THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

v.

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

Appellate Case No. 2011-183007

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AUG 19 2013
S.C. Supreme Court

Appeal from Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

RESPONDENT'S REPLY ON PETITION FOR REHEARING

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The respondent, responding to the Return by Appellant to Petition for Rehearing, replies as follows:

I. Exclusion N

In its Petition for Rehearing, BBCI argued that exclusion N does not exclude damage arising from the initial defective product or work, but excludes only the cost and expenses of recalling or withdrawing similar products or work from service. BBCI based this argument on the trailing language of exclusion N and the large body of case law which holds that exclusion N is so limited.[1] Auto-Owners makes no rebuttal to the case law cited and offers no supporting precedent from other jurisdictions, on this essential point.

Instead, disregarding the effect of precedent from this Court, Auto-Owners argues that BBCI abandoned this argument[2] or failed to raise it under Rule 217.[3] (Return, pp.3-4)

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1 Auto-Owners does point out that portions of the trailing language were quoted in *Newman* and in this case. Although BBCI did identify the omitted language that was not considered (Petition, Page 3), BBCI's subsequent language may have been too broad at times. However, as shown by the case law from other jurisdictions, BBCI asserts the trailing language was not properly construed in *Newman* and in this case and that the portions of the trailing language which were not quoted or considered are material to the proper construction of exclusion N.

2 BBCI pointed out to the trial court the origins of the sistership exclusion by citing *Olympic Steamship Co., Inc v. Centennial Ins.*, 117 Wash. 2d 37, 811 P.2d 672 (1991). However, BBCI never argued to the trial court nor in its briefs filed with the Court of Appeals, that those courts should disregard this Court's decision in *Auto-Owners Ins. Co., Inc. v. Newman.* 385 S.C. 197, 684 S.E.2d 541 (2009). Arguing those courts should overturn or ignore *Newman* would have been an improper argument to make, and the failure to make such an argument cannot be considered to be an abandonment of the argument.

3 Rule 217 allows a party to argue against precedent in its briefs, but requires permission to raise the challenge to precedent at oral argument. Thus, seeking

Those arguments fail because BBCI's briefs were drafted for a court which was bound to follow *Newman*, and no one knew at the time of briefing that this Court would take jurisdiction of this matter from the Court of Appeals.

II. Exclusion N Does Not Apply Based on the Facts

Auto-Owners fails to address BBCI's point that what was removed, was not M&M's work, but rather the property of a third party damaged by M&M's work. Auto-Owners states that cleaning was part of M&M's work. (Return, p. 6) Then it goes on to say, that what had to be removed was M&M's work. (Return, p.7) But, it was not the cleaning that was being removed. It was the brick damaged by the cleaning that was removed. That point is what Auto-Owners fails to address.

III. Exclusions J(5) and (L)

BBCI's argument is that this Court's interpretation of exclusion j(5) operates to render the subcontractor exception in exclusion L effectively a nullity. This result constitutes a contradiction in policy terms, which means that exclusion j(5) should be re-interpreted in the insured's favor so as not to contradict or nullify the subcontractor exception in exclusion L. Auto-Owner's response is to claim that BBCI is not construing the exclusions independently. (Return, p.7) However, that doctrine does not operate to allow an incorrect interpretation of one exclusion to effectively nullify a provision of another exclusion. It is accepted law that exclusions are to be construed narrowly against

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permission to argue against precedent comes after the issue has been briefed. Since these briefs were filed with the Court of Appeals, it was premature to brief this issue, since no one knew this Court would later take jurisdiction pursuant to Rule 204(b).

the insurer, *Owners Ins. Co v. Clayton*, 364 S.C. 555, 614 S.E.2d 611 (2005); a contract must be construed so as not to render a provision a nullity, *Newman*, at 545, fn 3; and that any contradictions or repugnant clauses must be construed in favor of coverage. *BLG Enterprises, Inc. v. First Financial Ins. Co.*, 328 S.C. 374, 491 S.E.2d 695 (Ct.App. 1997), affirmed 334 S.C. 529, 514 S.E.2d 327 (1999). These principles of construction apply whenever necessary to mitigate an unreasonable result if reading the exclusions independently leads to an unreasonable result.

What Auto-Owners does not address is the primary argument of BBCI which is the conflict between this Court's interpretation of exclusion j(5), and the effect of that holding on exclusion L. In *Newman*, this Court examined the interplay between exclusion L, the "your work" exclusion, and exclusion N. *Newman* recognized the subcontractor exception to the "your work" exclusion which provided that work done by a subcontractor was not excluded under exclusion L. *Newman*, at 545. After *Newman*, damage to "your work" during completed operations caused by a subcontractor is still covered. In discussing exclusion N, *Newman* noted the coverage allowed by exclusion L. But, *Newman* then applied exclusion N to exclude that part of the damages that was in itself, the defective work. *Newman* at 546. Thus, *Newman* used exclusion N to narrow the damages allowed by exclusion L, but did not use exclusion N to eliminate the subcontractor exception.

In this case, the Court's interpretation of exclusion j(5) does effectively wipe out the subcontractor exception in exclusion L. Exclusion j(5) applies to damages to the real property, i.e. the building under construction, arising out of on-going operations. Since

this Court has now held that subcontractors are "performing operations" for the insured during completed operations, anything they do after "completion" is now excluded by exclusion j(5). The holding in this case, that exclusion j(5) applies to completed operations, means that no damages arising from any work being done to the structure, including by the insured's subcontractors during completed operations, will be covered.

Exclusion L applies to damage to "your work" which arises out of "your work" during completed operations. But, the exclusion does not apply if the damage was caused by the operations of a subcontractor. However, since the subcontractor operations are on the structure or real property to which exclusion j(5) applies, the holding that j(5) applies during completed operations means that exclusion j(5) now eviscerates the "subcontractor exception." Auto-Owners has no response or explanation for this. In effect, Auto-Owners concedes that exclusion j(5) may nullify exclusion L, but then attempts to justify that result.

The contradiction problem is created by reading exclusion j(5) too broadly. Instead of applying j(5) to operations prior to substantial completion or owner occupancy, and letting exclusion L apply to completed operations after substantial completion or owner occupancy, the holding in this case confuses the time periods to which the exclusions are meant to apply. The (j) exclusions apply to work done before "completion," exclusion L applies to work done after "completion," and exclusion N is in a world of its own where there have been product recalls. When read in this way, the policy provides the coverage which the insurer sold expecting to make a profit, and which the insured bought expecting to save his business from ruinous claims, including in some

cases, those arising from his own negligence.

The result of confusing the time frames is that, as an unintended consequence, the greatly reduced coverage may eventually harm the homeowner whose largest investment has suffered damage, the recovery for which often depends upon whether a contractor or subcontractor has CGL coverage. Very few contractors will do, or can afford to do, what BBCI did in this case-- spend its own money to tear off the brick and replace it. The ultimate party being harmed will often be the innocent homeowners.

IV. Small Business Coverage

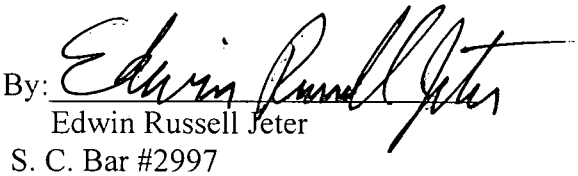
It is clear that once an owner occupies the structure, or once substantial completion is reached, that operations are still continuing on the job. Those operations are considered to be "completed operations," and the products-completed operations coverage offers coverage unless excluded by exclusion L, which covers this time period. Prior to substantial completion or owner occupancy, the work and operations are on-going operations. Exclusions j(5) and j(6) cover this time period. This analysis is not an instance of comparing exclusions with one another.

CONCLUSION

For the reasons stated, the relief sought in the Petition for Rehearing should be granted.

Respectfully submitted,

JETER AND WILLIAMS, P. A.

By: 
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August 19, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2011183007

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CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the Respondent's Reply on Petition for Rehearing on John L. McCants by leaving a copy of same addressed to John L. McCants with an employee at the offices of Rogers, Lewis, Jackson, Mann & Quinn, LLC, at 1330 Lady Street, Suite 400, Columbia, SC 29201.

James Williams

August 19, 2013