

**STATE OF MICHIGAN  
IN THE SUPREME COURT**  
(On Appeal from the Michigan Court of Appeals)

HASTINGS MUTUAL INSURANCE  
COMPANY,

Plaintiff-Appellant/  
Cross-Appellee,

Supreme Court No. 131546  
Court of Appeals No. 265621  
Oakland Circuit No. 04-056508-CK

v.

MOSHER, DOLAN, CATALDO &  
KELLY, INC.,

Defendant-Appellee/  
Cross-Appellant,

and

LISA FEINBLOOM and DAVID FEINBLOOM,

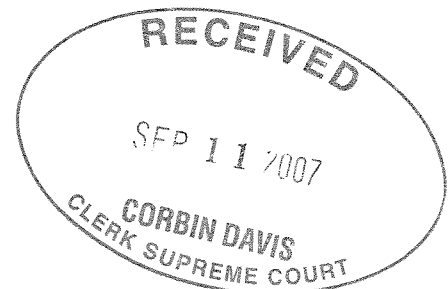
Defendants.

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**REPLY BRIEF OF APPELLEE/CROSS-APPELLANT**  
**MOSHER, DOLAN, CATALDO & KELLY, INC.**

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**TABLE OF CONTENTS**

Index of Authorities ..... ii

Introduction.....1

Reply Argument.....1

    I. Hastings’ argument about “faulty workmanship” is incorrect .....1

        A. There has been no finding of “faulty workmanship” .....1

        B. The mold growth was an occurrence because it was  
            an fortuitous natural event no intended or anticipated  
            by the insured.....2

        C. The fact that property damage allegedly arose from the  
            insured’s breach of warranty does not remove the accident  
            from liability coverage.....3

    II. The policy in effect at the time of the physical injury to tangible  
        property controls .....5

        A. Under the policy language, coverage is triggered when an  
            accident causes physical injury to tangible property .....6

        B. The cases relied upon by Hastings are distinguishable.....8

        C. Until now it has been undisputed that the visible mold grew  
            in 2001 .....8

    III. Issues regarding the other exclusions are not properly before the  
        Court at this time.....9

Relief Requested .....9

## INDEX OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Bituminous Casualty Crop v Bartlett</i> , 307 Minn 72; 240 NW2d 310, 313 (1976).....	3
<i>Bundy Tubing Co v Royal Indemnity Co</i> , 298 F2d 151, 153 (6th Cir. 1962) .....	3, 4
<i>Frankenmuth Mutual Ins Co v Masters</i> , 460 Mich 105; 595 NW2d 832 (1999) .....	2
<i>Harbor Ins Co, supra</i> at 912 F2d at 1524-1525.....	5
<i>Kalchthaler v Keller Constuction Co</i> , 224 Wis 2d 387; 591 NW2d 169 (Wis Ct App 1999).....	5
<i>Moss v Shelby Mut Ins Co</i> , 105 Mich App 671; 308 NW2d 428 (1981).....	8
<i>Ohio Casualty Ins Co v Terrace Enterprises, Inc</i> , 260 NW2d 450, 452 (Minn. 1977) .....	3

## INTRODUCTION

In the beginning of its brief, Hastings accurately sets forth the law applicable to insurance coverage issues. Just like any other contract, the terms of the insurance policy govern the parties respective rights and obligations. But Hastings' argument in the balance of its brief relies little on the actual policy language and instead falls back on case law. Hastings' case-law arguments are not especially helpful because the cases involve different facts and do nothing to illuminate the meaning of the actual language used in the policies at issue here. Mosher's position in this litigation, on the other hand, is supported by the plain meaning of the relevant policy language.

## REPLY ARGUMENT

### I. *Hastings' argument about "faulty workmanship" is incorrect.*

Hastings first argues that there was no "occurrence" in this case because "faulty workmanship" can never be an occurrence. Hastings' statement that the arbitrator found "faulty workmanship" is incorrect. The arbitrator made no such finding because he was not required to do so in order to find in favor of the Feinblooms on the breach of warranty claim. Moreover, mold growth is different than faulty workmanship because mold growth is an external, fortuitous, natural event—unlike, for example, a contractor's erroneous use of 2x2's where 2x4's are called for.

#### A. There has been no finding of "faulty workmanship."

Hastings brief assumes that the arbitrator found faulty workmanship by Mosher. This is not true. The arbitrator found that visible mold existed on the sub-floor material and joists above the basement when the Feinblooms took occupancy of the house. The "conduct" necessary for the Feinblooms to establish their breach of warranty claim against Mosher was the delivery of a structure out of compliance with the applicable

warranty. See Appendix p 37a. This was all that the arbitrator needed to find in order to establish a breach of warranty. See Appendix pp 36a-37a. The arbitrator also specifically found (1) that it was “irrelevant” whether Mosher was “negligent,” and (2) Mosher may have followed standard industry practices in the storage and erection of the framing material. Appendix p 37a. Accordingly, it is possible, based on the arbitrator’s findings, that the mold grew despite Mosher taking every step that it reasonably should have taken to avoid the mold growth. This possibility did not allow Mosher to avoid the Feinblooms’ breach of warranty claim because “faulty workmanship” was not a required element of that claim. But it also does not provide a factual basis for this Court to conclude—as Hastings suggests—that the mold grew as a result of “faulty workmanship” by Mosher.

B. The mold growth was an occurrence because it was an fortuitous natural event not intended or anticipated by the insured.

Mosher did not intentionally *put* visible mold onto the sub-floor material and joists above the basement. The mold grew on these surfaces as an external and natural force not controlled or directed by Mosher. Where the growth of mold itself is the physical injury, the event of the mold growth properly should be deemed an “occurrence” because it is an accident. The parties agree that the language of the policy controls the scope of coverage. The parties also agree that, under the policy, an “occurrence” is an accident. See Appendix p 71a. Although “accident” is not defined in the policy, the parties agree that it has been defined by Michigan courts to mean a fortuitous event that is not intended or anticipated by the insured. See, e.g., *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999) (holding that no occurrence exists when the insured intends to cause the harmful act, but that an occurrence exists when the

harmful consequences of an intentional act are not intended or anticipated). In this case, there is no dispute that Mosher did not intend or anticipate the growth of visible mold. Accordingly, the growth of visible mold—like any other unintended natural event causing damages— was an “occurrence.”

C. The fact that property damage allegedly arose from the insured’s breach of warranty does not remove the accident from liability coverage.

The purpose of liability coverage is to allocate the risk of lawsuits. If a homeowner negligently fails to remove ice from her front walkway, the fact of her negligence does not preclude her from relying on liability insurance coverage when the mail carrier sues. Likewise, if a driver’s negligent speeding contributes to an injury accident, he may still rely on his liability insurance coverage in the event of a lawsuit brought by a fellow motorist. The Sixth Circuit Court of Appeals, applying Michigan law, recognized that liability insurance would be essentially worthless if it did not provide coverage for injuries arising from the insured’s own breach of warranty:

The fact that the claims here involved breach of warranty or negligence did not remove them from the category of accident. [The insured] would not be legally obligated to pay a claim arising out of an accident occurring without its negligence or breach of warranty. If the liability policy were construed so as to cover only accidents not involving breach of warranty or negligence, then no protection would be given to the insured. The insured would not need liability insurance which did not cover the only claims for which it could be held liable. The word ‘accident’ is common in most liability policies and should not be construed in this type of case as not including claims involving negligence or breach of warranty.

*Bundy Tubing Co v Royal Indemnity Co*, 298 F2d 151, 153 (6th Cir. 1962); see also *Ohio Casualty Ins Co v Terrace Enterprises, Inc*, 260 NW2d 450, 452 (Minn. 1977), quoting *Bituminous Casualty Crop v Bartlett*, 307 Minn 72, 78; 240 NW2d 310, 313 (1976) (“A

construction contractor's liability is designed to protect him from fortuitous losses occurring in connection with his work. If property damages occurs because of mistake or carelessness on the part of the contractor or his employees, he reasonably expects that damage to be covered.”).

This result is consistent with the policy language which provides that the insured “will pay those sums that the insured becomes legally obligated to pay because of ‘bodily injury’ or ‘property damage.’” Appendix 61a, clause I.1.a. “Property damage” does not describe any specific legal theory, but instead refers to the actual “physical injury to tangible property” that gives rise to an underlying claim for damages. Appendix 71a, clause V.17.a. Accordingly, it is not the legal theory of the underlying complaint that matters, but whether the property damage happened by accident, as opposed to being intended.

The key policy provisions are the definition of “occurrence,” which simply states that an “occurrence” means “an accident,” and the definition of “property damage,” which is simply a “physical injury to tangible property.” Appendix p 71a. In short, if Mosher did not mean to put mold on the wood—which it indisputably did not—then the mold growth happened by accident and is an “occurrence.” If the mold on the wood constitutes a physical injury to tangible property—which it clearly does—then there is “property damage.” The plain language says so. Only by importing other, external considerations into the equation could a court conclude that the mold growth was not both accidental (whatever the causal agents) and a physical injury.

Without referring to any actual policy language, Hastings objects to a broad interpretation of “occurrence” because—according to Hastings—it would transform the

liability insurance policy into a “performance bond.” Hastings believes that this Court is not inclined to allow parties to freely enter into contracts amounting to “performance bonds.” But there is no law against entering into such an arrangement—if that is what the plain language actually called for. See *Kalchthaler v Keller Constuction Co*, 224 Wis 2d 387, 400; 591 NW2d 169 (Wis Ct App 1999) (holding that removing subcontractor’s work from the “your work” exclusion the insurance industry consciously decided to make liability insurance closer to a performance bond).

The conclusion that the term “occurrence” should be interpreted broadly to include property damage arising from faulty workmanship is supported by the text of the “Your Work” exclusion. As argued in Mosher’s primary brief, there would be no reason to expressly specify that the exclusion does not apply to work performed by subcontractors if work performed by subcontractors was not otherwise covered within the policies’ general coverage provisions.<sup>1</sup> Cf. *Harbor Ins Co*, *supra* at 912 F2d at 1524-1525 (applying the phrase “the exception that proves the rule” to an exclusion from an insurance policy in order to determine the scope of coverage). There also would have been no reason for Hastings to add the new “Damage to Work Performed by Subcontractors on Your Behalf” exclusion to the 2003 CGL policy if damage to work performed by subcontractors was not otherwise covered by the policy language.

**II. *The policy in effect at the time of the physical injury to tangible property controls.***

Hastings’ argues that the 2003 policy applies because the Feinblooms’ breach of warranty claim against Mosher accrued in 2003. This argument overlooks the actual

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<sup>1</sup> Section § I.A.2.1 of the 2001 and 2002 polices provided that coverage did not apply to “property damage” arising out of “your work,” but further provided that “[i]his 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.” (Emphasis added).

policy language. Under the language of the parties' insurance policy, neither the legal theory asserted by the underlying complainant nor the accrual date is relevant to determining when coverage is triggered. What matters is the date of the physical injury to the tangible property. Alternatively, Hastings asserts, for the first time in this case, that the growth of the visible mold may *not* have occurred in 2001. Hastings' new assertion is not consistent with the arbitrator's determination, upon which all parties have relied until now.

A. Under the policy language, coverage is triggered when an accident causes physical injury to tangible property.

Although Hastings initially acknowledges that coverage issues are governed by the policy terms, it ignores the policy terms when it argues that the 2003 Policy applies because the Feinblooms' breach of warranty cause of action against Mosher accrued during the 2003 policy period. Under the terms of the policy, neither the nature of the legal theory upon which the underlying complainant sues nor the date of accrual are relevant. Instead, the policy is triggered by the date of the *physical injury* to the *tangible property* that ultimately gives rise to a claim for damages. The following provisions govern the scope of coverage:

**I.A.1.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.*

\* \* \*

**I.A.1.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"; and
- (2) *The "bodily injury" or "property damage" occurs during the policy period.*

\* \* \*

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

\* \* \*

**V.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.

(Emphasis added).

Based on this language, the key date is when the “property damage” happened. Under I.A.1.b(2), it is the “property damage” that must occur during the policy period. (The requirement that the property damage result from an “occurrence” is a separate requirement unrelated to timing). Notably, “property damage” is not defined as (or by) the legal nature of the cause of action obligating the insured to pay damages. “Property damage” is defined as the actual *physical injury* to tangible property. In this case, it is undisputed that the *physical injury* was the growth of the mold, not the breach of warranty.

The date of delivery of occupancy is irrelevant because the nature of the underlying complainant’s legal theory plays no role in the triggering of coverage. The date of delivery of occupancy is also an arbitrary date because it has no bearing on the Feinblooms’ ownership of the offending property. As the owners of the underlying real estate upon which the house was being constructed, the Feinblooms owned the offending

joists as soon as they were installed in the structure and (as a result) incorporated as a fixture into their real estate. This occurred in 2001.

B. The cases relied upon by Hastings are distinguishable.

Hastings cites a number of cases, primarily *Moss v Shelby Mut Ins Co*, 105 Mich App 671, 679; 308 NW2d 428 (1981), for the proposition that an occurrence happens when the complaining party was injured as opposed to when the wrongful act occurred. Aside from the fact that these cases cannot trump the plain language of the policies at issue, which clearly triggers coverage based on the timing of the physical injury to the property, these are distinguishable because they address a different problem. They stand for the unremarkable proposition that an “occurrence” happens at the time of the property damage and not at the time of the insured’s negligence. Mosher agrees with this, but contends that the physical injury to the property (i.e. the growth of the visible mold) happened in 2001, not 2003 as Hastings now claims.

C. Until now it has been undisputed that the visible mold grew in 2001.

The arbitrator held that mold can grow within 48 hours of water saturation. The Feinblooms claimed that the water saturation happened during the 16-week framing period, which occurred in 2001. The arbitrator concluded that Mosher *installed* defective material (i.e., joists containing visible mold) into the residence. Appendix p 37a. It is undisputed that the installation of the joists occurred during the framing period in 2001. Accordingly, the arbitrator found that the physical damage to the Feinblooms’ joists happened in 2001. Therefore, the 2001 Policy applies.

**III. *Issues regarding the other exclusions are not properly before the Court at this time.***


This Court's grant order set forth three specific questions to be briefed: (1) whether there was an occurrence, (2) application of the "Your Work" and "Fungi" exclusions, and (3) the controlling policy years. The grant order did not allow for briefing on exclusion 2(m), exclusion 2(n), or the pollution exclusion. Until now, Hastings has not raised the pollution exclusion. Mosher's response to 2(m) and 2(n) are set forth in its reply brief in support of its cross application.

**RELIEF REQUESTED**

For the reasons stated, this Court should reverse the decision of the Court of Appeals and reinstate the judgment of the trial court granting summary disposition to Mosher. In the alternative, the Court should reverse the decision of the Court of Appeals and remand for resolution of any remaining questions of fact.

Respectfully submitted,

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