attributes his accident and

resulting injuries to alleged construction defects in the attachment of the stairway to the deck and it is undisputed that all of this work was performed by Bob Wood Construction. The exclusion applies to any claim for any liability *or* any damages arising out of the operations performed by the subcontractor. Thus, as long as either the damages or the liability arise out of the work performed by Bob Wood Construction, the claims are excluded from coverage. As the trial court correctly ruled, "there would be no damages under the negligence claims alleged against Best Way absent the alleged negligence of the subcontractor." [Blodgett's Add. p. 33]

In New Hampshire it is well-established that the phrase "arising out of" is a "very broad, general and comprehensive term[]" which has been defined as "originating from or growing out of or flowing from." Merrimack School District v. National School Bus Service, 140 N.H. 9, 13, 661 A.2d 1197 (1995), *quoting* Carter v. Bergeron, 102 N.H. 464, 470-71, 160 A.2d 348 (1960). The *Merrimack* case arose from an accident in which a student was struck by one of the defendant's school buses. Id. at 10-11. The child's father sued both the school district and the defendant school bus service alleging that each was negligent. Id. at 11. The lawsuit was settled and the school district sought indemnification from the defendant. Id. The defendant took the position that since the underlying lawsuit alleged independent negligence by the school district it was not obligated to indemnify the school district under the transportation agreement. Id. The indemnity clause provided that the defendant would indemnify the school district from "all claims for personal injury…which may, in any way, arise from or out of the operations of the [defendant]…" Id. at 12. The defendant argued that this clause limited its indemnity obligation to claims based on the defendant's own negligence and did not extend to the claims alleging that the school district negligently failed to supervise the students during dismissal and failed to enforce bus safety

rules. Id. at 13. This Court disagreed, ruling that the defendant's agreement to indemnify the school district for "any and all" causes of action "arising out of" the defendant's performance of the contract encompassed the claims that the school district itself was negligent. Id. The Court held that the claims against the school district for negligent supervision and negligent failure to enforce bus safety rules "ar[o]se out of" the defendant's operations since a school bus owned by the defendant and operated by one of its employees was the actual cause of the child's injury. Id. The assertion of different theories of liability against the school district did not operate to remove the claims from the "arising out of" provisions of the indemnity clause.

This Court has applied the same broad construction of "arising out of" in the context of insurance policies. In Philbrick v. Liberty Mutual Fire Ins. Co., 156 N.H. 389, 934 A.2d 582 (2007), the insureds' minor son sexually molested the plaintiffs' children while he was babysitting them. The plaintiffs filed a lawsuit against the insureds alleging negligent supervision and negligent entrustment. Id. at 390. Liberty Mutual denied coverage under the insureds' homeowners policy based in part on an exclusion for bodily injury "[a]rising out of sexual molestation." Id. The trial court denied Liberty Mutual's motion for summary judgment and granted summary judgment in favor of the plaintiffs. On appeal, the insureds argued that the exclusion did not bar coverage for a claim of negligent supervision because such a claim "arises" not from sexual molestation, but from an insured's negligence. Id. at 392. This Court rejected that argument, however, ruling that "the focus is on whether the alleged harm arose from an act excluded under the policy." Id. at 393. This Court explained that although it could be argued that the injuries may, in a sense, have been caused by the insureds' negligent acts, it did not follow that the injuries did not "arise out of" sexual molestation. Id.

"Indeed, there would be no injuries and, therefore, no damages under the negligence claim absent the sexual molestation." Id. This Court concluded that the injuries arose out of the excluded act of sexual molestation and, therefore, the policy excluded coverage for the negligent supervision and negligent entrustment claims against the insured parents. Id.

See, also, Preferred National Ins. Co. v. Docusearch, 149 N.H. 759, 763, 829 A.2d 1068 (2003) ("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"); Ross v. Home Ins. Co., 146 N.H. 468, 773 A.2d 654 (2001) (policy did not cover claims for negligent hiring and supervision because the underlying damages arose out of a rape which was not covered under the policy); State Farm Ins. Co. v. Bruns, 156 N.H. 708, 942 A.2d 1275 (2008) (policy did not cover claims for false imprisonment or invasion of privacy since the claims were intertwined with and dependent on sexual abuse claims which were not covered); Massachusetts Bay Ins. Co. v. American Healthcare Services Assoc., 170 N.H. 342, 172 A.3d 1043 (2017) (since the claimants' injuries arose out of the provision of medical services, the negligent hiring and supervision claims against the insured staffing company were excluded under the policy's healthcare professional services exclusion).

Applying the above precedent, this Court should rule that the claims for liability and damages against Best Way based on theories of negligent failure to inspect, negligent failure to warn, negligent hiring and negligent supervision all "arise out of" the work performed for Best Way by its subcontractor, Bob Wood Construction. It was the alleged negligent construction of the deck and stairway by Bob Wood Construction resulting in detachment of the stairs from the deck that is claimed to have been the direct cause of Blodgett's injuries. The claims against Best Way are not entirely "separate and distinct" from the acts of Bob Wood Construction, as

argued by Blodgett. As in the *Merrimack* and *Philbrick* cases, regardless of the theories of liability alleged in the complaint, all of the claims for liability and damages against Best Way originated from or grew out of or flowed from Bob Wood Construction's work and, therefore, they are claims for liability and damages "arising out of" Bob Wood Construction's completed operations. As a result, all of the claims are barred by the exclusion in the "Independent Contractors Limitations of Coverage" endorsement.

Although this Court has not yet had the opportunity to apply limitations of coverage provisions similar to those contained in the independent contractors endorsement, courts in other jurisdictions have held that such provisions are valid, enforceable and broadly exclude coverage for claims arising out of the work performed by independent contractors.

For example, in Cincinnati Specialty Underwriter's Ins. Co. v. Milionis Construction, Inc., 352 F. Supp. 3d 1049 (E.D. Wash. 2018), CSU's "Independent Contractors Limitations of Coverage" endorsement was applied to exclude coverage for construction-related property damage claims due to the insured's failure to obtain the required agreements from its subcontractors. Milionis was hired by property owners to serve as the general contractor for the construction of their residential home. Id. at 1052. The property owners alleged that Milionis negligently used and supplied the wrong construction drawings, plans and specifications. Id. at 1054. Other than excavation, Milionis performed no labor on the project and instead hired subcontractors to do "pretty much everything." Id. However, Milionis did not obtain written contracts from any of its subcontractors as required under its policy with CSU. Id. The property owners sought compensation for property damage, which required the dismantling and reconstruction of the basement walls, roof and driveway.

Id. at 1055. The Court found that all of the property damage "was caused by – or arose from – the work of the subcontractors" hired by Milionis as general contractor for the project. Id. According to the Court, under the endorsement's "plain terms", CSU was not required to indemnify Milionis unless Milionis met the "explicit, unambiguous conditions." Id. Since it was undisputed that Milionis did not obtain the required written contracts, it did not meet the conditions precedent to coverage under the policy. Id. The Court also found that CSU was prejudiced as the result of the failure to obtain the written contract containing the required indemnification and insurance provisions.[1] Id. at 1056. Consequently, the Court concluded that CSU was not required indemnify Milionis under its policy. Id.

Likewise, in U.S. Underwriters Ins. Co. v. Zeugma Corp., No. 97-CV-8031, 1998 U.S. Dist. LEXIS 14448 (S.D. N.Y. Sept. 15, 1998), the Court held that language of an exclusion of coverage for property damage "arising out of operations performed for any insured by independent contractors" has consistently been found by courts to be "clear and unambiguous." Id. at *7-8. As in New Hampshire, the courts of New York interpret the words "arising out of" as "broad, general, comprehensive terms ordinarily understood to mean originating from, incident to, or having connection with" the operations performed by an independent contractor for the insured. Id. at *8. The Court concluded that the exclusion applied to preclude all claims arising out of the independent contractors' work, including claims for negligent supervision. Id. at *10. As a result, the insured was not entitled to coverage under the policy. Id. at *11.

See, also, Certain Interested Underwriters at Lloyd's v. Stolberg, 680 F.3d 61, 67-69 (1st Cir. 2012) (applying Massachusetts law) (ruling that a policy's Independent Contractors Exclusion endorsement was

[1] This ruling is addressed more fully in the following section.

unambiguous and broadly excluded coverage for any claims arising out of the operations of independent contractors). Although the policy at issue in *Stolberg* included a specific reference to acts or omission of the insured in connection with its general supervision of the subcontractor's operations, the Court's decision was not dependent on that language but was instead based on the broad exclusion for injuries "arising out of operations performed for [the insured] by independent contractors." Id. at 66. In fact, the Court did not even address that language in its opinion beyond quoting the policy language. In light of New Hampshire's broad construction of the phrase "arising out of" such additional language is not required.

The only case relied upon by Blodgett is a Texas decision which has not been cited by any other legal authority. More significantly, the case is distinguishable on both the facts and applicable law. In Cincinnati Specialty Underwriters Inc. Co. v. Preferred Wright-Way Remodeling and Construction, LLC, 2019 U.S. Dist. LEXIS 5116, 2019 WL172755 (E.D. Tex. Jan. 1, 2019), *recon. den.* 2019 U.S. Dist. LEXIS 213953, 2019 WL 6699818 (E.D. Tex. June 28, 2019), the court ruled that CSU was not entitled to summary judgment because allegations that the insured failed to warn or instruct tenants about cabinet safety potentially supported a covered claim based on the insured's negligence independent of its subcontractor. Id. at *11. However, the court's decision was revisited and further clarified on a subsequent motion for reconsideration filed by CSU. In that decision, the court denied CSU's motion to reconsider, however, as explained below, its reasons for doing so render the case inapposite to the case at hand. Cincinnati Specialty Underwriters Inc. Co. v. Preferred Wright-Way Remodeling and Construction, LLC, 2019 U.S. Dist. LEXIS 213953, *supra.*

First, the court expressly rejected CSU's argument that the "arising out of operations" language should be interpreted "expansively."

Cincinnati Specialty Underwriters Inc. Co. v. Preferred Wright-Way Remodeling and Construction, LLC, 2019 U.S. Dist. LEXIS 213953, at *9-10. As discussed above, New Hampshire courts have consistently given this phrase an expansive construction. This significant legal distinction requires this Court to disregard the Texas federal court's decision as irrelevant based on entirely different approaches to the interpretation of "arising out of." Under New Hampshire's expansive construction, claims of negligent hiring, supervision, inspection and failure to warn all "arise out of" the subcontractor's alleged defective work.

Second, in ruling on the motion to reconsider, the district court pointed out that the complaint included additional allegations that the insured general contractor had negligently removed and re-installed the kitchen cabinets and, therefore, acted independently of and contrary to its subcontractor. Id. at *11. The court held that even under CSU's expansive definition of "arising out of", these allegations of direct independent negligence by the insured in removing and re-installing the cabinets prior to the injury-causing incident removed at least some of the claims from the endorsement's exclusion. Id. Notably, there are no such allegations in this case. Here, it is undisputed that Bob Wood Construction was the entity that installed the deck and stairway and that Best Way was not involved in that aspect of the project.

For the reasons set forth above, this Court should rule that all of the allegations in the underlying litigation involve claims "arising out of" the operations of Bob Wood Construction performed for Best Way within the meaning of the "Independent Contractors Limitations of Coverage" endorsement. Since it is undisputed that Best Way did not comply with the endorsement's requirements, all claims asserted by Blodgett against Best Way in the underlying litigation are excluded from coverage. To hold otherwise would eviscerate the independent contractor's exclusion because

mere allegations of a general contractor's overall supervisory role in a construction project would defeat the exclusion regardless of the fact that it was the independent contractor's work that directly caused the injury and without which the injury would not have occurred. The insured, on the other hand, has the ability to avoid the denial of coverage by simply obtaining the required written contracts from its subcontractors. *See,* Cincinnati Specialty Underwriters Ins. Co. v. Milionis Construction, Inc., 352 F. Supp. 3d at 1056 (noting that the insured "could have protected itself … by complying with the policy's conditions or by paying a larger premium to modify the policy").

III. CSU IS NOT REQUIRED TO PROVE THAT IT WAS PREJUDICED BY BEST WAY'S FAILURE TO COMPLY WITH THE ENDORSEMENT'S FORMAL WRITTEN CONTRACT REQUIREMENT

A. Neither the Policy Nor New Hampshire Law Require That the Insurer Prove Prejudice Under An Endorsement Which Makes Obtaining a Formal Written Contract a Condition Precedent to Coverage

Blodgett asks this Court to read into the policy exclusion a requirement that CSU prove that it has been prejudiced by the insured's failure to the comply with the endorsement's requirements in order to apply the exclusion. There is no such requirement in the policy. The exclusion states simply that "[T]his insurance *will not apply* to any loss, claim or "suit" … unless all of the above conditions have been met.

In New Hampshire, insurers are free to contractually limit the extent of their liability through use of clear and unambiguous policy exclusions provided they violate no statutory provision. Progressive Northern Insurance Co. v. Concord General Mutual Ins. Co., 151 N.H. at 653. There is nothing ambiguous about the exclusion of coverage in the "Independent

Contractors Limitations of Coverage" endorsement. If the insured does not comply with all of the endorsement's requirements, there is no coverage for claims arising out of work performed by the independent contractor – period.

"A condition precedent is a provision that makes an act or event contingent upon the performance or occurrence of another act or event." Santos v. Metropolitan Property & Casualty Ins. Co., 171 N.H. at 688. "In general, provisions which commence with words such as 'if,' on condition that,' 'subject to,' and 'provided' create conditions precedent." Id.

The CSU policy's "Independent Contractors Limitations of Coverage" endorsement states that "[a]s a *condition* to and for coverage to be provided by this policy, you must do all of the following…" The endorsement then lists all of the requirements that must be met in order for coverage to apply. The exclusion in bold type informs the insured that coverage "will not apply" to any claim "unless all of the above *conditions* have been met." Thus, satisfying all of the listed conditions is a prerequisite to obtaining coverage for any claims arising out of the operations of a subcontractor or independent contractor.

In Krigsman v. Progressive Northern Ins. Co., 151 N.H. 643, 864 A.2d 330 (2005), this Court held that submission to a reasonable request for an examination under oath (EUO) was a condition precedent to recovery under a motor vehicle policy. Id. at 645. As a result, the insurer could deny coverage "without proving it has been prejudiced by" the insured's refusal to submit to an EUO. Id. In so ruling, this Court distinguished the effect of an insured's breach of an EUO provision from the failure to provide timely notice, explaining that "[a] delay in receiving notice does not necessarily impair the insurer's ability to investigate the claim", while the insured's refusal to submit to an EUO "significantly affects the insurer's investigation of the claim." Id. at 649.

Likewise, in International Surplus Lines Ins. Co. v. Manufacturers & Merchants Mutual Ins. Co., 140 N.H. 15, 661 A.2d 1192 (1995), this Court rejected an insured's argument that the trial court should not have found an exclusion applicable without a finding that the insurer was prejudiced. The defendant (MMIC) sought coverage under a professional liability policy issued to it by International Surplus Lines (ISLIC). ISLIC denied any obligation to defend or indemnify MMIC based on an exclusion barring coverage for claims arising from any act, error or omission occurring prior to the effective date of the policy if the insured knew or reasonably could have foreseen that the act, error or omission might be the basis for a claim. Id. at 17. This Court declined to impose a prejudice requirement where there was no such requirement in the policy, explaining:

> Finally, the defendants argue that the trial court should not have found exclusion (i) applicable without a finding that ISLIC was prejudiced by the defendants' untimely notice of the claims against them. Exclusion (i), however, is not a notice provision; it is an exclusion for certain foreseeable claims based on acts that occurred prior to the policy's effective date. The exclusion contains no notice requirement. Thus, regardless of whether an insured tells ISLIC of a possible claim prior to the policy's effective date, coverage for such claims is barred "if… the insured at the effective date of this policy knew or could reasonably have foreseen that [a prior] act, error or omission might be the basis for claim or suit." Moreover, engrafting a prejudice requirement onto exclusion (i) would be unjustified because ISLIC has the right to exclude from coverage certain classes of risks.

Id. at 22. *See, also,* Stevens v. Merchants Mutual Ins. Co., 135 N.H. 26, 30, 599 A.2d 490 (1991) (enforcement of the permission to settle clause is not dependent on a showing of prejudice to the insurer).

In fact, as the trial court noted, this Court has only required a showing of prejudice in the context of the late notice defense. [Blodgett Add. p. 10-11] *See, e.g.*, Dover Mills Partnership v. Commercial Union Ins. Cos., 144 N.H. 336, 339, 740 A.2d 1064 (1999) (where the insurer is not prejudiced by a delay in reporting, the failure of the insured to give timely notice of the claim is not a material breach of the policy which would excuse the company from performance), *citing* American Employers' Ins. Co. v. Swanzey, 108 N.H. 433, 436, 237 A.2d 681, 683 (1968). In cases involving the late notice defense, the policy affords coverage at the time of the loss and the insurer's denial is based on subsequent acts of the insured which are said to defeat coverage. As a result, the insurer must prove that it has been prejudiced by the insured's post-loss conduct. Where, however, the policy contains a condition precedent – as in the CSU endorsement - if the insured has not obtained the required written contract from its subcontractor prior to the loss there is no coverage at the time the loss occurs.

Courts in other jurisdictions have construed similar indemnity and insurance requirements as conditions precedent *See, e.g.,* Advantage Roofing & Construction of La., Inc. v. Landmark American Ins. Co., 2018 U.S. Dist. LEXIS 243520, 2018 WL 1955516 (M.D. La. Mar. 13, 2018) (granting summary judgment in favor of insurer where insured failed to obtain the required written contracts from its subcontractor and specifically ruling that the insurer "was not required to show that it suffered prejudice from [the insured's] breach of the policy"); Meridian Construction & Development, LLC v. Admiral Ins. Co., 105 F. Supp. 3d 1331 (M.D. Fla. 2013) (insurer had no duty to defend or indemnify because the insured

failed to satisfy the conditions precedent to coverage relative to its independent contractors); North American Capacity Ins. Co. v. Claremont Liability Ins. Co., 177 Cal. App. 4th 272, 99 Cal. Rptr. 3d 225 (2009) (insurer's denial of coverage was proper where insured failed to comply with provisions of contractors warranty endorsement containing preconditions to coverage); Sharp General Contractors, Inc. v. Mt. Hawley Ins. Co., 604 F. Supp. 2d 1360 (S.D. Fla. 2009) (insured general contractor not entitled to coverage under CGL policy due to failure to comply with conditions of coverage relative to subcontractors under Contractors Endorsement); Certain Interested Underwriters at Lloyd's v. Halikoytakis, 444 Fed. Appx. 328 (11th Cir. 2011) (insured's breach of the Independent Contractors Special Condition by failing to be named as an additional insured on its subcontractor's policy invalidated coverage).

In this case, Best Way's failure to obtain the required formal written contract from Bob Wood Construction precludes coverage for any claims for liability or damages arising out of the subcontractor's operations regardless of whether or not CSU is prejudiced.

B. Even if a Showing of Prejudice Was Required, Best Way's Failure to Obtain the Required Insurance and Indemnity Provisions in a Formal Written Contract With Bob Wood Construction Was Prejudicial to CSU

For the reasons set forth above, this Court need not address whether CSU was prejudiced by Best Way's breach of the "Independent Contractors Limitations of Coverage" endorsement. However, Best Way's failure to require that Bob Wood Construction have it named as an additional insured on its liability policy and its failure to obtain a written indemnity agreement from Bob Wood Construction is in fact prejudicial to CSU in the event that it is required to indemnify Best Way in the underlying litigation.

In Cincinnati Specialty Underwriter's Ins. Co. v. Milionis Construction, Inc., 352 F. Supp. 3d 1049 (E.D. Wash. 2018), the court found that the insured's failure to comply with the "Independent Contractors Limitations of Coverage" conditions was in fact prejudicial to CSU because the noncompliance left Milionis with no contractual indemnification claims to assert against the subcontractors to compel them to contribute to its defense or settlement and because it left Milionis with no direct contractual rights to a defense and coverage from the subcontractors' insurers. Id. at 1056. As a result, CSU was left with no other insurers and parties to share in the costs of defending and indemnifying Milionis. Id.

Similarly, in North American Capacity Ins. Co. v. Claremont Liability Ins. Co., Cal. App. 4th 272, 99 Cal. Rptr. 3d 225 (2009), although the court held that a showing of prejudice was not required, it found that the insurer was in fact prejudiced by the insured's failure to comply with the policy endorsement which excluded liability coverage for operations completed by an independent contractor unless the insured obtained both (1) a hold harmless agreement from the contractor; and (2) a certificate of insurance showing the contractor was insured. Id. at 229-230. The Court noted that the practical effect of the policy endorsement was to shift damages caused by the independent contractor to the contractor and its carrier rather than to the insured general contractor and to place the risk of the contractor's defective performance upon both the contractor and its carrier. Id. at 230.

In this case, regardless of the fact that the policy only required that subcontractors contract to maintain two years of completed operations coverage, CSU is prejudiced because if Bob Wood Construction had obtained liability coverage as required it may have elected to continue such coverage through the accident date with its coverage being primary. More

significantly, CSU is prejudiced because even if the coverage had terminated prior to the accident date, Bob Wood Construction would still have been contractually obligated to defend and indemnify Best Way under the written indemnity agreement. In the absence of an express indemnity agreement, Best Way and CSU have no effective recourse against Bob Wood Construction.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the trial court and rule that CSU has no obligation to defend or indemnify Best Way in the underlying litigation.

REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellee CSU respectfully requests the opportunity to present a fifteen minute oral argument before a full panel of the Supreme Court. Oral argument will be presented by Christopher J. Poulin, Esq.

RULE 16(11) CERTIFICATION

I hereby certify that the Brief of Plaintiff/Appellee complies with the 9,500 word limit under Supreme Court Rule 16(11).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Plaintiff/Appellee will be served electronically via the Court's e-file system to Christina Rousseau, Esq., counsel for Russell Blodgett and John J. Cronin, III, Esq., counsel for Best Way Homes, Inc.

Dated: December 2, 2021

By: /s/ Christopher J. Poulin

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