THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
In the Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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S.C. Supreme Court

Opinion No. 5061 (S.C. Ct. App. filed December 12, 2012)

William and Mary Frances Walde
as assignees of Johnson Construction
Company of Aiken, Inc., ... Petitioners.

v.

Association Insurance Company, ...Respondent.

PETITIONERS' REPLY
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. Respondent Improperly Reargues Points to Which is it Bound by the Law of the Case

Respondent continually throughout its Return states the incorrect factual predicate for its arguments that Johnson's work in advising the Board was part and parcel of its work in locating and constructing the barn, i.e., there was one continuous project. *See* Respondent's Return, pages 7-8, 9-10, and 12-15. In doing so, Respondent simply restates arguments that were rejected by the Trial Court but which were not appealed by Respondent and thus became law of the case as the Court of Appeals ruled. The Court of Appeals ruled that the law of the case required it to hold that there were two separate contracts, the Permitting Contract (and thus the Permitting Work arising thereunder) and the Construction Contract (which was the actual construction of the barn), and the performances under each were separate. *See* Opinion, Appendix 2, n. 1; 13, n. 9. The Respondent cannot now change this law of the case.[1]

Further, the Respondent's Return for the first time since arguments before the trial court raises factual argument with regard to the interpretation of the Arbitration Demands, and some that were not so raised anyway. *See, e.g.*, Respondent's arguments in the first and second full paragraphs on page 13 of its Return.

Thus, this Court, as did the Court of Appeals, must consider the facts as established by the law of the case, not Respondent's arguments that while it may (or may not) have made before the trial court, failed to preserve on appeal. The facts which the Respondent must use are those established within the framework of the appellate rules and error preservation rules; it is not allowed by those rules to reargue points not preserved for this Court.

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[1] Respondent claims to have raised the issue with the Court of Appeals. *See* Return, pp. 18-19. Respondent may have mentioned it to the Court of Appeals , but did not argue it before either the Trial Court or the Court of Appeals. Such conclusory statements are not arguments that preserve an issue for appeal. *Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.E.7, 17 n.5, 620 S.E.2d 326, 332, n.5 (2005).

Finally, Respondent argues that it did properly raise the definition of "physical injury" as defined in the Policy, citing to its repeated statements in its Appellants Brief that no property damage was alleged. *See* Return, pp. 6-7. Appellant mentioned the term "physical injury" once in its Brief.[2] Its arguments on "property damage" made no effort to define, explain, or provide any legal support for a definition of "physical injury." Correspondingly, Petitioners made no attempt in their Reply Brief to argue the definition of "physical injury" as there was nothing in the Appellant's Brief to argue against, other than mere conclusory statements. It is exactly that sort of situation for which the rule exists that the Courts do not review issues not properly raised. *See Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.E.7, 17 n.5, 620 S.E.2d 326, 332, n.5 (2005); *Fields v. The Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E. 2d 283, 285 n.3 (Ct. App. 1993). The first time Petitioners were on notice of such an issue and the first time they had the opportunity to brief it was in the Petition for Rehearing. *See* Petition, Appendix pp. 17-20. The "physical injury" red herring is a textbook example of a 'conclusory argument' and should be rejected as such.

II. Respondent Continues to Confuse the Distinction Between the Permitting Contract Work being Complete Before the Barn was Constructed under the Construction Contract; thereby ignoring that 'Physical Injury' did not occur to the Work from the Permitting Contract (i.e., the Permit) but rather that 'Physical Injury' from the Permitting Contract occurred to the Barn.

The key mistake made by Respondent in nearly every argument made in its Return (and at times by the Court of Appeals as noted in the Petitioners' Writ) was the failure to comprehend the logical coverage distinction between Johnson's negligent performance of services, i.e., advice and representation before the BZA, and Johnson's construction of the barn. These two separate projects create an "occurrence" as defined in the Policy (the negligent representation

[2] By its own admission, Respondent stated only in its Appellate Brief: "nothing in this Demand sets forth any allegations that the building at issue was physically injured..." (Return to Petition for Rehearing, Appendix p. 25.) That is the extent of Respondent's 'argument' on this issue.

before the BZA, and then "physical damage" to the barn which was not part of the Permitting Work performed when the occurrence happened. Again, the law of the case is that these are two separate, unrelated acts and occurrences. Nothing about Johnson's construction of the barn was defective; there is no allegation that the product Johnson constructed was improper. However, Johnson's properly constructed barn was damaged because of Johnson's prior negligent representation before the BZA. The physical damage to the barn was caused by an occurrence that was not part of the construction of the barn, thus distinguishing these facts from the common construction coverage case.

For example, if the Waldes had hired "Acme Construction," an entity wholly unrelated to Johnson, to build the barn instead of Johnson, there would be no argument that Johnson's negligent advice under the Permitting Contract would be an occurrence and the remedial measures to repair the barn built by "Acme Construction" would be physical injury to the barn. The negligent advice and representation arising from the Permitting Contract would result in coverage for physical damage to property. Here, Respondent and the Court of Appeals keep assuming that all the events and circumstances flow from one occurrence and one contract, <u>but that is not the law of the case.</u> <u>That is not the facts the Court must follow</u>. The Court must consider if Johnson's negligent advice and representation resulted in physical damage to a structure and ignore that the structure was in this case built by Johnson.

Thus, Petitioners agree with the quoted language from *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.,* 395 S.C. 40, 717 S.E.2d 589, 593 (2011) cited by Respondent at page 9 of its Return: the property built by Johnson was "not defective at the outset, but rather was initially proper and injured thereafter." Respondent claims that the property was defective from the outset because it was placed in the wrong location; however,

that again misconstrues the nature of the property. Under the Construction Contract, the work was properly performed; it was placed where it was supposed to be (according to the Permitting Contract) and it was not injured or defective. The barn was physically injured only when the BZA ordered it torn down and removed and remedial measures had to be taken. Again, had "Acme Construction" build the barn instead of Johnson, there would be no debate that this property was physically injured.

Further, the "Your Work" exclusion does not apply because the "Work" performed under the Permitting Contract was different and separate work from that provided under the Construction Contract. Again, had "Acme Construction" built the barn, the barn would obviously not be "Your Work" for purposes of the "Your Work" exclusion arising out of the "occurrence" from the Permitting Contract.

The "Your Work" exclusion simply does not extend endlessly to all structures built by one contractor for an owner under separate contracts, which is the theoretical underpinning of Respondent's argument.

III. Respondent's Final Arguments were Properly Rejected by the Court of Appeals.

Respondent raises essentially two alternative sustaining grounds at Section IV of its Return. The first one in Subsection A, would be resolved if the Court grants *cert* and holds that the Court of Appeals improperly defined "physical injury." Beyond that, the same distinction between the Permitting Contract and the Construction Contract control this issue as discussed *supra.*

At Section B, Respondent attempts to by-pass the error preservation rules again by arguing that the Permitting Contract and Construction Contract were not separate contracts, notwithstanding that the Court of Appeals found that this issue was not preserved for appellate review and thus was law of the case. Further, as the Trial Court found, the issues for this Motion and this case are

confined within the context of the broad reading of the Complaint (or in this case, the Arbitration Demand) for the purposes of determining if the insurer had a duty to defend. The Arbitration Demand and Pre-Trial Brief clearly allege without ambiguity that there were two different contracts and two different courses of conduct; the Respondent cannot ignore allegations in the Complaint that even just "create a possibility of coverage..." *Spartan Petroleum Co., Inc. v. Federated Mut. Ins. Co.*, 162 F.3d 805, 808, n.2 (4th Cir. 1998) (R. 7.)

IV. The Petitioners Properly Alleged Loss of Use

Respondent claims, for the first time (as it made no such claim in its Brief in Support of its Appeal or its Return to the Petition for Rehearing) that Petitioners failed to allege "loss of use" damages and therefore the Court of Appeals improperly considered them. As an initial matter, the loss of use of the barn is a common sense result of the barn not being usable because it violated zoning ordinances.

Regardless, the Petitioners' Pre-Trial Brief (which is part of the Arbitration Demand to be considered for determining coverage under the duty to defend analysis as held by the Court of Appeals, Op., Appendix, p. 3, n. 2) does allege loss of use. The Pre-Trial Brief alleges in the first paragraph, page two: "[w]hat the Waldes ended up with is [not] a stable as permitted by the City, but one that is not completed *and is unusable*." (Italics added.) (R. 118.) Thereafter, the Pre-Trial Brief alleges "the Waldes had paid Johnson $110,500 *for the construction of the useless stable and accessory apartment*." (Italics added) (R. 125).[3] Thereafter, the Waldes alleged that even by that point in the arbitration "the stable is *not even now finished*" (italics in original) and listed items that prevented the stable from being usable. (R. 127-128).

[3] For purposes of the Court's analysis in a duty to defend case, the Pre-Trial Brief's allegations must be read, even *if ambiguous, to create coverage if it stated liability arguably covered by the policy. Donnelly* v. Transportation Ins. *Co.*, 589 F.2d 761, 767 (4th Cir. 1979*); Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 459 S.E.2d 318, 319 (S.C. App. 1995). *See* Trial Court Order, R. 6-7.

V. **Respondent is Wrong: the Appellate Courts are already grappling with *Walde's* definition of "physical injury."**

Respondent at its Return, page 10, fn. 2 dismisses the Form 4 Order in *Precision Walls, Inc. v. Liberty Mutual Fire Ins. Co.* noted by Petitioners and states that the Court should disregard it as the Order just mentions *Walde* and does show that the trial court relied upon Walde. Respondent is again wrong. However, attached at Tab 1 to this Reply is the Notice of Appeal filed in that case, with the trial court's Order specifically citing *Walde's* definition of 'physical injury' for the proposition that no property damage occurred in that case. *See* Trial Court Order, pp. 3-4. While Petitioners do not comment on the merits of that opinion, Petitioners' point is that South Carolina courts are clearly adopting and relying on the unduly narrow definition of "physical injury" set forth in *Walde*, and this Court should rectify that mistake by the Court of Appeals.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant certiorari and review this important and controlling issue of insurance law. Petitioners respectfully request that the Court act on this Petition and correct the mistake of the Court of Appeals.

Respectfully submitted,

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The Honorable Edgar W. Dickson

Opinion No. 5061
Filed December 12, 2012

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PROOF OF SERVICE

I, Susan Dunbar, an employee of the McNair Law Firm, hereby certify that I have this day served a copy of the Petitioners' Reply In Support Of Petition For Writ Of Certiorari upon counsel for Respondent by depositing a copy of same in the United States Mail, sufficient postage pre-paid as follows:

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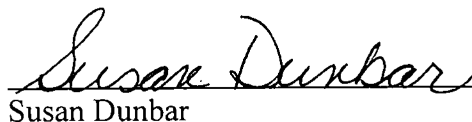
This 29th day of May, 2013.



Susan Dunbar

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