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S.C. Supreme Court

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.

BRIEF OF PETITIONER

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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 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

[1] Rhodes is the president of Piedmont.

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

[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).

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: (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. were 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. The Court of Appeals affirmed the judgment of the trial court, as modified, in a published decision. Auto-Owners Insurance Co. v. Rhodes, 385 S.C. 83, 682 S.E.2d 857, 865 (S.C.Ct.App. 2009). The Court of Appeals denied petitioner's Motion for Rehearing 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.

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.

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

(R. pp. 1312-1314).

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 individually responsible for the alleged negligent activities. He did not personally perform those activities. Rather, those activities were handled by Chuck Benenhaley, an employee of the corporation. Eadon's 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).

In Creel v. Louisiana Pest Control Insurance, Inc., 723 So.2d 440 (La. Ct. App. 1998), Creel was injured in an automobile accident with Roy Slay. Slay was the president of Ray's Pest Control, Inc. At the time of the accident, Slay was traveling to a customer's house to spray for insects. Louisiana Pest Control Insurance, Inc. issued a CGL policy to Ray's. The policy contained the identical definition of "Who Is An

Insured" as contained in Auto-Owner's policy. In analyzing the definitions, the Creel court stated the following:

> Under the language in (1)(c), an executive officer is only an insured if they are performing their duties as an executive officer. Pursuant to (2)(a), the employees of Ray's, other than its executive officers are also insureds under the policy. . . Thus, under the plain wording of the definition, an executive officer is precluded from being an employee and, thus, an insured except when performing his executive duties. Since we find that the language of the policy is clear and unambiguous, we must enforce the policy as written without resort to parol evidence concerning the intent of the parties with regard to what they intended the policy to provide.
>
> Slay testified that after he purchased Ray's, he assumed new duties associated with his position as president of the corporation. These duties included attending and participating in corporate meetings, the hiring and firing of personnel, handling financial dealings, and making corporate decisions. At the time of the accident, Slay was en route to spray a house for insects and pests. Under these facts, we find that he was not performing executive duties when the accident occurred, thus, the language of the policy plainly excludes him from being an employee and an insured.

Id. at 443.

The relevant inquiry is whether an insured's performance of executive duties results in liability, not whether the officer is merely in the scope of his employment with the corporation. Therefore, despite being "on the job" at the time liability arose, the Creel court found that Slay was not an insured, because he was not performing any executive functions at the time liability arose. See also, Harrison v. Ohio Cas. Ins. Co., Inc., 199 F.Supp.2d 518 (S.D. Miss. 2000).

A more recent case, Middlesex Mut. Assur. Co. v. Fish, 738 F.Supp.2d 124 (D.Me. 2010) is also persuasive. In Fish, the president of Clark's Custom Cabinetry, a closely owned family corporation, had just returned from installing cabinets and was unloading tools and materials from his personal truck to take to the shop. The president

testified that his duties as an executive officer included "bidding and invoicing of jobs, accounts receivable and payable, including paying any contractors or extra help, the coordination of preparation and filing of tax returns and other corporate documents, and securing any necessary permits, bonds and insurance." Id. at 134. He admitted that he was not performing any of these functions at the time of the accident.

The Fish court noted the reasoning employed by our Court of Appeals in deciding that Eadon met the definition of an insured – that in many small, closely held corporations, the duties of officers and employees may overlap.[4] However, in reaching its decision that Clark did not meet the definition of an insured, the Fish court noted,

> Even if the definition of "an insured" could be read to include Mr. Clark while he was pulling into the place of business at the end of a workday, Mr. Clark himself has narrowly defined his actual duties as President of Clark's Custom Cabinetry and the Court must accept his uncontroverted affidavit.

Id. Because Clark was sued for actions that he admitted were not within the scope of his duties as an executive officer of the corporation, the Fish court followed Creel and found that Clark did not meet the definition of an insured at the time of the accident.[5]

This Court should reach the same conclusion. Just like the officers in Creel and Fish, Eadon narrowly defined his actual duties as president of his corporations. While many closely held corporations may operate such that the duties of officers include a wide range of functions, C&B Fabricators, Inc. and LowCountry Signs and Fabrication,

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[4] The Fish court discussed the holding in Auto–Owners Insurance Co. v. Rhodes, 385 S.C. 83, 682 S.E.2d 857, 865 (S.C.Ct.App. 2009) and stated that its opinion was in accord with the holding therein. However, the Fish court was apparently unaware that Eadon had also narrowly defined his actual duties as president of his corporations that excluded the activities for which he was sued, because these facts were omitted by the Court of Appeals in its opinion.

[5] The Creel and Fish courts reached this conclusion even when the officer actually performed the work he was being sued for. In our case, Eadon did not even perform the work that he is being sued for.

Inc. clearly did not. Eadon testified that his duties did not include manufacturing, designing, building or erecting billboard signs. As a result, Eadon does not meet the definition of an insured under the facts of this particular case, and the Court of Appeals should be reversed on this issue.

2. THE COURT OF APPEALS' DECISION REGARDING EXCLUSION "N" IS IN CONFLICT WITH THE SUPREME COURT'S DECISION IN AUTO OWNERS INS. CO., INC. V. NEWMAN AND OTHER SUPREME COURT PRECEDENT.

The Court of Appeals held that Exclusion n in the Policy does not exclude the damages claimed for the loss of use, removal and disposal of the insured's work or product (the signs). Rhodes, 385 S.C. at 108, 682 S.E.2d at 871. The Court of Appeals held that Exclusion n did not apply because the facts 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. See Erie Ins. Exchange v. Colony Dev. Corp., 136 Ohio App.3d 406, 736 N.E.2d 941 (1999); Standard Fire Ins. Co. v. Chester-O'Donley & Assocs., Inc., 972 S.W.2d 1 (Tenn.Ct.App.1998). 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.

Rhodes, 385 S.C. 83, 108, 682 S.E.2d 857, 871.

The Court of Appeals adopted a narrow interpretation of Exclusion n and relied on an Ohio and Tennessee state court decision for authority despite authority on point in South Carolina. See Rhodes, 385 S.C. at 108, 682 S.E.2d at 871.

However, the Court of Appeals' decision is in direct conflict with the Supreme Court's application and analysis of Exclusion n in Auto Owners Ins. Co., Inc. v.

Newman, 385 S.C. 187, 684 S.E.2d 541 (2009)("Newman") and will only create confusion for those reading and applying South Carolina construction law if left undisturbed.

The 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.

In Newman, the Supreme Court applied Exclusion n to damages arising out of a residential construction defect claim.[6] In other words, the Supreme Court did not limit Exclusion n to product recall cases only. In Newman, the Supreme Court applied Exclusion n to hold that the portion of the damages that represented the costs to remove and replace the defectively installed stucco cladding was not covered by the CGL policy. Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546-47 ("Accordingly, we hold that any amount in the arbitrator's allowance allocated to the removal and replacement of the defective stucco is not covered under the CGL policy."). In applying Exclusion n, 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.

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[6] There are no substantive differences between the CGL policy addressed in Newman and the Policy in the present appeal.

Newman, 385 S.C. at 198, 684 S.E.2d at 546-47.

In applying Exclusion n, the Supreme Court utilized the fundamental insurance law principle that, "[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). When one applies the plain and ordinary language of Exclusion n to the facts herein, Exclusion n operates to exclude coverage. Exclusion n excludes the economic damages alleged by Rhodes and Piedmont for removal, disposal and loss of use of, at least, the two signs that did not fall. The damages included the cost to remove and dispose of the signs and all loss of use as a result of the removal of the signs. The SCDOT deemed the two standing signs unsafe, and made Piedmont Promotions remove them. 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. The costs to remove the two signs that did not fall, and the economic consequential damages flowing therefrom, are costs associated directly with faulty workmanship only and are not covered by Policy. Newman, 385 S.C. 187, 198, 684 S.E.2d 541, 546-47 ("... 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.").

The Court of Appeals' decision is also in conflict with a fundamental principle of CGL insurance coverage law reiterated recently in Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co. 395 S.C. 40, 717 S.E.2d 589 (2011). The fundamental principle is that defective construction or faulty workmanship damages alone are not

covered by a CGL policy. Crossmann, 395 S.C. at 50, 717 S.E.2d at 594. (emphasis added).[7] The principle has been the law in South Carolina for some period of time. See Newman, 385 S.C. at 198, 684 S.E.2d at 546-47("Accordingly, we hold that any amount in the arbitrators' allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy"); L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 366 S.C. 117, 124, 621 S.E.2d 33, 36 (2005)("As a result, the insurance policy will not stand to cover liability for the contractor's contract liability for a claim that was for money damages to compensate for the defective work.")("L-J"); Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 566, 561 S.E.2d 355, 358 (2002)("Specifically, "[t]he policies do not insure [an insured's] work itself, but rather, they generally insure consequential risks that stem from that work." Id. See also Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 459 S.E.2d 318 (Ct.App.1995), *aff'd,* 321 S.C. 310, 468 S.E.2d 304 (1996) (general liability policy is intended to provide coverage for tort liability for physical damage to property of others; it is not intended to provide coverage for insured's contractual liability which causes economic losses))"; C.D. Walters Const. Co., Inc. v. Fireman's Ins. Co. of Newark, New Jersey,281 S.C. 593, 597, 316 S.E.2d 709, 712 (S.C.App.,1984)("As the above quoted language from Weedo, supra, and the other cases above cited make clear, the [comprehensive] general liability policy does not cover ... faulty workmanship, but rather faulty workmanship which causes an accident.").

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[7] The Supreme Court in Crossmann did not address exclusions because the parties stipulated not to raise the issues of exclusions. Crossmann, 395 S.C. at 50, 717 S.E.2d at 594.

3. THE COURT OF APPEALS' FINDING THAT THE REMOVAL OF THE TWO SIGNS THAT DID NOT FALL CONSTITUTES AN "OCCURRENCE" CONFLICTS WITH A PRIOR DECISION 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. Rhodes, 385 S.C. 83, 103-04, 682 S.E.2d 857, 868.

In reaching this conclusion, the Court of Appeals again upheld coverage for what is a defective construction or faulty workmanship claim only. The argument herein specifically addresses the Court of Appeals' interpretation of Braswell v. Faircloth, 300 S.C. 338, 387 S.E.2d 707 (Ct.App. 1989)("Braswell") and Helena v. Allianz Underwriters Insurance, 357 S.C. 631, 594 S.E.2d 455 (2004)("Helena"). The Court of Appeals' misapprehension of Braswell and Helena led to an incorrect conclusion on the occurrence and property damage issues. First, it is important to remember that the analysis in Braswell was modified by the Supreme Court in Helena. However, the Supreme Court did not reverse the holding in Braswell. The conclusion in Braswell that there was some "property damage" was a sound one and was upheld by the Supreme Court in Helena. 357 S.C. at 640, 594 S.E.2d at 459 n.3.[8]

In Braswell, Pepper Industries, Inc. ("Pepper") entered into a contractual

[8] As an aside, Helena cannot be relied on entirely herein because the decisions rest on an environmental/pollution exclusion that is inapplicable to the present case. However, the two decisions are a good illustration of how the appellate courts address facts where there is both an insurable loss and business risk loss. It is important also to recall that the Supreme Court in Helena was addressing the split in authority among jurisdictions over whether federal and state environmental cleanup costs constitute "damages" under an insurance policy.

agreement with Braswell Shipyards Inc. ("Braswell") for the lease of property on which several storage tanks were located. Pepper purchased a CGL insurance policy from United States Fidelity & Guaranty ("USF&G"). Pepper abandoned the premises; and Neckland Associates ("Neckland") reentered the premises and terminated the lease. As of the date of termination of the lease, Pepper had left various corrosive chemical stored in barrels on the premises. The corrosive chemicals ate through a valve on one of the storage tanks and 1000 gallons of chemicals spilled onto a field adjacent to the tank. The South Carolina Department of Health and Environmental Control ("DHEC") issued an administrative order requiring Pepper to clean up the property. The Environmental Protection Agency ("EPA") also issued an order requiring Neckland Associates to remove stored waste located at the site.

Neckland Associates filed suit in federal court against Pepper. The federal court found Pepper liable to Neckland Associates for breach of the lease. The federal court awarded judgment against Pepper for damages, including damages for back rents; for cleanup of the chemical spill; for chemical sampling; for chemical testing; for disposal of hazardous waste; and for tank cleaning and sludge disposal. Braswell commenced a declaratory judgment action against USF&G seeking a declaration that the general liability policy issued to Pepper covered the damages awarded against Pepper.

Braswell argued in the declaratory judgment action that the chemical spill constituted an "occurrence" and contended that the contaminated soil from the spilled chemicals constituted "property" damages since the soil was physically injured. The trial court held that the insurance policy did not provide coverage because there was no "occurrence" and no "property damage" and ruled in favor of USF&G. The trial court

ruled as such because Braswell's claim against Pepper was one for restitution, relying on Maryland Cas. Co. v. Armco Inc., 822 F.2d 1348 (4th Cir. 1987).

The Court of Appeals reversed the trial court and found there was an occurrence, *in part,* of property damage. Braswell, 300 S.C. 343, 387 S.E2d at 709-10. The Court of Appeals stated, "we find the chemical spill caused some 'property damage'. The spilled chemicals caused physical injury to the land by contamination." Id. at 345, 387 S.E.2d at 710. The Court of Appeals specifically distinguished those costs necessary to clean contaminated soils versus the cost to haul away (unspilled) barrels of chemicals. Id. at 345, 387 S.E.2d at 711. The Court of Appeals stated,

> [s]ignificantly, we find no argument by Braswell in his brief *that absent the chemical spill* USF&G would have a duty to pay a judgment against Pepper for the cost of removal of the hazardous waste. Braswell argues that once the spill happened and the government agencies mandated a cleanup, all the costs are covered under the policy including the cost to remove the stored chemicals which had not leaked.

Id. at 343, 387 S.E.2d at 709. The Court of Appeals continued, "the other elements of the federal court judgment do not relate to 'property damage' as defined in the policy.... [t]he major portion of the judgment constituted costs for removal of stored waste. These stored wastes had not leaked." Id. at 344, 387 S.E.2d at 710.

The Court of Appeals rejected the theory that the insurer was obligated to pay for the entire clean-up: "[C]all it what you may, the underlying issue is whether Pepper's insurer must indemnify under its policy for the costs incurred in complying with a government directive. As we view the record, these government directives concerned stored chemicals which had not yet caused physical injury to property. The presence of these chemicals did not constitute property damage." Id. at 345, 387 S.E.2d at 711. The Court of Appeals found, "[u]pon the facts of this case we find an occurrence causing

property damage did result but only as to the spill of the 1000 gallons of chemicals....[t]he other costs constituting the federal judgment are not covered under the insurance policy." Id.

The Court of Appeals in Rhodes 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; a review of the case reveals as much.

The Helena Chemical Company was in the business of selling agricultural chemicals to the farming industry. The EPA and DHEC mandated that Helena Chemical cleanup the contaminated soils at the sites caused by Helena Chemical's chemicals. Helena Chemical's own study revealed that there was significant environmental damage to the soils. Id. at 635, 594 S.E.2d at 456.

In response to the cleanup of contaminated soils, Helena Chemical sought legal defense costs and cleanup costs from its insurer and commenced a declaratory judgment action to recover the same. Id. at 635, 594 S.E.2d at 457. In the action, the trial court granted summary judgment in the insurers' favor. The trial court found there was no insurance coverage because: (1) Helena's cleanup costs were not "damages"; and (2) Helena's claims fell under the insurance policies' pollution exclusion. Id. The trial court found the term "damages" did not include environmental cleanup costs, relying on Md. Cas. Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987) and Cincinnati Ins. Co. v. Milliken and Co., 857 F.2d 979 (4th Cir. 1988). [9] Id. at 635, 594 S.E.2d at 457.

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[9] The Armco court (applying Maryland law) held that the term " 'damages' is to be construed in consonance with its 'accepted technical meaning in law.' " The court explained there was a difference between legal and equitable damages, and this technical meaning of "damages" encompassed only legal damages, i.e., payments to a third party

By the time the Helena case reached the South Carolina Supreme Court, the Maryland Supreme Court had addressed the Fourth Circuit Armco decision. The Maryland Supreme Court rejected the reasoning of Armco with regard to the definition of damages. See Bausch & Lomb Inc. v. Utica Mut. Ins. Co., 625 A.2d 1021 (Md. 1993). The court noted, "'[d]amages' in common usage means the reparation in money for a detriment or injury sustained. The reasonably prudent layperson does not cut nice distinctions between the remedies offered at law and in equity." Id. at 1032-33.

The Supreme Court in Helena followed the reasoning of Bausch & Lomb while rejecting the distinctions being made by some courts on the word "damages" in environmental cleanup cases. Helena, 357 S.C. 631, 637, 594 S.E.2d 455, 458. The Supreme 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)).

The Supreme Court also addressed Braswell in Helena. The 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

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who has a legal claim for damages. Id. (citation omitted). In Milliken, the Fourth Circuit applied South Carolina law and followed Armco's reasoning.

recoverable since no property damage had yet resulted." Id. Helena, 357 S.C. 631, 640, 594 S.E.2d 455, 459. The Supreme Court noted, that although the Court of Appeals cited to Armco and Milliken, the Court of Appeals' holding in the decision "clearly rested upon a finding that there was no 'property damage,' not on an interpretation of the term 'damages'." Id. The Supreme Court stated, "for this reason, the Braswell court's reliance on the Fourth Circuit cases was misplaced." Id.

The Supreme Court noted that Braswell ultimately allowed insurance coverage for *environmental cleanup costs where property damage had occurred,* so it was questionable to the Supreme Court whether Braswell actually applied the holdings of Armco and Milliken. Id. at n. 3. The Supreme Court stated, "[t]o the extent Braswell could be read to approve of the logic in Armco and Milliken, it is hereby modified." Id. Helena did not reach an opposite result of Braswell. An accurate interpretation of both decisions is that the South Carolina appellate courts should not find an occurrence of property damages for the damages associated with the SCDOT mandate to take down the two unsafe signs – that were unimpaired and deemed unsafe only.

This line of thinking has been expressed in another of the Court of Appeals' construction defect insurance coverage cases: "It may be true that the same neglectful craftsmanship can be the cause of *both* a business expense of repair and a loss represented by damage to persons and property, the two consequences are vastly different in relation to sharing the cost of such risk as a matter of insurance underwriting." C.D. Walters, 281 S.C. at 596, 316 S.E.2d at 711-712.

The Court of Appeals has held in this case that an administrative order directing a contractor to correct or remove faulty workmanship is an occurrence of property damage.

The Court of Appeals' decision will be a bad precedent and should be reversed. Again, the SCDOT required Piedmont to remove the two still standing signs because of defects in the construction of these signs. To analogize, assume the road in L-J had not failed or suffered from alligator cracking; assume the SCDOT investigated the road and required the contractor to rebuild it because the SCDOT deemed it defective and unsafe. Under the Court of Appeals' reasoning, this administrative directive would cause there to be insurable loss for something that is nothing more than faulty workmanship.[10]

4. 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, the Court of Appeals relied primarily on L-J,. While the Supreme Court issued Newman and Crossmann since L-J, Appellant believes that a discussion of the faulty workmanship principle in L-J remains good law after the latter two and more recent decisions. 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, 366 S.C. at 123, 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." L-J, 366 S.C. at 123, 621 S.E.2d at 36.

[10] Under the Court of Appeals reasoning, a building code inspector's order to correct faulty workmanship could be deemed an occurrence.

The Supreme Court addressed the word "occurrence" in Crossmann and Newman. In both Newman and Crossmann, the Supreme Court held that the negligent application of the stucco or siding, by a subcontractor, resulted in an "occurrence" of water intrusion causing property damage to other parts of the building. Newman, 385 S.C. at 194, 684 S.E.2d at 545-46; Crossmann, 395 S.C. at 50, 717 S.E.2d at 594. ("In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute "property damage," but the defective construction would not."). In Newman and Crossmann, the Supreme Court found that the exterior sheathing and wooden framing of the respective buildings were "other property" (than the work of the subcontractor who caused the physical damage) sufficient to constitute an insured loss under the subject home builder's and general contractor's CGL policy. Newman, 385 S.C. at 194, 684 S.E.2d at 545-46; see Crossmann, 395 S.C. at 50, 717 S.E.2d at 594.

The analysis by the Court of Appeals in the present case is a flawed one. There is no "other property", and the facts herein do not involve a subcontractor performing 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.

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

In rejecting Exclusion k and l, the Court of Appeals stated:

Based on the evidence and testimony provided at trial, the circuit court

> determined Eadon violated all three of these conditions. The circuit court was correct in its determination that Exclusion l does not apply, as the "products-completed operations hazard" cannot serve as a broadly written catch-all exclusion that would prohibit recovery no matter what consequences "arise out of" the product of the insured.

In addressing Exclusion l, the Court of Appeals affirmed the trial court's citation and application of Kennedy v. Columbia Lumber & Manufacturing. 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 Preparatory"). The citation to the two Supreme Court decisions is confusing because the decisions address liability of a party, i.e., a builder and a manufacturer, in a construction defect claim, not CGL insurance coverage law. As an aside, since the Court of Appeals' 2009 decision, the Supreme Court has limited Kennedy's holding on the application of negligence law in construction defect cases to residential construction cases only -- as opposed to commercial construction cases. Sapp v. Ford Motor Co., 386 S.C. 143, 150, 687 S.E.2d 47, 51 (2009). A jury in the civil action over liability will have to determine whether C&B Fabricators, Inc. is liable under applicable construction defect law; however, CGL insurance law is not determined by Kennedy, Colleton Preparatory or Sapp.

The Court of Appeals erred in failing to apply Exclusions k and l to exclude all damages claimed for any damage to the signs themselves and any loss of use of all three 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. Like Exclusion n, Exclusion l excludes the recovery of economic damages which are to the work itself. 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).[11] 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.

The foregoing 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 [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.

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.

Rhodes, 385 S.C. 83, 104, 682 S.E.2d 857, 868.

[11] 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.)

The term "loss of use" is contained in the definition of "property damage" twice. The CGL 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. The fallen sign may meet the definition of "property damage". This is because the fallen sign was physically injured. In addition, Piedmont Promotions alleges that it lost the use of the fallen sign, which may meet the definition of "property damages". The other two signs were not physically injured, so one must refer to the second definition of "property damage", which is for loss of use to non-impaired tangible property. In this regard, Piedmont Promotions alleged that it lost the use of the remaining two signs, so arguably these two signs may meet the definition of "property damage" too.[12]

Notably, the claim that Rhodes/Piedmont lost the permits (to erect the 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.

The Court of Appeals did not apply existing legal precedent and policy provisions correctly.[13] As the owner of the fee simple title to the real estate, Rhodes alleges that

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[12] Even 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.)

[13] In Paragraph 20 of their First Amended Complaint, Samuel Rhodes and Piedmont Promotions allege that they sustained injury and damage as follows: a) by having to remove the signs as aforesaid; b) the Plaintiff now has lost the opportunity to erect and maintain as an economic enterprise on his real property in Fairfield County the outdoor advertising billboard signs adjacent Interstate I-77 as a consequence of the cancellation of the three permits by the South Carolina Department of Transportation; c) the Plaintiff has lost the certainty of the revenue from the advertising that the signs would have displayed for years to come; d) the Plaintiff has paid for three signs which are worthless because they cannot be used...; and e) as a consequence of having to remove the signs pursuant to

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. The present case is not a contamination case or one where the underlying real estate is physically injured like in Braswell and Helena. Rather, 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 producing value that it once did when the signs were installed on it. Rhodes contends that his real estate is less valuable because Rhodes will not be able to erect billboards on the real estate again. Rhodes alleges Eadons is at fault – an issue that a jury in the liability civil action will hear and decide.

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). One must then determine how the law treats diminution in value damages as an insurable loss. In South Carolina, the Supreme Court has answered this question and 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).

It does not help to characterize the damages herein as one for loss of use. Further,

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the mandate of the SCDOT, permanent fixtures on the Plaintiff's real property had to be removed which has resulted in significant injury to 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 SCDOT prohibiting the use of signs at this location.

it does not help to name the damages something else (e.g., lost profits) because the definition of property damages, in Part Two, only "insures" damages which are for loss of use. The term "loss of use" is part of the applicable exclusions too and must be examined herein. Exclusion k excludes "property damage" to "your product". Exclusion l excludes "property damage" to "your work". Since loss of use is specifically part of the definition of "property damage", loss of use to your work, your products, or the signs, is excluded by the Policy.

This conclusion is squarely consistent with South Carolina appellate court decisions, which requires one to find damage to "other property" -- something other than the signs affixed to the real estate. It is also squarely consistent with other South Carolina appellate court decisions finding CGL insurers are "not obligated to defend [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).

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.[14] As previously stated, this finding, made in a published opinion, conflicts with the Court's decisions in Crossmann, Newman and L-J, and will create confusion in the construction law area if not reversed.

[14] Only one sign fell. Rhodes removed one of the remaining signs and Eadon removed the other.

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 occurrence. Crossmann, 395 S.C. at 50, 717 S.E.2d at 594; Newman, 385 S.C. at 194, 684 S.E.2d at 544 (The negligent application of the stucco was not an "occurrence"); L-J, 366 S.C. at 124, 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 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 Tort action and argued that Eadon "was not acting on behalf of the corporation in contracting for the signs." Rhodes, 682 S.E.2d 857, 868 (emphasis in Opinion). Patently, the purpose of Rhodes and Piedmont's argument was to convince the trial court and the jury in the Tort action to award a judgment against Eadon individually as opposed to finding the obligation to be a corporate one.[15]

The Court of Appeals also acknowledges that Rhodes and Piedmont have argued that Eadon was acting on behalf of the corporation in this case. Id. 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."[16]

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[15] For instance, in response to Eadon's post trial motions in the Rhodes case, Rhodes and Piedmont argued successfully to the trial judge, "It was C&B Fabricators, Inc. which stopped doing business April 3, 2000 (before the sign began leaning), not C&B Fabrication. . . The contention of the defense, the pleadings and other pre-trial documents submitted to the court has advanced the contention that C&B Fabrication and C&B Fabricators, Inc. are one and the same. However, that has never been the case." (R. p. 241, footnote 1). Rhodes further stated, "The testimony of Mr. Eadon, both on his deposition and at the trial confirm the true circumstances . . . that C&B Fabrication (not ever a corporate entity) . . ." Id.

[16] 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

No facts in the Record or legal authority support the Court of Appeals' holding that the fourth requirement for judicial estoppel is not met in this case.[17] No facts in this case indicate that the inconsistency was anything other than intentional. In the Tort action, Rhodes and Piedmont represented that Eadon was not acting on behalf of the corporation because doing so best suited Rhodes and Piedmonts' purposes in that action. In the DJ action, Rhodes and Piedmont posited that Eadon was acting on behalf of the corporation in an attempt to extend insurance coverage to Eadon. These self-serving motivations provide surety that the repeated, inconsistent statements were intended by Rhodes and Piedmont.

Similarly, there are no facts to support a finding that the inconsistency was not intended to mislead the court. To the contrary, Rhodes and Piedmont are unabashedly inviting South Carolina's trial courts to err in either the DJ action or the Tort action. Rhodes and Piedmonts' positions are irreconcilable, and if they prevail in both the Tort and DJ actions, one trial court must err in this factual determination. The principle of equitable estoppel exists to prevent this very type of inequitable litigation conduct. Quinn v. Sharon Corp., 343 S.C. 411, 416, 540 S.E.2d 474, 476-77 (Ct.App.2000) (Anderson, J., concurring); see also Horton v. Suthers, 43 P.3d 611, 618 (Colo.2002).

The Court of Appeals erroneously excuses Rhodes and Piedmonts' inequitable conduct by concluding that Rhodes is a party to this action "only by virtue of having been

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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.")

[17] Contrast Cothran v. Brown, 357 S.C. 210, 217, 592 S.E.2d 629, 632 (2004). In Cothran the Court noted there was no intent to mislead the trial court, because Brown's position was consistent from one action to the next. Here, the positions were totally inconsistent.

included by Auto-Owners," thus presumably entitling Rhodes and Piedmont to argue inconsistent positions when it suits their needs in the DJ action. The Opinion includes no authority or basis for this exception to the doctrine of judicial estoppel, and Auto-Owners is aware of no case providing for such an exception. As such, the Opinion creates a new, broad except to the doctrine of judicial estoppel that compromises the purpose of the doctrine and endangers the integrity of South Carolina's judicial system:

> A court must be able to rely on the statements made by the parties because truth is the bedrock of justice. Therefore, a litigant cannot 'blow both hot and cold.'. . . 'Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding . . . from assuming a contrary position in another action simply because his or her interests have changed. . . . The doctrine rests upon the principle that a litigant 'should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.' . . . The purpose of judicial estoppel is to prevent the manipulation of the judicial system by the litigants.

Quinn, 343 S.C. at 416, 540 S.E.2d at 476-77 (Ct.App.2000) (further citations omitted).

In reaching its conclusion on judicial estoppel, the Court misapprehends the nature of this DJ action. South Carolina's Declaratory Judgment Act requires that Auto-Owners include Rhodes in this action. Specifically, it states,

> When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

S.C. CODE ANN. § 15-53-80 (Supp. 2002). Auto-Owners did not include Rhodes and Piedmont on a whim; it was required to do so by the Act.[18] Therefore, there is no justification for the Court to carve out an exception for Rhodes and Piedmont's conduct

[18] The record contains no evidence that Rhodes or Piedmont ever filed a motion under Rule 21, SCRCP, indicating to the trial court that they were improper parties to the DJ action. Rhodes and Piedmont have not preserved this issue for consideration, and the Court of Appeals should not *sua sponte* give Rhodes and Piedmont the status of an unnecessary party for the first time on appeal.

in this case. Because the Court of Appeals overlooked facts and misapprehended the law as stated above, Auto-Owners requests that the Court reconsider its decision and find that Eadon does not meet the definition of an insured under the policy under the facts of this case.

9. 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 Court of Appeals correctly points out that that in order for a declaratory judgment action to be ripe, a justiciable controversy must exist. Power v. McNair, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970). This general threshold for ripeness, however, does not alter the Court of Appeals' analysis under Rule 60(b) (5), SCRCP:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . . (5) . . . a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Since the Court of Appeals reversed the judgment in the Tort action, then Rule 60(b)(5), SCRCP, provides relief for a party from a judgment based on a previous ruling that is subsequently reversed.

The present action is one to determine if Auto-Owners owes a duty to indemnify Eadon for damages awarded against him. 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).[19]

In this case, a judgment against Eadon in the Tort action had been entered before the trial court entered its decision on the DJ action. At that point, the DJ action was ripe for final decision, and the trial court was proper in relying on it for its decision in this case. Subsequently, the judgment was vacated, and the trial court lacked absolutely any basis to obligate Auto-Owners to indemnify any defendant in the Tort action. 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 Tort action will be retried and additional coverage issues may arise out of the retrial. There could be new damages asserted that are not covered by the Court of Appeals' Order. There could 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 the DJ action cannot be decided at this time.

The Court of Appeals' opinion is contrary the precedent set in Griffin and Jourdan, *supra*, regarding the prerequisites to an award of indemnity. Rule 60(b)(5), SCRCP, specifically seeks to remove the injustice caused by binding a party by a reversed judgment; the trial court's blanket award of indemnity for any future judgment Rhodes may recover in the Tort action is error of law amounting to an abuse of discretion under the settled authority of Griffin and Jourdan.[20]

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[19] 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).

[20] The Court mistakenly relies on authorities that deal with the general justiciability of the case, *e.g.* Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462,

Conclusion

Based upon the foregoing discussion, Auto-Owners requests that the Court reverse the Court of Appeal's opinion in Auto–Owners Insurance Co. v. Rhodes, 385 S.C. 83, 682 S.E.2d 857, 865 (Ct. App. 2009) and find that Auto-Owners does not have an obligation to indemnify Eadon for the damages alleged by Rhodes and Piedmont.

Respectfully Submitted,

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April 9, 2012

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466 (2004) and Peoples Fed. Sav. & Loan Ass'n of S.C. v. Resource Planning, 358 S.C. 460, 596 S.E.2d 51 (2004), rather than making a determining under Rule 60(b)(5), SCRCP, as to whether the trial court erred by refusing to reverse a judgment based on the reversal of a judgment relied upon by the trial court to make factual findings required by law. This precise issue is not contemplated in those cases on general justiciability. Similarly, the Court mistakenly relies on Owners Ins. Co. v. Clayton, 364 S.C. 555, 557, 614 S.E.2d. 611, 612-23 (2005), even though the Court notes that, in Clayton, "the underlying action was not reversed on appeal." The fact that the Tort action was reversed on appeal is the central and prominent issue in Auto-Owners' Rule 60(b)(5) motion.

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 Gallivan White & Boyd, P.A., do hereby certify that I served a copy of Auto-Owners Insurance Company's Appellant Brief this the 9th day of April, 2012 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

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