ORIGINAL

IN THE SUPREME COURT OF OHIO

THE OHIO CASUALTY INSURANCE COMPANY,	)	Supreme Court Case No. 2011-1799
Appellee,	)	Appeal from the Ashland County Court of Appeals, Fifth Appellate District (Court of Appeals Case No. 2011-COA-009)
v.	)	
MANSFIELD PLUMBING PRODUCTS, LLC,	)	
Appellant.	)	

APPELLEE'S JURISDICTIONAL MEMORANDUM IN RESPONSE

Reginald S. Kramer, Esq. (#0024201)
Oldham Kramer
195 South Main Street
Akron, OH 44308-1314
Phone: (330) 762-7377
Fax: (330) 762-7390
Email: *rkramer@oldhamkramer.com*
Attorney for Appellant
Mansfield Plumbing Products, LLC

Robert W. Young, Esq. (#0064876)
Law Office of Robert W. Young, Esq.
5571 Sterling Lakes Circle, Suite 101
Mason, OH 45040
Phone: (513) 692-8059
Fax: (513) 297-9230
Email: *rwylaw25@yahoo.com*
Attorney for Appellee
The Ohio Casualty Insurance Company

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Proposition of Law No. 1:
This case is not of public or great general interest. Rather, this case is limited in scope to a factual situation where Loss in Progress provisions excluded excess liability insurance coverage for losses attributable to **property damage** that happened during the policy coverage periods but that was a later continuation of **property damage** which happened, and of which the insured admittedly was aware, before policy inception.

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This is an appeal of a declaratory judgment action filed by The Ohio Casualty Insurance Company ("Ohio Casualty") against its insured, Mansfield Plumbing Products, LLC ("Mansfield Plumbing"), in the Ashland County Court of Common Pleas. Ohio Casualty sought and obtained a declaration by the trial court that Ohio Casualty has no duty to defend, indemnify, or otherwise provide coverage to Mansfield Plumbing for any third-party claims, demands, damages, or causes of action which arose from or were due to water leakage incidents that occurred between December 1, 2003, and December 1, 2005, and that resulted from hush tube failures in toilets manufactured by Mansfield Plumbing.

Ohio Casualty provided follow-form excess liability insurance coverage to Mansfield Plumbing for two policy years between December 1, 2003, and December 1, 2005, over primary liability insurance coverage for the same policy years written by a Chubb affiliate, Federal Insurance Company ("Chubb"). Mansfield Plumbing had a $500,000.00 per **occurrence** self-insured retention ("SIR") under each Chubb primary liability insurance contract, with no aggregate limit on the SIR.

Mansfield Plumbing and Chubb agreed (but Ohio Casualty did not agree) that all of the water leak incidents (1) which were numerous; (2) which happened at different times, at different locations, and with different types of Mansfield Plumbing toilets; and (3) which

resulted in varying damages sustained by different property owners, constituted a single **occurrence** under each Chubb primary liability insurance contract. Mansfield Plumbing paid one $500,000.00 SIR, and Chubb paid one per **occurrence** liability coverage limit of $1,000,000.00, under each Chubb primary liability insurance contract. Mansfield Plumbing thereafter claimed that it sustained a net unreimbursed excess loss of $781,675.74 and that it was entitled to reimbursement of said amount, together with interest, from Ohio Casualty.

On the other hand, Ohio Casualty asserted that each water leak incident resulting in **property damage** constituted a separate **occurrence** under the terms of the Chubb primary liability insurance contracts; that Mansfield Plumbing was responsible for an SIR of $500,000.00 for each of the multiple **occurrences**; and that, under the facts, insurance contract terms, and applicable law, Chubb's primary liability coverage was never properly triggered, let alone exhausted. Full and proper exhaustion of the self-insured retention(s) and the applicable coverage limit(s) of each Chubb primary liability insurance contract is a condition precedent to the triggering of coverage under each Ohio Casualty follow-form excess liability insurance contract. Chubb's claims decisions to ignore its own policy coverage exclusions, to treat the water leak incidents as a single **occurrence**, and to pay the per **occurrence** limit of liability coverage under each Chubb primary liability insurance contract, claiming full exhaustion of coverage, were not decisions that were binding upon Ohio Casualty. In other words, the rights and obligations of Ohio Casualty were determined by the underlying facts, by the terms of the insurance contracts at issue, and by applicable law, not by the claims decisions of the primary liability insurer.

By and through a Joint Stipulation filed in the declaratory judgment action on May 6, 2010, Ohio Casualty and Mansfield Plumbing stipulated that PolyOne Geon 210 resin

utilized in the manufacturing process caused hush tube failures in Mansfield Plumbing toilets, resulting in multiple water leak incidents and related underlying third-party **property damage** claims asserted against Mansfield Plumbing. (Joint Stipulation ¶ 1.) In the separate matter of *Mansfield Plumbing Products, LLC v. PolyOne Corporation*, Cuyahoga County Common Pleas Case No. CV-05-566847 ("the *PolyOne* case"), Mansfield Plumbing sought and obtained recovery against PolyOne, the manufacturer and supplier of the PolyOne Geon 210 resin. Ohio Casualty and Mansfield Plumbing further stipulated that, if the trial court found that there was one **occurrence** under the terms of each Chubb primary liability insurance contract, then Mansfield Plumbing sustained a net loss, in excess of its self-insured retentions and primary insurance, of $781,675.74, for which it would be entitled to recovery, together with interest on said amount, from Ohio Casualty, *subject to the trial court's ruling(s) on the legal issue(s) regarding exhaustion of the Underlying Limits of Insurance.* (Joint Stipulation ¶ 2.) Finally, Ohio Casualty and Mansfield Plumbing stipulated that, if the trial court found that each third-party property damage claim constituted a separate **occurrence**, then Mansfield Plumbing sustained no net loss covered by the Ohio Casualty insurance contracts in excess of Mansfield Plumbing's self-insured retentions and primary liability insurance coverage. *Id.* The parties retained the right to appeal decision(s) of the trial court. *Id.*

The Chubb primary liability insurance contracts contain coverage exclusions for any Loss in Progress, stating: "This insurance does not apply to **bodily injury** or **property damage** that is a change, continuation or resumption of any **bodily injury** or **property damage** known by you, prior to the beginning of the policy period, to have occurred." (Exhibits 2 and 3 to Ohio Casualty's Complaint for Declaratory Judgment.) Mansfield

Plumbing specifically alleged in the *PolyOne* case that: "In and after August 2002, Mansfield received notice from residential, commercial and institutional purchasers of Mansfield toilets of cracking in the hush tube component manufactured with the Geon 210 purchased from PolyOne." (*PolyOne* case Complaint ¶ 6, Exhibit 1 to Ohio Casualty's Complaint for Declaratory Judgment.) As previously set forth, cracking in the hush tube components caused the incidents of water leakage that resulted in the third-party **property damage** claims against Mansfield Plumbing. (Joint Stipulation ¶ 1.) Thus, Mansfield Plumbing specifically asserted in a court filing that it received notice in and after August 2002 from residential, commercial, and institutional purchasers of Mansfield Plumbing toilets of the **occurrence** of continuing **property damage**.

In deciding supplemented cross-motions for summary judgment, the trial court specifically declined to rule on the number of **occurrences** issue. The trial court stated: "the Court does not need to determine the meaning of occurrence in this case, because regardless of which party's definition is adopted by this Court, the plain language of the parties' contract excludes the disputed damages from coverage." (Decision of trial court p. 5.) Instead, the trial court assumed *arguendo* that there was a single **occurrence** and held that, even if one considered the third-party **property damage** claims to have arisen from and to constitute a single **occurrence** (which Ohio Casualty did not, but which Mansfield Plumbing did), then it must be concluded that Mansfield Plumbing had actual knowledge of existent and continuing **property damage** in August 2002, well-before the inception of the 2003-2005 Chubb primary liability and Ohio Casualty follow-form excess liability insurance contracts. Such actual knowledge of existent and continuing **property damage** negated any triggered coverage under the Chubb and Ohio Casualty insurance contracts. In granting

summary judgment in favor of Ohio Casualty, the trial court reasoned that: "Either this case involves one occurrence, spanning from 2002 to 2005, or several occurrences, within that same time period. Regardless of which definition of occurrence is adopted by this Court, Defendant's claims for damages are excluded by the terms of the [Loss in Progress coverage exclusions]." (Decision of trial court p. 7.)

Mansfield Plumbing appealed to the Fifth Appellate District Court of Appeals, arguing that the trial court improperly construed and applied the Loss in Progress coverage exclusions of the Chubb primary liability insurance contracts. Mansfield Plumbing did not assign error to the trial court's declination to rule on the number of **occurrences** issue, and the Court of Appeals, therefore, did not address that issue. In affirming the trial court's decision granting summary judgment to Ohio Casualty, the Court of Appeals applied the plain and unambiguous terms of the Loss in Progress coverage exclusions, stating: "[A]ppellant knew prior to purchasing the policies that the hush tubes were failing and causing damage to third parties. We agree with the court the failing of the hush tubes is a continuation of property damage and is excluded by the loss in progress provision." *The Ohio Casualty Ins. Co. v. Mansfield Plumbing Products, LLC*, 2011-Ohio-4523, at ¶ 20.

Mansfield Plumbing asserts that this case is of public or great general interest, and Mansfield Plumbing asks The Supreme Court of Ohio to hear this appeal, on the grounds that: "The Fifth District's decision broadens the scope of the loss-in-progress exclusion such that it has nullified insurance coverage for potentially thousands of insureds and raised the potential that many injured parties will not be compensated." (Mansfield Plumbing's Proposition of Law No. 1, Memorandum in Support of Jurisdiction, p. 5.) In particular, Mansfield Plumbing asserts that the Fifth District "[confused] the notion that the occurrence

was known prior to the policy period with the notion that the actual damages were known prior to the policy period." (Memorandum in Support of Jurisdiction p. 8.) Mansfield Plumbing does not explain how the Court of Appeals' decision broadens the scope of the Loss in Progress coverage exclusions or how the fact-specific holding in this case supposedly applies to other insureds. Mansfield Plumbing does state that this case "has great import for any entity seeking coverage for environmental damage and toxic torts." *Id.*, at p. 1. However, Mansfield Plumbing does not explain how or why enforcement of a commercial general liability coverage exclusion for a pre-existing, known, and continuing loss would defeat "coverage for environmental damage and toxic torts."

Mansfield Plumbing asserts that the lower courts misconstrued the Loss in Progress exclusions because said provisions apply only to **property damage** of which the insured was aware before policy inception. Mansfield Plumbing argues that, while it was aware of the **occurrence** in 2002, before the 2003-2005 Chubb and Ohio Casualty policies incepted, it was not aware in 2002 of the **property damage** that eventually happened in the 2003-2005 time frame and that excess coverage should therefore apply. (Memorandum in Support of Jurisdiction pp. 6-7.) Mansfield Plumbing's argument is without merit. The Chubb and Ohio Casualty policies provide coverage only for **property damage** that happens during the period(s) of coverage. It is impossible for an insured to have actual knowledge of specific **property damage** before it happens. That is why the Loss in Progress coverage exclusions apply to **property damage** happening during the coverage period(s) that is a continuation of **property damage** which happened, and of which the insured was aware, *before policy inception.* The facts of this case fit squarely within the terms of the clear and unambiguous Loss in Progress coverage exclusions, which the trial and appellate courts properly construed and applied.

This case is simple, and it is limited to its facts. In short, Mansfield Plumbing knew about continuing **property damage** that existed before inception of the policies at issue. Coverage, therefore, was properly excluded. This case is not complicated, it is not broad in scope, and it is not of public or great general interest. Therefore, The Supreme Court of Ohio should decline to hear this appeal.

APPELLEE'S POSITION REGARDING APPELLANT'S PROPOSITION OF LAW

> This case is not of public or great general interest. Rather, this case is limited in scope to a factual situation where Loss in Progress provisions excluded excess liability insurance coverage for losses attributable to **property damage** that happened during the policy coverage periods but that was a later continuation of **property damage** which happened, and of which the insured admittedly was aware, before policy inception.

Even if there was only one **occurrence** giving rise to liability on the part of Mansfield Plumbing (which Mansfield Plumbing asserts, but which Ohio Casualty specifically denies), then there was one, continuous loss in progress, of which Mansfield Plumbing was aware, beginning in August 2002 and continuing through the Chubb and Ohio Casualty 2003-2005 policy years. In that event, all primary and excess liability coverage is properly excluded by the Loss in Progress coverage exclusions of the Chubb primary liability insurance contracts.

Mansfield Plumbing argues that the lower courts improperly construed and applied the Loss in Progress coverage exclusions. Mansfield Plumbing asserts that the lower courts misconstrued the Loss in Progress exclusions because said provisions apply only to **property damage** of which the insured was aware before policy inception. Mansfield Plumbing argues that, while it was aware of the **occurrence** in 2002, before the 2003-2005 Chubb and Ohio Casualty policies incepted, it was not aware in 2002 of the **property damage** that eventually happened in the 2003-2005 time frame and that excess coverage should therefore apply. (Memorandum in Support of Jurisdiction pp. 6-7.) Mansfield Plumbing's arguments strain logic

and defy the very purpose of liability coverage, namely, to indemnify the insured against casualties unknown to the insured at the time of contracting. The *Generali U.S. Branch* case, cited and quoted by Mansfield Plumbing at pages 8-9 of its Memorandum in Support of Jurisdiction, actually supports Ohio Casualty's position in stating: "The loss in progress doctrine applies 'where the insured has subjective knowledge of the damages that could underlie a legal claim against it.'" *Generali U.S. Branch v. National Trust Ins.*, 2009 WL 2762273, at *6, quoting *American & Foreign Ins. Co. v. Sequatchie Concrete Services, Inc.*, 441 F.3d 341, 346 (6th Cir. 2006.) Mansfield Plumbing admittedly possessed knowledge of the hush tube failures beginning in August 2002, well before the 2003-2005 Chubb/Ohio Casualty policy years.

Mansfield Plumbing states that "thousands of water damage claims *** manifested themselves over multiple years." (Memorandum in Support of Jurisdiction p. 1.) In making that statement, Mansfield Plumbing tacitly concedes that the **property damage** caused by hush tube failures, which it became aware of in August 2002, was continuing in nature. Accordingly, if there was only one **occurrence** giving rise to liability on the part of Mansfield Plumbing (which Mansfield Plumbing asserts, but which Ohio Casualty specifically denies), then there was one, continuous loss in progress, of which Mansfield Plumbing was aware, beginning in August 2002 and continuing through the Chubb and Ohio Casualty 2003-2005 policy years. In that event, all primary and excess liability coverage is excluded by the Loss in Progress coverage exclusions of the Chubb primary liability insurance contracts.

Mansfield Plumbing argues that the lower courts erred in construing the Loss in Progress coverage exclusions by confusing or failing to distinguish between the terms **occurrence** and **property damage**. (Memorandum in Support of Jurisdiction p. 6.)

Mansfield Plumbing states that: "The accident or harmful condition in this instance was the defective resin." *Id.* Mansfield Plumbing asserts that, while it was aware of the **occurrence** (i.e., the defective resin) in August 2002, it was not aware of the **property damage** that happened during 2003-2005 until 2003-2005. *Id.*, at p. 7. Mansfield Plumbing asserts that, for these reasons, it is entitled to excess liability insurance coverage from Ohio Casualty. Mansfield Plumbing's arguments are without merit.

The Chubb primary liability insurance contracts define an **occurrence** as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." This is a standard definition of an **occurrence** regularly utilized in countless liability insurance contracts issued throughout the United States. Mansfield Plumbing does not cite a single case, from any jurisdiction, holding Chubb's standard definition of an **occurrence** to be ambiguous. Further, Mansfield Plumbing does not allege that there is ambiguity in the Chubb primary liability insurance contracts' definition of **property damage**. To the contrary, Mansfield Plumbing specifically admits that the Chubb primary liability insurance contracts are "clear and unambiguous". (Memorandum in Support of Jurisdiction p. 5.)

Mansfield Plumbing asserts that it was aware of the **occurrence**, but not **property damage**, in August 2002. Mansfield Plumbing defines the **occurrence** as the defective resin. However, there can be no **occurrence** without an accident, and there can be no accident in the absence of some type of **bodily injury** or **property damage**. Therefore, as a matter of fact, as a matter of admission, and as a matter of law, Mansfield Plumbing was aware of **property damage** caused by hush tube failures in August 2002, well-before inception of the 2003-2005 Chubb and Ohio Casualty insurance contracts.

If Mansfield Plumbing's interpretation is correct, i.e., that the **occurrence** was the defective resin (which Ohio Casualty submits is incorrect), then the items of property damaged by the defective resin were Mansfield Plumbing's hush tubes themselves. There is no liability coverage for damage to the insured's own products. Rather, liability coverage exists for damage caused by the insured's product(s) to collateral property (i.e., property owned by a third party). The inescapable conclusion that the **occurrence** must have been the leaking of water, causing collateral property damage, and that the **occurrence** was not defective resin or even the manufacture of a defective hush tube, is demonstrated by the fact that, if a third party bought a Mansfield Plumbing toilet with a defective hush tube, but that third party never installed the toilet, or that third party removed the toilet before the hush tube failed, causing a water leak, then there never would be an accident resulting in **property damage** to that third party for which liability coverage would be available to Mansfield Plumbing.

Mansfield Plumbing further argues that: "Although the occurrence that caused the damage took place in 2002, the damage itself did not immediately manifest for each third-party." (Memorandum in Support of Jurisdiction p. 10.) This argument strains logic. The **property damage** for which any liability coverage would apply happened when each individual hush tube failed/ruptured, causing water leakage and various types and degrees of damages to various items of collateral property owned by third parties in various locations. The water presumably leaked from each hush tube in question at the moment of hush tube failure/rupture, not weeks, months or years after each failure.

Finally, Mansfield Plumbing argues that it did not know about the timing or magnitude of future **property damage** claims and that the Loss in Progress coverage

exclusions, therefore, are inapplicable. (Memorandum in Support of Jurisdiction p. 7.) However, those concerns are irrelevant to applicability of the Loss in Progress coverage exclusions. Rather, it is sufficient that, starting in August 2002, Mansfield Plumbing knew about the commencement, and continuation thereafter, of collateral **property damage** at multiple locations caused by hush tube failures.

An insurance policy is a contract, and a court's construction of a contract is a matter of law. When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. Courts examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. Courts look at the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. When the language of a written contract is clear, a court determines the intent of the parties from the writing itself and does not construe or interpret the contract. A contract is unambiguous if it can be given a definite legal meaning. A court may only construe an insurance contract when it is ambiguous, i.e., where its terms are reasonably susceptible of more than one interpretation. A court has the duty to enforce an insurance contract as made by the parties, and not to rewrite contract terms which are unambiguous under the guise of judicial construction. *Currier v. Penn-Ohio Logistics*, 186 Ohio App.3d 249, 254-55, 2010 Ohio 195, paragraphs 14 and 15. There is no ambiguity in the Loss in Progress coverage exclusions, and they must be enforced as written.

Ohio Casualty reiterates that full and proper exhaustion of the SIR(s) and the applicable coverage limit(s) of each Chubb primary liability insurance contract is a condition precedent to the triggering of coverage under each Ohio Casualty follow-form excess liability

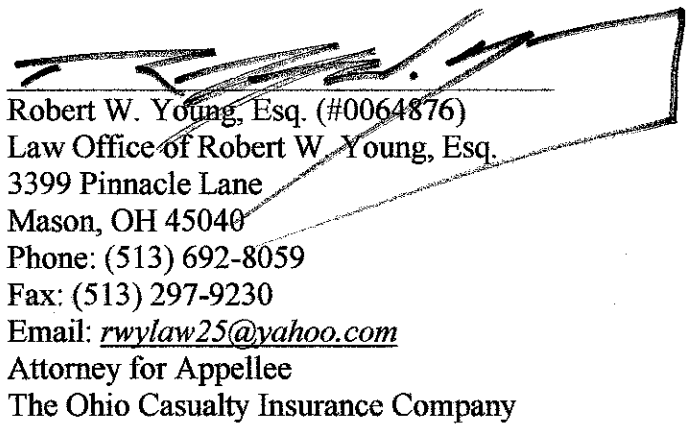
insurance contract. Chubb's claims decisions to ignore the Loss in Progress coverage exclusions, to treat the water leak incidents as a single **occurrence**, and to pay the per **occurrence** limit of liability coverage under each Chubb primary liability insurance contract, claiming full exhaustion of coverage, were not decisions that were binding upon Ohio Casualty. In other words, the rights and obligations of Ohio Casualty are determined by the underlying facts, by the terms of the insurance contracts at issue, and by applicable law, not by the claims decisions of the primary liability insurer. *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's London*, 449 Mass. 621, 871 N.E.2d 418 (Mass. 2007) (follow-form language only binds an excess insurer to the language used in the primary policy, not to the claims decisions of the primary insurer). It should be noted that the lower courts' decisions, by necessary implication, support this position, because the lower courts found Chubb's Loss in Progress coverage exclusions to be applicable, and to preclude any coverage obligation by Ohio Casualty, even though Chubb did not decide to deny coverage based upon application of its Loss in Progress coverage exclusions.

CONCLUSION

This case is not of public or great general interest. Rather, this case is limited in scope to a factual situation where Loss in Progress provisions excluded excess liability insurance coverage for losses attributable to **property damage** that happened during the policy coverage periods but that was a later continuation of **property damage** which happened, and of which the insured admittedly was aware, before policy inception.

FOR THE FOREGOING REASONS, Appellee Ohio Casualty respectfully submits that this case is not of public or great general interest and, therefore, The Supreme Court of Ohio should decline jurisdiction in this case.

Respectfully submitted,

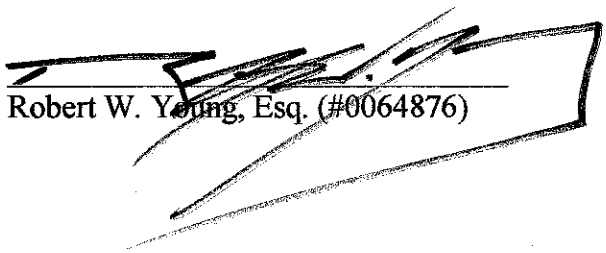


Robert W. Young, Esq. (#0064876)
Law Office of Robert W. Young, Esq.
3399 Pinnacle Lane
Mason, OH 45040
Phone: (513) 692-8059
Fax: (513) 297-9230
Email: *rwylaw25@yahoo.com*
Attorney for Appellee
The Ohio Casualty Insurance Company

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing Appellee's Jurisdictional Memorandum in Response was sent via U.S. Mail, on this 19th day of November, 2011, to the following:

Reginald S. Kramer, Esq.
Oldham Kramer
195 S. Main Street
Akron, Ohio 44308-1314
Attorney for Appellant
Mansfield Plumbing Products, LLC



Robert W. Young, Esq. (#0064876)