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Gallivan, White & Boyd, P.A.
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Facsimile 803.779.1767
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April 23, 2012

RECEIVED

APR 25 2012

Honorable Daniel E. Shearouse
Supreme Court Clerk
1231 Gervais Street
Columbia, South Carolina 29201

S.C. SUPREME COURT
pm 4-23-12

Re: Auto Owners Insurance Company, Appellant v. Samuel W. Rhodes,
Piedmont Promotions, Inc., Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., Respondents
Case No.: 02-CP-46-2369

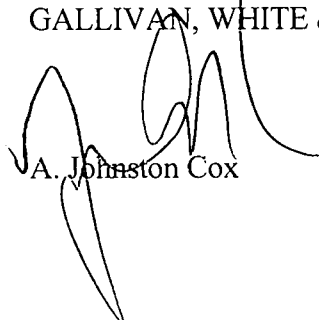
Dear Mr. Shearouse:

In regard to the above referenced matter, please allow this correspondence to serve as indication that I am co-counsel for Auto-Owners Insurance Company with Mr. John M. McCants of Ellis, Lawhorne and Sims, P.A. However, I have left Ellis Lawhorne and now practice at Gallivan, White & Boyd, P.A.

Please do not hesitate to contact me if you have any questions.

With kind regards, I am

Very truly yours,
GALLIVAN, WHITE & BOYD, P.A.



A. Johnston Cox

AJC/hah
Enclosure

cc: Creighton Coleman, Esquire
William O. Sweeny, Esquire
John M. McCants, Esquire

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April 23, 2012

Honorable Daniel E. Shearouse
Supreme Court Clerk
1231 Gervais Street
Columbia, South Carolina 29201

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APR 25 2012

pm 4-23-12

Re: Auto Owners Insurance Company, Appellant v. ^{90 SUPREME COURT} Rhodes,
Piedmont Promotions, Inc., Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., Respondents
Case No.: 02-CP-46-2369

Dear Mr. Shearouse:

In regard to the above referenced matter, I am writing to inform you that I have received a copy of the Respondent's Motion for Extension of Time to file their brief. I do not oppose this Motion.

Please do not hesitate to contact me if you have any questions.

With kind regards, I am

Very truly yours,
GALLIVAN, WHITE & BOYD, P.A.

A. Johnston Cox

AJC/hah
Enclosure

cc: Creighton Coleman, Esquire
William O. Sweeny, Esquire
John M. McCants, Esquire

ELLIS:LAWHORNE

JOHN L. MCCANTS
Direct Dial 803 212 4959
jmccants@ellislawhorne.com

April 23, 2012

Via U.S. Mail and Email: lallen@sccourts.org

The Honorable Daniel E. Shearouse
Attn: Linda Allen
Supreme Court Clerk
1231 Gervais Street
Columbia, South Carolina 29201

RE: Auto Owners Insurance Company v. Samuel W. Rhodes, Jr., *et al.*
Our File No.: 000118-56407

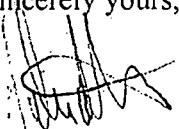
Dear Ms. Allen:

Pursuant to your telephone conversation of today with my paralegal, this letter will serve to confirm my formal consent to Respondent's Motion for Extension of Time to File Brief in the above-referenced matter.

Should you otherwise have any questions or comments, please do not hesitate to contact me.

With warm, kind regards, I am

Sincerely yours,

 For John L. McCants
John L. McCants

JLM/sb

cc: (w/ encl.)

Creighton B. Coleman, Esquire
A. Johnston Cox, Esquire
William O. Sweeny, III, Esquire
William R. Calhoun, Jr., Esquire

The Supreme Court of South Carolina

Auto-Owners Insurance
Company,

Petitioner,

v.

Samuel W. Rhodes, Piedmont
Promotions, Inc. and Marion L.
Eadon d/b/a C&B Fabrications,
C&B Fabrications, Inc. and Low
Country Signs, Inc.,

Respondents.

The Honorable Lee S. Alford
York County
Trial Court Case No. 2002-CP-46-02369

ORDER

For good cause having been shown, the time for serving and filing the Brief of
Respondents in the above entitled matter is hereby extended until July 9, 2012.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY


Clerk

Columbia, South Carolina

April 23, 2012

cc: A. Johnston Cox, Esquire
John M. McCants, Esquire
Creighton B. Coleman, Esquire
Hoover C. Blanton, Esquire
William O. Sweeny, III, Esquire
William R. Calhoun, Jr., Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
Lee S. Alford, Circuit Court Judge

RECEIVED
APR 18 2012
S.C. SUPREME COURT

Opinion No. 4605 (S.C. Ct. App. filed August 6, 2009)

Auto-Owners Insurance Company Petitioner,

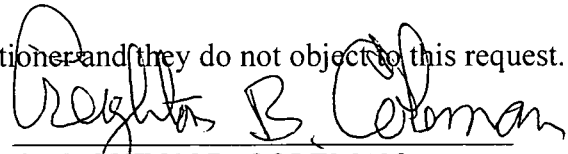
v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc..... Respondents.

MOTION FOR EXTENSION OF TIME TO FILE BRIEF OF RESPONDENTS
SAMUEL W. RHODES, JR. AND PIEDMONT PROMOTIONS, INC.

Respondents Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc. request a sixty (60) day extension of time in which to file their Brief in this matter. The grounds for this request are: the undersigned's commitments as a member of the South Carolina Legislature limit his ability to work on this appeal within the current deadline; and the undersigned's former co-counsel in this matter, Hoover C. Blanton, is no longer engaged in the active practice of law so that the undersigned must secure new co-counsel, who must then have adequate time to review this matter and participate in drafting the Brief.

I have contacted counsel for the Petitioner and they do not object to this request.


CREIGHTON B. COLEMAN
120 Washington Street/P.O. Box 1006
Winnsboro, South Carolina 29180
(803) 635-6884
Attorney for Respondents Samuel W.
Rhodes, Jr. and Piedmont Promotions, Inc.

April 16, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
Lee S. Alford, Circuit Court Judge

Opinion No. 4605 (S.C. Ct. App. filed August 6, 2009)

RECEIVED
APR 18 2012

Auto-Owners Insurance Company S.C. SUPREME COURT
Petitioner,

v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc..... Respondents.

CERTIFICATE OF SERVICE

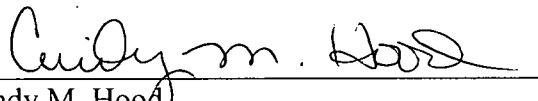
I, Cindy M. Hood, an employee of the Law firm of Coleman Tolen & Swearingen, LLC, do hereby certify that a copy of the **Motion for Extension of Time to File Brief of Respondents Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc.** was served on all parties, by mailing in the United States mail, postage prepaid, a copy there, to attorneys for all parties, this **16th day of April, 2012**, addressed as follows:

ELLIS, LAWHORNE & SIMS. P.A.
JOHN M. MCCANTS, ESQ.
1501 Main Street, 5th Floor
Columbia, SC 29202
(803) 254-4190

GALLIVAN WHITE & BOYD, P.A.
A. JOHNSTON COX, ESQ.
P.O. Box 7368
Columbia, SC 29202
(803) 779-1833

SWEENEY, WINGATE & BARROW, P.A.
WILLIAM O. SWEENEY, III, ESQ.
WILLIAM R. CALHOUN, JR., ESQ.
P.O. Box 12129
Columbia, SC 29211

ATTORNEYS FOR APPELLANT


Cindy M. Hood
Paralegal

Coleman Tolen & Swearingen, LLC

Attorneys at Law

120 WEST WASHINGTON STREET

PO Box 1006

WINNSBORO, SOUTH CAROLINA 29180

CREIGHTON B. COLEMAN
creighton@cbcoleman-llc.com

TELEPHONE: 803-635-6884
FACSIMILE: 803-635-9228

April 16, 2012

The Honorable Daniel E. Shearouse
Supreme Court Clerk
1231 Gervais Street
Columbia, SC 29201

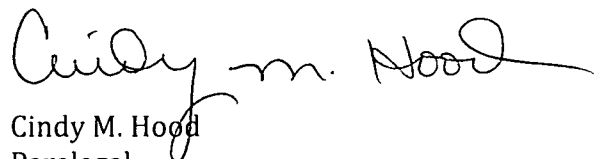
Re: *Samuel W. Rhodes, Jr. v. Marion L. Eadon d/b/a C&B Fabrication*
Civil Action No. 08-CP-14-0334
Our File No. 4595

Dear Mr. Shearouse:

I am enclosing the original and seven (7) copies of the Motion for Extension of Time to File Brief of Respondents Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc. for filing in the above-referenced matter. Please return a clocked copy to me in the envelope provided for your convenience.

Thank you for your assistance in this matter. Please do not hesitate to give our office a call with any questions or concerns.

Very truly yours,


Cindy M. Hood
Paralegal

Enclosures

cc: William O. Sweeny, Esquire
John M. McCants, Esquire
A. Johnston Cox, Esquire

RECEIVED

APR 18 2012

S.C. SUPREME COURT

Check # 8199
\$2500

A. JOHNSTON COX
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JCOX@GWBLAWFIRM.COM



Gallivan, White & Boyd, P.A.
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Facsimile 803.779.1767
www.GWBlawfirm.com

April 9, 2012

Via Hand-Delivery
Honorable Daniel E. Shearouse
Supreme Court Clerk
1231 Gervais Street
Columbia, South Carolina 29201

Re: Auto Owners Insurance Company, Appellant v. Samuel W. Rhodes,
Piedmont Promotions, Inc., Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., Respondents
Case No.: 02-CP-46-2369

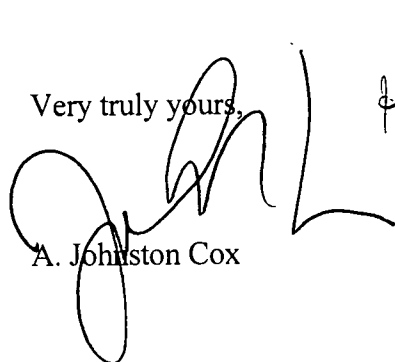
Dear Mr. Shearouse:

Enclosed for filing are the original and 15 (fifteen) copies of Auto-Owners Insurance Company's Brief and 13 (thirteen) copies of the Appendix in the above-referenced matter

Thank you for your assistance. Please do not hesitate to give our office a call with any questions or concerns.

With kind regards, I am

Very truly yours,



A. Johnston Cox

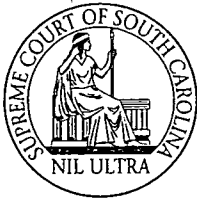
AJC/mhb
Enclosure

cc: Creighton Coleman, Esquire
William O. Sweeny, Esquire
John M. McCants, Esquire

RECEIVED

APR 9 2012

S.C. Supreme Court



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 13, 2012

Hoover C. Blanton, Esquire
McCutchen Blanton Hopkins & Campbell, LLP
P.O. Box 11316
Columbia, SC 29211-1316

Re: Auto-Owners v. Rhodes, Samuel

Dear Mr. Blanton:

The following Order has been endorsed on your Petition to be Relieved as Attorney of Record in the above entitled case on appeal.

"Granted.

Costa M. Pleicones A.C.J.
For the Court

By s/Daniel E. Shearouse
Clerk

Toal, C.J., and Hearn, J., not participating.

March 13, 2012."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

Daniel E. Shearouse
CLERK *DS*

DES/lda

cc: A. Johnston Cox, Esquire
John M. McCants, Esquire
Creighton B. Coleman, Esquire
William O. Sweeny, III, Esquire
William R. Calhoun, Jr., Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No.: 02-CP-46-2369
Case Tracking Number 2009-143546

RECEIVED
FEB 21 2012
S.C. Supreme Court

Auto-Owners Insurance Company, ... Petitioner,
v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., ... Respondents.

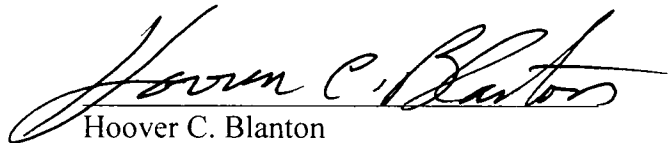
PETITION TO BE RELIEVED AS ATTORNEY OF RECORD

The undersigned attorney of record for the Respondents, Samuel W. Rhodes, Jr., and Piedmont Promotions, Inc., hereby petitions the Court to be relieved as attorney of record for Samuel R. Rhodes, Jr., and Piedmont Promotions, Inc., effective upon action on this Petition by this Court.

The reason and cause for the request to be relieved as attorney of record is more fully set forth in the attached Affidavit of the undersigned, submitted herewith.

In compliance with Rule 264(b) SCACR, written notice to each client has been given. Notice has also been given to counsel for all other parties of record in this case.

Respectfully submitted,



Hoover C. Blanton
McCutchen Blanton, LLP
1414 Lady Street
Post Office Box 11316
Columbia, South Carolina 29211-1316
803-255-0997
PETITIONER

Columbia, South Carolina
February 21, 2012

GRANTED.

COSTA M. PLECONES A.C.J.

FOR THE COURT

BY: D. D. S.
CCEAK

TOAL, C.J., AND HEARN.

J., NOT PARTICIPATING.

March 12, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No.: 02-CP-46-2369
Case Tracking Number 2009-143546

Auto-Owners Insurance Company, ... Petitioner,
v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., ... Respondents.

AFFIDAVIT OF PETITIONER HOOVER C. BLANTON

AFFIDAVIT

4. He is now over eighty-six years of age. After over fifty-eight years as a practicing attorney, he has reached his time to retire from the practice of law.¹ His

Page 2 of 3

withdrawal as counsel of record should not handicap the clients. Creighton B. Coleman, also attorney of record, has been active in the preparation for, and the conduct of, the trial of this case and has been involved in the appeal as reflected by the Briefs in the Court of Appeals and the Petition for a Writ of Certiorari and the supporting Brief on behalf of the Respondents, Rhodes and Piedmont, in the Supreme Court. Creighton B. Coleman will continue to represent the clients in this case.

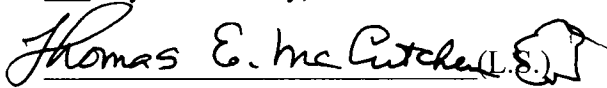
5. He respectfully requests the Court to grant his Petition promptly. That will accommodate the objective to close his practice in an orderly manner and retire from the practice of law.

6. If more is required of him, he is available and willing to submit any additional or supplemental information that the Court may require.


Hoover C. Blanton

SWORN TO before me this

21th day of February, 2012


Thomas E. McCutchen (L.S.)

Thomas E. McCutchen

Notary Public for South Carolina

My Commission Expires: 03/29/2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No.: 02-CP-46-2369
Case Tracking Number 2009-143546

RECEIVED
FEB 21 2012
S.C. Supreme Court

Auto-Owners Insurance Company, ... Petitioner,
v.

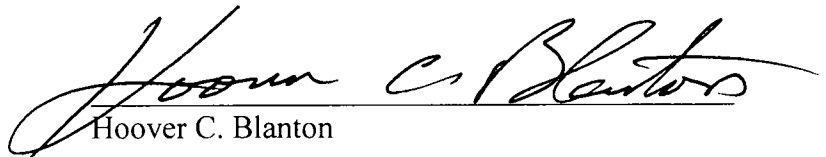
Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., ... Respondents.

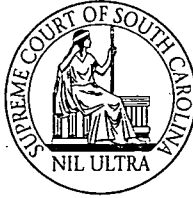
CERTIFICATE OF SERVICE

I, the undersigned attorney and Petitioner, hereby certify that a copy of the **Petition to Be Relieved as Attorney of Record and Affidavit of Petitioner Hoover C. Blanton**, were served on counsel for all other parties, by placing in the United States mail, postage prepaid, a copy thereof this 21th day of February 2012, as follows:

A. Johnston Cox, Esquire
John M. McCants, Esquire
Ellis, Lawhorne & Sims, P.A.
Post Office Box 2285
Columbia, South Carolina 29202

William O. Sweeny, III, Esquire
William R. Calhoun, Jr., Esquire
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211


Hoover C. Blanton



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 9, 2012

A. Johnston Cox, Esquire
John M. McCants, Esquire
Ellis Lawhorne & Sims PA
P.O. Box 2285
Columbia, SC 29202

Re: Auto-Owners v. Rhodes, Samuel

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before April 9, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,


CLERK

DES/lda

cc: Creighton B. Coleman, Esquire
Hoover C. Blanton, Esquire
William O. Sweeny, III, Esquire
William R. Calhoun, Jr., Esquire
The Honorable Tanya Gee

The Supreme Court of South Carolina

Auto-Owners Insurance
Company,

Petitioner,

v.

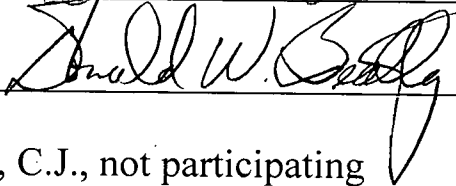
Samuel W. Rhodes,
Piedmont Promotions, Inc.
and Marion L. Eadon d/b/a
C&B Fabrications, C&B
Fabrications, Inc. and Low
Country Signs, Inc.,

Respondents.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857 (2009). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.



J.


J.

Toal, C.J., not participating

Hearn, J., not participating

Columbia, South Carolina

March 9, 2012

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

OCT 23 2009

APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Lee S. Alford, Circuit Court Judge

Opinion No. 4605 (S.C. Ct. App. filed August 6, 2009)

Auto-Owners Insurance Company, ...Petitioner,

v.

Samuel W. Rhodes, Piedmont Promotions, Inc.,

Marion L. Eadon d/b/a C&B Fabrication, C&B

Fabrications, Inc., and Low Country Signs, Inc., ...Respondents.

PETITION FOR A WRIT OF CERTIORARI

ELLIS, LAWHORNE & SIMS, P.A.

A. JOHNSTON COX

JOHN M. MCCANTS

Post Office Box 2285

Columbia, South Carolina 29202

(803) 254-4190

ATTORNEYS FOR PETITIONER

Other Counsel of Record:

Hoover C. Blanton

McCutchen, Blanton, Hopkins & Campbell, LLP

Post Office Drawer 11316

Columbia, South Carolina 29211-1316

William O. Sweeney

Sweeney Wingate & Barrow, PA

Post Office Box 12129

Columbia, South Carolina, 29211

Creighton B. Coleman

Coleman & Tolen, LLC

Post Office Box 1006

Winnsboro, South Carolina 29180

Attorneys for Respondent Marion L.

Eadon d/b/a C&B Fabrication, C&B

Fabrications, Inc. and Low Country

Signs, Inc.

Attorneys for Respondents Samuel W. Rhodes

and Piedmont Promotions, Inc

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for rehearing was made and finally ruled on by the Court of Appeals on September 23, 2009.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that Marion Eadon meets the definition of an insured under a CGL policy issued to corporations, when his duties as an officer of those corporations do not include the activities for which he was sued?
2. Did the Court of Appeals err in failing to apply Exclusion N to exclude damages claimed for removal, disposal and loss of use of the signs in contravention of the Court's recent holding in Auto Owners Ins. Co., Inc. v. Newman?
3. Did the Court of Appeals err in failing to apply either Exclusion K or Exclusion L to exclude damages for loss of use of the signs built by the insured, which constitute either "your product" or "your work?"
4. Did the Court of Appeals err in finding that the removal of the two standing signs was an "occurrence" because the South Carolina Department of Transportation ordered that they be removed because they were dangerous?
5. Did the Court of Appeals err in finding that there was an "occurrence" when there was no damage to other property?
6. Did the Court of Appeals err in finding that diminution of value of real estate is a covered loss when the Supreme Court has previously held that diminution of value is not a covered loss?
7. Did the Court of Appeals err in finding that Auto-Owners must indemnify its insured for costs it incurred in removing and disposing of its own work product in contravention of Auto Owners Ins. Co., Inc. v. Newman?
8. Did the Court of Appeals err in affirming the trial court's denial of petitioner's Rule 60(b)(4) and (5) motions?
9. Did the Court of Appeals err in finding that Respondents Rhodes and Piedmont are not judicially estopped from taking inconsistent positions in related proceedings?

STATEMENT OF THE CASE

This is a declaratory judgment action arising out of a lawsuit brought by Piedmont Promotions, Inc. ("Piedmont")¹ and Samuel W. Rhodes ("Rhodes") against Marion L. Eadon d/b/a C&B Fabrication ("Eadon"). Piedmont and Rhodes sued Eadon for economic

¹ Rhodes is the president of Piedmont.

damages arising out of the faulty construction of three outdoor advertising billboard signs, which resulted in one of the signs falling and the two others being taken down and removed.

The action, entitled Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc. v. Marion L. Eadon d/b/a C&B Fabrication, civil action number 01-CP-20-334, was commenced in the Fairfield County Court of Common Pleas (“Rhodes case”). (R. pp. 119-134). The Amended Complaint alleges that Rhodes and Piedmont contracted Eadon to fabricate, deliver, and install three outdoor advertising billboard signs on property that Rhodes owned along Interstate 77 in Fairfield County. The signs were installed, completed, and put to their intended use by Piedmont in February 2000. In December 2000, Piedmont reported that one of the signs was leaning towards the interstate. On or about January 20, 2001, a different sign fell across the interstate. The South Carolina Department of Transportation (“SCDOT”) ordered that the other two signs be removed because they were unsafe. See, Rhodes v. Eadon, Op. No. 2006-UP-413, (S.C. Ct. App. filed December 15, 2006).

The Amended Complaint further alleges that the signs fabricated by Eadon were defective and unsuitable for their intended use. Rhodes and Piedmont did not sue C&B Fabrications, Inc., C&B Fabricators, Inc., Low County Signs, Inc. or LowCountry Signs and Fabrication, Inc., nor do they allege that Eadon was ever working on behalf of any corporation. (R. pp. 1086-1089). The Amended Complaint does not contain any allegation of vicarious or supervisory liability. (R. pp. 119-134).

The Rhodes case was tried before a jury starting August 30, 2004. Piedmont and Rhodes sought the following damages at trial: \$51,820.00 for the cost of each sign (total 3 @ \$155,467.00); \$300.00 for cutting the fallen sign loose from its base; \$100.00 for

bush hogging the area around the signs; and \$1,835.00 and \$5,590.00 for taking down and removing one of the signs that did not fall. (R. pp. 1143; 1161-1163). They claimed \$1,500.00 for cleaning up the fallen sign and repairing a fence. (R. p. 1169). Rhodes and Piedmont also sought past and future loss of use of the signs (past and future rental income of up to \$4,212,386) (R. pp. 1173-174; 1178-1186) and diminution of the value of the land upon which the signs were erected of \$1.8 million (R. p. 1192).

The Rhodes jury returned a verdict against Eadon on September 2, 2004, in the amount of \$3,000,000 actual damages and \$3,500,000 punitive damages on the negligence cause of action.

Eadon sought a defense and indemnification from Auto-Owners Insurance Company (“Auto-Owners”) under a Commercial General Liability Policy (“Policy”) (R. pp. 1296-1339), policy number 036064416, issued to “C&B Fabricators, Inc. and LowCountry Signs and Fabrication, Inc., both d/b/a C&B Fabrication, trade name of these corporations.” (Policy) (R. pp. 1296-1339).² Eadon is the president of the corporations listed as named insureds in the policy. Auto-Owners defended Eadon under a full reservation of rights through the trial in Fairfield County and continues to do so.

Auto-Owners commenced this declaratory judgment action asking the court to determine whether it has a duty to indemnify Eadon under the Policy issued to “C&B Fabricators, Inc. and LowCountry Signs and Fabrication, Inc., both d/b/a C&B Fabrication, trade name of these corporations.” The two primary issues in this case are

² The named insureds originally appeared on the policy as “C&B Fabrications, Inc. and Low Country Signs, Inc.” However, the parties stipulated that the correct designation of the named insureds are “C&B Fabricators, Inc. and LowCountry Signs and Fabrication, Inc., both d/b/a C&B Fabrication, trade name of these corporations,” and agreed to reform the policy to reflect this designation. (R. pp. 1243).

(1) Does Eadon, who was sued as an individual, qualify as an insured under the terms of the policy in light of the particular facts of this case, and (2) If so, are the damages sought by Rhodes and Piedmont covered by the Policy?

Eadon has testified that he intended to form a corporation for the purpose of engaging in the business of building billboard signs and intended for the policy to be issued to a corporation. He also admitted that he intended the policy to be issued to C&B Fabricators, Inc. (R. pp. 1101-1103; 1105-1109). Furthermore, Eadon has testified that he knew nothing about the sign business. His only duties as an officer of C&B Fabricators, Inc. and LowCountry Signs & Fabrication, Inc. was to provide money and insurance for the operation of the corporations. (R. pp. 1105, 1114). Chuck Benenhaley, an employee of the corporation, was in charge of running the business and everything involved with building, erecting, inspecting and repairing signs. It was not within Eadon's duties as an officer to run the corporation, do any sign work, determine what materials were needed to perform sign work, negotiate any contracts or supervise the sign work or any of the employees. It was not within his duties as an officer of the corporations to design signs, build signs or repair signs. He did not personally build the signs, erect the signs, design the signs or inspect the signs. All of those duties were assigned to Benenhaley and other employees. (R. pp. 1103-1105, 114, 1205-1209). Basically, Eadon was the money man.

Following the verdict in the Rhodes case, the parties to the declaratory judgment action submitted the Rhodes trial transcript, briefs and other materials to the Honorable Lee Alford for his decision non-jury. In an Order dated November 7, 2006 (R. pp. 13-60), Judge Alford found that Eadon is an insured under the policy and that all damages,

except for the contract price of the signs, are covered under the terms of the policy. After post-trial motions were filed in this case, the South Carolina Court of Appeals reversed the Rhodes judgment. See, Rhodes v. Eadon, Op. No. 2006-UP-413 (S.C. Ct. App. filed December 15, 2006). Auto-Owners then filed a motion to vacate the November 7, 2006 Order pursuant to Rule 60(b)(2)(4) and (5), SCRCP. (R. pp. 1022-1028). The trial court issued its order denying Auto-Owners' post-trial motions and Rule 60(b) motions on March 23, 2007 (R. pp. 61-62) and issued its Revised Supplemental Order on March 30, 2007. (R. pp. 63-64). Auto-Owners timely filed its Notice of Appeal on April 10, 2007. Following the Supreme Court's final opinion in, the Court of Appeals affirmed the judgment of the trial court, as modified, in a published decision. Auto-Owners Ins. Co. v. Samuel W. Rhodes, et. al., Op. No. 4605 (S.C. Ct. App. filed Aug. 6, 2009). The Court of Appeals denied petitioner's Motion for Rehearing, which was based in part on the recent Newman decision, on September 23, 2009.

ARGUMENT

1. AS A MATTER OF FIRST IMPRESSION, THE COURT OF APPEALS SHOULD HAVE HELD THAT MARION EADON DOES NOT QUALIFY AS AN INSURED UNDER THE TERMS OF THE POLICY IN LIGHT OF THE PARTICULAR FACTS OF THIS CASE.

This a novel issue in South Carolina. No South Carolina court has previously examined who qualifies as an insured under the terms of Auto-Owners' commercial general liability policy. Marion Eadon does not meet the definition of an insured found in the policy, because he was not sued for any activity within his duties as an officer of the corporation.

In analyzing this issue, the Court of Appeals correctly found that Rhodes and Piedmont sued an individual, Marion Eadon, in the Rhodes case, and that Rhodes and

Piedmont did not sue any corporate entity. The Court of Appeals also agreed with Auto-Owners that the named insureds on its policy are corporations and that its CGL policy was issued to corporations. Marion Eadon is not listed on the policy as a named insured.³ However, the Court of Appeals erred in finding that Marion Eadon qualifies as an insured under the terms of the policy. Eadon was not sued for negligently performing his duties as an officer of the corporations.

The Policy states, “[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of...‘property damage’ to which this insurance applies.” *See, 1(a)*. The Policy further states the following:

Section II – WHO IS AN INSURED

1. If you are designated in the Declarations as:
 - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
 - c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are insureds, but only with respect to their liability as stockholders.
2. Each of the following is also an insured:
 - a. Your employees, other than your executive officers, but only for acts within the scope of their employment with you. . .

No person or organization is an insured with respect to the conduct of any current or past partnership or joint venture that is not shown as a Named Insured in the Declarations.

(R. pp. 1312-1314).

³ The named insured was plainly identified on the Declarations as “corporation.” (R. pp. 1296-1339).

The Court of Appeals agreed that because Eadon is not listed as a named insured, he must meet the definition of an insured contained in Section 1. c. However, the Court of Appeals failed to read Section 1.c . in conjunction with Section 2. a. When Section II 1. c. and 2. a. are read together, as they must be, it is clear that the policy treats executive officers and employees differently. Executive officers are only covered “with respect to their duties as your officers and directors” and employees “other than your executive officers,” are insured “only for acts within the scope of their employment with you. . . .” The policy plainly and unambiguously delineates between employees and officers.

The Court of Appeals erroneously stated that in order to find that Eadon is not an insured for the acts of negligence asserted against him, the Court must conclude that “the duties of an officer and those of an employee, as delineated by a general commercial liability policy, are mutually exclusive.” This is incorrect. Auto-Owners agrees that an officer’s duties may overlap his duties as an employee; for instance, an officer’s duties may include the same things that other employees do for the corporation. However, in this case, Eadon himself has testified that his duties as an officer do not include designing, manufacturing, installing or inspecting the signs built by the corporation or supervising in any manner that aspect of the business. He is not responsible for insuring that these functions are carried out correctly and there is no evidence in the record to the contrary. Whether Eadon is viewed as an employee or an officer, it is undisputed that he is in no way responsible for the alleged negligent activities. Those activities were handled by Chuck Benenhaley, an employee of the corporation. His only duty as an officer of C&B Fabricators, Inc. and LowCountry Signs & Fabrication, Inc. was to

provide money and insurance for the operation of the corporations. (R. pp. 1103-1105, 1114, 1205-1209).

Furthermore, Eadon's uncontroverted testimony is that C&B Fabricators, Inc. was no longer doing business and he was out of the sign business completely by the time he began receiving calls from Rhodes about the leaning sign. (R. pp. 1210-1211, 1250, 1095-1096). In addition, there is no evidence that LowCountry Signs & Fabrication, Inc. did any business or had any relationship with Rhodes or Piedmont. Likewise, there is no evidence that Eadon undertook any action with regard to Rhodes within his duties as an officer of LowCountry Signs & Fabrication, Inc. (R. pp. 1117-1118).

Because Eadon is only covered under the policy with respect to his duties as an officer of the insured corporations, and his only duty as an officer (to supply money and insurance) could not have been the basis of the verdict against him, Auto-Owners has no duty to indemnify him for any damages awarded against him in the Rhodes case. See, Creel v. Louisiana Pest Control Insurance, Inc., 723 So.2d 440 (La. Ct. App. 1998); Bowie v. Home Ins. Co., 923 F.2d 705 (9th Cir. 1991); Boso v. Erie Ins. Co. / Erie Ins. Exchange, 669 N.E.2d 47 (Ohio Ct. App. 1995); Harrison v. Ohio Cas. Ins. Co., Inc., 199 F.Supp.2d 518 (S.D. Miss. 2000); Carpenter v. Fed. Ins. Co., 637 A.2d 1008 (Pa. Super. Ct. 1994); Lomes v. Hartford Fin. Serv. Group, Inc., 105 Cal. Rptr. 2d 471 (2001).

As a result, Eadon does not meet the definition of an insured under the facts of this particular case, and the Court of Appeals opinion on this issue should be reversed.

2. THE COURT OF APPEALS' DECISION REGARDING EXCLUSION "N" IS IN CONFLICT WITH THE SUPREME COURT'S DECISION IN AUTO OWNERS V. NEWMAN.

The Court of Appeals held that exclusion N does not exclude the damages

claimed for the loss of use, removal and disposal of the insured's work or product (the signs). The Court of Appeals' published decision is in direct conflict with the Supreme Court's holding in Auto Owners Ins. Co., Inc. v. Newman, Op. No. 26450 (S.C. Sup. Ct. filed Sept. 8, 2009) and will only create confusion in this area of the law if left undisturbed.

The subject Commercial General Liability ("CGL") policy provides that the insurance does not apply to:

- n. Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

The Court of Appeals held that Exclusion N did not apply because the case did not involve a product recall, stating:

These exclusions are typically included and applied to shield insurers from liability for the costs associated with unanticipated product recalls, and do not apply to claims involving losses resulting from the failure of the insured's product or work, when there is no evidence of a general recall of similar products or materials from the market place. [citations omitted] The circumstances giving rise to the Tort action, without question, did not involve a product recall; therefore, the circuit court did not err in finding Exclusion n inapplicable to this case.

Auto-Owners Ins. Co. v. Samuel W. Rhodes, et. al., Op. No. 4605 (S.C. Ct. App. filed Aug. 6, 2009).

The Court of Appeals adopted a narrow interpretation of Exclusion N, citing foreign jurisdictions for authority. That foreign authority is not persuasive or binding in light of the holding in Newman.

In Newman, the Supreme Court applied Exclusion N to damages associated with the repair and replacement of stucco or a construction defect claim. In referring to Exclusion N, the Supreme Court applied two (2) important insurance law principles. First, the Supreme Court stated:

[T]erms [of Exclusion N] 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.

Newman. In making this statement, the Supreme Court was applying the principle, “[w]hen a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense. Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

The Court of Appeals’ reading of N is consistent with the Supreme Court’s prior decision in Helena v. Allianz Underwriters Insurance, 357 S.C. 631, 594 S.E.2d 455 (2004)(discussed herein), in which the Court stated, “the Fourth Circuit’s logic contains an inherent paradox: although insurance policy terms are to be construed in their ordinary and usual way, the Armco and Milliken courts both accorded the term ‘damages’ a narrow, technical meaning.” Id. at 638, 594 S.E.2d at 458. Further, “this goes against South Carolina precedent which holds that this Court must give policy language its plain, ordinary, and popular meaning.” Id. (citing Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002)).

Second, the decision reached in Newman regarding Exclusion N is consistent with the principal that each exclusion in the policy must be read and applied independently of every other exclusion. Engineered Products, 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 (N.J. 1979)). Further, “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.” Id. (citing Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (N.J. 1979)).

In deciding coverage for the facts in Rhodes, the Court of Appeals should have looked to “plain and ordinary” language of Exclusion N to see whether the exclusion applies to the facts and no further. To limit Exclusion N to a particular industry or situation was error and “goes against South Carolina precedent which holds that this Court must give policy language its plain, ordinary, and popular meaning.” Helena, 594 S.E.2d at 458 (citing Century Indem., 561 S.E.2d at 358).

Exclusion N excludes the damages alleged by Rhodes and Piedmont for removal, disposal and loss of use of the two signs that did not fall. These damages include the cost to remove and dispose of the signs and all loss of use (economic damages claimed) as a result of the removal of the signs. The SCDOT deemed the two standing signs unsafe, and made Piedmont Promotions remove them. As explained in Newman, Exclusion N excludes damages for *any loss, cost or expense* incurred by Rhodes/Piedmont for the *loss*

of use, repair or removal or disposal of the signs if the signs are withdrawn from use by the SCDOT because of a known or suspected defect in it.

3. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH PRIOR PRECEDENT REGARDING EXCLUSIONS K AND L.

The Court of Appeals erred in failing to apply Exclusions K and L to exclude all damages claimed for loss of use of the billboard signs. Rhodes and Piedmont claim millions of dollars in lost profits due to the loss of use of the billboard signs.

Exclusion K excludes “property damage” to “your product”. Exclusion L excludes “property damage” to “your work”. The signs built by C&B Fabricators, Inc. constitute either “your product” or “your work.” The policy defines “property damage” as 1) physical injury to tangible property, including all resulting *loss of use* of that property; or 2) *loss of use* of tangible property that is not physically injured. Therefore, the policy excludes physical injury to the signs and loss of use of the signs, whether or not physically injured.

The trial court stated, “Mr. Rhodes presented evidence of damages for the loss of use of the billboards that amounted to a present value of \$4,212,386, plus damage to real property.” (R. p. 37) (emphasis added).⁴ Since “loss of use” is specifically part of the definition of “property damage,” loss of use to your work or your product (the signs) is excluded by the Policy.

This conclusion is squarely consistent with L-J, which requires there to be damage to “other property” -- something other than the signs affixed to the real estate. It is also consistent with the Court’s finding that CGL insurers are “not obligated to defend

⁴ The trial court in the DJ action refers to the “loss of use” of the signs on numerous occasions in its decision. (R. pp. 27, 29, 37, and 42.)

[an] insured where [the] action against insured did not involve accidental injury to *property other than that on which insured was performing its work.*” Century Indem., 348 S.C. at 567, 561 S.E.2d at 360 (citing C.D. Walters., 281 S.C. 593, 316 S.E.2d 709).

Notably, the claim that Piedmont lost the permits (to erect its signs) is not a covered loss. This is because the permits are not a tangible property interest, but an intangible economic right. One will recall that both definitions of “property damage” require there to be *tangible property* in first instance.

4. THE COURT OF APPEALS’ FINDING THAT THE REMOVAL OF THE TWO SIGNS THAT DID NOT FALL CONSTITUTES AN “OCCURRENCE” CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT.

The Court of Appeals stated:

The circuit court analogized the insurer's duty to pay expenditures having to do with environmental clean-ups to the case at hand, wherein SCDOT deemed the remaining two signs unsafe, and required Rhodes to take them down. We find the circuit court's analysis of Helena to be accurate, and, therefore, the cost associated with Rhodes' required removal of the final sign comports with the broader definition of damages or physical injury to tangible property defined in subsection 12.a.

Auto-Owners Ins. Co. v. Samuel W. Rhodes, et. al., Op. No. 4605 (S.C. Ct. App. filed Aug. 6, 2009).

The SCDOT required Piedmont Promotions, Inc. (owner of all three signs) to remove the two still standing signs because of defects in the construction of these signs – same as the sign that fell down. The Court of Appeals’ misapprehension of Braswell v. Faircloth, 300 S.C. 338, 387 S.E.2d 707 (Ct.App. 1989) and Helena together led to an incorrect conclusion on the occurrence and property damage issues.

In Braswell the Court of Appeals found an occurrence of property damage as to chemicals that spilled and contaminated underlying soils. However, the Court of Appeals

did not find an occurrence of property damages as to the cost associated with the removal of the still standing barrels of chemicals that had not spilled into the soil. Braswell, 387 S.E.2d at 711. A more complete synopsis of the Braswell decision is contained in Auto Owners' previous briefs, including the brief in support of the Motion for a Rehearing before the Court of Appeals.

The Supreme Court in Helena did not alter the analysis in Braswell as to the finding that the unspilled chemicals did not constitute an occurrence of property damage. Helena, 594 S.E.2d at 459. The Supreme Court noted that the Court of Appeals reversed the Braswell trial court, in part, "finding the chemical spill constituted an 'occurrence,' and therefore the cleanup costs associated with the spill should be covered by the insurer. But because most of the costs were for removal of stored wastes that had not leaked, the Court of Appeals held these costs were not recoverable since no property damage had yet resulted." Id. The Supreme Court did not find this conclusion to be incorrect or reversible. A more complete synopsis of the Helena decision is contained in Auto Owners' previous briefs, including the brief for the Motion for a Rehearing before the Court of Appeals.

The Court of Appeals in the Rhodes Opinion erroneously found Helena materially altered the result in Braswell or operated to give blanket insurance coverage for state and federal cleanups where there was no contaminated soil. The Helena decision did not do so. An accurate reading of both decisions is that the South Carolina appellate courts will not find an occurrence of property damages for the damages associated with the SCDOT mandate to take down the two unsafe signs – that were only defective in construction. This reading is also consistent with the Supreme Court's reasoning in Newman that, "the

subcontractor's negligent application of the stucco does not on its own constitute an "occurrence". Auto Owners Ins. Co., Inc. v. Newman, Op. No. 26450 (S.C. Sup. Ct. filed Sept. 8, 2009). This reading is also consistent with the Supreme Court's application of Exclusion N in Newman.

5. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH A PRIOR DECISION OF THE SUPREME COURT REGARDING "OCCURRENCE" AND THE REQUIREMENT THAT THERE BE DAMAGE TO OTHER PROPERTY.

In finding the existence of an occurrence in this construction defect case, the Court of Appeals relied primarily on L-J. In L-J, the Court examined the word "occurrence" in a construction defect case and its relation to faulty workmanship. In L-J, the Court stated, "[t]he CGL policy may provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, *not in cases where faulty workmanship damages the work product alone.*" L-J, 621 S.E.2d at 36 n. 4. To explain its position further, the Court stated, "[w]e find these negligent acts constitute faulty workmanship, which damaged the roadway system only. And because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence." Id. at 36.

The Supreme Court recently addressed the word "occurrence" in a residential construction defect claim in Newman. In Newman, the Supreme Court held that the negligent application of the stucco, by a subcontractor, resulted in an "occurrence" of water intrusion causing property damage. The Supreme Court found that the exterior sheathing and wooden framing of the house was "other property" (than the work of the stucco subcontractor) sufficient to constitute an insured loss under the home builder's

CGL policy. The Supreme Court found an occurrence in Newman, in part, because of the exception to Exclusion L involving a subcontractor.

The analysis by the Court of Appeals in the present case is a flawed one. There is no “other property” in the facts of the case, and the case does not involve a subcontractor doing the particular work. In this case, the insured’s work/product (the signs) were affixed to and made part of the real estate. The loss of the signs has generated multiple forms of damages to the same property, e.g., cost of removal, disposal, loss of use and diminution in value, arising out of and flowing from it. The focus on the different types of damages caused the trial court and Court of Appeals to reach an incorrect coverage decision in this commercial construction defect case.

6. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH A PRIOR DECISION OF THE SUPREME COURT REGARDING DIMINUTION IN VALUE DAMAGES.

The Court of Appeals stated:

The circuit court found the diminution in value of Rhodes' property attributable to the loss of his permits to erect signs in the future, fit within the second part of the definition of property damage: loss of use of tangible property. Thus, the Policy would provide coverage for lost profits from the inability to maintain signs on the property and contributing to its overall diminution in value.

Auto-Owners Ins. Co. v. Samuel W. Rhodes, et. al., Op. No. 4605 (S.C. Ct. App. filed Aug. 6, 2009)

The Court of Appeals did not apply existing legal precedent and policy provisions correctly. As the owner of the fee simple title to the real estate, Rhodes alleges that Eadon damaged the real estate. Since one is addressing real estate, one must look to what recovery South Carolina state law permits for damages to real estate. Aside from relatively small amounts for clean up cost and hauling away debris, Rhodes is seeking

diminution in value damages. Rhodes is alleging that the acts or omissions of Eadon diminished the economic value of his real estate. Rhodes alleges that his real estate does not have the same income production potential without the signs as it did with the signs.

South Carolina state law addresses damages to real property. The law states, “[i]n the absence of evidence of specific damages, the measure of damages for injury to real property is the difference between the value of entire premises before and after injury thereto. Joyner v. St. Matthews Builders, 263 S.C. 136, 208 S.E.2d 48 (1974). The Court has held that diminution in value to real estate is not a CGL insurable loss. Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc., 356 S.C. 156, 588 S.E.2d 112 (2003). Therefore, damages for diminution in value of the real estate is not a covered loss under Auto-Owners CGL policy.

7. THE COURT OF APPEALS SHOULD HAVE HELD THAT AUTO-OWNERS HAS NO DUTY TO INDEMNIFY ITS INSURED FOR COSTS INCURRED IN REMOVING ITS WORK PRODUCT (THE SIGNS) FROM RHODES’ PROPERTY.

The Court of Appeals erred in finding that Auto-Owners must indemnify its insured for the costs it incurred in removing one of the signs that did not fall.⁵ As previously stated, this finding, made in a published opinion, conflicts with the Court’s recent decisions in L-J and Auto-Owners v. Newman, Op. No. 26450 (S.C. Sup. Ct. filed Sept. 8, 2009), and will create confusion in this area of the law if not reversed.

The cost incurred by the insured to remove and dispose of the insured’s own defective work product is not a covered loss under the policy. As previously discussed, an insured removing a billboard sign because it was defectively built is not an

⁵ Only one sign fell. Rhodes removed one of the remaining signs and Eadon removed the other.

occurrence. L-J, 621 S.E.2d at 36 (“the damage in the present case did not constitute an ‘occurrence.’ If we were to hold otherwise, the CGL policy would be more like a performance bond, which guarantees the work, rather than like an insurance policy, which is intended to insure against accidents.”). Furthermore, the Court of Appeals allowed Eadon his cost to remove a sign, which is no different than the cost to remove the stucco in Newman – and not a covered loss. Even if it somehow meets the definition of an occurrence, it is excluded pursuant to Exclusion N.

In addition, this issue was never raised to the trial court and Auto-Owners never had an opportunity to respond to it. The only issue presented to the trial court in this case is whether Auto-Owners’ has a duty to indemnify Eadon for the damages asserted against him by Rhodes and Piedmont. The Court of Appeals’ mistakenly believes that Eadon and C&B filed a counterclaim raising this issue. However, this is incorrect. The truth of this is evidenced by the fact that Auto-Owners filed a Second Amended Complaint on July 18, 2005. (R. p. 635). Eadon and C&B filed an Answer to the Second Amended Complaint in August 2005. (R. p. 716). It contains no counterclaim and is the last responsive pleading filed by Eadon and C&B in this case.

Therefore, the Court of Appeals erred in finding that Auto-Owners has a duty to indemnify its insured for costs incurred in removing its own work product.

8. THE COURT OF APPEALS SHOULD HAVE REVERSED THE TRIAL COURT’S DENIAL OF AUTO-OWNERS RULE 60(B)(4) AND (5) MOTIONS AFTER THE VERDICT IN THE RHODES CASE WAS REVERSED.

The trial court should have vacated its Order issued on November 7, 2006 and stayed the case after the Court of Appeals reversed the judgment in the Rhodes case. See, Rhodes v. Eadon, Op. No. 2006-UP-413 (S.C. Ct. App. filed December 15, 2006). Once

the Court of Appeals reversed the verdict in the Rhodes case and remanded it for retrial in Clarendon County, no duty for Auto-Owners to indemnify Eadon existed. As the Court of Appeals aptly notes in its opinion, a declaratory judgment action to determine the indemnity obligation is generally not ripe until the underlying action for damages has been resolved. This is because “the allegations of the Complaint ... are not determinative of ... the right to indemnity. Rather, such a determination is based on the evidence and the facts found by the fact finder.” Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 476 S.E.2d 708 (Ct.App.1996) (quoting Griffin v. Van Norman, 302 S.C. 520, 397 S.E.2d 378 (Ct.App. 1990)).⁶

The Court of Appeals rejected the precedent set by Jourdan and Griffin and determined that the trial court correctly denied Auto-Owners Rule 60 motions. The Court of Appeals erred in doing so. The duty to indemnify is based on the evidence and the facts found by the fact finder in the underlying action, and those facts have not yet been determined in this case. The Rhodes case will be retried. Eadon may prevail. Additional coverage issues may arise out of the retrial. There may be new damages asserted that are not covered by the Court of Appeals’ Order. There may be additional evidence presented to the jury that impacts the issue of whether Eadon meets the definition of an insured. The jury may find that Eadon acted willfully and intentionally, thus triggering the exclusions of Auto-Owners’ CGL policy. These possibilities demonstrate that this declaratory judgment action should not be decided at this time, that the trial Court’s order should be vacated and the case remanded back to the trial court so that the facts as

⁶ See also Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 377 (N.C. 1986); Ellett Bros., Inc. v. U.S. Fid. & Guar. Co., 275 F.3d 384 (4th Cir. 2001).

determined by the trier of fact in Clarendon County can be considered in determining Auto-Owners' duty to indemnify Eadon.

9. THE COURT OF APPEALS SHOULD HAVE HELD THAT RHODES AND PIEDMONT ARE JUDICIALLY ESTOPPED FROM ARGUING IN THIS CASE THAT EADON WAS ACTING ON BEHALF OF A CORPORATION, WHEN THEY ARGUED IN THE RHODES CASE THAT HE WAS OPERATING A SOLE PROPRIETORSHIP SO AS TO SUBJECT HIM TO INDIVIDUAL LIABILITY.

The Court of Appeals agrees with Auto-Owners that Rhodes and Piedmont sued Eadon as an individual in the Rhodes action and argued that Eadon "was not acting on behalf of the corporation in contracting for the signs." (emphasis in Opinion). The purpose of Rhodes and Piedmont's argument was to convince the trial court in the Rhodes action to award a judgment against Eadon individually as opposed to finding the obligation to be a corporate one.

The Court of Appeals also acknowledges that Rhodes and Piedmont have argued that Eadon was acting on behalf of the corporations in this case. The purpose of this argument was to persuade the trial court in the DJ action that a verdict against Eadon will be covered by the insurance policy. The Court of Appeals found that these entirely inconsistent positions met all of the requirements of judicial estoppel except for the fourth requirement: "the inconsistency must be a part of an intentional effort to mislead the court."⁷

⁷ See Wright v. Craft, 372 S.C. 1, 38, 640 S.E.2d 486, 506 (Ct.App.2006) ("Five elements are required for the application of judicial estoppel: (1) two inconsistent positions must be taken by the same party or parties in privity with each other; (2) the two inconsistent positions were both made pursuant to sworn statements; (3) the positions must be taken in the same or related proceedings involving the same parties in privity with each other; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent-that is, the truth of one position must necessarily preclude the veracity of the other position.").

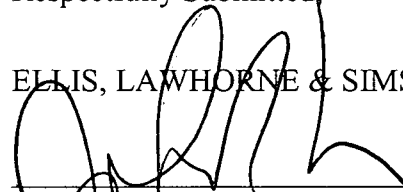
It is unclear under the Court of Appeals' analysis how one would ever prove that the inconsistency is part of an intentional effort to mislead the court. The very fact that a party takes completely inconsistent positions in related cases for the purpose of advancing his position in each of those cases is proof of an intent to deceive the court. See, Cothran v. Brown, 357 S.C. 210, 217, 592 S.E.2d 629, 632 (2004) (no intent to mislead the court, because Brown's position was consistent from one action to the next). The principle of judicial estoppel exists to prevent this very type of litigation conduct and it was error not to apply it in this case. Quinn v. Sharon Corp., 343 S.C. 411, 416, 540 S.E.2d 474, 476-77 (Ct.App. 2000).

Conclusion

Based upon the foregoing arguments, Petitioner requests that the Supreme Court issue a writ of certiorari to review the final decision of the Court of Appeals.

Respectfully Submitted,

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October 23, 2009

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

RECEIVED

OCT 23 2009

S.C. SUPREME COURT

Opinion No. 4605 (S.C. Ct. App. filed August 6, 2009)

Auto-Owners Insurance Company, ...Petitioner,

v.

Samuel W. Rhodes, Piedmont Promotions, Inc.,

Marion L. Eadon d/b/a C&B Fabrication, C&B

Fabrications, Inc., and Low Country Signs, Inc., ...Respondents.

CERTIFICATE OF SERVICE

I am an employee of the law firm of Ellis Lawhorne & Sims, P.A., do hereby certify that I served a copy of Auto-Owners Insurance Company's Petition for Writ of Certiorari and Appendix this the 23rd day of October, 2009 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

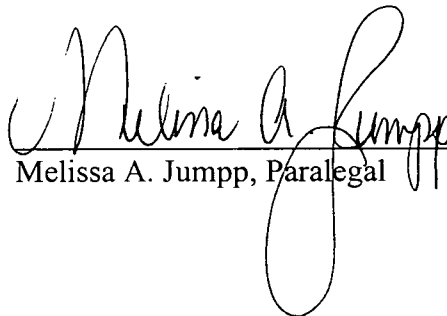
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

RECEIVED

Lee S. Alford, Circuit Court Judge

OCT 23 2009

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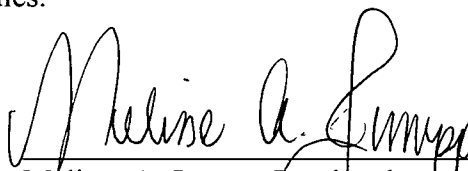
Samuel W. Rhodes, Piedmont Promotions, Inc.,

Marion L. Eadon d/b/a C&B Fabrication, C&B

Fabrications, Inc., and Low Country Signs, Inc., ...Respondents.

CERTIFICATE OF SERVICE

I am an employee of the law firm of Ellis Lawhorne & Sims, P.A., I do hereby certify that I have filed a copy of Auto-Owners Insurance Company's Petition for Writ of Certiorari and Appendix this the 23rd day of October, 2009 with the S.C. Court of Appeals as required under Rule 226(c) of the S.C. Appellate Court Rules.


Melissa A. Jumpp, Paralegal

RECEIVED

NOV 12 2009

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No.: 02-CP-46-2369
Case Tracking Number 2009-143546

Auto-Owners Insurance Company..... Petitioner

v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon, C&B Fabrications, Inc.,
and Low Country Signs, Inc..... Respondents

**RESPONDENT MARION EADON'S RESPONSE TO
PETITIONER'S PETITION FOR *CERTIORARI***

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FABRICATIONS, INC. AND
LOW COUNTRY SIGNS, INC.**

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QUESTIONS PRESENTED

1. Was there evidence to support the Court of Appeal's and Trial Court's holdings that Mr. Eadon was an insured under Auto-Owner's CGL policy?
2. Did the Court of Appeals correctly affirm the Trial court's finding that the fall of one of the billboard towers was an "occurrence" under Auto-Owner's CGL policy and that there was property damage flowing from that occurrence?
3. Did the Court of Appeals and Trial Court make the correct legal determination that the CGL policy's exclusion "n" – the "sistership" or "product withdrawal" exclusion – did not exclude coverage for the removal of the two defective signs that had not yet fallen?
4. Did the Court of Appeals and the trial court correctly hold, because there was damage to property other than the signs themselves, that exclusions "k" and "l" – for C&B Fabrications' "product" and "work" respectively – were ineffective to deny coverage for damages other than the amount paid for the signs?
5. Was the Court of Appeals correct in implicitly holding that the situation underlying Auto Owners Inc. Co. v. Carl Brazell Builders, Inc., 356 S.C. 156, 588 S.E.2d 112 (2003), was distinguishable from the situation in this case in that in Brazell there was no allegation of physical injury to property – making the loss purely economic – where there is clearly an allegation of property damage as defined by the policy in Rhodes v. Eadon?
6. Was the Court of Appeals correct, in both law and equity, and in the interest of judicial economy, in affirming the trial court's denial of Appellant's motions under Rule 60(b)?

STATEMENT OF THE CASE

The "Factual Background" in the trial court's Order provides an excellent statement of the case. What follows is an edited version of the trial court's rendering of the facts, R. 13-23, to which references to the Record (Appendix) have been added.

Respondent Rhodes obtained permits in the name of Piedmont Promotions, Inc. from the South Carolina Department of Transportation (SCDOT) to erect three outdoor advertising signs on real estate adjacent I-77. Rhodes had conversations with Marion L. Eadon (Eadon) and also met with Eadon at his place of business, C&B Fabrication, to discuss having the signs made. R 1139, Line 21-1140, Line 13. Eadon personally assured Rhodes that the signs would be correctly designed, fabricated and installed and he personally would stand behind the work. R. 1141, Lines 8-15, 1148, Lines 17-25.

Thereafter a written proposal dated July 9, 1999 by C&B Fabrication (C&B) to design, fabricate, deliver and install three signposts. The proposal was on the letterhead of C&B Fabrication. The proposal by C&B was for \$155,460.00 but was negotiated down to \$153,960.00, with Eadon personally approving C&B Fabrication's lower offer. R. 1144, Line 16-1145, Line 2. The revised proposal was accepted by Rhodes. Mr. Rhodes testified that he "was accepting it from Marion Eadon, C&B Fabrication." R. 1145, Line 1. When the proposal was accepted, Rhodes paid one-half the agreed price to C&B. Subsequent payments were made on February 8 and February 22, 2000, the latter being when the installation of the signs was completed by C&B. When Rhodes made the final payment to C&B, he requested a copy of the engineering drawings for the signs. Tracy Benenhaley, C&B's man on the erection site, furnished Rhodes a copy of the drawings, which had been prepared by Thompson Engineering Group, L.L.P. on or about July 13, 1999.

In December 2000, approximately ten months after installation, the middle sign was discovered leaning toward I-77. Rhodes requested that Eadon correct the leaning sign, inspect the other two signs and make any needed corrections to them. R. 1153, Lines 6-19; 1211, Lines 13-16, 1227, Lines 10-16. On or about January 17, 2001, Eadon sent a crew which made adjustments to the leaning sign. R. 1159, Lines 6-9. When C&B personnel were correcting the leaning sign, Rhodes requested that they inspect the other two signs and was assured by them that they would do so.

Three days later on the afternoon of January 20, 2001, the southernmost of the signs fell on I-77 across both southbound traffic lanes. SCDOT required Rhodes to immediately take down the remaining two signs because of safety concerns. Pursuant to

Rhodes' demand, Eadon had one of the remaining signs taken down but refused to take down the last sign, R. 1160, Lines 21-23; 1211, Lines 13-25, so Rhodes took down the last sign. On January 23, 2001, SCDOT gave notice of cancellation of all three advertising billboard permits.

On February 8, 2001, Auto-Owners sent a reservation of rights letter to Eadon pertaining to the "claim" in which it questioned whether and occurrence had taken place and cited several policy provisions, including four exclusions. Auto-Owners paid several claims for damages caused by the falling of the sign, some to the SCDOT and some to Piedmont Promotions. *See, e.g.*, R. 1284-85. On August 2, 2001, Auto-Owners wrote Rhodes saying: "As I explained to you on the phone, we do insure C&B Fabrications but their liability policy does not have coverage for most of the expenses that will be incurred by someone in this loss. We have coverage for resulting damages that this sign has caused and I have enclosed a draft to you in the amount of \$1,800.00.... We will also have coverage for the expenses that the SCDOT has billed you for and I have paid that bill directly to them." R. 497.

On December 12, 2001, Rhodes and Piedmont instituted a civil action (Rhodes action) in the Court of Common Pleas for Fairfield County against Marion L. Eadon, d/b/a C&B Fabrication. In that action they alleged damages to the real estate and lost income by Piedmont as a proximate result of negligent design, fabrication, and erection of the signs by C&B and its negligent failure to discover and correct the defective condition of the signs, all of which resulted in the fall of one of the signs, the mandate by SCDOT that the remaining two signs be taken down and cancellation of the three sign permits. *See*, First Amended Complaint, R. 119-134.

As the liability insurer, Auto-Owners retained counsel to defend the action by Rhodes and Piedmont against Marion L. Eadon d/b/a C&B Fabrication. On February 8, 2002, Auto-Owners sent a letter to Eadon saying that a defense of the tort suit was under a reservation of rights. The letter stated in part: “we will be defending presently due to the claim of damage to real property that is alleged in the suit papers.... Should the claim of damage to real property be dismissed, there is a strong likelihood that we will no longer be providing a defense to you.” R. 1288-89.

On October 14, 2002, Auto-Owners filed the current DJ action. The Complaint quoted policy provisions pertaining to property damage, occurrence, your product, your work, and four exclusions (k, l, m and n). The Complaint alleged that “by reason of the provisions of the insurance policy and the applicable laws” the policy provides no coverage to and no obligation to defend the Rhodes action. The Complaint sought a stay of the Rhodes action pending resolution of the DJ action. It failed to allege that Marion L. Eadon d/b/a C&B Fabrication was not an insured under the policy, raising only the issues of whether there had been an occurrence and the four cited exceptions. R. 158-163.

Eadon answered and counter-claimed, *inter alia*, for bad faith regarding Auto-Owners’ attempt to cease defending Mr. Eadon in the tort action. R. 135-140.

Five months later, on March 14, 2003, Auto-Owners filed an Amended Complaint in this DJ action. Auto-Owners’ Amended Complaint, as did its original Complaint, alleges that “Marion L. Eadon d/b/a C&B Fabrications, Inc. completed and installed the signs in February of 2000.” R. 148, ¶ 6. The Amended Complaint alleges that the policy was issued “to C&B Fabrications, Inc. and Low Country Signs, Inc” R. 149, ¶10. Auto-Owners’ Amended Complaint also alleges that its “policy of insurance provides no

coverage to Marion L. Eadon d/b/a C&B Fabrications, Inc. with respect to the described law suit, by reason of the provisions of the insurance policy.” R. 151, ¶19. The only “provisions” of the policy mentioned in the Amended Complaint are “occurrence” and four exclusions. No issue is raised in the Amended Complaint as to Marion L. Eadon d/b/a C&B Fabrication not being insured under the policy. The Amended Complaint abandoned the contention of no duty to defend and abandoned the request to stay the underlying action.

On June 20, 2003 an Amended Complaint was filed in the Rhodes action. The Amended Complaint in the Rhodes action alleged:

As a consequence of having to remove the signs pursuant to the mandate of the South Carolina Department of Transportation, permanent fixtures on the Plaintiff’s real property had to be removed which has resulted in significant injury to the Plaintiff’s real property and has significantly impaired its value and usefulness, which injury cannot be replaced or repaired under the current mandates of the South Carolina Department of Transportation prohibiting the use of signs at this location.

R. 125, ¶ 20 e

Evidence to support this allegation was presented at the Rhodes trial. An expert real estate appraiser testified as to the damage to the real estate. R. 1189, Line 2-1192, Line 5. An expert economist testified as to the consequential damages resulting from the loss of the revenue the signs would have produced. R. 1182, Line 1-1186, Line 11.

On December 18, 2003, Auto-Owners filed a Motion for Summary Judgment in the DJ action. That motion was heard by the court on January 22, 2004 and denied.

While the Rhodes action was pending, on March 6, 2003, Auto-Owners filed a Motion to Intervene in the Rhodes action to be permitted to submit special interrogatories. Auto-Owners’ motion contained the statement:

Auto-Owners Insurance Company issued an insurance policy to the Defendant [Marion L. Eadon d/b/a C&B Fabrication] with liability coverage for the period of time relevant to this action (the "Policy").

R. 154.

Thereafter on April 21, 2003 Auto-Owners filed an Amended Motion to Intervene in the Rhodes action in which it reiterated the same statement. R. 220.

At the hearing on the Motion to Intervene in the Rhodes action, Auto-Owners submitted its Memorandum dated July 9, 2003 in which it again stated that Auto-Owners "is the insurance carrier for the Defendant [Marion L. Eadon d/b/a C&B Fabrication]. The thrust of Auto-Owners' Motion to Intervene and the basis for it was that it needed to determine which causes of action the jury found in favor of the Plaintiffs and the amount and type of damages pertaining to each. R. 225-226. There was no mention of any question about whether Mr. Eadon was an insured under the policy.

The Rhodes action was tried the week of August 30, 2004. At the end of the four-day trial the jury returned a verdict for the Plaintiffs under the Negligence cause of action for \$3,000,000 actual damages and \$3,500,000 punitive damages. On the Contract cause of action and the Implied Warranty cause of action Plaintiffs' verdicts for \$5,000 actual damages in each were awarded. Rhodes and Piedmont elected to recover on the Negligence cause of action in which the jury rendered the \$6,500,000 verdict. The only cause of action upon which judgment has been entered is the negligence cause of action. It clearly is one covered by the policy. The reasons Auto-Owners advanced in moving for intervention had all been resolved factually by the jury's verdict and the judgment entered on it. The Defendant's post-trial motions were denied. On appeal, the Court of

Appeals reversed the verdict on the ground that venue was improper in Fairfield County. Op. No. 2006-VP-413 (Dec. 15, 2006).

The Court and the parties concurred in deferring trial of this DJ action until after the trial of the Rhodes action. This DJ action was on the jury trial roster as the first case for the September 13, 2004 term. On September 3, 2004, Auto-Owners served a Motion for Continuance, based on its position that it needed a transcript of the Rhodes trial. Over the objection of all Defendants the Court granted the requested continuance. Also on September 3, 2004, Auto-Owners filed its Motion to Serve a Second Amended Complaint.

The Defendants opposed Auto-Owners' Motion to Amend its Amended Complaint. No proposed Amended Complaint was submitted with Auto-Owners' Motion to Amend. In its Memorandum in Support of its Motion to Amend it proposed two general areas. First: a change in the language of its Complaint from "Marion L. Eadon d/b/a C&B Fabrications, Inc." to "Marion L. Eadon d/b/a C&B Fabrication." Second: whether "Marion L. Eadon d/b/a C&B Fabrication is an insured" under its policy. This was Auto-Owner's first claim that Mr. Eadon was not an insured. The Motion to Amend was extensively briefed by all parties and conferences and arguments on the Motion were heard by the Court. The Court allowed the Motion to Amend in an Order dated June 5, 2005. Auto-Owners served its Second Amended Complaint on July 15, 2005. R. 635-641.

In January and February, 2005, all parties had filed motions for summary judgment. The Court had conferences with counsel for the parties, the summary

judgment motions were extensively briefed and arguments presented. The Court denied the motions in Orders issued August 3, 2005.

In this DJ action the Defendants requested a jury trial on disputed facts. The Court found that the only factual issue for the jury concerned an ambiguity in the names of the business entities intended by the parties to be covered in the insurance contract. This issue arose by reason of the Second Amended Complaint which put in issue whether Marion L. Eadon d/b/a C&B Fabrication was insured under the policy for the judgment obtained in the Rhodes action. The remaining issues as to policy terms and provisions, particularly the four exclusions, were to be decided by the Court. The case was called for trial on June 26, 2006, with a jury was drawn and excused until the following day. The Court was provided with a transcript of the Rhodes trial, deposition transcripts from the Rhodes trial and the DJ action, and additional briefs by the parties. The Court was receptive and generous to the parties in permitting the submission of all evidence pertinent and relevant to issues raised by the parties. The Court reviewed the trial and deposition transcripts that afternoon and evening. The jury returned a second day but prior to submission of any evidence, the parties entered into a Stipulation as to the sole jury issue and the Stipulation was entered on the record:

Stipulation

For purposes of this Declaratory action only, the name insureds on Auto-Owners' policies are reformed to C&B Fabricators, Inc. and Lowcountry Signs & Fabrication, Inc. both d/b/a C&B Fabrication, trade name of these corporations.

R. 23. The jury was then dismissed with the consent of all parties. The Court requested the submission of final briefs from the parties on the issues to be resolved by the Court.

The trial court issued its Order on November 7, 2006. The findings and conclusions of that Order included the following:

- I. There was an occurrence within the meaning and application of that term in the Auto-Owners policy.
- II. There was property damage within the meaning and application of that term in the Auto-Owners policy.
- III. Exclusions k, l, m, and n do not apply within the meaning and terms of the Auto-Owners policy.
- IV. Marion L. Eadon d/b/a C&B Fabrication is insured under the words of the Auto-Owners policy and in accordance with the actual or implied expectations of both Auto-Owners and Mr. Eadon for the judgment obtained in the Rhodes action, including actual and punitive damages, except for the \$153,960.00 cost of the three signs, up to the policy limits.

R. 59-60 (Footnote omitted.) Auto-Owners served a Motion to Alter or Amend or for a New Trial on November 20, 2006, R. 998-1007, and on the following day, November 21, 2006, served an amended version of the same motion. R. 1011-1020.

After the Court of Appeals reversed Rhodes v. Eadon, the trial court on March 23, 2007, issued a supplementary Order in the present declaratory action. R. 61-62. The Order denied Auto-Owners' Motion to Alter or Amend or for a new trial. Based on the result of the Rhodes v. Eadon appeal, the Court held as follows:

It follows, *a fortiori*, that if the judgment for money damages in favor of Rhodes and Piedmont Promotions, Inc. against Marion L. Eadon d/b/a C&B Fabrication is vacated there are no sums that the insured is legally obligated to pay as damages. Therefore, Items IV and V [quoted *supra*.] of the Findings and Conclusions in this Court's Order would be void and of no effect.

The remaining three items in the Findings and Conclusions of the Order together with the other findings of the Order shall remain in effect.

A week later, March 30, 2007, the trial court issued a revised supplemental Order.

R 63-64. The key portion of that Order is an exception added to the previously-cited extract of the March 23 Order, as follows:

Therefore, Items IV and V of the Findings and Conclusions in this Court's Order would be void and of no effect, with the exception that the legal conclusion that Marion L. Eadon d/b/a C&B Fabrication is insured under the terms of the policy and in accordance with the intention of coverage by the parties – remains in full force and effect.

R. 64. Auto-Owners appealed and on August 6, 2009, the Court of Appeals, in a unanimous panel decision, affirmed the trial court with a modification. The Court of Appeals' conclusion, outlining the part of the trial court's Order that is vacated because of the reversal of Rhodes v. Eadon and the issues of fact and law upon which the trial court was affirmed, was as follows:

[W]e vacate the portions of the circuit court's order, under "The Policy Provisions" section, referencing the former verdict in the Tort action. On the merits, we find the circuit court was correct in its determination that: Eadon d/b/a C&B Fabrication was an insured under the Policy; there was an occurrence resulting in damages; and that none of the exclusions in the Policy apply.

Auto-Owners Ins. Co. v. Rhodes, 385 S.C. 83, ___, 682 S.E.2d 857, 871 (Ct. App. 2009).

Auto-Owners has petitioned for *certiorari*. For the reasons addressed below, that petition should be denied.

ARGUMENT

I. THIS IS AN ACTION AT LAW, SO THE TRIAL COURT'S FINDINGS OF FACT SHOULD BE AFFIRMED IF THERE IS ANY EVIDENCE THAT SUPPORTS THEM.

A declaratory judgment to determine whether insurance coverage exists is an action at law. In an action at law tried by a court without a jury, the trial court's findings of fact should be affirmed if there is any evidence to support the finding. Auto-Owners

Ins. Co. v. Newman, __ S.C.__, __ S.E.2d __, 2009 WL 2851211 (S.C. 2009) at *1. In the case at hand, there is evidence in the record to support each of the three holdings of the trial court: 1) Mr. Eadon is an insured; 2) there was an “occurrence;” and 3) none of the exclusions – k, l, or n – is effective to exclude coverage.

II. MR. EADON WAS AN INSURED UNDER THE POLICY.

The Policy provides that Mr. Eadon, the president of C&B Fabrication, was an insured “with respect to [his] duties as [C&B Fabrication’s] officer or director.” There is a wealth of factual evidence that in C&B Fabrication’s dealings with Mr. Rhodes and Piedmont Promotions, Mr. Eadon, in his capacity as president of C&B, was a key player. He testified in deposition that he had been working on behalf of the corporation.¹ R. 1123, Line 23-1124, Line 5. The evidence supports the inference that it was primarily Mr. Eadon who convinced Mr. Rhodes, on behalf of Piedmont Promotions, Inc., to do business with the corporation, C&B. Eadon met with Rhodes at C&B’s plant and gave him a tour of the corporate operation. R. 1139, Line 21-1140, Line 13. Mr. Rhodes testified that Mr. Eadon told him that C&B Fabrication “could build the signs, they could build better signs than anybody had built... He said they were just a great company and they could build anything I wanted them to.” R. 1141, Lines 12-15. Mr. Rhodes’ also testified at trial as follows:

- Q. As a result of your conversations with Mr. Eadon and seeing the site, why did you make the determination to go with Mr. Eadon?
- A. Well, he assured me they build great signs, he could personally guarantee it, he just – he knew how to build a sign and he’d build me the best sign that I could ever get.

¹ The stipulation, quoted *supra*, p. 8, R. 23, states that both corporations named in the insurance policy, C&B Fabricators, Inc. and Lowcountry Signs & Fabrication, Inc., did business as “C&B Fabrication.” The Defendant in the underlying action was “Marion Eadon d/b/a C&B Fabrication.”

R. 1141, Line 25-1142, Line 5. A fair inference can be drawn that Mr. Eadon – as an executive of the corporation – was instrumental in bringing Mr. Rhodes’ business to C&B Fabrication. Mr. Eadon also testified that all the sign businesses that he operated were corporations. R. 116, Lines 13-18. Certainly if the president of a corporation is bringing significant business into that corporation, he or she is acting ”with respect to” his or her duties with that corporation.

Mr. Eadon also exercised his authority as an executive of the corporation when he approved a \$1,500 reduction in the price of signs, to which Mr. Eadon attached a condition regarding the payment schedule. Mr. Eadon’s executive decision led directly to the consummation of the contract and Mr. Rhodes’ giving C&B Fabrication a check for half of the contract amount. R. 1144, Lines 15-23. Check at R. 1246. The corporate agent who called Mr. Eadon, Chuck Benenhaley, recognized who held the executive authority in C&B Fabrication. Mr. Eadon’s indirect, but decisive, participation in the negotiation with Mr. Rhodes was also clearly on behalf of the insured corporation.

After the signs fell, Mr. Rhodes looked to Mr. Eadon in his corporate capacity to make things right. When Mr. Rhodes was informed that the middle sign was leaning, he “called Mr. Eadon and told him that it was leaning and needed to be fixed.” R. 1153, Lines 6-8. Mr. Rhodes did not call the man who had directly installed the signs, Chuck Benenhaley, but Mr. Eadon, the Chief executive of the corporation which had undertaken to install the signs. After calling Mr. Eadon several times to no effect, R. 1153, Lines 16-21, Mr. Rhodes wrote to Mr. Eadon at C&B Fabricators. R. 1154, Lines 3-8. His letter, R. 1249, includes the sentence, “[t]he middle sign of the three signs that *you* recently built for me has begun leaning and become dangerous” (emphasis added). The “you”

referenced in that letter is clearly the corporation, represented by its chief executive, as Mr. Eadon did not personally build the sign posts. Mr. Eadon responded to that letter with a letter of his own. Eadon's letter recognized that Rhodes had addressed him in his corporate capacity, and Eadon likewise responded from the corporate perspective. His first sentence was, "[a]s you well know, C & B Fabrication went out of business April 3, 2000." R. 1250.

Mr. Rhodes testified as follows as to what happened after the southernmost of the three signs fell:

- Q. What did you do as a result of the information you received about the sign in the roadway?
- A. I immediately called Mr. Eadon and told him what the highway department said, and he said that we needed to get somebody there immediately to get the sign, do whatever the department of transportation told us to do, and he sent someone there....
- Q. As a result of your conversations with D.O.T. officials, what did you do next?
- A. Well, Mr. Eadon – when I got there, **he had sent** Tracy Benenhaley, and they were taking down the middle sign because the highway department said to take that down. Then they told them to take down the northernmost signs, too, because they deemed it to be unsafe, and they wanted to know what other signs Mr. Eadon had built for me.
- Q. As a result of your conversation, did Mr. Eadon take down the middle sign?
- A. Yes, sir.

R. 1159, Line 23 – 1160, Line 4; 1160, Lines 9-16, 21-23 (emphasis added).

Mr. Eadon was the “go-to” executive for clients, the person answerable to clients for the functioning of C&B Fabrication. His sending Mr. Benenhaley manifests his acting directly in response to a corporate responsibility.

The promotion to Mr. Rhodes of C&B Fabrication's business by Mr. Eadon, Eadon's approval of the final negotiating position with Mr. Rhodes, and the post-accident

actions of Mr. Eadon on behalf of C&B Fabrication are all evidence of Mr. Eadon's actions pursuing his duties as an executive of the insured corporation.

The policy states that corporate executives "are insureds, but only with respect to their duties as your officers..." This is a much broader basis for being an "insured" than that for other employees, who are insureds only "for acts within the scope of their employment..." Petitioner Auto-Owners is attempting to apply the narrower, "acts-within-scope-of-employment" to Mr. Eadon, rather than the broader standard that is applicable to executives. It is thereby construing the indefinite and possibly ambiguous words of the policy against the insured, which is against the policy of South Carolina. Super Duper, Inc. v. Pennsylvania Nat. Mut. Cas. Ins. Co., Op. No. 26717 (S.C. Sup. Ct. filed September 14, 2009) (Shearouse Adv. Sh. 40 at 14, 22) *citing* Greenville County v. Insurance Reserve Fund, 313 S.C. 546, 547-48, 443 S.E.2d 552, 553 (1994).

There is, therefore, an abundance of evidence that Mr. Eadon was acting "with respect to his duties" as an executive of C&B Fabrication. The factual holdings of the Court of Appeals and the trial court that he was an insured should be affirmed.

III. THERE WAS AN "OCCURRENCE" AS DEFINED BY THE POLICY WHICH CAUSED PROPERTY DAMAGE.

The basic policy definition of "occurrence" in Auto-Owners' policy is "an accident." Here, there was clearly an accident, the falling of the southernmost sign. That event was neither expected nor intended by Mr. Rhodes or by Mr. Eadon. The fall of the sign, therefore, fits into this state's definition of an accident. Auto-Owners v. Newman, Op. No. 26450 (S.C. Sup. Ct. filed September 8, 2009) (Shearouse Adv. Sh. 39 at 12, 16).

There is clearly property damage to property other than C&B Fabrication's work product which was caused by the occurrence, though the quantum of that damage is

unknown pending the decision of the jury in Clarendon County. The fall of the sign, blocking both southbound lanes of the interstate, is obviously property damage. R. 1159, Lines 12-19. Auto-Owners, in fact, admitted in court that the fall of the sign caused physical damage and was, therefore an occurrence. R. 1137, Lines 3-8. There was other property damage associated with the fall of the sign, including damage to the real property on which the signs were installed. R. 1149, Lines 1-16.

Petitioner erroneously reports that the Court of Appeals held that the “removal of the two signs that did not fall constitutes an “occurrence.” Petitioner’s Petition, p. 14. In the Court of Appeals’ discussion of the “existence of an occurrence,” R. 1557-1559, there is no such holding. The Court of Appeals’ final statement in that section clearly implies that there was one occurrence, the unexpected falling of the sign, and that damages – inferably to property – were caused by that fall. Auto-Owners v. Rhodes, 385 S.C. 83, ____, 682 S.E.2d 857, 867 (Ct. App. 2009) (“...the circuit court’s finding that the damages were a result of the unexpected happening of the sign falling thus constituting an occurrence under the policy, is upheld”). The removal of the two signs is likely property damage flowing from the fall of the sign; there does not need to be a separate occurrence regarding their removal.

IV. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT’S HOLDING THAT EXCLUSION “n” DID NOT EXCLUDE COVERAGE FOR THE TWO DEFECTIVE SIGNS THAT HAD NOT YET FALLEN.

The engineering expert who testified at the Fairfield County trial in Rhodes v. Eadon testified that when the sign fell the wind was blowing only 30 mph; the sign should have been able to withstand winds in the 80-90 mph range. R. 1176, Lines 1-3. He explained the failure as follows:

- Q. As a result of your investigation and study into this matter, Mr. Campbell, did you arrive at any professional conclusion ...about the design of the sign as it was built?
- A. As it was built, it was not even close to the sign as designed. The pipe sizes were reduced on the upper sections where the extra strength was needed. The height of the sign was increased, which added additional load. The thickness of the pipe was reduced. The number of internal rings was reduced. The welds were omitted and lugs were installed. It just goes on and on, the list of problems created by the way it was built as opposed to the way it was designed. There's ...very little similarity from one to the other, from an engineering standpoint.
- Q. Did the sign as erected – did it meet industry standards for signs of that type?
- A. No, sir, it did not.

R. 1176, Lines 8-25. The problem, moreover, was not solely with the sign that fell. Mr. Campbell testified as follows:

- Q. Do you have a professional opinion as to why that sign fell?
- A. Because it was not even close to ...being capable of withstanding the loads as prescribed by the building code and industry standards.
- Q. Is your opinion to a reasonable degree of certainty as a professional structural engineer?
- A. Yes, sir, it is.
- Q. As to the remaining two signs that did not fall, do you have the same or a different opinion as to the quality of their design and construction?
- A. Well, **the others were essentially a mirror image of the one that fell.** We're fortunate they did not fall completely.

R. 1177, Lines 13-25 (emphasis added). The clear testimony is that all three of the signs were defective, not just the one that fell. Exclusion "n," R. 86, is not intended to exclude coverage for property damage to other property – which by the policy includes loss of use, R. 95-96 – actually caused by the negligent acts or omissions of the insured.

Exclusion "n" is called the "product recall" or "sistership" exclusion. The treatise, Insurance Coverage Disputes, describes this exclusion as follows:

The sistership exclusion is intended to preclude insurance coverage for the cost of withdrawing a product from the market where a danger or defect in the product is perceived. The term “sistership” is derived from the practice in the aircraft industry of recalling airplanes for repairs when a plane of the same model crashes as a result of a design or manufacturing defect. The typical sistership exclusion excludes coverage for “damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named policyholder’s products or work . . . or of any property of which such products, work, or property form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein.”

The vast majority of courts have construed the sistership exclusion quite narrowly. For example, courts have found that the sistership exclusion **does not exclude coverage for that damage caused by the failure of the insured’s product** and which arouses apprehension about the quality of “sister” products. Nor does the sistership exclusion preclude recover for policyholder’s “withdrawal” of its product **where the withdrawal was not merely a preventative measure, but takes place because actual damage from the product already had occurred.** Courts have also found that the sistership exclusion does not preclude coverage for withdrawal of products **where those products were not withdrawn by the policyholder.** Although many insurers have argued for expanded application of the sistership exclusion, **courts have rarely applied the exclusion to preclude coverage outside of the context of a true withdrawal of a product from the market as a preventative measure.** However, where the defective product did not cause damage to any other property, the exclusion has been applied.

J. Mathias, J. Shugrue, T. Marrinson, D. Struck, *Insurance Coverage Disputes* (Rel. 24, 2009) §10.01 [2][6] pp. 10-54.17-.19 (footnotes omitted) (emphasis added).

Courts in many jurisdictions have similarly addressed exclusion “n.” *See, e.g., Imperial Casualty & Indemnity Co. v. High Concrete Structures, Inc.*, 858 F.2d 128, 136-37 (3d Cir. 1988) (“sistership provisions are not intended to exclude from coverage damages arising from the product that raised suspicion. *A fortiori*, they do not exclude coverage of damages arising from a defective products when no sister products are involved”); *United States Fid & Guar Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926, 934 (Ill. 1991) (a complaint seeking damages for removal and replacement of a defective

product but not the cost of “preventive action” was not affected by the sistership exclusion); Centillium Communications, Inc. v. Atlantic Mut. Inc. Co., 528 F. Supp. 2d 940, 950 (N.D. Cal. 2007) (“[t]he ‘product recall’ or ‘sistership’ exclusion ‘operates to exclude coverage for the cost of ‘preventative or curative action’ when the **insured** withdraws a product in situations in which a danger is merely apprehended.” [citation omitted]. “It does not, however operate to exclude coverage for actual damage caused by the very product giving rise to such an apprehension”); (emphasis added); Stark Liquidation Co. v. Florists’ Mut. Ins. Co., 243 S.W.3d 385, 395-96 (Mo. Ct. App. 2007) (“[a]s the majority of courts have held the ‘sistership exclusion’ does not apply when the **insured** does not withdraw the product in question from the market because of a suspected defect in another identical product.” [citations omitted] “The weight of authority from other state and federal courts’ hold that the clause ‘applies only when an insured withdraws its own product from the market’”(emphasis added; Corn Plus Co-Op v. Continental Cas. Co., 444 F. Supp.2d 981, 991 (D. Minn. 2006) (“[t]o qualify under the sistership exclusion, ‘the repair or replacement process must include more than [the] product that has already failed, ‘because there is no withdrawal or recall where no attempt is made to prevent future failures.’” [citations omitted]. “The sistership has no application when the product in question is ‘not withdrawn from the market because of a suspected defect in another product but is withdrawn because it was [itself] damaged by defective construction.’”) (citations omitted).

In the case at hand, based on the legal holdings regarding the exclusion, exclusion “n” is not applicable because: 1) the other two signposts were not withdrawn by the insured C&B Fabrication, but by the Department of Transportation, R. 1160, Lines 12-

15; 2) the other two sign posts were themselves defective, R. 1164, Line 8; 3) the three signposts were not mass-assembled, but were installed individually, R. 1149, Lines 1-16. Therefore, they were not identical, “sister” products; 4) there was no recall from the market of other identical products to prevent future damages; after the three defective signs were down, there were no others to cause future damages; 5) the order to take down the two signposts that had not fallen was directly caused by the fall of the first sign; R. 1199, Lines 12-22; taking down the other two is one aspect of damages caused by the occurrence of the first falling.

The Court of Appeals and trial court were, therefore, entirely correct in holding that exclusion “n” did not preclude coverage for the damages associated with taking down the two sign posts. There is factual evidence to support that holding.

V. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT RIGHTLY DECIDED THAT EXCLUSIONS “k” AND “l” EXCLUDED COVERAGE ONLY FOR THE COST OF THE SIGNS THEMSELVES.

Exclusions “k” and “l” exclude, respectively, property damage to the insured’s own “product” and “work.” R. 86. The only things that were C&B Fabrications’ “product” or “work” were the three sign posts it installed adjacent to Interstate 77.

Mr. Rhodes’ negligence claim against Mr. Eadon d/b/a C&B Fabrication included an allegation of damage to the real property. R. 124-25. When installed on the real estate, the sign posts became fixtures on the property. R. 1149, Lines 1-16. When the sign posts fell, that caused damage to the fixtures and hence to the real property. The amount of damages to which Mr. Rhodes is entitled is to be determined by the jury. Exclusions “k” and “l” do not affect those damages, as the real property is clearly not Mr. Eadon’s “work” or “product.”

Exclusions in insurance policies are, moreover, to be read and applied narrowly. Auto-Owners Ins. Co. v. Rhodes, *supra.*, 682 S.E.2d at 869 (“Rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to broadly constructed”) (citations omitted.) When that principal is applied in this case, exclusion “k” and “l” are not effective to deny coverage for the loss of use of the edifice that includes – but is not limited to – C&B Fabrication’s “work” or “product.”²

VI. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT AUTO-OWNERS INS. CO. V. CARL BRAZELL BUILDERS, INC., 356 S.C. 156, 588 S.E.2d 112 (2003), IS DISTINGUISHABLE.

The Petitioner asserts that the Court of Appeals erred in failing to apply existing precedent and Petition’s policy provision. The assertion is that the Court of Appeals erred in affirming the trial court’s holding that the diminution in value of Mr. Rhodes’ property was an insurable loss. Petitioner cites Auto-Owners Inc. Co. v. Carl Brazell Builders, Inc., 356 S.C. 156, 588 S.E.2d 112 (2003) for the proposition that “diminution in value to real estate is not CGL insurable loss.” Petition for *Certiorari*, p. 18. Petitioner fails to recognize that there is a significant difference between the Brazell situation and the situation here. This Court described the situation in Brazell as follows:

We find the amended complaint in the underlying action does not allege any physical injury which meets the definition of “property damage”

² Construed narrowly, neither exclusion “k” nor exclusion “l” would exclude damages from the loss of use of the signposts. Both exclusions use the preposition “to” in stating “property damages to “your work” and “to your product.” That preposition is appropriate for physical injury to the insured’s work or product but makes no sense in regard to loss of use, e.g., “loss of use to your property.” Certainly to the extent the insured’s work or product is incorporated into a project with others’ work or product, the loss of use of the insured’s product invariably affects others participating in the project adversely. That is damage that a CGL policy is designed to cover. The term “property damage” in an exclusion should be construed narrowly to mean “physical injury,” even as “arising out of” is narrowly construed in an insurance policy exclusion to mean “caused by.” Owners Ins. Co. v. Clayton, 364 S.C.555, 561, 614 S.E.2d 611, 560 (2005) *citing* McPherson v. Michigan Mut. Inc. Co., 310 S.C. 316, 426 S.E.2d 770 (1993). Otherwise, the term “property damage,” when including loss of use, makes the exclusion ambiguous.

provided in the CGL policies. According to the Order of Certification, Claimants do not allege any physical injury to their property, but solely economic damages, particularly the diminished value of their property, as a result of Contractor's knowing sale of homes located on property containing hazardous materials. Under the unambiguous language of the policies, there is no property damage and, therefore no covered occurrence. B.L.G. Enterprises, Inc. v. First Financial Ins. Co., *supra*.

Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc., *supra*, 356 S.C. at 163, 588 S.E.2d at 115-16.

In the case at hand, as addressed above, there is damage to the property itself. R. 1149, Line 1 -1150, Line 13; 1159, Line 11-1160, Line 16; R. 1169, Lines 18-25; R. 1173. There was not simply economic damages, diminution in value, here as in Brazell, but physical injury to property, causing loss of use of the property. The cited holding of Brazell is, therefore, inapplicable in the case at hand and the Court of Appeals did not err in failing to apply the cited holding.

VII. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF AUTO-OWNERS' MOTIONS TO DISMISS THIS DECLARATORY JUDGMENT UNDER RULES 60(b)(4) and 60(b)(5) OR TO STAY THIS ACTION.

Auto-Owners initiated this declaratory action *before* the underlying tort action came to a verdict; it was initiated for the purpose of determining whether there was coverage under its insurance policy. Seeking a determination of such justiciable controversies is specifically allowed by S.C. Code Ann. §15-43-10 *et. seq.* When Auto-Owners initiated this action over seven years ago – with no underlying verdict in hand – it stated in its Complaint that, “Auto-Owners brings this action pursuant to S.C. Code Ann §15-53-10 *et. seq.* and South Carolina Rule of Civil Procedure 57, and alleges that an actual and justiciable controversy exists between the parties as is set forth in this

Complaint.” R. 68, ¶4. Auto-Owners should not now be heard to complain that this declaratory action should be dismissed.

The four issues that the trial court decided were actual, justiciable issues – issues that will have to be decided if there is any verdict for Rhodes and Piedmont Promotions in the underlying tort action. They are: 1) there was an occurrence; 2) Mr. Eadon was an insured under the policy; and 3) there was property damage as defined by the policy; and 4) Mr. Eadon was an insured under the policy. R. 59, 64. Judicial economy is served by not dismissing this action with the high probability that after the Rhodes v. Eadon verdict another seven-year process of litigation will be reinitiated to adjudicate these same issues.

Equity also argues in favor of not vacating this declaratory action inasmuch as Mr. Eadon has incurred legal fees and costs – as an individual – for seven years based on the declaratory action initiated by the insurance company. Mr. Eadon has made a motion before the trial court for the costs and fees incurred in this action. R. 995-96. If he ultimately prevails in this declaratory action brought by the insurance company, Mr. Eadon, under State Auto Prop. And Cas. Ins. Co. v. Reynolds, 357 S.C. 219, 592 S.E.2d 633 (2004) and Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978), should be awarded his costs and fees. Dismissing or vacating the prior holdings in this case would deprive Mr. Eadon of this possibility. Equity would not appear to support extinguishing Mr. Eadon’s remedy for being brought into litigation by his insurer.

The Court of Appeals, moreover, cites legal precedent in support of its affirmance of the trial court’s exercise of its discretion in denying the motions to dismiss or to stay.

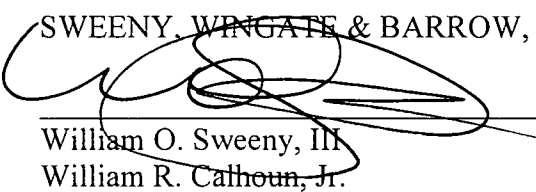
CONCLUSION

Petitioner's petition for *certiorari* should be denied. There is evidence to support every factual finding made by the trial court and affirmed by the Court of Appeals. The Court of Appeals' opinion, moreover, applies binding precedent correctly regarding every issue raised by Petitioner. The Court of Appeals' modification of the trial court's orders – vacating “the portions of the order under ‘the Policy Provisions’ section” – eliminating the references to the prior trial of the tort action, verdict and damages, R. 1564, properly limits the scope of the holding to the justiciable controversies appropriate for determination at this time. The Court of Appeals and trial court properly analyzed Auto-Owners' policy in light of the unchallenged facts – not determined by the jury – to hold that there was an occurrence causing property damages, that Mr. Eadon was an insured and that exclusions “k,” “l,” and “n” did not exclude damages other than the cost of C&B Fabrication's “work” or “product.” This case does not actually meet any of the criteria for granting *certiorari*. Petitioner tries to yoke them into one or more of the criteria, but perusal of its claims reveals that none is actually one that merits this Court's review.

Certiorari should not be granted.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



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**ATTORNEYS FOR MARION L. EADON, C&B
FABRICATIONS, INC. AND LOW COUNTRY
SIGNS**

November 12, 2009

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

NOV 12 2009

APPEAL FROM YORK COUNTY
Court of Common Pleas
Lee S. Alford, Circuit Court Judge

S.C. SUPREME COURT

Case No.: 02-CP-46-2369
Case Tracking Number 2009-143546

Auto-Owners Insurance Company..... Petitioner

v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon, C&B Fabrications, Inc.,
and Low Country Signs, Inc..... Respondents

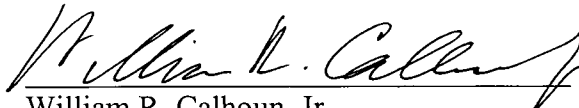
PROOF OF SERVICE

I certify that I have served the Response of Respondents Marion L. Eadon, C&B Fabrications, Inc and Low Country Signs, Inc. to Petitioner's Petition for *Certiorari* on Auto-Owners Insurance Company, Samuel W. Rhodes, Jr., and Piedmont Promotions, Inc. by depositing one copy of each document in the United States Mail, postage prepaid, on November 12, 2009, addressed to their respective attorneys of record, as follows:

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November 12, 2009


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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 18 2009

APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Lee S. Alford, Circuit Court Judge

Case No.: 02-CP-46-2369
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Auto-Owners Insurance Company, ... Petitioner,
v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., ... Respondents.

**RESPONDENTS', SAMUEL W. RHODES, JR. AND PIEDMONT
PROMOTIONS, INC., RETURN TO PETITIONER'S
PETITION FOR A WRIT OF CERTIORARI**

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**ATTORNEYS FOR THE RESPONDENTS
SAMUEL W. RHODES, JR. AND
PIEDMONT PROMOTIONS, INC.**

QUESTIONS PRESENTED

- I. IS MARION L. EADON D/B/A C&B FABRICATION INSURED UNDER THE AUTO-OWNERS' POLICY?
- II. WAS THERE AN "OCCURRENCE" THAT CAUSED DAMAGE TO OTHER PROPERTY WITHIN THE MEANING OF THE AUTO-OWNERS POLICY?
- III. DO POLICY EXCLUSIONS k,l, and n APPLY?
- IV. SHOULD THIS DECLARATORY JUDGMENT ACTION HAVE BEEN STAYED PENDING A RETRIAL OF THE RHODES V. EADON D/B/A C&B FABRICATION UNDERLYING ACTION?
- V. ARE THERE FACTS TO SUPPORT THE PETITIONER'S "JUDICIAL ESTOPPEL" CONTENTION AGAINST RHODES AND PIEDMONT?

STATEMENT OF THE CASE

For the sake of brevity and convenience, Respondents Rhodes and Piedmont adopt the Statement of the Case presented in the Respondent Marion Eadon's Response to the Petition for a Writ of Certiorari.

ARGUMENT

- I. MARION L. EADON D/B/A C&B FABRICATION IS INSURED UNDER THE AUTO-OWNERS' POLICY.

Petitioner contends that "Eadon does not meet the definition of an insured found in the policy, because he was not sued for any activity within his duties as an officer of the corporation." (p. 6) Petitioner apparently contends that the Court of Appeals held that Eadon is insured only as an officer of his corporations. That is not what the Trial Court held. The Trial Court held that Marion L. Eadon d/b/a C&B Fabrication is insured under Auto-Owners' policy. That ruling by the Trial Court has been affirmed by the Court of Appeals. Both have

affirmed that Eadon's activity, in connection with soliciting, contracting for, designing, fabricating, and erecting the three sign towers also qualifies as activity within his duties as an officer of the corporation. Eadon was the sole owner of each of his two sign fabricating "S" corporations; first, C&B Fabricators, Inc., and second, Lowcountry Signs & Fabrication, Inc.

There were two successive corporate entities chartered by Eadon but there was only one sign business. That was the business for which the insurance was sought and obtained for a period of three years. C&B Fabrication was the business name for the sign business regardless of any underlying, affiliated, in use or not in use, corporate entity chartered by Eadon for the sign business. The risk insured was the sign business. It was irrelevant whether the business had a corporate or non-corporate status for insuring or premium purposes. [R. pp. 1133-1135; Watson deposition, pp. 63-65]. On the application for insurance the signature for the name of the "insured" was that of "Marion Eadon." Eadon signed the Auto-Owners insurance application forms as "Marion Eadon". They were not signed as an officer of any corporate entity. [R.pp. 1346, 1348, 1349, 1351; Watson deposition, Exhibits 6 and 7]. With a previous insurer, Eadon had insured his business as "M.L. Eadon d/b/a C&B Fabrication." [R. pp. 1132-1133; R.pp. 1352, 1353; Watson deposition pp. 62-63; Exhibit 13 Watson deposition].

Eadon has not been sued solely "individually". Eadon has been sued d/b/a C&B Fabrication. That was the name of the business in which the entire transaction with Rhodes was conducted, beginning with the initial contact through the flawed inspection and repair of the signs three days before one of them fell on I-77.

When Rhodes went to Manning to discuss having the signs designed, fabricated and installed, Eadon is the one who took him on the tour of the plant, showed him their signs and took him on a tour away from the facility in Eadon's car to show him some signs they had built. [R. pp. 1139-1141; Rhodes Tr. pp.49-51.] Rhodes testified: "I told him I wanted three 130-foot H.A.G.L. [Height Above Ground Level] stack unipoles, a turnkey job, that I wanted one person responsible for doing the whole job, and that included electrical hookups and everything. And he told me he could take care of that, and that's - - and I wanted him to do everything, design and build them, install them, and have it ready to where all I had to do was put the advertising on them." [R. p. 1148; Rhodes Tr. p. 59]. Eadon assured him they could build the signs and "could build better signs than anybody had built" and "could build anything I wanted them to build." [R. pp. 1141, 1142, 1148; Rhodes Tr. pp. 51, 52, 59.] He "told me that they built the best signs, and he would personally guarantee he would build me a great sign and nobody could build me a better sign than he could." [R. p. 1148; Rhodes Tr. p. 59]. In talking with Eadon and while on the premises, Eadon did not say anything about his business being a corporation or that he was an officer or representative of a corporation and no signs were seen on the premises by Rhodes indicating a corporate status. [R. pp. 1140-1141; Rhodes Tr. pp 50-51.] Eadon confirmed that the exterior sign across the front of the building where the signs were made was "C&B Fabrication". [R. p. 1206; Rhodes Tr., (Vol. III), p. 129] and the phone was answered "C&B Fab". [R. pp. 1206-1207; Rhodes Tr. (Vol. III), p. 130]. Rhodes decided to let Eadon build the signs because "he assured me they build great signs, he could personally guarantee it, he just - he knew how to build a sign and he'd build me the best sign that I could ever get." [R. p. 1142; Rhodes Tr. p. 52.]

Appellant's contention is basically that because Eadon personally did not do the welding his employees did, drive the truck his employees drove, operate the crane his employees operated and did not get his hands dirty, he is exempt from the consequences of what he **caused** to happen. He financed the operation. He determined who would be participants in the operation. He received the payments from the enterprise. The only persons with check writing authority on the C&B Fabrication bank account were Eadon and his secretary Holly Miles. [R. p. 1215; Rhodes Tr. (Vol III), p.144.] He owned the business. He promoted the business. He negotiated the deal with Rhodes. He boasted about it being the best. Only Eadon could approve Rhodes' counter proposal for a \$500.00 per sign reduction in the proposal offering because Benenhaley [Eadon's employee] had to telephone Eadon to get that approval. Only Eadon had authority to make decisions. [R. p. 1144; Rhodes Tr. p. 54.] He sent the crew to do the repairs and inspection three days before a sign fell. He did a volume of sign building. He was making twenty-five additional signs at the same time. [R. p. 1230; Rhodes Tr. (Vol. III) p.163].

Eadon was deposed in this DJ action. To **repeated** questioning by Auto-Owners' counsel seeking to limit Eadon's concept of the insurance coverage to a specific corporate entity, to wit, C&B Fabricators, Inc., Eadon consistently (and correctly) refused to agree with his interrogator but responded to those questions that his assumption and expectation was that the policy covered everything he was doing as a sign designer, fabricator and installer.

Excerpts from Eadon's deposition of January 17, 2006 follow:

Q: Did you consider that policy to cover C&B Fabricators Inc, the corporate entity that's formed?

A: I assumed it covered everything that I was affiliated with, myself and all my

affiliations with the sign business whatever name it was in. (Page 19) [R.p. 1108].

...

Q: What you intended when you got a general liability policy was getting a general liability policy for C&B Fabricators, Inc.?

A: And to cover myself also, you know? The whole - - the corporation and me included. (Page 26) [R.p. 1112].

...

Q: Did you ask Mike [Watson the issuing insurance agent] any specific questions about what the policies did or did not cover?

A: He assured me that he'd take care of everything and I'm covered for everything just like I do on all my other stuff. I say, "Mike, I need complete coverage of this." He said, "no problem. I'll handle it."

...

A: He said I was covered for anything no matter what. He said I had \$5 million we had to, you know, should be able to do business for that company. He said, "that covers everything that you can think of." (Page 27) [R.p. 1113].

...

Q: Did you understand that if you were found personal liable and not working on behalf of C&B Fabricators, Inc. that you would not be covered under the policy?

A: I thought the policy covered me and the corporation you know? (Page 44) [R.p. 1119].

...

A: Mike's statements are and were that "We look out for you." I'm talking about when he's dealing one and one. "I'm looking out for you personally regardless of what you're involved in: corporations, personal or whatever". (Page 45) [R.p. 1120].

What Eadon's solely owned "S" corporations did or did not do is what Eadon did or did not do. He was also d/b/a C&B Fabrication, not a corporate entity. The ruling by the Trial Court, affirmed by the Court of Appeals, that Marion L. Eadon d/b/a C&B Fabrication is insured under the Auto-Owners' policies is supported by facts. The Court of Appeals decision does not pioneer into new territory but applies existing established South Carolina

law.

II. THERE WAS AN “OCCURRENCE” THAT CAUSED DAMAGE TO OTHER PROPERTY WITHIN THE MEANING OF THE AUTO-OWNERS POLICY.

The event of four ten-foot, six inches by thirty-six foot, center-mount outdoor advertising signs stacked on a one hundred thirty foot high tower, falling on both Southbound traffic lanes of I-77 is an accident. The policy says “ ‘occurrence’ means an accident.” [R. p. 1319; Policy Section V9, page 13].

An accident is “ ‘ an unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt.’ ” Auto-Owners Insurance Company, Inc. v. Newman, ____ S.C. ____, ____ S.E.2d ____ (Opinion No. 26450, filed September 8, 2009).

A general liability insurance policy typically does not cover claims of faulty workmanship, but instead **covers claims of faulty workmanship that causes an accident.** (Emphasis added.)

Isle of Palms Pest Control Company v. Monticello Insurance Company, 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1995), affirmed 321 S.C. 310, 468 S.E.2d 304 (1996). Faulty workmanship of C&B Fabrication caused the 130' tower with the ten foot, six inch double stacked signs on top to fall on I-77. “Faulty workmanship” caused that accident.

Auto-Owners’ counsel admitted in open court that the event of the sign falling on I-77 was an occurrence. [R. p. 1137; Tr. of January 22, 2004; First SJ hearing, p. 6, lines 4-8]. The contention is that because the remaining two signs did not fall that their mandated removal by public authority because of safety concerns and the cancellation of the permits for the signs does not constitute an occurrence. The sign that fell was the domino that caused

all the resulting damage. Auto-Owners contention conflicts with the plain language of its policy:

Paragraph 12 of the policy says (pages 13 and 14):[R. pp. 1319-1320].

“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 shall be deemed to occur at the time of the “occurrence” that caused it.** (Emphasis added.)

The sign that fell was the “occurrence” that caused it all.

If only the “faulty workmanship” itself is the extent of the damage, then there is no coverage. On the other hand, if the “faulty workmanship” causes property damage to other property, beyond damage to the “faulty workmanship,” that damage to other property is covered under the CGL policy.

Contrary to Petitioner’s assertion, the Court of Appeals has not misconstrued Helena Chemical Company v. Allianz Underwriters Insurance Company, 357 S.C. 631, 594 S.E.2d 455 (2004). From Helena:

The plain, ordinary meaning of “damages” is monies paid on an insured’s loss, in this case, from property damage. An “ordinary” meaning of the term is not a legalistic one dependent on whether the damages are classified as legal versus equitable. (Cite omitted.) “The policy language, ‘all sums which the insured shall become legally obligated to pay as damages because of property damage,’ can reasonably be interpreted to cover **any claim asserted against the insured arising out of property damage, which requires the expenditure of money**, regardless of whether the claim can be characterized as legal or equitable in nature.”(Cite omitted). “To give words in an insurance contract a technical meaning simply by reading them ‘in the insurance

context,' would render meaningless our law's requirement that words be given their ordinary meaning unless a technical meaning is plainly intended." (Emphasis added.)

Neither does the opinion of the Court of Appeals conflict with previous decisions of this Court regarding occurrence and property damage, as asserted by Petitioner, citing the cases of Auto-Owners Insurance Company, Inc. v. Newman (Opinion No. 26450, filed September 8, 2009) and L-J v. Bituminous Fire & Marine Insurance Co., 366 S.C. 117, 621 S.E.2d 33 (2005). L-J stated and Newman restated what these cases, and others near and far, have uniformly held.

A claim against an insured under a CGL policy will invariably arise out of the insured's "work" or the insured's "work product." That is the reason for obtaining insurance. It is only when the sole damage is to the "work" or "work product", and nothing more, that the CGL policy does not apply. The CGL policy *does* apply to "claims of faulty workmanship that causes an accident." Isle of Palms Pest Control Company v. Monticello Insurance Company, 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1995), affirmed 321 S.C. 310, 468 S.E.2d 304 (1996). In this case, there is abundant evidence that there was damage to property other than the insureds "work" or "work product."

Petitioner asserts that "diminution in value of the real estate is not a covered loss." It cites as support for its contention Auto-Owners Insurance Co. v. Carl Brazell Builders, Inc., 356 S.C. 156, 588 S.E.2d 112 (2003). Brazell does not support Petitioner's contention. From Brazell:

We find the amended complaint in the underlying action does not allege any physical injury which meets the definition of "property damage" provided in the CGL policies. According to the Order of Certification, Claimants do not

allege any physical injury to their property, but solely economic damages, particularly the diminished value of their property, as a result of Contractors' knowing sale of homes located on property containing hazardous materials. Under the unambiguous language of the policies, there is no property damage and, therefore no covered occurrence.

Simply stated, the policy in Brazell did not apply because there was no "property damage" and no "occurrence" as defined in the policy. In this case, there was an occurrence. The sign fell on the Interstate. In this case, there is property damage.

III. POLICY EXCLUSIONS k, l and n DO NOT APPLY.

The Trial Court and the Court of Appeals correctly held that exclusions k, l and n do not apply. These Respondents adopt the Trial Court's [R pp. 36-42; 47-50] and the Court of Appeals' treatment of these issues.

IV. THIS DJ ACTION SHOULD NOT HAVE BEEN AND SHOULD NOT BE STAYED.

The Trial Court and the Court of Appeals correctly held that this DJ action should not be stayed. The underlying Rhodes action has been pending over eight (8) years. This DJ action, instituted by Auto-Owners, has been pending over seven (7) years. The issues and the facts in the underlying case are not ambiguous or uncertain. A rich and full factual basis exists for resolution of the issues in this DJ action. The Court of Appeals should be affirmed.

V. THE PETITIONER'S "JUDICIAL ESTOPPEL" CONTENTION AGAINST RHODES AND PIEDMONT IS BASED UPON A FACTUAL FICTION ORIGINATING WITH AUTO-OWNERS.

Petitioner's contention is that Rhodes and Piedmont have taken "entirely inconsistent positions" in this DJ action from the position they take in the underlying Rhodes action and for that reason, are judicially estopped from taking the position that Eadon was acting on

behalf of his corporations in this DJ action.

The Petitioner asserts as the factual basis for its contention the Court of Appeals' decision in Auto-Owners Insurance Company v. Samuel W. Rhodes, Piedmont Promotions, Inc. and Marion L. Eadon d/b/a C&B Fabrication, C&B Fabrications, Inc. and Low Country Signs, Inc., decided by the Court of Appeals August 6, 2009 (Opinion No.: 4605). That opinion does not support the Petitioner's contention. The underlying facts upon which this DJ action was decided does not support the Petitioner's contention. The underlying facts and the applicable law are now addressed:

Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629, 632 (2004) is the current South Carolina authority on judicial estoppel. The following is from that opinion:

This Court has not previously explicitly delineated the requirements for the application of judicial estoppel. We now adopt the following elements necessary for the doctrine to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

...

The doctrine of judicial estoppel is an equitable concept and should be applied sparingly, with clear regard for the facts of the particular case. The application of judicial estoppel must be determined on a case-by-case basis, and must not be applied to impede the truth-seeking function of the court.

The following are "the facts of [this] particular case."

Paragraph 2 of the First Amended Complaint [R.p. 119] in the Rhodes action filed June 20, 2003, alleges:

2. The Defendant, Marion L. Eadon, is a citizen and resident of South

Carolina and at all times relevant hereto was doing business as C&B Fabrication.

Paragraph 3 of Defendant's Answer to the First Amended Complaint in the Rhodes action alleges (responding to Plaintiffs' Paragraph 2) [R.p. 202]:

3. Admits that Marion Eadon is a citizen and resident of South Carolina, but denies the remaining allegations of Paragraph Two (2) of the First Amended Complaint.

The Defendant's Answer to the first Amended Complaint in the Rhodes action, further alleges (Paragraph 6) [R.p. 203].

6. Denies the allegations of Paragraph Seven (7) of the First Amended Complaint and further alleges that Eadon individually did not make the proposal to Rhodes, but C&B Fabricators, Inc. submitted a proposal to Rhodes.

Two of the issues framed by the Rhodes action pleadings are: (1) whether Marion L. Eadon was doing business as C&B Fabrication; and (2) was the proposal submitted to Rhodes by C&B Fabricators, Inc., a corporation, or by Eadon, d/b/a C&B Fabrication. Those continue to be factual issues framed by the pleadings for the trial of that case.

The written proposal by C&B Fabrication to design, fabricate, deliver and install the three signs (130 foot H.A.G.L. stack unipoles each containing four sign faces) dated July 9, 1999 was issued to "Sam Rhodes." It was accepted (as amended) by Sam Rhodes on August 4, 1999. Nothing in the proposal refers to C&B Fabrication as a corporate entity. Nothing in the proposal says "C&B Fabricators, Inc." In the text of the proposal only "C&B Fabrication" is mentioned. [Exhibit 4; R.p. 1245.] At the time Rhodes accepted the proposal, the payment check for one half the contract price was issued to "C&B Fabrication" not C&B Fabricators, Inc. [Exhibit 5; R.p. 1246.] The checks and payments for these signs were

deposited by Eadon using deposit slips with the printed letterhead "C&B Fabrication" not on deposit slips with the printed letterhead "C&B Fabricators, Inc." [Defendants' Exhibits 24, 25; R.pp. 1277-1278.]

Installation of the signs was completed on February 22, 2000. The three signs (130 foot H.A.G.L. stack unipoles) were installed on real estate owned by Rhodes which Rhodes leased to his solely owned "S" corporation, Piedmont Promotions, Inc. In December of 2000, ten months after the signs were installed, Rhodes was informed that the middle sign was leaning. He called Eadon and informed him that it needed to be fixed. There were several exchanges between Rhodes and Eadon about that being accomplished. Some of these exchanges included facsimile transmitted letters. In a fax from Rhodes to Eadon on December 29, 2000, Rhodes stated:

The middle sign of the three signs that you recently built for me has begun leaning and become dangerous. It is in need of immediate repair. Please repair this immediately since it was not built correctly. I need to know your response to this matter immediately. [Exhibit 8A; R.p. 1249.]

The same date, Eadon faxed a response to Rhodes which included the following:

As you well know, C&B Fabricators went out of business April 03, 2000. I was trying to get Tracy Benenhaley to look at the sign and repair it. ... I am willing to do what it takes to correct the repairs on the leaning structure if you will rent the crane. If this is not satisfactory let me know. A lawsuit is a waste of time due to the fact that C&B Fabricators went out of business in April and does not have any assets. [Exhibit 8B; R.p. 1250.]

The December 29, 2000 fax letter from Eadon to Rhodes has the same fax number and entry for "C&B Fabrication" at the top as does the written proposal from C&B Fabrication to Sam Rhodes dated July 9, 1999. [Exhibit 4; R.p. 1245.]

On or about January 17, 2001, Eadon sent a crew to inspect and repair the signs.

Rhodes met them at the location and they had a crane tied to one of the signs at that time working on it. [Rhodes trial testimony (Volume I) p. 82; R.p. 1159.] Two or three days later, on Saturday, January 20, 2001, one of the signs fell across the southbound traffic lanes of Interstate 77. That was the triggering domino that fell.

Inasmuch as the issue of judicial estoppel is to be tried by the Court as an equitable issue (Gaymon v. Richland Memorial Hospital, 327 S.C. 66, 488 S.E.2d 332 [1997]) and because “the facts of the particular case” (Cothran v. Brown, *supra.*) are dispositive, the Court should be aware of all relevant facts. The allegations in the Rhodes action Complaint that Marion L. Eadon was doing business as C&B Fabrication (which allegation is denied in the Answer) is supported by documented historical facts. C&B Fabrication was in business when it issued the proposal to Sam Rhodes on July 9, 1999. C&B Fabrication was still doing business in November 2000. Eadon signed checks printed “C&B Fabrication D/B/A Low Country Sign Fabrication Inc” as did his bookkeeper. [Exhibit 47; R.p. 1258.] The address and phone number on these checks, Rt 2 Box 825, Manning, SC 29102-2917, PH 803-473-5808, is the same address and phone number as appears on the C&B Fabrication proposal to Rhodes of July 9, 1999. [Exhibit 4; R.p. 1245.] A bank account existed and bank statements for “C&B Fabrication D/B/A Low Country Sign Fabrication Inc” from April 2000 through November 2000 corroborate the business activity of C&B Fabrication. [Exhibit 48; R.pp. 1259-1274.] C&B Fabrication was in business at the end of the year 2000 as demonstrated by its tax deposit sheet for that year. [Exhibit 46; R.p. 1257.] Statements from the bank loan department (dated December 29, 2000) were sent to “Marion L. Eadon, Jr D/B/A C&B Fabrications.” [Exhibit 49; R.p. 1275.]

Bills and invoices (dated November 2, 1999 and November 3, 1999) from suppliers were addressed to "C&B Fabrication." [Exhibit 50; R.p. 1276.] Thompson Engineering Group prepared the drawings from which the signs were supposed to have been made. The drawings were prepared for "C&B Fabrication". Nothing on the drawing indicates "C&B Fabricators, Inc." [Exhibit 6; R.p. 1343 (Appendix).] Thompson Engineering did two or three hundred other drawings for C&B Fabrication, not C&B Fabricators, Inc. [Eadon's trial testimony Tr. (Vol. III) p. 145; R.p. 1216.] Eadon's December 29, 2000 letter to Rhodes is on the letterhead of "Marion L. Eadon". However, the facsimile origin logo at the top of the page shows "C&B Fabrication" and the fax number shown is the identical fax number appearing for C&B Fabrication on the proposal submitted to Sam Rhodes dated July 9, 1999. [Exhibit 4; R.p. 1245.] In that December 29, 2000 letter, Eadon says in the first sentence of the letter that "C&B Fabricators went out of business April 3, 2000." He repeats the same statement in the last sentence of the letter when he says "a law suit is a waste of time due to the fact that C&B Fabricators went out of business in April and does not have any assets." At this juncture, December 29, 2000, Eadon is attempting to shift responsibility from his operation d/b/a C&B Fabrication to C&B Fabricators, Inc., a corporate entity which, under his own statement, has "no assets" and "went out of business April 3, 2000". However, C&B Fabrication was still in business as it had been all along.

It is important to note that C&B Fabrication was doing business as Low Country Sign Fabrication Inc", as the cancelled checks and bank statements reflect, in April 2000 and C&B Fabrication continued functioning in this style at least into November 2000 as evidenced by the cancelled checks and bank statements. However, regardless of the name or style, Eadon

was his sign business and Eadon had only one sign business.

On October 14, 2002, ten months after the Complaint was filed in the instant action, Auto-Owners filed this DJ action in York County for a declaration that its liability insurance policy did not cover the events described in the Rhodes Complaint for the alleged reasons that there was no “occurrence” and that four policy exclusions applied. Eight months later, on June 20, 2003, Auto-Owners filed an Amended Complaint. On July 18, 2005, ten months after the verdict in the Rhodes action tried in Fairfield County, Auto-Owners filed a Second Amended Complaint. In its Second Amended Complaint, Auto-Owners alleged (Paragraph 4) (R.pp. 635-636):

4. On September 17, 2000, Auto-Owners issued and delivered a Commercial General Liability Policy (“Policy”), policy number 0356064416, to C&B Fabrications, Inc. and Low Country Signs, Inc. The entity designated in the Policy’s Declarations is “corporation.” A certified copy of this policy is attached to this Amended Complaint, is labeled “Exhibit A,” and is adopted herein by this reference.”

To that allegation, Rhodes and Piedmont answered (Paragraphs 5, 39, 40 and 41 of their Answer to Auto-Owners’ Second Amended Complaint)

5. They deny Paragraph 4 as stated. They admit only that Auto-Owners issued its liability policy on or about September 17, 2000 and, on information and belief, the copy appended to the Second Amended Complaint is a copy of that policy. They deny that it was issued to “C&B Fabrications, Inc. and Low Country Signs, Inc.” as alleged because C&B Fabrications, Inc. And Low Country Signs, Inc. are not and never have been corporate entities. They admit that the policy was issued by Auto-Owners to Marion L. Eadon to cover his operations as a sign designer, fabricator and installer **under the operation of C&B Fabrication and Lowcountry Signs and Fabrication and in whatever name or style the business was conducted.** (Emphasis added.)

...

39. On information and belief the policy issued by Auto-Owners was issued for the purpose of insuring, within the provisions of the policy, **the operation or operations conducted by Marion L. Eadon under whatever name and style used by him.** (Emphasis added.)
40. The names in the policy as insureds are C&B Fabrications, Inc. and Low Country Signs, Inc., neither of which ever existed as a legal entity. However, the names are close enough to reflect that they were intended to insure the sign fabrication and installation operation of Marion L. Eadon **because he was doing business as C&B Fabrication. He was doing business in the style of "C&B Fabrication D/B/A Low Country Sign Fabrication Inc"**. This usage and terminology is sufficiently identical to the two names in the Auto-Owners policy to confirm the intent and reasonable expectation of Marion L. Eadon that his sign fabrication and installation operation was insured. If the policy does not insure that operation then it insures no operation because the two names in the policy have never existed as legal entities. If C&B Fabrication D/B/A Low Country Sign Fabrication Inc is not insured under the policy then no entity is insured under the policy. That result would permit Auto-Owners to avoid responsibility for its contractual obligation for which it received good and valid consideration when the premium was paid. (Emphasis added.)
41. By reason of the foregoing the Auto-Owners policy does insure **Marion L. Eadon d/b/a C&B Fabrication by reason of the circumstances and the reasonable expectation of Marion L. Eadon in acquiring the policy. In the alternative, Auto-Owners should be estopped from denying coverage under the existing circumstances.** (Emphasis added.)

Based upon the issues presented in Rhodes and Piedmont's Answer in this DJ action, Auto-Owners accused Rhodes and Eadon of changing their position from what they contended in the Rhodes action. They accused Rhodes and Piedmont of saying in their DJ action that Eadon was acting as a corporate officer and not as d/b/a C&B Fabrication. That assertion by Auto-Owners is a perversion of the facts. Rhodes and Piedmont have never altered their contention that Marion L. Eadon d/b/a C&B Fabrication is the contracting and

performing/non-performing party. The Rhodes and Piedmont brief in the Court of Appeals in this DJ action further demonstrate that fact. (Rhodes and Piedmont Court of Appeals Brief, pp. 4-8; 14-20.)

In seeking to disclaim coverage in this DJ action, Auto-Owners contends that its policy insures only a corporate entity and for that reason does not insure Marion L. Eadon d/b/a C&B Fabrication because it was not a corporate entity and that an individual cannot d/b/a as a corporation. That contention was made in face of the fact, documented by cancelled checks and bank statements and Eadon's testimony at the Rhodes v. Eadon trial, that Eadon was doing exactly that. Six pages of Rhodes and Piedmont's brief in the Court of Appeals in this DJ action address the fact that Eadon was d/b/a C&B Fabrication and the absence of action, documentation, or information imparted to Rhodes by Eadon that C&B Fabrication is a corporate entity. As stated above, the issue framed by Auto-Owners (for the first time in its Second Amended Complaint) is that Marion L. Eadon d/b/a C&B Fabrication is not insured under the policy because it is not a corporate entity. Rhodes and Piedmont's response to that was not to allege that Marion L. Eadon d/b/a C&B Fabrication is a corporation but to show that Marion L. Eadon d/b/a C&B Fabrication is insured regardless of its status as corporate or non-corporate. The following excerpt from Rhodes and Piedmont's brief in the Court of Appeals demonstrates that:

(Rhodes and Piedmont Court of Appeals Brief p. 20.)

The second renewal of the Auto-Owners policy shows the named insured as "C&B Fabrications, Inc. & Low Country Signs, Inc.". Neither existed as a corporate entity. The factual Stipulation [made at trial, five years plus six months after the sign fell on I-77] renamed the insured in the policy to "C&B Fabricators, Inc. and Low Country Signs & Fabrication, Inc. both d/b/a C&B

Fabrication, trade name of these corporations.” Therefore, C&B Fabrication [not a corporate entity] is insured.

The Petitioner cites as the factual basis for judicial estoppel the Court of Appeals’ opinion in this Auto-Owners’ DJ action against Rhodes and Eadon. Petitioner does not cite any language in Rhodes and Piedmont’s pleadings in this case, their brief on appeal in this case, or **any** recorded record that Rhodes and Piedmont took the position that Eadon was acting **solely** as an officer of his corporation at any time. Only the Court of Appeals’ opinion is cited. The language in the Court of Appeals’ opinion which the Petitioner relies upon for judicial estoppel deals with the Auto-Owners’ **accusation** that Rhodes and Eadon contended in this DJ action that Eadon was acting on behalf of his corporation. In dealing with that accusation of Auto-Owners, the Court of Appeals adopted the **accusation** of Auto-Owners that Rhodes and Piedmont had made such a contention. In fact, they had not. The Court of Appeals correctly ruled that judicial estoppel could not apply because there was no privity and there was no intentional effort to mislead the Court. The Petitioner is now alleging that **Auto-Owners’** contention made in this DJ action was one advanced by Rhodes and Piedmont. This is simply more manipulation by Auto-Owners attempting to evade coverage under its policies.

In this DJ action, Rhodes and Piedmont have been consistent in their position that Auto-Owners’ policy insures “the operation or operations conducted by Marion L. Eadon under whatever name and style used by him.” That is stated in their Answer to the Auto-Owners’ Second Amended Complaint (quoted above) and in their Request to Admit which Auto-Owners denied [R.pp. 1091-1092.] In a law case, the Trial Court found for a fact from

the evidence that Marion L. Eadon d/b/a C&B Fabrication is insured under Auto-Owners' policy. The Court of Appeals has affirmed. Both were correct.

The Court of Appeals, as did the Trial Court, also had before it the additional issue of whether Eadon, under the stipulated facts, is insured under the Auto-Owners' policies as an officer of his corporation, and the Court held that Eadon is insured both: (1) as an officer of his corporation and (2) as Marion L. Eadon d/b/a C&B Fabrication.

In this DJ action, **Eadon** advanced his position that he was **also** insured under the Auto-Owners policy as a corporate officer because he contends that any actions on his part were done as an officer of his corporation. However, Eadon did not limit his position to one that the Auto-Owners' policy covered only his activities as a corporate officer. Eadon expressly stated in his Answer to the Auto-Owners Second Amended Complaint (Paragraph 5) that [R.p. 717]:

5. "it is denied that Auto-Owner's policy is limited to corporations."

The complete text of the factual stipulation by Auto-Owners, Rhodes, Piedmont and Marion L. Eadon d/b/a C&B Fabrication, is:

For purposes of this Declaratory action only, the named insureds on Auto-Owners' policies are reformed to C&B fabricators, Inc. and Lowcountry Signs & Fabrication, Inc. both d/b/a C&B Fabrication, trade name of these corporations. (Judge Alford's Order p. 11) [R.p. 23.]

Auto-Owners has distorted and misstated the position of Rhodes and Piedmont. As stated in the Answer to the Amended Complaint in the Rhodes action, the position of Marion L. Eadon d/b/a C&B Fabrication in the Rhodes action is that the contract for the signs was with the corporate entity C&B Fabricators, Inc. and not with Marion L. Eadon d/b/a C&B

Fabrication. [Paragraph 6; R.p. 203.] The issue framed by the pleadings in the Rhodes action is not whether Eadon was acting in any corporate capacity but whether the Plaintiffs have sued the wrong party, to wit, C&B Fabricators, Inc. Rhodes and Piedmont characterize or describe Eadon d/b/a C&B Fabrication as a non-corporate business entity. It is described that way in the caption of their Complaint and in the text thereof, without the use of the word “individually” or otherwise. Eadon had communicated in writing with Rhodes before the sign fell that C&B Fabricators, Inc. went out of business April 3, 2000 and had no assets. C&B Fabricators, Inc. was not (at that time, but is now pursuant to the stipulation) a named insured under the Auto-Owners’ policy. Two misnomers for corporate entities were named in the policy but neither existed as a corporate entity. Had Rhodes and Piedmont sued C&B Fabricators, Inc., **Auto-Owners** would have contended (correctly) that C&B Fabricators, Inc. was not named as an insured in the policy. It would also have contended (correctly) that because the contract for the signs was with C&B Fabrication that C&B Fabricators, Inc., was not a party to it. The stipulation altered the factual setting in this DJ action. **The stipulation conformed the facts.**

Eadon was acting on behalf of C&B Fabrication, regardless of whether its status was corporate or non-corporate. It was the sign business. He was the sign business.

Auto-Owners has contended that an individual cannot d/b/a as a corporation. Under the facts, that is exactly what Eadon did. That was not illegal. It was not immoral. It was just his way of doing business. He had only the one sign business. The trial court in this DJ action, perforce the factual stipulation by the parties, held that Marion L. Eadon, d/b/a C&B Fabrication is insured under the Auto-Owners’ policy. A unanimous Court of Appeals’ panel

has affirmed that finding. From that opinion:

The circuit court found Eadon d/b/a C&B Fabrication is an insured under the Policy. The court based its conclusion on several factors. First, the court noted that, although the Policy was issued to Eadon and named the insured as "C&B Fabrications Inc. and Low Country Signs Inc.," neither of those two companies actually existed at the time the Policy was issued. Instead, the two companies, C&B Fabricators, Inc. and Lowcountry Signs & Fabrication, Inc., were chartered by Eadon, and in the stipulation entered into by the parties to this DJ action, the Policy was reformed to reflect the fact that these companies were the named insured under the Policy, and they both did business under the trade name, C&B Fabrication. Additionally, Eadon was sued in the underlying Tort action as doing business under the same name, C&B Fabrication. **Thus, the circuit court determined, it was the belief of all parties privy to the Policy that it would serve as coverage for the sign-making business conducted by C&B and by Eadon.** (Emphasis added). (Auto-Owners v. Rhodes, p. 5).

...

The trial court in this DJ action found and held that Marion L. Eadon d/b/a C&B Fabrication is insured under the Auto-Owners policy. That ruling was affirmed by the Court of Appeals by repeated statements to that effect. It is important to note that the last two sentences of the Court of Appeals' opinion states it again when it says:

On the merits, we find the circuit court was correct in its determination that: Eadon d/b/a C&B Fabrication was an insured under the Policy; there was an occurrence resulting in damages; and that none of the exclusions in the Policy apply. As a result, the decision of the circuit court is affirmed as modified.

(Auto-Owners v. Rhodes, p. 13)

The theme in Petitioner's contention is that the Court of Appeals has held that Marion L. Eadon d/b/a C&B Fabrication is insured under the Auto-Owners' policy **only** as an officer of a corporation. The foregoing excerpts from the Court of Appeals' opinion do not support that contention. The trial court and the Court of Appeals in this DJ action were specific and clear that Marion L. Eadon d/b/a C&B Fabrication is insured under the policy.

Accordingly, under the affirmation of the trial court by the Court of Appeals, Eadon is insured regardless of whether he may be liable d/b/a C&B Fabrication or acting as an officer of his corporations, C&B Fabricators, Inc. and Lowcountry Signs & Fabrication, Inc.

Judicial estoppel cannot apply because the five requirements, enunciated in Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629, 632 (2004), have not been shown. They are:

- (1) Two inconsistent positions taken by the same party or parties in privity with one another.

Rhodes and Piedmont have not taken an inconsistent position in the two actions.

- (2) The positions must be taken in the same or related proceedings involving the same party or parties in privity with each other.

The alleged inconsistent position of Rhodes and Piedmont is an **accusation** by Auto-Owners in this DJ action. In this DJ action, the Court of Appeals has correctly held that there was no privity between Auto-Owners and Rhodes and Piedmont.

- (3) A party taking the position must have been successful in maintaining that position and have received some benefit.

It was Eadon's effort (and not Rhodes or Piedmont) on that issue that caused a favorable benefit to Eadon when the Trial Court and the Court of Appeals held that he is insured as an officer of his corporations. On the contrary, the benefit to Rhodes and Piedmont in this DJ action under the facts is the holding that Marion L. Eadon d/b/a C&B Fabrication is insured under the policy.

- (4) The inconsistency must be part of an intentional effort to mislead the Court.

Petitioner's statement that "the Court of Appeals found that these entirely inconsistent positions met all the requirements of judicial estoppel except for the fourth

requirement ‘the inconsistency must be part of an intentional effort to mislead the court’ ” (Petition p. 21) is not supported by the opinion. The Court of Appeals had to address only one of the five requirements. That was enough. As stated by the Court of Appeals, there was no intentional effort to mislead the Court. Any inference of efforts to mislead the Court arise solely from Auto-Owners’ attempts at manipulation of the facts.

(5) The two positions must be totally inconsistent.

Under the unique facts of how Eadon conducted his sign business, the positions of Rhodes and Piedmont that Eadon is insured both as a corporate officer and d/b/a C&B Fabrication are not inconsistent.

It is pertinent to repeat the caution stated in Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004) that:

The doctrine of judicial estoppel is an equitable concept and should be applied sparingly, . . . and must not be applied to impede the truth seeking function of the Court.

There is no factual or equitable basis for the application of judicial estoppel in this case.

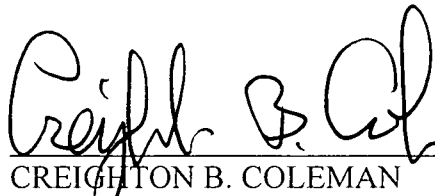
CONCLUSION

The Court of Appeals has correctly affirmed the Trial Court that Marion L. Eadon d/b/a C&B Fabrication is insured under Auto-Owners’ policies. There is a factual basis for the Trial Court’s ruling and its affirmation by the Court of Appeals. The Petition for a Writ of Certiorari should be denied.

Should this Court grant the Petition for Certiorari, these Respondents will advance as an additional sustaining ground that the Trial Court and the Court of Appeals should be

affirmed under the application of the “reasonable expectations of the parties to the insurance contract” on the basis of this Court’s opinions in the cases of Kennedy v. Columbia Lumber and Manufacturing, Inc., 299 S.C. 335, 384 S.E.2d 730, 733 (1989) (one of the primary objectives of the law of contracts is “to carry out the reasonable expectations of the parties”) and Joe Harden Builders, Inc. v. AETNA Casualty & Surety Co., 326 S.C. 231, 486 S.E.2d 89, 91 (1997) (“this interpretation of the policy best meets the fair expectations of the parties under the language of the policy”). These decisions and others are treated in the Order of the Trial Court [pp. 43 and 44; R.pp. 55 and 56] and in the Court of Appeals brief of these Respondents (pp. 20-24.)

All of which is respectfully submitted.



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SAMUEL W. RHODES, JR. AND
PIEDMONT PROMOTIONS, INC.**

December 18, 2009

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No.: 02-CP-46-2369
Case Tracking Number 2009-143546

Auto-Owners Insurance Company, ... Petitioner,
v.

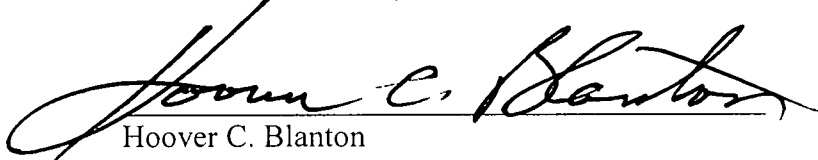
Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., ... Respondents.

CERTIFICATE OF SERVICE

I, the undersigned attorney for Respondents Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc., hereby certify that a copy of the **Respondents', Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc., Return to Petitioner's Petition for a Writ of Certiorari** was served on all parties, by mailing in the United States mail, postage prepaid, a copy thereof, to attorneys for all parties, this **18th** day of **December, 2009**, addressed as follows:

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

RECEIVED

JAN - 8 2010

S.C. SUPREME COURT

Opinion No. 4605 (S.C. Ct. App. filed August 6, 2009)

Auto-Owners Insurance Company, ...Petitioner,

v.

Samuel W. Rhodes, Piedmont Promotions, Inc.,

Marion L. Eadon d/b/a C&B Fabrication, C&B

Fabrications, Inc., and Low Country Signs, Inc., ...Respondents.

AUTO-OWNERS' REPLY TO RETURNS

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Signs, Inc.

Attorneys for Respondents Samuel W. Rhodes

and Piedmont Promotions, Inc

REPLY ARGUMENT

The Respondents' Returns to the Petition for Writ of Certiorari highlight the need for the Supreme Court to grant the Petition for a Writ of Certiorari ("Petition") in this case. The Court of Appeals' erroneous holdings on the issues presented in the Petition must be corrected to clarify the law in some instances and to conform to previous decisions by the Supreme Court in others.

- I. AS A MATTER OF FIRST IMPRESSION, THE COURT OF APPEALS SHOULD HAVE HELD THAT MARION EADON DOES NOT QUALIFY AS AN INSURED UNDER THE TERMS OF THE POLICY IN LIGHT OF THE PARTICULAR FACTS OF THIS CASE.

Auto-Owners finds interesting Rhodes' statement that "Petitioner apparently contends that the Court of Appeals held that Eadon is insured only as an officer of his corporations. That is not what the Trial Court held." That is exactly what the Court of Appeals held, and it is inconceivable that the Court of Appeals' opinion could be read to hold otherwise.

The Court of Appeals held that "C & B [Fabricators, Inc.] agreed to complete the signs for \$153,960." The Court also held that "C&B [Fabricators, Inc.] and Lowcountry [Signs and Fabrication, Inc.] held a Commercial General Liability Policy (the Policy) with Auto-Owners Insurance Company (Auto-Owners)." Auto-Owners Insurance Company v. Rhodes, 385 S.C. 83, 682 S.E.2d 857, 861 (2009) ("Rhodes").¹

Furthermore, the Court of Appeals unequivocally states,

Based on this evidence the circuit court found that coverage applied to Eadon under Section 1.c. of the Policy, because his dealings with Rhodes and Piedmont were conducted with respect to his duties as an officer of the company.

¹ The Court of Appeals defines "C&B" as C&B Fabricators, Inc. and "Lowcountry" as Lowcountry Signs and Fabrication, Inc. Id. at 861.

Id. at 865. The Court of Appeals further notes, “The [trial] court’s order clearly finds coverage based on Eadon’s actions as a director of the corporation.” Id. at 866. The Court of Appeals’ ultimate, although erroneous, holding on this issue is,

Therefore, insofar as Eadon’s responsibilities involved him in the procurement of the contract with Rhodes and Piedmont, or the commercial general liability policy with Auto-Owners, we hold he was an insured under the Policy.

Id. at 866.

Despite this finding by the Court of Appeals, Rhodes and Piedmont argue that the Court of Appeals held that the policy covers Eadon for anything he (or anyone else) does, whether he is working on behalf of a named corporation or not, as long as he is involved in a sign business. To reach such a conclusion, the Court of Appeals would have to disregard the legal distinction between an individual and a corporation, that the policy was issued to corporations, that the entity conducting the sign business was a corporation, that the type of entity being insured affects the definition of who is an insured under the policy and that an individual can not be held liable for corporate negligence unless the individual personally participates in the negligence.

Obviously, Auto-Owners disagrees with Rhodes’ and Piedmont’s interpretation of the Court of Appeals’ decision. The Court of Appeals held that Eadon can only be insured with respect to his duties as an officer or director of the insured corporations and looked to the definition of an insured as controlling on the issue.² Under the plain terms

² As previously discussed, the Rhodes case has not yet been retried. Rhodes and Piedmont apparently attempt to blur the holding of the Court of Appeals to avoid the res judicata/collateral estoppel effect of the findings that the contract was performed by a corporation and that Eadon was acting on behalf of the named corporation in discussing the contract with Rhodes, as opposed to an individual conducting a sole proprietorship.

of the policy, if Eadon is acting outside his duties as an officer or director of the named insureds, he is not considered an insured under the policy. Despite Respondents' unsupported arguments to the contrary, the policy only insures the corporate entities named in the declarations and people who meet the definition of an insured. The policy also states,

No person or organization is an insured with respect to the conduct of any current or past partnership or joint venture that is not shown as a Named Insured in the Declarations.

(R. pp. 1312-1314). However, if the Court of Appeals' opinion can be construed to hold that the policy covers entities not listed as named insureds and people not acting within their duties as officers of the named corporations, the Supreme Court needs to clarify the holding to avoid this erroneous interpretation of the policy and application of South Carolina law.

Auto-Owners contends that the Court of Appeals was correct in finding that Eadon must meet the definition of an insured under Section 1.c. of the Policy to be considered an insured. However, the Court of Appeals erred in failing to apply the policy language as clearly written and apply the particular facts of this case to determine if Eadon meets the definition. The Court of Appeals' disregarded persuasive authority from other jurisdictions interpreting the definition as Auto-Owners proposes, and instead based its determination on an unwillingness to find that "the duties of an officer and those of an employee, as delineated by a general commercial liability policy, are mutually exclusive." Id. at 865.

Such a finding is not necessary for Auto-Owners to prevail. Auto-Owners agrees that the duties of an employee and the duties of an officer are not always mutually

exclusive. However, when an officer admits that certain activities fall outside his duties as an officer of the corporation, and he has been sued for negligent performance of those activities, he does not meet the definition of an insured under Auto-Owners' policy. See, Creel v. Louisiana Pest Control Insurance, Inc., 723 So.2d 440 (La. Ct. App. 1998); Bowie v. Home Ins. Co., 923 F.2d 705 (9th Cir. 1991); Boso v. Erie Ins. Co. / Erie Ins. Exchange, 669 N.E.2d 47 (Ohio Ct. App. 1995); Harrison v. Ohio Cas. Ins. Co., Inc., 199 F.Supp.2d 518 (S.D. Miss. 2000); Carpenter v. Fed. Ins. Co., 637 A.2d 1008 (Pa. Super. Ct. 1994); Lomes v. Hartford Fin. Serv. Group, Inc., 105 Cal. Rptr. 2d 471 (2001).

The Amended Complaint in the Rhodes case states that Eadon negligently constructed, designed, manufactured and repaired the signs. There is no supervisory liability alleged in the Amended Complaint. (R. pp. 119-134). Eadon's testimony that his duties as an officer of the corporation did not include constructing, designing, manufacturing and repairing the signs is undisputed. (R. pp. 1103-1105, 1114, 1205-1209). In addition, there is no evidence in the record that Eadon personally constructed, designed, manufactured or repaired the signs or that he even supervised these actions. He is not involved at all in that side of the business. Eadon simply does not meet the definition of an insured under the terms of the Policy.

The Court of Appeals found that "insofar as Eadon's responsibilities involved him in the procurement of the contract with Rhodes and Piedmont, or the commercial general liability policy with Auto-Owners, we hold he was an insured under the Policy." Id. at 866. However, Eadon was not sued for approving a price reduction or buying an insurance policy. He was personally sued for negligent construction of billboard signs, a activity that he admits he had no personal involvement and is not within his duties as an

officer of the corporation. Not every action taken by a person who is an officer of a corporation falls within his duties as an officer of the corporation. This is especially true when a corporate officer testifies that certain activities are not within his duties as an officer of the corporation.

This issue warrants the Supreme Court's acceptance of Auto-Owners' Petition for a Writ of Certiorari. This is a novel issue of law in South Carolina. In addition, the Court of Appeals' erred in failing to apply the clear and unambiguous terms of Auto-Owners' policy, resulting in an extension of coverage to corporate officers for negligent acts outside their duties as officers of a corporate named insured.

II. THE COURT OF APPEALS SHOULD HAVE APPLIED THE DOCTRINE OF JUDICIAL ESTOPPEL.

Rhodes continues to argue inconsistent positions, even within his brief before this Court. On the one hand he argues that for insurance purposes Marion Eadon d/b/a C&B Fabrication is the same as C&B Fabricators, Inc., because there was only one sign business, whether it was a corporation or a sole proprietorship. He then later goes to great lengths to explain how Marion Eadon d/b/a C&B Fabrication is a sole proprietorship separate from C&B Fabricators, Inc. for purposes of pinning individual liability on Marion Eadon. Either Eadon is acting on behalf of the corporations or he is not. If he is not acting on behalf of the corporations, but on behalf of a sole proprietorship or other business entity that is not a named insured, he is not an insured under the policy. The policy only insures the named corporations and officers and employees who meet the definition of an insured.

Furthermore, the Court of Appeals erred on the privity issue. The Court of Appeals found that Rhodes and Piedmont contracted with C&B Fabricators, Inc. to have

the signs built. Rhodes and Piedmont are therefore in privity with C&B Fabricators, Inc., which is in privity with Auto-Owners. Therefore, Rhodes and Piedmont should be judicially estopped from taking inconsistent positions in these related cases.

III. THE COURT OF APPEALS' DECISION REGARDING EXCLUSION "N" IS IN CONFLICT WITH THE SUPREME COURT'S DECISION IN AUTO OWNERS V. NEWMAN.

The Court of Appeals held that exclusion N does not exclude the damages claimed for the loss of use, removal and disposal of the insured's work or product (the signs). The Court of Appeals' decision is in direct conflict with the Supreme Court's holding in Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) ("Newman").

In Newman, the Supreme Court applied Exclusion N to damages associated with the repair and replacement of stucco or a construction defect claim.³ In doing so, the Supreme Court stated:

[T]erms [of Exclusion N] unambiguously prohibit recovery for the cost of removing and replacing the defective stucco even when the replacement of

³ The subject Commercial General Liability ("CGL") policy provides that the insurance does not apply to:

- n. Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
 - (1) "Your product";
 - (2) "Your work"; or
 - (3) "Impaired property";

if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

the defective work may be incidental to the repair of property damage covered by the policy.

Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 546. In making this statement, the Court applied the principle, “[w]hen a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense. Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). The Court of Appeals did not follow Newman. Instead, the Court of Appeals held that Exclusion N did not apply because the facts did not involve a product recall. Rhodes, 385 S.C. 83, 682 S.E.2d 857, 871 (2009). Respondents Rhodes, Piedmont and Eadon do not cite, discuss or otherwise distinguish Newman in their briefs. Respondents Rhodes and Piedmont make no argument other than to adopt the holding of the Court of Appeals. As does the Court of Appeals, Eadon argues that Exclusion N is limited to facts involving a product recall, and Eadon cites various foreign jurisdictions for authority that Exclusion N is limited to product recall cases. The foreign authority is not persuasive or binding in light of the holding in Newman.

In deciding coverage for the facts in Rhodes, the Court of Appeals should have looked to “plain and ordinary” language of Exclusion N, as did the Supreme Court in Newman, to see whether the exclusion applies to the facts. To limit Exclusion N to a particular industry or situation was error and “goes against South Carolina precedent which holds that this Court must give policy language its plain, ordinary, and popular meaning.” Helena Chemical Company v. Allianz Underwriters Insurance Company, 357 S.C. 631, 594 S.E.2d 455, 458 (2004)(“Helena”) (citing Century Indem., 561 S.E.2d at 358).

Exclusion N excludes the damages alleged by Rhodes and Piedmont for removal, disposal and loss of use of the two signs that did not fall. Exclusion N also excludes any expenses Eadon incurred in removing one of the signs.⁴ These damages include the cost to remove and dispose of the signs and all loss of use (economic damages claimed) as a result of the removal of the signs. The SCDOT deemed the two standing signs unsafe, and made Piedmont Promotions remove them. As explained in Newman, Exclusion N excludes damages for *any loss, cost or expense* incurred by Rhodes/Piedmont for the *loss of use, repair or removal or disposal* of the signs if the signs are withdrawn from use by the SCDOT because of a known or suspected defect in it.

IV. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH PRIOR PRECEDENT REGARDING EXCLUSIONS K AND L.

The Court of Appeals erred in failing to apply Exclusions K and L to exclude all damages claimed for loss of use of the billboard signs. Rhodes and Piedmont claim millions of dollars in lost profits due to the loss of use of the billboard signs.

Rhodes and Piedmont make no argument other than to adopt the holding of the Court of Appeals. Eadon contends that Exclusion K and L are not applicable because C&B Fabrications' "product" or "work" is the signs, and not the real estate underneath the signs; and Rhodes alleges damages to the real estate in addition to the signs. Eadon also contends that because exclusions are to be interpreted narrowly, the Court of Appeals was correct to conclude that the loss of use damages for the signs is covered by

⁴ The Court of Appeals upheld the trial court's order that Auto-Owners is required to reimburse Eadon for expenses incurred in removing his own defective work product, despite the fact that Eadon did not file a counterclaim against Auto-Owners, never plead for this relief and never presented any evidence of expenses incurred. Auto-Owners requests that the Court correct that erroneous ruling as well. Eadon makes no argument in his Return contrary to Auto-Owners' position on this issue.

the CGL policy, because the real estate was damaged as well.

On the one hand, Eadon acknowledges that the signs affixed to the real estate are one legal interest, but contends that for the purposes of insurance the real estate is “other property”. Assuming the signs and real estate underneath are somehow distinguishable, it should not be problematic to find that the loss of use damages associated with the signs (undisputedly the work or product of C&B Fabrication) is excluded by Exclusion K and/or L. As noted by Eadon, Rhodes has presented an expert real estate appraiser to testify as to damage (diminution in value) to his real estate; and Piedmont has retained an expert economist to testify as to consequential damage resulting from loss of revenue (loss of use) the signs would have produced. Eadon Brief, pg. 5. The trial court stated, “Mr. Rhodes presented evidence of damages for the loss of use of the billboards that amounted to a present value of \$4,212,386, plus damage to real property.” (R. p. 37) (emphasis added).⁵ Respondents distinguish the damages but do not want to recognize exclusions.

Exclusion K excludes “property damage” to “your product”. Exclusion L excludes “property damage” to “your work”. The signs built by C&B Fabricators, Inc. constitute either “your product” or “your work.” The policy defines “property damage” as 1) physical injury to tangible property, including all resulting *loss of use* of that property; or 2) *loss of use* of tangible property that is not physically injured. Therefore, the policy excludes physical injury to the signs and loss of use of the signs, whether or not physically injured. This exclusion is the basis for the principle reiterated recently, “a claim solely for economic losses resulting from faulty workmanship is part of an

⁵ The trial court in the DJ action refers to the “loss of use” of the signs on numerous occasions in its decision. (R. pp. 27, 29, 37, and 42.)

insured's contractual liability which a CGL policy is not intended to cover.” Newman, 385 S.C. 187, 684 S.E.2d 541; ; see L-J v. Bituminous Fire & Marine Insurance Co, 366 S.C. 117, 122, 621 S.E.2d 33, 35 (2005).

In discussing Exclusion K and L, the Court of Appeals also cited Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989)(“Kennedy”) and Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc. 379 S.C. 181, 666 S.E.2d 247 (2008)(“Colleton”) and stated, “[b]ased on the evidence and testimony provided at trial, the circuit court determined Eadon violated all three of these conditions.”⁶ Rhodes, 385 S.C. 83, 682 S.E.2d 857, 870.

The Court of Appeals’ holding is inconsistent with recent Supreme Court authority. The Court recently addressed Kennedy and Colleton in Sapp v. Ford Motor Co., Op. No. 26754 (S.C.Sup.Ct. filed December 21, 2009) (Shearouse Adv. Sh. No. 55). (“Sapp”). In Sapp, the Court held that the narrow exception to the economic loss rule applied in Kennedy did not apply to commercial real estate construction cases. The present matter is a commercial construction case, not a residential construction case. Accordingly, the Court of Appeals’ reliance on Kennedy and Colleton is erroneous. The rights and remedies herein between Rhodes/Piedmont Promotions and Eadon are governed by contract and warranty law, not tort law.

V. THE COURT OF APPEALS’ FINDING THAT THE REMOVAL OF THE TWO SIGNS THAT DID NOT FALL CONSTITUTES AN “OCCURRENCE” CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT.

⁶ The Court of Appeals is referring to the three (3) bases set forth in Kennedy for a negligence cause of action against a residential builder. These bases are cited in the Court of Appeals’ decision. The bases do not apply in a commercial construction defect case.

Rhodes, Piedmont and Eadon argue that the occurrence is the one sign that fell and there does not need to be a separate occurrence for the other two signs. Brief pg. 15. On this issue, Auto Owners has briefed Braswell v. Faircloth, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989)(“Braswell”) and Helena in its Petition and explained how the Court of Appeals erroneously applied these decisions. Eadon does not cite, discuss or otherwise distinguish these decisions. Rhodes and Piedmont cite Helena and quote that portion of the decision wherein the Court discussed how the ordinary meaning of the word damage should prevail over a legalistic one. Auto Owners agrees with the point made by the Court regarding the ordinary meaning of word damage; however, that portion of the decision is not the relevant point herein, which point is Braswell and Helena do not stand for the proposition that because one sign fell, any and all damages following this event are covered by the policy.

The Court of Appeals in Braswell did not find that any and all damages that followed an occurrence of property damages were covered by the policy. The Court of Appeals in Braswell found that the clean-up costs associated with the chemicals that spilled and contaminated the underlying soils constituted an occurrence of property damage; *and* the Court of Appeals found that the cost associated with the EPA order to remove from the site the remaining barrels of chemicals, that had not yet spilled chemicals, was not an occurrence of property damage. Braswell, 300 S.C. 338, 344, 387 S.E.2d 707, 710. Helena did not disturb the finding above in Braswell.

The reasoning in Braswell should apply to the present matter regarding the still standing signs. An accurate reading of Braswell and Helena is that the South Carolina appellate courts will not find an occurrence of property damages for the damages

associated with the SCDOT mandate to take down the two unsafe signs – that were only defective in construction. This reading is also consistent with the Supreme Court’s reasoning in Newman that, “the subcontractor’s negligent application of the stucco does not on its own constitute an “occurrence”. Newman, 385 S.C. 187, 194, 684 S.E.2d 541, 544. This reading is also consistent with the Supreme Court’s application of Exclusion N in Newman discussed herein.

VI. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH A PRIOR DECISION OF THE SUPREME COURT REGARDING “OCCURRENCE” AND THE REQUIREMENT THAT THERE BE DAMAGE TO OTHER PROPERTY.

In finding the existence of an occurrence in this commercial construction defect case, the Court of Appeals relied primarily on L-J. In L-J, the Court examined the word “occurrence” in a construction defect case and its relation to faulty workmanship. In L-J, the Court stated, “[t]he CGL policy may provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, *not in cases where faulty workmanship damages the work product alone.*” L-J, 621 S.E.2d at 36 n. 4. To explain its position further, the Court stated, “[w]e find these negligent acts constitute faulty workmanship, which damaged the roadway system only. And because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence.” Id. at 36.

Eadon contends that there is damage to “other property” which is the real estate underneath the signs. Eadon Brief pg. 15. The present facts are no different than L-J wherein the Court effectively found that the real estate underneath the road was not “other property” sufficient to constitute an occurrence or an insurable loss. In the present

matter, the work/product (the signs) were affixed to and made part of the real estate. The loss of the signs has generated multiple forms of economic loss damages to the same property, e.g., cost of removal, disposal, loss of use and diminution in value, arising out of and flowing from it.⁷ The focus on the different types of damages caused the Court of Appeals to reach an incorrect coverage decision in this commercial construction defect case.

VII. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH A PRIOR DECISION OF THE SUPREME COURT REGARDING DIMINUTION IN VALUE DAMAGES.

The Court of Appeals stated:

The circuit court also found the diminution in value of Rhodes' property attributable to the loss of his permits to erect signs in the future, fit within the second part of the definition of property damage: loss of use of tangible property. Thus, the Policy would provide coverage for lost profits from the inability to maintain signs on the property and contributing to its overall diminution in value.

⁷ In Sapp, the Court cited with approval various federal court decisions that have addressed commercial cases and tort versus contract damages. One of the decisions, Palmetto Linen Service, Inc. v. U.N.X., Inc., 205 F.3d 126 (4th Cir. 2000), may best describe how the relation between Eadon/C&B Fabrication, Inc., Rhodes and Piedmont Promotions should be viewed by the courts. The Fourth Circuit Court of Appeals stated, "in the context of a commercial transaction between sophisticated parties, injury to other property is not actionable in tort if the injury was or should have been reasonably contemplated by the parties to the contract." Palmetto, 205 F.3d at 130. In addressing the economic loss rule, the Court noted, the consequential damages were "the natural and foreseeable result of a malfunction" of the product in that case.... Id. at 130. Further, the "other alleged losses were similarly foreseeable." Id. at 130. "The parties to the contract either contemplated or should have contemplated these dangers in allocating the risk of loss.... business entities must protect their commercial interests up front through the medium of contract. The economic loss rule dictates that Palmetto cannot now obtain in tort a remedy for which it did not bargain." Id. at 130. The Respondents Rhodes and Piedmont Promotions are seeking economic loss damages that can determined by contract law. The Respondents are seeking insurance coverage for damages that should be allocated and recoverable between them in their commercial contract, not under tort law.

Rhodes, 385 S.C. 83, 682 S.E.2d 857, 868. The Court has held that diminution in value to real estate is not a CGL insurable loss. Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc., 356 S.C. 156, 588 S.E.2d 112 (2003)(“Brazell”). Rhodes, Piedmont and Eadon explicitly or implicitly agree with the holding in Brazell that diminution in value of the real estate is not a covered loss. Recall, in the underlying civil action, Rhodes is seeking diminution in value to his real estate and Piedmont is seeking lost profits (loss of use) for its signs.

Respondents appear to argue that Rhodes alleges “physical injury to property, causing loss of use of the property” and these facts make the case different from Brazell. To the contrary, the facts in the two cases are not substantively different. Rhodes is not alleging that his real estate has been physically injured in the same sense as chemicals contaminated the soils in Braswell.⁸ There may have been significant debris and the temporary disturbance of the land as a result of the sign falling down. Embedded in the ground, crews removed the remnants of one sign from the ground and removed the other two signs as well, which likely temporarily disturbed the ground. However, these clean-up costs are nominal in comparison to the diminution in value that Rhodes really seeks in this action.

Rhodes is not alleging the fallen sign permanently, physically injured his real estate such that he is unable to construct new signs on it. There is nothing physically wrong with Rhodes’ real estate from an engineering or construction standpoint (resulting from the fallen sign). Instead, Rhodes is alleging that he is unable to construct signs on

⁸ The homeowners in Brazell did not allege that there was some permanent physical injury to their real estate due to the alleged bomb laden soils.

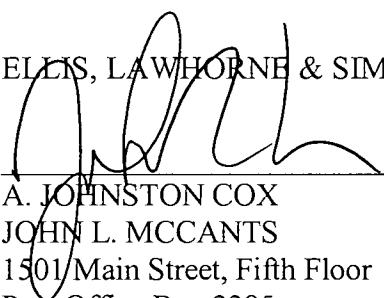
his real estate because Eadon caused him to lose his permits with the SCDOT. Rhodes contends that his real estate has diminished in value because Rhodes cannot get new permits to re-erect signs. Rhodes alleges that his real estate does not have the same income production potential without the signs as it did with the signs. These allegations fall squarely within the holding of Brazell to preclude coverage for these economic damages. As stated, "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." Newman, 385 S.C. 187, 193, 684 S.E.2d 541, 544.

Conclusion

The Court of Appeals erred in its decisions on the issues presented in Auto-Owners' Petition for Writ of Certiorari. These issues include novel questions of law and holdings that are in conflict with prior decisions of the Supreme Court. Therefore, Auto-Owners requests that the Supreme Court grant its Petition so that these errors can be corrected.

Respectfully Submitted,

ELLIS, LAWHORNE & SIMS, P.A.



A. JOHNSTON COX
JOHN L. MCCANTS
1501 Main Street, Fifth Floor
Post Office Box 2285
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Tel: (803) 254-4190

ATTORNEYS FOR PETITIONER

January 8, 2010

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Opinion No. 4605 (S.C. Ct. App. filed August 6, 2009)

Auto-Owners Insurance Company, ...Petitioner,

v.

Samuel W. Rhodes, Piedmont Promotions, Inc.,

Marion L. Eadon d/b/a C&B Fabrication, C&B

Fabrications, Inc., and Low Country Signs, Inc., ...Respondents.

CERTIFICATE OF SERVICE

I am an employee of the law firm of Ellis Lawhorne & Sims, P.A., do hereby certify that I served a copy of Auto-Owners Insurance Company's Reply Brief this the 8th day of January, 2010 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

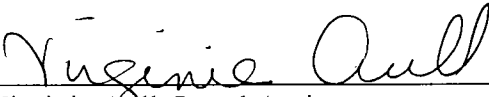
Hoover C. Blanton
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Attorneys for Respondent Marion L.
Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc. and Low Country
Signs, Inc.

Attorneys for Respondents Samuel W. Rhodes
and Piedmont Promotions, Inc


Virginia Aull, Legal Assistant

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THOMAS E. McCUTCHEN
HOOVER C. BLANTON

RECEIVED
FEB 21 2012
S.C. Supreme Court

February 21, 2012

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29211-1330

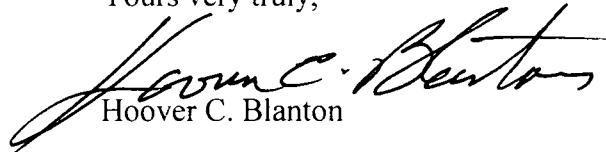
RE: Auto-Owners Insurance Company v. Samuel W. Rhodes, Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B Fabrications, Inc. and Low Country
Signs, Inc.
Supreme Court Case Tracking No.: 2009-143546

Dear Mr. Shearouse:

Enclosed is the original and six copies of my Petition to be Relieved As Attorney of Record in this case with supporting Affidavit and a Certificate of Service on other counsel in this case. Also enclosed is my filing fee check in the amount of \$25.00. If more is required at this time, please let me know.

Thank you for your cooperation.

Yours very truly,


Hoover C. Blanton

HCB/sbe
Enclosures

cc: (via U.S. Mail)
A. Johnston Cox, Esquire
John M. McCants, Esquire
William O. Sweeny, III, Esquire
William R. Calhoun, Jr. Esquire
Creighton B. Coleman, Esquire

check # 1373
\$25.00



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 18, 2010

C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Michael J. Anzelmo, Esquire
Nelson Mullins Riley & Scarborough
P O Box 11070
Columbia, SC 29211

Re: Auto-Owners v. Rhodes, Samuel

Gentlemen:

The following Order has been endorsed on your Motion of Harleystown Mutual Insurance Company for Leave to Appear and File a Brief as Amicus Curiae in Support of the Petition for a Writ of Certiorari in the above entitled matter.

"Motion denied.

s/ Costa M. Pleicones A.C.J.
For the Court

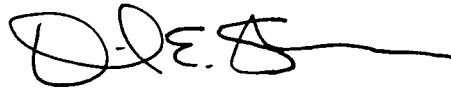
Chief Justice Jean H. Toal and
Justice Kaye G. Hearn, not
participating

February 18, 2010."

By copy of this letter we are advising all counsel of record of the action of the Court in this matter.

C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Michael J. Anzelmo, Esquire
Page Two
February 18, 2010

Very truly yours,

A handwritten signature in black ink, appearing to be "D.E.S." followed by a long horizontal flourish.

CLERK

DES/dmh

cc: A. Johnston Cox, Esquire
John M. McCants, Esquire
Creighton B. Coleman, Esquire
Hoover C. Blanton, Esquire
William O. Sweeny, III, Esquire
William R. Calhoun, Jr., Esquire



SWEENEY WINGATE & BARROW P.A.

February 12, 2010

Reply to: Main Office

William R. Calhoun, Jr.
(803) 256-2233
wrc@swblaw.com

RECEIVED

FEB 12 2010

S.C. SUPREME COURT

Via Hand Delivery

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: Auto-Owners Insurance Company v. Samuel W. Rhodes, Jr., Piedmont
Promotions, Inc., Marion L. Eadon, C&B Fabrications, Inc., and Low Country
Signs, Inc.
Civil Action No.: 02-CP-46-2369
Our File: 3333/4386

Dear Mr. Shearouse:

Enclosed are the original and seven copies of Respondent Marion L. Eadon's Return to the Motion of Harleysville Mutual Insurance Company to be allowed to submit an *amicus curiae* brief in support of Auto-Owners Insurance Company's petition for *certiorari*. Please return with the courier who delivers this correspondence one stamped copy of the return.

An original Certificate of Service is also enclosed, along with a copy for stamping.

By copy hereof, all counsel of record are being served with this correspondence.

Respectfully,

SWEENEY, WINGATE & BARROW, P.A.



William R. Calhoun, Jr.

WRC/bjp

Enclosures

February 12, 2010

Page 2

CC: Alfred Johnston Cox, Esquire
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1501 Main Street, 5th Floor
Post Office Box 2285
Columbia, South Carolina 29202

Hoover C. Blanton, Esquire
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STATE OF SOUTH CAROLINA
In the Supreme Court

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FEB 12 2010

APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Lee S. Alford, Circuit Court Judge

Case No.: 02-CP-46-2369
Case Tracking Number 2009-143546

Auto-Owners Insurance Company.....Petitioner

v.

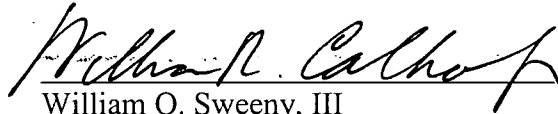
Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon, C&B Fabrications, Inc.,
and Low Country Signs, Inc.....Respondents

**Return of Marion L. Eadon , C&B Fabrications, Inc. and Low Country Signs, Inc. to
Motion of Harleysville Mutual Insurance Company for Leave to Appear and File a
Brief as Amicus Curiae in Support of Petition for a Writ of Certiorari**

Respondents Marion L. Eadon, C&B Fabrications, Inc, and Low Country Signs, Inc. oppose the motion of Harleysville Mutual Insurance Company for leave to submit an *amicus curiae* brief in support of Auto-Owners Insurance Company's Petition for a writ of certiorari. Harleysville has nothing to add to the Court's deliberations that could not be provided by the insurance company that initiated this declaratory action. This court, moreover, is not without experience in addressing the coverage issues and exclusions that Harleysville intends to address.

Another effect of adding Harleysville Insurance Company as an *amicus curiae* is that further delay will be imposed on the process. Auto-Owners' Amended Complaint in this action was filed on March 14, 2003. The seventh anniversary of that filing is soon to arrive. This almost-seven years of litigation has featured delay after delay, and has caused Respondent Eadon to incur very large legal expenses. Further delay does not appear to be either necessary or in keeping with the objective of the SCRCF, Rule 1, to "secure the just, speedy, and inexpensive determination of every action."

Respectfully submitted,



William O. Sweeny, III
William R. Calhoun, Jr.
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, S. C. 29211
(803) 256-2233

**ATTORNEYS FOR RESPONDENT
MARION L. EADON d/b/a C&B
FABRICATION, C&B
FABRICATIONS, INC. AND
LOW COUNTRY SIGNS, INC.**

STATE OF SOUTH CAROLINA
In the Supreme Court

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FEB 12 2010

APPEAL FROM YORK COUNTY
Court of Common Pleas
Lee S. Alford, Circuit Court Judge

S.C. SUPREME COURT

Case No.: 02-CP-46-2369
Case Tracking Number 2009-143546

Auto-Owners Insurance Company..... Petitioner

v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon, C&B Fabrications, Inc.,
and Low Country Signs, Inc..... Respondents

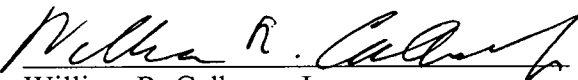
PROOF OF SERVICE

I certify that I have served the Return of Respondents Marion L. Eadon, C&B Fabrications, Inc and Low Country Signs, Inc. to the motion of Harleysville Mutual Insurance Company to be allowed to file an *amicus curiae* brief in support of Auto-Owners Insurance Company's Petition for Certiorari on Auto-Owners Insurance Company, Samuel W. Rhodes, Jr., and Piedmont Promotions, Inc. by depositing one copy of each document in the United States Mail, postage prepaid, on February 12, 2010, addressed to their respective attorneys of record, as follows:

Alfred Johnston Cox, Esquire
Ellis, Lawhorne & Sims, P.A.
1501 Main Street, 5th Floor
Post Office Box 2285
Columbia, South Carolina 29202
Attorney for Auto-Owners Ins. Co

Hoover C. Blanton, Esquire
McCutchen, Blanton, Johnson & Barnette, LLP
Post Office Box 11209
1414 Lady Street
Columbia, South Carolina 29211-1209
Attorney for Samuel W. Rhodes, Jr and
Piedmont Promotions, Inc..

February 12, 2010


William R. Calhoun, Jr.
Post Office Box 12129
Columbia, S. C. 29211
(803) 256-2233
Attorney for the Cited Respondents

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No.: 02-CP-46-2369
Case Tracking Number 2009-143546

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FEB 12 2010

S.C. SUPREME COURT

Auto-Owners Insurance Company, ... Petitioner,
v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., ... Respondents.

**RESPONDENTS', SAMUEL W. RHODES, JR. AND PIEDMONT
PROMOTIONS, INC., RETURN TO THE MOTION OF HARLEYSVILLE
MUTUAL INSURANCE COMPANY FOR LEAVE TO APPEAR AND FILE A
BRIEF AS AMICUS CURIAE IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI**

CREIGHTON B. COLEMAN
120 Washington Street
Post Office Box 1006
Winnsboro, South Carolina 29180
(803) 635-6884

HOOVER C. BLANTON
1414 Lady Street
Post Office Box 11316
Columbia, South Carolina 29211-1316
(803) 255-0997

**ATTORNEYS FOR THE RESPONDENTS
SAMUEL W. RHODES, JR. AND
PIEDMONT PROMOTIONS, INC.**

The Respondents, Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc., oppose the motion of Harleysville Mutual Insurance Company (Harleysville) for leave to appear and file a brief as amicus curiae in support of a Petition for Writ of Certiorari.

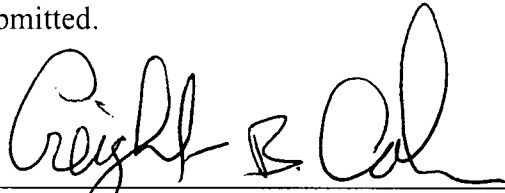
There are no new, fresh or novel issues presented by the Petitioner, Auto-Owners Insurance Company (Auto-Owners), which invites or justifies an insurance industry participation and assault upon the Court of Appeals' ruling in this case. Auto-Owners is not a stranger to appeals asserting its position as to coverage or non-coverage of its commercial general liability policy. It currently and, in the past, has demonstrated its sophistication in hiring experienced and competent counsel to represent its interests. Harleysville does not contend that Auto-Owners cannot adequately represent its interests in this litigation involving its insured under the particular facts out of which the litigation issues arise. Harleysville cannot change those facts or those circumstances by its participation. Furthermore, the addition of another insurer challenging the ruling of the Court of Appeals should not have any influence on this Court because the resolution of any appellate issue in this case should not be influenced by the number of participants on the side of an issue. The issues presented by the parties, as gleaned from the Record on Appeal, governed by existing precedent, should be the Court's guide, not the volume of the chorus on one side.

Harleysville's statement that it has been "involved in hundreds of disputes" involving the issues presented in this case demonstrates the attitude of some casually insurers. Regardless of the ruling of whatever Court is involved, Harleysville continues to raise the same issues and seeks to overturn established precedent. It is not suggested that this is either illegal or immoral. However, unquestionably, it is redundant and a burden on the appellate

process and individual litigants. Harleysville should not be rewarded by humoring its desire to raise the numbers of disputes that it has been involved in from "hundreds" to "thousands."

The motion to appear as amicus curiae should be denied.

All of which is respectfully submitted.



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**ATTORNEYS FOR THE RESPONDENTS
SAMUEL W. RHODES, JR. AND
PIEDMONT PROMOTIONS, INC.**

February 12, 2010

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No.: 02-CP-46-2369
Case Tracking Number 2009-143546

Auto-Owners Insurance Company, ... Petitioner,
v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., ... Respondents.

CERTIFICATE OF SERVICE

I, the undersigned attorney for Respondents Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc., hereby certify that a copy of the **Respondents', Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc., Return to the Motion of Harleystown Mutual Insurance Company for Leave to Appear and File a Brief as Amicus Curiae in Support of the Petition for Writ of Certiorari** was served on all parties, by mailing in the United States mail, postage prepaid, a copy thereof, to attorneys for all parties, this **12th** day of **February, 2010**, addressed as follows:

A. Johnston Cox, Esquire
John M. McCants, Esquire
Ellis, Lawhorne & Sims, P.A.
Post Office Box 2285
Columbia, South Carolina 29202

William O. Sweeny, III, Esquire
William R. Calhoun, Jr., Esquire
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211

C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Michael J. Anzelmo, Esquire
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Columbia, South Carolina 29211-1070


Hoover C. Blanton

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 02-CP-46-2369

Auto-Owners Insurance Company, ... Appellant,

v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., ... Respondents.

**Motion of Harleystown Mutual Insurance Company for Leave to Appear and File a
Brief as Amicus Curiae in Support of Petition for a Writ of Certiorari**

Harleystown Mutual Insurance Company ("Harleystown") respectfully requests leave of the Court to appear as *amicus curiae* pursuant to Rule 213 of the South Carolina Appellate Court Rules. This application is accompanied by Harleystown's proposed Brief of Amicus Curiae as allowed under Rule 213, SCACR. In support of this Motion of Harleystown Mutual Insurance Company to Appear and File a Brief as Amicus Curiae, your *amicus* respectfully shows the Court as follows:

I. Statement of Interest of Amicus Curiae and Reasons why a Brief of Amicus Curiae is Desirable.

Harleystown Mutual Insurance Company ("Harleystown") is a casualty insurance company that writes property and casualty insurance policies around the country, including South Carolina. Harleystown has substantial experience with the exact

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S.C. SUPREME COURT

coverage issues presented in this appeal. To date, Harleysville has been involved in hundreds of disputes involving the issues presented in this matter, specifically the issues of whether faulty work constitutes an occurrence under a Commercial General Liability policy and the efficacy of the exclusions contained in the policy. Moreover, Harleysville has been involved in several recent matters currently pending or recently resolved by the appellate courts of South Carolina in which similar issues were addressed. Moreover, Harleysville participated as *amicus curiae* in Auto-Owners Insurance Company, Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009), which is this Court's most recent pronouncement on CGL coverage issues, including the application of exclusions K, L, and N. In all the above actions, Harleysville's CGL policies contain identical language to the CGL policy at issue here, including exclusions K, L, and N, which were incorrectly construed and applied by the Court of Appeals in the Opinion.

Given Harleysville's familiarity and experience litigating similar issues, Harleysville possesses unique insight and familiarity with the circumstances and background of the claims at issue in this matter. As a result, Harleysville respectfully submits that this experience and insight would be of assistance to this Court in reaching the correct resolution on the coverage issues presented in this litigation.

II. Conclusion.

Based on the foregoing, Harleysville respectfully requests that this Court grant Harleysville leave of the Court to appear as *amicus curiae* in this action.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
C. Mitchell Brown
William C. Wood, Jr.
Michael J. Anzelmo
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Harleysville Mutual Insurance Company

Columbia, South Carolina

February 5, 2010

Motion denied.



For the Court *ACJ*

*Chief Justice Jean H. Toal and Justice
Kaye M. Heare, not participating*

February 18, 2010

Attachment

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 02-CP-46-2369

Auto-Owners Insurance Company Petitioner,

v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., ... Respondents.

**Amicus Brief of Harleysville Mutual Insurance Company
in Support of Petition for a Writ of Certiorari**

C. Mitchell Brown
William C. Wood, Jr.
Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH LLP
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Statement of Issues

- I. Under Newman, the plain and unambiguous language of exclusion N is not limited to product recall settings and should have barred coverage here.
- II. Exclusions K and L also operate to bar coverage under the CGL policy at issue here.
- III. Diminution in value to real property is not an insurable loss under a CGL policy absent a finding of "physical injury to tangible property."

Statement of the Case

This declaratory judgment action arises out of a lawsuit brought by Piedmont Promotions, Inc. ("Piedmont"), and Samuel W. Rhodes against Marion L. Eadon d/b/a C&B Fabrication. In that action, Piedmont and Rhodes contracted with Eadon to fabricate, deliver, and install three outdoor advertising billboard signs on property Rhodes owned along Interstate 77 in Fairfield County. After the signs were designed and installed, one sign fell across Interstate 77. Thereafter, the South Carolina Department of Transportation ordered that the remaining two signs be removed. Piedmont and Rhodes sued Eadon for economic damages alleging faulty construction of the signs.¹ At trial, the jury returned a verdict in favor of Piedmont and Rhodes, awarding \$3,000,000 in actual damages and \$3,500,000 in punitive damages.

Auto-Owners Insurance Company ("Auto-Owners") commenced this declaratory judgment action seeking a determination that it had no duty to indemnify under its CGL policy with Eadon. The circuit court found that the damages awarded by the jury in the underlying action were covered except for the contract price of the signs. While post-trial motions were pending in this declaratory judgment action, the Court of Appeals reversed the underlying tort judgment.² As a result, Auto-Owners filed a motion to vacate the order issued in the declaratory judgment action, which was denied by the circuit court. The Court of Appeals affirmed the order of the circuit court on

¹ Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc. v. Marion L. Eadon d/b/a C&B Fabrication, civil action no. 01-CP-20-334.

² See Rhodes v. Eadon, Op. No. 2006-UP-413 (S.C. Ct. App., filed December 15, 2006)

coverage.³ Subsequent to the court of appeals opinion, this Court issued its opinion, after rehearing, in Auto-Owners Insurance Company, Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009). Auto-Owners included the Newman precedent in its petition for rehearing at the Court of Appeals, arguing that the Court of Appeals' opinion conflicted with Newman and its holding regarding the exclusions contained in the CGL policy. The Court of Appeals denied the petition for rehearing. Auto-Owners then petitioned this Court for a writ of certiorari to review the Rhodes opinion. Harleysville Mutual Insurance Company ("Harleysville") writes in support of the petition for certiorari.

Introduction

Pursuant to Rules 213 and 242 of the South Carolina Appellate Court Rules, Harleysville submits this amicus brief in support of Auto-Owners' petition for a writ of certiorari. Harleysville has filed a motion for leave to file this brief contemporaneously with this brief. The petition should be granted because, among other things, the Court of Appeals' opinion conflicts with this Court's recent opinion in Newman.

Statement of Interest

Harleysville Mutual Insurance Company ("Harleysville") is a casualty insurance company that writes property and casualty insurance policies around the country, including South Carolina. Harleysville has substantial experience with the exact coverage issues presented in this appeal. To date, Harleysville has been involved in hundreds of disputes involving the issues presented in this matter, specifically the issues

³ Auto-Owners Insurance Company v. Samuel W. Rhodes, Piedmont Promotions, Inc., Marion L. Eadon d/b/a C&B Fabrication, C&B Fabrications, Inc., and Low Country Signs, Inc., 385 S.C. 83, 682 S.E.2d 857 (Ct. App. 2009), filed August 6, 2009.

of whether faulty work constitutes an occurrence under a Commercial General Liability policy and the application of the exclusions contained in the policy. Moreover, Harleysville has been involved in several recent matters currently pending or recently resolved by the appellate courts of South Carolina in which parallel issues were addressed. Currently, Harleysville has two actions pending at the court of appeals and one pending before this Court in which similar coverage questions are at issue. Moreover, Harleysville participated as amicus curiae in Auto-Owners Insurance Company, Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009), which is this Court's most recent pronouncement on CGL coverage issues, addressing a CGL policy identical to that used by Harleysville. In all the above actions, Harleysville's CGL policies contain identical language to the Auto-Owners CGL policy at issue here, including exclusions 2(k) (hereinafter K), 2(l) (hereinafter L), and 2(n) (hereinafter N), which were addressed by the Court of Appeals in this action. The Court of Appeals construed these exclusions in a manner that directly conflicts with the manner in which this Court construed these exclusions in Newman.

Given Harleysville's familiarity and experience litigating similar issues in South Carolina and throughout the country, Harleysville possesses unique insight and familiarity with the circumstances and background of the claims at issue in this matter. As a result, Harleysville respectfully submits that this experience and insight would be of assistance to this Court in reaching the correct resolution on the coverage issues presented in this litigation and to harmonize the Rhodes opinion with this Court's interpretation of the relevant issues as set forth in Newman.

Law/Analysis

- I. Under Newman, the plain and unambiguous language of exclusion N is not limited to product recall settings and should have barred coverage here.

The Court of Appeals ignored the plain and unambiguous language of exclusion N by limiting its application only to "product recalls." The wording of the exclusion is not so limited. As exclusion N unambiguously provides, "[t]his insurance does not apply" to:

Damages claimed for any loss, cost or expense incurred by you or others for loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product;"
- (2) "'Your work;" or
- (3) "Impaired property;"

if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

Importantly, this holding directly conflicts with this Court's recent decision in Newman that exclusion N bars coverage for claimed damage consisting of defective workmanship in the construction of a home which involved no "product recall" in the normal sense that such phrase is used. As here, the Newman case involved the withdrawal from use of a product, not a product recall. Nevertheless, the Newman Court correctly found that the above exclusion barred coverage which the Court of Appeals here found not barred. This Court should grant the petition for writ of certiorari to resolve this conflict.

a. **Exclusion N is not limited to "product recalls".**

The language of exclusion N is not limited to "product recalls" as held by the Court of Appeals. The language of exclusion N does not limit its application to any specific situation, such as a mass recall of products, area of law, such as products liability, or cause of action. Rather, the exclusion applies to any situation in which any product or work is withdrawn or recalled from the market or from any use by any person or organization for any defect or suspected defect.

The Court of Appeals failed to adhere to the established rules for construing insurance contracts in construing exclusion N to apply only to product recalls. Insurance policies are subject to the general rules of contract construction. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008). South Carolina law is well-settled: courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning. Fritz-Pontiac-Cadillac-Buick v. Goforth, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994) (holding that courts should not torture the meaning of policy to language to extend coverage that was never intended by the parties; rather, courts must give policy language its plain, ordinary, and popular meaning); Diamond State Ins. Co. v. Homestead Industries, Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) (stating that insurance policy language must be given its plain, ordinary, and popular meaning); Sloan Constr. Co. v. Central Nat'l Ins. Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977) (same). When an insurance contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999);

Myers v. Nat'l Sales Ins. Co., 362 S.C. 41, 45, 606 S.E.2d 486, 488 (Ct. App. 2004) ("When the contract is unambiguous, clear, and explicit, it must be construed according to the terms used by the parties.").

b. The Court in Newman applied exclusion N outside the "product recall" context.

Contrary to the Court of Appeals' limited interpretation, this Court cited this exact exclusion to bar certain coverage in Auto-Owners Insurance Company, Inc. v. Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546-47 (2009) in a much more broad fashion. In Newman, the construction defects involved had nothing to do with a "product recall," yet this Court correctly held that Exclusion N was applicable by its plain and clear terms. In Newman, this Court held that although the "subcontractor exception" in the CGL policy preserved coverage for certain property damage, "another policy exclusion [N] bars coverage for damage to the defective workmanship itself." Id. at 197, 684 S.E.2d at 546. The Court then cited exclusion N and held that:

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.

Id. at 198, 684 S.E.2d at 546 (citing L-J v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 122, 621 S.E.2d 33, 35 (2005)). The Court did not limit application of exclusion N to product recalls, but applied it, consistent with its language, to any situation involving removal or loss of defective product or work. Accordingly, the

Court of Appeals' decision to limit exclusion N to "product recalls" is inconsistent with the holding in Newman. This Court should grant the writ of certiorari and reverse the holding of the Court of Appeals.

c. **Newman's treatment of exclusion N is consistent with other courts.**

The Newman application of exclusion N is consistent with its application in other jurisdictions. These courts give effect to the plain language of the exclusion.

In North American Precast, Inc. v. Gen. Cas. Co. of Wis., C/A No. 3:04-1307, 2008 WL 906327 (S.D. W. Va. Mar. 31, 2008), the West Virginia district court held that exclusion N applies to bar coverage for an isolated incident where a defective product used in construction is removed. In that action, the subcontractor provided the general contractor with concrete planks to be used in the construction of a jail. During construction one of the planks collapsed due to a subcontractors' poor workmanship, causing damage to exterior masonry and to the floor of the jail. In addressing the issue, the court applied exclusion N, which was identical to the exclusion in the Auto-Owner's policy.

The plaintiffs argued that exclusion N was inapplicable because it only addresses products withdrawn from the market. However, the court rejected this limited application of exclusion N, stating that "the plain language of this provision, however, does not limit the exclusion to traditional recalls from the stream of commerce." Id. at 9. The court noted that under the plain language of exclusion N it applies if the product is "*withdrawn or recalled from the market or from use by any person . . . because of a known or suspected defect*" Id. (emphasis in original). The court further held that the engineer that rejected the deficient planks qualified as a "person" within the

meaning of exclusion N. The stop work order was a means of "withdraw[ing]" the panels "from use." Id. Thus, the court held exclusion N applied to the damages sought for "lost use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal" of the concrete planks. Id.

In West Am. Ins. Co. v. Lindepuu, 128 F. Supp. 2d 220 (E.D. Pa. 2000), the court held the exclusion barred coverage for a subcontractor's negligent installation of numerous doors and windows in a residential development. The court expressly considered that there was no general recall of the doors/windows, stating:

I fail to see how [the subcontractor's] negligent installation can be anything other than either his 'work' or 'impaired property' that was 'withdrawn from use' and had to be 'replaced' or 'repaired' 'because of a known or suspected defect, deficiency' or 'inadequacy,' and therefore subject to exclusion n.

Id. at 229. Thus, the court held that "[u]nder the plain language of the policy the claims . . . for damage to the windows and doors and the cost for their replacement are not covered under Exclusion n." Id. Again, in that action, the exclusion N language was the same as it is here.

In American Int'l Surplus Lines Ins. Co. v. IES Lead Paint Div., Inc. C/A No. 94-4627, 1996 U.S. Dist. Lexis 3404 (E.D. Pa. Mar. 19, 1996), the court addressed the applicability of exclusion N to faulty construction work withdrawn from use by a state agency. A state agency shut down the insured's asbestos abatement work for violations. The court applied exclusion N, holding that the property at issue was "impaired property" that was "withdrawn from use" by the state agency, that the state agency was an "organization" as defined by the policy, and that this withdrawal from use was because of a "defect, deficiency, etc." Id. at 15-16. Exclusion N was held to

exclude coverage for defective work performed by a contractor despite the non-existence of any "recall" or general withdrawal from the market. The exclusion N language there was the same as here.

In Aetna Casualty and Surety Co. v. Deluxe Systems, Inc. of Florida, 711 So.2d 1293 (Fla. App. 1998), the insured seller of shelving sought a defense and coverage for the buyer's claims for damages consisting of the replacement of defective shelves and the loss of use of a storage facility during the repair and remediation. The court applied exclusion N, holding "[we] have no trouble concluding that [the buyer's] damage claims which relate to the purchase and installation of replacement shelving components are excluded from coverage under exclusion N." Id. at 1297. No general "product recall" was involved there. The exclusion N language there was also the same as here.

In Flynn v. Timms, 199 A.D.2d 873 (N.Y. 1993), the insured argued the exclusion did not apply to damages related to a partially collapsed retaining wall because use of the wall was not entirely discontinued and parts of the wall were still present on the property. The court rejected that argument, reasoning that the collapse and defective condition effectively limited the insured's ability to use the wall such that the wall was "withdrawn from use" under the exclusion N language and the cost to repair or replace the wall was barred from coverage. Again, no "product recall" was involved and the language of Exclusion N there was the same as here.

The Newman opinion follows the rationale of the above cases in rejecting the view that exclusion N is limited to settings where products are recalled from the market. Exclusion N applies to any incident where a defective product used is removed.

d. The history of the drafting of exclusion N supports the conclusions of Newman.

The Court of Appeals erred in looking to exclusion N's historical, pre-1986 revision history to apply a "product recall" limitation. Historically, exclusion N was addressed by some as the "sistership" exclusion. The name "sistership" derived from an incident in the aircraft industry when the Civil Aeronautics Administration grounded all airplanes of a certain make and type because one crashed, and the agency suspected others of having a common structural defect. The damages arising from the loss of use of all the "sister ships" were enormous, and the "sistership" exclusion was born. See, e.g., Todd Shipyards Corp. v. Turbine Servs., Inc., 674 F.2d 401 (5th Cir. 1982).

However, exclusion N—this so-called "sistership" exclusion, was substantially revised in 1986. These alterations broadened the language of exclusion N and rendered the historical application relied on by the Court of Appeals⁴ irrelevant. The new language of exclusion N, which is the language that appears in the Auto-Owners policy,

⁴ It is the case that other courts erroneously continue to construe exclusion N in this limited "sistership" way, despite the revisions to the language in 1986. See, e.g., Standard Fire Ins. Co. v. Chester-O'Donely Assocs., Inc., 972 S.W.2d 1 (Tenn. Ct. App. 1998). These courts are in error.

is broader and not limited to product recall settings. See Newman, 385 S.C. at 197-98, 684 S.E.2d at 546-47.⁵

The revisions to the plain language of exclusion N are evident when the pre-revision language is compared to the post-revision exclusion N. Pre 1986 exclusion N provided that it excluded coverage for:

[D]amages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured's products or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein.

The revisions altered the language and scope of exclusion N to provide that "[t]his insurance does not apply" to:

Damages claimed for any loss, cost or expense incurred by you or others for loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product;"
- (2) "'Your work;" or
- (3) "Impaired property;"

if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

⁵ Even before the 1986 revisions exclusion N, some courts correctly recognized its language was not necessarily limited to broad product recalls. In Charles E. Brohawn & Bros., Inc. v. Employers Comm. Union Ins. Co., 409 A.2d 1055 (Del. 1979), the contractor argued that the sistership exclusion only excluded damages resulting from the withdrawal of similar products other than the one in which the defect was discovered. The court rejected this limited view of the exclusion. After noting its historical origin relating to the grounding of all aircraft of a certain type where a defect in one is discovered, the court noted that the specific language of the exclusion "*was not intended for that limited purpose*" (emphasis added). Id. at 1057 n.3. Rather, the court held that the exclusion excludes coverage for damages resulting from the withdrawal or repair of *any* defective product, where the defect has been discovered and the product withdrawn or repaired.

The 1986 revisions enlarged the types of damages that are barred by the exclusion. The revisions excluded damages claimed by the insured for "recall," "adjustment," "removal," and "disposal." Additionally, the 1986 revisions expanded the exclusion to bar coverage for damages to "your product," "your work," and "impaired property." These 1986 revisions changes were necessary to reflect the inclusion in the standard CGL policy of the definition for "impaired property." The revisions also expanded the scope of the exclusion to bar coverage by including any "product, work or property" that was withdrawn or recalled from the market or from use "by any person or organization" because of a "known or suspected defect, deficiency, inadequacy or dangerous condition in it."

As can be seen, the revisions added new language to exclusion N that significantly expanded the application of the exclusion. As of 1986, Exclusion N now applied to a broader category of "product work, or property" than did the pre-1986 exclusion. Accordingly, the revisions to exclusion N removed any "product recall" limitation in the pre-1986 so-called "sistership" exclusion. This limitation no longer applies in exclusion N that is applicable in this action and that was applied by this Court in Newman.

The revisions to the plain language of exclusion N are evident when the pre-revision language is compared to the post-revision exclusion N. Pre 1986 exclusion N provided that it excluded coverage for:

[D]amages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured's products or of any property of which such products or work form a part, if such products, work or property are;

withdrawn from the market or from use because of any known or suspected defect or deficiency therein.

The revisions altered the language and scope of exclusion N to provide that "[t]his insurance does not apply" to:

Damages claimed for any loss, cost or expense incurred by you or others for loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product;"
- (2) "'Your work;" or
- (3) "Impaired property;"

if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

As can be seen, the revisions to exclusion N removed any "product recall" limitation in the pre-1986 so-called "sistership" exclusion. This limitation no longer applies in exclusion N that is applicable in this action and that was applied by this Court in Newman.

Accordingly, any "product recall" limitation in the pre-1986 so-called "sistership" exclusion that might have existed no longer applies. Newman correctly applies the current language of the exclusion. The Court of Appeals erred by relying on the historical context of the sistership exclusion rather than the current language to of the policy in determining coverage.

II. Exclusions K and L also operate to bar coverage under the CGL policy at issue here.

The Court of Appeals also erred in holding that exclusions K and L do not exclude damages claimed for "loss of use" of the signs. Such a loss is barred by the

plain language of each exclusion. Additionally, the Court of Appeals employed a faulty analysis as to why exclusion L failed to bar coverage. This Court should grant certiorari to correct these errors.

Exclusion K bars coverage for "property damage" to "your product." Likewise, exclusion L bars coverage for "property damage" to "your work." The policy defines "property damage" as (1) "physical injury to tangible property, including all resulting loss of use of that property," or (2) "loss of use of tangible property that is not physically injured."

It is unquestioned that the signs in this matter were the insured's product and work under the policy. It is also unquestionable that the signs are "tangible property." Therefore, exclusions K and L bar all damage consisting of "loss of use" of the signs, whether it is the sign that fell and was physically damaged or the signs that were uninjured but ordered removed from the property. The Court of Appeals held that exclusion K did not bar coverage for damages resulting from loss of use. As a result, this Court should grant the petition for writ of certiorari to clarify that "loss of use" damages are barred by exclusions K and L.

Moreover, the Court of Appeals erred in relying on Kennedy v. Columbia Lumber & Manufacturing Co., 299 S.C. 335, 384 S.E.2d 730 (1989), and Colleton Prep. Academy, Inc. v. Hoover Universal, Inc., 379 S.C. 181, 666 S.E.2d 247 (2008), in analyzing exclusion L in the CGL policy. Kennedy and Colleton Prep address whether an at-fault party may be liable in tort or only in contract under the economic loss rule. These cases address common law rules, which remain constant, evolve or change, or disappear depending on judicial case law. Coverage is decided by the

contract, not by changing common law jurisprudence in a particular area of law. Neither case addresses the issue of coverage under a CGL policy or the interpretation of policy language at issue in exclusions K and L. Coverage determinations turn on application of the policy language contained in the exclusion. See Fritz-Pontiac-Cadillac-Buick, 312 S.C. at 318, 440 S.E.2d at 369 (holding that courts should not torture the meaning of policy to language to extend coverage that was never intended by the parties; rather, courts must give policy language its plain, ordinary, and popular meaning). Therefore, this Court should grant certiorari and reverse.

III. Diminution in value to real property is not an insurable loss under a CGL policy absent a finding of "physical injury to tangible property".

The Court of Appeals held that Rhodes was entitled to recover under the CGL policy for the diminution of his real property that was attributable to economic damages. Rhodes, 385 S.C. at 104, 682 S.E.2d at 868. This holding failed to adhere to the established rule that diminution in the value of the real property is not "property damage" under a CGL policy.

This Court has definitively established that "the diminished value of tangible property does not constitute property damage within the meaning of CGL policies which define property damage as physical injury." Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc., 356 S.C. 156, 163-64, 588 S.E.2d 112, 116 (2003). In Brazell, the insured's property suffered a diminution in value as the result of a contractor's negligence. Id. at 163, 588 S.E.2d at 115. The insured, however, only alleged economic damages and loss of use to the property but did not allege any "physical injury." Id. This Court found that the insured's allegations did "not allege any

physical injury which meets the definition of 'property damage' provided in the CGL policies [insured did] not allege any physical injury to their property, but solely economic damages, particularly the diminished value of their property" Id. As a result, this Court held no property damage occurred within the meaning of the CGL policies at issue. Id. at 163-64, 588 S.E.2d at 116.

The damages alleged in Rhodes were the same as the damages allegations in Brazell—economic damages that related to the diminished value of the real property. The Court of Appeals recognized the damages claimed by the insured were for the "diminution in the value of Rhodes' property attributable to . . . loss of use of the tangible property." Rhodes, 385 S.C. at 104, 682 S.E.2d at 868. The Court of Appeals actually conflates two potentially separate components of damage: (1) the money lost because the signs were no longer being used; and (2) the decreased value of the underlying property because the signs were no longer a fixture on the real property. The first measure is the "loss of use" that is excluded under the policy. The second is not "property damage" as defined under the policy. Brazell, 356 S.C. at 164, 588 S.E.2d at 116 (recognizing that the policy language precludes coverage for intangible injuries such as diminution in value and that diminution in value is intangible damage, not physical injury, therefore, the CGL policy does not provide coverage) (citations omitted). Therefore, the Court of Appeals combines two components of damages that taken individually would be excluded under the policy, and combines those elements to allow coverage. This holding is in conflict with this Court's opinion in Brazell that diminished value of tangible property does not constitute property damage within the

meaning of CGL policies. This Court should thus also grant certiorari to address this error by the Court of Appeals.

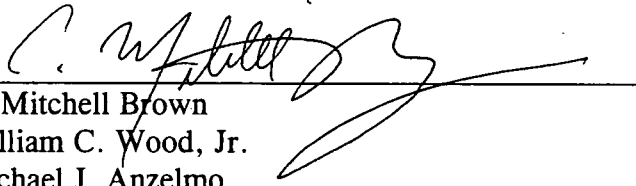
Conclusion

Based on the foregoing, this Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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February 5, 2010

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 02-CP-46-2369

Auto-Owners Insurance Company, ... Petitioner.

v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., ... Respondents,

PROOF OF SERVICE

I, the undersigned administrative assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Amicus Curiae Harleysville Mutual Insurance Company hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by delivering to the following address(es):

Pleadings: **Motion of Harleysville Mutual Insurance Company for Leave to Appear and File a Brief as Amicus Curiae in Support of Petition for a Writ of Certiorari**

Counsel Served:

Hoover Blanton, Esquire
Hopkins & Campbell, LLP
Post Office Box 11963
Columbia, SC 29211-1963

A. Johnston Cox, Esquire
John L. McCants, Esquire
Ellis Lawhorne & Sims, PA
Post Office Box 2285
Columbia, SC 29202

William O. Sweeny III, Esquire
William R. Calhoun Jr., Esquire
Sweeny Wingate & Barrow, PA
Post Office Box 12129
Columbia, SC 29211

Creighton B. Coleman, Esquire
Coleman & Tolen, LLC
Post Office Box 1006
Winnsboro, SC 29180



Lisa P. Whitehurst
Administrative Assistant

January 5, 2010

McCUTCHEN BLANTON HOPKINS & CAMPBELL, LLP

1414 LADY STREET (29201)
POST OFFICE BOX 11316
COLUMBIA, SOUTH CAROLINA 29211-1316
TELEPHONE 803/255-0997
FAX 803/255-0998
WWW.MBHCLAW.COM

WILLIAM E. HOPKINS, JR.*
SUSAN F. CAMPBELL

OF COUNSEL:
THOMAS E. McCUTCHEN
HOOVER C. BLANTON

PAUL B. DEAL

*CERTIFIED CIVIL COURT MEDIATOR

February 12, 2010

RECEIVED

FEB 12 2010

Hand Delivered

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29211-1330

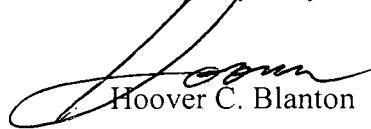
S.C. SUPREME COURT

RE: Auto-Owners Insurance Company v. Samuel W. Rhodes, Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B Fabrications, Inc. and Low Country
Signs, Inc.
Supreme Court Case Tracking No.: 2009-143546

Dear Mr. Shearouse:

Enclosed are original and six copies of the **Respondents', Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc., Return to the Motion of Harleysville Mutual Insurance Company for Leave to Appear and File a Brief as Amicus Curiae in Support of the Petition for Writ of Certiorari**. Also attached is a Certificate of Service on all counsel of record and Harleysville's counsel. Additional copies of this Return are attached which we request that you clock for return to us. If more is required, please let us know. Thank you for your assistance.

Yours very truly,


Hoover C. Blanton

HCB/jss
Enclosure

cc : A. Johnston Cox, Esquire (w/enclosures)
John L. McCants, Esquire (w/enclosures)
William O. Sweeny, Esquire (w/enclosures)
William R. Calhoun, Jr., Esquire (w/enclosures)
Creighton B. Coleman, Esquire (w/enclosures)
C. Mitchell Brown, Esquire (w/enclosures)
William C. Wood, Jr., Esquire (w/enclosures)
Michael J. Anzelmo, Esquire (w/enclosures)

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9024
www.nelsonmullins.com

Michael J. Anzelmo
Tel: 803.255.9312
Fax: 803.255.9024
michael.anzelmo@nelsonmullins.com

February 5, 2010

RECEIVED

FEB - 5 2010

S.C. SUPREME COURT

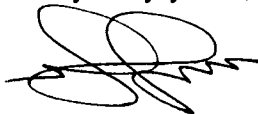
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Auto-Owners Insurance Company v. Samuel W. Rhodes, Piedmont
Productions, Inc., Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc.
Our File No. 00470/01578

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Motion of Harleysville Mutual Insurance Company for Leave to Appear and File a Brief as Amicus Curiae in Support of Petition for a Writ of Certiorari in regard to the above-referenced matter. We would ask that you file the original and return clocked-in copies to us via our courier. Also enclosed is our Firm check in the amount of \$25.00 as the required filing fee. If the motion is granted, we will provide the appropriate number of bound amicus briefs to the Court.

Very truly yours,



Michael J. Anzelmo

MJA:lpw
Enclosures

cc: Hoover C. Blanton, Esquire
A. Johnston Cox, Esquire / John L. McCants, Esquire
William O. Sweeny, Esquire / William R. Calhoun, Jr., Esquire
Creighton B. Coleman, Esquire

ELLIS:LAWHORNE

A. JOHNSTON COX
DIRECT DIAL (803) 212-4969
JCOX@ELLISLAWHORNE.COM

January 8, 2010

RECEIVED

JAN - 8 2010

S.C. SUPREME COURT

Via Hand-Delivery
Honorable Daniel E. Shearouse
Supreme Court Clerk
1231 Gervais Street
Columbia, South Carolina 29201

Re: Auto Owners Insurance Company, Appellant v. Samuel W. Rhodes,
Piedmont Promotions, Inc., Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., Respondents
Case No.: 02-CP-46-2369
Our File Number: 118-56407

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Auto-Owners Insurance Company's Reply Brief in the above-referenced matter.

Thank you for your assistance. Please do not hesitate to give our office a call with any questions or concerns.

With kind regards, I am

Very truly yours,

A. Johnston Cox

AJC:vra
Enclosure

cc: Hoover C. Blanton, Esquire
Creighton Coleman, Esquire
William O. Sweeny, Esquire

The Supreme Court of South Carolina

Auto-Owners Insurance
Company,

Petitioner,

v.

Samuel W. Rhodes, Piedmont
Promotions, Inc. and Marion L.
Eadon d/b/a C&B Fabrications,
C&B Fabrications, Inc. and
Low Country Signs, Inc.,

Respondents.

The Honorable Lee S. Alford
York County
Trial Court Case No. 2002-CP-46-02369

ORDER

For good cause having been shown, the time for serving and filing the
Reply to the Return to Petition for a Writ of Certiorari in the above entitled
matter is hereby extended until January 8, 2010.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

December 23, 2009

cc: A. Johnston Cox, Esquire
John M. McCants, Esquire
Creighton Coleman, Esquire
Hoover Blanton, Esquire
William O. Sweeny, III, Esquire
William R. Calhoun, Jr., Esquire

ELLIS:LAWHORNE

A. JOHNSTON COX
DIRECT DIAL (803) 212-4969
JCOX@ELLISLAWHORNE.COM

December 21, 2009

HAND DELIVERED

The Honorable Daniel E. Shearhouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29211-1330

Re: Auto Owners Insurance Company, Appellant v. Samuel W. Rhodes, Piedmont
Promotions, Inc., Marion L. Eadon d/b/a C&B Fabrication, C&B Fabrications,
Inc., and Low Country Signs, Inc., Respondents
Case No.: 02-CP-46-2369
Our File Number: 118-56407

Dear Mr. Shearouse:

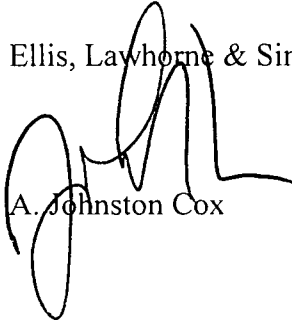
This letter is to respectfully request a Ten (10) Day Extension of Time in which to file Auto-Owners Reply to the Return to Auto-Owners Petition for Writ of Certiorari in the above-referenced matter. This request is based on the fact that the Reply is currently due on or before December 29, 2009. As this time period extends over the Christmas holiday, it would be difficult to comply with the current deadline. Therefore, the Reply would be due on or before January 8, 2010. Enclosed is our filing fee check in the amount of \$25.00.

Please do not hesitate to contact me if you have any questions or concerns.

With kind regards, I am

Very truly yours,

Ellis, Lawhorne & Sims, P.A.



A. Johnston Cox

AJC/smw
Enclosures

cc: Hoover C. Blanton, Esquire
Creighton Coleman, Esquire
William O. Sweeny, Esquire

McCUTCHEN BLANTON HOPKINS & CAMPBELL, LLP

1414 LADY STREET (29201)
POST OFFICE BOX 11316
COLUMBIA, SOUTH CAROLINA 29211-1316
TELEPHONE 803/255-0997
FAX 803/255-0998
WWW.MBHCLAW.COM

WILLIAM E. HOPKINS, JR.*
SUSAN F. CAMPBELL

OF COUNSEL:
THOMAS E. McCUTCHEN
HOOVER C. BLANTON

PAUL B. DEAL

*CERTIFIED CIVIL COURT MEDIATOR

RECEIVED

DEC 18 2009

December 18, 2009

S.C. SUPREME COURT

Hand Delivered

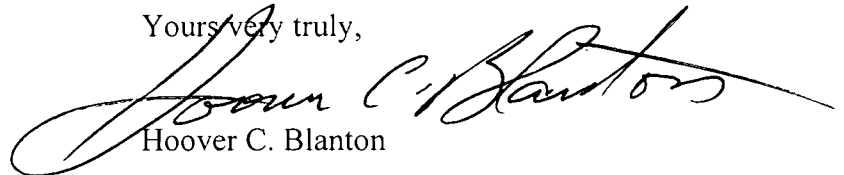
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29211-1330

RE: Auto-Owners Insurance Company v. Samuel W. Rhodes, Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B Fabrications, Inc. and Low Country
Signs, Inc.
Supreme Court Case Tracking No.: 2009-143546

Dear Mr. Shearouse:

Submitted herewith for filing is the original and six copies of the Return of Respondents, Rhodes and Piedmont, to the Petition for a Writ of Certiorari and a Certificate of Service on other counsel of record. Two additional copies are enclosed which we request you to clock for return to us. If more is required, please let us know. Thank you for your cooperation.

Yours very truly,



Hoover C. Blanton

HCB/jss
Enclosure

cc : A. Johnston Cox, Esquire (w/enclosures)
John L. McCants, Esquire (w/enclosures)
William O. Sweeny, Esquire (w/enclosures)
William R. Calhoun, Jr., Esquire (w/enclosures)
Creighton B. Coleman, Esquire (w/enclosures)

The Supreme Court of South Carolina

Auto-Owners Insurance
Company,

Petitioner,

v.

Samuel W. Rhodes, Piedmont
Promotions, Inc. and Marion L.
Eadon d/b/a C&B Fabrications,
C&B Fabrications, Inc. and
Low Country Signs, Inc.,

Respondents.

The Honorable Lee S. Alford
York County
Trial Court Case No. 2002-CP-46-02369

ORDER

For good cause having been shown, the time for serving and filing the Return to Petition for Writ of Certiorari on behalf of Samuel Rhodes and Piedmont Productions in the above entitled matter is hereby extended until December 22, 2009.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

November 17, 2009

cc: A. Johnston Cox, Esquire
John M. McCants, Esquire
Creighton Coleman, Esquire
Hoover Blanton, Esquire
William O. Sweeny, III, Esquire
William R. Calhoun, Jr., Esquire

McCUTCHEN BLANTON HOPKINS & CAMPBELL, LLP

1414 LADY STREET (29201)
POST OFFICE BOX 11316
COLUMBIA, SOUTH CAROLINA 29211-1316
TELEPHONE 803/255-0997
FAX 803/255-0998
WWW.MBHCLAW.COM

WILLIAM E. HOPKINS, JR.*
SUSAN F. CAMPBELL

*CERTIFIED CIVIL COURT MEDIATOR

OF COUNSEL:
THOMAS E. McCUTCHEN
HOOVER C. BLANTON

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NOV 16 2009

S.C. SUPREME COURT

November 16, 2009

Hand Delivered

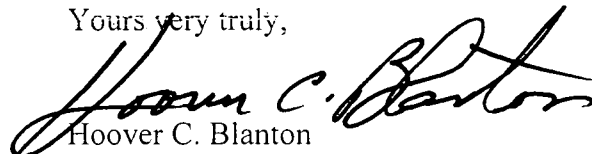
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29211-1330

RE: Auto-Owners Insurance Company v. Samuel W. Rhodes, Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B Fabrications, Inc. and Low Country
Signs, Inc.
Supreme Court Case Tracking No.: 2009-143546

Dear Mr. Shearouse:

The Respondents' Return to Appellant's Petition for a Writ of Certiorari is due November 22, 2009. Because of the current press of other in-office matters, it does not appear that we will complete the Respondent's Return by that due date. Accordingly, we respectfully request a thirty (30) day extension to and through December 22, 2009 in which to serve and file the Respondent's Return to the Petition for a Writ of Certiorari. Enclosed is our filing fee check in the amount of \$25.00. If more is required, please let us know. Thank you for your cooperation.

Yours very truly,



Hoover C. Blanton

HCB/jss
Enclosure

cc : A. Johnston Cox, Esquire
John L. McCants, Esquire
William O. Sweeny, Esquire
Creighton B. Coleman, Esquire



SWEENEY WINGATE & BARROW P.A.

RECEIVED

NOV 12 2009

S.C. SUPREME COURT

November 12, 2009

By Hand Delivery

The Honorable Daniel E. Shearouse
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Auto-Owners Ins, Co. v. Rhodes, et al
C.A. No.: 02-CP-46-2369
Case Tracking No.: 2009-143546

Dear Mr. Shearouse,

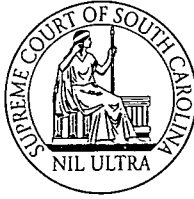
Enclosed for filing are the original and 7 copies of the Respondents Marion L. Eadon, C&B Fabrications, Inc. and Low Country Signs, Inc.'s Response to the Petition for Certiorari of Petitioner Auto-Owners Insurance Company, along with Proof of Service. Please return with the courier who delivers these documents at least one copy of each stamped "received." By copy hereof, the cited documents and this letter are being served on other counsel of record.

Thank you very much.

Sincerely,

William R. Calhoun, Jr.
Attorney for Marion L. Eadon and
other cited Respondents

Cc: Alfred Johnston Cox, Esq.
Hoover C. Blanton, Esq.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 26, 2009

A. Johnston Cox, Esquire
John M. McCants, Esquire
Ellis Lawhorne & Sims PA
P.O. Box 2285
Columbia, SC 29202

Re: Auto-Owners v. Rhodes, Samuel
Case Tracking No. 2009-143546

Dear Counsel:

This office has received your Petition for a Writ of Certiorari in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

A. Johnston Cox, Esquire
John M. McCants, Esquire
Page Two
October 26, 2009

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a long horizontal stroke extending to the right.

CLERK

DES/dmh

Enclosure

cc: Creighton Coleman, Esquire
Hoover Blanton, Esquire
William Sweeny, III, Esquire

ELLIS:LAWHORNE

A. JOHNSTON COX
803 212 4969
jcox@ellislawhorne.com

RECEIVED

October 23, 2009

OCT 23 2009

S.C. SUPREME COURT

Via Hand-Delivery
Honorable Daniel E. Shearouse
Supreme Court Clerk
1231 Gervais Street
Columbia, South Carolina 29201

Re: Auto Owners Insurance Company, Appellant v. Samuel W. Rhodes, Piedmont Promotions, Inc., Marion L. Eadon d/b/a C&B Fabrication, C&B Fabrications, Inc., and Low Country Signs, Inc., Respondents
Case No.: 02-CP-46-2369
Our File Number: 118-56407

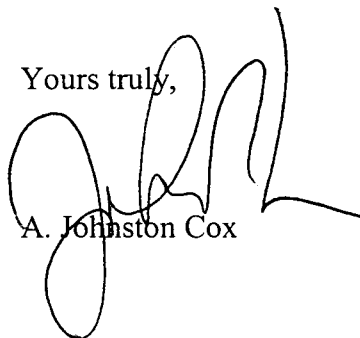
Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Auto-Owners Insurance Company's Petition for Writ of Certiorari in the above-referenced matter. I am also at this time filing two (2) copies of the Appendix as required by Rule 226 of the South Carolina Appellate Court Rules. In addition, I have enclosed our firm's check in the amount of \$100.00 which represents the filing fee associated with this request.

Thank you for your assistance. Please do not hesitate to give our office a call with any questions or concerns.

With kind regards, I am

Yours truly,



A. Johnston Cox

/maj

Enclosures

cc: Hoover C. Blanton, Esquire
Creighton B. Coleman, Esquire
William O. Sweeney, Esquire

ELLIS:LAWHORNE

A. JOHNSTON COX
803 212 4969
jcox@ellislawhorne.com

RECEIVED
OCT 23 2009
S.C. SUPREME COURT

October 23, 2009

VIA HAND-DELIVERY

Honorable Jeanette Barber
South Carolina Court of Appeals
John C. Calhoun Building
1015 Sumter Street,
Columbia, South Carolina 29201

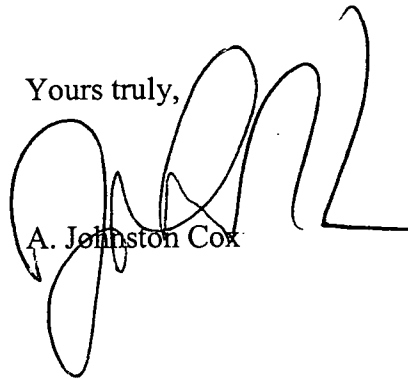
Re: Auto Owners Insurance Company, Appellant v. Samuel W. Rhodes, Piedmont
Promotions, Inc., Marion L. Eadon d/b/a C&B Fabrication, C&B Fabrications,
Inc., and Low Country Signs, Inc., Respondents
Case No.: 02-CP-46-2369
Our File Number: 118-56407

Dear Ms. Barber:

Enclosed for filing are one copy each of Auto-Owners Insurance Company's Petition for Writ of Certiorari and Appendix in the above-referenced matter. Thank you for your assistance. Please do not hesitate to give our office a call with any questions or concerns.

With kind regards, I am

Yours truly,



A. Johnston Cox

/maj

Enclosures

cc: Hoover C. Blanton, Esquire
Creighton B. Coleman, Esquire
William O. Sweeney, Esquire