IN THE SUPREME COURT OF OHIO

LIGHTNING ROD MUTUAL INSURANCE COMPANY,	:	Case No. 2016-1116
Plaintiff-Appellee,	:	
v.	:	On Appeal from the Fourth Appellate District, Scioto County, Ohio
ROBERT SOUTHWORTH, *et al.*,	:	(C.A. Case No. 15CV003704)
Defendants,	:	
and	:	
CMH HOMES INC., dba LUV HOMES,	:	
Defendant-Appellant.	:	

MERIT BRIEF OF AMICUS CURIAE OHIO INSURANCE INSTITUTE IN SUPPORT OF APPELLEE LIGHTNING ROD MUTUAL INSURANCE COMPANY

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INTRODUCTION

This is just a simple insurance coverage case based on undisputed facts. But, Appellant CMH Homes Inc. ("CMH") attempts to use this case to create a new theory of recovery to salvage its deficient claim. Because of this attempt, the issues raised by this appeal are extremely important to amicus curiae Ohio Insurance Institute ("OII").

In this case, the Defendant's defective construction caused all the damage 11 months before Defendant purchased Appellee's insurance policy

It is undisputed in this case that owners of the subject property, the Beatties, purchased their double-wide mobile home from CMH and that Defendant Robert Southworth ("Southworth") attempted to assemble the two halves of the home and install it on specially-designed footers. It is also undisputed that Southworth failed to follow the installation manual for the property in two major respects—**he failed to install the required number of lag bolts** that would hold the two halves of the trailer together at the seam (otherwise known as the "marriage line"), and **he failed properly to place concrete footers** that would support the property and keep it level. (Merit Brief of Appellant at 3-6). Almost from the day Southworth completed his work—**11 months before** Appellee Lightning Rod Mutual Insurance Co.'s ("Lightning Rod") **policy came into effect** in November 2008, the mobile home cracked at the seams, rained plaster, and otherwise **fell apart around the Beatties**. (*Id.*).

CMH made several attempts to repair the Beatties' home, but the same issues kept reoccurring due to original defective construction. (*Id.*) The Beatties ultimately sued CMH and others and were compensated at the trial court level for Southworth's failure to deliver to them a livable home. But, CMH is now pursuing over **$1 million against Lightning Rod** on the policy coverage issue, **most of which is comprised of attorneys' fees**.

CMH seeks to rewrite the law to secure retroactive insurance coverage for its losses

CMH challenges the trial court's and the Court of Appeals' findings that a "continuous trigger" theory does not apply to this case. CMH argues that this basic contract interpretation case is the springboard that must be used to rewrite Ohio law and equate **ordinary property damage** from Southworth's defective construction **with latent progressive damage characteristic of asbestos and hazardous waste contamination cases**.

None of the facts here arise to the "continuous trigger" theory

Even if the false equivalency CMH champions were appropriate in a construction defect case, this case is limited to its unique set of facts—a singular injury that occurred, was discovered, and was unsuccessfully repaired before Lightning Rod issued its policy—facts that appear in none of the "continuous trigger" cases CMH asks this Court to rely upon here. Critically, no conflict exists among Ohio courts on the question of when a "continuous trigger" may apply to an insurance contract—it may only apply in circumstances where a damage is progressive as a result of a continuous harmful process—**a circumstance CMH has not established in this case.**

Regardless of any trigger theory, faulty construction is not an occurrence policy matter; it is a performance bond or contractor errors and omissions policy matter

Ultimately, even if conceptually continuous trigger theory were applicable to a construction defect case, the basic tenet of Ohio law is that no insurance policy covers construction defects. **Performance bonds or contractor errors and omissions policies, not occurrence-based commercial liability policies, cover risks directly associated with faulty construction**.

STATEMENT OF INTEREST OF AMICUS CURIAE

OII is uniquely qualified to provide this Court with a broad perspective on the principles of insurance law relevant to this appeal, as well as practical insight into the negative consequences for insurers and insureds alike if the ruling below is not upheld. OII is the professional trade association for property and casualty insurance companies in the State of Ohio, and its members include thirty-three domestic property and casualty insurers, fourteen foreign property and casualty insurers and reinsurers, eight insurance trade associations and three insurance-related organizations. Based on 2015 market share data from the Ohio Department of Insurance, OII's member companies represent over 87% of Ohio's private passenger auto insurance market, nearly 83% of the homeowners market and over 44% of the commercial market.

OII provides a wide range of services to its members and to the public, media, and government officials in three primary areas: education and research, legislative and regulatory affairs, and public information. In connection with these activities, OII closely monitors judicial decisions in Ohio that address important issues of insurance law, and it has participated as an amicus in several landmark insurance cases decided by this Court.

Adoption of the "continuous trigger" theory would alter the cost-risk basis of construction insurance coverage

OII has chosen to participate in this appeal because the importance of legal issues it raises extends far beyond the immediate parties. OII is particularly concerned with CMH's argument in favor of the "continuous trigger" application both in this unique situation, where the policy in question was purchased **after** the damage in question has occurred, and to construction defect cases in general, because it fails to recognize the effect a blanket application of "continuous trigger" in construction defect cases **would have on availability and affordability of general liability policies**.

Liability insurance is not intended to cover damages for which no premium has been paid

Insurance makes modern life possible by spreading risks of losses that an individual or business could not bear alone. If a court expands the coverage of an insurance policy by interpreting its provisions to cover risks that the parties did not intend to cover—such as, in this case, the risk that an insurer will be called upon to cover ordinary construction defects or that an insurer may be liable for damage that predates its coverage—**the premium that the insured paid for the insurance would no longer correspond to the risks of loss** that the insurer is required to indemnify. In other words, the insurer would be required to pay losses for which the insured paid no premium. This would ultimately require an adjustment in the rates that other policyholders would have to pay for the judicially-expanded coverage, even though the policyholders would not want or need that coverage. The resulting uncertainty, inefficiency, and unnecessary costs can be prevented if courts enforce the clear language of insurance policy provisions.

In this case, CMH's premise that a simple construction defect that went unrepaired and repeatedly manifested itself for years—all that is at issue in this case—is an "occurrence" triggering liability coverage with every manifestation of the defect is contrary to this Court's finding that **general liability policies do not insure defective workmanship and its foreseeable results**. *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269, ¶10, 18. To agree with CMH's premise would be tantamount to imposing on insurers an obligation never contemplated in their bargains with the insureds and thus never priced into policy premiums.

Similarly, even if construction defects were a covered risk under a standard general liability policy, **here the gravamen is damage** to the subject property **that occurred and clearly manifested itself before the policy was purchased**—i.e., the risk that was not

considered and not priced by Lightning Rod into the policy. Consequently, the conclusion that CMH urges—that because the effects of that damage continued to plague the Beatties' property into Lightning Rod's policy period, it is liable for that preexisting damage—would also lead to **placing unanticipated and unpriced risks on insurers** issuing occurrence-based policies.

Liability insurance is not intended to cover risks retroactively

Insurers price their occurrence-based liability policies anticipating that they would be liable only for the risks that are attendant to each particular business seeking coverage as insurers find such businesses at the time of policy sale. Insurers are well-equipped to cast their minds forward and, based on their industry experience, **anticipate what risks a particular business may pose into the future**. Contrary to CMH's view that occurrence-based policies must cover preexisting manifest damages, the clear consensus among all court that have considered this issue is that such policies in fact allow for coverage of damages that actually occur during the policy period but may not be discovered until, or linger into, the period following policy expiration.

Consequently, absent clear evidence of property damage that can be fairly analogized to a progressive bodily illness or a toxic waste contamination—latent conditions characterized by unique difficulty of identifying a precise moment of transition from wellness to injury —the weight of authority in Ohio and across all other jurisdictions is on the side of applying manifestation or injury-in-fact triggers of coverage in construction defect cases, not a continuous trigger CMH advocates. **CMH argues for a novel and unjustifiable rule** that would greatly increase underwriting costs of pricing risks associated with past activities that an insurer would be unable to observe, measure, and evaluate in its underwriting process.

Unanticipated and far-reaching obligations CMH urges to be imposed on insurers will greatly undermine the liability insurance marketplace

The likely results of the radical remaking of the insurance market CMH urges will include a spike in litigation, unaffordable premiums, or even some liability insurers leaving the construction insurance market altogether, leading to even higher premiums. If subsequent insurers are suddenly held liable for all results of construction defects that manifest themselves in preceding policy periods, they will become unwilling to issue coverage.[1] Conversely, relying on the new rule, construction companies and **contractors will suddenly become free to avoid buying liability coverage until after their shoddy work causes damages**. With fewer businesses covered on continuing basis, innocent third parties will be more likely to bear the attendant costs.

The issues raised by this appeal are thus extremely important to OII. An occurrence-based insurance policy issued in Ohio does not allow coverage for damages that occurred and manifested themselves before the coverage went into effect. All relevant Ohio authorities support the ruling below, and foreign decisions on which CMH relies to argue for a radical change in Ohio insurance law do not support this change. Moreover, even if the Court were to reverse on trigger grounds, Ohio law separately precludes insurance coverage for defective construction, and the ultimate result of this case would not change on remand.

OII therefore supports the Appellee in this appeal and ask the Court to affirm the ruling below.

[1] *See New Orleans Assets L.L.C. v. Travelers Prop. Cas. Co.*, E.D.La. Nos. 01-2171, 02-974, 2002 U.S. Dist. LEXIS 25878, at *10 (Sep. 12, 2002), fn. 2 (actual injury and manifestation triggers "protect an insured's access to insurance. Even if damage manifests in a building, subsequent insurers would be willing to issue policies because they could rely on the loss-in-progress rule to preclude coverage for progressive property damage.")

STATEMENT OF FACTS

The few undisputed facts that are relevant to this appeal are not complicated.

Southworth failed to connect and install correctly the two halves of the Beatties' mobile home

The Beatties purchased their double-wide mobile home from CMH in November 2007. (Merits Brief of the Appellee at Section III.A(1)). CMH contracted with MJW Towing, who subcontracted Southworth to assemble and install the Beatties' home. (*Id.*). CMH never had a contract directly with Southworth that would entitle it to indemnification. (*Id.*).

As soon as the Beatties moved into the home, and at the latest as of January 2008, they noticed ceiling cracking along the "marriage line" of the home, drywall cracking, damage to flooring, wall panels, trim, and doors (including doors sticking due to framing going out of plumb), and squeaky floors. (Merits Brief of the Appellant at 4). CMH made several attempts to repair these issues before November 2008, but the same problems kept re-appearing. (*Id.*).

Southworth purchased the Lightning Rod policy 11 months later, while the damage was on-going

In November of 2008 Southworth purchased an occurrence-based general liability policy from Lightning Rod. "After the inception of the Lightning Rod policy in November 2008, **damage continued to occur and recur** at the Beattie home," including cracking of the floors, trim, and drywall throughout the house, and doors going "out of square." (*Id.* at 4-5, emphasis added). Despite various repair attempts, drywall cracking, bowing of walls, floors, and ceilings, and various surfaces going out of plumb continued even after Lightning Rod's policy expired in November 2012. (*Id.* at 6).

The Beatties filed a lawsuit against CMH and others in 2010 and ultimately secured a judgment for $25,000, plus attorneys' fees and interest, with Lightning Rod providing a defense while Southworth was a party to the case and until the trial court found that Lightning Rod had

no indemnification obligations. (*Id.* at 7 and Merits Brief of the Appellee at Section II). Once Lightning Rod won on its declaratory judgment action, Southworth's insurer whose policy covered the time period preceding Lightning Rod's coverage assumed the defense. (Merits Brief of the Appellee at Section II). CMH took its indemnification claim against Southworth to arbitration and secured a judgment of over $1 million, mainly consisting of its attorneys' fees, and participated in the underlying declaratory judgment action initiated by Lightning Rod, arguing that Lightning Rod owes it indemnification for the arbitration award. (Merits Brief of the Appellant at 7-8)

Both the trial court, and the Fourth District Court of Appeals on a *de novo* review, found that because Southworth botched the assembly and installation of the Beatties' home and **the results of that defective work manifested themselves before Southworth purchased the Lightning Rod policy, Lightning Rod's policy was not triggered**. (*Id*. at 11). As the Court of Appeals found, under Ohio law, the fact that the same damaging results of Southworth's construction defect, first manifested before Lightning Rod's policy took effect and then persisted into Lightning Rod's policy period, precluded the Lightning Rod's policy from being triggered. (*Id*. at 11, citing to the June 16, 2016 Decision and Judgment Entry).

Amicus curiae OII submits this brief in support of Appellee and asks the Court to affirm the Court of Appeal's ruling.

ARGUMENT

A. The defective work and the relevant resulting damage to the Beatties' property occurred before the Lightning Rod policy period. Thus, as the courts below properly determined, facts of this case dictate application of manifestation or injury-in-fact, not continuous trigger theory.

1. Coverage "triggers" are practical tools that help determine what coverage is available in a particular circumstance, based on the timing of the injury and its discovery or manifestation.

CMH would like the Court to assume that a continuous coverage "trigger" categorically governs occurrence-based commercial general liabilities ("CGL") policies CGL policies and mandates coverage from the initial to last manifestation of a construction defect. It goes as far as erroneously to describe continuous coverage as "Ohio's allocation method" and "Ohio's law of continuous trigger." (Merit Brief of Appellant at 22 and 25). However, **various trigger concepts were created precisely because CGL policies "do not [generally] refer to a 'trigger**,'" and courts use those concepts to "describe the event or events that under the terms of the insurance policy determines whether a policy must respond to a claim **in a given set of circumstances**." *Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr*, 172 N.J. 409, 416, 799 A.2d 499 (2002) (citing to Robert D. Fram, "*End Game: Trigger of Coverage in the Third Decade of CGL Latent Injury Litigation*," in 10th Annual Insurance, Excess, and Reinsurance Coverage Disputes 9).

There is no "consistent pattern" among the courts of application of any type of trigger theory in any "specific type of case." *Dow Chem. Co. v. Associated Idemn. Corp.*, 724 F.Supp. 474, 479 (E.D. Mich. 1989); *Plum v. W. Am. Ins. Co.*, 1st. Dist. Hamilton No. C-050115, 2006-Ohio-452, at ¶19 (**what type of trigger will apply in a particular case "depends on the nature of the damage**") (emphasis added); *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 24-25 (Tex. 2008) ("courts have not uniformly resolved [the] issue" when

coverage is "triggered under occurrence-based" policies, and the varying approaches reflect "**different factual circumstances**" in each case). Instead, courts endeavor in each case concerning coverage under an occurrence-based CGL policy to identify the first "occurrence" of a "real or actual injury" contemplated by the policy by defining it "in temporal relation to initial exposure or ultimate manifestation." *Dow Chem. Co*. at 479; *Plum* at ¶19 (**timing of the first manifestation of property damage is the key to trigger determination**).

Thus, inquiry into whether a particular policy has been triggered is always fact-specific and is not susceptible to categorical pronouncements.

2. Continuous trigger theory was created to aid in coverage determination where initial damage that triggers liability is difficult to detect or cannot be linked to a single event, but instead develops and intensifies over an extended period of time, as in asbestos or environmental contamination-related injuries.

Whether under Ohio law, or law of any other jurisdiction, such injuries are not equivalent to property damage from defective construction that manifests itself immediately

a. Interpretation of "occurrence" and application of continues damages trigger in asbestos and environmental damages cases is unique and motivated by public policy concerns not applicable to construction defect-related property damage cases

Occurrence-based CGL policies, including the Lightning Rod policy at issue, provide coverage for "bodily injury" or "property damage" that "occurs" during the policy period and define an "occurrence" as "an accident, including continuous or repeated exposure to the same general harmful condition." (Merit Brief of Appellant at 14-15). When courts around the country first became inundated with asbestos and environmental contamination cases in the 1980s, they struggled to fit the progressive nature of such unique harms into the "accident" framework.

Trigger theories were developed to deal with the unique challenge of asbestos cases

As the Sixth Circuit Court of Appeals explained in one of the first cases to apply the continuous trigger (or "multiple trigger") theory—an asbestosis case—terms "'bodily injury' and 'occurrence' are **inherently ambiguous as applied to the progressive disease context** . . . [because ordinarily in asbestosis cases] there is considerable dispute as to when an injury from asbestosis should be deemed to occur." *Ins. Co. of N. Am. v. Forty-Eight Insulations,* 633 F.2d 1212, 1222 (6th Cir. 1980). With the understanding that asbestosis is "**a series of continuing injuries** to the body which accumulate to cause death or disability," *Forty-Eight Insulations* at 1217, other courts followed suit in: (1) defining "bodily injury" in asbestos cases "to mean any part of the injurious process that begins with an initial exposure and ends with manifestation of disease" and (2) finding any insurer on the risk during any part such process to be liable for the overall damage. *E.g. Keene Corp. v. Ins. Co. of N. Am.*, 215 U.S.App.D.C. 156, 667 F.2d 1034, 1047 (1981).

The continuous trigger theory was applied in environmental cases for the same reasons

When **the same reasoning began to be applied to environmental contamination cases**, it was with recognition that adoption of the continuous trigger theory was:

> compelled by important public policy considerations, including the need to adapt tort law to the peculiarities of mass-exposure tort cases, . . . and the public interest in enhancing available insurance coverage for environmental damages [which] would enable courts to better channel the available resources into remediation of environmental harms.

Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr, 172 N.J. 409, 411, 799 A.2d 499 (2002). Notably, to adopt the categorical application of the continuous trigger theory in asbestos and environmental contamination cases, courts **"have had to abandon a precise determination of when injury in fact did occur** because of the evidentiary problems posed." *Detrex Chem.*

Indus., Inc. v. Emps. Ins. of Wausau, 746 F.Supp. 1310, 1322-1323 (N.D. Ohio 1990) (emphasis added). But, there is

> **no persuasive authority to support the application of the multiple-trigger [continuous] theory in single-exposure property damages cases**. That theory seems confined to asbestos and hazardous waste cases, which . . . are so unique and affected by public policy that they offer no persuasive authority for *any* of the possible trigger theories.

Dow Chem. Co. v. Associated Indem. Corp., 724 F.Supp. 474, 483 (E.D.Mich.1989) (emphasis added). *See also Gencorp, Inc. v. AIU Ins. Co.*, 104 F. Supp. 2d 740, 748-749 (N.D. Ohio 2000) ("the law developed in the context of insidious diseases should be transported to the property damage context **only when the facts support the analogy—when the new injury is in fact continuously occurring.**") (citation omitted, emphasis added).

CMH correctly notes that Ohio courts have, in fact, followed federal courts in adopting the continuous trigger theory in their own consideration of asbestosis and long-term environmental damage cases (Merit Brief of Appellant at 22-24 and cases cited therein). However, **it has identified no reason for a categorical extension of this theory to an ordinary singe-cause property damage case** such as this one, where the property damage from Southworth's defective work occurred and manifested long before Lightning Rod policy came into effect.

b. Absent a showing of truly continuing latent damage comparable to an asbestos-like injury—as distinct from the immediately-manifested reoccurring property damage at issue here—a continuous trigger will not apply

Contrary to CMH's insistence that the "continuous trigger is . . . the most consistent with the plain language of the [standard CGL policy], as well the intent behind that plan language," 9 Merit Brief of Appellant at 31), both in environmental pollution and in property damage cases,

various courts have disagreed with such a sweeping generalization. *See e.g. Cleveland Bd. of Educ. v. R.J. Stickle Int'l,* 76 Ohio App. 3d 432, 436-437, 602 N.E.2d 353 (8th Dist. 1991) (rejecting a continuous trigger theory where a **roof leak resulting from faulty construction** manifested and went unabated since the completion of construction). The *Montrose Chemical* discussion of the drafting history of CGL occurrence-based policy language CMH cites in support of its theory simply describes California Supreme Court's opinion that the drafters understood that: (1) in certain situations, damage resulting from an "occurrence" may not be discovered until long after the occurrence and (2) such damage, to the extent it amounts to a progressive injury, would be covered by the insurer(s) on the risk at the time of the occurrence even after policy expiration. *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645, 688, 42 Cal.Rptr.2d 324, 913 P.2d 878 (1995).

No similar reason exists for expanding the continuing trigger theory to a single-cause construction defect case

Conversely, however, where no evidence is presented of a new and worsening property damage akin to a progressive bodily injury developing over several policy periods—as would be true in a case where each additional molecule of chemical invisibly leaching into the ground causes new or additional soil and/or ground water contamination—**the prevailing rule in property damage cases is to apply an injury-in-fact or a manifestation trigger**. *E.g. Hastings Mut. Ins. Co. v. Vill. Cmtys. Real Estate, Inc.*, 10th Dist. Franklin No. 14AP-35, 2014-Ohio-2916, ¶ 21 ("**continuation or resumption of [the] same damage**"—a leaky basement that manifested long before the policy period—does bring the claims within subsequent policy coverage) (emphasis added); *Detrex Chem. Indus.*, 746 F.Supp. at 1322 (finding that injury-in-fact trigger is most consistent with the CGL policy "occurrence" and "property damage" definitions, even in environmental contamination case); *Gencorp., Inc.* (same); *Don's Bldg.*

Supply, Inc. v. OneBeacon Ins. Co., 267 S.W.3d 20, 29-30 (Tex. 2008) (**injury-in-fact approach is more technically on par "with the spirit of the parties' actual intentions, and with the insured's expectations, based on frequently encountered policy language tying bodily 'injury' or property 'damage' to the concept of 'occurrence.**'") (emphasis added); *Inland Waters Pollution Control v. Ins. Co*., 997 F.2d 172, 186 (6th Cir.1993) (**where "the date upon which damage first occurred is ascertainable**"—the injury-in-fact date—**continuous trigger theory is inapplicable**) (emphasis added); *Penn National Co. v. St. John*, 106 A.3d 1, 15-18, 21 (Pa. 2014) (manifestation of the property injury caused by the plumbing installation defect, not the delayed discovery of the underlying cause of the injury); *New Orleans Assets L.L.C. v. Travelers Prop. Cas. Co*., E.D.La. Nos. 01-2171, 02-974, 2002 U.S. Dist. LEXIS 25878, *8-9 (Sep. 12, 2002) (applying the manifestation theory in the construction defect case concerning mold damage).

3. As the Court of Appeals correctly found, CMH identified not a single authority—from any jurisdiction in or outside of Ohio—where a retroactive obligation to cover property damage was imposed on an insurer that issued a CGL policy after the property damage both occurred and manifested itself.

The defining issue of every case where a continuous policy trigger has ever been applied—an injury that progresses undiscovered for some time after the initial occurrence[2]—is not present here. **Under an occurrence policy**, "both insured and insurer anticipate that the claim would probably not be made until after the policy period and possibly when another policy is in effect," and **coverage** under such policy **applies "no matter when the claim is made [provided, however that] the act complained of occurred during the policy period**." *Gelman*

[2] *See* CMH's citations at page 25 of its merits brief to *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co*., 74 Ohio Misc.2d 183, 191, 660 N.E.2d 770 (C.P.1995) (delayed injury manifestation in an asbestos injury case); *Hartford Ins. Grp. v. Commercial Union Assurance Cos*., 6th Dist. Erie C.A. No. E-79-6, 1979 Ohio App. LEXIS 9786, at *1 (June 15, 1979) (damage to a property from continuing underground water trespass over a 19-year period).

Scis. v. Fid. & Cas. Co., 456 Mich. 305, 322-323, 572 N.W.2d 617 (1998) (emphasis added), *overruled on other grounds in* 469 Mich. 41. Here, the first injury to the Beatties' property—their mobile home pulling apart at the seams and shifting off its foundation due to Southworth's defective work—**occurred and manifested itself when ceilings and walls cracked, floors bowed, doors went out of square, etc., 11 months before Lightning Rod issued its policy**.

a. Ohio law is clear that occurrence of property damage—evident in identifiable injury to the property—triggers CGL coverage to the exclusion of policies obtained after the damage has become evident

Where, as here, property damage has occurred and manifested before the subject policy came into effect, i.e. **where the injury-in-fact took place before the effective date of the policy, the policy provides no coverage**. Ohio cases on which CMH relies to argue that continuous coverage trigger must apply to all property damage cases are either no longer good authority—like *Hanna*—or are inapposite and in fact support the conclusion that injury-in-fact or manifestation trigger are the rules of the road in property damage insurance coverage determinations cases.

i. Relevant Ohio cases are consistent with the decision below

Ohio courts are clear that in situations where property damage (defined as "physical injury to tangible property, including all resulting loss of use of that property") occurs[3] before a particular policy comes into existence, that policy does not provide coverage for the damage. In *R.J. Stickle Int'l*, the Eighth District Court of Appeals rejected a continuous trigger theory where **a roof leak resulting from faulty construction** manifested and continued unabated since shortly after the completion of construction. 76 Ohio App. 3d at 436-437. The court held that the:

[3] The CGL policy at issue does not define the term "occur," but its ordinary dictionary definition is "to come into existence." MERRIAM-WEBSTER'S ONLINE DICTIONARY. *Retrieved from* http://www.merriam-webster.com (14 April, 2017).

> **insurer at the time of the first visible manifestation of damage must bear the responsibility for the entire loss . . . in a situation where the damage manifests itself immediately and continues unabated into a successive carrier's coverage period, there is no occurrence** . . . because the continuous damage is no longer unusual, unexpected, or unforeseen and, therefore, not an accident

76 Ohio App.3d at 437 (emphasis added).

Similarly, in *Reynolds*, the Ninth District Court of Appeals found that when property damage from **faulty construction was visible and discovered within the first six months** of occupancy and before the insurance policy at issue came into effect, the policy provided no coverage for the damage. *Reynolds v. Celine Mut. Ins. Co*., 9th Dist. Lorain No. 98CA007268, 2000 Ohio App. LEXIS 517 (Feb. 16, 2000) .

Further, in *Hastings Mutual Ins. Co.*, **a water intrusion manifested**, was observed by property occupants before the policy at issue came into effect, and continued for several years thereafter. 2014-Ohio-2916, ¶ 18-20. While some of the intrusions took place during the policy period, the Tenth District Court of Appeals found that policy language **precluded coverage for "continuation or resumption" of the damage that manifested itself before the policy period**. *Id.* at ¶ 21.

These decisions are consistent with the application of an injury-in-fact or manifestation triggers and rejection of a continuation trigger in the absence of truly progressive latent injury akin to an insidious disease or hidden environmental contamination.

ii. Ohio court cases CMH cites are distinguishable, but do not indicate a conflict among the districts

In *Custom Agri Sys.*, this Court effectively overruled *Hanna* when the Court determined that construction defects, **such as improper framing, do not constitute "occurrences**" under CGL policies. 2012-Ohio-4712, at ¶ 10; *see Ohio Cas. Ins. Co. v. Hanna*, 9th Dist. Medina Nos. 07CA0016-M, 07CA0017-M, 2008-Ohio-3203, ¶ 11, 17, 22 (erroneously finding that defective

framing of the house—not the resulting damages to the drywall, trim, roof shingles, or windows—was both the "occurrence" and the "physical injury" under the CGL policy definitions). Moreover, even if *Hanna* were still good law, it was a case where construction and defect manifestation time points fell into different policy coverages. 2008-Ohio-3203, ¶ 18-19, 25 (finding that issues with the fixtures resulting from defective framing were not discovered, or damage did not "occur" until the second insurer's coverage period began). Here, they both preceded Lightning Rod's coverage.

In *Polk*, the Court of Appeals for the Eleventh District determined, in keeping with environmental damage cases, that discovery of previously hidden damage is the final trigger point in a multiple trigger/continuous trigger situation. *Polk v. Landings of Walden Condo. Ass'n*, 11th Dist. Portage No. 2004-P-0075, 2005-Ohio-4042, ¶ 90. Here, all ill effects of Southworth's failure properly to assemble and install the Beatties' mobile home were not hidden, but instead **patent and obvious immediately following construction** long before Lightning Rod issued its policy.

Finally, *Plum* and *Milwaukee Ins. Co*. are both inapplicable delayed damage manifestation cases (i.e. cases where construction-related property damage does not manifest until long after construction has been completed). Both indicate only that Ohio courts may apply continued trigger theory when answering the initial duty to defend question, but when it comes to actual indemnification coverage determinations, **injury-in-fact or manifestation triggers would be applied**.

The *Plum* court rejected the application of the manifestation trigger to unique facts of the case for public policy reasons. But, it nevertheless held that on remand, the single insurer on the risk during construction and thereafter could be held liable only to the "extent the damage to

the . . . house occurred during the period [the insurer's] policy was in effect," ostensibly applying the injury-in-fact trigger. 2006-Ohio-452 at ¶ 24.

Finally, in *Milwaukee Ins. Co.* the court determined that an insurer on the risk during construction, long before time of water damage discovery, could still owe a defense for the damage. *Westfield Ins. Co. v. Milwaukee Ins. Co*., 12th Dist. Butler No. CA2004-12-298, 2005-Ohio-4746, ¶ 18-19. However, with respect to actual duty to cover the ultimate damage, the court explained that on remand, **an injury-in-fact evaluation would have to be performed** to allocate coverage. *Id*. at ¶19.

None of the Ohio cases CMH cited, even if they could be read to adopt a continuous trigger theory in construction defect case, are applicable to the current situation where the Lightning Rod policy did not come into being until after the relevant damage occurred and manifested.

b. Foreign authorities CMH cites are inapposite and provide no useful guidance to the Court

Cases concerning latent progressive bodily injuries and long-term environmental pollution are irrelevant

Just like similar Ohio cases, **foreign asbestos and environmental pollution cases are irrelevant** because CMH offered no evidence of latent progressive damage to the Beatties' property comparable to progressive bodily injuries or environmental damage. *See* Merit Brief of Appellant at 28-29, citing to *Montrose* (long-term hazardous waste discharge), *National Priorities Pub. Serv. Co. v. Wallis & Cos*., 986 P.2d 924 (Colo.1999) and *Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr*, 172 N.J. 409, 411, 799 A.2d 499 (2002) (both cases concerning toxic discharge from a landfill over many decades); *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co*., 275 Kan. 698, 71 P.3d 1097 (2003) (progressive bodily injury to many

employees over many years due to excessive noise); *Towns v. N. Sec. Ins. Co*., 184 Vt. 322, 2008 VT 98, 964 A.2d 1150 (groundwater pollution from diverted contaminated waste materials).

Unique construction defect cases involving long-delayed damage manifestation are irrelevant

While continuous trigger theory is normally applied in cases where there is a question as to which of multiple carriers on the risk between construction and the delayed manifestation of damage is liable for the damage, the *Joe Harden* court adopted a hybrid injury-in-fact / continuous trigger theory even though only one insurer's coverage was in question. *Joe Harden Builders v. Aetna Cas. & Sur. Co*., 326 S.C. 231, 233, 236, 486 S.E.2d 89 (1997) ("progressive damage that is not apparent at the time of the underlying injury-causing event" triggers "coverage at the time of an injury-in-fact and continuously thereafter").

American Family Mutual Ins. Co. vs American Girl, Inc., 268 Wis. 2d 16, 2004 WI 2, 673 N.W.2d 65—a duty to defend case—is inapposite because: (1) the court rejected the business risk barrier to coverage for construction defects[4] and (2) to the extent the *American Girl* court endorsed any application of the continuous trigger theory, it did so only up to the point of damage discovery or manifestation. *Id*. at ¶ 86 ("**insurers are not obligated to cover losses which are already occurring when the coverage is written or which has already occurred**.")

Every one of these cases concerns latent progressive property damage resulting from faulty construction that manifested itself for the first time long after construction completion, with no easily identifiable damage starting point. Thus, even if their reasoning were applicable here, it would not trigger Lightning Rod's coverage issued 11 months after damage to the Beatties' property already occurred and manifested.

[4] This Court expressly endorsed such a barrier in *Custom Agri Sys.*

Overall, CMH cited not a single authority either from or outside Ohio that would support its radical proposition that a CGL insurer can be required to cover ordinary property damage that occurred and manifested itself well before the insurer issued its policy.

B. Even if the Court were to remand this case for consideration of the continuous trigger theory, the outcome would not change because an Ohio general liability policy of insurance does not cover construction defects and their natural consequences—all that is at issue in this case. Such defects and consequences are ordinary business risks and not "occurrences."

As a matter of well-established Ohio law, as this Court articulated in the *Custom Agri Sys.* matter, occurrence-based commercial general liability policies **are not intended to protect business owners against business operations risks, such as their own faulty performance**. 2012-Ohio-4712 at ¶10, 18. Thus, because CGL policies define "occurrence" in terms of accidental and unexpected events, such policies do not insure against defective workmanship or foreseeable damages flowing from defective workmanship, because such defects and the resulting property damages are not accidental or unexpected. *Id*. at ¶¶12-13, 18-19; *see also Reggie Constr., Ltd. v. Westfield Ins. Co*., 11th Dist. Lake No. 2013-L-095, 2014-Ohio-3769 (relying on the *Custom Agri Sys.* holding to find that predictable consequences of poor workmanship, such as moisture seeping into the building due to construction defects, are not "occurrences" capable of triggering a CGL policy coverage). But, parties hiring contractors are not without protection against faulty workmanship and its natural effects. **Performance bonds, or errors and omissions policies, not CGL occurrence-based polices designed to insure against accidents, provide such protection**. *See* 2012-Ohio-4712, at ¶18.

Southworth's own faulty construction caused all of the damages

Here, Southworth's failure to: (1) use the required number of bolts to fasten the two halves of the mobile home together and (2) install proper supports for the home was defective

workmanship that foreseeably resulted in all of the damage at issue in this case. Southworth has admitted as much in his deposition. (Merits Brief of Appellee at 12-13 citing to Southworth's testimony). Therefore, none of the damages caused by Southworth's defective construction were accidental, were not an "occurrence," and are thus not covered by Lightning Rod's policy, or any CGL policy, as a matter of Ohio law. **To find otherwise in this case would turn occurrence-based liability insurance policies into performance bonds or errors and omissions policies and upend reasonable expectations of all parties to Ohio CGL insurance contracts**.

CONCLUSION

Amicus curiae Ohio Insurance Institute supports the Appellee and asks the Court to find either that this appeal was improvidently granted, or affirm the ruling below because:

1. This is a simple insurance contract interpretation case with undisputed facts;
2. There is no conflict among Ohio courts with respect to how the unambiguous policy language should be applied to the facts of this case;
3. Ohio law does not support Appellant's theories for upending the insurance marketplace with a "continuous" coverage trigger; and
4. Appellant's "continuous" coverage trigger theory has no application to the facts of this case.

The decision of the Court of Appeals in this case is consistent with the unambiguous language of the insurance policy, with the undisputed intentions of the parties at the time they entered into the policy, and with the self-evident legal principle that a CGL insurer cannot be required retroactively to cover ordinary property damage that occurred and manifested well before the insurer issued its policy. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

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