

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

AUG 12 2013

J. Ernest Kinard, Jr., Circuit Court Judge

**S.C. Supreme Court**

Case No. 2007-CP-40-7251

Bennett & Bennett Construction, Inc.....Respondent,

v.

Auto-Owners Insurance Co., Inc. ....Appellant.

**RETURN BY APPELLANT TO PETITION FOR REHEARING**

John L. McCants, Esq.  
Rogers Lewis Jackson Mann & Quinn, LLC  
P.O. Box 11803 (29211)  
1330 Lady Street, Suite 400  
Columbia, SC 29201  
Tele: 803- 978-2834  
Fax: 803-252-3653  
jmccants@rogerslewis.com  
Attorney for Appellant

## ARGUMENTS

- I. THE SUPREME COURT DID NOT OVERLOOK OR MISAPPREHEND EXCLUSION N.
- II. THE SUPREME COURT DID NOT OVERLOOK OR MISAPPREHEND *NEWMAN*.
- III. THE SUPREME COURT DID NOT OVERLOOK OR MISAPPREHEND EXCLUSION J(5).
- IV. THE SUPREME COURT DID NOT OVERLOOK OR MISAPPREHEND SMALL BUSINESS CONSTRUCTION.

## STANDARD FOR PETITION FOR REHEARING

In order to prevail on a petition for rehearing, Petitioner must demonstrate that the Supreme Court overlooked or misapprehended an argument. Rule 221(a), SCACR. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001). “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Id.* at 532, 564 S.E.2d 322 (citing Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933))).

## ARGUMENTS

### I. THE SUPREME COURT DID NOT OVERLOOK OR MISAPPREHEND EXCLUSION N.

Petitioner argues that the initial briefs for the appeal were drafted before the appeal was transferred to the Supreme Court pursuant to Rule 204, SCACR. Accordingly, Petitioner drafted its initial brief for the Court of Appeals, which was bound by the Supreme Court’s interpretation of Exclusion N in *Auto-Owners Ins. Co., Inc. v. Newman*, 684 S.E.2d 541, 385 S.C. 197 (2009) (“Newman”). Petitioner argues that it does not believe that the Supreme Court has had before the Court a line of cases, *see e.g.*, *Olympic Steamship Co., Inc. v. Centennial Ins.*, 117 Wash. 2d 37, 42, 811 P.2d 672, 676 (Wash. 1991), interpreting Exclusion N differently than *Newman*, and should now consider the cases by way of this Petition for Rehearing.

First, it is incorrect that the *Olympic Steamship Co.* line of cases have not been in front of the Supreme Court before for consideration. Indeed, the trial court accepted

Petitioner's argument made in its Petition and rejected Exclusion N in part by citing to *Olympic Steamship Co.* (R. at 15.). So the argument has been before the Supreme Court, and Petitioner is really seeking to try the case a second time before the Supreme Court. Second, to the extent the *Olympic Steamship Co.* line of cases are inconsistent with *Newman*, Rule 217, SCACR permitted Petitioner to argue against precedent in its appellate brief drafted for the Court of Appeals. Rule 217, SCACR also permitted Petitioner to move before the Supreme Court (the case having been transferred) to argue against precedent by making a motion fifteen (15) days before oral argument.

Third, Appellant argued in its brief that Exclusion N bars the claim. Although Petitioner cited the decision to the trial court, Petitioner failed to argue the *Olympic Steamship Co.* decision, or line of cases, in its initial brief. Accordingly, the argument may be deemed abandoned. *See, e.g., First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal). Notwithstanding, Rule 220(c), SCACR permitted the Supreme Court to "affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." The *Olympic Steamship Co.* case, or argument, was in fact part of the Record on Appeal for the Supreme Court to consider in whether to affirm the trial court's order even if Petitioner did not affirmatively pursue the argument in its brief. (R. Pg. 15). *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

Finally, Petitioner cites *Auto-Owners v. Rhodes*, 385 S.C. 83, 108, 682 S.E.2d 857, 871 (Ct. App. 2009) ("*Rhodes*"), which interpreted Exclusion N consistent with *Olympic Steamship Co.* In *Rhodes*, the Supreme Court granted Auto-Owners Insurance Company's writ of certiorari, and the Supreme Court held oral arguments in February

2013. Auto-Owners specifically challenged the Court of Appeals' interpretation of Exclusion N in its writ of certiorari.

Appellant submits that the correct approach to reading Exclusion N is the one used in *Newman*. In the part of *Newman* addressing Exclusion N, the Supreme Court cited the well-established principle that a court must give policy language its plain, ordinary, and popular meaning; and when a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. See *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). The Supreme Court did so in the following excerpt from *Newman*:

C. Damages awarded for replacement of the defective stucco

....

Although the subcontractor exception preserves coverage for property damage that would otherwise be excluded as "your work," another policy exclusion bars coverage for damage to the defective workmanship itself. Specifically, **the policy exclusion provides that the insurance does not cover damages "claimed for any loss, cost or expense ... for the repair, replacement, adjustment, removal or disposal of ... 'Your product'; ... 'Your work'; or ... 'Impaired property'; if such product, work or property is withdrawn ... from use ... because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it."** These terms unambiguously prohibit recovery for the cost of removing and replacing the defective stucco-even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy-and serve as one of the bases for this Court's acknowledgment that a claim solely for economic losses resulting from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover. See L-J 366 S.C. at 122, 621 S.E.2d at 35. Accordingly, we hold that any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy.

*Newman*, 385 S.C. at 197-98, 684 S.E.2d at 546.

The Supreme Court did the same in the present appeal and applied the plain, ordinary and popular meaning of the language in Exclusion N to reach a correct result that is based on the facts of the case. Moreover, in both the present appeal and *Newman* the Supreme Court did quote the trailing language of Exclusion N, and applied the language to the facts in each respective case, which Petitioner argues the Supreme Court did not do.

II. THE SUPREME COURT DID NOT OVERLOOK OR MISAPPREHEND *NEWMAN*.

Petitioner argues that *Newman* only excludes the removal of defective work, and the Supreme Court's decision supports the proposition that Exclusion N also bars coverage for "property damage" to other property caused by the insured's defective work. Petitioner's position is based on the premise that Petitioner supplied the brick, so the brick is "other property". M&M subcontracted with Respondent to install the brick. M&M was also obligated to clean the brick whether Respondent agreed to pay M&M for the work or not. (R. at 48.). The brick installation and cleaning is M&M's work by definition in the Policy.<sup>1</sup> Further, the definition of "your work" includes work

---

<sup>1</sup> "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.

"Your work" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and
- b. The providing of or failure to provide warnings or instructions.

“performed on your behalf” so it is immaterial that M&M subcontracted the work. Exclusion N is not restricted if a subcontractor does the work. In this matter, Respondent sued M&M for the amount of money (loss, cost or expense) it cost Respondent to remove M&M’s work because the work was withdrawn from use by Respondent because of a “known defect, deficiency, inadequacy or dangerous condition in [M&M’s work].” Exclusion N then applies. The law on damage to other property is correctly stated in the CONCLUSION section of the Supreme Court’s decision.

### III. THE SUPREME COURT DID NOT OVERLOOK OR MISAPPREHEND EXCLUSION J(5).

Respondent argues that the Supreme Court’s application of Exclusion j(5) to a “completed operation” creates an ambiguity with Exclusion L. In sum, Petitioner argues that the Exclusion L must apply if there is a “completed operation”. Appellant disagrees and responds too that the argument was briefed extensively before, so Petitioner is seeking to try the case a second time. First, Exclusion L and j(5) are not mutually exclusive. Unlike Exclusion L, Exclusion J(5)’s text does not include the Products Completed Operations Hazard as a caveat, which is a significant distinction. Second, Respondent’s comparative analysis of the two exclusions is contrary to the rule that each exclusion in a policy must be read and applied independently of every other exclusion; exclusions are not read cumulatively. *Newman*, 385 S.C. at 197, 684 S.E.2d at 546 (citing *Engineered Prods., Inc. v. Aetna Cas. & Sur. Co.*, 295 S.C. 375, 378-79, 368 S.E.2d 674, 675-76 (Ct. App. 1988) (quoting *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 795 (1979))).

---

See Definition of “Your Work” on prior page [R.p. 202].

The Court of Appeals in *Engineered Products* stated the following:

The flaw in Engineered Products' argument that Exclusion (a) renders the policy ambiguous is its apparent belief that exclusions should be read together and cumulatively. The settled rule, however, is just the opposite. Exclusions in an insurance policy are to be read independently of each other; they are not to be read cumulatively. *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 795 (1979). Indeed, as the New Jersey Supreme Court noted in *Weedo*, quoting Tinker, *Comprehensive General Liability Insurance-Perspective and Overview*, 25 FED'N INS.COUN.Q. 217, 223 (1975),

“If any one exclusion applies there should be no coverage, regardless of inferences that might be argued on the basis of exceptions or qualifications contained in other exclusions. There is no instance in which an exclusion can properly be regarded as inconsistent with another exclusion, since they bear no relationship with one another.”

*Engineered Prods.*, 295 S.C. at 378, 368 S.E.2d at 675 citing 81 N.J. at 248, 405 A.2d at 795

The Supreme Court's application of Exclusion j(5) is based on the principle that a court must give policy language its plain, ordinary, and popular meaning. *B.L.G. Enters. Inc.*, 334 S.C. 529, 514 S.E.2d 327. The plain meaning of the phrase "are performing operations" means that M&M (or M&M's subcontractor) was actively working on the job at the time of the damage.

*Newman* is precedent for the application of an exclusion to a "completed operation". In *Newman*, the Supreme Court found that the subcontractor completed the installation of the stucco which meant that the "Products-Completed Operations Hazard" was applicable. See *Newman*, 385 S.C. at 194, 684 S.E.2d at 545. Even though the "Products-Completed Operations Hazard" was applicable, the Supreme Court found that Exclusion N applied to bar coverage for those damages which were the cost to remove

and replace the stucco. *Newman*, 385 S.C. at 197, 684 S.E.2d at 546 ("Although the subcontractor exception preserves coverage for property damage that would otherwise be excluded as "your work," another policy exclusion bars coverage for damage to the defective workmanship itself.") Like Exclusion j(5), Exclusion N does not include the definition of "Products-Completed Operations Hazard" in its text. In sum, the fact that the "Products-Completed Operations Hazard" may be in place does not mean that other exclusions are inapplicable. See *Newman*, 385 S.C. 187, 684 S.E.2d 541.

The Supreme Court was correct in its reading of the cases cited by the trial court. See e.g., *Advantage Homebuilding, LLC v. Maryland Cas. Co.*, 470 F.3d 1003 (10<sup>th</sup> Cir. 2006); *Action Auto Stores, Inc. v. United Capitol Ins. Co.*, 845 F. Supp. 428 (W.D. Mich. 1993); *Fisher v. American Family Mut. Ins. Co.*, 579 N.W.2d 599 (N.D. 1998); *Alverson v. Northwestern Nat Cas. Co.*, 559 N.W.2d 234 (S.D. 1997); and *Spears v. Smith*, 690 N.E.2d 557 (Ohio Ct. App.1996). None of the courts found coverage where a contractor was actively working on the job at the time of the damages. In the cases where a court found coverage, the facts and conclusions of law are fundamentally consistent with *Newman, L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005) and *Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011).

#### IV. THE SUPREME COURT DID NOT OVERLOOK OR MISAPPREHEND SMALL BUSINESS CONSTRUCTION.

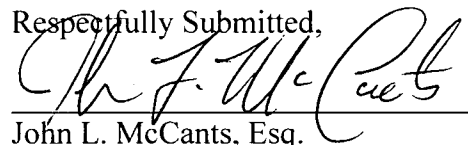
The crux of Petitioner's last argument is to again compare Exclusion j(5) to other exclusions to argue or show that j(5) does not apply to a "completed operation". Further, Petitioner argues that j(5) is an exception to the Supreme Court's general rule expressed in the CONCLUSIONS section of the decision. Petitioner is arguing its case for a second

time on appeal. First, as argued, it is incorrect to compare exclusions in the manner being done by Petitioner. *Newman*, 385 S.C. 187, 197, 684 S.E.2d 541, 546. Second, in *Newman*, the Supreme Court correctly found that Exclusion N applied to a “completed operation,” and the Supreme Court did the same herein as to Exclusions j(5) and N. The Supreme Court did so in both instances based on what is one of the most established principles of contract interpretation -- that a court must give policy language its plain, ordinary, and popular meaning; and when a contract is unambiguous, it must be construed according to the terms the parties have used. *See B.L.G. Enters, Inc.*, 334 S.C. at 535, 514 S.E.2d at 330. Second, there is no factual dispute that M&M (or its subcontractor) damaged M&M’s work (the brick installation) while actively performing operations that were part of M&M’s scope of work. The facts fit squarely into the law expressed in the CONCLUSIONS section of the decision.

### CONCLUSION

The Supreme Court should deny the Petition for Rehearing.

Respectfully Submitted,



John L. McCants, Esq.

Rogers Lewis Jackson Mann & Quinn, LLC

P.O. Box 11803 (29211)

1330 Lady Street, Suite 400

Columbia, SC 29201

Tele: 803- 978-2834

Fax: 803-252-3653

[jmccants@rogerslewis.com](mailto:jmccants@rogerslewis.com)

Attorney for Appellant

August 12, 2013

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

AUG 12 2013

**S.C. Supreme Court**

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2007-CP-40-7251

Bennett & Bennett Construction, Inc.....Respondent,

v.

Auto-Owners Insurance Co., Inc. ....Appellant.

**CERTIFICATE OF SERVICE**

I certify that I have served a copy of Appellant's Return to Petition for Rehearing Respondent by hand delivery and by depositing a copy of same in the United States Mail, postage prepaid, on August 12, 2013, addressed to its attorney of record, Edwin Russell Jeter, Jeter and Williams, P.A., Post Office Box 7425, Columbia, South Carolina, 29202.

August 12, 2013



John L. McCants, Esq.  
Rogers Lewis Jackson Mann & Quinn, LLC  
P.O. Box 11803 (29211)  
1330 Lady Street, Suite 400  
Columbia, SC 29201  
Tele: 803- 978-2834  
Fax: 803-252-3653  
jmccants@rogerslewis.com  
Attorney for Appellant