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Supreme Court of Texas.
Lamar Homes, Inc., Petitioner,
v.
Mid-Continent Casualty Company, Respondent.
No. 05-0832.

February 14, 2006

Appearances:
Lee H. Shidlofsky, for petitioner.
Jennifer Bruch Hogan, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Don R. Willett, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister

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JUSTICE: Orders ready to hear argument in 05-0832 the Lamar Homes, Inc. versus Mid-Continent Casualty Company

COURT MARSHALL: May it please the Court. Mr. Lee H. Shidlofsky reserve 5 minutes for rebuttal.

ORAL ARGUMENT OF LEE H. SHIDLOFSKY ON BEHALF OF THE PETITIONER

MR. SHIDLOFSKY: May it please the Court. Opposing Counsel. There are three certified questions before the Court today, the first two deal with the definition of properly damage in a occurrence in a CDO policy. And the third deals with Article 2155 and the Texas Insurance Code because the third certified questions is conditioned on a former bancers on the first two, because the first two are really the heart of the debate at plan on. Unless the Court has any question underlying on the briefing for the 21-55 questions. I would call the Court's attention to amicus brief which called on Friday, by Valerio energy and erickson specifically address to article 2155 and it's applicability in the liability policies. Turning now to the first two questions, the fifth circuit ask when the home owners chooses a general contractor for construction deffects and alleges only damage to relocities to the home itself. The's such allegation alleged accident or occurrence fair-- sufficient and trigger duty to defend and duty to indemnify. In the second question is similar to those, to those same allegations alleged properly damage sufficient to trigger the duty to defend or indemnify.

More of those contents, that the answer to those two questions based on the policy language is "yes".

JUSTICE: What do you think the accident was, specifically?

MR. SHIDLOFSKY: The accident is the unexpected and under-- unintended damage that results from the faulty workmanship. It's not the faulty workmanship itself it's the the unexpected, unintended consequences from the faulty workmanship that's the accident.

JUSTICE: Well, though the coverage is for-- let's see the damages resulting from an occurrence? Is that right or wrong?

MR. SHIDLOFSKY: It's, it's physical injury that resulting from an occurrence?

JUSTICE: And so the physical injury, and so -

MR. SHIDLOFSKY: All positive.

JUSTICE: - is the faulty workmanship or not?

MR. SHIDLOFSKY: No, the physical injury is the result of the faulty workmanship. They fits just it that-- a defect itself, did you just put windows in background in the house? That's not property damage, that's just a defect if the windows then then leak and cause water damage that's the unexpected and unintended result. That's the physical injury that results from the defective workmanship,

JUSTICE: So you, so-- it's a bad paint job or a poorly hang door.

MR. SHIDLOFSKY: No covergae.

JUSTICE:No coverage.

MR. SHIDLOFSKY: No coverage. And, and the more is not contending that, sure customer dissatisfaction claims are not covered under CGO policy, it's because they don't, they don't-- they're not property damaged. If I, if the specs called to paint a house red and you paint it white-- are hopefully that recovery the other way around. The mere fact that the paint color is wrong it's not physical injury detaining to a property. That's not the sort of thing as CGO policy is designed.

JUSTICE: But, but it was-- are you saying then that it was your client intent when it CGO policy, that if you built a house but the slab purely designed or purely made and it broke, would you attempt that somebody else will bad effect at ...

MR. SHIDLOFSKY: If the work arouse out of the work of a sub contractors and it cause physical damage, yes, it was. That's the exactly the intent of purchasing the CGO policy to provide protection for only intended and unexpected consequences. And in this particular -

JUSTICE: Of course, it has to be pretty unimaginative plane attorney that can't imagine that some harm beside painting I mean-- people don't follow law suits cause you painted the house a wrong color. Follow him because you did something wrong that made the foundation don't do this, the doors don't do that. So in fact, it is the CGO is going to cover every, virtually every home defects sentence file.

MR. SHIDLOFSKY: - well, there's a difference between the duty to defend and the duty and to indemnify. I mean, if, if you do have an imaginative plane, and he does plead physical damage you know, arises

JUSTICE: They always do.

MR. SHIDLOFSKY: Then, then there's a duty to defend, but the duty to indemnify is based on the actual facts, so that plane should be improve of, that, that physical injury detains to a property and there's going to be no duty to indemnify.

JUSTICE: So scenario with the subcontractor require to provide of his own coverage of big bonded for a situation like ...

MR. SHIDLOFSKY: Typically, the subcontractor does or hopefully the subcontractor does have its own insurance, and, and most of this case

the subcontractors are a party to the litigation.

JUSTICE: And so the situation like this if you're correct then that wouldn't be necessary in future, wouldn't it?

MR. SHIDLOFSKY: I'm sorry.

JUSTICE: Those bonding requirements wouldn't be necessary in the future if, if, the-- you would always claim against the subcontractors since they cover for all types of occurrences under CGO.

MR. SHIDLOFSKY: Well, I said that the subcontractor typically has, has insurance. The bonding issue in the whole argument that may going to make is not a performance bond and it' just-- the simple reality is that performance bond is not used on residential construction they are in commercial construction and the implication of this case and what this Court's decide certainly extend will be on residential construction. But in a home construction arena, his former response is not used, is not, is not part of the project, may come into entire note that ...

JUSTICE: Let me ask you question taking of in just this greenest question. If the foundation is not built properly and a two inch crack develops on it, but it causes no other damage to build. No leaking, just half of the size that maybe unlikely. Then there's no accident or crime scene.

MR. SHIDLOFSKY: Well, it's an interesting, you highlight what is in emergence, in emerg ...

JUSTICE: Dis you like the great paints to distinguish between doing something wrong and building versus doing something wrong that causes other injury.

MR. SHIDLOFSKY: Right. I believe that the crack itself that is physical injury to tangible property. Now, there is an emerging middle ground and, and you, you just highlighting what that is and I don't particularly endorse this middle ground cause I think-- I still think you have to read something into the policy. And to the property damage definition in the occurrence, that's not there. But if you work to go with that middle ground, it would still require affirmative answers. And the middle ground is exemplified which just recently by the OPD Hotel Group case and that's at 2006 Westlaw 91577. It's a brand new case out of the South-- District Court of South Carolina. When that Court set, it looked that the LJ Case from the South Carolina Supreme Court which said; "No, no con just damage the work itself." And it look at the case that LJ relied on, which is the high country case out New Hampshire which said, "Damage the work itself could be in account." And it try to reconcile the two, and what it said was, and again this is the new middle ground approach, "If the physical damage is just to the defective work itself." In other words in your example, just plan-- if, if a faulty workmanship is to the foundation and all that is physically injured is the foundation then there's no occurrence property damage, but if the faulty foundation causes structural damage beyond the foundation itself, even though that still all the general contractor's work is defined by the policy, that is an occurrence of property damage. In Oakidi you had a hotel and there is problems with the exterior, I believe the windows and the exterior sheeting. And the Court said, "If that's all the exterior sheeting started to crack." Under LJ that wouldn't be an account to property damage but once water got in and damage other parts of that hotel even though it's all the general contractor's work, that is an occurrence of property damage and, and again even if the Court were deviant to that middle ground position. It requires [inaudible] answers to the, to the two certified questions. Mid-continent entire no preference position, they're entire

briefing here is premise on-- the faulty promise that a CGL policy per se does not cover claim sounding in contract of warranty. In particular make comment argue-- argues that damages solved by homeowners against their general contractors are presumed to be expected or intended by virtue of the inherent contractual premise that you provide a properly constructed home. The problem with that argument is nothing in the definition of the property damage are unfurnished seize anything about the breach of contract or breach of warranty. In this,

JUSTICE: Well, you just don't think of a breach of contract is an accident, that's one thing.

MS. HOGAN: Well, ...

JUSTICE: Which is not, you think of an accident that somebody-- hiding somebody out on the street, and not, not somebody failing to perform a new promise to create.

MS. HOGAN: Well, this Court has routinely recognized that the contractual relationship between the parties can create duties under both the contract and authority and that the same act may breach the contract and authority that simultaneously or individually.

JUSTICE: Well, but a part from contract that occur again, we just think this hard to think in the breach of contract is-- as an expert

MS. HOGAN: You cannot.

JUSTICE: Hundred people[inaudible] for a change one

MS. HOGAN: You going to keep in mind here that, that under the particular facts of this case and really the fact of most of the case is that, that, were in the appendix in this context the general contract has not alleges to perform the work itself, the general contractors alleged of negatively supervised itself contractors. They're the one that performs the work. And so it's, it's only a breach of contract cause of action only because it's, it's Lamar homes the general contractor that, that has a contract with the home owner, but there's not a real big different between is negligence claim against them and a breach of contract that's now is true that the negligence claim may not be viable because of the economic crucial that's exactly made come into our argument. Will you can't sue a negligence because of the economic laws rule. But there's several problem with that argument the economic clause rules on liability defense. JMoDerhams Belly homes all those cases had nothing to do with the insurance coverage, whether alone with the specific definitions of property damage and occurrence.

JUSTICE: Coming back to the occurrence, tell me where in the sequence the accident occurs. The home owner says that he went all over my house and how did he get there? Well, I had a foundation contractor to before the concrete wall. They cracked that cause the walls to shift and the water came in, it was an accident. That's not an accident he never, he can never should have built the foundation away there. And if your letting that's your promise, but it's hard to say that it's an accident.

MS. HOGAN: The accidents is not just the cause of the effect, the culmination of the cause and the effect, so the building and the faulty - ...

JUSTICE: The culmination -

MS. HOGAN: In other words, it's not just the cause, not just the act of building and it's not it's, it's when that act resulted on expected and unintended copy.

JUSTICE: By the, but in its commercial case the culmination maybe in fact intended in a breach of contract case. You may-- one contract in party may certainly intend the culmination of the faulty construction and damage what do you thinks the things economically

that's easier for him to buy them, then spending the money to supervise properly to the-- so how-- I mean, it's not necessarily in accident, not necessarily commercial context unintended.

MS. HOGAN: Well, in, in, Lamar Homes does not intended that every allegation and negligence or breach of contract or breach of warranty is going to be, is going to be in accident. This would-- Lamar Homes is containing set of bright line rule that if the allegation or the damage the home itself, that per se cannot be properly damage on occurrence.

JUSTICE: The problem with my hand is, I don't discern of anything, if the side of bright line, what is it and it's just hard to see where you think of an accident is a tree falling over the wrong side and when it shouldn't that. Nut not that walls leak because somebody built at the nation.

MS. HOGAN: You know, the one thing that's interesting is if you look the fact of this case line of thing in the Court is not a spy in the facts of this case, but in addition to ensuring on our homes we cannot ensure the foundation of subcontractor then they took in exactly opposite position these are the event. These are the helper, they said as the hellebore the subcontractor that allegedly constructed the foundation. Each property damage them accounts but I said the general contractor Lamar it's not. It just simply does not make sense, that the same practice in the shea rack and that stone venire can be property damaged cause by neptines as to the foundation subcontractor, but not as to the general contractor. The mere existence of the contract between the Lamar Homes and the Lamar East doesn't support that conclusion and no possible justification and underlining are otherwise supports that distinction.

JUSTICE: Do we believe of the worry about the fact that if we adapt the rule 'bout what your talking about that a contractors would essentially be encourage to have the right word, it would be so concern about following their contractual responsibility because they can always called on the CGO carrier recovery is that ...

MS, HOGAN: I don't, I don't think so at all your Honor. Professional such as lawyers and doctors have insurance coverage to cover the result of our shutty workmanship adn although my client may disagree that hasn't seem to be elapsed of the intent issue of on the doctor and lawyers just because we have--I don't let the statute of limitation go lying I may not practice theory of take care of it. And, and the trees everyone knows that been and modeled accident that may have been your fault or it's not in a speeding tape, we had a little gift that when you're old time, in the form of an increase premium anything into speed, anything into acts and to got substantial increase in premium or you get cancelled all together. So the point is that sort of, that sort of rest is taking care of three underlying the process ...

JUSTICE: Honestly, I saw CG 2294 that your ...

MS. HOGAN: I saw CG 2294 a new endorsement that came out believed in 2003 and it eliminates the sub contractor exception. And the sub contractor exception to exclusionary, but we pointed not to create coverage but just to show the policy of make cannon's position.

JUSTICE: But you say in your brief that if that endorsement have been to this policy then there would be no coverage or cover.

MR. SHIDLOFSKY: That is absolutely correct

JUSTICE: And so is this had been done or across the country or.

MR. SHIDLOFSKY: They can, it will not issue the policy on the cited Texas to my knowledge that does not have CG 2294 on it today.

JUSTICE: My further question, listen in their time there is cache.

MR. SHIDLOFSKY: I'm Sorry.
JUSTICE: Because it wasn't in there at the time when there is no coverage.
MR. SHIDLOFSKY: That's exactly but we condemned are lecture actively in circuit.
JUSTICE: Thank you Counsel the Court is ready to hear argument from the appellee.

ORAL ARGUMENT OF JENNIFER BRUCH HOGAN ON BEHALF OF THE RESPONDENT

MS. HOGAN: May It please the Court. Jennifer Hogan to present argument for the appellee.
JUSTICE: And so we can need address the last statement made hereby the opposing counsel?
MS. HOGAN: Pardon.
JUSTICE: Can you dress the last statement made by opposing counsel.
NS. HOGAN: Yea. I assume.
JUSTICE: Yes,
MS HOGAN: Endorsements.
JUSTICE: Make sure you trying to retroactively exclude coverage.
MS. HOGAN: Certainly were not trying to retroactively exclude coverage, we believe the fact that it's not an exclusion that has anything to do the case at all the provision that the policy-- I think that if we look at the intent of the parties, the argument that has been forward was that it is this change in policy lines that occurred in 1988 which added this exception to an exclusion and that exception to an exclusion attainment of practice in 1988 suddenly made construction defects kind as the long as the construction defects were performed work, were performed by sub-contractors suddenly now its liability in terms covered all of that, because of this change in policy of 1988, no Court healback in 1988, no Court really hellback until about 1999 and starting into the 2000 until now, and a few, the Court held have accepted this argument that's being brought by the other side, that somehow this exception to an exclusion created coverage that had never existed before for construction deficiencies. When that started happening ten to fifteen years after the fact, the ISO came back interactive a new indorsement that takes out not just the exception right, it is in the take out the entirely of being able to get coverage for any sort of true property damage caused by an accident to the insurance work, even if it happens by a subcontractors. All that thing demonstrates is that the intent of the parties wasn't never in adding that exception to the exclusion to in fact create this coverage if what, once started that occur accepted that interpretation of the policy, the ISO came back and said; no, that's not the ever been intention of the party and were going to-- if that is what's triggering this analysis by the Courts. This exception to the exclusion we are in fact going to take it out. So I think that it made well be true, I don't it's not in the record will make can this is including that in it's policy is now or not. But certainly I would suggest that if the split of the authority that exist in the Court underline, this Court today, in Texas I would say certainly the proving thing for it to do, not because I think that the policy actually covers those things as it exist today. But simply to make certain that if the Court going to

undertake that interpretation of the policy, then it is sure carriers going to be protected, because if you look what is policy thus cover it's a standard form policy for commercial general liability. The premium in this case, the total premium for all aspects of the coverage including it's premises operations and they can properly, the entire premium for this prop-- for this coverage worth $12,005. It covers every battling injury that someone's going to sustain basically from the accident stand point. If someone is trespassing on the vacant lot and gets himself injured and is-- and the found builder because he owns the property assue that's going to be a property occurrence, if somebody tricks in falls from a roof under-- were a house is under construction, if somebody drops a boarder or piece of lumber on the child's next door or the truck next door, or the fence next door, or a something line on the owner's car's we drive thru, somebody shoots an nail gun, all of those kinds have accidents cause property damaged and involving injury. Everyone of those is covered under this policy, construction site of dangerous places, we want people to have liability policy, we want people pay $12,005 a year, so if someone got badly injured on a particular site we have all of this people who paid that kind of money in, then it's going to be covered those are the kind of opportunities risk that everyone agrees that this policy covers. That, that's what Lamar paid $12,005 for.

JUSTICE: So what do you think the exception to explanation one covers?

MS. HOGAN: I think, we said that a couple of things that it covers in our brief your Honor, it covers for take-- if for example you could have an error can be accidents that damage the work of, of the contractor, and his work is obviously the entire structure and they put it in this sort of completed operation when the home is finished. We say if a someone goes out to perform a warranty, say the dishwasher are working someone goes out, performs that warranty and leaves and on the way out toss it to match the house burns down, that's damage to your work by an accident. That's the same kind of risk that is, that is if a strange walking by the house that's the matches in burns down the house.

JUSTICE: But you say, if it was the insured employee, wouldn't be covered?

MS. HOGAN: That's right. That's what we said, and that's ...

JUSTICE: That's if she insured ...

MS. HOGAN: Sub contractor

JUSTICE: Employee?

MS. HOGAN: It would be cover, it would be cover.

JUSTICE: Don't say microarmcents

MS. HOGAN: I think you can maybe look at-- most of these things they are going to-- one pro-- make more sense, if this sub contractor exception is the recover the idea that you have more sub contractor doing work but it's accident that is oneself ...

JUSTICE: He likely work both's coming surely, surely he wanted money walk both.

MS. HOGAN: You might want both. But the, the sub contractor exception is a step to give back some coverage that would otherwise be excluded. But only for accidents contract which are all the time constructing more than a single project in a, in subdivision or a town home complex. If someone-- if one is finished and you back up track or a backhoe in to the one that's completed next door, if your the sub contractor that's going to be an accident it's an intentional damage, it doesn't have anything to do with the actual work that your then the

operation that were then providing to the other home. That's the same thing is it anyone drive a car into your house, into your completed structure. That would be an accident that would be covered under the policy. We have to be able to give under this Court's precedence some meaning to the exclusion, the exclusion are narrow, because there in the first instance frankly, there is not a lot of accidents causing damage to your work that are going to exist because those are simply not accident, just accept you are correct to trying to point out at were is this accident, what is this accident. And I don't think can actually ever beyond identified to the Court. The suggestion that the ...

JUSTICE: What? It seems to me there have to be some kind of thing that are accidents, where you wouldn't have exclusion more.

MS. HOGAN: Certainly, and there are, if the tree-- if a-- if a tree falls on the house while the tender operations that's, that's going to be an accident causing property damage to your work. We better going to reach the exclusion some of may apply, they may not, but there certainly can be accidents to your work if you send a-- someone to come in doing work to work again it's completed operations. If he trips and falls to a plate gra-- glass window, when he was coming to repair the dishwasher. Someone's coming to repair the dishwasher, that's going to be an accident causing damage to your work. That is not however, a claim for defective construction and if we take this Court to-- why this Court has always look at these kind of questions. The way I look at Griffin the way I look to the Cawin case, Griffin is the case of the drive by shooting, Cawin is the case of the suggestive pictures and both were just acting like you apply the identical type of analysis to this case that you applied on those cases. In those cases you said their pleadings of negligence, there's an allegation that they don't maintain a state speed or fail to operate his vehicle in a safe manner. The Court look at those and it applied to the over arching law that exist, that distinguish it between negligence claims and intentional tort claims. And this Court said, "It's an intentional tort claim." The label that the plaintiff attaches doesn't matter. It's an intentional tort claim and the damages that flow from an unintentional tort are not accidental damages. Identically in this case, what we ask the Court to do to is that apply that same analysis that had pleaded negligence ...

JUSTICE: Now, let's go back, [inaudible] you said damages that flow from an unintentionally tort are not accidental damages. There can be an intended or unexpected consequences of intentional acts, can't they?

MS. HOGAN: Are we?

JUSTICE: Or did you mean to say that damages that flow from an intentional conduct are not occurrences?

MS. HOGAN: No, I mean to say your Honor, that in the intentional tort pra-- it doesn't matter whether you subjectively intended your consequences. The Court is able to distinguish, there are certainly intentional acts cases. It-- You may have an intentional act that's only a negligence claim. But when you're talking about an intentional tort this Court infa-- I mean, that's what the Court wrote in Griffin it doesn't matter that you didn't expect the damage that you didn't know know that she was going to see the pictures that you didn't know that she was going to be harmed by your acts. Your intentional conduct you are charged with those damages as a matter of law, and your subjective intent does not matter and is identical in the contract situation, your Honor. These damages, the law says; that this direct damages the loss to the structure itself-- to the subject of your

contract ther-- that damage is conclusively presumed foreseeable that's just contract law and that contract law is no different really than the intentional tort law that says, "These damages from your intentional tort; if I hit you the fact that you didn't die." And I say, "wow I didn't intent that," is not going to protect you in that intentional tort analysis ...

JUSTICE: I'm concern that the intentional tort that your throwing extends too far. The allegations here on this part of them, there was negligent workmanship that in performing the contract some of the work was done negligently or shutterly are you saying that's intentional?

MS. HOGAN: No, I don' think that this is an intentional tort case. I think ...

JUSTICE: But it was the negligent work that cause the problem that breach the contract here, right?

MS. HOGAN: Perhaps so in the contract here he don't, he don't ...

JUSTICE: Of the-- I mean that's, that's the part of the allegation and pleading.

MS. HOGAN: No I think your Honor, you can't take to the fact that it falls to negligence.

JUSTICE: Isn't the plaintiff that did not allege negligence?

MS HOGAN: I'm saying it doesn't matter what did the plaintiff alleges negligence, I'm saying that what matters is that under this Court's legal theory that plaintiff can call it negligence it is not negligence the only claim that the plaintiff's can is a claim for breach of contract. The duties arises in contract, the damages arises only in contract? Lamar homes did not have a negligence duty to construct this foundation, Lamar home had a contractual basis, construct ...

JUSTICE: So whether the damages are cause negligently or intentionally if it can constitute the breach of contract and it's not cover it's none occurrence.

MS. HOGAN: That's correct it-- if it is act-- certainly there that right-- we understand that in the tort in contract agreement. There are going to be close question and there are going to be things could be both breaches of contract and tort. You said that many times, but this Court is very good a distinguishing when is something actually and only a breach of contract. And frankly the law of Court has a very good attitude and the District Court hear the better of the District Court got that exactly right. These claims if you can-- perhaps someday there something that acknowledge that they are both at work and the breach of contract. But in this case, and when this is the only type of allegation that you have only construction deficiencies and only damaging that product itself house itself and that situation you have only a contract claim firm that is what this Court say in general homes.

JUSTICE: Or why was it the fifth circuit so concern about the valid presented to us, if that was clear.

MS. HOGAN: I think that, the ...

JUSTICE: The fifth Circuit said that we haven't decided this particular issue directly and that our Court of appeals should split that issue.

MS. HOGAN: That is so deteriotic the Court's of appeal split, I think that the Court's of appeal had largely followed the hand such as the decision out of the doubt for Court came down they do exactly what you said, you don't do in Britain and in Palace which is you don't accept the plaintiff pleading of negligence or a negligence theory or a negligence allegation as being determined if-- of what the claim

actually is. And that's all we sound happen here, now, look at this allegation and exactly the same what, if you look at this allegation and you consider the law that distinguishes between the torts and contracts and exactly the same with the law to-- distinguishes between negligence and intentional tort and your going to come out in this case that is exactly the way we've said. The more we want you to change the definition of the work of accident that this Court has use all long so that all new acts is what the damage intended was it actually expected subject to the stand point of the issue, that is not this Court's definition of an accident. This Court says, that if it is the natural or probable result, and let me just stop there and talk about what the natural and probable results is-- windows that are installed backward or foundation that has, that has not enough steel one, which is the allegation here, the natural and probable results is going to be crack in the seat wall water intrusion if that's supposed to be the accident, it's not an accident because those are absolutely the natural and probable foreseeable as a matter of long results of the conduct and of the-- just the physical structure itself when it is put in backward or put in wrong way.

JUSTICE: Saying those, saying those counsel if that's, if that's the test and someone who doesn't pay attention and a non more in section and rights to and it's somebody we all have an accident because such-- I mean anybody can tell you that's why you look both ways if you don't-- matter of accident so is you do something intentionally and something happen if you don't anticipate still more on accidents don't we rule of that kind?

MS. HOGAN: No, your Honor, I'm not thinking that the Court is actually very good at it, and that's the thing that the Court did it here.

JUSTICE: Let's say they, they, they intended but in a lot of amount still they may design a draft. They just like is-- it was a design so, so we can say that's, that's not an unexpected unintended occurrence when the foundation falls.

MS. HOGAN: Your Honor, when you have a contract, I think that you have to be able to stay ...

JUSTICE: Let, let me go to your contract this second I want the virtue and I don't want a because I look a-- under your work the definition in , in this contract eventually and it says, your work means and it says your work in plead you work, and I'm, I'm, reading on pages 13 and 14 your work in pleads the warranty or representation may have be anytime with respect to the fitness quality, durability, performance of use of your work, saying that some point there was a contemplation in here that, that there was more to at it simply contract that oppose to a point situation.

MS. HOGAN: Your Honor, I think that what you have here, as, as I say I don't think we've read anything out of the policy, the defect, the work absolutely, includes the representation and the warranties and the product itself, but the question before the Court is whether there is an occur a property damage cause by in occurrence which is define as an accident and their-- may can be for ...

JUSTICE: Well, Let me ask you this, say, say someone in the second floor that has for we have the design improper and, and wrong mode of truth no truth next, it is improperly calculated, somebody run their computer wrong one day-- and someone who is in the second floor that has and two years later, gives way and collapses is that an accident? ...

MS. HOGAN: Badly injury is always going to be an accident.

JUSTICE: No, no, no the occurrence, not the result of the occurrence but the occurrence itself.

MS. HOGAN: You can-- you can only judge in occurrence frankly your Honor, I have this Court's test by the results it is, it is, that is what determines whether something is an accident or accidental.

JUSTICE: Okay. So someone in your house who don't expect the occur and the house collapses they have an accident injure.

MS. HOGAN: That's correct.

JUSTICE: How about the house itself and how about the house itself, is it collapses and accident?

MS. HOGAN: No. It's not because the only-- because you have to look at with the insured itand look at the from the standpoint of the insured. The insured only obligation to go the house that won't enter itself, collapse on itself, and not they made another thing that's all that happens, and that happen only because of a contraction obligation that exist, that the only possible source of the duty that it could ever rise to liability, if you, if it is if the injury-- if the injured is someone different then your going to have different results, But there is nothing wrong with making the, the contractor responsible for his own performance.

JUSTICE: So put it in another way, if, if a, a builder spent a million dollar on what should be a hundred thousand dollar house to reimburse all the structure and the foundation with a, a, steel, metal, reinforcement agency to go well beyond what any built of what if, say, say their gun with the owner a give theft the house walk to the front door and it falls down, that's not an accident still -

MS. HOGAN: Your Honor.

JUSTICE: - because it was built personal to a contract.

MS. HOGAN: That would be correct your Honor. What to this possible liability be for that structure other than breach of contract.

JUSTICE: I'm just trying to understand conceptually where your coming from.

MS. HOGAN: And that's where, that is where coming from, if, if the, if the damage, we say in the law that the damage to the subject matter of the contract is proceedings of the matter of law, and once the damage is when you have only what this Court has determine to be only a breach of contract, then the damage that arises from that comes entirely-- it is entirely foreseeable. There is no other client, this Court said in Gene Walter Towns you can't proceed on a negligence client. However, shallowing is done or however the belver has done, you don't have a negligence plan, you don't have a tort plan to bring you that only breach of contract.

JUSTICE: Those that, those that position run into our rule that determine duty to defend by stomach pleadings trying to split negligence, breach of contract and breach of warranty. They pled negligence in many to go they said, "We should disregard negligence in this case in their pleading and look at what's really at stake." So I'm doing, we need to reconcile those two position.

MS. HOGAN: Your Honor I think you reconcile those two position, it's the Courts opinion in Cawil and Griffin that say that's how you interpret the, under the eight rules that's not something new that I come what with, that is what, this Court said, there were negligence allegation in both of those cases, and this Court said it is-- the label that attached of negligence does not count.

JUSTICE: Thank you, no further questions. Thank you, Ms. Hogan.

REBUTTAL ARGUMENT OF LEE H. SHIDLOFSKY ON BEHALF OF PETITIONER

MR. SHIDLOFSKY: Justice Wainwright, I think your question hit it right perfectly. Mid-continent had said dormitory event, if windows are put-- installed backwards the reasonably foreseeable fact that is they're going to leak and caused damage. Yet Mid-continent consistent with its own briefing will defend and indemnify the sub-- the freeing sub-contractor that put in the [inaudible]. They won't defend and indemnify the general contractor the only difference is because the general contractor had a contract, that puts too much emphasis on the label of the cause of action, they, they give credence in their brief to the duty to defense standard but then they ignore it. On the one end you say, "You can ignore negligence based app-- negligence based allegation by applying a liability defense and the duty to defense standard which has problems in of itself applying the liability defense and the duty to defend." But after we apply our liability defense in the coverage Court even on the last rule, all that's left is breach of contract, breach of warranty. Well, those causes action per se and not covered by the CGO policy. But yet if, if you look at that hand on the property damage and the current you don't see any mention what so ever of that distinction. And the California Supreme Court in the Landmark Vandebore decision noted that the arbitrary distinction between contract and tort is evident when we consider the same act may constitute the breach of contract in a Court.

JUSTICE: In the example with lawyers course lawyers said, we make it back two policies: CGO Policy and the professional act that's what distribute built and stood to say. Your's, your saying, obviously you would have professional mistake on and CGO fight mistakes, but CGO challengers that makes a mistake of insuring home building cap makes easy to pay all of them that you pay, if you represent the law and then she don't.

MR. SHIDLOFSKY: Well, I mean there are different type of policy that sometimes are issue, the engineers ...

JUSTICE: But CGO policy is your, your CGO policy is probably not much different from problem, the more ...

MR. SHIDLOFSKY: That's absolutely correct. The standard, the standard ...

JUSTICE: So how come they have to pay for all the negligence mistakes that homebuilders makes but not lawyers.

MR. SHIDLOFSKY: They have to pay for it negligence mistake that cause property damage and that's, and that's really the difference, I mean you still govern by the insuring agreement it's just like-- I think you said, "It's hard to get-- it's different to get here in this job, it's difficult for me as a lawyer to cause property damage about the injury." So it's still govern by that in, in insuring agreement, and, and more recognizes ...

JUSTICE: Let me try to understand, you think if you use paint that fades overtime and you didn't-- and shouldn't have faded that is an interior ...

MR. SHIDLOFSKY: That is not because that is not physical injury.

JUSTICE: Or glass that steady and then get's the word 'doesn't' tempt anymore that's ...

MR. SHIDLOFSKY: Only that, causes a loss abuse to the house and that's another part. That's the second part of the property damage, but in of itself that, that probably will not be property damage. And again

we got to realize that this policy is filled with exclusions that delineate the scope of coverage for construction defects. Gen ...

JUSTICE: I know, I know you'd already cover this County clause to why isn't that property damage of the exempt just to say they-- is it because with stand of the damage is significant?

MR. SHIDLOFSKY: No, because what court have said is, physical injury means the actual physical change in the property, if you had the DCB case which they cited out Colorado Court that was a media room that wasn't sound proof enough. That's a customer dissatisfaction claim, that's a perfect example of where the vision allegation construction defect that would not turn to the insuring agreement. If you got a media for--it was not sound proof enough that's not physical under attainable property, if you got a window just-- the landing a little bit or it doesn't or that's more sound proof that's not physical injury it ...

JUSTICE: What's the damage as, as empty cap

MR. SHIDLOFSKY: That's her physical injury-- the exclusion ...

JUSTICE: Are there any further question? Thank you Counsel. The case is submitted and that conclude all arguments for today and Marshall will now adjourn the court.

COURT MARSHALL: All rise. Oyez, Oyez, Oyez. The honorable, the Supreme Court has now stand ...