STATE OF OHIO	)	IN THE COURT OF COMMON PLEAS
	)SS:	
CUYAHOGA COUNTY	)	CASE NO. CV-484139

THE OAKWOOD CLUB	)	
	)	
	)	
Plaintiff	)	-
	)	
vs.	)	**OPINION AND ORDER**
	)	
KINNEY GOLF COURSE DESIGN, ET AL	)	
	)	
	)	
Defendants	)	

MICHAEL J. RUSSO, JUDGE:

This matter comes before the Court upon the Complaint for Declaratory Judgment filed by Intervenor Westfield Insurance Company ("Westfield"). The matter was tried to the Court upon stipulated facts and argument thereon was had on October 29, 2004. For the following reasons, the Court finds that Westfield has a duty to defend Ohio Valley Group Inc. ("Ohio Valley") against claims asserted by The Oakwood Club ("Oakwood") in Case No. CV 04 542368. The duty to indemnify will be determined by a jury interrogatory only if Ohio Valley is found to be liable.

FACTS

On September 8, 2004, Plaintiff Oakwood filed a Complaint against Defendants Kinney Golf Course Design and Ohio Valley. The Complaint alleges that on December 9, 1994 and October 1, 1996, Oakwood entered into agreements with Ohio Valley's predecessor, Ohio Valley

Landscape and Design, to provide labor and equipment for construction and recontouring of bunkers for the Bunker Renovation Project on the Club's golf course. (Complaint ¶ 9). Oakwood discovered in 2001 that the drain tiles apparently were installed incorrectly by Ohio Valley and, as a result, the bunker drainage systems were not functioning properly. (Complaint ¶ 10). In Count III of the Complaint, Oakwood alleges that, as a direct and proximate result of Ohio Valley's negligent failure to perform its bunker renovation duties in a workmanlike manner and in accordance with industry standards, the golf course has suffered physical damage. The cost to repair the damage is expected to be in excess of $400,000. (Complaint ¶ 17). Count IV of the complaint alleges breach of contract. (Complaint ¶¶ 19-20).

During the years relevant to Oakwood's Complaint, Westfield issued successive commercial insurance policies to Ohio Valley. (See Policy No. CWP 3 640 696). The parties have stipulated that the copy of the policy attached to Westfield's Combined Motion to Dismiss/Motion for Summary Judgment (at Appendix A) is a true and accurate copy of the original policy issued to Ohio Valley, effective July 7, 1994 to July 7, 1995. The parties also have stipulated that the copy of the policy attached to Westfield's Declaratory Judgment Complaint (at the Appendix) is a true and accurate copy of the original policy issued to Ohio Valley, effective July 7, 1995 to July 7, 1998. All policy provisions pertinent to the matter before the Court are identical in the aforementioned policies. (See Joint Trial Stipulations of the Parties).

Westfield argues that the alleged property damage was not caused by an "occurrence" as required to provide coverage. In the alternative, Westfield argues that even if the alleged property damage has been caused by an "occurrence", then the exclusions within the policy avoid coverage. Ohio Valley, on the other hand, argues that the allegations in the Complaint are an

"occurrence" under the policy and that the exclusions do not apply, such that Westfield owes a duty to defend. Further, Ohio Valley claims that it purchased the "products-completed operation hazard" endorsement, which is an exception to the "your work" exclusion relied upon by Westfield.

ANALYSIS

The Ohio Supreme Court has considered an insurer's duty to defend where the complaint does not clearly bring the matter within the coverage of the policy and has held:

> Where the insurer's duty to defend is not apparent from the pleadings in the action against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim.

Willoughby Hills v. Cincinnati Ins. Co. (1984), 9 Ohio St.3d 177, at the syllabus. Under the policy at issue, Westfield has agreed to defend and indemnify Ohio Valley for property damage caused by an "occurrence" unless the damage is otherwise excluded in the policy. Here, Westfield's policy provides, in pertinent part:

> **SECTION I - COVERAGES**
>
> ***
>
> **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:
> i) The…"property damage" is caused by an "occurrence" that takes place in the "coverage territory;" and
> The …"property damage" occurs during the policy period.
>
> [Appendix A – Bates no.56]

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SECTION V – DEFINITIONS

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

15) "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.

[Appendix A – Bates nos.65-66]

The threshold issue the Court must address is whether the allegations contained in the Complaint constitute an "occurrence," such that coverage may be triggered. Westfield disputes that any liability arises, in the first instance, because the claimed negligence or defective workmanship does not constitute an "occurrence". There is abundant case authority in Ohio which holds, however, "that allegations that a contractor failed to fulfill its duties in constructing or designing that which it constructed, constitute an 'occurrence' …" *Acme Construction Co., Inc. v. Continental National Indemnity Co.,* No. 81402, 2003-Ohio-434, 2003 WL 194879 (Ohio Ct. App. 8th Dist.). *See also, Zanco, Inc. v. Michigan Mutual Ins. Co.* (1984), 11 Ohio St.3d 114, 115-116; *Erie Insurance Exchange v. Colony Development Corporation* (1999), 136 Ohio App.3d 406, 415; and, *Ohio Casualty Ins. Co. v. Joseph Sylvester Constr. Co.* (Sept. 30, 1991), Trumbull App. No. 90-T-4439, 1991 WL 206628.

In this case, Oakwood's Complaint alleges negligence and breach of contract against Ohio Valley; it does not allege that any action was done with the intent or expectation of causing harm. Oakwood's allegations thus "potentially or arguably" fall within the policy's general liability

coverage for property damage caused by an "occurrence" (i.e., an accident). As the Eighth District Court of Appeals noted in *Acme*, *supra at* ¶ 13, "[t]he reason commercial general liability insurance policies do not provide coverage for claims against a contractor stemming from allegedly poor workmanship is because the policies contain *exclusions for such coverage,* not because the underlying conduct of a contractor does not constitute an 'occurrence'." In accordance with the rationale expressed in *Acme,* this Court finds that the alleged negligent failure of the insured to perform the bunker renovation in a workmanlike manner in accordance with industry standards, which led to physical damage to the golf course, constitutes an occurrence.

As the Court has determined the threshold issue that the allegations contained in the Complaint constitute an "occurrence" potentially triggering coverage, the Court next must examine the exclusions to determine whether coverage is excluded. While there are a number of exclusions within the policy, the only exclusion that arguably may apply in this instance is the "your work" exclusion. The policy provides, in pertinent part:

> **SECTION I - COVERAGES**
> ***
> **Exclusions**
> This insurance does not apply to:
> ***
> **j. Damage to Property**
> "Property damage" to:
>
> 6. That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
>
> ***
>
> Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."

[Appendix A – Bates no. 52]

SECTION V – DEFINITIONS

14. a. "Products-completed operations hazard" includes all "bodily injury" and "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.

15. "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.

19. "Your work" means:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

[Appendix A- Bates nos.59-60][1]

Courts have consistently recognized that the "your work" or "work performed" exclusion in a commercial general liability policy eliminates the duty of an insurance company to defend against allegations that its insured's work must be repaired or replaced. *See Acme, supra* (holding no duty to defend where the allegations in the complaint were that the sewer system, which had been designed and installed by the plaintiff, was defective and had to be replaced); *Hahn's Electric Company v. Cochran,* Nos. 01AP-1391, 01AP-1394, 2002-Ohio-5009, (Ohio Ct. App. 10th Dist.) (holding no duty to defend where the damages alleged in the counterclaim were

1 Ohio Valley paid an additional premium for the "products-completed operations hazard," which is an exception to the "your work" exclusion.

limited to repair, replacement and/or completion of the electrical work performed by the insured); and *Zanco, supra* (holding no duty to defend when the counterclaim alleged that the plaintiff breached its duty to construct condominiums in a workmanlike manner, thereby causing defects in the structure, and plaintiff did not deny the defects).

While there is an exclusion in the policy issued by Westfield to Ohio Valley for work performed incorrectly by the insured, the policy also contains an exception to the exclusion for "products-completed." In *Erie Insurance Exchange v. Colony Development Corporation* (1999), 136 Ohio App.3d 406, 415-416, the court discussed the "work performed exclusion" and noted:

> "[t]his exclusion in a policy generally operates to ensure that '[d]amage resulting from a contractor's own work usually is excluded as liability insurance should not be a warranty or performance bond for general contractors.' *Panzica Constr. Co. v. Ohio Cas. Ins. Co.* (May 16, 1996), Cuyahoga App. No. 69444, unreported, 1996 WL 257470. 'This is to discourage careless work by making general contractors pay for any losses caused by their own work.' *Id.* The exclusion, however, operates to exclude coverage only for damage to the work of the insured; it does not exclude coverage for collateral damage to other property."

Thus, courts have recognized that when there are allegations of collateral damage to property other than the work performed, coverage will not be excluded. *See Erie, supra* (holding the "work performed exclusion" did not excuse the insurer from defending where the allegations of damage was more than just the work performed by the insured but included collateral damage to the surrounding landscape); and *Akers v. Beacon Ins. Co. of America* (Aug. 31, 1987), Marion App. No. 9-86-16, 1987 WL 16260 (holding the insurer was obligated to defend where there were allegations that water damage occurred in a residence when the contractor negligently repaired the roof and installed skylights). Similarly, in *Spears v. Smith* (1996), 117 Ohio App.3d 262, where damage arose after the insured's completion of construction and the damage was

done to the subcontractor's work, the court found the "completed operations" exception to the "your work" exclusion applicable and held the insurer had a duty to defend the general contractor.

In this case, the Complaint does not limit Oakwood's claims to repair or replacement of the drain tile in the bunkers, but specifically alleges collateral damage (i.e., damage to the golf course in an amount in excess of $400,000). The property damage alleged falls squarely within the "products-completed operations hazard" exception to the "your work" exclusion, since the property damage occurred away from the Ohio Valley's premises and arose out of the work performed by Ohio Valley. Therefore, the Court finds that Westfield has a duty to defend Ohio Valley on the complaint filed by Oakwood.

The Court recognizes that since Westfield has a duty to defend, the next issue is the duty to indemnify. It is axiomatic that an insurer's duty to indemnify is separate and distinct from its duty to defend. The duty to indemnify only arises if liability in fact exists under the policy. *Chemstress Consultant Co., Inc. v. Cincinnati Ins. Co.* (1998), 128 Ohio App.3d 396, 402. The insurer's ultimate obligation to indemnify is premature until facts regarding potential liability are revealed during the defense of the litigation. The specific nature of the damages, if any, suffered by Oakwood can be determined by an interrogatory posed to the jury.

Accordingly, the Court hereby declares that under Policy CWP 3 640 696, issued successively by Westfield to Ohio Valley, that Westfield owes a duty to defend Ohio Valley in the lawsuit brought by Oakwood. The duty of Westfield to indemnify Ohio Valley will be determined at the trial of Case No. CV 04 542368.

IT IS SO ORDERED.

DATE: MICHAEL J. RUSSO, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing **Opinion and Order** has been sent by regular U.S. Mail this ____ day of April, 2005 to: Randy L. Taylor, Esq., 2500 Terminal Tower, 50 Public Square, Cleveland, Ohio 44113-2241, Counsel for Intervening Plaintiff Westfield Insurance Company, and Kathleen B. Dangelo, Esq., P. O. Box 75, Novelty, Ohio 44072, Counsel for Defendant The Ohio Valley Group, Inc. fka Ohio Valley Landscape & Design, Inc.

MICHAEL J. RUSSO, JUDGE