

Nos. A04-1442 and A04-1612

State of Minnesota
 In Supreme Court

Wooddale Builders, Inc.,

Appellant,

vs.

Maryland Casualty Company, d/b/a Zurich North America,

Appellant,

vs.

American Family Insurance, and
 Western National Insurance Group,

Appellants,

and

West Bend Mutual Insurance Company, and
 American Economy Insurance Co. (SafeCo),

Respondents.

REPLY BRIEF OF APPELLANT WESTERN NATIONAL

Ted E. Sullivan (#122452)
 William L. Davidson (#201777)
 LIND, JENSEN, SULLIVAN
 & PETERSON, P.A.
 150 South Fifth Street, Suite 1700
 Minneapolis, MN 55402
 (612) 333-3637

James T. Martin (#68044)
 GISLASON, MARTIN
 & VARPNESS, P.A.
 7600 Parklawn Avenue South
 Suite 444
 Edina, MN 55435
 (952) 831-5793

Attorneys for Respondent SafeCo

Attorney for Appellant Western National

(Additional Counsel Listed on following page)

David Oskie (#144265)
James M. Hamilton (#167526)
OSKIE, REUTER, HAMILTON,
SOFIO & ZENTNER, P.A.
970 Raymond Avenue
Suite 202
St. Paul, MN 55114
(651) 644-8037

*Attorneys for Appellant American
Family Insurance Group*

Ernest F. Peake (#212453)
Chad A. Kelsch (#0300794)
LEONARD, O'BRIEN, SPENCER,
GALE & SAYRE, LTD.
100 South Fifth Street
Suite 2500
Minneapolis, MN 55402-1216
(612) 332-1030

*Attorneys for Appellant
Wooddale Builders, Inc.*

Andrea E. Reisbord (#22411X)
Peter G. Van Bergen (#112033)
COUSINEAU, McGUIRE &
ANDERSON, CHARTERED
600 Travelers Express Tower
1550 Utica Avenue South
Minneapolis, MN 55416-5318
(952) 546-8400

*Attorneys for Appellant Maryland Casualty
Company d/b/a Zurich North America*

Erik F. Hansen (#303410)
J. Robert Keena (#258817)
HELLMUTH & JOHNSON, PLLC
10400 Viking Drive, Suite 500
Eden Prairie, MN 55344
(952) 941-4005

*Attorneys for Defective Construction
Homeowners of Minnesota*

Gregory J. Johnson (#202678)
Klay C. Ahrens (#236913)
JOHNSON • PROVO-PETERSON, LLP
First National Bank Building
332 Minnesota Street, Suite W-975
St. Paul, MN 55101
(651) 227-2534

*Attorneys for Respondent
West Bend Mutual Insurance Company*

Jocelyn Knoll (#02298X)
Katie Pfeifer (#0309709)
DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
(612) 340-2600

*Attorneys for Builders Association of Minnesota, as
Umbrella Organization for Builders Association of
the Twin Cities and Minnesota Out State Builders
Association*

Thomas H. Boyd (#200517)
Christianna L. Finner, Esq. (#310724)
WINTHROP & WEINSTINE, P.A.
Suite 3500
225 South Sixth Street
Minneapolis, MN 55402
(612) 604-6400

*Attorneys for Amicus Minnesota Chamber of
Commerce*

Alan C. Williams, Esq. (#117328)
Assistant Attorney General
State of Minnesota
900 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101
(651) 296-7200

*Attorneys for the Office of the Minnesota Attorney
General's Office*

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INTRODUCTION

West Bend is to be commended for its deft efforts to make sense of and to defend the Court of Appeals' flawed rationale and decision. But the opinion is beyond redemption. As is evident from the avalanche of support¹ for the decision reached by the trial court, it is clear that Judge Blaeser's opinion is the one which most accurately states Minnesota law. For these reasons, the Court of Appeals' decision should be reversed, and the case remanded with directions that the trial court judgment be reinstated.

ARGUMENT

A. THE COURT OF APPEALS ERRED IN ALLOCATING DEFENSE COSTS PRO RATA BASED ON THE TIME ON THE RISK.

West Bend, the sole renegade on this issue, introduces a multitude of non-judicial (and non-precedential) cases to support its flawed position that defense costs should be allocated *pro rata* rather than equally. Its argument restates the holding of the Court of Appeals below that "the majority of jurisdictions that have addressed allocation of defense costs among consecutively liable insurers have held that defense costs should be apportioned according to the same methodology as indemnity costs." *Wooddale*, 695 N.W.2d

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With the exception of West Bend and the *Amicus* Defective Construction Homeowners of Minnesota (DCHM), every entity taking a position supports discovery as the appropriate end date for allocation, and supports the assertion that defense costs should be allocated equally among insurers on the risk. West Bend's position will be addressed in this Reply, and Western National notes only that the issues raised by the DCHM are not properly before this court and, therefore, should not be considered. See, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (appellate review limited to issues considered and decided by district court); *4Am. Jur. 2d Amicus Curiae, Section 7* (Amicus Curiae must accept the case before the Court with the issues made by the parties).

399, 406 (Minn.App. 2005), West Bend Brief, p. 31. Conspicuously absent, however, from both the lower court's opinion and West Bend's Brief is any discussion, let alone acknowledgment of *Iowa National Mutual Insurance Co. v. Universal Underwriters Insurance Co.*, 276 Minn. 362, 150 N.W.2d 233 (1967). There, this Court held that each insurer owes its insured an independent duty to defend, and that as such, there is no such thing as equitable contribution towards defense costs between insurers under Minnesota law. See, *St. Paul School Dist. No. 625 v. Columbia Transit Corp.*, 321 N.W.2d 41, 48 (Minn.1982)("We have specifically rejected contribution and subrogation as bases for recovery of attorneys fees in a similar case and we do so in this case." (citing *Iowa Nat'l*, 150 N.W.2d at 237)).

Support for the trial court's opinion rests not only with *Iowa National* and its progeny, but also from other decisions issued by this Court. In *Domtar, Inc. v. Niagra Fire Insurance Co.*, 563 N.W.2d 724, 739 (Minn. 1997), this Court stated that "when two or more insurers arguably have primary coverage for a claim, each should share equally in the insured's defense costs." (emphasis supplied)(citing *Jostens, Inc. v. Mission Insurance Co.*, 387 N.W.2d 161, 167 (Minn. 1986). West Bend, seeking to distance itself from *Jostens'* desolating language, takes liberty with it, by asserting in an edited quote that it applies only to concurrent, not consecutive insurers. West Bend Brief, p. 29. *Jostens* says no such thing. Indeed, it states clearly that defense costs are to be shared equally in all scenarios in which there are multiple primary insurers. *Jostens*, 387 N.W.2d at 167.

Clearly, Minnesota looks to an insurer's contractual obligation to defend, not to equitable principles, in refusing to allow contribution between insurers. Yet, it is the adoption of equitable contribution which forms the basis of all of the foreign jurisdiction cases relied upon by West Bend. See, e.g., *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 451 F.Supp. 1230, 1236-37 (E.D.Mich.1978), *aff'd*, 633 F.2d 1212 (6th Cir.1980), *aff'd on reh'g*, 657 F.2d 814 (6th Cir.1981), *cert. denied*, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981). Indeed, other jurisdictions that, like Minnesota, also refuse to recognize equitable contribution have rejected arguments identical to those put forth by West Bend here. See, e.g., *Texas Property and Casualty Insurance Guaranty Association/ Southwest Aggregates*, 982 S.W.2d 600, 607 (Tex. App. 1998)("We believe that *Forty-Eight Insulations* and its progeny are irreconcilable with [our Supreme Court's] holding that each insurer is fully liable to the insured for defense costs."); *United Services Auto. Ass'n v. State Farm Fire and Cas. Co.* 110 P.3d 570, 573 (Okla. App. 2004)("The doctrine [of equitable contribution] applies only when co-insurers have covered the same insured and the same particular risk at the same level of coverage. [However], the law in Oklahoma is [that] the duty of an insurance company to defend lawsuits against the insured is personal to each insurer, and that the insurer is not entitled to divide the duty nor require contribution from another insurer, absent a specific contractual right").

West Bend fails to recognize that the duty to defend is a contractual obligation, owed equally by each insurer, that Minnesota law places on primary insurers a duty of defense

which is far more expansive than the duty to indemnify, and that equitable considerations are irrelevant. It matters not whether the policies are consecutive or concurrent, and defense costs should be shared equally amongst Wooddale's insurers.

B. NOTICE IS THE PROPER END DATE FOR ALLOCATION IN CLAIMS INVOLVING CONTINUOUS TRIGGERS OF COVERAGE.

Western National is perplexed by West Bend's argument for remediation as the end date for allocating indemnification obligations. Indeed, West Bend appears to be putting forth an argument that arrives, ultimately, at the very assertion argued by Western National (and virtually all others) in this case, *i.e.*, that based on the "known risk doctrine", no insurer should be obligated to pay defense or indemnification costs on claims where notice was provided to its insured prior to the inception of the insurer's policy initiation date. See West Bend's Brief, pp. 22-24.

Simply put, West Bend appears to agree that the "known risk doctrine" is alive and well in Minnesota, and that it excuses an insurer's defense or indemnification obligations as to claims of which the insured was on notice prior to the insurer going on the risk.² Western National concedes (and has never argued otherwise) that notice of claims first

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Western National hastens to add that our appellate courts' discussion of the "known risk doctrine" in *Domtar* offers only guidance, not dispositive direction as it relates to the case at bar. Indeed, in *Domtar*, first the Court of Appeals and then this Court addressed a specific claim for specific coverage, and the insurer was asserting that the damage was known to the insured before that insurer's policy took affect. There, factual disputes precluded a final decision by either Court. Here, of course, we are addressing dozens of claims, some of which notice may have been provided to Wooddale prior to Western National's policy inception date, and some of which may have been provided after.

provided to Wooddale that predated Western National's policy termination date (November 13, 2002) would be covered under Western National's policy. Rather, it is notice of claims to Wooddale that predated the inception date of Western National's coverage (November 13, 2000) which Western National asserts should not result in a defense/ indemnification obligation on its part. West Bend apparently concedes as much. See, West Bend Brief, pp. 23-24.

Here, the Court of Appeals failed to recognize the significant problems that would be created by setting the remediation date as the end of the allocation period. The simplest and most efficient method of determining the termination date for the allocation period is the date the insured receives notice of the loss. That conclusion not only makes the most practical sense, but is consistent with this Court's decision in *Northern States Power Company v. Fidelity and Casualty Co. of New York*, 523 N.W.2d 657, 663 (Minn. 1994) (damages are "evenly distributed (or continuous) through each policy period from the first point at which damages occurred to the time of discovery, clean-up or whenever the last triggered policy period ended.") While this language may appear to provide the opportunity for contrary argument, in subsequent cases, such as *In Re: Silicone Implant Insurance Coverage Litigation*, 667 N.W.2d 405, 417 (Minn. 2003), this Court has reiterated the necessity that damages in "continuous trigger" cases are very fact dependent, so "trial courts

must be given the flexibility to apportion them in a manner befitting each case." *Id.* at 417, citing *NSP, supra*, 523 N.W.2d, at 663).³

It is axiomatic that from the moment a general contractor is notified by a homeowner that the home is suffering from water damage due to negligent construction activities, the general contractor's risk is no longer fortuitous; it is no longer an "accident". Rather, it is a claim for property damage, no different than a car accident pre-dating the inception date of an insurance policy. Under these circumstances, there is simply no basis for the Court of Appeals' conclusion that an "occurrence" took place, and the notice date is the only appropriate and functional end date for allocation.

C. WOODDALE MUST BE ASSESSED AN ALLOCATION PERIOD FOR CLAIMS RECEIVED AFTER ITS INSURANCE LAPSED.

There is no record evidence that any of the sixty or so claims that are at issue in this case were claims where notice was first provided to Wooddale after the expiration of its last insurance policy with Western National, November 13, 2002. Consequently, there was no reason to address or even contemplate how such claims should be handled. However, because the Court of Appeals has overruled the trial court and held that remediation is the end date for allocation, it is now proper, indeed imperative, that this Court address the issue,

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This Court's language from *In Re: Silicone* also demonstrates conclusively that the Court of Appeals' erred in applying a *de novo* review standard on this issue. As Western National argued in the Court of Appeals, the proper standard of review is a "abuse of discretion".

not only as it relates to Wooddale, but other general contractors in dozens, if not hundreds of lawsuits pending across the state of Minnesota.

At the outset, Western National submits that reinstatement of the trial court's decision on this issue will substantially limit the number of disputes that will exist when compared to the number that will be created if the Court of Appeals is affirmed. That, of course, is because the lower courts' decision to use remediation as the end date for allocation clearly extends the potential allocation period. In other words, remediation as an end date will always occur months, if not years after notice is first provided to the general contractor. Consequently, those are additional years and additional opportunities for disputes as to who should bear contribution obligations.

For purposes of the argument, an example helps to clarify the issue. Assume on the facts before the Court, that on June 15, 2003 Wooddale received notice from a homeowner that a home Wooddale built in 1995 was experiencing water infiltration problems. Clearly, had Wooddale chosen to procure another CGL policy with Insurance Company ABC for the calendar year after the expiration of Western National's policy, then, and in that event, insurer XYZ would be part of the allocation equation, as would the previous five insurers who are parties to this lawsuit. However, Wooddale chose not to procure any insurance after Western National's policy lapsed.⁴ Under those circumstances, Western National asserts that

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It is important to note that the record does not contain any evidence to support the various allegations put forth by both Wooddale and West Bend that Wooddale was unable to procure CGL policy coverage after the expiration of Western National's policy. Absent such record evidence, the

Wooddale (or any other contractor in its position) should be treated no differently than any of the insurers which provided coverage to Wooddale in the years going back to the closing on the 1995 home. To wit, it should be assessed an allocation period based on its time on the risk.

Both West Bend and Wooddale miss the mark when they refer to the parties' stipulation at the trial court level which stated that "insurers" would be liable for the pro rata time on the risk as it related to indemnification. Of course, at the time of the stipulation there were no claims submitted to Wooddale as part of the record which postdated Western National's policy expiration. Not surprisingly, there was no reason to raise this issue, let alone address and resolve it, and no weight should therefore be afforded to the trial court's use of the term "insurers" in that context.

Under these circumstances, and given the fact that these scenarios are likely to arise again and again in trial courts across the state, it is imperative for this Court to address the issue. *Agra Res. Coop v. Freeborn County Bd. of Comm'rs.*, 682 N.W.2d 681, 684 (Minn.App.2004) ("Appellate court, in its discretion, may review any matter in the interest of justice"). Here, Western National submits that builders such as Wooddale who choose not to continue to procure insurance must be treated no differently than had they obtained insurance. The alternative would be to encourage the discontinuation of coverage by contractors. While defense costs will not be an issue, general contractors that choose to go

only conclusion to be drawn is that Wooddale chose not to purchase CGL coverage.

uninsured should be put into the allocation mix when claims are submitted to them after the expiration of any applicable CGL insurance.

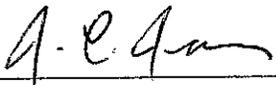
CONCLUSION

The Court of Appeals erred across the board in its decision. A review of Minnesota case law, public policy, and the arguments of the parties and *Amici* involved compels a conclusion that its decision should be reversed in total, and the trial court's judgment should be reinstated. Further, this Court should offer guidance on the role an insured must take in allocation when it chooses to let insurance lapse yet still receives additional water infiltration claims which post-date the lapse.

Respectfully submitted,

Dated: 11-3-05

GISLASON, MARTIN & VARPNESS, P.A.

By 
James T. Martin (#68044)
Julian C. Janes (#258635)
Attorneys for Appellant Western National
7600 Parklawn Avenue South
Suite 444
Edina, MN 55435
(952) 831-5793

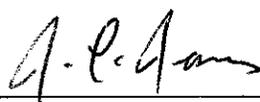
CERTIFICATION

I certify that this Brief conforms to RCAP 132.01 and was prepared as follows:

Proportional serif font - WordPerfect for Windows 8.0 - Times
New Roman Font face, font size 13. This Brief contains 2,469
words and is nine pages.

Dated: 11-3-05

GISLASON, MARTIN & VARPNESS, P.A.

By 

James T. Martin (#68044)

Julian C. Janes (#258635)

Attorneys for Appellant Western National

7600 Parklawn Avenue South

Suite 444

Edina, MN 55435

(952) 831-5793