

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

2015 FEB -6 AM 10:36

IN THE COURT OF CLAIMS OF OHIO

GRAND VALLEY LOCAL SCHOOL)	CASE NO. 2014-00469-PR
DISTRICT BOARD OF EDUCATION, et)	
al.,)	
)	JUDGE PATRICK M. MCGRATH
Plaintiff/Counter Defendants,)	
)	
v.)	
)	
BUEHRER GROUP ARCHITECTURE &)	MOTION FOR LEAVE TO INTERVENE
ENGINEERING, INC., et al.,)	AS A NEW PARTY PLAINTIFF
)	
Defendants.)	

Pursuant to Rules 5 and 24 of the Ohio Rules of Civil Procedure, Erie Insurance Exchange ("ERIE"), respectfully moves this Court for leave to intervene as a plaintiff in this action. A supporting brief and proposed intervening complaint is attached and incorporated by reference herein. Respectfully submitted,


RANDY L. TAYLOR (0069529)
RTaylor@westonhurd.com
RONALD A. RISPO (0017494)
RRispo@westonhurd.com
Weston Hurd, LLP
 The Tower at Erievuew
 1301 East 9th Street, Suite 1900
 Cleveland, OH 44114-1882
 216.241.6602
 Fax 216.621.8369

*Counsel for Intervening Plaintiff
 Erie Insurance Exchange*

ON COMPUTER

BRIEF

I. PRELIMINARY STATEMENT

On May 15, 2014, this action was removed to this Court from the Ashtabula County Court of Common Pleas, Case No. 2014CVO161. On July 2, 2014, plaintiffs, Grand Valley School District Board of Education (“Grand Valley”), Ohio School Facilities Commission (“OSFC”) and State of Ohio (collectively “Plaintiffs”) filed an amended complaint in the within matter against Jack Gibson Construction Co. (“Gibson”). In response to the original complaint, Gibson filed third-party complaint (“Third-Party Complaint”) against Boak & Sons, Inc. (“Boak”) and J. William Pustelak (“Pustelak”), among others. On June 12, 2014, Boak filed a fourth-party complaint (“Fourth-Party Complaint”) against Hirschmann Construction Services, Inc. (“Hirschmann”).

Pustelak and Hirschmann each claim entitlement to a defense and indemnity under separate policies of insurance issued by ERIE. ERIE has heretofore paid the defense costs on behalf of said defendants, pending a determination of whether coverage is afforded under the policies at issue. ERIE’s investigation reveals that its policies do not afford coverage under the circumstances.

II. LAW AND ARGUMENT

The within motion has been served upon all parties pursuant to Civ.R. 24(C) along with a copy of the anticipated intervening complaint, the latter of which has been attached as Exhibit 1 thereto.

Rule 24(A) of the Ohio Rules of Civil Procedure provides that:

(A) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the

action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

As noted above, and in the attached proposed intervening complaint, ERIE has a right to intervene based on the fact that its rights and obligations regarding indemnification may be decided in part in the present case. Additionally, ERIE's duty to defend will terminate upon a decision finding that it has no duty to indemnify against the claims presented. Thus, while ERIE is exposed to potential liability for indemnification and is incurring defense costs day by day, its interests are not currently being represented in the present suit.

Intervention of right requires that the applicant show that its interests are not adequately represented by the existing parties. This burden is minimal and is met if the applicant shows that the representations of its interests may be inadequate. *Bush v. Viterna* (5th Cir. 1984), 740 F.2d 350, 355; and *Sanguine Ltd. v. U.S. Dept. of Interior* (10th Cir. 1984), 736 F.2d 1416, 1419. Once that minimal burden is met, Civ.R. 24(A) provides that the applicant, in this case ERIE, “. . . shall be permitted to intervene”. (Emphasis added).

The interests of Erie are not represented in any way by the existing parties. The existing parties all were principals in the acts which underlie Plaintiffs' claims. None of the existing parties are concerned with protecting ERIE's interests. Further, Pustelak and Hirschmann have demanded a defense in the present case. If ERIE is not allowed to intervene in the present action, the ultimate decision effectively could preclude the former an opportunity to litigate its coverage defenses.

The plaintiff in *Howell v. Richardson* (1989), 45 Ohio St.3d 365, alleged that the defendant's act of shooting him was both negligent and intentional. A bench trial resulted in a finding that the defendant's acts were negligent. The plaintiff subsequently sought to satisfy a judgment against the defendant's insurer. In the supplemental proceeding, the trial judge concluded that the determination of negligence had been resolved and the insurer was bound thereby.

The Ohio Supreme Court affirmed the decision, holding that an insurer should intervene if it wants to protect its interests, reasoning that:

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 relitigation of liability in the supplemental proceeding. [Id. at 367-68. Emphasis added.]

As noted above, issues relating to ERIE's alleged duty to defend and duty to indemnify will be addressed in the within matter, and should be resolved therein. Thus, ERIE must seize the opportunity to protect its interests by intervening.

Subsequent decisions have applied the holding in *Howell* that, if the insurer does not enter the original action and participate, then it cannot relitigate its liability in a subsequent action. In *Damario v. Doyle* (Jan. 11, 1991), Lake App. No. 89-L-14-082, 1991 WL 1586, Damario, after a jury trial, obtained a judgment against Doyle for damages resulting from an assault. The complaint alleged both negligent and intentional conduct. The trial judge

refused to instruct the jury on negligence and required Damario to prove an intentional tort.

When the judgment remained unpaid, Damario filed a supplemental petition against State Farm, Doyle's homeowner's insurer. State Farm moved for summary judgment on the basis of an intentional conduct coverage exclusion. The trial court granted State Farm's motion, concluding that the jury verdict of assault and battery established that Doyle's actions were intentional. In affirming the decision, the appellate court quoted *Howell*, in holding that collateral estoppel precluded Damario from relitigating the issue of intent. See also *Hendrix v. Nationwide Ins. Co.* (Dec. 11, 1991), Summit App. No. 15164, 1991 WL 262882. Because the issue of the insured's intent had not been determined, collateral estoppel did not preclude litigation of this issue in a supplemental petition against the insurer. See also *Prince v. Buckeye Union Ins. Co.* (Dec. 2, 1992), Richland App. No. 92-CA-6, 1992 WL 362578. If an insurance company does not participate in the original action, it cannot relitigate its liability in a subsequent supplemental action.

In *Sabbato v. Hardy* (5th App.), 2001 WL 842021, ERIE demonstrated it had an interest in the underlying tort action and was so situated that the disposition of that action may have impaired or impeded its ability to protect its interest unless it was permitted to intervene. Further, the appellate court noted that the denial of a motion for leave to intervene is a final appealable order, citing *Myers v. Basobas* (1998), 129 Ohio App.3d 692, 296; *Fairview Gen. Hosp. v. Fletcher* (1990), 69 Ohio App.3d 827, 830; *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, syllabus.

Other appellate districts have found that intervention is permitted “as a right” and must be granted to an insurance company in the same posture as the insured. In *Tomcany v. Range Const.*, 2004-Ohio-5314, the Eleventh District Court of Appeals held:

There is no reason to think that this matter could not have proceeded to trial as scheduled, with appellant's participation limited to that which it requested, or that appellant's participation would have prejudiced the parties. Permitting narrow intervention in the instant matter was the only practical means to allow these legal claims to be decided efficiently and consistently and without extreme prejudice to appellant.

Accordingly, the trial court abused its discretion by denying appellant's motion to intervene as of right, and appellant's first and second assignments of error are well-taken. We decline to address appellant's third assignment of error. We hereby reverse the judgment of the trial court, dissolve the stay previously granted in this matter, and remand this matter for further proceedings consistent with this opinion. [Id. at ¶¶45-47. See also *Cabot II-OHIMO6 LLC v. Franklin County Bd. of Revision*, 2007 Ohio Tax LEXIS 822 (Ohio B.T.A. June 15, 2007).]

Also in *Crittenden Court Apt. Assoc. v. Jacobson/Reliance*, 2005-Ohio-1993, the Eighth District Court of Appeals observed that:

In fact, issues determined in one proceeding at times may be given preclusive effect in a later proceeding. See *Grange Mut. Cas. Co. v. Uhrin* (1990), 49 Ohio St.3d 162, 550 N.E.2d 950; *Howell v. Richardson* (1989), 45 Ohio St.3d 365, 544 N.E.2d 878. Permitting narrow intervention in the instant case, by contrast, was the only practical means to allow all legal claims to be decided efficiently and consistently in one proceeding.

Under analogous circumstances, the court in *Peterman v. Pataskala* (1997), 122 Ohio App.3d 758, 702 N.E.2d 965, found intervention appropriate “due to the fact that appellants have no other method, available to them, to protect their interests. Such circumstances favor intervention.” Id. at 763, 702 N.E.2d 965. While intervention should not be allowed on mere demand, it is appropriate where it has been demonstrated that a particularized need to intervene as of right under Civ.R. 24(A) exists, that intervention would not cause any delay or disruption of the existing trial proceedings, that the intervening

party's participation at trial would be limited, and that no apparent prejudice would result from granting such limited intervention. On balance, we find the circumstances justifying Westfield and Fidelity's limited intervention far outweigh any circumstance that could justify excluding them from these proceedings. Accordingly, appellants' first and second assignments of error are sustained. (Id. at ¶¶25-6).

Accordingly, ERIE has the right to intervene in order to protect its respective interests in the underlying suit, lest its fate be determined in its absence. Further, the interests of justice and judicial economy would both be served by permitting the intervention sought by ERIE. Consequently, this Court should grant the within motion for leave to file a complaint for declaratory judgment.

The purpose of the intervening complaint on behalf of ERIE is not to delay these proceedings. Rather, ERIE merely seeks to protect its interests relative to: 1) its alleged duty to defend, as asserted by Pustelak and Hirschmann; and 2) its alleged duty to indemnify in light of the claims for coverage.

This case was only recently transferred to this Honorable Court. Pustelak only received service of the summons on October 14, 2014. Trial does not appear to be currently scheduled in this matter. The various parties will not incur any prejudice as a result of granting the within motion. ERIE is entitled to assert and protect its interests against a claim for coverage and duty to defend. Thus, Erie respectfully requests that this Court grant leave to intervene and to file an intervening complaint for declaratory judgment.

III. CONCLUSION

Accordingly, the Court should grant the within motion to intervene. A proposed Judgment Entry is attached for the benefit of the Court.

Respectfully submitted,



RANDY L. TAYLOR (0069529)
RTaylor@westonhurd.com
RONALD A. RISPO (0017494)
RRispo@westonhurd.com
Weston Hurd, LLP
The Tower at Erieview
1301 East 9th Street, Suite 1900
Cleveland, OH 44114-1882
216.241.6602
Fax 216.621.8369

*Counsel for Intervening Plaintiff
Erie Insurance Exchange*

CERTIFICATE OF SERVICE

A copy of the foregoing was served by regular U.S. mail on the 3rd day of February,

2015, upon the following:

David A. Beals, Esq.
Jerry K. Kasai, Esq.
Court of Claims Defense
150 East Gay Street, 18th Floor
Columbus, Ohio 43215
Counsel for Plaintiffs

Brian Buzby, Esq.
Porter, Wright, Morris & Arthur, LLP
41 South High Street
Columbus, Ohio 43215
Counsel for Hartford Fire Insurance Co.

McMillan Construction Limited
Aka McMillan Construction Company
c/o David O. McMillan
26457 State Route 58
Wellington, Ohio 44090

P. Kohl Schneider, Esq.
Gallagher Sharp
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, Ohio 44115
Counsel for J. William Pustelak

Patrick F. Roche, Sr., Esq.
Davis & Young
1200 Fifth Third Center
600 Superior Avenue, E.
Cleveland, Ohio 44114
Counsel for Defendants Boak & Sons, Inc

Velotta Asphalt Paving Company, Inc.
c/o Michael F. Velotta
640 West Acadia Pt.
Aurora, Ohio 44202

Brian C. Lee, Esq.
Reminger Co., L.P.A.
101 West Prospect Avenue, Suite 1400
Cleveland, Ohio 44115
*Counsel for Buehrer Group
Architecture and Engineering, Inc.*

Stephen P. Withee, Esq.
Ashley L. Oliker, Esq.
Frost Brown Todd, LLC
10 W. Broad Street, Suite 2300
Columbus, Ohio 43215
Counsel for Merchants Bonding Co.

Joseph A. Gerling, Esq.
Scott A. Fenton, Esq.
Lane, Alton & Horst, LLC
Two Miranova Place, Suite 500
Columbus, Ohio 43215
Counsel for Jack Gibson Construction Co.

Cari Fusco Evans, Esq.
Fischer, Evans & Robbins, Ltd.
3521 Whipple Avenue, N.W.
Canton, Ohio 44718
Counsel for Westfield Insurance Co.

Robert C. Kokor, Esq.
394 ST. RT. 7, S.E.
Brookfield, Ohio 44403
*Counsel for Hirschmann Construction
Services, Inc.*



RANDY L. TAYLOR (0069529)

IN THE COURT OF CLAIMS OF OHIO

GRAND VALLEY LOCAL SCHOOL)
DISTRICT BOARD OF EDUCATION, ET.)
AL.,)

Plaintiffs/Counter Defendants)

v.)

BUEHRER GROUP ARCHITECTURE &)
ENGINEERING, INC., ET AL.)

Defendants)

CASE NO. 2014-00469-PR

JUDGE PATRICK M. MCGRATH

**COMPLAINT FOR DECLARATORY
JUDGMENT**

Intervening Plaintiff, Erie Insurance Exchange (“ERIE”), pursuant to Rule 57 of the Ohio Rules of Civil Procedure, and §2721.01, *et. seq.*, of the Ohio Revised Code, for its Complaint for Declaratory Judgment against third-party defendant J. William Pustelak (“Pustelak”) and fourth-party defendant Hirschmann Construction Services, Inc. (collectively, “the ERIE insureds”) states as follows:

BACKGROUND

1. ERIE is an insurer licensed to issue insurance policies in the State of Ohio.
2. At all times pertinent hereto, Jack Gibson Construction Co. (“Gibson”) was the general contractor on a construction project involving a new PK-12 School Building located at 111 Grand Valley Ave. West, Orwell, Ohio 44076.



3. At all times pertinent hereto, third-party defendant/fourth-party plaintiff, Boak & Sons, Inc. (“Boak”) was an Ohio corporation, with its principal place of business in Youngstown, Ohio.
4. At all times pertinent hereto, third-party defendant Pustelak was a Pennsylvania corporation, with its principal place of business located in Waterford, Pennsylvania.
5. At all times pertinent hereto, fourth-party defendant Hirschmann was a Pennsylvania corporation, with its principal place of business located in Hermitage, Pennsylvania.
6. At all times pertinent hereto, fourth-party defendant Joseph Hirschmann was a resident of Pennsylvania and the owner/operator of Hirschmann Construction Services, Inc. (collectively “Hirschmann”).
7. On July 2, 2014, plaintiffs, Grand Valley School District Board of Education (“Grand Valley”), Ohio School Facilities Commission (“OSFC”) and State of Ohio (collectively “Plaintiffs”) filed an amended complaint in the within matter against Jack Gibson Construction Co. (“Gibson”), among others, seeking recovery for claimed property damage to property at 111 Grand Valley Ave. West, Orwell, Ohio 44076 (the “Project”) allegedly due to negligent design and construction.
8. In response to the Plaintiffs’ original claim brought in the Ashtabula County Court of Common Pleas (Case No. 2014CV0161), Gibson filed a third-party complaint against Boak and Pustelak (“Third-Party Complaint”), among others.
9. Gibson’s Third-Party Complaint includes the following general allegations:
 - On October 14, 2003, Gibson entered a contract with plaintiffs Grand Valley and OSFC for general trades work for the Project, at ¶6;
 - On October 23, 2003, Gibson entered into a subcontract with Pustelak to furnish materials and labor necessary to perform the masonry work during the Project, at ¶7;

- Plaintiffs filed an action in which they allege claims including breach of contract for failing to perform in a workmanlike manner, and breach of express and implied warranties against Gibson related to the work performed by the third-party defendants, at ¶10; and
 - Upon information and belief, Plaintiffs' claims include claims for defects in the construction of the masonry performed by Pustelak, at ¶11.
10. Gibson's Third-Party Complaint asserts the following claims against Pustelak:
- Breach of contract – to the extent it failed to perform in a workmanlike manner for which damages would include costs of repair and replacement of defective work, at ¶¶18-19;
 - Negligence – to the extent that Pustelak performed any work in an unworkmanlike manner, at ¶¶21-22;
 - Indemnity – for agreements to defend and hold Gibson harmless, at ¶24;
 - Contribution – for any failure to exercise reasonable care in the performance of its duties, at ¶27; and
 - Breach of express and implied warranties – for any breach of warranties due to deficiencies and defects in materials and/or workmanship, at ¶¶30-32.
11. On June 23, 2014, Gibson's Third-Party Complaint filed in the underlying suit was transmitted to this Court in light of removal of the case from the Ashtabula County Court of Common Pleas.
12. Upon information and belief, Pustelak completed its work on the Project in November of 2004.

13. In response to Gibson's Third-Party Complaint, on June 12, 2014, Boak filed a fourth-party complaint against Hirschmann ("Fourth-Party Complaint"), alleging that:
- Gibson subcontracted the roofing work on the Project to Boak, at ¶1;
 - On June 2, 2004, Boak and Hirschmann executed Purchase Order No. 4872 which subcontracted the roofing work on the Project to Hirschmann, at ¶2;
 - Hirschmann breached its subcontract with Boak by failing to perform in a workmanlike manner and to otherwise perform the work in compliance with Hirschmann's obligations as set forth in its subcontract with Boak, at ¶4;
 - If the roofing work was done in an unworkmanlike or otherwise negligent manner, then Boak is entitled to contribution from Boak, at ¶6; and
 - To the extent that any work performed by Hirschmann is deemed defective, Hirschmann is in breach of contractual and common law warranty obligations to Boak, at ¶7.
14. Upon information and belief, Hirschmann subcontracted the roofing work on the Project to non-party Todd Fabian Roofing, the latter of which actually performed and completed same sometime in 2004.
15. ERIE insured Pustelak under a commercial package policy, No. Q40-0152635, which was issued for the policy period of 4/1/07 to 4/1/08, but which cancelled on 11/1/07. ("Pustelak's ERIE Policy"). Ex. A.
16. Upon information and belief, the claimed damages alleged to be associated with the masonry work on the Project manifested after Pustelak's ERIE Policy cancelled.

17. ERIE insured Hirschmann under a commercial package policy, No. Q45-1650558, which was issued for the policy period of 12/5/05 to 9/16/06. (“Hirschmann’s ERIE Policy”). Ex. B. ERIE continued to insure Hirschmann until 9/16/08.
18. Upon information and belief, the claimed damages alleged to be associated with the roofing work on the Project manifested after Hirschmann’s ERIE Policy cancelled
19. Pursuant to Rule 57 of the Ohio Rules of Civil Procedure and §2721.01, et. seq., of the Ohio Revised Code, ERIE has a statutory right to file this lawsuit to determine its rights and duties under the Pustelak ERIE Policy and the Hirschmann ERIE Policy (collectively “the ERIE Policies”) with respect to the claims asserted against the latter in the Third-Party Complaint.
20. The ERIE Policies include several coverage forms, only one of which is even arguably relevant to the claims asserted in the Third-Party Complaint, i.e. the Commercial General Liability Coverage form (“CGL”).
21. ERIE’s CGL provides in pertinent part as follows:

SECTION I – COVERAGES

COVERAGE A . . . PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages.

- b. This insurance applies to . . . “property damage” only if:
 - 1) The . . . “property damage” is caused by an “occurrence” [defined in the policy as an “accident”] that takes place in the

“coverage territory”;

- 2) The . . . “property damage” occurs during the policy period;
and

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

. . . “property damage” expected or intended from the standpoint of the insured. . .

b. Contractual Liability

. . . “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- 1) That the insured would have in the absence of the contract or agreement; or
- 2) Assumed in a contract or agreement that is an “insured contract”, provided the . . . “property damage” occurs subsequent to the execution of the 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 on,

repaired or replaced because “your work” was incorrectly performed on it.

Paragraphs . . . 5) and 6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph 6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard”.

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 including in the “products operations hazard”.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

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.

n. **Recall Of Products, Work Or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- 1) “Your product”;
- 2) “Your work”; or
- 3) “Impaired property”;

If such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

2. **Duties In The Event Of Occurrence, Offense, Claim or Suit**

a. You must see to it that we are notified as soon as practicable of an “occurrence” or an offense which may result in a claim. To the extent possible, notice should include.

- 1) How, when and where the “occurrence” or offense took place;
- 2) The names and addresses of any injured persons and witnesses; and
- 3) The nature and location of any injury or damage arising out of the “occurrence” or offense.

b. If a claim is made or “suite” is brought against any insured, you must”

- 1) Immediately record the specifics of the claim or “suit” and the date received; and
- 2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

SECTION V – DEFINITIONS

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a contract or agreement;
- if such property can be restored to use by:
- a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
 - b. Your fulfilling the terms of the contract or agreement.

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

16. "Products-completed operations hazard":
- a. Includes all . . . "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
 - 1) Products that are still in your physical possession; or
 - 2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at

the earliest of the following times:

- a) When all the work called for in you contract has been completed.
- b) When all the work to be done at the job site has been completed if you contract calls for work at more than one job site.
- c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

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.

21. "Your product"

a. Means:

- 1) Any goods or products, other than real property . . . sold, handled, distributed or disposed of by:

- a) You;

b. Includes:

- 1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product;” and

22. “Your work”

a. Means:

- 1) Work or operations performed by you or on your behalf; and
- 2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- 1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”; and [CG 00 01 (Ed. 10/01) UF-9708, Ex. A and B.]

FIRST CLAIM FOR DECLARATORY JUDGMENT

12. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.
13. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter because the alleged damages were not “property damage” such that would trigger coverage under the Erie Policies.

SECOND CLAIM FOR DECLARATORY JUDGMENT

14. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.

15. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter because the alleged “property damage” was not caused by an “occurrence” such that would trigger coverage under the Erie Policies.

THIRD CLAIM FOR DECLARATORY JUDGMENT

16. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.
17. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter because the alleged “property damages” were expected or intended by the ERIE insureds.

FOURTH CLAIM FOR DECLARATORY JUDGMENT

18. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.
19. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter because the alleged “property damage” did not occur during the policy period of the Erie Policies such that would trigger coverage thereunder.

FIFTH CLAIM FOR DECLARATORY JUDGMENT

20. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.
21. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter because any conceivable coverage was precluded by the contractual liability exclusion under the Erie Policies.

SIXTH CLAIM FOR DECLARATORY JUDGMENT

- 22. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.
- 23. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter because any conceivable coverage was precluded by the contractual liability exclusion under the Erie Policies.

SEVENTH CLAIM FOR DECLARATORY JUDGMENT

- 24. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.
- 25. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter to the extent that the alleged “property damage” occurred during the performance of operations and arising therefrom.

EIGHTH CLAIM FOR DECLARATORY JUDGMENT

- 26. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.
- 27. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter because any conceivable coverage was precluded by the exclusion under the Erie Policies for property that must be restored, repaired, or replaced due to the insureds’ incorrect performance of work.

NINTH CLAIM FOR DECLARATORY JUDGMENT

- 28. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.

29. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter because any conceivable coverage was precluded by the exclusion under the Erie Policies for damage to “your product”.

TENTH CLAIM FOR DECLARATORY JUDGMENT

30. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.
31. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter because any conceivable coverage was precluded by the exclusion under the Erie Policies for “property damage” to “your work”.

ELEVENTH CLAIM FOR DECLARATORY JUDGMENT

32. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.
33. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter because any conceivable coverage was precluded by the exclusion under the Erie Policies for “property damage” to “impaired property”.

TWELTH CLAIM FOR DECLARATORY JUDGMENT

34. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.
35. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter because any conceivable coverage was precluded by the exclusion under the Erie Policies for recall of products, work or “impaired property”.

THIRTEENTH CLAIM FOR DECLARATORY JUDGMENT

36. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.
37. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter because any conceivable coverage was excluded for any damage resulting from or related to breach of contract or warranties or representations made with respect to the fitness, quality, durability performance or use of the ERIE insureds' work or product.

FOURTEENTH CLAIM FOR DECLARATORY JUDGMENT

38. ERIE incorporates, by reference, the preceding paragraphs of its complaint for declaratory judgment as if fully rewritten herein.
39. ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann relative to the claims against the latter to the extent they failed to comply with any of the terms or conditions of the ERIE Policies including, but not limited to, those set forth herein.

WHEREFORE, Plaintiff ERIE prays that this Court enter a judgment in its favor:

- A. Declaring the rights and duties of the parties to the policies of insurance issued by ERIE;
- B. Declaring that ERIE owes no duty to defend and/or indemnify Pustelak and/or Hirschmann with respect to the claims set forth in the lawsuit filed in the Court of Claims of Ohio, Case No. 2014-00469;
and

Respectfully submitted

RANDY L. TAYLOR (0069529)

RTaylor@westonhurd.com

RONALD A. RISPO (0017494)

RRispo@westonhurd.com

Weston Hurd LLP

The Tower at Erieview

1301 E. 9th Street, Suite 1900

Cleveland, OH 44114

(216) 687-3217

(216) 621-8369 (fax)

Counsel for Defendant

Erie Insurance Exchange

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was sent by regular mail upon the following on this
3rd day of February, 2015:

Randy L. Taylor

IN THE COURT OF CLAIMS OF OHIO

GRAND VALLEY LOCAL SCHOOL) CASE NO. 2014-00469-PR
DISTRICT BOARD OF EDUCATION, et)
al.,)
) JUDGE PATRICK M. MCGRATH
Plaintiff/Counter Defendants,)
)
v.)
)
BUEHRER GROUP ARCHITECTURE &) JUDGMENT ENTRY
ENGINEERING, INC., et al.,)
)
Defendants.)

This cause came to be heard on Erie Insurance Exchange's Motion for Leave to Intervene as New Party Plaintiff. Upon consideration of the Motion, the Court finds the Motion is well taken and, therefore it is:

ORDERED, ADJUDGED AND DECREED THAT Erie Insurance Exchange is permitted to intervene as a New Party Plaintiff.

IT IS SO ORDERED.

JUDGE PATRICK M. MCGRATH

Weston Hurd LLP
Attorneys at Law

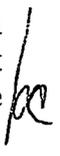
Randy L. Taylor
216.687.3242
RTaylor@westonhurd.com

February 3, 2015

Ohio Judicial Center
Court of Claims
65 South Front Street, Third Floor
Columbus, Ohio 43215

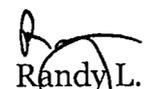
*Re: Grand Valley Local School District Board of Education, et al. v. Buehrer Group
Architecture & Engineering, Inc., et al.
Court of Claims Case No 2014-00469 PR*

Dear Sir or Madam:

In connection with the captioned matter, enclosed is an original and one (1) copy of a Motion for Leave to Intervene as New Party Plaintiff, along with a proposed Judgment Entry. Please file the original on our behalf and return a time-stamped copy in the envelope provided for your convenience. 

Please feel free to contact me should you have any questions.

Very truly yours,


Randy L. Taylor
RLT/clk
Enclosures

cc: All parties and counsel of record

The Tower at Erieview
1301 East 9th Street, Suite 1900, Cleveland, Ohio 44114-1862
tel 216.241.6602 ■ fax 216.621.8369 ■ www.westonhurd.com