Case No. G050759

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NAVIGATORS SPECIALTY INSURANCE COMPANY,

Plaintiff and Respondent,

vs.

MOOREFIELD CONSTRUCTION, INC.,

Defendant and Appellant.

Appeal from the Superior Court of Orange County, California
Superior Court Case No. 30-2011-00492111
Honorable David Chaffee, Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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TABLE OF CONTENTS

Page

APPLICATION

Pursuant to California Rules of Court, rule 8.200, subdivision (c)(1), proposed amicus curiae Building Industry Legal Defense Foundation ("BILD") respectfully requests permission to file an amicus curiae brief in this matter, in support of Defendant and Appellant Moorefield Construction, Inc. ("Moorefield"). Pursuant to Rule 8.200, subdivision (c)(4), the proposed amicus curiae brief is combined with this Application.

I. BACKGROUND OF PROPOSED AMICUS

Formed in 1987, BILD is the premier legal advocate for the building and construction industry in California. BILD is a non-profit mutual benefit corporation and wholly-owned subsidiary of the Building Industry Association of Southern California, Inc. ("BIA"), which has approximately 1,100 member companies, including builders, subcontractors, remodelers, designers, architects, engineers, sales and marketing professionals, law firms, manufacturers and more.

BILD's purposes are to initiate or support litigation or agency action designed to improve the business climate for the building industry; to monitor legal developments and legislation critical to the building industry; and to educate the industry, public officials and the public of legal and policy issues critical to sustaining the building industry. BILD focuses its litigation efforts on cases with a regional or statewide significance to its mission.

II. INTEREST OF PROPOSED AMICUS

As discussed above, BILD monitors and supports litigation which affects the business climate for the building industry members of BIA. This action involves the issue of whether damage to property following a contractor's work on a construction project can constitute an "occurrence" within the meaning of a Comprehensive General Liability ("CGL") policy of insurance, or whether, because a contractor performs its work intentionally, such damage is not subject to coverage. Contractors (and others in the building industry) – including BIA's members – routinely undertake acts that are intentional in the sense that the contractors deliberately perform them as a necessary part of their work. In some circumstances, those acts are followed by damage for which the contractors seek defense and/or indemnity from their insurers pursuant to CGL policies. Were the Court to affirm the trial court's judgment, the reasonable expectations of those contractors to coverage under their CGL policies would be jeopardized, and potentially entirely negated. Indeed, if CGL policies do not insure against claims for damage related to contractors' work, it is difficult to comprehend what benefit they would provide to contractors given the nature of a contractor's services.

This is an issue of immense daily importance to the members of BIA, for whom BILD advocates before the Courts.

III. HOW THE PROPOSED AMICUS CURIAE BRIEF WILL ASSIST THE COURT

After reviewing the briefs filed by the parties in this action, BILD believes this Court would benefit from additional briefing on the meaning of "intentional" in the context of a CGL policy, application of the law governing interpretation of insurance contracts upon the coverage to be afforded contractors and the meaning of the term "accident," and the policy concerns for the building industry inherent in the trial court's Judgment.

By focusing on these issues, BILD's brief will complement the Parties' briefs.

IV. RULE 8.200 DISCLOSURE

Pursuant to Rule 8.200, subdivision (c)(2)-(3), neither Appellant nor Respondent nor their respective counsel authored this brief in whole or in part. Neither Appellant nor Respondent nor the respective counsel made any monetary contribution towards or in support of the preparation of this brief.

V. CONCLUSION

BILD respectfully requests that this Court accept the filing of the attached brief.

Dated: September 14, 2015

RUTAN & TUCKER, LLP

By: _____
Gerard M. Mooney
Duke F. Wahlquist
Attorneys for Proposed Amicus Curiae BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-1931.

On September 14, 2015, I served on the interested parties in said action the within:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

as stated below:

☒ (BY MAIL) by placing a true copy thereof in sealed envelope(s) addressed as shown on the attached mailing list.

In the course of my employment with Rutan & Tucker, LLP, I have, through first-hand personal observation, become readily familiar with Rutan & Tucker, LLP's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, I deposited such envelope(s) in an out-box for collection by other personnel of Rutan & Tucker, LLP, and for ultimate posting and placement with the U.S. Postal Service on that same day in the ordinary course of business. If the customary business practices of Rutan & Tucker, LLP with regard to collection and processing of correspondence and mailing were followed, and I am confident that they were, such envelope(s) were posted and placed in the United States mail at Costa Mesa, California, that same date. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on September 14, 2015, at Costa Mesa, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Carol Makenen
(Type or print name)

Carol Makenen
(Signature)

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE	Court of Appeal Case Number: G050759
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Gerard Mooney (SBN 222137) Duke F. Wahlquist (SBN 117722) RUTAN & TUCKER, LLP 611 Anton Blvd., Suite 1400 Costa Mesa, CA 92626 TELEPHONE NO.: 714-641-5100 FAX NO. *(Optional):* 714-546-9035 E-MAIL ADDRESS *(Optional):* gmooney@rutan.com ATTORNEY FOR *(Name):* Gerard M. Mooney	Superior Court Case Number: 30-2011-00492111 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: NAVIGATORS SPECIALTY INSURANCE COMPANY RESPONDENT/REAL PARTY IN INTEREST: MOOREFIELD CONSTRUCTION, INC.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Amicus Curiae, Building Industry Legal Defense Foundation

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: September 14, 2015

Gerard M. Mooney
(TYPE OR PRINT NAME)

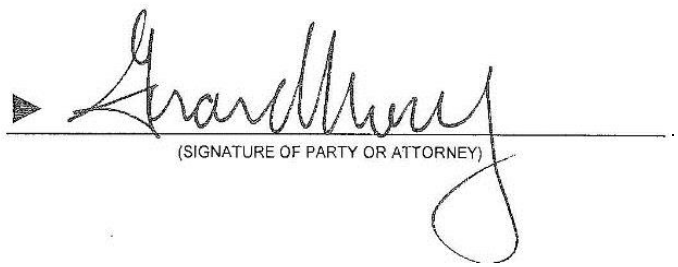
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

OTHER STATE CASES

Page(s)

OTHER AUTHORITIES

MEMORANDUM

I. INTRODUCTION.

The Comprehensive General Liability ("CGL") policy (the "Policy") pursuant to which Plaintiff and Respondent Navigators Specialty Insurance Company ("Navigators") insured Defendant and Appellant Moorefield Construction, Inc. ("Moorefield") provides that Navigators will pay "those sums [Moorefield] becomes legally obligated to pay as damages because of . . . 'property damage'" to which the Policy applies. (5 Appellant's Appendix ["AA"] 1392.) The "property damage" must have been caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (5AA 1393.) The term "accident" is not defined in the Policy. (5AA 1393.)

The Trial Court found that Moorefield's installation of flooring titles over a concrete slab with elevated moisture vapor levels was an intentional act, such that the Policy did not cover a suit brought against Moorefield for damages the property owner suffered as a result of a failure of the tiles' adhesive. (5 AA 1481.) The Trial Court reached this conclusion despite evidence that the concrete's elevated moisture vapor level merely increased the risk of an adhesive failure and the adhesive failed as a result of a multi-year process of moisture vapor emission from the concrete. (1 Reporter's Transcript ["RT"] 215-216.) The Trial Court nevertheless ordered

Moorefield to reimburse Navigators $1 million in policy benefits Navigators paid on Moorefield's behalf to settle the suit. (5 AA 1483.)

Proposed amicus curiae Building Industry Legal Defense Foundation ("BILD") contends the Trial Court's judgment was in error, as a matter of fundamental principles of insurance contract interpretation and public policy. Indeed, the majority position among the courts having considered the question is that construction defects causing "property damage" are "accidents" subject to coverage under CGL policies such as the Policy at issue in this action. (*See*, Christopher C. French, "Construction Defects: Are They 'Occurrences'?," (2012) 47 GONZ. L. REV. 1, 28-31.) The law in California should be no different.

II. INTERPRETATION OF THE POLICY IS A QUESTION OF LAW FOR THIS COURT.

It is well-settled that the interpretation of an insurance policy is generally a question of law. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18). An insurer's duty to defend or indemnify its insured is likewise contractual in nature and thus a question of law. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 47; *Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319.) "Unless the interpretation of the instrument turn[ed] upon the credibility of conflicting extrinsic evidence, a reviewing court makes an independent determination of the policy's meaning," and

reviews the trial court's interpretation *de novo*. (*Cooper Companies v. Transcon. Ins. Co.* (1995) 31 Cal.App.4th 1094, 1100.)

III. LONGSTANDING CALIFORNIA LAW GOVERNING INTERPRETATION OF INSURANCE CONTRACTS MANDATES TREATMENT OF CONSTRUCTION DEFECTS AS "ACCIDENTS" UNDER CGL POLICIES.

As the California Supreme Court explained in *E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, quoting *Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th 1, interpretation of an insurance policy is governed by "well-settled rules of contract interpretation":

> The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the mutual intention of the parties. Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.)

(*E.M.M.I. Inc. v. Zurich American Ins. Co.*, *supra*, 32 Cal.4th at 471 [internal quotation marks and citations omitted].)

It is equally well-settled that ambiguity or uncertainty in an insurance policy is resolved against the insurer, and the insured's reasonable expectations of coverage must be protected. (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807-808.) As a result, courts interpret coverage clauses broadly to ensure the greatest possible coverage,

and interpret exclusionary clauses narrowly against the insurer. (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406; *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 101-102.)

Applying these bedrock rules of interpretation here, it is clear that construction defects resulting in "property damage" – including Moorefield's installation of the tile – constitute "occurrences" under CGL policies such as the one Navigators issued to Moorefield, unless the insurer proves the insured "actually expected or intended to do the construction work defectively and cause damage." (French, "Construction Defects: Are They 'Occurrences'?," *supra*, 47 GONZ. L. REV. at 28-31.)

The term "accident" – the definition of the term "occurrence" – is not defined in standard form CGL policies (*ibid.*), and is not defined in the Policy at issue here (5AA 1393). California courts have defined the term "accident" in the context of liability policies as "an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause." (*Geddes & Smith, Inc. v. St. Paul-Mercury Indem. Co.* (1959) 51 Cal.2d 558, 563-564.) More recently, in the context of an insured's assault and battery upon a third party, the California Supreme Court held that an event is not an "accident" within a CGL policy "when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor." (*Delgado v. Interinsurance Exch. of Auto. Club of Southern Calif.* (2009) 47 Cal.4th 302, 311-312.)

As one commentator observed, "[c]ontractors generally do not expect or intend to do their work defectively." (French, "Construction Defects: Are They 'Occurrences'?," *supra*, 47 GONZ. L. REV. at 46.) Likewise, contractors generally do not intend that the "objective accomplished" by their work be a defect in construction or an event causing damage to property. (*See, id.*) Under any reasonable interpretation of the term "accident," a contractor's defective performance of its work should – absent the insurer's establishing an actual expectation or intention to perform defective work directly causing damage to property – constitute an "accident" under a CGL policy.

So it should be as to Moorefield. The Trial Court did not find that the adhesive was certain to fail or that Moorefield expected it to fail. (1 RT 178, 215-216.) Rather, it was undisputed that the failure of the adhesive was only a possibility – just as it was possible the adhesive would not fail. (1 RT 178, 215-216.) Indeed, Navigators' expert acknowledged that failure of the tiles could occur even were the moisture level of the concrete within the ostensibly acceptable limits. (1 RT 178.)

Furthermore, the failure did not occur immediately as a direct result of the titles' installation, but was rather the fortuitous result of a years-long process of emission of moisture from the concrete. (5 AA 1396.) Such a circumstance – where the insured is at most aware of a possibility of one of several potential outcomes, and where the act itself is not the direct cause

of that outcome, but was instead followed by a series of additional fortuitous causative events – plainly constitutes an "accident" as that term is defined under California law. (*Geddes & Smith, Inc. v. St. Paul-Mercury Indem. Co., supra*, 51 Cal.2d at 563-564; *Delgado v. Interinsurance Exch. of Auto. Club of Southern Calif., supra*, 47 Cal.4th at 311-312.)

The parties cite *Merced Mut. Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41 ("*Merced"*) with regard to whether an intentional act may constitute an "accident" under a CGL policy. In fact, *Merced* supports a finding that a construction defect resulting in "property damage" may be an "accident."

Merced addressed a claim against an insured involving the insured's forcing a third party to orally copulate him, which the *Merced* court held was not an "accident." The court held that while "coverage is not always precluded merely because the insured acted intentionally and the victim was injured," an "accident" is "never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage." (*Id.* at 50.) In addition, the court held, "where the insured acted deliberately with the intent to cause injury" or "intended all of the acts that resulted in the victim's injury," the event would not constitute an "accident" simply because the insured "did not intend to cause injury." (*Ibid.*)

On the other hand, the *Merced* court held, "an 'accident' exists when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity." (*Ibid.* [emphasis added].) The court offered the following illustrative example:

> When a driver intentionally speeds and, as a result, negligently hits another car, the speeding would be an intentional act. However, the act directly responsible for the injury – hitting the other car – was not intended by the driver and was fortuitous. Accordingly, the occurrence resulting in injury would be deemed an accident. On the other hand, where the driver was speeding and deliberately hit the other car, the act directly responsible for the injury – hitting the other car – would be intentional and any resulting injury would be directly caused by the driver's intentional act.

(*Ibid.*)

In the context of a construction defect, a contractor does not typically act with an intent to cause damage to property, directly or indirectly. This is certainly true when the alleged defect does not itself result in the damage, but is followed by additional events that in fact cause the damage. A contractor "intends" to drive a nail into a roof, but does not "intend" that water seeping in through the hole over the ensuing years cause damage to the attic. A contractor "intends" to add water while mixing concrete, but does not "intend" that years of chemical reactions and settlement create a weakened area in the structure. Indeed, as the *Merced* court's example of the car accident indicates, an act may still constitute an "accident" where a party engages in that act intentionally – for example, speeding – leading to

another, unintended event – hitting another car – that is directly responsible for the harm.

The *Merced* court's analysis further establishes that where a party intentionally engages in conduct with knowledge that such conduct carries a risk – as opposed to a certainty – of triggering events that may subsequently cause damage, the damage is still the result of an "accident" under a CGL policy. The speeding driver in the court's example would presumably be aware that his speeding carries an increased risk of hitting another car; however, hitting the car remains, as the court explains, an unintentional and fortuitous event, and thus an "accident" under a CGL policy. So it is with regard to a construction defect, where a contractor intentionally does work, even with knowledge that work may create a risk of further events that could lead to harm: the harm is nevertheless fortuitous and unintended, and the result of an "accident."

Much of the case law upon which the trial court and Navigators rely is either inapposite or supports Moorefield's position. Navigators relies in primary part upon cases addressing conduct that is itself harmful or directly intended to cause harm, such as intentionally punching a person in the groin, directly causing the victim harm (*State Farm Gen. Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 583) or kicking and hitting a person in claimed self-defense, also directly causing that person harm (*Delgado v. Interinsurance Exch. of Auto. Club of Southern Calif., supra*, 47 Cal.4th at

315-316). Here, Moorefield did not engage in such an act, nor did the damage result directly and immediately from the act. Such case law is of little utility in determining the effect of "intentional" conduct such as Moorefield's upon the application of a CGL policy.

Of greater utility may be *Geddes & Smith, Inc. v. St. Paul-Mercury Indem. Co.*, *supra*, 51 Cal.2d 558 ("*Geddes*"), in which the California Supreme Court held that the failure of a manufacturer's aluminum doors was an "accident" and within the coverage of a CGL policy because, although the manufacture of the doors was intentional, the failure of the doors was an "accident," *i.e.*, an "unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause." (*Id.* at 563-564.)

Following *Geddes*, in *Maryland Cas. Co. v. Reeder* (1990) 221 Cal.App.3d 961, the Court of Appeal reversed an order of summary judgment in favor of an insurer denying coverage under an "occurrence"-based CGL policy – which, like the Navigators Policy, defined "occurrence" as an "accident" – for soil subsidence that caused cracks in concrete and other structural elements of condominiums, as well as defective roofing systems that resulted in water damage to building structures and living areas. (*Id.* at 970-971.) The court held that "where the defect in fact has caused either physical injury to or the lost use of tangible property, liability coverage has been found" under such accident-

based policies. (*Id.* at 969-970.) Coverage likewise should be found under the Navigator Policy, where the failure of tiles installed by Moorefield caused undisputed property damage.

IV. THE "REASONABLE EXPECTATIONS" DOCTRINE REQUIRES THAT CONSTRUCTION DEFECTS CONSTITUTE "OCCURRENCES" UNDER CGL POLICIES.

Courts "generally interpret the coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured." (*Conway v. Farmers Home Mut. Ins. Co.* (1994) 26 Cal.App.4th 1185, 1191.) This rule of interpretation additionally requires that construction defects constitute "occurrences" under CGL policies such as the Policy here.

"[A] contractor buys CGL insurance . . . to protect itself against claims relating to its construction business." (French, "Construction Defects: Are They 'Occurrences'?," *supra*, 47 GONZ. L. REV. at 48.) As a result, "a contractor reasonably expects that it will be covered for construction defect claims brought against it because those are among the most common types of claims asserted against contractors." (*Ibid.*) Were this Court to hold otherwise, it would render illusory the coverage CGL policies are generally intended to provide.

As a commentator succinctly put it:

> Contractors reasonably expect that when they purchase CGL insurance to cover their business liabilities, they will receive coverage for liability claims relating to property damage

> arising out of their business activities. Such claims are often the result of alleged construction defects. Thus, if construction defects were not "occurrences" under CGL policies, then CGL policies would unfairly and impermissibly provide illusory coverage to contractors.

(French, "Construction Defects: Are They 'Occurrences'?," *supra*, 47 GONZ. L. REV. at 1.) Put another way, if CGL policies do not cover contractors for the potentially harmful consequences of their work, what coverage do they provide contractors at all? Apparently, Navigators believes the answer is "none." That cannot be – and, indeed, is not – the law in California.

V. THERE IS NO "MORAL HAZARD" BASIS FOR DENYING MOOREFIELD COVERAGE UNDER THE POLICY.

Navigators contends that "Moorefield's reckless, irresponsible, avoidable conduct is the kind of moral hazard insurers seek to avoid by limiting liability coverage to accidents." (Respondent's Brief at 10.) Navigators contends that "no fortuity exists under the facts of this case to establish coverage for Moorefield's lost gamble that it could place flooring prematurely without resulting damage," and that "[a] contrary finding" from this Court "would defy the facts and case law embodying the moral hazard principle, by not only encouraging, but rewarding Moorefield for undertaking a deliberate risk in the interest of profits." (*Ibid.*) Navigators' contention rings hollow.

"Moral hazard" is not a viable concern in the context of construction defects. As explained by one commentator:

> In addition to taking pride in a job well done, a contractor is incentivized to do its work well, despite the existence of liability insurance, in order to get paid for the work, obtain future work, and avoid claims and litigation. If the work is not done right, the contractor will not be paid; nor will the contractor be hired again. Further, even if the contractor is able to eventually recover from its insurer, very few litigants would describe litigation as a pleasant or valuable use of their time, particularly while they are trying to run a profitable construction business.
>
> Moreover, proponents of the "moral hazard" theory do not point to any empirical evidence that a contractor actually reviews his or her insurance policy to determine whether the insurance will cover the resulting damage before proceeding to do a job sloppily. In short, "moral hazard" arguments in the context of construction defect claims are based solely on theory, not empirical evidence.

(French, "Construction Defects: Are They 'Occurrences'?," *supra*, 47 GONZ. L. REV. at 43-44.)

Here, there is no evidence of which BILD is aware that Moorefield made any calculation to intentionally perform defective work, much less to do so because it had insurance. Indeed, Navigators' contention, if accepted, would potentially negate the insurance coverage of every insured contractor who performs work carrying even a remote risk of eventual property damage – which, given the realities of complicated construction projects, is all work.

In addition, public policy favors insurance coverage for construction defects:

> [T]here are other more tangible public policies favoring insurance recoveries for construction defects. For example, public policy favors compensating innocent victims. Thus, in situations where a homeowner would go uncompensated in the absence of the contractor's insurance (*e.g.*, the contractor is insolvent or judgment proof), public policy favors allowing the homeowner to recover insurance proceeds regardless of whether the contractor could have or should have done the work right in the first place.
>
> Another competing public policy is the enforcement of contracts, such as insurance policies, in accordance with their express terms. Indeed, as one court correctly noted in the context of analyzing whether insurance should be allowed to cover intentional torts, "[t]here is more than one public policy. One such policy is that an insurance company which accepts a premium for covering all liability for damages should honor its obligation." Because insurers draft the language contained in their policies, they do not need courts to resort to "public policy" arguments to help the insurers avoid coverage for the types of claims the insurers do not want to insure. The insurers can simply state in the insurance policy, in clear terms, the specific types of claims that are not covered. If the insurer fails to do that, then public policy favors enforcing the terms of the policy in favor of coverage.

(*Id.* at 44-45.) The same public policies apply here: Had Moorefield not installed the tiles when it did, Moorefield would have incurred substantial penalties, but, in addition, Best Buy could not have opened its store, Best Buy employees would not have had work, customers could not have had access to products, and Best Buy's landlord would not be paid rent, among other costs. By Moorefield's installing the tiles and completing the project, Best Buy could open its doors and earn revenue, Best Buy's employees

were able to work and earn income, customers could obtain products, and the landlord received rent, to name but a few benefits. The public policy balance plainly rests on the side of insuring the defect, and Navigators' "moral hazard" contention fails.

VI. CONCLUSION.

For all of the foregoing reasons, and as more fully set forth in the briefs filed by Moorefield, BILD urges the Court to reverse the trial court's judgment, and affirm contractors' reasonable expectations of coverage pursuant to their CGL policies.

Dated: September 14, 2015

RUTAN & TUCKER, LLP

By: _____
Gerard M. Mooney
Duke F. Wahlquist
Attorneys for Proposed Amicus Curiae BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION

CERTIFICATE OF WORD COUNT

Pursuant to and in compliance with Rule 8.204(c) of the California Rules of Court, I hereby certify that the foregoing , including footnotes, contains 3,225 words as counted by Microsoft Word.

Dated: September 14, 2015

RUTAN & TUCKER, LLP

By: _____
Gerard M. Mooney
Duke F. Wahlquist
Attorneys for Proposed Amicus Curiae BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-1931.

On September 14, 2015, I served on the interested parties in said action the within:

PROPOSED AMICUS CURIAE BRIEF

as stated below:

☒ (BY MAIL) by placing a true copy thereof in sealed envelope(s) addressed as shown on the attached mailing list.

In the course of my employment with Rutan & Tucker, LLP, I have, through first-hand personal observation, become readily familiar with Rutan & Tucker, LLP's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, I deposited such envelope(s) in an out-box for collection by other personnel of Rutan & Tucker, LLP, and for ultimate posting and placement with the U.S. Postal Service on that same day in the ordinary course of business. If the customary business practices of Rutan & Tucker, LLP with regard to collection and processing of correspondence and mailing were followed, and I am confident that they were, such envelope(s) were posted and placed in the United States mail at Costa Mesa, California, that same date. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on September 14, 2015, at Costa Mesa, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Carol Makenen
(Type or print name)

Carol Makenen
(Signature)

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E-Submission by Court of Appeal Fourth District