

**ORIGINAL**

**IN THE COURT OF CLAIMS  
STATE OF OHIO**

GRAND VALLEY LOCAL SCHOOL )  
DISTRICT BOARD OF EDUCATION, )  
et al., )

Plaintiffs, )

vs. )

BUEHRER GROUP ARCHITECTURE & )  
ENGINEERING, INC., et al., )

Defendants. )

CASE NO. 2014-00469 PR

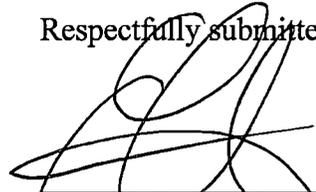
JUDGE PATRICK M. McGRATH

**MOTION FOR LEAVE ON BEHALF  
OF WESTFIELD INSURANCE  
COMPANY TO INTERVENE AS  
A NEW PARTY DEFENDANT**

Pursuant to Rule 24 of the Ohio Rules of Civil Procedure, Westfield Insurance Company ("Westfield") as a potential insurer through a policy of insurance issued to Boak & Sons, Inc., respectfully requests this Court to permit it to intervene as a New Party Defendant to pursue a claim for declaratory judgment. This action is necessary to protect Westfield's interest as a potential provider of liability insurance coverage. This motion is based on and supported by the attached Memorandum of Law in Support. A proposed Intervening Answer, Crossclaim and Counterclaim for Declaratory Judgment is attached hereto as Exhibit "A".

**ON COMPUTER**

Respectfully submitted,



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Counsel for Intervening Defendant  
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## **MEMORANDUM OF LAW AND SUPPORT**

### **I. STATEMENT OF FACTS**

Plaintiffs Grand Valley Local School District Board of Education, Ohio School Facilities Commission and State of Ohio (“Plaintiffs”) commenced this lawsuit in the Ashtabula County Court of Common Pleas seeking damages relating to the construction of a new PK-12 school building which occurred between 2001 and 2005.<sup>1</sup> The general contractor on the project was Jack Gibson Construction Limited (“Gibson”). Plaintiffs’ Complaint alleges that Gibson breached its contract by failing to construct the building in accordance with the plans and specifications, failing to correct defective materials and conditions, failing to perform repairs, and failing to perform in a workmanlike manner. (See generally Complaint). Plaintiffs further claim that Gibson breached express and implied warranties. Gibson filed a third party complaint against Boak & Sons, Inc. (“Boak”), the roofing subcontractor on the project, seeking contribution and indemnification. (See generally Third Party Complaint). Gibson alleges that Boak failed to perform in a workmanlike manner making it liable for the claims of Plaintiffs.

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<sup>1</sup> The action has been removed to this Court based upon a counterclaim filed against Plaintiffs.

Gibson further claims that Boak has a contractual obligation to defend and indemnify it and was required to name Gibson as an additional insured on its commercial general liability policy.

Westfield Insurance Company issued a Commercial Insurance Coverage policy of insurance to Boak bearing Policy No. TRA 1587667. Boak has submitted this claim to Westfield requesting a defense and indemnification for the claims asserted. Westfield is providing a defense to Boak under a reservation of rights. Based upon the state of Ohio law pursuant to the *Westfield Insurance Co. v. Custom Agri Systems, Inc.*, 133 Ohio St.3d 476 (2012), decision, Westfield believes that coverage is not triggered by the claims of Plaintiffs or Gibson since there is no “property damage” caused by an “occurrence”. Based upon the questions which exist regarding coverage, Westfield is seeking a right to intervene in this action to pursue a declaration of the coverage owed.

## II. ARGUMENT

Westfield seeks to intervene in the present action as a New Party Defendant to present issues of declaratory judgment concerning coverage to the Court. Westfield does not intend, nor does it anticipate, that its intervention in this lawsuit will result in prejudice to any of the parties.

Westfield is entitled to intervene in the present action as a matter of right pursuant to Civil Rule 24(A)(2) which provides in relevant part as follows:

- (A) Intervention of Right. Upon timely application, anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated so that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties. (Emphasis added.)

Civil Rule 24 requires that Westfield be permitted to intervene if it satisfies the elements in that Rule.

Civil Rule 24 is virtually identical to Federal Rule 24 which provides guidance for this Court. The Sixth Circuit Court of Appeals has “interpreted Rule 24(a) as establishing four elements, each of which must be satisfied before intervention as a right will be granted: (1) timeliness of the application to intervene, (2) the applicant’s substantial legal interest in the case, (3) impairment of the applicant’s ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court.” *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir., 1997)(citing *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir., 1993).

Westfield’s request to intervene in this action should be deemed timely. This lawsuit was filed in February of 2014 and is at its inception. The granting of intervention at this time will not prejudice any party and will permit the prompt determination of coverage prior to adjudication of the issues of liability and damages. If intervention is granted by the Court, Westfield does intend to submit the coverage issue to the Court for consideration as a matter of law pursuant to a motion for summary judgment.

The claims asserted by Plaintiffs against Gibson, as the general contractor for the construction of the Stadium, relate to alleged defects in the work and products supplied. Gibson is seeking indemnification for those claims against Boak and other subcontractors. The law of Ohio has become much clearer with regard to the lack of insurance coverage for such claims. The Supreme Court of Ohio in *Westfield Insurance Co. v. Custom Agri Systems, Inc.*, 133 Ohio St.3d 476, 2012-Ohio-4712, made clear that claims of faulty workmanship and defects in construction do not present covered property damage caused by an occurrence. Westfield submits that there are legal issues presented in this matter which require determination for purposes of coverage under the Westfield Insurance Company policy.

Westfield's substantial legal interest in this case, as well the potential for impairment of its ability to protect its interests, is based upon the Ohio Supreme Court's ruling in *Howell v. Richardson* (1989), 45 Ohio St.3d 365. In *Howell*, the plaintiff brought suit alleging that the defendant's act of shooting him was both negligent and intentional. At the conclusion of a bench trial, the trial judge determined that the defendant's actions were negligent. The plaintiff subsequently attempted to satisfy its judgment against defendant's insurer, State Farm. In that supplemental proceeding, the trial judge concluded that the determination of negligence had been resolved in the bench trial and that State Farm was bound by this determination. The Supreme Court on considering appeal of this issue held that an insurer should intervene if it wants to protect its interests:

The insurance company may legitimately decline to defend where it believes in good faith that its insured acted intentionally. It may nevertheless enter the action and participate as a third party defendant so as to defeat any liability on its part (*i.e.* by demonstrating that the acts of the insured, tortfeasor were intentional). It is this opportunity that must be seized. Otherwise, whether seized or not, the opportunity to litigate in the original matter will preclude re-litigation of liability in the supplemental proceeding. *Id.* at 367-68.

The Supreme Court also observed that collateral estoppel applies "to those in privity with the litigants and to those who could have entered the proceeding but did not avail themselves of the opportunity". *Id.* at 367. Based on the holding in *Howell*, Westfield has an interest in the present action as it will be bound by any factual determinations made by this Court that may affect the existence of coverage.

Subsequent decisions have applied the holding in *Howell* that, if the insurer does not enter the original action and participate, then it cannot re-litigate its liability in a subsequent action. *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514 (2007). Westfield acknowledges that the *Gehm* court did hold that although Westfield will not be prevented from re-litigating the

factual issues that are relevant to coverage if its present motion is denied, such action could lead to inconsistent results, and will not serve the interest of judicial economy. If insurer attempts to intervene but is denied such right, insurer is not precluded from litigation factual issues.

The final element which Westfield must satisfy to be entitled to intervention as a right is that its interests are not represented by the parties already before the Court. This burden is minimal and is met if the applicant shows that representation of its interests may be inadequate. *Foster v. Gueroy* (D.C. Cir., 1981), 655 F.2d 1319, 1325; *Bush v. Viterna* (5<sup>th</sup> Cir., 1984), 740 F.2d 350; and *Sanguine Ltd. v. United States Dept. of Interior* (10<sup>th</sup> Cir., 1984), 736 F.2d 1416, 1419. Westfield's interests are not represented in any way by the existing parties. The existing parties allegedly were principals in the acts which underlie Plaintiffs' claims and the Defendants' defenses. None of the existing parties is an insurer with interests similar to Westfield's. The existing parties are motivated to collect any judgment that may be awarded, and Westfield is motivated to ensure that only the coverage owed under the policy, if any, is provided.

Westfield submits that it is entitled to intervene as a right in this lawsuit. If the Court determines that Westfield is not entitled to intervention of right, Westfield requests that in the alternative it be permitted to intervene pursuant to Rule 24(B) of the Ohio Rules of Civil Procedure which provides:

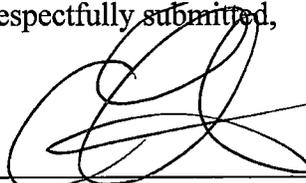
- (B) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action: (1) when a statute of the state confers a conditional right to intervene; or (2) when an applicant's claim or defense in the main action have a question of law or fact in common ... in exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Intervention is permissive under Civil Rule 24(B) where an applicant's claim or defense and the main action have a question of law or fact in common. The questions of fact presented by Westfield are in common with the questions of fact presented in the within matter.

III. CONCLUSION

For these reasons, Westfield Insurance Company respectfully requests the Court to issue an order granting it leave to intervene as a New Party Defendant in this lawsuit. A copy of Westfield's proposed Answer, Crossclaim and Counterclaim for Declaratory Judgment is attached hereto as Exhibit "A".

Respectfully submitted,



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Counsel for Intervening Defendant  
Westfield Insurance Company

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A copy of the foregoing was sent by ordinary U.S. mail this 17<sup>th</sup> day of July, 2014, to the following:

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Counsel for  
Third Party Defendant/Fourth Party Plaintiff  
Boak & Sons, Inc.

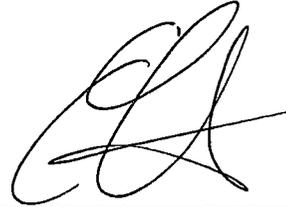
McMillian Construction Limited  
aka McMillian Construction Company  
c/o David O. McMillian  
26457 State Route 58  
Wellington, OH 44090  
Defendant

J. William Pustelak  
d/b/a Pustelak, Inc.  
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Third Party Defendant

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c/o Joseph Hirschmann  
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Fourth Party Defendant



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Cari Fusco Evans, Esq.

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c: David A. Beals, Esq./Richard Silk, Esq./Jerry K. Kasai, Esq.  
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Brian Buzby, Esq.  
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Stephen P. Withee, Esq./Ashley L. Oliker, Esq.  
Joseph A. Gerling, Esq./Scott A. Fenton, Esq.  
Patrick F. Roche, Esq.  
Cari Fusco Evans, Esq.  
McMillian Construction Limited aka McMillian Construction Company  
c/o David O. McMillian  
J. William Pustelak d/b/a Pustelak, Inc.  
Velotta Asphalt Paving Company, Inc.  
Hirschmann Construction Services, Inc. c/o John Hirschmann

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**Fischer, Evans & Robbins, Ltd.**  
**Attorneys At Law**

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July 17, 2014

*(Via Regular U.S. Mail)*

Mark Reed, Clerk of Courts  
Court of Claims of Ohio  
The Ohio Judicial Center  
65 South Front Street  
Columbus, OH 43215

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COURT OF CLAIMS  
OF OHIO  
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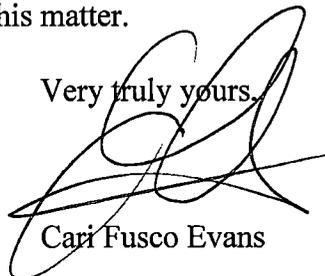
Dear Mr. Reed:

**Re: *Grand Valley Local School District Board of Education, et al.***  
***v. Buehrer Group Architecture & Engineering, Inc., et al.***  
***Court of Claims of Ohio***  
***Case No. 2014-00469 PR***

Enclosed you will find an original and two copies each of a Motion for Leave on Behalf of Westfield Insurance Company to Intervene as a New Party Defendant and a proposed Judgment Entry for filing with regard to the above-captioned matter. Please file the motion and deliver a copy of it along with the proposed judgment entry to Judge McGrath for his approval. After obtaining his signature, please file the judgment entry and return a date-stamped copy of each to the undersigned in the enclosed pre-addressed, stamped envelope. *Jac*

Thank you for your assistance in this matter.

Very truly yours,



Cari Fusco Evans

CFE:myb  
Enclosures

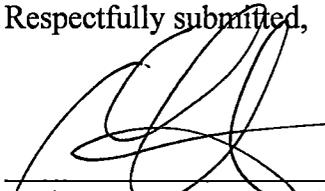
Mark Reed, Clerk of Courts  
Court of Claims of Ohio  
July 17, 2014  
Page 2

c w/encls: David A. Beals, Esq./Richard Silk, Esq./Jerry K. Kasai, Esq.  
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Velotta Asphalt Paving Company, Inc.  
Hirschmann Construction Services, Inc. c/o John Hirschmann  
Mr. Scott Covell (*Claim No. R-TRA-1587667-080311-B*)  
(*Via E-Mail Transmission*)

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Respectfully submitted,



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**CROSSCLAIM AND COUNTERCLAIM OF INTERVENING DEFENDANT  
WESTFIELD INSURANCE COMPANY**

Intervening Defendant Westfield Insurance Company (“Westfield”), for its Crossclaim against Defendant Boak & Sons, Inc. (“Boak”) and Counterclaim against Jack Gibson Construction Co. (“Gibson”) hereby states as follows:

1. Westfield is a duly chartered corporation licensed to do business, including the issuance of insurance policies, in the state of Ohio.
2. Westfield issued a Commercial Insurance Coverage Policy to Boak bearing policy No. TRA 1587667 (hereinafter “Westfield Policy”). A copy of the Westfield Policy is attached hereto as Exhibit “1”.
3. Grand Valley Local School District Board of Education, Ohio School Facilities Commission, and State of Ohio Through the Ohio School Facilities Commission (hereinafter “Plaintiffs”) have commenced this lawsuit alleging liability on the part of Gibson regarding a school construction project (“the Project”). The allegations in the Complaint are incorporated herein for purposes of stating the allegations made but not admitting the truth of those allegations.

4. Plaintiffs claim that Gibson committed breach of contract and negligence regarding the Project.

5. Gibson filed a Third Party Complaint which included claims against Boak. The allegations in the Third Party Complaint are incorporated herein for purposes of stating the allegations made but not admitting the truth of those allegations.

6. Boak has requested coverage, including a defense and indemnification, under the Westfield Policy of insurance for allegations that have been asserted by Plaintiffs and Gibson.

6. By virtue of the Complaint and Third Party Complaint in this case, all of the named parties herein may have an interest in the coverage action for declaratory judgment.

7. The policy of Westfield Policy contains Form CG 0001 1207 entitled "Commercial General Liability Coverage Form" which provides, in part:

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our own discretion, investigate any "occurrence" and settle any claim or "suit" that may result. ...

\*\*\*

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;"

(2) The “bodily injury” or “property damage” occurs during the policy period; ...

8. The Westfield Policy defines property damage as:

17. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

9. The Westfield Policy defines occurrence as:

- 13. “Occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

10. The Westfield Policy contains express exclusions from coverage as follows:

2. Exclusions

This insurance does not apply to:

b. Contractual Liability

“Bodily injury” or “property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

\*\*\*

j. Damage to Property

“Property damage” to:

\*\*\*

- 5. That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or

6. That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

\*\*\*

k. Damage to Your Product

“Property damage” to “your product” arising out of it or any part of it.

l. Damage to Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.”

\*\*\* [exception removed by Endorsement]

m. Damage to Impaired Property or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work;” or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

11. Westfield submits that the claims of Plaintiffs and Gibson are not covered by the Westfield Policy.

12. Westfield submits that the claims of Plaintiffs and Gibson are excluded based upon the clear and unambiguous exclusions contained in the policy including, but not limited to, those stated in the preceding paragraphs.

13. Westfield further submits that Boak may have failed to comply with all conditions and limitations contained in the policy thereby negating any potential coverage which may have existed thereunder.

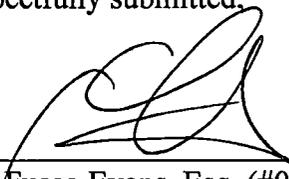
14. Based upon the conditions, limitations and exclusions contained in the Westfield policy including, but not limited to, those discussed herein, neither Gibson nor Boak is entitled to a defense or indemnification under the policy for any property damage alleged by Plaintiffs in the subject lawsuit.

WHEREFORE, Westfield Insurance Company respectfully requests this Court to enter judgment declaring as follows:

1. Westfield issued a policy of insurance to Boak & Sons, Inc. bearing Policy No. TRA 1587667.

2. Based upon conditions, limitations and exclusions contained in the Westfield policy, Westfield owes no obligation to Gibson or Boak to provide a defense or indemnification for any and all claims which have been asserted or could have been asserted in this lawsuit including, but not limited to, those set forth in the Complaint and Third Party Complaint herein.

Respectfully submitted,



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Defendant

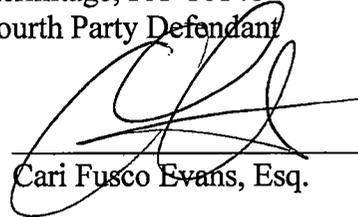
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