

Vol. IV

RECEIVED

THE STATE OF SOUTH CAROLINA
In the Supreme Court

OCT 28

S.C. 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.

APPENDIX Volume 4

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

GALLIVAN WHITE & BOYD, P.A.
A. JOHNSTON COX
Post Office Box 7368
Columbia, South Carolina 29202
(803) 779-1833

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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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

APPENDIX
TO THE RECORD ON APPEAL
(ROA Pages 1343 -1353)

A. JOHNSTON COX
JOHN M. MCCANTS
1501 Main Street, 6th Floor
Post Office Box 2285
Columbia, SC 29202
(803) 254-4190
ATTORNEYS FOR APPELLANT
AUTO-OWNERS INSURANCE COMPANY

CREIGHTON B. COLEMAN
120 Washington Street
Post Office Box 1006
Winnsboro, South Carolina 29180
(803) 635-6884
ATTORNEYS FOR THE RESPONDENTS
SAMUEL W. RHODES, JR. AND
PIEDMONT PROMOTIONS, INC.

HOOVER C. BLANTON
1414 Lady Street
Post Office Drawer 11963
Columbia, South Carolina 29211-1963
(803) 255-0997

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

WILLIAM O. SWEENEY
Sweeny Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211
(803) 256-2233

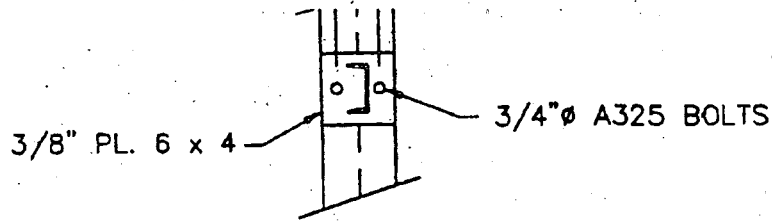
**ATTORNEYS FOR MARION L. EADON,
C&B FABRICATIONS, AND LOW
COUNTRY SIGNS, INC.**

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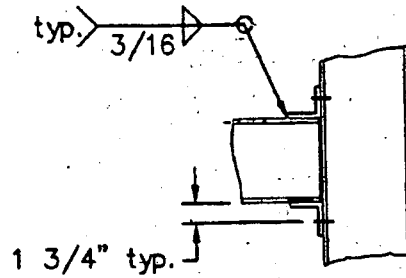
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Exhibits to the Deposition of Michael Watson (April 4, 2006):	
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a)

c)



SECTION D-D
1"=1'-0"



SECTION G-G
N.T.S.



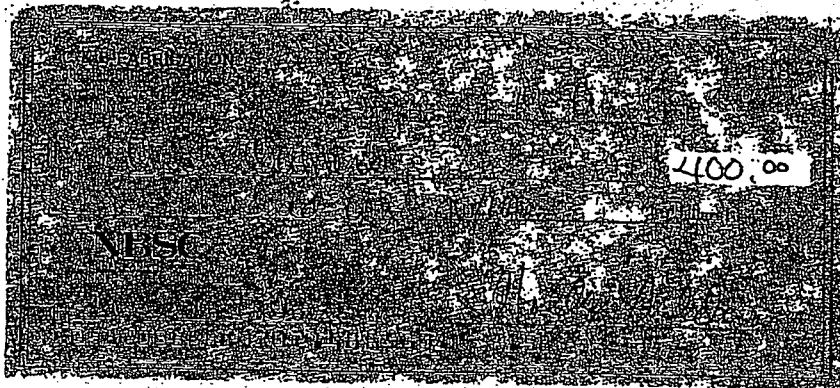
NOTICE
 This drawing is for permitting purposes only and is for the sole use of TEG and its designees. Unauthorized use is strictly prohibited.

Location: Columbia, SC Area

C & B Fabrication Rt. 2 Box 825 Manning, SC 29102	
10'6 X 36' CM, Stack, 15'V @ 127'-0" O.A.H.	
<div style="font-size: 2em; font-weight: bold; margin-bottom: 5px;">TEG</div> THOMPSON ENGINEERING GROUP, LLC P.O. BOX 747 ATHENS, TN 37371-0747 (423)745-0644	DRAWN BY: BAB
	DATE: 07/13/99
	SCALE: 1/4"=1'-0"
	PROJ.# 073499
DWO.# ED-2120	



PERSON, JR., P.E.



DEPOSITION
EXHIBIT
4-12-06
5
Wagen
9/13



41-633-711-00

COMMERCIAL AUTOMOBILE & FLEET APPLICATION

AGENCY <i>Good Buddy Watson Inc.</i>	AGENCY CODE <i>11-070</i>	PRODUCER CODE	<input type="checkbox"/> PROPOSAL <input checked="" type="checkbox"/> ISSUE	<input type="checkbox"/> ANNUAL <input type="checkbox"/> 6 MONTH	PROPOSED EFFECTIVE DATE <i>2/16/99</i>
APPLICANT <i>C.S. Fabrication Inc.</i>		REVOLVING CREDIT <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO			
GARAGE MAILING ADDRESS		<input type="checkbox"/> INDIVIDUAL <input type="checkbox"/> PARTNERSHIP <input type="checkbox"/> CORPORATION	<input type="checkbox"/> MULTI-POLICY DISCOUNT <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> INSIDE CITY LIMIT <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	
Street: P.O. Box: City: <i>Cherokee</i> State: <i>SC</i> ZIP: <i>29102</i>		DESCRIPTION OF APPLICANT'S BUSINESS <i>Sign Manufacturing and Erection</i>		NUMBER OF YEARS IN BUSINESS <i>1 Year</i> OTHER AUTO-OWNERS POLICY NUMBERS <i>36064416 36064344</i>	

Previous Address: *Route 2 Box 825 (Highway 301) W. of S. Manning*
None - just purchased vehicle

None

DEPOSITION EXHIBIT
6
Watson

	Y	N		Y	N
IS THERE A REGULAR VEHICLE MAINTENANCE PROGRAM?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	DOES THE APPLICANT OPERATE UNDER PERMITS OF OTHERS?	<input type="checkbox"/>	<input type="checkbox"/>
DO ANY VEHICLES HAVE SPECIAL EQUIPMENT?	<input type="checkbox"/>	<input type="checkbox"/>	DOES APPLICANT HAUL FOR OTHERS?	<input type="checkbox"/>	<input type="checkbox"/>
IS THERE ANY NIGHT DRIVING? IF SO WHAT PERCENTAGE?	<input type="checkbox"/>	<input type="checkbox"/>	ARE ANY HAZARDOUS MATERIALS TRANSPORTED?	<input type="checkbox"/>	<input type="checkbox"/>
MUST DRIVERS ADHERE TO A DELIVERY SCHEDULE?	<input type="checkbox"/>	<input type="checkbox"/>	ARE PASSENGERS CARRIED IN ANY VEHICLES?	<input type="checkbox"/>	<input type="checkbox"/>
DO EMPLOYEES USE THEIR OWN VEHICLES IN THIS BUSINESS?	<input type="checkbox"/>	<input type="checkbox"/>	DOES THE APPLICANT HAVE A DRIVER SAFETY PROGRAM?	<input type="checkbox"/>	<input type="checkbox"/>
DOES APPLICANT OWN VEHICLES NOT SCHEDULED ON THIS APPLICATION?	<input type="checkbox"/>	<input type="checkbox"/>	DOES THE APPLICANT REVIEW DRIVER'S MOTOR VEHICLE RECORDS?	<input type="checkbox"/>	<input type="checkbox"/>
ARE ANY SCHEDULED VEHICLES TITLED TO OTHERS?	<input type="checkbox"/>	<input type="checkbox"/>	DOES THE APPLICANT HIRE INEXPERIENCED OPERATORS?	<input type="checkbox"/>	<input type="checkbox"/>
ARE ANY VEHICLES RENTED/LEASED TO OTHERS?	<input type="checkbox"/>	<input type="checkbox"/>	CONTRACTORS CREDIT?	<input type="checkbox"/>	<input type="checkbox"/>
DOES THE APPLICANT USE RENTED OR LEASED VEHICLES?	<input type="checkbox"/>	<input type="checkbox"/>	WHAT IS THE AVERAGE DAILY OPERATING TIME PER DRIVER?	<i>4/0</i>	<input type="checkbox"/>

NUMBER OF VEHICLES OWNED: TRUCKS _____ TRACTORS _____ SEMITRAILERS _____ FULL TRAILERS _____
 TYPES OF TRAILERS: VAN _____ FLATBED _____ DUMP _____ LIVESTOCK _____ GRAIN _____ REFRIGERATED _____

COMMENTS & EXPLANATIONS
Applicant owned 2 other vehicles insured with Allstate that will expire at the next expiration

ALABAMA	IOWA	NEBRASKA	TENNESSEE
ARIZONA	KANSAS	NORTH CAROLINA	VIRGINIA
FLORIDA	KENTUCKY KYU NO.	NORTH DAKOTA	WISCONSIN
GEORGIA	MICHIGAN	OHIO	INTERSTATE COMMERCE COMMISSION
IL MOTOR CARRIER NO.	MINNESOTA	SOUTH CAROLINA	IDC MTR CARRIER/DOCKET NUMBER
INDIANA PSCI. NO.	MISSOURI	SOUTH DAKOTA	

1993 (11-85) South Carolina

#	DRIVER'S LICENSE NUMBER	LICENSE STATE	BIRTH DATE	NAME AS IT APPEARS ON DRIVER'S LICENSE	OPER. VEH. #	YEARS DRIVING EXP.		OWNER	EMPLOY
						COMM. VEH.	FOR APPL.		
1		SC		Charles D. Benenaley	1				✓
2				Benenaley					
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									
18									

None

APPLICANT'S STATEMENT

I declare the facts stated in this application to be true and request the Company to issue this insurance and any renewals thereof in reliance thereon. I declare that the vehicle(s) listed on the application are being used for the legitimate commercial purpose as described.

[Signature]
Applicant's Signature

8-17-99
Date

PROXY DESIGNATION

I designate H.J. Arends, J.W. Fisher and H.E. Powell and each of them, attorneys and proxies, with power of substitution and revocation to each, to vote as proxy at all meetings of the Company, and at any and all adjournments thereof. The power hereunder shall be exercised by a majority of said attorneys and proxies so present, but if only one is so present, then that one shall have full power to act.

Applicant's Signature

Date

AGENT'S STATEMENT

Coverage is bound.

[Signature]
Agent's Signature

2/16/99
Date

Aug 16 1999 4:45 PM
Date Time

Agent's Social Security Num

NOTICE: As part of our normal underwriting routine, an investigative consumer report may be obtained including information as to character, general reputation, personal characteristics, and mode of living obtained through personal interviews with neighbors, friends, associates, or other acquaintances. Upon your written request we will furnish in writing a description of the nature and scope of the investigation requested.

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State of South Carolina Department of Insurance
 1612 Marion Street
 Post Office Box 100105
 Columbia, South Carolina 29202-3105
 (803) 737-6140.

II. OFFER OF ADDITIONAL UNINSURED MOTORIST COVERAGE

\$25,000/\$50,000/\$25,000
 \$50,000/\$100,000/\$25,000
 \$100,000/\$300,000/\$25,000
 \$250,000/\$500,000/\$50,000
 \$50,000
 \$100,000
 \$250,000
 \$300,000
 \$500,000

Limits of Coverage Amount of Increased Premium
 (These increased premium charges must be filled-in by
 your insurance agent prior to your decision and signature.)

Do you wish to purchase additional uninsured motorist coverage? Yes No
 If your answer is "yes", then specify the limits which you desire. These limits cannot exceed your automobile
 insurance liability limits. I select \$50,000 CS

Marion Eason 8-17-99
 Signature Today's Date

III. OFFER OF UNDERINSURED MOTORIST COVERAGE

\$15,000/\$30,000/\$10,000
 \$25,000/\$50,000/\$10,000
 \$50,000/\$100,000/\$25,000
 \$100,000/\$300,000/\$25,000
 \$250,000/\$500,000/\$50,000
 \$35,000
 \$50,000
 \$100,000
 \$250,000
 \$300,000
 \$500,000

Limits of Coverage Amount of Increased Premium
 (These increased premium charges must be filled-in by
 your insurance agent prior to your decision and signature.)

Do you wish to purchase underinsured motorist coverage? Yes No
 If your answer is "yes", then specify the limits which you desire. These limits cannot exceed your automobile
 insurance liability limits. I select \$50,000 CS

Marion Eason 8-17-99
 Signature Today's Date

IV. APPLICANT'S ACKNOWLEDGEMENT

I hereby acknowledge that I have read, or have had read to me, the above explanations and offers of additional
 uninsured motorist coverage and underinsured motorist coverage. I have indicated whether or not I wish to
 purchase each coverage in the spaces provided. I further understand that the above explanations of these
 coverages are intended only to be brief descriptions of coverages, and that payment of benefits under any of
 these coverages is subject both to the terms and conditions of my automobile insurance policy and to the State
 of South Carolina's laws.

Type or Print Your Name:
 Your Signature:
 Your Address:

Marion Eason
Marion Eason
 506 S. Mill Street
 Murrellsville, S.C. 29102

Today's Date: Aug. 16, 1999

NOTICE OF DEDUCTIBLE OPTIONS

South Carolina Statutes require that we offer comprehensive, fire and theft, and collision coverages including various deductible options. The premium differences are indicated by the percentages listed within each coverage column of the following chart:

DEDUCTIBLE AMOUNT	COMPREHENSIVE	FIRE AND THEFT	COLLISION
No Deductible	100%	100%	Not Available
\$50 Deductible	88%	88%	110%
\$100 Deductible	80%	80%	100%
\$150 Deductible	76%	76%	90%
\$200 Deductible	70%	70%	85%
\$250 Deductible	64%	64%	75%
\$500 Deductible	57%	57%	65%
\$1000 Deductible	50%	50%	45%

Deductibles result in considerable premium reductions. For example, if your premium for collision coverage with a \$100 deductible is \$100, your premium would be only \$85 or 85% of \$100 if you select a \$200 deductible.

Please indicate the deductible which you want applied to each coverage you have selected or indicate if you do not want the coverage.

- | COMPREHENSIVE | FIRE AND THEFT | COLLISION |
|---|--|--|
| <input type="checkbox"/> No Deductible | <input type="checkbox"/> No Deductible | <input type="checkbox"/> \$50 Deductible |
| <input type="checkbox"/> \$50 Deductible | <input type="checkbox"/> \$50 Deductible | <input type="checkbox"/> \$100 Deductible |
| <input type="checkbox"/> \$100 Deductible | <input type="checkbox"/> \$100 Deductible | <input type="checkbox"/> \$150 Deductible |
| <input type="checkbox"/> \$150 Deductible | <input type="checkbox"/> \$150 Deductible | <input type="checkbox"/> \$200 Deductible |
| <input type="checkbox"/> \$200 Deductible | <input type="checkbox"/> \$200 Deductible | <input checked="" type="checkbox"/> \$250 Deductible |
| <input checked="" type="checkbox"/> \$250 Deductible | <input type="checkbox"/> \$250 Deductible | <input type="checkbox"/> \$500 Deductible |
| <input type="checkbox"/> \$500 Deductible | <input type="checkbox"/> \$500 Deductible | <input type="checkbox"/> \$1000 Deductible |
| <input type="checkbox"/> \$1000 Deductible | <input type="checkbox"/> \$1000 Deductible | |
| <input type="checkbox"/> I do not want Comprehensive coverage. | | |
| <input type="checkbox"/> I do not want Fire and Theft coverage. | | |
| <input type="checkbox"/> I do not want Collision coverage. | | |

Policy Number _____

Date _____

Signature of Named Insured _____

If you wish to revise the coverage you presently have, please complete and sign this form and return it to your agent. Policies ceded to the South Carolina Reinsurance Facility must have a minimum deductible of \$250 for Comprehensive and Collision coverages.



WATSON

COMMERCIAL AUTOMOBILE & FLEET APPLICANT

AGENCY <i>Wesley Sadler Watson Ins.</i>	AGENCY CODE <i>116-070</i>	PRODUCER CODE	<input type="checkbox"/> PROPOSAL <input checked="" type="checkbox"/> ISSUE	<input type="checkbox"/> ANNUAL <input checked="" type="checkbox"/> 6 MONTH	PROPOSED EFFECTIVE DATE <i>09/23/07</i>
APPLICANT <i>Sign Country Signs, Inc.</i>		REVOLVING CREDIT <input type="checkbox"/> YES <input type="checkbox"/> NO	POLICY NUMBER		
GARAGE MAILING ADDRESS Street: P.O. Box: City: <i>Manning</i> County: <i>Darlington</i> State: <i>SC</i> ZIP: <i>29102</i>		<input type="checkbox"/> INDIVIDUAL <input type="checkbox"/> PARTNERSHIP <input checked="" type="checkbox"/> CORPORATION <input type="checkbox"/>	MULTI-POLICY DISCOUNT <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	INSIDE CITY LIMITS <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
DESCRIPTION OF APPLICANT'S BUSINESS <i>Sign Manufacturing</i>		NUMBER OF YEARS IN BUSINESS <i>2 years</i>		OTHER AUTO-OWNERS POLICY NUMBERS <i>Baronial Police Dept. Dumont: 36010020, 4214711900, 4214711901 36323464, 36323465</i>	

<i>Auto-Division Ins.</i>	<i>4163371100</i>	<i>8-16-00 to</i>	<i>0</i>
		<i>8-16-01</i>	

DEPOSITION EXHIBIT
7
Watson

IS THERE A REGULAR VEHICLE MAINTENANCE PROGRAM?	<input checked="" type="checkbox"/> Y <input type="checkbox"/> N	DOES THE APPLICANT OPERATE UNDER PERMITS OF OTHERS?	<input type="checkbox"/> Y <input checked="" type="checkbox"/> N
DO ANY VEHICLES HAVE SPECIAL EQUIPMENT?		DOES APPLICANT HAIL FOR OTHERS?	
IS THERE ANY NIGHT DRIVING? IF SO WHAT PERCENTAGE?	%	ARE ANY HAZARDOUS MATERIALS TRANSPORTED?	<input checked="" type="checkbox"/>
MUST DRIVERS ADHERE TO A DELIVERY SCHEDULE?		ARE PASSENGERS CARRIED IN ANY VEHICLES?	<input checked="" type="checkbox"/>
DO EMPLOYEES USE THEIR OWN VEHICLES IN THIS BUSINESS?		DOES THE APPLICANT HAVE A DRIVER SAFETY PROGRAM?	<input checked="" type="checkbox"/>
DOES APPLICANT OWN VEHICLES NOT SCHEDULED ON THIS APPLICATION?		DOES THE APPLICANT REVIEW DRIVER'S MOTOR VEHICLE RECORDS?	<input checked="" type="checkbox"/>
ARE ANY SCHEDULED VEHICLES TITLED TO OTHERS?		DOES THE APPLICANT HIRE INEXPERIENCED OPERATORS?	<input checked="" type="checkbox"/>
ARE ANY VEHICLES RENTED/LEASED TO OTHERS?		CONTRACTORS CREDIT?	<input checked="" type="checkbox"/>
DOES THE APPLICANT USE RENTED OR LEASED VEHICLES?		WHAT IS THE AVERAGE DAILY OPERATING TIME PER DRIVER?	<i>1/2</i>
NUMBER OF VEHICLES OWNED:	TRUCKS <i>130</i>	TRACTORS	SEMI TRAILERS
TYPES OF TRAILERS:	VAN	HAYBOX	DUMP
	LEVELER	CRANE	REFRIGERATED

COMMENTS & EXPLANATIONS

MOTOR CARRIER FILINGS - Indicate necessary filings. Filings will be made only in states where listed below.

ALABAMA	IOWA	NEBRASKA	TENNESSEE
ARIZONA	KANSAS	NORTH CAROLINA	VIRGINIA
FLORIDA	KENTUCKY KYU ND.	NORTH DAKOTA	WISCONSIN
GEORGIA	MICHIGAN	OHIO	INTERSTATE COMMERCE COMMISSION
IL MOTOR CARRIER NO.	MINNESOTA	SOUTH CAROLINA	ICC MTR CARRIER/DOCKET NUMBER
INDIANA PSCL NO.	MISSOURI	SOUTH DAKOTA	

DRIVER EXCLUSION ENDORSEMENT
(Specified Operator(s) Excluded)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

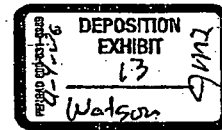
This endorsement changes the policy effective on the inception date of the policy or as of the date shown below, if later.

This policy does not apply to any claim or loss arising from accidents or occurrences involving any covered auto while being driven or operated by:

<u>Horace Wade Bryant</u>	<u>004423124</u>	
(Name of Excluded Operator)	(Driver's License Number)	(Relationship to Named Insured)

Signed as accepted by the Excluded Operator:

<u>X Wade Bryant</u>	<u>20-Oct-99</u>
(Signature of Excluded Operator)	(Date)



THIS EXCLUSION SHALL NOT APPLY TO ANY PERSONAL INJURY PROTECTION COVERAGE UNDER THIS POLICY.

Signed as accepted by the Named Insured, representing all insureds:

<u>X M L Eadon</u>	<u>20-Oct-99</u>	
(Signature of Named Insured)	(Date)	(Witness to Signature of Named Insured)

All other terms, conditions and agreements of the policy shall remain unchanged.

Company Name Columbia Insurance Company	Policy Number 71AP108914
	Endorsement Effective 10/18/99
Named Insured M L Eadon dba C & B Fabrication	Countersigned by Greenville, SC gws 10/18/99 COLUMBIA INSURANCE SERVICE, INC. <u>[Signature]</u> (Authorized Representative)

(The Attaching Clause need be completed only when this endorsement is issued subsequent to preparation of the policy)

DRIVER EXCLUSION ENDORSEMENT
(Specified Operator(s) Excluded)

M-4001 South Carolina (1/8)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement changes the policy effective on the inception date of the policy or as of the date shown below, later.

This policy does not apply to any claim or loss arising from accidents or occurrences involving any covered auto while being driven or operated by:

David Yul 008645175 _____
(Name of Excluded Operator) (Driver's License Number) (Relationship to Named Insured)

Signed as accepted by the Excluded Operator:

X David Yul _____ 20 Oct 99 _____
(Signature of Excluded Operator) (Date)

THIS EXCLUSION SHALL NOT APPLY TO ANY PERSONAL INJURY PROTECTION COVERAGE UNDER THIS POLICY.

Signed as accepted by the Named Insured, representing all insureds:

X Marcus Eadon _____ _____
(Signature of Named Insured) (Date) (Witness to Signature of Named Insured)

All other terms, conditions and agreements of the policy shall remain unchanged.

Company Name Columbia Insurance Company	Policy Number 71AP108914
	Endorsement Effective 10/16/99
Named Insured M L Eadon dba C & B Fabrication	Countersigned by Greenville, SC gws 10/15/99 CAROLINA INSURANCE CO. INC. PA <u>M. H. Stuchland</u> (Authorized Representative)

(The Attaching Clause need be completed only when this endorsement is issued subsequent to preparation of the policy)

M-4001 South Carolina (1/89)

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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, 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 **Appendix To The Record On Appeal (ROA Pages 1343 - 1353)** 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, 2008**, addressed as follows:

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

William O. Sweeny, III, Esquire
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
1515 Lady Street
Columbia, SC 29211


Hoover C. Blanton

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

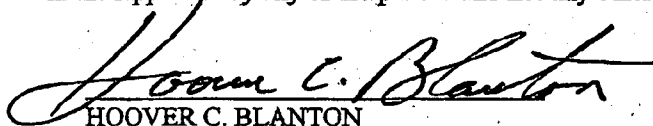
Case No.: 02-CP-46-2369

Auto-Owners Insurance Company, Appellant,
v.

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

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondents Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc. hereby certifies that the Appendix to the Record on Appeal contains all material proposed to be included in the Appendix by any of the parties and not any other material.



HOOVER C. BLANTON
1414 Lady Street
Post Office Box 11963
Columbia, South Carolina 29211-1963
(803) 255-0997

December 18, 2008

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

DEC 01 2008

APPEAL FROM YORK COUNTY
Court of Common Pleas

SC Court of Appeals

Lee S. Alford, Circuit Court Judge

Case No. 02-CP-46-2369

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,

FINAL BRIEF OF APPELLANT AUTO-OWNERS INSURANCE COMPANY

ELLIS, LAWHORNE & SIMS, P.A.

A. JOHNSTON COX
JOHN M. MCCANTS
Post Office Box 2285
Columbia, South Carolina 29202
(803) 254-4190

ATTORNEYS FOR APPELLANT
AUTO-OWNERS INSURANCE COMPANY

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DENYING AUTO-OWNERS' MOTION FOR RELIEF FROM ITS NOVEMBER 7, 2006 ORDER PURSUANT TO RULE 60(b)(2), (4) AND (5), SCRCP, WHEN THE JUDGMENT UPON WHICH THIS ACTION IS FOUNDED WAS REVERSED BY THE COURT OF APPEALS IN ITS ORDER DATED DECEMBER 15, 2006, THE TRIAL COURT'S ORDER REPEATEDLY REFERENCES "FINDINGS" BY THE JURY IN THAT ACTION AS SUPPORT FOR ITS RULING AND THERE REMAINS NO JUDGMENT UPON WHICH TO BASE A DUTY TO INDEMNIFY?

II. DID THE TRIAL COURT ERR IN FINDING THAT AUTO-OWNERS HAS A DUTY TO INDEMNIFY MARION L. EADON FROM AN AWARD OF DAMAGES IN THE CASE OF SAMUEL RHODES, JR., ET. AL. V. MARION L. EADON D/B/A C&B FABRICATION, CIVIL ACTION NUMBER 01-CP-20-334, WHEN

(a) THE TRIAL COURT FAILED TO RULE THAT EADON AND RHODES HAVE THE BURDEN OF PROVING THAT MARION L. EADON D/B/A C&B FABRICATION IS AN INSURED UNDER THE TERMS OF THE POLICY;

(b) THE TRIAL COURT FOUND THAT MARION L. EADON D/B/A C&B FABRICATION IS THE SAME LEGAL ENTITY AS C&B FABRICATORS, INC. AND LOWCOUNTRY SIGNS AND FABRICATION, INC., WHEN THE DEFENDANT IN THE RHODES ACTION IS AN INDIVIDUAL, THE NAMED INSUREDS ON THE POLICY ARE CORPORATIONS AND AN INDIVIDUAL CAN NOT "D/B/A" A CORPORATION?

(c) THE TRIAL COURT RULED THAT MARION L. EADON QUALIFIES AS AN INSURED UNDER THE POLICY EVEN THOUGH MARION L. EADON DOES NOT MEET THE DEFINITION OF AN INSURED UNDER THE TERMS OF THE POLICY AND THE ONLY EVIDENCE IN THE RECORD IS THAT HE WAS SUED FOR ACTIVITIES OUTSIDE THE SCOPE OF HIS DUTIES AS AN OFFICER OF THE CORPORATIONS NAMED IN THE POLICY?

(d) THE TRIAL COURT IGNORED THE LACK OF EVIDENCE THAT EADON PERSONALLY ENGAGED IN ANY ACT THAT WOULD MAKE HIM INDIVIDUALLY LIABLE TO RHODES AND PIEDMONT EVEN IF HE WAS ACTING WITHIN THE SCOPE OF HIS DUTIES AS AN OFFICER OF THE CORPORATIONS NAMED IN THE POLICY?

(e) THE TRIAL COURT FAILED TO FIND THAT RHODES AND PIEDMONT ARE JUDICIALLY ESTOPPED FROM ARGUING THAT (1) EADON WAS ACTING ON BEHALF OF A CORPORATION AND (2) MARION L. EADON D/B/A C&B FABRICATION IS THE SAME ENTITY AS C&B FABRICATORS, INC. OR LOWCOUNTRY SIGNS & FABRICATION, INC., BECAUSE THEY SUCCESSFULLY ARGUED THE OPPOSITE POSITION IN THE RHODES ACTION?

(f) THE TRIAL COURT BASED ITS DECISION ON THE REASONABLE EXPECTATIONS DOCTRINE WHEN THE REASONABLE EXPECTATIONS DOCTRINE HAS BEEN REPEATEDLY REJECTED BY SOUTH CAROLINA COURTS AND THERE WAS NO AMBIGUITY IN THE POLICY WHICH WOULD WARRANT THE APPLICATION OF THE DOCTRINE?

III. DID THE TRIAL COURT ERR IN MAKING FINDINGS OF FACT INCONSISTENT WITH THE RECORD IN THE RHODES CASE, THAT HAVE NO SUPPORT IN THE RECORD AND ARE SPECULATIVE?

IV. DID THE TRIAL COURT ERR IN FINDING AN OCCURRENCE OR PROPERTY DAMAGE TRIGGERING COVERAGE UNDER THE COMMERCIAL GENERAL LIABILITY POLICY?

V. DID THE COURT ERR IN FINDING THAT THE REMOVAL OF THE TWO SIGNS THAT DID NOT FALL BY ORDER OF THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION CONSTITUTES AN OCCURRENCE OR PROPERTY DAMAGE UNDER THE TERMS OF THE POLICY AND THE APPLICABLE COMMON LAW?

VI. DID THE TRIAL COURT ERR IN FINDING THAT THE EXCLUSIONS FOUND IN THE COMMERCIAL GENERAL LIABILITY POLICY ISSUED TO C&B FABRICATIONS, INC. AND LOW COUNTRY SIGNS, INC. DID NOT EXCLUDE THE DAMAGES CLAIMED AGAINST MARION L. EADON IN THE CASE OF SAMUEL RHODES, JR., ET. AL. V. MARION L. EADON D/B/A C&B FABRICATION, CIVIL ACTION NUMBER 01-CP-20-334 WHEN

(a) THE TRIAL COURT FOUND THAT EXCLUSION K DOES NOT EXCLUDE THE DAMAGES FOR THE CONTRACT PRICE OF THE SIGNS AS WELL AS THE LOSS OF INCOME FROM THE SIGNS, EVEN THOUGH THE SIGNS MEET THE DEFINITION OF "YOUR PRODUCT" AND THE TERM "PROPERTY DAMAGE" INCLUDES LOSS OF USE?

(b) THE TRIAL COURT FAILED TO FIND THAT EXCLUSION L PRECLUDES COVERAGE FOR DAMAGE TO THE SIGNS, INCLUDING THE LOSS OF USE OF THE SIGNS, WHETHER OR NOT THEY ARE CONSIDERED REAL PROPERTY AND IN FINDING THAT EXCLUSION L IS AMBIGUOUS?

(c) THE TRIAL COURT FOUND THAT EXCLUSION M DOES NOT APPLY TO EXCLUDE DAMAGES AWARDED AGAINST MARION L. EADON D/B/A C&B FABRICATION?

(d) THE TRIAL COURT FOUND THAT EXCLUSION N DOES NOT APPLY TO EXCLUDE DAMAGES AWARDED AGAINST MARION L. EADON D/B/A C&B FABRICATION?

VII. DID THE TRIAL COURT ERR IN STATING THAT "C&B FABRICATION IS ENTITLED TO PAYMENT FROM AUTO-OWNERS" FOR COST OF REMOVAL OF

ONE OF THE SIGNS THAT DID NOT FALL, WHEN THAT ISSUE WAS NOT RAISED IN THE PLEADINGS OR ARGUED BY THE PARTIES AND THEREFORE WAS NOT PROPERLY BEFORE THE COURT?

STATEMENT OF THE CASE

Samuel W. Rhodes, Jr. ("Rhodes") and Piedmont Promotions, Inc. ("Piedmont") commenced a civil action in the Court of Common Pleas for Fairfield County, South Carolina, alleging various causes of action against Marion L. Eadon d/b/a C&B Fabrication alleging negligent construction of bill board signs. The action is styled, 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 ("Rhodes case"). Rhodes and Piedmont filed an Amended Complaint on January 17, 2003. (R. pp. 119-140). The case was tried to verdict on September 2, 2004. The jury returned a verdict in favor of Rhodes and Piedmont in the amount of three million (\$3,000,000) dollars actual damages and three million five hundred thousand (\$3,500,000) dollars punitive damages.

Auto-Owners filed this declaratory judgment action on October 14, 2002. (R. pp. 67-111). Auto-Owners filed its Second Amended Complaint on July 18, 2005. (R. pp. 635-714). The trial court ordered that the case proceed to a jury trial on June 26, 2006, because the court identified one issue of fact that required determination by a jury. The parties entered into a stipulation resolving the issue of fact identified by the trial court. The trial court decided the remaining issues non-jury based upon materials submitted to the trial court by the parties. The trial court issued its Order dated November 7, 2006 (R. pp. 13-60).

Auto-Owners timely filed post-trial motions on November 22, 2006. (R. pp. 998-1020). By Order dated December 15, 2006, the South Carolina Court of Appeals reversed and vacated the judgment in the Rhodes case and ordered that it be transferred to Clarendon County for trial. The South Carolina Supreme Court denied Rhodes' and Piedmont's petition for certiorari on February 21, 2008.

Following the Court of Appeal's Order vacating the judgment in the Rhodes case, Auto-Owners moved that the trial court vacate its order or stay the case pursuant to Rule 60(b)(2), (4) and (5). 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.

STATEMENT OF FACTS

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. (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, another one of the signs fell across the interstate. The South Carolina Department of Transportation ordered that the other two signs be taken down because they were unsafe. See Rhodes v. Eadon, Op. No. 2006-UP-413, (S.C.Ct.App. filed December 15, 2006).

¹ Rhodes is the president of Piedmont.

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 rental income for the signs of up to \$12 million (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). 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."² There are two primary issues in this case (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.

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).

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), SCRPC. (R. pp. 1022-1028). Judge Alford granted in part and denied in part the Rule 60(b) motions and denied the remaining post-trial motions. (R. pp. 61-62). This appeal ensued.

STANDARD OF REVIEW

Declaratory judgment actions are neither legal nor equitable, and therefore, the standard of review depends on the nature of the underlying issues. Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct.App.2003). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. Auto-Owners Ins. Co. v. Haman, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct.App.2006) (internal citation omitted). In an action at law tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. S.C. Elec. & Gas Co. v. Hartough, 375 S.C. 541, 654 S.E.2d 87 (Ct.App.2007). The appellate court will disturb the trial court's findings of fact if there is no evidence that reasonably supports those findings. Haman, 368 S.C. at 540, 629 SE.2d at 685.

ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING AUTO-OWNERS' MOTION FOR RELIEF FROM ITS NOVEMBER 7, 2006 ORDER PURSUANT TO RULE 60(b)(2), (4) AND (5), SCRCP, WHEN THE JUDGMENT UPON WHICH THIS ACTION IS FOUNDED WAS REVERSED BY THE COURT OF APPEALS IN ITS ORDER DATED DECEMBER 15, 2006, THE TRIAL COURT'S ORDER REPEATEDLY REFERENCES "FINDINGS" BY THE JURY IN THE RHODES CASE AS SUPPORT FOR ITS RULING AND THERE REMAINS NO JUDGMENT UPON WHICH TO BASE A DUTY TO INDEMNIFY.

As previously stated, Auto-Owners seeks a determination whether it owes a duty to indemnify Eadon from a jury award in the Rhodes case. At the time Judge Alford issued the November 7, 2006 Order (R. pp. 13-60), a judgment had been entered against Eadon in the Rhodes case. However, before the trial court ruled on the post-trial motions filed by Auto-Owners, the Court of Appeals reversed the judgment and remanded the Rhodes case for a new trial in Clarendon County. The South Carolina Supreme Court denied Rhodes and Piedmont's petition for certiorari. (S.C.Sup.Ct. Order dated February 21, 2008). In short, there is no judgment against Eadon which gives rise to a duty to indemnify at this time.

Based upon the Court of Appeals' opinion, Auto-Owners moved the trial court for relief from its Order pursuant to Rule 60(b)(2), (4) and (5) (R. pp. 1022-1028). The trial court granted the motion in part and denied the motion in part, holding

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 of the Findings and Conclusions in this Court's Order 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. pp. 61-62).

However, this ruling by the trial court leaves in effect its conclusions that Marion L. Eadon d/b/a C&B Fabrication is an insured, that there was an occurrence, that there

was "property damage" and that exclusions k, l, m, and n do not apply to exclude the damages submitted to the jury at trial.

Because no duty to indemnify has yet arisen and the duty to indemnify is measured by the facts ultimately determined at trial, the trial court erred in refusing to vacate its Order and stay the matter pending the conclusion of the Rhodes case. As a general practice, courts wait to decide coverage until litigation or agreement has determined the particular damage for which an insured will be responsible. Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 377 (N.C. 1986) ("An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial."); Ellett Bros., Inc. v. U.S. Fid. & Guar. Co., 275 F.3d 384 (4th Cir. 2001); Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 476 S.E.2d 708 (Ct.App.1996) ("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.").

The trial court repeatedly relies on the "findings" of the jury in the Rhodes case as support for its rulings on whether Eadon is an insured under the policy and whether the damages submitted to the jury are covered by the policy.³ The following are examples of such reliance in the November 7, 2006 Order (R. pp. 13-60): (a) "The jury verdict in the Rhodes action confirms that there were property damages caused by the work product and not merely damage to the work product itself." (R. p. 27) (b) "The judgment in the Rhodes action establishes that there was an occurrence." (R. p. 31) (c) "The jury in the Rhodes action found as a fact that both physical injury to the real estate and loss of use of that real estate had occurred as a consequence of the sign falling." (R. p. 32) (d) "The jury found that the diminution in value of Rhodes' property and the

³ As will be discussed in more detail below, there is no evidence in the record that supports these findings of fact.

Piedmont loss of income were foreseeable results of the negligence . . ." (R. p. 35)) (e) "However, the Rhodes jury verdict for \$6.5 Million on the negligence cause of action inferably did not include this amount . . . In the context of a \$6.5 Million judgment, the exclusion, therefore, has no practical impact." (R. pp. 36-37) (f) "The claim is not for damage to "your work" [the signs]. The claim is for damage to the real estate. That is the sole basis for the jury verdict." (R. p. 37) (g) "The Rhodes action verdict proved that Marion L. Eadon d/b/a C&B Fabrication (1) violated applicable building codes; (2) deviated from industry standards; and (3) constructed signs that posed serious risk of physical harm." (R. p. 38) (h) "In the Rhodes action, not only were there allegations of damage beyond the work product of C&B Fabrication, there was proof of damage to the real estate of Rhodes and consequential damage to Piedmont Promotions from the loss of revenue from the signs." (R. p. 42) (i) "The damages awarded in the Rhodes action are not for loss, cost, or expense for loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of "your product", "your work", or "impaired property". The damages were to the real estate as a consequence of the event of the sign falling . . ." (R. p. 47) (j) "Based upon evidence presented in the Rhodes action, the jury found that once installed in the real estate . . . the signs were permanent fixtures and intended to be so." (R. p. 51).

However, the evidence presented at the trial of the Rhodes case in Fairfield County and the jury's "findings" will ultimately have no bearing on Auto-Owners' duty to indemnify, because the trial and verdict rendered in Fairfield County in the Rhodes case are void. The Rhodes court had no jurisdiction to try the case to verdict. Rhodes v. Eadon, Op. No. 2006-UP-413 (S.C.Ct.App. filed December 15, 2006); Ross v. Richland Co., 270 S.C. 100, 240 S.E.2d 649 (1978) (stating that generally, a judgment is void if a court acts without jurisdiction). The Court of Appeals remanded the Rhodes case for a new trial in Clarendon County. The evidence and verdict in the Clarendon County trial

will provide the basis upon which to determine Auto-Owners duty to indemnify, not the evidence and verdict in the Fairfield County trial. Because the trial court relied on the jury's "findings," in the Fairfield County trial to support its holding, its Order should be vacated.

In addition, Auto-Owners is entitled to relief from the trial court's Order because the "prior judgment upon which it is based has been reversed or otherwise vacated" and "it is no longer equitable that the judgment should have prospective application." Rule 60(b)(5), SCRCP. The trial court's Order is based upon a prior judgment which has been vacated. The Rhodes case has been remanded for the purpose of transferring venue. The Rhodes case will have to be retried in another venue. The next trial may result in a defense verdict, in which case no duty to indemnify will arise. Different or new evidence may be presented which would affect a duty to indemnify. Auto-Owners' duty to indemnify should be "measured by the facts ultimately determined at trial," not by the facts determined at a trial that is null and void. Jourdan, 476 S.E.2d 708, 711

The need to vacate the trial court's Order and stay the case pending the conclusion of the Rhodes case is apparent. Auto-Owners requests that the trial court's Order be vacated and the case remanded with the instruction that it be stayed pending the conclusion of the Rhodes case.

II. THE TRIAL COURT ERRED IN FINDING THAT AUTO-OWNERS HAS A DUTY TO INDEMNIFY MARION L. EADON FROM AN AWARD OF DAMAGES IN THE CASE OF SAMUEL RHODES, JR., ET. AL. V. MARION L. EADON D/B/A C&B FABRICATION, CIVIL ACTION NUMBER 01-CP-20-334.

The trial court erroneously concluded that "Marion L. Eadon d/b/a C&B Fabrication" is an insured under the policy. The trial court's decision is based upon three erroneous findings: (1) Marion L. Eadon d/b/a C&B Fabrication is the same legal entity as C&B Fabricators, Inc. and LowCountry Signs & Fabrication, Inc. (2) Eadon meets the definition of an insured, because he was generally acting on behalf of the corporations in

conducting the sign business, and (3) Eadon's reasonable expectations were that he would be covered regardless of what business entity was listed on the policy as the named insured. The trial court committed reversible error in reaching all three of these decisions, and its ruling should be reversed.

(a) THE TRIAL COURT FAILED TO RULE THAT EADON AND RHODES HAVE THE BURDEN OF PROVING THAT MARION L. EADON D/B/A C&B FABRICATION IS AN INSURED UNDER THE TERMS OF THE POLICY.

As an initial problem, the trial court's Order contains no holding that Eadon and Rhodes have the burden of proving that Eadon is an insured under the terms of the policy. Therefore, it is unclear from the Order whether the trial court found that Rhodes and Eadon had carried their burden or if the trial court's Order is founded upon the erroneous notion that Auto-Owners had some burden of proof and failed to carry it. This distinction is critical, because Auto-Owners has no burden to prove that Eadon is **not** an insured.

In a declaratory judgment action, "[t]he burden of proof is on the insured to show that a claim falls within the coverage of an insurance contract. The insurer bears the burden of establishing exclusions to coverage." Sunex Intern. Inc. v. Travelers Indem. Co. of Ill., 185 F.Supp.2d 614, 617 (D.S.C. 2001) (internal citations omitted); Gamble v. Travelers Ins. Co., 251 S.C. 98, 160 S.E.2d 523 (1968). The same is true for any person seeking coverage under an insurance policy. See Rakestraw v. Allstate Ins. Co., 238 S.C. 217, 119 S.E.2d 746 (1961). In this matter, it is Eadon and Rhodes' burden to prove that the verdict awarded against Marion L. Eadon d/b/a C&B Fabrication in the Rhodes case was, in fact, awarded against an insured under the terms of the policy.

It is not Auto-Owner's obligation to prove that Eadon is not an insured, because the definition of an insured in the policy is not an exclusion. Id. The fact that Auto-Owners initiated the declaratory judgment action does not alter the burden of proof. See Penn America Ins. Co. v. Valade, 28 Fed.Appx. 253 (4th Cir. 2002) (stating that party

seeking coverage under an insurance policy bears the burden of proving that any claimed damage falls within the policy's terms and this burden of proof remains unchanged when the insurer initiates a declaratory judgment proceeding concerning its coverage obligations under an insurance policy); American Auto. Ins. Co. v. Mayfield, 287 F.Supp.2d 661, 664 (N.D.Tex. 2003) ("To assist in determining whether an insurer has a duty to defend, the Fifth Circuit has explained the parties' shifting burdens of proof as follows: The insured bears the initial burden of showing that the claim . . . is potentially within the insurance policy's scope of coverage. If the insurer relies on the policy's exclusions to deny coverage, the burden shifts back to the insured to show that an exception to the exclusion applies"). (citations omitted); Royal Globe Ins. Co. v. Whitaker, 226 Cal. Rptr. 435 (Cal. Ct. App. 1986) ("While the burden is on the insurer to prove a claim covered falls within an exclusion, the burden is on the insured initially to prove that an event is a claim within the scope of the basic coverage") (internal citations omitted).

Auto-Owners requests that the judgment be reversed and remanded with the instruction that the trial court is to determine whether the Defendants have met their burden of proving that Eadon meets the definition of an insured under the policy.

(b) THE TRIAL COURT ERRED IN FINDING THAT MARION L. EADON D/B/A C&B FABRICATION IS THE SAME LEGAL ENTITY AS C&B FABRICATORS, INC. AND LOWCOUNTRY SIGNS AND FABRICATION, INC., WHEN THE DEFENDANT IN THE RHODES ACTION IS AN INDIVIDUAL, THE NAMED INSUREDS ON THE POLICY ARE CORPORATIONS AND AN INDIVIDUAL CAN NOT "D/B/A" A CORPORATION.

As previously discussed, the named insureds on the policy issued by Auto-Owners are corporations. Rhodes and Piedmont sued an individual, "Marion L. Eadon d/b/a C&B Fabrication." (R. pp. 119-134). The verdict in the Rhodes case was against "Marion L. Eadon d/b/a C&B Fabrication." There is no question that Rhodes and Piedmont sued an individual. The Amended Complaint states, "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." (R. p. 119). Rhodes and Piedmont purposefully made the decision in the Rhodes case, for whatever reason, not to sue a corporate entity, but to sue Marion L. Eadon individually. (R. pp. 1086-1089).

In finding that Eadon is an insured under the policy, the trial court essentially found that Marion L. Eadon and the corporations were one and the same. (R. p. 55). Marion L. Eadon d/b/a C&B Fabrication is not the same legal entity as C&B Fabricators, Inc. and LowCountry Signs & Fabrication, Inc. As a d/b/a, the trade name "C&B Fabrication" is not a separate legal entity from Marion L. Eadon. "Doing business under another name does not create an entity distinct from the person operating the business." Carlson v. Doekson Gross, Inc., 372 N.W.2d 902, 905 (N.D.1985). "The designation 'd/b/a' means 'doing business as' but is merely descriptive of the person or corporation who does business under some other name. Doing business under another name does not create an entity distinct from the person operating the business. . . . The business name is a fiction, and so too is any implication that the business is a legal entity separate from its owner." Providence Washington Ins. Co. v. Valley Forge, 50 Cal. Rptr. 2d 192, 195 (Cal. Ct. App. 1996) (internal citations omitted).⁴ See also, Carlson v. Doekson, 372 N.W.2d at 906 (N.D. 1985) (holding that "when the designation of the named insured is

⁴ This concept is universally accepted. See Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct.App.2004); O'Hanton v. Hartford Acc. & Indem. Co., 639 F.2d 1019 (3d Cir. 1981); Duval v. Midwest Auto City, Inc., 425 F.Supp. 1381 (D.Neb. 1977); Pinkerton's v. Superior Court (Schrieber), 57 Cal. Rptr. 2d 356 (Cal. 1996); Allstate Ins. Co. v. Willison, 885 P.2d 342 (Colo. Ct. App. 1994); Chmielewski v. Aetna Cas. and Sur. Co., 591 A.2d 101, 113 (Conn. 1991) ("property owned by an individual in a trade name is nonetheless owned by him"); Purcell v. Allstate Ins. Co., 310 S.E.2d 530 (Ga. App. 1983); Samples v. Ga. Mutual Ins. Co., 138 S.E.2d 463 (Ga. Ct. App. 1964) (holding that fact that plaintiff's husband purchased automobile in name that he used in doing business does not contradict fact that he owned automobile as individual); Georgantas v. Country Mut. Ins. Co., 570 N.E.2d 870 (Ill. App. Ct. 1991); Trombley v. Allstate Ins. Co., 640 So.2d 815 (La. App. 1994); Bushey v. Northern Assurance, 766 A.2d 598, 603 (Md. 2001) ("sole proprietorship form of business provides 'complete identity of the business entity with the proprietor himself'"); Hall v. Auto-Owners Ins. Co., 658 N.W.2d 711, 720-721 (Neb. 2003); Toulousaine de Distrib. v. Tri-State Seed & Grain, 520 N.W.2d 210 (Neb. 1994); Gabrelcik v. National Indemnity Co., 131 N.W.2d 534 (Minn. 1964); Recalde v. ITT Hartford, 492 S.E.2d 435 (Va. 1997); 18 Am. Jur. 2d. Corporations § 2 (2004).

in the form 'Individual dba ...' the individual is the named insured, irrespective of whatever language follows the 'dba').

"Marion L. Eadon d/b/a C&B Fabrication" is a sole proprietorship. "The sole proprietorship form of doing business encompasses the complete identity of the business entity with the proprietor himself or herself; thus, a sole proprietorship has no legal existence apart from its owner." 18 Am. Jur. 2d Corporations § 6 (2004). "A sole proprietorship is *not* a legal entity itself. Rather, the term refers to a natural person who *directly* owns the business...." Providence, 50 Cal. Rptr. 2d at 194.

In contrast to a sole proprietorship, "a corporation is a legal entity that is completely separate and distinct from its shareholders...." Bogese, Inc. v. State Highway Comm'r., 462 S.E.2d 345, 348 (1995). A corporation, by definition, is not a form of sole proprietorship; the sole proprietorship is a business form in which an individual, rather than a partnership or corporation, owns the business. 18 Am. Jur.2d Corporations § 6 (2004); Ladd v. Scudder Kemper Investments, Inc., 741 N.E.2d 47 (Mass. 2001); Bogese, Inc., 462 S.E.2d at 348 (In contrast to a sole proprietorship, "a corporation is a legal entity that is completely separate and distinct from its shareholders..."). "[A]n individual obviously cannot 'do business as' a corporation." Carlson, 372 N.W.2d at 905.

There was never any ambiguity in the policy as to whether the business entities listed as named insureds were corporations. The policy, on its face, indicated that the named insureds were corporations. (R. pp. 1296-1339). The trial court found there was an ambiguity because the names of the corporations were identified incorrectly. This ambiguity was resolved when the parties agreed to reform the policy to identify the correct names of the corporations. As stipulated by the parties, the named insureds are "C&B Fabricators, Inc. and LowCountry Signs & Fabrication, Inc. both d/b/a C&B Fabrication, trade name of these corporations." (R. p. 65). Not only did the parties

stipulate to the correct names of the named insured, but they also stipulated that they were corporations d/b/a C&B Fabrication.

The trade name "C&B Fabrication" is a fiction and does not constitute a separate legal entity from the corporations insured under the policy. Marion L. Eadon and the corporations are distinct and separate legal entities. Marion L. Eadon cannot d/b/a a corporation. Carlson, 372 N.W.2d at 905. "Marion L. Eadon d/b/a C&B Fabrication" can not legally be the same entity as "C&B Fabricators, Inc. and LowCountry Signs & Fabrication, Inc. both d/b/a C&B Fabrication." The first is an individual operating under a trade name and the latter is a corporation operating under a trade name.

The trial court's misunderstanding as to the legal nature of a trade name is evident in the following statement by the court: "Eadon was the sign business. The judgment is against the trade name C&B Fabrication. Under the Stipulation the trade name is insured." (R. p. 55). As previously discussed, the Rhodes verdict is not against the trade name. It is against Marion L. Eadon d/b/a C&B Fabrication – an individual. Likewise, the trade name itself is not insured, the two corporations listed on the policy are insured.

There is no escaping the fact that the Rhodes verdict was rendered against Marion L. Eadon, an individual, d/b/a a trade name and not the corporations named in the policy. Therefore, the determination of whether Marion Eadon is entitled to indemnification depends on whether he meets the definition of an insured under the terms of the policy.

(c) THE TRIAL COURT ERRED WHEN IT RULED THAT MARION L. EADON QUALIFIES AS AN INSURED UNDER THE POLICY EVEN THOUGH MARION L. EADON DOES NOT MEET THE DEFINITION OF AN INSURED UNDER THE TERMS OF THE POLICY AND THE ONLY EVIDENCE IN THE RECORD IS THAT HE WAS SUED FOR ACTIVITIES OUTSIDE THE SCOPE OF HIS DUTIES AS AN OFFICER OF THE CORPORATIONS NAMED IN THE POLICY.

Eadon does not qualify as an insured under the terms of the policy, because he was not sued for negligently performing his duties as an officer of the corporations. As

previously discussed, the named insureds on the policy issued by Auto-Owners were corporations. The named insured was plainly identified on the Declarations as "corporation." (R. pp. 1296-1339). 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).

Marion L. Eadon is not listed on the Declarations as an insured. Only the corporations C&B Fabricators, Inc. and LowCountry Signs & Fabrication, Inc. are listed as insureds. In addition, the Declarations page states that the entity being insured is a corporation. The clear, plain and unambiguous language of the policy states that the policy covered corporations as named insureds.

Therefore, to be an insured under the policy, Eadon must qualify under Section 1.c. - the damages awarded against him must have been a result of carrying out his duties as an officer or director of C&B Fabricators, Inc. and LowCountry Signs & Fabrication, Inc. See Harrison v. Ohio Cas. Ins. Co., Inc., 199 F.Supp.2d 518 (S.D.

Miss. 2000); Boso v. Erie Ins. Co. / Erie Ins. Exchange, 669 N.E.2d 47 (Ohio Ct. App. 1995); Carpenter v. Fed. Ins. Co., 637 A.2d 1008 (Pa. 1994); Bowie v. Home Ins. Co., 923 F.2d 705 (9th Cir. 1991).

The Rhodes Amended Complaint alleges that Eadon negligently fabricated, erected, inspected and repaired the signs. (R. p. 131). The Amended Complaint does not contain any allegation of vicarious or supervisory liability.

Eadon 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 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. 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. He did not personally design, build, repair or inspect any signs. It was not within his duties as an officer of the corporations to design signs, build signs or repair signs. (R. pp. 1103-1105, 1114, 1205-1209). All of those duties were assigned to Benenhaley.

Eadon had no duties as an officer of the corporation that could have subjected him to personal liability for the negligent acts alleged in the Rhodes case. He was not sued for, and therefore no verdict was rendered against him for, negligent performance of any of his duties as an officer of the corporation. His duties did not include fabricating, inspecting, erecting or repairing the signs. He did not have any personal involvement in

fabricating, inspecting, erecting or repairing the signs. Even if it was his duty to supervise these aspects of the business (which he denies and there is no evidence to the contrary), Rhodes and Piedmont did not allege any supervisory or vicarious liability. Rhodes simply alleged that Eadon himself failed to do these things, things that were not within his duties as an officer of the corporation.

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 the damages awarded in the Rhodes case.

There is no reported decision in South Carolina on this issue. However, the facts of this case are similar to those 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)

The case of Carpenter v. Fed. Ins. Co., 637 A.2d 1008 (Pa. Super. Ct. 1994) is also persuasive. In that case, Robert Carpenter and Merle Kintigh formed a partnership for the purpose of constructing homes. One of their clients brought suit against Robert M. Carpenter and Merle R. Kintigh, individually, and trading and doing business as Kintigh and Carpenter Fine Homes. Carpenter brought a declaratory judgment action against several insurance companies. Two of the companies insured R.M. Carpenter d/b/a/ Wineman and Carpenter, Inc. Carpenter argued that these policies extended coverage to him as an individual, for his liability as a member of the partnership, which built the plaintiff's home (Kintigh and Carpenter a/k/a/ Kintigh and Carpenter Fine Homes). Id.

The court ruled that Carpenter, the individual, was not an insured under the policy. The court relied heavily on the fact that the named insured on the policy, "R.M. Carpenter d/b/a/ Wineman and Carpenter, Inc." was identified as a corporation on the Declarations page. Id. at 1011. Therefore, Carpenter's status as an insured extended only to his actions within his duties as an officer, director, and/or shareholder of the corporation. Id.

In Lomes v. Hartford Fin. Serv. Group, Inc., 105 Cal. Rptr. 2d 471 (2001), Lomes and William Low were sole shareholders of Newton Wholesale Co., Inc. ("Newton"). Their business relationship soured and Low took control of the company, ousting Lomes as President and an employee of the corporation. However, Lomes remained a director and minority shareholder. Low and Newton sued Lomes as "an individual" for defamation and other causes of action. Lomes sought a defense from the insurance company that issued a CGL policy to the corporation.

At the time of the alleged defamation, Lomes was still a director, but not an officer or employee of the corporation. The policy issued by Hartford contained the identical definition of an insured used in the Auto-Owners policy. In finding that Lomes was not an insured under the policy, the court stated,

Lomes was sued as an individual, not as a director. And while it is undisputed that Lomes was still a director at the time of his alleged acts, he would also have had to be fulfilling his duties as an officer or director of Newton Wholesale to qualify for coverage.

Lomes, 105 Cal. Rptr. 2d at 474.

The trial court erred in ruling that Eadon meets the definition of an insured based upon the evidence in the record. The only evidence is that none of the activities for which Eadon was sued in the Rhodes case fall within his duties as an officer of a corporation insured by the policy. All of those duties were undertaken by someone else, and Eadon had no responsibility for them. Eadon's liability in the Rhodes case did not

and cannot result from the performance of his executive duties as an officer of the corporation. Therefore, the trial court's Order should be reversed.

(d) THE TRIAL COURT ERRED WHEN IT IGNORED THE LACK OF EVIDENCE THAT EADON PERSONALLY ENGAGED IN ANY ACT THAT WOULD MAKE HIM INDIVIDUALLY LIABLE TO RHODES AND PIEDMONT EVEN IF HE WAS ACTING WITHIN THE SCOPE OF HIS DUTIES AS AN OFFICER OF THE CORPORATIONS NAMED IN THE POLICY.⁵

An insurer's duty to indemnify an insured for damages awarded against it at trial is largely determined by the evidence introduced at the trial and the jury's verdict. Likewise, in a subsequent action to determine coverage, all parties are bound by the evidence introduced at the previous trial, the legal rulings made by the trial judge, and the findings of fact made by the jury. The parties may not relitigate the factual findings essential to the judgment in the tort action. Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965).

"The insurer, however, is not bound as to issues not necessarily adjudicated in the prior action and can still present any [coverage] defenses not inconsistent with that judgment." Farmer v. Allstate Ins. Co., 311 F.Supp.2d 884 (2004); see also, Sims, 247 S.C. at 87, 145 S.E.2d at 525 ("[T]he judgment against the indemnitee does not decide issues as to the existence and extent of the duty to indemnify, and that in a subsequent action the indemnitor may show that the circumstances under which he was required to give indemnity do not exist"); London v. The Surety Co., 250 S.C. 26, 156 S.E.2d 329 (1967).

The jury in the Rhodes case found that all of the actions regarding the billboard signs were taken by Marion Eadon individually doing business as C&B Fabrication, not as an officer, director or shareholder of C&B Fabricators, Inc. or LowCountry Signs &

⁵ In making this argument Auto-Owners understands that the jury verdict in the Rhodes case has been reversed, there is no verdict, and therefore no duty to indemnify. Auto-Owners is compelled to make this argument because the trial court's Order is largely based upon its view of the jury's findings in Rhodes. If this Court does not vacate the trial court's Order, Auto-Owners does not wish to waive the argument.

Fabrication, Inc. Eadon's status as an individual, as opposed to a corporate officer, cannot be relitigated in this action.

A review of the Rhodes pleadings and trial transcript reveals that Marion Eadon was sued individually d/b/a C&B Fabrication, that the jury found that Marion L. Eadon d/b/a C&B Fabrication was a separate entity from C&B Fabricators, Inc., and that Marion Eadon was acting individually and not as an officer, director or employee of any corporation. In fact, the only way the jury could have found against Marion Eadon is if they determined that he was not working on behalf of a corporation.

The truth of this statement is learned by examining Judge Dennis' rulings from the bench and his charge of the law to the jury. Rhodes and Piedmont argued at trial that Eadon was doing business as an individual under the name of C&B Fabrication, which was a separate entity from his corporation, C&B Fabricators, Inc. Alternatively, they argued that Eadon was personally liable even if he was acting on behalf of a corporation, because he negligently misrepresented facts to the plaintiffs, and he was personally involved in the construction of the signs.

However, Judge Dennis granted Eadon's motion for directed verdict on the negligent misrepresentation claim, finding that there was no evidence of negligent misrepresentation. (R. pp. 1193-1194). In addition, Judge Dennis rejected Rhodes contention that Eadon was personally involved with the signs so as to make him liable individually.

Mr. Blanton: As to the negligence count, your honor, if Mr. Eadon was an actor in the events, he is liable whether or not he's liable on the contract or not.

The Court: Based on what theory if he's a corporation? If he was an agent doing work maybe there was a possibility, reading some of the cases, a possibility that would connect him individually, but if he's a corporation, I don't care what he is involved in. It's a corporate liability. . .

Mr. Blanton: Because the actor in tort - - It doesn't matter whether he's an agent or not. He or she is still liable for what he or she does.

The Court: Well. What proof do I have that he did anything other than talk on the phone?

Mr. Blanton: He's the fellow that made the deal and promised to do it across the board.

The Court: No sir. The deal is not the tort. The tort was building the sign improperly. That wasn't the deal. There's no evidence that he did any construction, none, zero.

Mr. Blanton: If C&B Fabrication –

The Court: Thank you, Sir, I appreciate it. You can argue that one in Columbia. I'm comfortable with that one. I'm not the least bit concerned about him having responsibility personally because he didn't do anything with the construction. . .

(R. pp. 1238-1239).

In light of the evidence introduced at trial, the issue before the jury was simple.

The question becomes, do you find it was a corporation? It's really simply charged this way, and I'm prepared to do it if you all agree to it because I'm charging on the facts, but it comes down to, if you believe the defendant was a corporation and not the individual, then that's it. But if you believe that the defendant – that this whole transaction was with Mr. Eadon, then you've got to find – you've got to determine how much damages, because then it simply shifts to the element of damages. . .

But clearly, everything starts with, who was that person? Was that person the corporation or was that person the gentleman sitting at the table? It's that simple. . . .

(R. pp. 1236-1237).

Judge Dennis correctly ruled that there was no evidence that Eadon personally participated in the alleged tortious activities. Therefore, Eadon could not be individually liable to the plaintiffs if the jury concluded that he was acting as an officer, director or employee of a corporation. The only possible way that he could be liable to the plaintiffs individually is if the jury concluded that he was acting individually and not on behalf of any corporation. Judge Dennis charged the jury to that effect in explaining the verdict form:

The third choice is, "we find for the Defendant." Now what will you be saying? One or two things, and one really incorporates the other. Obviously, the plaintiff has to prove the fault, the person who committed the negligence. **If you conclude from the evidence that the party that committed the negligence in this case was the corporation, in other words, the defendant was not acting individually but was acting through a corporation and as a corporation, then you must return a verdict for the defendant.**

(R. p. 1242) (emphasis added).

As previously stated, Eadon vigorously contended at trial that he was acting through and as a corporation in his dealings with the plaintiffs. Accordingly, Auto-Owners provided Eadon a defense to the action. However, in returning a verdict against Eadon, it was necessary that the jury reject his contention and find that he was acting individually, and not on behalf of any corporation. Even Eadon recognizes that he was sued individually and that Rhodes and Piedmont did not sue any corporation that he was involved with. (R. p. 1118). Therefore, the parties should not be permitted to relitigate this issue.

(e) THE TRIAL COURT ERRED IN FAILING TO FIND THAT RHODES AND PIEDMONT ARE JUDICIALLY ESTOPPED FROM ARGUING THAT (1) EADON WAS ACTING ON BEHALF OF A CORPORATION AND (2) MARION L. EADON D/B/A C&B FABRICATION IS THE SAME ENTITY AS C&B FABRICATORS, INC. OR LOWCOUNTRY SIGNS & FABRICATION, INC., BECAUSE THEY SUCCESSFULLY ARGUED THE OPPOSITE POSITION IN THE RHODES ACTION.⁶

Rhodes and Piedmont claimed in the Fairfield County civil action that Marion Eadon did business as Marion Eadon d/b/a C&B Fabrication, a sole proprietorship. Rhodes further claimed in the Fairfield County action that Marion Eadon held himself out as an individual and not one acting on behalf of a corporation. They argued that he was not acting on behalf of a corporation; he was acting as an individual doing business as a sole proprietorship. Rhodes and Piedmont prevailed on this theory and the jury returned a verdict against Eadon individually.

⁶ Auto-Owners briefs this arguments for the same reason discussed in footnote 4.

Marion Eadon defended himself in the Fairfield County action on the basis that his corporation was the real party in interest; that he was not individually involved with design, manufacture, installation or repair of the signs; and that any obligation owed to Rhodes was a corporate obligation, not a personal one. Marion Eadon failed on this theory and was found liable individually.

Despite their success in the Rhodes case on this theory, Rhodes and Piedmont argued the trial court in this case that Marion L. Eadon d/b/a C&B Fabrication is the same as C&B Fabricators, Inc. or LowCountry Signs & Fabrication, Inc. However, Rhodes and Piedmont are bound by the doctrine of judicial estoppel from changing their position.

In Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997), the South Carolina Supreme Court formally adopted the doctrine of judicial estoppel as it relates to matters of fact, not law. Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, a position the litigant has previously asserted in the same or related proceeding. Id. at 251, 489 S.E.2d at 477; see also Colleton Reg'l. Hosp. v. MRS Med. Review Sys., 866 F.Supp. 896, 900 (D.S.C. 1994) ("Judicial estoppel is an equitable doctrine which precludes a party from adopting a legal position in conflict with one earlier taken in the same or related litigation."). The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary. See Hawkins v. Bruno Yacht Sales, 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003).

The South Carolina Supreme Court adopted the following elements for judicial estoppel: (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. See Carrigg v. Cannon, 347 S.C. 75, 83, 552 S.E.2d 767, 772 (Cl.App.2001).

Hayne involved a mortgage foreclosure. 327 S.C. at 248, 489 S.E.2d at 475. In defense of the foreclosure, the defendant debtor argued that he owned the real property. However, in a separate and prior civil action involving a divorce from his wife, the defendant debtor argued that his son owned the property. In Hayne, the defendant debtor was taking two totally inconsistent positions, while both positions could not be true at the same time. Id. at 252, 489 S.E.2d at 477.

Rhodes' argument that Marion d/b/a C&B Fabrication (a sole proprietorship) is the same as C&B Fabrications, Inc. (a corporation) violates the foregoing principle. Rhodes and Piedmont presented evidence and argued to the jury that at all relevant times to the action Marion Eadon was acting individually, doing business as an entity known as C&B Fabrication, and not as an employee, officer or director of any corporation. Eadon's only defense to the action was that at all relevant times he was acting as an employee, officer or director of a corporation, was not personally involved with the alleged negligent actions and, therefore, was not individually liable for the acts of the corporation.

As previously discussed, the transcript from the Fairfield County action reveals that Marion Eadon was sued individually d/b/a C&B Fabrication, that the jury found that Marion L. Eadon d/b/a C&B Fabrication was a separate entity from C&B Fabrications, Inc., and that Marion Eadon was acting individually and not as an officer, director or employee of any corporation. In fact, the only way the jury could have found against Marion Eadon is if they determined that he was not working on behalf of a corporation.

Although in this action Rhodes and Piedmont have tried to obscure the jury's finding that Eadon was operating as a sole proprietorship and was not acting on behalf

of a corporation, it was clear to them when they successfully argued in response to Eadon's post-trial motions:

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.* Rhodes has also argued in this case that C&B Fabrication is and never was a corporate entity and that the jury in the Rhodes case "found (correctly so under clear facts) that the transaction was not between Rhodes and C&B Fabricators, Inc.," but between Rhodes and Marion L. Eadon d/b/a C&B Fabrication. (R. p. 272).

Rhodes and Piedmont successfully argued and proved that Eadon was not acting on behalf on any corporation in the Rhodes case. They successfully argued that C&B Fabrication was not the same entity as C&B Fabricators, Inc. The trial court should have judicially estopped Rhodes and Piedmont from arguing the opposite position in this action.

Furthermore, having lost on this factual issue in the Rhodes case, Eadon should be collaterally estopped from relitigating the issue in this case. See Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003). Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action. *Id.* Under the doctrine of collateral estoppel, once final judgment on the merits has been reached in a prior claim, relitigation of the issues actually and necessarily litigated and determined in the first suit are precluded in any subsequent action based upon a different claim. Richburg v. Baughman, 290 S.C. 431,

351 S.E.2d 164 (1986); Sims, 247 S.C. at 86-87, 145 S.E.2d at 525 (applying to declaratory judgment actions). The parties in this case are bound by the facts determined by the jury in the Rhodes case. See Sims, 247 S.C. at 86-87, 145 S.E.2d at 525.

As addressed above, the issue whether Marion Eadon was acting on behalf of a corporation was adjudicated against him in the Fairfield County action. The jury determined that he was not acting on behalf of any corporation. Because the trial court erred in allowing this issue to be relitigated in this case and also erred in finding that Eadon was acting on behalf of a corporation, the trial court's Order should be reversed.

(f) THE TRIAL COURT ERRED IN BASING ITS DECISION ON THE REASONABLE EXPECTATIONS DOCTRINE WHEN THE REASONABLE EXPECTATIONS DOCTRINE HAS BEEN REPEATEDLY REJECTED BY SOUTH CAROLINA COURTS AND THERE WAS NO AMBIGUITY IN THE POLICY WHICH WOULD WARRANT THE APPLICATION OF THE DOCTRINE.

The trial court, which mentioned the policy definition of an insured only in passing, instead based its determination that Eadon is an insured upon the reasonable expectations doctrine. Despite the fact that the named insured is identified on the policy as a corporation and Eadon testified that he intended to purchase an insurance policy for the corporation, the trial court ignored the plain language of the policy and held:

Eadon purchased insurance to insure his sign business operation. He had only one sign business operation. He obviously thought he was covered. He expected to be covered. . . Whether the name was corporate or individual made no difference. The status of the insured (corporate or individual) was not the relevant factor.

(R. pp. 53-54). The trial court went on to hold that because Eadon expected that he was individually covered, he is an insured no matter what the policy language says.

The trial court's initial error was holding that the designation of the named insured as an individual or a corporation is irrelevant. In doing so, the trial court ignored the unambiguous language of the policy. The policy clearly states the named insureds are corporations. The policy unambiguously describes who qualifies as an insured when

the named insured is an individual as opposed to when the named insured is a corporation. Different persons qualify as an insured depending upon the status of the named insured. Whether the named insured is an individual or a corporation is a crucial factor in determining coverage under any insurance policy. The trial court should not be permitted to rewrite the insurance contract to find coverage.

In addition, the trial court erred in applying the reasonable expectations doctrine to find coverage because (1) South Carolina does not recognize the doctrine and (2) there is no ambiguity in the policy to warrant its application. The reasonable expectations doctrine has been repeatedly rejected by South Carolina courts and is contrary to South Carolina law. This doctrine essentially is that "the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated these expectations." Allstate Ins. Co. v. Mangum, 299 S.C. 226, 383 S.E.2d 464 (Ct.App.1989). In Mangum, the Court of Appeals stated, "[t]his view has never been accepted by the Supreme Court of this State. In South Carolina, insurance policies are subject to the general rules of contract construction." Id. at 31, 383 S.E.2d at 467. Furthermore, the reasonable expectations doctrine flies in the face of the long-stated policy in South Carolina that "[t]he judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction...." Thompson v. Continental Ins. Cos., 291 S.C. 47, 48, 351 S.E.2d 904, 905 (Ct. App.1986).

In Southern Atlantic Fin. Services, Inc. v. Middleton, 356 S.C. 444, 590 S.E.2d 27 (2003), the South Carolina Supreme Court rejected the reasonable expectations doctrine and reiterated the general rules of contract construction in South Carolina:

Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly. Ambiguous language in a contract, however, should be

construed liberally and interpreted strongly in favor of the non-drafting party. "After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." A contract is read as a whole document so that "one may not, by pointing out a single sentence or clause, create an ambiguity."

Id. at 29 (internal citations omitted). The Supreme Court stated, "Although we agree with the Court of Appeals' ultimate holding, we find its creation of a "reasonable expectations" test is an unwarranted and unnecessary extension of South Carolina law...." Id.

The doctrine was again rejected by the Court of Appeals in the case of Ex parte United Serv. Auto. Ass'n, 365 S.C. 50, 614 S.E.2d 652 (Ct.App.2005). The court stated, "The doctrine of reasonable expectations, which is essentially that the objectively reasonable expectations of insureds as to coverage will be honored even though a careful review of the terms of the policy would have shown otherwise, has been rejected in South Carolina." Id. at 54, 614 S.E.2d at 654. Because South Carolina courts have repeatedly rejected to doctrine of reasonable expectations, the trial court erred in using the doctrine as a basis for ignoring the unambiguous policy language and finding that Marion L. Eadon is an insured under the terms of the policy.

However, even if South Carolina had adopted this doctrine, the trial court erred in using it as a basis of its decision, because no ambiguity in the policy exists to warrant its application. In jurisdictions that have adopted the reasonable expectations doctrine, it is clear that the doctrine is only utilized after an ambiguity has been identified in the policy language. See National R.R. Passenger Corp. v. Lexington Ins. Co., 445 F.Supp.2d 37 (D.D.C. 2006). The procedure for using the doctrine is described as follows:

"An insurance policy is a contract between the insured and the insurer, and in construing it [a court] must first look to the language of the contract." When that language is ambiguous, "[e]xtrinsic evidence of the parties' subjective intent may be resorted to," and any doubts are resolved in a manner "consistent with the reasonable expectations of the purchaser of the policy." When that language is not ambiguous, however, the policy must be enforced as written, absent a statute or public policy to the contrary.

Id. at 41 (internal citations omitted).

The policy language at issue in this case is not ambiguous. The trial court did not identify an ambiguity in the policy. On the contrary, in discussing the definition of an insured in the policy, the trial court specifically found there was no ambiguity, stating, "While the policy is not ambiguous in the context of this case, if it were ambiguous, that ambiguity would be resolved in favor of coverage." (R. p. 56). As previously discussed, there is no ambiguity concerning whether the named insured on the policy was a corporation or an individual. The policy unambiguously states on its face that the named insured is a corporation. The only ambiguity identified by the trial court was which corporate entities were intended to be covered in the policy, because the names of the corporations were incorrectly identified on the policy. The parties cleared up the ambiguity by stipulating to the correct names of the corporations.

Because there is no ambiguity in the policy, the trial court had no basis upon which to apply the reasonable expectations doctrine. Therefore, the trial court should have enforced the policy as written and found that Marion L. Eadon is not an insured under the terms of the policy.

Even if the trial court had found the policy ambiguous as to whether the named insured was intended to be a corporation or an individual, the only evidence in the record is that Eadon intended to form a corporation to carry out his sign business, he did form a corporation for that purpose and he intended to purchase insurance for that corporation. Eadon denies that he ever operated a sole proprietorship (R. pp. 1101-1103, 1105-1109). There is no basis for a finding that Eadon intended to insure anything other than a corporation.

For the reasons discussed above, the trial court erred in using the reasonable expectations doctrine as a basis to ignore the unambiguous policy language and find

that Eadon is an insured because he "expected" to be covered. Such a ruling ignores South Carolina's long-standing rules of contract construction. The trial court's ruling on this issue should be reversed.

III. THE TRIAL COURT ERRED IN MAKING FINDINGS OF FACT INCONSISTENT WITH THE RECORD IN THE RHODES CASE, THAT HAVE NO SUPPORT IN THE RECORD AND ARE SPECULATIVE.

The trial court's Order contains several statements of fact contrary to or inconsistent with the evidence presented in the Rhodes action and the jury's determination in that action. As previously stated, the parties may not relitigate the factual findings essential to the judgment in the tort action. Sims, 247 S.C. at 86-87, 145 S.E.2d at 525. The parties and trial court are bound by the factual findings essential to the judgment in the Rhodes action and they are not free to pass their own judgment on the facts. One essential factual determination, in light of Judge Dennis' instructions to the jury, was that the jury had to find that Eadon was operating a sole proprietorship as opposed to a corporation in order to find him liable. The trial court is not permitted to disturb that factual finding. To reach the conclusion that Eadon was operating only one sign business is contrary to the factual determination made by the jury.

In addition, whether Eadon gave Rhodes a personal guarantee as to the quality of the signs was disputed at trial. (R. p. 14). The negligent misrepresentation cause of action, based upon the alleged personal guarantee, was dismissed at trial and was not part of the jury's deliberation. The trial court in this case was not requested or required to make its own factual determination regarding whether Eadon gave Rhodes a personal guarantee. It was not a basis of the underlying judgment.

The trial court also makes the factual statement that the SCDOT prevented Rhodes from re-erecting the signs because of safety concerns (R. p. 29). This finding of

⁷ Again, Auto-Owners understands that the jury's verdict in the Rhodes case has been vacated. However, if this Court allows the trial court's order to stand in its current form, Auto-Owners does not wish to waive this argument.

fact is not supported by record in the Rhodes action. The only evidence is that Rhodes was prevented from re-erecting the signs because he was operating a sham business under SCDOT regulations. (Rhodes v. Eadon, Op. No. 2006-UP-413, (Ct. App., filed December 15, 2006).

The Court's implication that Eadon took some action or inaction in relation to Rhodes and Piedmont on behalf of C&B Fabricators, Inc. or LowCountry Signs & Fabrication, Inc. at the time that the sign fell is contrary to the evidence submitted in the Rhodes action. (R. p. 53). The only evidence submitted is that Eadon was completely out of the sign business at the time the sign fell. (R. pp. 1210-1211, 1250, 1095-1096). In addition, there is no evidence that Eadon undertook any action in regards to Rhodes within his duties as an officer of LowCountry Signs & Fabrication, Inc. (R. pp. 1117-1118).

Furthermore, the trial court's statement that Eadon conducted all business on behalf of the corporations named in the policy is contrary to the evidence and the jury's verdict. The evidence shows that Eadon's participation in the corporations was extremely limited. Eadon supplied the money and the corporations were run by other people. Chuck Benenhaley ran and operated C&B Fabricators, Inc., and Eadon testified in his deposition that he never even went to the business location of LowCountry Signs & Fabrication, Inc. (R. pp. 1114-1115).

The Order also contains statements of fact that are speculative and which are not supported by any evidence. The specific findings of fact at issue are discussed in Section I of this brief. Generally, the trial court speculated as to what the jury's award of damages represented, even though the record contains absolutely no evidence as to what the jury's verdict represented, other than a finding that Eadon was not acting on behalf of a corporation. The Defendants opposed Auto-Owners' request to submit special interrogatories, which would have revealed what damages the jury was

awarding. (R. pp. 1-6, 228-230, 1240-1242). The best possible method of determining this information having been thwarted by the Defendants, the trial court should not now be permitted to speculate what the jury's damage award represents without any evidentiary support. Because the trial court based its decision regarding whether the damages presented to the jury are covered by the policy on these unsupported findings of fact, Auto-Owners requests that the trial court's findings be reversed.

IV. THE TRIAL COURT ERRED IN FINDING AN OCCURRENCE OF PROPERTY DAMAGE TRIGGERING COVERAGE UNDER THE COMMERCIAL GENERAL LIABILITY POLICY.

The trial court erred in finding that the claim constituted an "occurrence" of "property damages" under the terms of the Policy and South Carolina law. The Policy states Auto-Owners Insurance "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) (R. p. 1307). The policy states that "this insurance applies to... 'property damage' only if: (1)...the 'property damage' is caused by an 'occurrence' ...; and (2)... 'property damage' occurs during the policy period." See 1(b) (R. p. 1307).

The term "property damage" is defined by the Policy as "physical injury to tangible property, including all resulting loss of use of that property." See 12(a) (R. p. 1320). The Policy defines the word "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." See 9 (R. p. 1319). The word "accident" is not defined in the Policy. In the absence of a definition, the term "should be defined according to the ordinary and usual understanding of the term's significance to the ordinary person." USAA Prop. and Cas. Ins. Co. v. Rowland, 312 S.C. 536, 539, 435 S.E.2d 879, 881-82 (Ct.App.1993) (specifically discussing the word "accident"). The South Carolina Supreme Court has defined the word "accident" to be "an unexpected happening or event, which occurs by chance and usually suddenly,

with harmful result, not intended or designed by the one suffering the harm or hurt.”
Green v. United Ins. Co. of America, 254 S.C. 202, 174 S.E.2d 400 (1970).

The trial court erred in holding the damages are covered, because there was not an accident. An accident must cause the property damage. See Policy 1(a) (R. p. 1307). In a decision analyzing basically the same CGL policy, the Supreme Court held in L-J, Inc. v. Bituminous Fire and Marine Ins. Co., 366 S.C. 117, 621 S.E.2d 33 (2005), that damage caused by faulty workmanship and sustained only by the insured's own work product is not a covered loss. Id. at 123, n.4, 621 S.E.2d at 36, n. 4.

The Supreme Court also made the following statement:

Although our courts have not addressed the specific issue of whether faulty workmanship constitutes an occurrence, we have addressed the issue of whether CGL policies are intended to cover faulty workmanship. For example, this Court has held that a CGL policy is not intended to cover economic loss resulting from faulty workmanship. Moreover, our court of appeals has held that any liability that is incurred because of faulty workmanship is part of the insured's contractual liability, not an insurable event under a CGL policy.

Id. at 121-22, 621 S.E.2d at 35 (internal citation).

The Supreme Court in L-J, Inc. recognized, “this Court has held that a CGL policy is not intended to cover economic loss resulting from faulty workmanship.” 366 S.C. at 121, 621 S.E.2d at 35 (citing Century Indemnity Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 563, 561 S.E.2d 355, 357 (2002)). The Court also recognized that “our court of appeals has held that any liability that is incurred because of faulty workmanship is part of the insured's contractual liability, not an insurable event under a CGL policy.” Id. at 122, 621 S.E.2d at 35 (citing Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 16, 459 S.E.2d 318, 320 (Ct.App.1994)). The Supreme Court added “that 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." Id. at 123, 621 S.E.2d at 36.

In the field of construction, a CGL insurance policy is plainly different from a performance bond, which does "insure" workmanship:

[T]he 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.

A performance bond guarantees that the work will be performed according to the specifications of the contract by providing a surety to stand in the place of the contractor should the contractor be unable to perform as required under the contract.

Id. at 122, 621 S.E.2d at 36-37.

The Supreme Court stated, "[t]he CGL policy may, however, 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." Id. at 123, n.4, 621 S.E.2d at 36, n. 4.

This majority analysis set forth in L-J has been consistently recognized for several years and courts from many states have declined to find coverage for faulty work under CGL policies. See Essex Ins. Co. v. Holder, No. 07-803, 2008 WL 598160 (Ark. Mar. 6, 2008) (finding that faulty work did not constitute an occurrence under the CGL policy).⁸

⁸ See also Burlington Ins. Co. v. Oceanic Design & Constr. Inc., 383 F.3d 940, 948-49 (9th Cir. 2004) (predicting Hawaii courts would find no coverage); Travelers Indem. Co. v. Miller Bldg. Corp., 97 Fed.Appx. 431, 434 (4th Cir. 2004) (predicting North Carolina courts would find coverage only to extent defects damage carpet supplied by owner, not builder); Acuity v. Burd & Smith, 2006 ND 187, 721 N.W.2d 33, 39 (N.D. 2006); Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 899-900 (Pa. 2006); Auto-Owners Ins. Co. v. Home Pride Cos., 684 N.W.2d 571, 577 (Neb. 2004); Corder v. William W. Smith Excavating Co., 556 S.E.2d 77, 82 (W. Va. 2001); Pursell Constr. Inc. v. Hawkeye-Security Ins. Co., 596 N.W.2d 67, 70 (Iowa 1999); Commerce Ins. Co. v. Betty Caplette Builders, Inc., 647 N.E.2d 1211, 1214 (Mass. 1995); Dodson v. St. Paul Ins. Co., 1991 OK 24, 812 P.2d 372, 378 (Okla. 1991); Peerless Ins. Co. v. Brennon, 564 A.2d 383, 386 (Me. 1989).

For there to be coverage, faulty construction must cause an accident. C.D. Walters Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, 281 S.C. 593, 596, 316 S.E.2d 709, 711 (Ct.App.1984); Isle of Palms Pest Control Co., 319 S.C. 12, 459 S.E.2d 318 (Ct.App.1994). In C.D. Walters, this Court held as follows:

The consequence of not performing well is part of every business venture; the replacement or repair of faulty goods and works is a business expense, to be borne by the insured-contractor in order to satisfy customers [. . .]. [A] comprehensive general liability policy does not cover . . . faulty workmanship, but rather faulty workmanship which causes an accident.

281 S.C. at 596-97, 316 S.E.2d at 711-12 (emphasis added).

As stated by the Supreme Court, "[t]his type of insurance 'is not intended to insure business risks, i.e., risks that are the normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage.'" Century Indem. Co., 348 S.C. at 565, 561 S.E.2d at 358 (2002). The South Carolina Supreme Court has stated, "[b]ased on the law of this State, coverage for the repair and/or replacement of the substrate and substructure of the home is excluded by the faulty workmanship provision." Id. at 566, 561 S.E.2d at 359 (citing Engineered Prod., Inc. v. Aetna Cas. & Sur. Co., 295 S.C. 375, 368 S.E.2d 674 (Ct.App.1988)). Furthermore, this Court found in C.D. Walters that a comprehensive general liability policy excluded property damage to work performed by the insured arising out of the work and did not involve accidental injury to property other than that on which the insured performed its work. 281 S.C. at 598, 316 S.E.2d at 712.

The substance of the matter is not changed because Rhodes can state a cause of action in tort. This is the point effectively made in Engineered Prod., Inc. v. Aetna Cas. & Sur. Co., 295 S.C. 375, 379, 368 S.E.2d 674, 676 (Ct. App. 1988)("Because the replacement of the rack system lost in the storm 'was made . . . necessary by reason of

faulty workmanship thereon by or on behalf of [Engineered Products] . . . we therefore hold that Aetna had no duty to defend Engineered Products in the action . . . irrespective of whether the action alleged a claim for a breach of contract or for tort.”). Even if one interjects tort theories into construction law, the matter between Rhodes and Eadon is still a commercial, construction dispute. Moreover, economic losses foreseeably flowing from a contractor’s work are a part of the business risk borne by a contractor and not an insurable loss under a CGL policy.

The faulty construction discussed herein did not cause an accident as to the damages sought by Rhodes. First, the damages found to be covered were sustained to the purported insured’s work. The CGL policy does not cover what is a commercial, contractual matter between Eadon and Rhodes; or what are the predictable economic losses suffered by Rhodes because of faulty work. The damages awarded are the predictable, foreseeable result of the faulty work – the cost to clean up and lost revenue of the signs. The sign did not fall and fortuitously physically injure a third, unrelated person or his/her property, e.g., a passing motorist. There was no claim for physical injury to the interstate highway.

The trial court has erred in finding that damage to the “real estate” constitutes an occurrence under the policy. The trial court repeatedly held that the signs are “real estate” because they are fixtures. From there, the trial court leapt to the conclusion that because the signs are “real estate,” damage to them is covered under the policy. There is no basis either in the law or the policy for such a holding. Whether real estate or not, the defendants must prove that there is damage to “other property” to constitute an occurrence.

“South Carolina courts have defined a fixture as ‘an article which was a chattel, but by being physically annexed to the realty by one having an interest in the soil becomes a part and parcel of it.’” Carjow, LLC v. Simmons, 349 S.C. 514, 563 S.E.2d

359 (Ct.App.2002). If, as the trial court held, the signs are fixtures, the signs and the "real estate," by law, are one and the same. See Hyman v. Wellman Enterprises, Inc., 337 S.C. 80, 82, 522 S.E.2d 150, 151-152 (Ct.App.1999) (By being physically annexed to the realty, chattel becomes a part and parcel of it). As Rhodes has repeatedly argued, the signs are the real estate. That being the case, any damage to the "real estate" is not damage to "other property" and can not constitute an occurrence under South Carolina law. The Supreme Court in L-J, Inc. does not distinguish the land from the road; nor does the Court of Appeals in C.D. Walters distinguish land from the trees. This matter does not concern a fortuitous accident harming a third, unrelated parties' person or property.

The trial court also held that the "real estate" suffered physical injury and "property damage" because it has incurred diminution in value. It lost its value because it is no longer income producing. First, Rhodes' land is not physically injured within the meaning of the term "property damage" in a CGL insurance policy. See Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc., 356 S.C. 156, 163, 588 S.E.2d 112, 115 (2003); see also Braswell v. Faircloth, 300 S.C. 338, 344, 387 S.E.2d 707, 710 (Ct.App.1989) (holding chemical contamination is physical injury). In Brazell Builders, the South Carolina Supreme Court held that diminution in value of real estate is not a physical injury that constitutes "property damage," therefore diminution in value is not an insured loss under a CGL policy. Id. Rhodes submitted damages for diminution in value of the real estate in the amount of \$1.8 million (R. p. 1192). This diminution of value of the real estate is not "property damage" as defined by the policy, because it is not physical damage to the property.

Second, the trial court's holding ignores that the "real estate" is not "other property" separate from the signs themselves (as discussed above) and that all of the claimed damages are a result of the loss of use (loss of rental income) of the signs

themselves. The loss of income was due to the falling of the one sign and the subsequent removal of the others. The only reason the property was generating income was because of the signs, which are the real estate and which constitute "your work", which is discussed further below.

Further, the trial court erred in stating that Auto-Owners admitted that the falling sign was an occurrence. (R. p. 31). The statements of counsel made during a summary judgment motion in January 2004 were prior to the Supreme Court's L-J, Inc. decision. In addition, as discussed above, there was no physical damage to property of a third person due to the falling sign.

Because the trial court erred in finding that the claimed damages for diminution in value of the real estate constitutes "property damage," that holding should be reversed, and this Court should declare that such damages are not covered under the policy.

V. THE COURT ERRED IN FINDING THAT REMOVAL OF THE TWO SIGNS ORDERED BY THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION CONSTITUTES DAMAGES ARISING OUT OF AN OCCURRENCE OF PROPERTY DAMAGE UNDER THE TERMS OF THE POLICY AND THE APPLICABLE COMMON LAW.

The trial court erred in finding that the ordered removal of the signs constitutes property damage or an occurrence under South Carolina law. The South Carolina Department of Transportation ("SCDOT") ordered Rhodes to take the signs down due to the "unsafe conditions of the signs." Rhodes v. Eadon, Op. No. 2006-UP-413, (S.C.Ct.App. filed December 15, 2006). Contrary to the trial court's finding that the signs could not be replaced because the SCDOT deemed them unsafe, the only evidence in the record is that SCDOT would not allow him to reinstall signs because Rhodes was conducting a sham business. Rhodes v. Eadon, Op. No. 2006-UP-413, (S.C.Ct.App. filed December 15, 2006).

Importantly, the order to remove the signs does not constitute "physical injury to tangible property." See Braswell, 300 S.C. at 344, 387 S.E.2d at 710. In Braswell, the

Court of Appeals found that a chemical spill that contaminated some land constituted an occurrence of property damage because the contamination physically injured the land. Id. The Plaintiff also sought damages for the costs to remove containers of stored waste (that had not spilled), which Plaintiff was required to remove pursuant to an order of the South Carolina Department of Health and Environmental Control. Id. at 341, 387 S.E.2d at 708. The Court of Appeals found that the claim for damages to remove the unspilt waste was preventative in nature and had not yet caused contamination or physical injury. Therefore, the Court of Appeals held the cost of compliance with the government mandate to remove the stored waste and containers was not a covered claim because it did not arise out of "property damage." Id. at 345, 387 S.E.2d at 711.

Braswell applies to the situation here. In Braswell, the Court determined that the cost of compliance with the government order to remove the large chemical containers did not arise out of "property damage." Id. In this case, the costs to remove the additional signs that had not fallen were preventative in nature, just as the costs to test, clean, and remove the drum(s) holding chemicals that had not leaked were preventative in nature. The still-standing signs had not caused any "property damage" at the time of the government mandate. In contrast, the trial court erred in its application Helena Chemical Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004) to this analysis. (R. pp. 34-35). Whether the cost of compliance with the clean-up mandate, referred to by the Court in Helena as "damages," *arose out of "property damage"* was not at issue in Helena, as it was in Braswell and is in this case. The issue in Helena was whether environmental clean up costs were "damages" despite the fact that the claims were restitutionary to the insured, rather than payable to a third party as the result of lawsuit. Id. at 636, 594 S.E.2d at 457. The prerequisite coverage issue under the policy, namely, whether those "damages" arose out of "property damage," was not contested by the insurer, since the land was clearly spoiled by the chemical spill, which was "property

damage" pursuant to prior case law. Id. at 636, 594 S.E.2d at 457 (distinguishing the Helena issue from the issue in Braswell).

Notably, the Helena Court only modified the holding in Braswell to the extent that Braswell can be read to suggest that the improper holding in two federal authorities cited therein is the law in South Carolina, namely, that the term "damages" should be narrowly construed to exclude restitutionary damages. Id. at 640, 594 S.E.2d at 459, n.3. However, the Court otherwise reviewed Braswell and concurred with the result in Braswell which held that the removal of the non-leaking drums did not constitute "property damage," and therefore the "damages" associated with testing, cleaning, and removal of these drums were not covered under the policy. Id. at 640, 594 S.E.2d at 459. Accordingly, to this extent, Helena constitutes further authority in favor of reversing the trial court's order. Id.

In its analysis, the trial court conflates the concepts of "property damage" and "damages" that might subsequently flow from "property damage." (R. p. 34). This is evidenced by the court's error in referring to the cost of removal of the still-standing signs, and the loss of revenue from the sign's use, as "property damage" in its decision. (R. pp. 35-36). Rather than properly applying the definition of "property damage" found in the policy, or the relevant principles found in Braswell and Helena, the trial court instead only cites to an unrelated uniform commercial code case and a non-analogous asbestos testing case as authority for its finding of "property damage" in this matter. (R. pp. 35-36). However, since the costs associated with removal of the two signs did not arise out of "property damage" under the CGL policy or the applicable common law, the trial court erred in finding that the claimed economic damages (cost to remove the signs, loss of use and diminution in value of property) related to the removal of the signs are covered damages. This ruling by the trial court should be reversed.

VI. THE TRIAL COURT ERRED IN FINDING THAT THE EXCLUSIONS FOUND IN THE COMMERCIAL GENERAL LIABILITY POLICY ISSUED TO C&B FABRICATIONS, INC. AND LOW COUNTRY SIGNS, INC. DID NOT EXCLUDE THE DAMAGES CLAIMED AGAINST MARION L. EADON IN THE RHODES CASE.

Even if one concludes that there was an "occurrence" of "property damage," the "property damage" claimed by Rhodes and Piedmont is excluded as an insurable loss. The trial court erred in not applying the exclusions found in the policy to the damages. "Exclusions in an insurance policy are to be read independently of each other; they are not to be read cumulatively." Engineered Products, Inc., 295 S.C. at 378, 368 S.E.2d at 675. "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)).

(a) THE TRIAL COURT ERRED IN FINDING THAT EXCLUSION K DOES NOT EXCLUDE THE DAMAGES FOR BOTH THE CONTRACT PRICE OF THE SIGNS AS WELL AS THE LOSS OF INCOME FROM THE SIGNS, EVEN THOUGH THE SIGNS MEET THE DEFINITION OF "YOUR PRODUCT" AND THE TERM "PROPERTY DAMAGE" INCLUDES LOSS OF USE.

While the trial court acknowledged that Exclusion K applies to exclude the contract price of the signs (Eadon's product), it erred in failing to find that Exclusion K also excludes any damages resulting from the loss of use of the signs.

Exclusion K states the insurance does not apply to "property damage" to 'your product' arising out of it." (R. p. 1310).⁹ The term "property damage" is defined by the Policy as:

- 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

⁹ The definition of "your product" includes, "any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by: you...." In addition, "your product" includes "warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your product.'"

b) Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it.

(R. pp. 1319-1320).

Therefore, Exclusion K excludes physical injury to "your product," including all resulting loss of use of "your product." In its initial analysis of whether "property damage" has occurred, the trial court recognized that the term "property damage" includes loss of use, stating, "loss of use of the signs was 'property damage' also." (R. p. 36). It also noted that "Rhodes presented evidence of damages for the loss of use of the billboards that amounted to a present day value of \$4,212,386." (R. p. 37).

Despite acknowledging that "property damage" includes loss of use of the signs and that Rhodes and Piedmont submitted damages for such loss of use, the trial court failed to apply Exclusion K to those damages. Therefore, Auto-Owners requests that the trial court's order be reversed and this Court declare that all damages for loss of use are excluded.

(b) THE TRIAL COURT ERRED IN FAILING TO FIND THAT EXCLUSION L PRECLUDES COVERAGE FOR DAMAGE TO THE SIGNS, INCLUDING THE LOSS OF USE OF THE SIGNS, AND IN FINDING THAT EXCLUSION L IS AMBIGUOUS.

Even if Exclusion K does not apply, Exclusion L is applicable to all the damages.

Exclusion L states the insurance does not apply to the following:

L. 'Property damage' to 'your work' arising out of it or any part of it and including in the 'products-completed operations hazard'.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

The Policy defines "your work" as:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations;

'Your work' includes:

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

(R. p. 1320).

Exclusion L should be read to exclude physical injury to "your work," including all resulting loss of use of "your work." The definition of "your work" includes both the labor and materials. Therefore, the definition encompasses the negligent labor in manufacturing, designing, installing, inspecting and repairing the signs. In addition, the definition includes "any part of it" which then includes the land. Further, unlike Exclusion K, Exclusion L does not exclude "real property" from the definition of "your work". Even if the signs are considered real property, the "your work" exclusion still applies.

Again, the trial court acknowledged that Exclusion L excludes the damage to the signs themselves. (R. p. 37). In so doing, the trial court acknowledged that the signs are, in fact, "your work." However, the trial court wrongly limited the exclusion to the contract price of the signs. It should still be remembered that the definition of "property damage" includes "all resulting loss of use"; therefore, "loss of use" related to "your work" is excluded by Exclusion L. As such, any damages for property damage to, or loss of use of, the signs/real estate, if any, are excluded by Exclusion L.¹⁰

Furthermore, the trial court erred in holding that Exclusion L is ambiguous. First, Auto-Owners is not aware of a South Carolina appellate court decision finding that Exclusion L is ambiguous. Second, Exclusion L is not ambiguous. There is only one reasonable interpretation of Exclusion L, the interpretation discussed above. Furthermore, a finding that a policy provision is ambiguous does not automatically mean

¹⁰ It should be noted that the Court declared in its analysis of exclusion L that "The claim is not for damage to "your work" [the signs]. The claim is for damage to real estate." This statement can not be reconciled with the trial court's acknowledgement on eleven different occasions in the Order that Rhodes and Piedmont presented evidence of damages due to loss of use of the signs.

there is coverage as a matter of law, as stated by the trial court. If a court determines that an ambiguity exists, it must identify a reasonable interpretation of the provision that would result in coverage. Fowler v. Canal Ins. Co., 300 S.C. 420, 422, 389 S.E.2d 301, 303 (Ct.App.1990) ("where language used in an insurance contract is capable of two reasonable interpretations, the construction which is most favorable to the insured should be adopted."). It is not enough to state, "there is an ambiguity, therefore there is coverage." There has to be an alternative reasonable interpretation of the policy provision. Id. The trial court did not, and cannot, identify a reasonable interpretation of the policy language that would result in a finding of coverage under the exclusion.

Because all resulting loss of use of the signs/real estate is unambiguously excluded under Exclusion L, the trial court's order finding coverage for the damages for such loss of use should be reversed. Auto-Owners requests that this Court declare that all resulting loss of use of the signs/real estate is excluded under exclusion L.

(c) THE TRIAL COURT ERRED IN FINDING THAT EXCLUSION M DOES NOT APPLY TO EXCLUDE DAMAGES AWARDED AGAINST EADON.

Exclusion M apply to Rhodes' and Piedmont's claims for loss of use of the signs and the property upon which the two signs that did not fall were erected. Exclusion M states,

this insurance does not apply to 'property damage' to 'impaired property' or property that has not been physically injured, arising out of (1) a defect, deficiency, inadequacy or dangerous condition in 'your product' or 'your work'; . . . This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to 'your product' or 'your work' after it has been put to its intended use.

(R. p. 1310).

It has been held that Exclusion M:

narrows coverage for claims involving the reduced usefulness or impairment of property other than the insured's. The exclusion targets situations where a defective product, after being incorporated into the property of another, must be replaced or removed at great expense

thereby causing loss of use of the property. The effect of the 'impaired property' exclusion is to bar coverage for loss of use claims (1) when the loss was caused solely by the insured's failure to provide work of the quality or performance capabilities called for by the contract and (2) when there has been no physical injury to property other than the insured's work itself.

Standard Fire Ins. Co. v. Chester O'Donley, 972 S.W.2d 1, 10 (Tenn. Ct. App. 1998).

Exclusion M applies to the loss of use/loss of value claims arising from the removal of the two signs that did not fall. There is no allegation of physical injury to the real property due to the removal of the two signs, only economic injury (diminution of value). Therefore, the economic damages claimed for the diminution of value of the real estate due to the removal of the signs is not covered under the policy. Isle of Palms Pest Control Co., 319 S.C. at 20, 459 S.E.2d at 322 (Exclusion M applies to claims for loss of use of property which has not been physically injured); see also, Aetna Cas. & Sur. Co. v. Deluxe Systems, 711 So.2d 1293, 1297 (Fla. Ct. App. 1998).

(d) THE TRIAL COURT ERRED IN FINDING THAT EXCLUSION N DOES NOT APPLY TO EXCLUDE DAMAGES AWARDED AGAINST EADON.

Exclusion N reads as follows:

Damages claimed for any loss, cost or expense incurred by you or other 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 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.

(R. p. 1310) (emphasis added).

The operative words are in bold print and together read as follows: the Policy excludes damages claimed for any loss incurred by other for the loss of use, removal or disposal of your work if such work is withdrawn from use by any organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it. It has been held that Exclusion N is designed "to limit the insurer's exposure in cases where,

because of the actual failure of the insured's product, similar products are withdrawn from use to prevent the failure of those other products which have not yet failed." Action Auto Stores, Inc. v. United Capitol Ins. Co., 845 F.Supp. 417 (W.D. Mich. 1993) (quoting Honeycomb Systems, Inc. v. Admiral Ins. Co., 567 F.Supp. 1400 (D.Me. 1983)).

Applying the exclusion to the facts, it excludes damages for any loss incurred by Rhodes for the loss of use, removal or disposal of the signs if such signs are withdrawn from use by the SCDOT because of a known or suspected unsafe condition in the signs. As previously discussed, the SCDOT required Rhodes to remove the two signs that did not fall because they were unsafe. Rhodes v. Eadon, Op. No. 2006-UP-413, (S.C.Ct.App. filed December 15, 2006). The DOT required that the signs be removed from the marketplace before they failed. Based on Exclusion N, the removal and disposal costs and "loss of use" of the signs withdrawn from use by the SCDOT are not insured damages. The trial court erred in failing to exclude these damages under Exclusion N. Therefore, the trial court's order finding coverage for the damages submitted to the jury for such damages should be reversed.

VII. THE TRIAL COURT ERRED IN STATING THAT "C&B FABRICATION IS ENTITLED TO PAYMENT FROM AUTO-OWNERS" FOR THE COST OF REMOVAL OF ONE OF THE SIGNS THAT DID NOT FALL, WHEN THAT ISSUE WAS NOT RAISED IN THE PLEADINGS OR ARGUED BY THE PARTIES AND THEREFORE WAS NOT PROPERLY BEFORE THE COURT.

This action was instituted by Auto-Owners to determine if the damages awarded against Marion L. Eadon in the Rhodes action are covered by the insurance policy issued to the named insureds. The money that Eadon expended in removing a sign that did not fall was not an element of damages presented in the Rhodes action. This issue was not raised by any party to this litigation and is not framed by the pleadings in this case. Eadon has not pursued any claim in this case.¹¹ (R. pp. 716-722). There is no evidence in this case that Eadon expended any money or how much he expended.

¹¹ In fact, the statute of limitations has long since run on any such claim.

Therefore, the trial court erred in including this finding in its Order. (R. p. 35). In addition, Eadon's cost to remove his own defective workmanship does not constitute an occurrence or property damage under the policy. In addition, the cost of removal is excluded under the terms of the policy discussed above.

CONCLUSION

Based upon the foregoing discussion, Auto-Owners requests that it be granted relief from the trial court's Order and the case be remanded to the trial court with the instruction that it be stayed until the Rhodes case is concluded; or that the Court issue an Order finding that Marion L. Eadon does not qualify as an insured under the policy and that the policy provides no coverage for the damages sought by Rhodes and Piedmont.


ELLIS, LAWHORNE & SIMS, P.A.

A. JOHNSTON COX
JOHN M. MCCANTS
1330 Lady Street, Fourth Floor
Post Office Box 2285
Columbia, South Carolina 29202
TEL: (803) 254-4190

ATTORNEYS FOR APPELLANT
AUTO-OWNERS INSURANCE COMPANY

November 26, 2008

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

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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,

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),
SCACR.

ELLIS, LAWHORNE & SIMS, P.A.

A. JOHNSTON COX
JOHN M. MCCANTS
1330 Lady Street, Fourth Floor
Post Office Box 2285
Columbia, South Carolina 29202
TEL: (803) 254-4190

ATTORNEYS FOR APPELLANT
AUTO-OWNERS INSURANCE COMPANY

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**FINAL BRIEF OF RESPONDENTS
SAMUEL W. RHODES, JR. AND
PIEDMONT PROMOTIONS, INC.**

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 11963
Columbia, South Carolina 29211-1963
(803) 255-0997

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

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STATEMENT OF ISSUES ON APPEAL

- I. **IS MARION L. EADON D/B/A C&B FABRICATION INSURED UNDER AUTO-OWNERS' POLICY FOR THE EVENTS ALLEGED IN THE RHODES AND PIEDMONT AMENDED COMPLAINT ?**
- II. **DO THE EVENTS ALLEGED IN THE RHODES AND PIEDMONT AMENDED COMPLAINT, IF PROVED, CONSTITUTE AN "OCCURRENCE" WITHIN THE MEANING OF THE AUTO-OWNERS POLICY?**
- III. **DO THE FACTUAL ALLEGATIONS AS TO DAMAGES IN THE RHODES AND PIEDMONT AMENDED COMPLAINT, IF PROVED, CONSTITUTE "PROPERTY DAMAGE" UNDER THE AUTO-OWNERS POLICY?**
- IV. **DO THE FOUR EXCLUSIONS (k, l, m, and n) AVOID COVERAGE UNDER AUTO-OWNERS' POLICY?**

STATEMENT OF THE CASE

On December 12, 2001, Samuel W. Rhodes, Jr. (Rhodes) and Piedmont Promotions, Inc. (Piedmont) filed a civil action in the Court of Common Pleas for Fairfield County, South Carolina against "Marion L. Eadon, d/b/a C & B Fabrication" (C&B), (Rhodes action). Auto-Owners Insurance Company (Auto-Owners) employed counsel to defend the action pursuant to a policy of Commercial General Liability Insurance it had issued. The Complaint alleges several causes of action arising out of the event of an outdoor advertising sign having fallen onto both Southbound lanes of Interstate I-77. The sign was a fixture on real estate in Fairfield County owned by Rhodes and leased to Piedmont. The sign, and two identical signs on the same property had been designed, fabricated and installed by C&B Fabrication.

On October 14, 2002, Auto-Owners filed a Declaratory Judgment (DJ) action in the

Court of Common Pleas for York County, South Carolina naming as Defendants "Samuel W. Rhodes, Piedmont Promotions, Inc., and Marion L. Eadon, C&B Fabrications, Inc. and Low Country Signs, Inc." The Auto-Owners Complaint sought (1) a declaration of no coverage for the events described in the Complaint of the Rhodes action; (2) that it had no obligation to defend "Marion L. Eadon d/b/a C&B Fabrications, Inc." in the Rhodes action; and (3) that the proceedings in the Rhodes action "be stayed, pending resolution of the issues in this lawsuit." [R. pp.66-72]

Auto-Owners' Complaint alleged that there was no "occurrence" as defined in its policy and that policy exclusions k, l, m, and n avoided coverage under its policy for the Rhodes action. Rhodes and Piedmont answered the Auto-Owners Complaint denying the material allegations of the Complaint and prayed for a declaration that there is insurance coverage for the events alleged in the Rhodes action. [R. pp. 112-117]

On March 14, 2003, Auto-Owners filed an Amended Complaint which reflected (1) abandonment of its claim of no obligation to defend "Marion L. Eadon, d/b/a C & B Fabrications, Inc." in the Rhodes action and (2) abandonment of its prayer that the Rhodes action be stayed pending resolution of its DJ action. [R. pp. 147-152]. Rhodes and Piedmont answered the Auto-Owners Amended Complaint denying the material allegations of the Amended Complaint and prayed for a declaration that there is insurance coverage for the events alleged in the Rhodes action. On June 20, 2003 an Amended Complaint was filed in the Rhodes action. [R. pp. 119-134]

On December 18, 2003, Auto-Owners filed a Motion for Summary Judgment. That motion was briefed extensively and argued and denied. The Rhodes case was tried and a

verdict rendered and judgment entered on the negligence cause of action only in favor of the Plaintiffs on September 2, 2004.

On September 3, 2004, Auto-Owners again filed a Motion to Amend its Complaint and also filed a Motion to Continue the case beyond its scheduled trial at the September 13, 2004 term of Court. At the opening of Court on Monday, September 13, 2004 the Motions were heard. Both Motions were opposed by all Defendants. The Court granted the Motion to Continue. The parties conducted more discovery.

Cross Motions for Summary Judgment were made by the parties and were extensively briefed by the parties. On June 5, 2005 the Court granted the Auto-Owners Motion to Amend its Complaint and Auto-Owners' Second Amended Complaint was filed on July 18, 2005. [R. pp. 635-641]. Answers by the Defendants (and Counterclaim by Rhodes and Piedmont) were made to Auto-Owners' Second Amended Complaint.

Auto-Owners' Second Amended Complaint alleged non-coverage under its policy pursuant to the same exclusions referenced in the Complaint and First Amended Complaint (k, l, m, and n). The prayer of the Second Amended Complaint sought a declaration whether "Auto-Owners has a duty to indemnify Marion L. Eadon d/b/a C&B Fabrication for the damages awarded against Marion L. Eadon d/b/a C&B Fabrication" in the Rhodes action. [R. p.641]. On August 3, 2005 the Court entered Orders denying the Motions for Summary Judgment. [R. pp. 10-12]

The case came for trial on June 26, 2006 and a jury was empaneled. The parties entered into a factual stipulation. The Court decided the remaining issues non-jury which included consideration of depositions, discovery material, a transcript of the Rhodes trial,

and briefs submitted by the parties. In an Order filed November 7, 2006 the Court ruled that Marion L. Eadon, d/b/a C&B Fabrication is insured under the Auto-Owners policy for the events alleged and for the Judgment entered in the Rhodes action. [R. pp. 13-60]. Auto-Owners filed post-trial motions on November 22, 2006. On December 15, 2006 the Court of Appeals reversed the Judgment in the Rhodes case on the venue issue and ordered that it be transferred to Clarendon County for trial (Court of Appeals Unpublished Opinion Number 2006-UP-413, filed December 15, 2006). Auto-Owners filed a Motion to Vacate the Court's Order of November 7, 2006 or to Stay the case. The Trial Court issued a Supplemental Order dated March 23, 2007 [R. pp. 61-62] and a revised Supplemental Order on March 30, 2007. [R. pp. 63-64]. Auto-Owners filed its Notice of Appeal on April 10, 2007. The South Carolina Supreme Court denied the Petition for Certiorari in the Rhodes action on February 21, 2008.

STATEMENT OF FACTS

Marion L. Eadon has established and operated several diverse business interests and activities in Clarendon County over the years including the chartering of several corporate entities and partnerships [They included: Kit & Kel; H&E Clarendon, Inc.; Employment Solutions, Inc. (name changed to Eadon Solutions, Inc.); K&S Prefab, Inc.; Lowcountry Signs & Fabrication, Inc.; Snyder Tire Company; Black River Construction, LLC; East Coast Equipment Rentals, LLC; C&B Fabricators, Inc. [R. pp. 1232-1234; Rhodes trial Tr. (Vol. III) pp. 178-180; 9-1-04]. In the latter part of 1998 he started a sign manufacturing business in Manning, South Carolina. The sign manufacturing business was conducted in the name of "C&B Fabrication". [R. p. 106]. He obtained a policy of Commercial General Liability

Insurance from Auto-Owners with effective date of September 17, 1998. The policy was issued in the name of "C&B Fabrications, Inc.". On September 23, 1998, Eadon chartered a South Carolina S-Corporation "C&B Fabricators, Inc.". Eadon is the sole stockholder of that entity. [R. p. 1212]. Eadon had only one sign manufacturing business.

Rhodes is the sole owner of Piedmont, a South Carolina S-Corporation. As a result of discussions between Rhodes and Eadon, C&B Fabrication submitted a written proposal, dated July 9, 1999, to Rhodes to design, fabricate and erect three outdoor advertising signs on Rhodes' Fairfield County real estate he had leased to Piedmont. After further negotiations, with a reduced agreed price of \$153,960.00 from the submitted price of \$155,460.00, the written proposal submitted by C&B Fabrication to Rhodes was accepted by Rhodes on August 4, 1999. [R. p. 1245]. At that time the agreed one-half payment of the cost (\$76,880.00) was made by Rhodes payable with a check of Piedmont to "C&B Fabrication". [R. p. 1246]. Nothing in the discussions or in the written proposal from C&B Fabrication to Rhodes indicated that C&B Fabrication was a corporate entity. [R. p. 1245; Rhodes trial, Pl's Exhibit #4]. The three signs were designed, fabricated and installed. The work was completed and final payment made on February 22, 2000. At that time a set of engineering drawings purportedly for the three signs were delivered to Rhodes. The drawings were prepared for "C&B Fabrication" by Thompson Engineering Group, Athens, Tennessee, and were dated July 13, 1999. Nothing on the drawings indicate C&B Fabrication is a corporate entity. [R.pp. 1215-1216; Rhodes trial, Pl's Exhibit #6].

On September 17, 1999, Auto-Owners renewed its Commercial General Liability Policy naming "C&B Fabrications, Inc." as insured.

On April 3, 2000, just six weeks after the three signs were erected, "C&B Fabricators" went out of business "and does not have any assets". [R. p. 1250; Eadon's letter to Rhodes of December 29, 2000; Rhodes trial, Pl's Exhibit #8-B; Exhibit 10 to Rhodes SJ Brief]. However, Eadon's sign business as C&B Fabrication continued. The same month, April 2000, a bank account was established, checks printed and business conducted in the name of "C&B Fabrication D/B/A Low Country Sign Fabrication Inc". [R. pp. 376-407]. When Eadon "went out of business" as C&B Fabricators, Inc. on April 3, 2000, Eadon chartered another corporation on May 1, 2000 "Low Country Signs & Fabrication, Inc.". [R. p.362; R. pp. 1210-1211; Rhodes trial Tr. (Vol. III), pp. 134-135] This sign business continued at least through November 2000 as demonstrated by cancelled checks and bank statements. [R. pp. 376-407; Rhodes trial Plaintiffs' Exhibits #47, #48; Exhibits 14, 15 and 16 to Rhodes SJ Brief].

On September 17, 2000, Auto-Owners renewed its Commercial General Liability Policy with the name of the insured being "C&B Fabrications Inc & Low Country Signs Inc". [R. p. 436]. This second renewal of the policy, as had the two prior policies, included "products-completed operations" and described the activity of the insured as "sign mfg.", "sign erection, installation or repair". [R. p. 436; (Auto Owners Policy Declarations Page)].

Eadon also had at least one other bank account in the name of "Marion L. Eadon, Jr. D/B/A C&B Fabrications" [R.p. 375; Rhodes trial Plaintiffs' Exhibit #49; Exhibit 13 to Rhodes SJ Brief].

In December 2000, the middle sign was discerned to be leaning toward the interstate. Rhodes contacted Eadon about this, requesting that he repair the sign and inspect the other

two signs. Exchanges were ongoing for some weeks, including facsimile letter exchanges between Eadon and Rhodes. [R. pp. 1249-1250; Rhodes trial Plaintiffs' Exhibits #8A, #8B; Exhibit 10 to Rhodes SJ Brief.] On or about January 17, 2001, Eadon had a crew make adjustments to the leaning sign. Rhodes was on the premises at the time and he requested the crew to inspect the other two signs and was assured by them that they would do so. [R. pp. 334-337; Rhodes deposition, pp. 37-45]. On Saturday afternoon, January 20, 2001, the Southernmost sign fell across both Southbound traffic lanes of I-77. The South Carolina Department of Transportation (SCDOT) required Rhodes to immediately take down the remaining two signs and cancelled all three sign permits because they "are unsafe and present a hazard to the motoring public." [R. pp. 1251-1252; Rhodes trial, Pl. Exhibits #14 and #16].

There was no corporate entity "C&B Fabrications, Inc.", which is the name of the insured in the Auto-Owners policy issued September 17, 1998, the first renewal policy issued in September, 1999 and in the second renewal issued September 17, 2000. The additional name for the named insured in the second renewal of September 17, 2000 was "Low Country Signs Inc". [R. p. 1296]. At the time the second renewal Auto-Owners policy was issued on September 17, 2000, Eadon was doing business as C&B Fabrication. [R. p. 375]. C&B Fabrication was doing business as "Low Country Sign Fabrication Inc." [R. pp. 376-407; R. p. 1258]. The bank statements of C&B Fabrication for April 2000 to November 2000 show a cash intake of over \$346,000.00. [R. pp. 394-407; R.p.1257; Rhodes trial Pl's Exhibits #47, #48; Exhibit 16 to Rhodes SJ Brief]. Bank deposits were made with deposit slips printed "C&B Fabrication". [R. pp. 1277-1278; R. pp. 1213, 1215; Rhodes trial Tr.,

(Vol. III), pp. 142, 144; 9/1/04; Rhodes trial Def. Exhibits #24, #25]. Eadon had only one sign manufacturing business. It was the one in operation at the time the second renewal of the Auto-Owners policy occurred September 17, 2000, the policy year in which the event occurred. Eadon confirmed in his Rhodes trial testimony what the bank records document: that is, as of September 2000, C&B Fabrication was doing business as Low Country Sign Fabrication Inc. [R.p. 1219; Rhodes trial Tr., (Vol. III), p.152; 9/1/04]. The purpose in obtaining insurance was to insure the sign manufacturing business. Eadon testified that he assumed the policy "covered everything that I was affiliated with, myself and all my affiliations with the sign business whatever name it was in." [R. pp. 1108, 1112, 1113, 1119, 1120, 1121, 1127, 1128; Eadon deposition pp. 19, 26, 27, 44, 45, 47, 53, and 60].

In the Rhodes case the core of the defense position is stated in the Answer to the Amended Complaint in the Rhodes case [Paragraph 6] "that Eadon individually did not make the proposal to Rhodes, but C&B Fabricators, Inc. submitted a proposal to Rhodes." [R.p. 203].

Three years and one month after the Rhodes action was filed, and four months after the jury verdict in favor of the Plaintiffs in the Rhodes action, in its second Motion for Summary Judgment on January 14, 2005, Auto-Owners, for the first time, asserted that Marion L. Eadon d/b/a C&B Fabrication is not insured under its policy because the policy insures only a corporate entity.

STANDARD OF REVIEW

An action to determine coverage under an insurance policy is an action at law. Auto-Owners Insurance Company, Inc. v. Newman, ___ S.C. ___, ___ S.E.2d ___, (Opinion No.

26450, filed March 10, 2008). The construction of an insurance contract is a matter of law for the Court. Winchester v. United Insurance Company, 231 S.C. 432, 99 S.E.2d 34, 36 (1957). In an action at law, tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support. His findings are equivalent to those of a jury in an action at law. King v. PYA/Monarch, Inc., 317 S.C. 385, 453 S.E.2d 885 (1995). See Auto-Owners Insurance Company v. Rollison, ____ S.C. ____, ____ S.E.2d ____ (Opinion No. 26512, Filed June 30, 2008). The Supreme Court does not consider the weight of the evidence in an appeal in a law case. Parnell v. Carolina Coca Cola Bottling Company, 231 S.C. 426, 98 S.E.2d 834 (1957).

ARGUMENT

I. MARION L. EADON D/B/A C&B FABRICATION IS INSURED UNDER AUTO-OWNERS' POLICY FOR THE EVENTS ALLEGED IN THE RHODES AND PIEDMONT AMENDED COMPLAINT.

The factual details of Eadon acquiring three successive policies of liability insurance with Auto-Owners to insure his sign business appear in the November 7, 2006 Trial Court's Order [pp. 40-47; R. pp. 52-59]. They are adopted and incorporated here by reference.

A

The sign designed, fabricated, installed and inspected (three days before) by C&B Fabrication fell on I-77 on January 20, 2001. Auto-Owners was notified and conducted its investigation. On February 8, 2001 Auto-Owners wrote Eadon a reservation of rights letter which referenced only the issues of whether the event was "an occurrence", whether there was "property damage" as defined in the policy and the identified exclusions, all of which terms were referenced by excerpts from the policy. [R. pp. 1280-1283; Exhibit 2 to Rhodes

SJ Brief]. On August 2, 2001 Auto-Owners wrote Rhodes a letter which stated "We do insure C&B Fabrications" and that "we have coverage for resulting damages that this sign has caused". The letter mentions an \$1800.00 draft enclosed in payment for some of the damages caused by the sign falling. [R. p. 344; Exhibit 4 to Rhodes SJ Brief]. Auto-Owners also paid other elements of damages caused by the sign falling.

The Rhodes action was filed on December 12, 2001. Upon receipt of those suit papers Auto-Owners wrote Eadon on February 8, 2002 stating that it was defending the action against "Marion L. Eadon d/b/a C&B Fabrications." It stated the defense was under a reservation of rights and identified counsel it had retained to defend the action. It stated "we have paid for what we believe is covered property damage thus far" under the policy and that "we will be defending presently due to the claim of damage to real property that is alleged in these suit papers." It further stated "I had previously outlined the exclusions that we would not cover the actual damage to the signs in my past reservation of rights letter to you. 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. pp. 1288-1289; Exhibit 5 to Rhodes SJ Brief]. This letter referenced only the exclusions in the policy as to property damage coverage. No question or issue was presented as to whether the policy insured "Marion L. Eadon d/b/a C&B Fabrication." At this point, there was no ambiguity about the defendant in the Rhodes action being Marion L. Eadon d/b/a C&B Fabrication. There was no ambiguity about the identity of the insureds named in the Auto-Owners policy. They are referenced in the letter as "C&B Fabrications, Inc. & Low Country Signs, Inc." This reservation of rights letter raised no question about the distinction between the insured

named in the policy and the defendant in the Rhodes action, Marion L. Eadon d/b/a C&B Fabrication.

The Answer and defense position in the Rhodes action by counsel selected and paid for by Auto-Owners is that "Eadon individually did not make the proposal to Rhodes, but C&B Fabricators, Inc. submitted a proposal to Rhodes." [R. p. 203; Answer to Amended Complaint in Rhodes action, Paragraph 6; Exhibit 12 to Rhodes SJ Brief]. Thus, the defense ploy in the Rhodes action is an attempt to deflect liability onto a defunct corporate entity with no assets (C&B Fabricators, Inc.) that went out of business six weeks after it installed the defectively designed and fabricated three signs along I-77. That defense ploy is still ongoing. C&B Fabricators, Inc. was not then a named insured in the policy. Had it been sued, Auto-Owners' position would have been that it is not insured under the policy but that C&B Fabrication is the insured.

The Auto-Owners DJ action was filed October 14, 2002, some ten months after the Rhodes action was instituted. In its Complaint, Auto-Owners did not allege or contend that Marion L. Eadon d/b/a C&B Fabrication is not insured under its policy. The only questions raised pertain to whether there had been an occurrence and whether the four exclusions applied. On March 6, 2003 Auto-Owners filed a Motion to Intervene in the Rhodes action in which it stated in part:

Auto-Owners Insurance Company issued an insurance policy to the Defendant with liability coverage for the period of time relevant to this action (the Policy). [R. p. 347; Exhibit 6 to Rhodes SJ Brief]

The Defendant in "this action" (the Rhodes action) is Marion L. Eadon d/b/a C&B Fabrication. Auto-Owners filed an Amended Complaint on March 14, 2003. Nothing in the

Amended Complaint raises any issue or question as to whether Marion L. Eadon, d/b/a C&B Fabrication is insured. On April 21, 2003 Auto-Owners filed an Amended Notice of Motion to Intervene in the Rhodes action in which it again made the identical statement it made in the earlier Motion to Intervene on March 6, 2003. [R. p. 154; Exhibit 7 to Rhodes SJ Brief]. In Auto-Owners' Memorandum, dated July 9, 2003, in support of its Motion to Intervene in the Rhodes action it stated that Auto-Owners "is the insurance carrier for the Defendants" in the Rhodes action. The Defendant in the Rhodes action is Marion L. Eadon d/b/a C&B Fabrication. [R. p. 222; Exhibit 8 to Rhodes SJ Brief].

Auto-Owners' Amended Complaint, filed March 14, 2003 alleges that "Marion L. Eadon d/b/a C&B Fabrications, Inc. completed and installed the signs in February of 2000." [R. p. 148; Paragraph 6, Amended Complaint]. The same Amended Complaint alleges that its policy "included property damage liability coverage, subject to certain conditions and exclusions set forth in the policy." [R. p. 149; Paragraph 10, Amended Complaint]. The only provisions of the policy mentioned in the Amended Complaint are "occurrence" and the four exclusions.

The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible.

Elrod v. All, 243 S.C. 425, 134 S.E.2d 410, 416 (1964); Postal v. Mann, 308 S.C. 385, 418 S.E.2d 322, 323 (Ct. App. 1992). An admission contained in a pleading in one action may be admitted in evidence against the pleader on a trial of another action. Young v. Martin,

254 S.C. 50, 173 S.E. 2d 361 (1970). Perforce the statements in its documents filed in the Rhodes action, Auto-Owners is bound by its statements.

Auto-Owners' first Motion for Summary Judgment was filed on December 29, 2003 and heard by the Court on January 22, 2004. In its Motion and during argument and presentation to the Court, no mention or reference or contention was made by Auto-Owners that Marion L. Eadon d/b/a C&B Fabrication was not insured under its policy. Only the issues of whether there had been an occurrence and the exclusions was mentioned. Auto-Owners entered a defense of Marion L. Eadon d/b/a C&B Fabrication and gave every indication, both by word and deed, that it insured Marion L. Eadon d/b/a C&B Fabrication subject to the reservation as to whether there had been an occurrence within the policy meaning and whether one or more of the four identified exclusions apply. By its words and by its conduct, Auto-Owners has waived any question of coverage or at the very least it is estopped to now contend that Marion L. Eadon d/b/a C&B Fabrication is not insured under its policy.

The scope of risk under an insurance policy can be extended by estoppel if the insurer has misled the insured into believing the particular risk is within the coverage.

The Crescent Company of Spartanburg, Inc. v. Insurance Company of North America, 266 S.C. 598, 225 S.E.2d 656, 659 (1976); Standard Fire Insurance Company v. Marine Contracting and Towing Company, 301 S.C. 418, 392 S.E.2d 460 (1990). The first contention by Auto-Owners that Marion L. Eadon d/b/a C&B Fabrication is not insured under its policy was four months after the jury verdict in the Rhodes case when Auto-Owners filed its Second Motion for Summary Judgment on January 14, 2005. Even if Auto-Owners,

by its words and by its deeds, is not barred by waiver or estoppel from asserting that Marion L. Eadon d/b/a C&B Fabrication is not insured under its policy, its words and deeds are significant facts from which reasonable inferences can and have been drawn to show the intent of the parties to their contract because "the conduct of the parties is entitled to great weight in interpreting an ambiguous contract." Langston v. Niles, 265 S.C. 445, 219 S.E.2d 829, 834 (1975); "Subsequent conduct of the parties, after executing a contract, is admissible to show their intent." Mass Corporation v. Thompson, 62 NC App., 31, 302 S.E.2d 271, 275 (1983); Management Systems Associates, Inc. v. McDonnell Douglas Corporation (4th Cir., - NC; 1985) 762 F.2d 1161, 1171; "Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." Old Colony Trust Company v. City of Omaha, 230 U.S. 100, 33 S.Ct. 967 (1913).

C&B Fabrication issued at least one check payable to Auto-Owners dated August 17, 1999 [R. pp. 1130-1131; Watson deposition, pp. 49-50; Exhibit 5 to Watson deposition]. The sign business operated by Eadon was C&B Fabrication. Marion L. Eadon did business as C&B Fabrication. There was only one sign business. That was the business for which the insurance was sought and obtained for a period of three years. There were two successive corporate entities chartered by Eadon but there was only one sign business. 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. [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; Watson deposition pp. 62-63; Exhibit 13 Watson deposition].

B

Appellant's contentions are: that the policy insures only a corporate entity; that Rhodes and Piedmont sued only "Marion L. Eadon individually" [Appellant's Brief, p. 14]; that an individual "cannot d/b/a a corporation" [Appellant's Brief, p. 13]; and because the policies list only a corporate name(s) [even though the purported corporations named in the policy(s) did not in fact exist] as insured there is no coverage under the policy. In the alternative, Appellant contends that even if Eadon is covered as an officer of a corporation "it was not within Eadon's duties as an officer to run the corporation, ... negotiate any contracts or supervise the sign work of any of the employees." [Appellant's Brief, p.6]. These contentions are the exact opposite of the facts. Eadon is not 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.

The proposal to design, fabricate and install the signs was by C&B Fabrication. [R. p. 1245; Rhodes trial, PI's Exhibit #4.] Nothing in the proposal refers to C&B Fabrication

as a corporate entity. The letterhead says "C&B Fabrication." Only "C&B Fabrication" is mentioned in the text of the proposal. This proposal by C&B Fabrication is dated July 9, 1999. On the face of the proposal it shows that it is issued to "Sam Rhodes." It was accepted by Sam Rhodes on August 4, 1999. [R. pp. 1245, 1144; Rhodes trial, PI's Exhibit #4; Tr.p. 54.] Rhodes testified he "was accepting it [the proposal] from Marion Eadon, C&B Fabrication." [R. pp. 1145-1146; Rhodes Tr. pp.55-56.] 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. 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].

The first check in payment of one-half the contract price was issued to "C&B Fabrication". [R. pp. 1246; 1144-1145; Rhodes trial Pl's Exhibit #5-A; Tr. pp.54-55.] The

checks in payment for these signs were deposited using deposit slips with the printed letterhead "C&B Fabrication", not on deposit slips with the printed letterhead "C&B Fabricators, Inc." [R. pp. 1277-1278; 1213; Rhodes trial Def's Exhibits #24 and #25; Tr. (Vol. III), p. 142.]

In the fax letter exchanges between Rhodes and Eadon on December 29, 2000, Eadon's 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 under date of July 9, 1999. [R. p. 1250; Rhodes trial Pl's Exhibit #8-B.] 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 C&B Fabrication to C&B Fabricators, Inc. a corporate entity which, under his own statement "went out of business April 3, 2000". However, C&B Fabrication was still in business as it had been all along. Thompson Engineering Group prepared the drawings from which the signs were supposed to have been made. These drawings were prepared for "C&B Fabrication". Nothing on the drawings indicates "C&B Fabricators, Inc." [Rhodes trial, Pl's Exhibit #6.] Thompson Engineering did two or three hundred other drawings for C&B Fabrication, not C&B Fabricators, Inc. [R. p. 1216; Rhodes Tr. (Vol III), p.145.]

C&B Fabrication was in business when it issued the proposal to Sam Rhodes, July

9, 1999. C&B Fabrication was still doing business in September 2000. Eadon signed checks printed "C&B Fabrication D/B/A Low Country Sign Fabrication Inc". Eadon confirmed this in his trial testimony. [R. pp. 1258, 1218, 1219; Rhodes trial Pl's Exhibit #47; Tr. (Vol III), pp.151-152.] Bank statements for "C&B Fabrication DBA Low Country Sign Fabrication Inc Rt 2 Box 825, Manning SC" from April 2000 through October 2000 demonstrate the business activity of C&B Fabrication. [R. pp. 1259-1274; pp. 1220-1221; Rhodes trial Pl's Exhibit #48; Tr.(Vol III), pp.153-154.] It was in business at the end of the year 2000 as demonstrated by its tax deposit sheet for that year [R. p. 1257, 1217; Rhodes trial Pl's Exhibit #46; Tr. (Vol III), p.150.] Low Country Sign Fabrication Inc continued to do basically what C&B Fabrication had been doing. [R. pp. 1223-1225; Rhodes Tr.(Vol III) pp.156-158.] Statements from the bank loan department were sent to "M.L. Eadon, Jr., doing business as C&B Fabrication." [R. pp. 1275, 1221; Rhodes trial Pl's Exhibit #49; Tr.(Vol III) p.154.] Eadon is known as Marion L. Eadon, Marion L. Eadon, Jr., and M.L. Eadon. They are one and the same person. [R. p. 1212; Rhodes trial Tr. (Vol III) p.140.] Bills and invoices from suppliers were addressed to "C&B Fabrication" [R. pp. 1276, 1222; Rhodes trial Pl's Exhibit 50; Tr. (Vol III) p.155.]

C&B Fabrication made the proposal to Rhodes. C&B Fabrication designed the signs. C&B Fabrication ordered drawings for the signs from Thompson Engineering. C&B Fabrication fabricated the signs. C&B Fabrication failed to follow the design drawings by Thompson Engineering. C&B Fabrication erected the signs. C&B Fabrication purported to correct the leaning sign and inspect the other two signs three days before one of them fell on the southbound travel lanes of I-77. The payment made when the proposal was accepted by

Rhodes was to C&B Fabrication. Payments for the sign were deposited to the checking account of C&B Fabrication. Only Eadon and his bookkeeper had check writing authority on the bank account of C&B Fabrication. It is a fact that Eadon established, owned, operated and, beyond any question, did business as C&B Fabrication all of the time regardless of whether C&B Fabrication was in a corporate status part of the time, all of the time or none of the time. C&B Fabrication is the sign business. Marion Eadon is C&B Fabrication. Whatever C&B Fabrication did or failed to do is what Marion Eadon did or failed to do.

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 excerpt in the Trial Court's Order [R. pp. 57-58]; (p. 45-46) from the case of McCall v. IKON, d/b/a IKON Educational Services, 363 S. C. 646, 611 S.E.2d 315 (Ct. App. 2005) is incorporated herein by reference but an excerpt from the IKON case is a reminder:

"If a corporation has acquired a name by usage, an adjudication against it by the name so acquired is valid and binding." "Furthermore, use of a trade name will not invalidate the judgment if the misnomer does not cause the corporation prejudice."

Reasonable Expectations of the Parties

Auto-Owners' cites Southern Atlantic Financial Services, Inc. v. Middleton, 356 S.C. 444, 590 S.E.2d 27 (2003) as authority for the "reasonable expectations" doctrine having

been rejected by the Supreme Court. That assertion is a gross overstatement. The issue in Middleton was whether the acceleration clause language in a promissory note, pertaining to prior notice of default prior to the acceleration clause becoming effective, was ambiguous. The Trial Court did not find an ambiguity. The Court of Appeals reversed, holding that there was an ambiguity. In addition, the Court of Appeals cited a California case on non-enforcement of adhesion contracts when the contract "does not fall within the reasonable expectations of the weaker or 'adhering party'". On certiorari, the Supreme Court affirmed the Court of Appeals finding that the promissory note acceleration clause language was ambiguous but modified the Court of Appeals opinion on the basis that the subject provisions of the promissory note were "patently ambiguous." The further modification by the Supreme Court was that invoking the reasonable expectations test was unnecessary "as this case may be decided utilizing basic principles of contract ambiguity." In a footnote, the Supreme Court said "for the same reasons, we do not address whether the present contract is one of adhesion; the Court of Appeals' opinion is modified to the extent it so held."

Allstate Insurance Company v. Mangum, 299 S.C. 226, 383 S.E.2d 464 (Ct. App. 1989) was a declaratory judgment action by Allstate to determine liability under its homeowner's policy. The policy had been issued to husband and wife. On a family outing on a boat, husband and one of the daughters drowned. Wife sought to recover against Allstate on the homeowner's policy for the drowning death of husband. By express language, the policy excluded liability coverage for "bodily injury to an insured person." Under the policy definitions, both husband and daughter were insured persons. Because of the policy language the Trial Court held there was no coverage under the policy. The Court

of Appeals affirmed that ruling. The plaintiff had argued in the Trial Court that the Court adopt the doctrine of reasonable expectations to find coverage. The Trial Court did not rule upon that contention. In addressing the appellant's contention that the reasonable expectation doctrine be applied to find coverage, the Court of Appeals said "this view has never been accepted by the Supreme Court of this State. In South Carolina insurance policies are subject to the general rules of contract construction." The Court then said that even though the issue had been argued before the trial judge, because the trial judge failed to pass on the issue and the party asserting it did not preserve it for appeal by requesting a reconsideration under Rule 59(e) SCRPC, appellant had "failed to preserve for appeal the argument of reasonable expectations."

Two months later the Supreme Court decided Kennedy v. Columbia Lumber and Manufacturing Company, Inc., 299 S.C. 335, 384 S.E.2d 730, (1989). In that case the Supreme Court stated 733:

One of the primary objectives of the law of contracts "is to carry out the reasonable expectations of the parties"

quoting Lane v. Trenholm Building Company, 267 S.C. 479, 299 S.E. 2d 728 (1976).

Discussing the holding in Lane, the Supreme Court, in Kennedy, also said:

To have held against the buyer there [in Lane] would have been to frustrate his reasonable expectations when he entered the transaction.

Kennedy does not mention Allstate v. Mangum. Thus, under Lane and Kennedy "to carry out the reasonable expectations of the parties" is an established part of the law of contracts and is, indeed, "one of the primary objectives of the law of contracts."

In Joe Harden Builders, Inc. v. Aetna Casualty & Surety Company, 326 S.C. 231, 486

S.E.2d 89, 91 (1997), the Supreme Court answered a question certified from the United States District Court pertaining to coverage under an insurance policy. The Supreme Court's answer concluded with:

We conclude this interpretation of the policy best meets the fair expectations of the parties under the language of the policy.

Joe Harden Builders did not mention Allstate v. Mangum. Thus, under the Supreme Court opinions, the "reasonable expectations" ["fair expectations" in Joe Harden Builders] of the parties is general contract law, including insurance contracts.

In the later case of Ex Parte United Services Automobile Association v. Moore, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005) the issue before the Court of Appeals was whether the inclusion of the name of a person as an operator on the declaration page of an automobile liability policy created an ambiguity as to whether that individual was a named insured under the policy where the policy language identifying the named insured did not include that person. The Court of Appeals held that merely naming a person as an operator on the declarations page, but not including that person as a named insured in the policy, did not constitute an ambiguity in the policy and affirmed the Trial Court. In discussing cases from other jurisdictions which had reached a different result under similar policy declaration page language the Court of Appeals said "these cases, however, relied on the doctrine of reasonable expectations." It then said that the doctrine has been rejected in South Carolina and cited Allstate v. Mangum for that proposition. No reference was made in the opinion to Kennedy v. Columbia Lumber and Manufacturing nor any mention of Joe Harden Builders.

Southern Atlantic Financial Services, Inc. v. Middleton, was not an insurance contract

case. Middleton merely deleted the reasonable expectations doctrine as an element of consideration in that case. Middleton does not purport to be a general, globalized treatment of the application of the reasonable expectations doctrine in South Carolina. Middleton does not mention Kennedy v. Columbia Lumber and Manufacturing Company, 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’”). Middleton does not reference Joe Harden Builders, Inc. v. Aetna Casualty & Surety Company, 326 S.C. 231, 486 S.E.2d 89, 91 (1997), which was a case interpreting an insurance contract (“we conclude this interpretation of the policy best meets the fair expectations of the parties under the language of the policy.”) Middleton does not mention Allstate Insurance Company v. Mangum, 299 S.C. 226, 383 S.E.2d 464 (Ct. App. 1989) (where the Court of Appeals declined to apply the doctrine of reasonable expectations because the trial judge failed to pass on the issue.). Middleton did not mention Ex Parte United Services Automobile Association v. Moore, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005) (which cites Mangum for authority that the doctrine of reasonable expectations has been rejected in South Carolina.)

It is submitted that pursuant to Kennedy and Joe Harden Builders, Inc., under the law of contracts, and particularly the law pertaining to insurance contracts, the reasonable expectations doctrine is permissible and applicable when based upon factual proof. Factual proof is abundant in the instant case.

At the same time, as was the result in Allstate Insurance Company v. Mangum, 299 S.C. 226, 383 S.E.2d 464 (Ct. App. 1989), and Southern Atlantic Financial Services, Inc. v. Middleton, 356 S.C. 444, 590 S.E.2d 27 (2003), the Trial Court may be affirmed regardless

of the application of the reasonable expectations of the parties. It was only an element of a combination of facts which separately and collectively supported the Trial Court's finding that there is coverage under Auto-Owner's policy. Foremost among these is the factual Stipulation of the parties at trial that "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." The "insureds" [plural and not singular] on the Auto-Owners' policies [plural and not singular], were reformed. The policies covered three years. The first policy year began September 17, 1998. Low Country Signs & Fabrication, Inc., was not chartered until May 1, 2000. The one constant throughout all the sign manufacturing activity of Eadon is C&B Fabrication. Marion Eadon is C&B Fabrication. Under the Stipulation C&B Fabrication is a trade name of the corporate entities. Thus, Marion L. Eadon d/b/a C&B Fabrication is insured under the policy.

On the other hand, if the position of these Respondents on this issue is not accepted, it is respectfully submitted that this case and all the issues presented by it should be certified to the Supreme Court to stabilize once and for all the applicable law on reasonable expectations. The facts establish beyond question that Marion Eadon's reasonable expectations were that his premium payments for three years purchased insurance for Marion L. Eadon d/b/a C&B Fabrication.

II. THE EVENTS ALLEGED IN THE RHODES AND PIEDMONT AMENDED COMPLAINT, IF PROVED, CONSTITUTE AN "OCCURRENCE" 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 "an '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 March 10, 2008).

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 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 authorities on this cited by the Trial Court in its Order [R. pp. 25-31; pp. 13-19] are incorporated herein by reference to avoid unnecessary repetition. See Auto-Owners Insurance Company v. Home Pride Companies, Inc., 268 NEB 528, 684 N.W. 2d 571 (2004) (the contractor "failed to install the shingles in a workman-like manner and that such faulty workmanship caused substantial and material damage to the roof structures and buildings" stated a claim under a standard GCL policy); High Country Assocs. v. New Hampshire Ins. Co., 648 A.2d 474 (N.H.1994) (negligent construction which resulted in water-damaged walls caused by continuous exposure to moisture through leaky walls); Mooney Corporation

v. United States Fidelity and Guaranty Co., 136 N.H. 463, 618 A.2d 793 (1992) (one unit of a fifty-two unit condominium project was damaged by a chimney fire: an inspection revealed charring in four other units and as a result the State Fire Marshall prohibited the use of the fireplaces in all the units: this loss of use of all fifty-two fireplaces constituted property damages caused by an occurrence under the GCL policy). The New Hampshire court in the High Country case cited its earlier Mooney case. The High Country case was cited with approval by the South Carolina Supreme Court in L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 366 S.C. 117, 621 S.E.2d 33 (2005).

Auto-Owners cites L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 366 S.C. 117, 621 S.E.2d 33 (2005) apparently for the proposition "that any liability that is incurred because of faulty workmanship is part of the insured's contractual liability, not an insurable event under a CGL policy." What L-J, Inc. held was clearly stated in the later case of Auto-Owners Insurance Company, Inc. v. Newman, ___ S.C. ___, ___ S.E.2d ___ (Opinion No. 26450, filed March 10, 2008) where the Supreme Court stated:

Specifically, the Court found that the developer's claim alleged negligent construction causing damage only to the work product itself (i.e. the roadway), and that such a claim was merely one for faulty workmanship. *Id.* Because damages to the work product alone resulting from faulty workmanship could not typically be said to have been "caused by an accident or by exposure to the same general harmful conditions," the Court reasoned that such claims for faulty workmanship did not constitute an "occurrence" falling within the policy's coverage. *Id.*

The *L-J* court went on to explain, however, that a CGL policy may provide coverage where a claim for faulty workmanship alleges third party bodily injury or damage to other property. *Id.* n.4. To illustrate this theory, the Court examined the case of High Country Associates v. New Hampshire Insurance Co., in which a condominium homeowners' association sued the condominium builder seeking damages allegedly due to negligent

construction of the condominium buildings. 648 A.2d 474, 476 (N.H. 1994). The complaint alleged that the continuous moisture intrusion resulting from a subcontractor's defective installation of siding resulted in moisture seeping into the buildings, which caused widespread decay of the interior and exterior walls and loss of structural integrity over a nine-year period. *Id.* The *High Country* court found that the complaint was not simply a claim for faulty workmanship seeking damages to repair the defective work product itself, but rather, was a claim for negligent construction resulting in damage to other property. *Id.* at 477. The court determined that the continuous exposure to moisture due to the defective installation of siding constituted an "occurrence" under the policy and that, in this way, the homeowners' association had properly "alleged negligent construction that resulted in an occurrence, rather than an occurrence of alleged negligent construction." *Id.* at 478. Accordingly, *High Country* held that the CGL policy would cover the homeowners' association's claim against the builder, if successful. *Id.*

This Court's attempt to distinguish an "occurrence" of alleged negligent construction, such as that which took place in *L-J*, from negligent construction resulting in an "occurrence", such as that which took place in *High Country*, has apparently caused confusion in other courts' interpretations of the ultimate holding in *L-J*.

The Supreme Court again cited the New Hampshire *High Country* case as an example of "negligent construction resulting in an 'occurrence'". Whether coverage exists under a CGL policy for the resulting damage is not to be determined merely by identifying the source of the damage as originating in "negligent construction", or "faulty workmanship". 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 beyond damage to the "faulty workmanship" to other property the damage caused by that negligent "faulty workmanship" is covered under the CGL policy. In fact, if the property damage caused by the negligent "faulty workmanship", cannot be repaired or corrected without also repairing and correcting the very "faulty workmanship" which caused the damage, the cost of replacing or redoing the "faulty workmanship" is also insured as a part of the damages. That was the

factual setting in Newman. The “defective workmanship” in Newman was “the negligent application of stucco... [which] allowed for continuous moisture intrusion resulting in substantial water damage to the home’s exterior sheathing and wooden framing.” In Newman, Auto-Owners contended that the cost of “replacing and repairing the defective stucco itself constitutes property damage to the work product alone” which should have been excluded as covered under its CGL policy. That contention was rejected by the Supreme Court which said:

Because this underlying moisture damage could neither be assessed nor repaired without first removing the entire stucco exterior, the trial court correctly concluded that the arbitrator’s allowance for replacement of the defective stucco was covered by the CGL policy as a cost associated with remedying the other property damage that resulted from an “occurrence.”

The Supreme Court’s recurring citation of the New Hampshire High Country opinion as a factual example of coverage under a CGL policy is significant, particularly in view of the fact that High Country cited and relied upon the earlier New Hampshire case of Mooney Corporation v. United States Fidelity and Guaranty Co., 136 N.H. 463, 618 A.2d 793 (1992).

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 basis for the 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).

When four, 10’6” high outdoor advertising signs, stacked two deep, on a 130’ tower

fall onto I-77 traffic lanes, that is an accident." The Trial Court correctly held that that was an "occurrence" within the Auto-Owners policy.

III. THE ALLEGATIONS IN THE RHODES AND PIEDMONT AMENDED COMPLAINT, IF PROVED, WILL ESTABLISH "PROPERTY DAMAGE" UNDER THE AUTO-OWNERS POLICY.

Insuring agreement 1a says (page 1; R.p. 1307):

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

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.

The Amended Complaint in the Rhodes action alleges (Paragraph 11; R.p. 121):

In December, 2000, it was observed that one of the three signs was leaning towards Interstate Highway I-77 and this was reported to the Defendant who was requested to correct the leaning and to inspect the other two signs and make any needed corrections to them. On or about Wednesday, January 17, 2001, the Defendant made adjustments to the sign that was leaning and purportedly checked the other two signs.

The Rhodes and Piedmont Amended Complaint alleges (Paragraph 20 e; R.p. 125):

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.

Rhodes testified on his deposition in the Rhodes case that his real estate is not worth what it was with the signs up. [R. p. 333; Exhibit 1 to Rhodes and Piedmont SJ Brief.] At the Rhodes trial the Plaintiffs' expert real estate appraiser testified as to the damage the real estate had sustained [R. pp. 1190-1192; Rhodes Tr., (Vol. III, pp. 27-29, 9-1-04.) By reason of the Rhodes trial, it is certain that when the Rhodes case is tried again that there will be competent evidence corroborating and supporting the allegations of the Rhodes and Piedmont Complaint of damage to real estate and the consequences flowing therefrom.

The Rhodes real estate is certainly "tangible property." The three signs were fixtures and a permanent part of the property. The use of that property, which included the advertising signs as a part of it, generated revenue. Because the signs are no longer a part of the property there is a resulting "loss of use" of that property. Moreover, even had the real estate (tangible property) not sustained physical injury, there is a "loss of use of tangible property [the signs] that is not physically injured." [Policy Paragraph 12b; R.p. 1320]. Accordingly, even had the real estate not sustained physical injury, there is a loss of use of that real estate. The policy language expressly includes each circumstance (physical injury or loss of use) as "property damage".

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.)

Helena Chemical Company v. Allianz Underwriters Insurance Company, 357 S.C. 631, 594 S.E.2d 455 (2004). Helena has significant parallels to the instant case. It was an insurance coverage case. The Supreme Court held that “the plain, ordinary meaning of ‘damages’ includes environmental clean-up costs under an insurance policy. Of particular importance is the Supreme Court’s adoption of language from Bausch & Lomb, Inc. v. Utica Mutual Insurance Company, 625 A.2d 1021 (Md. 1993):

“Policy-holders will, instead, reasonably infer that the insurer’s pledge to pay damages to apply generally to compensatory outlays of various kinds, including expenditures made to comply with administrative orders or formal injunctions. The ordinary person understands ‘damages’ as meaning money paid to make good an insured loss in this context, environmental response costs fall within that definition.” (Emphasis added).

Helena, 357 S.C. at 638, 594 S.E.2d at 458.

The “claims” against Helena were the demands by public authority (EPA and DHEC) that Helena clean up the polluted soil. Helena’s damages were the costs of complying with those “claims”. In the instant case when the sign fell on Interstate 77, public authority then asserted “claims”. The South Carolina Department of Transportation (SCDOT) (1) mandated that the fallen sign be removed from the traffic thoroughfare. It also (2) mandated that the remnants of the fallen sign be removed from its adjacent right-of-way. It also (3) mandated that the two remaining signs be taken down because they were a public safety hazard. These mandates were “claims”. Compliance with these “claims” per public authority required “the expenditure of money” (Helena). In the instant case the costs of removing the fallen sign is a claim covered by Auto-Owners’ policy. In fact, it has

acknowledged that claim as being covered and has paid some of the costs associated with removing the fallen sign from the traffic lanes and from the right-of-way. Accordingly, under the parallels of *Helena*, damage resulting from the sign which fell, which precipitated the removal of the remaining two signs, is "property damage."

"Property damage" included "the costs of inspection, testing and the removal of the hazardous asbestos material" from school buildings. Kershaw County Board of Education v. United States Gypsum Company, 302 S.C. 390, 396 S.E.2d 369 (1990). Property damage alleged and proved in the Rhodes action was damage to the real estate and the costs of removal of the signs. Damage to the real estate included physical injury in that its physical features were altered and changed (permanent fixtures were removed) and it was left with residual buried (twenty-eight feet in poured concrete) metal stumps (twenty-one feet above-ground) and wreckage of the sign remnants which will be costly to remove. The loss of use of the signs was "property damage" also.

Although it arose under the commercial code, the holding of the Court in Gasque v. Eagle Machine Company Limited, 270 S.C. 499, 243 S.E.2d 831 (1978), is informative:

The issue then is whether damages in the form of diminution in value of the defective product and consequential economic loss constitute damage to the *property* of Appellant within the meaning of Code Section 36-2-318....
Diminution in value of the subject product and consequential loss of profits occasioned by its defective performance constitute property damage.

Gasque, 270 S.C. at 503, 243 S.E.2d at 832.

The Rhodes action trial establishes that there is evidence to prove the allegations of property damage. It would be unreasonable to assume that the same or similar evidence will not be presented when the case is retried. There is property damage within the terms of the

Auto-Owners policy. The Trial Court correctly ruled on this issue. It should be affirmed.

IV. NONE OF THE FOUR EXCLUSIONS (k, l, m, n) AVOID COVERAGE UNDER THE AUTO-OWNERS POLICY

Exclusion k

Exclusion k says [Policy, pp. 1, 4; R.p. 1310]:

This insurance does not apply to:

* * *

k. "Property damage" to "your product" arising out of it or any part of it.

C&B Fabrication's "product" was the signs, the purchase price of which was \$153,960. If applicable, Exclusion k would, at most, exclude only \$51,820.00 in damages, the cost of the sign which sustained damage when it fell. ¹ [R. p. 1245; Rhodes trial, Pl's Exhibit #4] However, Exclusion k is intended to preclude coverage for economic losses to an insured based on his having to fulfill contractual obligations, Fisher v. American Family Mut. Ins. Co., 579 N.W.2d 599, 605-06 (N.D. 1988). Exclusion k, moreover, has no application based on the products-completed operations hazard, discussed in more detail hereafter.

Exclusion l

Policy exclusion l reads (Policy page 4; R.p. 1310):

The Defendants stipulated "that damage to the sign which fell is not covered under the policy." (Trial Court's Order, p. 39; R. pp. 51-52) The Defendants also stipulated "that \$153,960.00 of the actual damages verdict in the Rhodes action, which represents the total purchase price of all three signs, not just the one sign that fell, is not covered by Auto-Owners' policy. This Stipulation does not include damages awarded in the Rhodes action for the loss of use of the signs and the cost of removal." (Trial Court's Order, p. 39; R.pp. 51-52).

including in the "products - completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

The Rhodes and Piedmont claim is not for damage to "your work" [the signs]. The claim is for damage to the real estate and for loss of use of the improved [revenue-producing permanent fixtures - the signs] real estate. Even so, were the exclusion applied to "your work" [the signs], then the excluded damages would be only the value of the product. The purchase price of the signs was \$153,960.00. Only one sign sustained damage. That would be the only excluded damage to "your work" if the exclusion applies. However, Auto-Owners seeks to eliminate all coverage because it contends there was damage to "your work [or product]" [one of the signs, not all three]. That is not what the law is. In the case of Kennedy v. Columbia Lumber and Manufacturing Company, Inc., 299 S.C. 335, 384 S.E.2d 730 (1989) the Supreme Court made clear the circumstances under which tort liability is incurred:

Where a purchaser buys a product which is defective and physically harms him, his remedy is in either tort or contract. This is so, the analysis provides, because his losses are more than merely "economic." ...

If a builder performs construction in such a way that he violates a contractual duty *only*, then his liability is only contractual. If he acts in a way to violate a legal duty, however, his liability is both in contract and in tort. ...

A violation of a building code violates a legal duty for which a builder can be held liable in tort for proximately caused losses. *Terlinde*, 275 S.C. 399, 271 S.E.2d 770, imposes a legal duty on builders to undertake construction commensurate with industry standards. Where a building code or industry standard does not apply, public policy further demands the imposition of a legal duty on a builder to refrain from constructing housing that he knows or should know will pose serious risk of physical harm. ...

A cause of action in negligence will be available where a builder has violated

a legal duty, no matter the type of resulting damage. ...

A builder may be liable to a home buyer in tort despite the fact that the buyer suffered only "economic losses" where: (1) the builder has violated an applicable building code; (2) the builder has deviated from industry standards; (3) the builder has constructed housing that he knows or should know will pose serious risks of physical harm.

Kennedy, 299 S.C. at 345-47, 384 S.E.2d 736-38.

There was evidence in the Rhodes trial that Marion L. Eadon d/b/a C&B Fabrication (1) violated the applicable building codes; (2) deviated from industry standards; and (3) constructed signs that posed serious risk of physical harm. (Rhodes trial testimony of Plaintiffs' expert structural engineer, Alan Campbell: sign was not built according to design; sign did not meet industry standards; sign did not meet code requirements; sign defective and not capable of withstanding code-prescribed wind loads; sign fell because it did not meet building code and industry standard requirements: [R. pp. 1176-1177;; Rhodes Tr., pp. 249-250; 9/30/04]).

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).

In Century Indemnity Company v. Golden Hills Builders, Inc., 348 S.C. 559, 561 S.E.2d 355 (2002), the Supreme Court answered questions certified to it by the Fourth Circuit Court of Appeals as to coverage under a CGL Policy. The Supreme Court held that the faulty workmanship exclusion prevented coverage under the policy under the facts. The Court was then asked to answer the question whether coverage was restored by the products-completed operations hazards provision of the policy. The Court said:

The policy provides that the faulty workmanship exclusion does not apply to "property damage" included in the "products-completed operations hazard" provision. This provision states:

11. a. "Products-completed operations hazard" includes all ... "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
 - (1) Products that are still in your physical possession; or
 - (2) Work that has not yet been completed or abandoned.
- b. "Your work" will be deemed completed at the earliest of the following times:
 - (1) When all of the work called for in your contract has been completed. ...
 - (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Under this provision, the products-completed operations hazard does not include "property damage" which arose out of Insured's products that were still in Insured's physical possession, as was the case here because Insured still had physical possession of the home. *B.L.G. Enterprises, Inc., supra* (when contract is unambiguous, clear, and explicit, it must be construed according to terms parties have used).

Further, the products-completed operations hazard does not include "property damage" which arose out of Insured's work that had not yet been completed. The work had clearly not been completed at the end of the policy period.

Century, 348 S.C. at 567-68, 561 S.E.2d at 359. Again, the damages alleged in the Rhodes and Piedmont Complaint are not for damage to "your work" but for damage to and loss of use of the Rhodes real estate.

In Century the Supreme Court held that the products-completed operation hazard did not afford coverage for two reasons: (1) the property damage arose out of the insured's products that were still in the insured's physical possession and (2) the property damage arose out of the insured's work that had not yet been completed. These two factual

circumstances prevented the applicability of the products-completed operations hazard. Otherwise, the products-completed operations hazards would have restored coverage had the insured not been in physical possession of its product and had the insured's work been completed before the damage. Applying the same test in the instant case the insured no longer had physical possession of its product and the insured had completed all the work on its project. The products-completed operations hazard language in Auto-Owners' policy in the instant case is verbatim the same, including the paragraphs and sub-paragraph numbers and the format. (Auto-Owners' policy 11.a, page 13; R.p. 1319).

As to both exclusion k and exclusion l, if either precludes coverage because the damage to other property arose out of "your product" or arose out of "your work", then there would never be a covered claim under the policy because the policy insures the very thing these two exclusions purport to exclude because every claim will of necessity arise out of "your product" or "your work". That is what the policy insures. The policy insures only that. Eliminating those two areas eliminates all coverage. That creates the classic ambiguity. When that ambiguity exists there is coverage as a matter of law.

Isle of Palms purchased a liability insurance policy to protect itself against claims for damage to property of others caused by its negligence. The declarations page of the policy included "exterminator" in the list of covered general liability hazards, and the premium was based primarily on Isle of Palms' receipts from its exterminating business. To give effect to the professional liability exclusion would render the policy virtually meaningless, because it would exclude coverage for all claims arising from Isle of Palms' exterminating services, the very risk contemplated by the parties. See *Canal Ins. Co. v. Insurance Co. of N. Am.*, ___ S.C. ___, 431 S.E.2d 577 (1993) (refusing to construe exclusion to prohibit coverage for the only vehicle contemplated by the parties). The internal inconsistency created by an exclusion which purports to bar coverage for claims arising out of the very operation sought to be insured renders the

policy ambiguous, and we must resolve that ambiguity in favor of coverage. *South Carolina Budget & Control Bd. v. Prince*, 304 S.C. 241, 403 S.E.2d 643 (1991); *Millstead v. Life Ins. Co. of Virginia*, 256 S.C.449, 182 S.E.2d 867 (1971) (ambiguity in exclusion should be resolved in favor of coverage). Accordingly, we refuse to interpret the exclusion so as to bar claims for property damage caused by Isle of Palms' negligence in performing its exterminating services. (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).

When a policy is "susceptible to more than one reasonable interpretation, one of which would provide coverage, this court must hold as a matter of law in favor of coverage." (Emphasis added.)

S.C. State Budget and Control Board v. Prince, 304 S.C. 241, 403 S.E.2d 643, 647 (1991); McPherson v. Michigan Mutual Insurance Company, 310 S.C. 316, 426 S.E. 2d 770, 771 (1993); Goldston v. State Farm Mutual Automobile Insurance Company, 358 S.C. 157, 594 S.E.2d 511 (Ct. App. 2004).

Because the signs may not be re-erected, the damage "cannot be repaired or restored by simply [replacing the signs]" (Auto-Owners Insurance Company v. Home Pride Companies, Inc., 268 NEB 528, 684 N.W.2d 571 (2004)). The consequential damage to the real estate cannot be undone. Accordingly, the "your work" and "impaired property" exclusions do not apply in the instant case any more than they applied in the Auto Owners Insurance Company v. Home Pride Companies, Inc case.

Exclusion m

Policy exclusion m says [Policy, page 4; R.p. 1310]:

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- 1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or ...

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

Exclusion m does not apply because there was a sudden and accidental physical injury to "your product" and "your work" after it had been put to its intended use which resulted in "loss of use of other property". The fall of the sign on I-77 was sudden. The fall of the sign on the interstate was accidental. The fall of the sign on the interstate resulted in physical injury to the sign. Auto-Owners has acknowledged that the sign had been put to its intended use. [R. p. 68]. The sudden, accidental fall of the sign resulted in "loss of use of other property" (the use of the property and the signs to produce rental income). Accordingly, the exclusion within exclusion m applies. Even in the absence of the effectiveness of the exclusionary provision in exclusion m, it still would not be applicable.

Definition 5, policy page 11, [R. p. 1317] defines "impaired property" as follows:

"Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

- a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
- b. Your fulfilling the terms of the contract or agreement.

The tangible property is the real estate. It can still "be used". It is not "less useful"

because it incorporates "your product" or "your work". It is not the existence of "your product" or "your work" that makes it less useful. It is the inability to erect signs on the property that makes it "less useful". This circumstance is not because "your product" or "your work" is "incorporated" into the real estate. It is a consequence of what "your product" and "your work" did to the real estate that makes it "less useful".

Furthermore, the "repair, replacement, adjustment or removal of 'your product'" would not restore the property to full use because no signs can be re-erected under the SCDOT mandate. The sole, proximate cause of that SCDOT mandate was the sudden (but after prior warnings of the sign leaning), accidental fall (solely because the "faulty workmanship" violated building codes, deviated from industry standards, and did not follow design plans) of the sign on I-77. Accordingly, the real estate is not "impaired property" as defined in the policy.

The case of Standard Fire Insurance Company v. Chester - O'Donley & Associates, Inc., (TN Ct. App. 1998) 972 S.W.2d 1, dealt with the coverage of a CGL policy and discussed several provisions generally, including their historical origin. One was the "impaired property" exclusion [exclusion "m" in Auto-Owners' policy]. That Court said:

This exclusion was first included in commercial general liability policies in 1966 and was later amended and refined in 1973, 1986, and 1990. It narrows coverage for claims involving the reduced usefulness or impairment of property other than the insured's. (Cites omitted). The exclusion targets situations where a defective product, after being incorporated into the property of another, must be replaced or removed at great expense thereby causing loss of use of the property. (Cites omitted).

The effect of the "impaired property" exclusion is to bar coverage for loss of use claims (1) when the loss was caused solely by the insured's failure to provide work of the quality or performance capabilities called for by the

contract and (2) when there has been no physical injury to property other than the insured's work itself. **The exclusion does not apply if there is damage to property other than the insured's work, (cite omitted), or if the insured's work cannot be repaired or replaced without causing physical injury to other property. (Emphasis added.)**

Chester-O'Donley & Assoc., 972 S.W. 2d at 9-10.

Glens Falls Insurance Company v. Donmac Golf Shaping Company, Inc., 203 Ga App. 508, 417 S.E.2d 197 (Ga. Ct. App. 1992) was a DJ action construing a comprehensive GCL policy. In that case the developer of a golf course learned after its construction that it had occurred on Federally protected wetlands and that substantial portions of the project had been built on wetlands without the necessary permits in violation of Federal law. The developer sued the engineering firm responsible for the engineering work and the architect who designed the project and the contractor who built the project. The developer alleged "out of pocket expenses to mitigate the illegal wetland development in that he had been required to undertake restoration and preservation of certain areas within the project; to eliminate certain proposed residential loss in the project, and to purchase additional land outside the project for similar preservation purposes." The developer also alleged damage in that substantial reduction in the fair market value of the project had occurred. Damages of five million dollars were sought. (The contract price of the project was 1.2 million dollars). The Trial Court and the Court of Appeals held that there was coverage under the policy and that exclusions "m" and "n" did not apply. [Exclusions "m" and "n" are identical with exclusions "m" and "n" in Auto-Owners' policy in the instant case.] In holding that these exclusions did not apply under the facts the Georgia Court of Appeals said:

By contrast, the damages sought by the developer against Donmac are not

directly related to the cost of repairing and replacing deficiencies in Donmac's work on the project -- and therefore excluded from the CGL coverage as business risks -- but rather are claims beyond the scope of the contractual expectations for additional tort damages caused by the alleged deficiencies in Donmac's performance.

Glens Falls, 417 S.E.2d at 200-01. Exclusion m does not apply.

Exclusion n

Policy exclusion n says (Policy, page 4; R. p. 1310):

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 damages alleged in the Rhodes action are not for loss, cost or expense for loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of "your product", "your work", or "impaired property". The Rhodes and Piedmont Complaint's allegations are for damages to the real estate as a consequence of the event of the sign falling and the resulting mandate of the SCDOT requiring the other two signs to be removed. The loss claimed is not for damage to "your product" or "your work". The claimed loss is damage to the real estate, and its loss of use.

Exclusion n was also addressed by the Tennessee Court of Appeals in Standard Fire Insurance Company v. Chester - O'Donley & Associates, Inc., (TN Ct. App. 1998) 972

S.W.2d 1. The Tennessee Court said:

This provision first appeared in commercial general liability policies in 1966 and takes its name from the occurrences in the aircraft industry where enormous loss-of-use claims resulted from the grounding of all airplanes of the same type because one airplane crashed, and its "sisterships" were suspected of having a common defect. (Cites omitted).

The exclusion is designed to shield insurers from liability for the costs associated with unanticipated product recalls. (Cites omitted). It does not apply to claims involving losses resulting from the failure of the insured's product or work, (cite omitted) or to claims that are not based on the withdrawal or recall of the insured's own product or work. (Cites omitted).

The removal of defective products that failed after their installation does not come within the sistership exclusion of the insured's general liability policy because there has been no general withdrawal of similar products from the general marketplace. (Cites omitted). Based upon the undisputed facts, the "sistership" exclusion does not apply in this case because there is no evidence of a general recall of similar products or materials from the marketplace. (Emphasis added.)

Chester - O'Donley & Assoc., 972 S.W. 2d at 10-11.

Another case applying the same result to the "work performed" and "sistership" exclusions is Erie Insurance Exchange v. Colony Development Corporation, 136 Oh App 3d 406, 736 N.E.2d 941 (1999) In an action for damages arising out of the design, construction and sale of a condominium complex the liability insurer brought a DJ action to determine coverage under a CGL policy. The Trial Court held there was no duty to defend and no coverage but the Court of Appeals reversed, saying:

The complaint alleges various damages, principally to the condominium units and common areas themselves, but the complaint also alleges damages to the surrounding landscape including death of and damage to major trees, excessive erosion, and excessive accumulation of water. ...

Erie, 736 N.E. 2d at 947.

As to the "work-performed exclusion" the Court said:

The exclusion, however, operates to exclude coverage only for damage

to the work of the insured; it does not exclude coverage for collateral damage to other property. ...

However, some of the damages alleged in the underlying action do not appear from the complaint to be damages to the condominium units or common areas. In particular, the Association alleges damages to the surrounding landscape, including erosion and death of major trees.

Id. At 948-49 (Emphasis added).

As to the "sistership" exclusion (the language being identical with the language in Auto-Owners' exclusion "n") the Ohio Court said:

As noted by this Court before "[c]ourts have interpreted this 'sistership' exclusion to require a recall from the market in order for insurance coverage to be excluded." (Cite omitted) When such a recall occurs, damages are excluded by this provision for the removal from the market of "sister" products to prevent future failures. **"However, damages claimed for the initial failure would not be excluded."**

Id. at 950 (Emphasis added.)

In Auto-Owners v. Home Pride Companies, Inc., 268 Neb. 528, 684 N.W.2d 571 (2004), the Nebraska Supreme Court there dealt with the Auto-Owners policy exclusions for damages to (2) "your work" or (3) "impaired property". [Identical terms in an apparently identical policy as the one in the instant Auto-Owners' case, exclusion n.] The Court said:

[E]xclusion "n(2)" does not serve to exclude Appletree and Peterson's damage claim because their claim extends beyond the cost to simply repair and replace the contractors' work, i.e., to reshingle the roofs. As previously noted, Appletree and Peterson allege that the contractors' faulty workmanship resulted in substantial damage to the roof structures and buildings. Therefore their claimed damages to the roof structures and buildings fall outside of the exclusion.

Similarly, in regard to exclusion "n(3)," the policy states that the property is not "impaired" unless it is capable of being restored by the "repair, replacement, adjustment or removal of ... 'your work'; or ... [y]our fulfilling the terms of the contractor agreement." Therefore, because damage to the roof structures and buildings cannot be repaired or restored by simply

reshingling the apartment roofs, they are not "impaired property" within the meaning of exclusion "n(3)."

Home Pride, 684 N.W.2d at 579-80. Exclusion n does not apply.

The Trial Court ruled correctly that none of the four exclusions apply to the facts alleged (and once proved in the Rhodes case trial) in the Rhodes and Piedmont Amended Complaint. The Trial Court should be affirmed.

CONCLUSION

Auto-Owners instituted their DJ action over five years and nine months ago. When the case was first scheduled for trial three years and eleven months ago it successfully moved, over objection, to continue the case. When it was tried over two years ago it unsuccessfully moved the Trial Court to stay the case. After its appeal it successfully moved, over objection, that its appeal be stayed. It now asks this Court to stay its appeal. Auto-Owners brought this DJ action. Its moneyed corporate status exempts it from the aging and dying course under which mere human beings exist. Auto-Owners can litigate forever. It has a track record to demonstrate that fact. Sam Rhodes is a mere mortal. He cannot endure endless litigation. "Justice delayed is justice denied" should be more than a slogan. This case should proceed without further delays or stays.

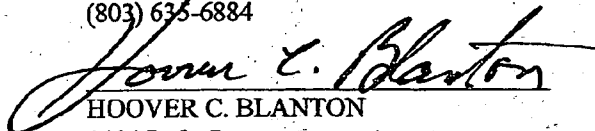
For three years Marion L. Eadon d/b/a C&B Fabrication paid the premiums to insure the sign business he owned. He should not be denied the benefit of the insurance coverage. The Auto-Owners policy includes "products-completed operations hazard" coverage. The allegations of the Rhodes and Piedmont Complaint certainly allege property damage. Because of the prior Rhodes case trial, this Court has a preview of evidence that will be

presented when the case is tried again. This preview of the facts corroborates the allegations of the Rhodes and Piedmont Complaint as alleging property damages that are covered under Auto-Owners' policy. The Trial Court should be affirmed.

All of which is respectfully submitted.



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



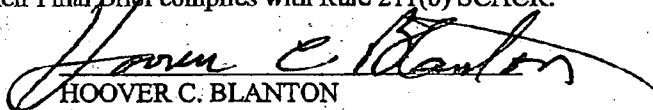
HOOVER C. BLANTON
1414 Lady Street
Post Office Box 11963
Columbia, South Carolina 29211-1963
(803) 255-0997

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

December 1, 2008

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondents Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc. certifies that their Final Brief complies with Rule 211(b) SCACR.



HOOVER C. BLANTON
1414 Lady Street
Post Office Box 11963
Columbia, South Carolina 29211-1963
(803) 255-0997

December 1, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

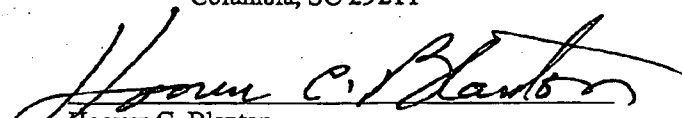
Samuel W. Rhodes, Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., Respondents.

CERTIFICATE OF SERVICE

I, the undersigned attorney for Respondents Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc., hereby certify that a copy of the **Final Brief of Respondents Samuel W. Rhodes and Piedmont Promotions, Inc.** was served on all parties, by mailing in the United States mail, postage prepaid, a copy thereof, to attorneys for all parties, this 1st day of **December, 2008**, addressed as follows:

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

William O. Sweeny, III, Esquire
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
1515 Lady Street
Columbia, SC 29211


Hoover C. Blanton

STATE OF SOUTH CAROLINA
In the Court of Appeals

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, C&B Fabrications, Inc.,
and Low Country Signs, Inc..... Respondents

**INITIAL BRIEF OF RESPONDENTS MARION L. EADON DBA C&B
FABRICATION, C&B FABRICATIONS, INC. AND LOW COUNTRY SIGNS**

WILLIAM O.SWEENEY, III
WILLIAM R. CALHOUN, JR.
SWEENEY WINGATE & BARROW, P.A.
Post Office Box 12129
Columbia, S. C. 29211
(803) 256-2233

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

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ISSUES ON APPEAL

1. Did the Trial Court correctly determine, in the situation that presented itself, that Mr. Eadon was an insured under Auto-Owners policy?
2. Did the Trial Court correctly determine that there was an "occurrence" as defined by the policy and South Carolina law?
3. Did the Trial Court correctly determine that property damage occurred as a result of an occurrence?
4. Did the Trial Court correctly determine that none of the exclusions in Auto-Owners' policy were effective to deny coverage?

STATEMENT OF THE CASE

This is a declaratory judgment action in which Auto-Owners initially sought declarations that it had no duty under its insurance contract to defend or indemnify Marion Eadon based on allegations in an underlying civil action for property damage, Rhodes v. Eadon, C.A. 01-CP-20-334. Original Complaint, pp. 5-6; R. 71-72. The original complaint was filed in the Court of Common Pleas for York County on October 14, 2002. Defendants Eadon, C & B Fabrications, Inc. and Low Country Signs, Inc. answered and counterclaimed for bad faith failure to defend and breach of contract. Answer and Counterclaim, pp. 4-5; R. 138-39. Auto-Owners filed an amended complaint, dropping its request for a declaration that it had no duty to defend Eadon. R. 147-52.

This litigation continued, but trial of it was deferred until the completion of the underlying tort action, Rhodes v. Eadon d/b/a C & B Fabrication, C.A. No 01-CP-20-334, in Fairfield County. In that action, judgment was awarded against Marion L. Eadon d/b/a C & B Fabrication in the total amount of \$6.5 million on September 2, 2004. The trial of

this declaratory action was set for the September 13, 2004. Rather than resolve this case at that time, on the day the case was called to trial, Auto-Owners filed a motion for a continuance ostensibly in order to obtain a copy of the transcript of the Rhodes v. Eadon d/b/a C & B Fabrication trial. The Trial Court granted Auto-Owners' motion to continue over the objection of all Respondents. After the underlying verdict was rendered, the insurance company then moved for leave to file a second amended complaint, wherein – for the first time – it alleged that Mr. Eadon was not even an insured under the policy. Order of 11/7/06, pp. 9-10; R. 21-22. The Trial Court allowed the amendment.

All parties moved for summary judgment in early 2005, which the Trial Court denied. Respondents here requested a jury trial on the disputed issues of fact, most particularly on the question of whether Mr. Eadon was an insured under the policy. The Trial Court held that the only disputed issue of fact for the jury's determination was the ambiguity in the names of the businesses to be covered by the policy. The issues of the unambiguous terms of the policy – such as whether there was an "occurrence" and the effect of the policy exclusions – were to be decided by the Court. *Id.*, pp. 10-11; R. 22-23.

This declaratory action was set for trial on June 26, 2006. Instead of going to trial, however, all parties agreed on the following stipulation:

For purposes of this Declaratory action only, the named insured on Auto-Owner's 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.

Id., p. 11; R. 23. The effect of this stipulation was that, in considering coverage, the judgment in Rhodes v. Marion L. Eadon d/b/a C & B Fabrication was deemed to be awarded against Rhodes v. Marion L. Eadon d/b/a C & B Fabricators, Inc.

After extensive briefing of the issues by the parties, the Court on November 7, 2006, entered its Order. R. 13-60.

On November 16, 2006, Respondent Eadon, having expended over \$105 Thousand Dollars in this declaratory action, filed his motion for costs based on the precedent in this State. R. 995-96. State Auto Prop. And Cas. Ins. Co. v. Raynolds, 357 S.C. 219, 226, 592 S.E.2d 633, 637 (2004) (“it is well settled in South Carolina that when a defendant insured prevails in a declaratory judgment action, the insured is entitled to recover attorney’s fees”):

On or about November 21, 2006, Appellant moved to alter or amend the Order of November 7, 2006, or in the alternative, for a new trial. R. 998-1007.

Meanwhile, the Court of Appeals, on December 15, 2006, issued its unpublished opinion, No. 2006-UP-413, which reversed the judgment and remanded to transfer venue in Rhodes v. Marion Eadon d/b/a C & B Fabrication. The Court of Appeals held that venue was improperly set in Fairfield County based on the incorrect determination that venue was provided in that County under S.C. CODE ANN. § 15-7-10 as an “injury to real property.” The Court remanded the case to effect its transfer to Clarendon County. The Respondents petitioned for reconsideration and reconsideration *en banc*, both of which were denied.

Subsequently, in this declaratory case, on December 28, 2006, Auto-Owners Insurance Company moved to alter or amend the Trial Court’s Order of November 7, 2006, or in the alternative for a new trial under Rule 60(2), (4) and (5), or in the alternative, for the Trial Court to stay the case in its current posture — implicitly

requesting, *inter alia*, that the Court stay the payment of attorney fees to Mr. Eadon under Raynolds, R. 1022-24.

On March 23, 2007, in response to the changed posture of Rhodes v. Eadon d/b/a C&B Fabrication and to Auto-Owner's motion for relief or a stay, the Trial Court in this declaratory matter issued a Supplemental Order, R. 61-62, which held that if the holding of the Court of Appeals to reverse and remand remained in effect, Items IV and V in the Findings and Conclusions of the Order of November 7, Order, pp. 47-48; R. 59-60, would "be void and of no effect." R. 62.

Based on a motion from Respondents Rhodes and Piedmont Promotions, Inc., the Trial Court issued a Revised Supplemental Order on March 30, 2007, modifying its Supplemental Order of March 23. R. 63-64. The modification made clear that while Items IV and V were void and of no effect regarding the judgment in Rhodes v. Eadon d/b/a C & B Fabrication, the Court's "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 the parties – remains in full force and effect." R. 64. The Trial Court also reiterated the holdings in its Order of November 7 that there was an "occurrence" under the terms of the policy, that there was "property damage" under the terms of the policy, and that exclusions k, l, and n in the policy did not bar coverage under the facts of this case. Order of 11/7/06, p. 47, R. 59; Order of 3/30/07, p. 2; R. 64. The Revised Supplemental Order also denied Auto-Owner's motion for a new trial.

On April 9, 2007, Auto-Owners filed its Notice of Appeal in this declaratory action, appealing the Trial Court's Orders of November 7, 2006, and the Supplementary Orders of March 22 and March 30, 2007.

On April 19, 2007, Auto-Owners moved to stay this declaratory action until the conclusion of the appeal. On April 20, 2007, Auto-Owners filed a Supplemental Memorandum in Opposition to Eadon's Motion for Costs, asserting that South Carolina precedent was inapplicable because Auto-Owners had not denied a defense to Mr. Eadon. Auto-Owner's initial Complaint had, indeed, attempted to obtain a declaration that it had no duty to defend. It was withdrawn from Auto-Owner's Amended Complaint after Mr. Eadon counterclaimed for bad faith and breach of contract. R. 71-72, 138-39, 147-52.

In their underlying case against Mr. Eadon, Mr. Rhodes and Piedmont Promotions, having been denied rehearing by the Court of Appeals panel and *en banc*, petitioned the Supreme Court for Certiorari. By Order of February 21, 2008, the Supreme Court denied certiorari in Rhodes v. Eadon d/b/a C & B Fabrication.

Auto-Owners had sought and obtained from the Court of Appeals, on September 7, an Order staying the appeal of this declaratory action "pending conclusion of appeal in Rhodes v. Eadon." Auto-Owners also sought and obtained from the Court of Appeals an Order giving it until May 14, 2008 to serve and file its initial brief in the appeal of this declaratory action.

This Respondents' Brief responds to Appellant's Brief.

FACTS

The portions of the Tailored Protection Policy issued to C & B Fabrications, Inc. and Low Country Signs, Inc., for the period 9/17/2000-9/17/2001 that pertain to liability coverage are at R. 83-96. The Declarations, p. 2, show that there is coverage, and a premium charged, for sign manufacturing and sign erection, installation or repair. R.75.

The policy provides coverage, and a premium is charged, for "products/completed operations" in both of the aforementioned categories of covered activities. R. 75.

The portions of the policy that are most germane to the coverage questions in issue are as follows:

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
- b. This insurance applies to "bodily injury" and "property damage" only if:
 - (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; R. 83.

2. Exclusions

This insurance does not apply to:

- k. "Property damage" to "your product" arising out of it or any party of it. R. 86.
- l. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard". R. 86.
- m. "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
 - (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
 - (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use. R. 86.
- 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. R. 86.

SECTION II and WHO IS AN INSURED

1. If you are designated in the Declarations as:

- c. An organization other than a partnership or joint venture, you are insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. R. 88-89.

SECTION V – DEFINITIONS

- 5. "Impaired property" means tangible property other than "your product" or "your work", that cannot be used or is less useful because:
 - a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a contract or agreement;
 - if such property can be restored to use by:
 - a. The repair, replacement, adjustment or removal of "your product" or "your work"; R. 93.
 - 9. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. R. 95.
 - 11. a. "Products-completed operations hazard" includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
 - (1) Products that are still in your physical possession; or
 - (2) Work that has not yet been completed or abandoned.
 - b. "Your work" will be deemed completed at the earliest of the following times:
 - (1) When all of the work called for in your contract has been completed.
- Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed. R. 95.

12. "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. R. 95-96.

14. "Your product" means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
(1) You...

"Your product" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product" ... R. 96.

15. "Your work" means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work" ... R. 96.

The facts of this situation, from which the Trial Court could reach the conclusions that it reached, as reflected in the Orders of November 7, 2006 and March 22 and 30, 2007, are derived from the pleadings and discovery in the present case and from exhibits and undisputed testimony in the trial of Rhodes v. Eadon d/b/a C & B Fabrication.¹ The facts at the heart of this declaratory action are stated by Appellant as follows:

7. Rhodes and Piedmont Promotions, Inc. alleged in their First Amended Complaint that they contracted with Marion L.

¹ It is recognized that the jury's verdict and Court's instructions in Rhodes v. Eadon d/b/a C & B Fabrication are of no effect. To the extent that sworn trial testimony is not contradicted, it is submitted that the Court considering the declaratory question could consider it.

Eadon d/b/a C & B Fabrication to fabricate, deliver, and install three outdoor advertising billboard signs on Rhodes' and/or Piedmont Promotions, Inc.'s real property in Fairfield County South Carolina.

9. Rhodes and Piedmont Promotions, Inc. alleged in their First Amended Complaint that Marion L. Eadon d/b/a C & B Fabrication completed the installation of the three signs in February 2000.

10. Rhodes and Piedmont Promotions, Inc. alleged in their First Amended Complaint that one of the signs fell on Interstate Highway I-77 on January 20, 2001.

11. Rhodes and Piedmont Promotions, Inc. alleged in their First Amended Complaint that the South Carolina Department of Transportation ordered Rhodes and/or Piedmont Promotions, Inc. to take down or remove the remaining signs which had not fallen.

Second Amended Complaint, ¶¶ 7, 9, 10, 11; R. 636-37. These statements of fact were not contradicted or disputed at trial. See, Testimony of Rhodes, Tr. Vol. I, pp. 49, 52-4, 58-60, 70, 76, 82, 89-90; R. 1139, 1142-44, 1147-49, 1153, 1158, 1159, 1164-65. Testimony of Eadon, Tr. Vol. III, pp. 130, 132, 135, 161-63. R. 1207, 1209, 1211, 1228-1230. There is, therefore, no dispute as to these basic facts.

After the billboard fell across Interstate 77, a General Liability Notice of Occurrence/Claim was forwarded from the insurance agent, Creech Roddey Watson Insurance, to Auto-Owners. R. 1294. It confirms that one billboard fell and that another was taken down.

Auto-Owners, after receipt of the Notice of Occurrence/Claim, sent Mr. Eadon a series of letters outlining the parties' rights under the policy. On February 8, 2001, the insurance company sent Mr. Eadon a reservation of rights letter, suggesting that the company was not sure if the incident constituted an occurrence as defined by the policy. R. 1280-83. On May 1, 2001, Auto-Owners sent Mr. Eadon a follow-up letter. It reiterates the fact that a billboard that a billboard that Mr. Eadon built, "fell across I-77."

The letter discussed the costs of removing the billboard from I-77 and assured Mr. Eadon that, “[w]e will have coverage under your policy to pay for the removal of the billboard from the states [sic] highway so it could be cleared and get the traffic flowing again.” Auto-Owner’s Senior Claims Agent, Mr. Anders, said that he had paid \$7100.⁰⁰ to do so. Mr. Anders also informed Mr. Eadon that, “I have previously sent you a reservation of rights letter and explained to you what we would and would not have coverage for in this particular loss.” R.1284-86. Neither of these letters raised any question about whether Mr. Eadon was an insured. In fact, they implicitly affirmed that he was an insured but might not have coverage for all damages claimed.

Mr. Anders sent letters to Mr. Eadon and Mr. Rhodes during the remainder of 2001 to address various bills for consequential damages. R. 1287.

On February 8, 2002, having received the pleadings in Rhodes v. Eadon d/b/a C & B Fabrication, Mr. Anders wrote again to Mr. Eadon, informing him, *inter alia*, that Auto-Owners “will be providing a defense to you” in the cited legal action. It also said that, “[w]e have paid for what we believe is covered property damage thus far under your Commercial General Liability Policy.” R. 1288-89.

On September 25, 2002, Auto-Owners sent another reservation of rights letter to Mr. Eadon, reiterating the statement first contained in the letter of February 8, 2001 but omitted from any of the subsequent letters over the next 19 months: that Auto-Owners was unsure that there had been an “occurrence” in the incident. R. 1290-93.

In none of its multiple communications with Mr. Eadon did Auto-Owners ever suggest that he might not be an insured under the policy. Though they had had the caption of the underlying tort action at least since February 8, 2002, Auto-Owners did not

make any claim that Mr. Eadon was not an insured under the policy until that claim was made in connection with Auto-Owner's moving to be allowed to file and serve its Second Amended Complaint in this action, filed on July 18, 2005, some three and one-half years after it received Rhodes' Complaint in the tort action and some 10 months after the verdict was reached in Rhodes v. Eadon d/b/a C & B Fabrication.

In the underlying tort action, Auto-Owners, in trying to intervene had informed that court that, "Auto-Owners ... is the insurance carrier for the Defendants and is presently defending the Defendants...." R. 222. (emphasis added). Auto-Owners was not permitted to intervene in that action.

Having failed to intervene in Rhodes v. Eadon d/b/a C & B Fabrication, Auto-Owners also attempted to have a "special verdict form [be] submitted to the jury and/or a form submitted to the jury and/or a general verdict form accompanied by written interrogatories" presented to the jury. Request for Special Verdict Form, R. 228-29. The whole basis for this request, as mentioned in its request, is that Auto-Owners sought only "for the jury to differentiate potentially alleged covered and non-covered losses alleged to be caused by the Defendant." R. 229. The only inference that can justify such interference in the tort case is that Auto-Owners wanted to know which damages it was responsible for, implicitly admitting that there might be some. Auto-Owners made no mention of having the jury determine whether Mr. Eadon was an insured under the policy until the judgment of \$6.5 million was entered against him.

After the Trial Court entered its Order of November 7, 2006, Auto-Owners made a motion to alter or amend the judgment under rule 59(e), SCRCP. R. 998-1007. After

the Court of Appeals issued its opinion in 2006-UP-413, Auto-Owners made an amended motion to alter or amend the Order of November 7. R. 1011-1020.

By Supplemental Order of March 23, 2007 and Revised Supplemental Order of March 30, 2007, the Trial Court denied Auto-Owners' motions to alter or amend. On April 9, 2007 Auto-Owners filed its Notice of Appeal. The appeal was stayed pending final resolution of Rhodes v. Eadon d/b/a C & B Fabrication.

This is the Brief of Respondents Marion L. Eadon, C&B Fabrications, Inc., and Low Country Signs, Inc., submitted pursuant to Rule 208(a)(2), SCRPC.

ARGUMENT

I. THE STANDARD OF REVIEW IS THAT THE TRIAL COURT'S HOLDING SHOULD BE AFFIRMED IF THERE IS ANY EVIDENCE WHICH SUPPORTS IT.

This Court has articulated the standard of review for a case such as this as follows:

“On appeal of an action at law tried by the judge without a jury [the Court of Appeals] will review the [judge's] factual findings to determine if there is any evidence to support them.” South Carolina Farm Bureau Mut. Ins. Co. v. Windham, 303 S.C. 330, 331, 400 S.E.2d 497, 497 (Ct.App.1990). An action to construe a contract is one at law. Texcon, Inc. v. Anderson Aviation, Inc., 284 S.C. 307, 326 S.E.2d 168 (Ct.App.1985). In legal actions, our scope of review extends only to the correction of errors of law. State Auto Property & Cas. Ins. Co. v. Gibbs, 314, S.C. 345, 444 S.E.2d 504 (1994) (action to declare excess or secondary liability insurance coverage is an action at law and thus, facts found by a judge sitting without a jury should not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings).

State Farm Mut. Auto. Ins. Co. v. Moorer, 330 S.C. 46, 51, 496 S.E.2d 875, 878 (Ct. App. 1998).

In the case at hand, there is evidence to support each of the Trial Court's factual findings, as addressed *infra*.

In the case at hand there is probative evidence to support each of the Trial Court factual findings.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT MR. EADON WAS AN INSURED BASED ON THE EVIDENCE IN THIS CASE.

The policy provision, quoted *supra*, p. 7, states that an officer of the corporation which is the named insured under the policy is also an insured "with respect to [his] duties as" an officer of the corporation." Policy, § II 1 c; R. 89. Mr. Eadon testified in his deposition that he was the president of the corporation. Eadon, Depo. pp. 13-14; R.1102-03. There is no evidence to the contrary.

The first question, therefore, is whether Mr. Eadon's dealings with Mr. Rhodes were "with respect to" his duties as an officer of the insured corporation. The second question is whether the insured corporation is the entity that Mr. Eadon is alleged to be doing business as in Rhodes v. Eadon d/b/a C&B Fabrication.

Addressing the second question first, Auto-Owners – and the other parties to this action – stipulated that C&B Fabrication was the trade name for the named insured corporations: C&B Fabricators, Inc. and Low Country Signs & Fabrication, Inc. That stipulation is, *de facto*, to state the C & B Fabrication is the same legal entity as the named insureds. It is clear, therefore, that the allegations in Rhodes v. Eadon d/b/a C&B

Fabrication are against Marion Eadon d/b/a a named insured.² This stipulation, therefore, makes clear that there is an affirmative answer to the second question – the insured corporation is the corporation as which Mr. Eadon was doing business.

If Mr. Eadon, an officer of the insured corporation, was also “doing business as” the insured corporation, the only reasonable conclusion is that he was acting “with respect to his duties as an officer” of the insured corporation. Mr. Eadon, in deposition, testified that he never operated or insured any business that was not a corporation. Dep. of Eadon, p. 34, lines 13-18; R. 1116, lines 13-18. There is no evidence that Mr. Eadon

² To the extent Appellant asserts that a d/b/a designation represents only a proprietorship that is incorrect. The abbreviation “d/b/a” represents the phrase, “doing business as.” The phrase can indicate that a person is doing business as a sole proprietorship, but that is not necessarily the case. The “doing business as” description is sufficiently general to refer to other forms of business organizations, including partnerships and corporations. The caption of Jackson v. River Pines, Inc., 276 S.C. 29, 274 S.E.2d 912 (1981) includes a defendant, “... The above listed individuals d/b/a River Pines Company, a partnership.” In Tallevast v. Herzog, 225 S.C. 563, 83 S.E.2d 204 (1954), a partnership was “doing business as” Firestone Home and Auto Supplies, a trade name. The caption of a Fourth Circuit case includes as parties, *inter alia*, individuals who are d/b/a a corporation, and apparent partnerships d/b/a a corporation. In re American Honda Motor Co., Inc., Dealerships Relations Litigation, 315 F.3d 417 (4th Cir. 2003). Among the parties in American Honda are over 80 “d/b/a” entries, including the following:

“Claudia Close, d/b/a Jim Close House of Honda d/b/a House of Honda, as Executrix of the Estate of James R. Close, Humphrey Motors, Inc.”

“Breakaway Incorporated d/b/a Breakaway Honda, a South Carolina Corporation”

“Mildred Radar, d/b/a Pioneer Honda, a California resident, individually and on the behalf of all other similarly situated”

“Bob Jackson & Son, d/b/a Honda Santa Ana, a California Corporation”

“C. H. Jurgenson, d/b/a Jurgenson’s Honda, a Corporation”

“Henry Khachturian, d/b/a Hank Tarian, a California resident”

The American Honda caption alone demonstrates the variety of different business relationships that are encompassed in the general “doing business as” description. It is clearly not limited to sole proprietorships, despite Auto-Owners’ assertion to that effect.

was ever affiliated with any sign manufacturing corporation other than the named insureds under Auto-Owners' policy. This inexorably leads to the conclusion that anything that Mr. Eadon did in the sign business was pursuant to his position as an executive officer of the named insured corporations.

Mr. Rhodes' uncontradicted testimony in the Rhodes v. Eadon trial was that he visited and toured Mr. Eadon's manufacturing facility in Manning, S.C. and received Mr. Eadon's personal assurances that "they could build better signs than anybody had built. And he said they were just a great company and they could build anything I wanted them to. Tr. I, p. 49, line 11 – p. 51, line 15; R. 1139, line 11- 1141, line 15 (emphasis added). Mr. Rhodes testified that Mr. Eadon told him that he could personally guarantee the quality of the signs. Tr. I, p. 52, lines 3-8; R. 1142, lines 3-8. As a consequence of this meeting, C&B Fabrication submitted a proposal to Mr. Rhodes to fabricate, deliver and install three signs for Piedmont Promotions, Inc. Mr. Eadon's name was on the proposal as "M.L. Eadon, President." Tr. I, p. 53, lines 2-24; R. 1143, lines 2-24. Mr. Eadon was, therefore, integrally involved in securing Mr. Rhodes' business for C&B Fabrication, the trade name for Auto-Owner's named insured, C&B Fabricators, Inc. Mr. Rhodes, in a response in Rhodes v. Eadon, stated that he relied on these assurances from Mr. Eadon in accepting the proposal of C&B Fabrication. R. 1148, lines 9-25.

The evidence of record is also that the final price the corporation was to charge for the signs and the condition of the signs had to be approved by Mr. Eadon. Tr. I, p. 54, lines 9-23; R. 1144, lines 9-23.

After the signs were installed, one started leaning. When he was informed of that, Mr. Rhodes telephoned Mr. Eadon, implicitly because Mr. Eadon was the president of

C&B Fabrication, and the man who needed to fix the problem. Tr. I, p. 70, lines 4-8; R. 1153, lines 4-8. Mr. Rhodes testified that he telephoned Mr. Eadon several times and was led to believe that the sign would be fixed, but it was not. Mr. Rhodes testified that he also tried to communicate with Mr. Eadon by letter, expressing urgency about the situation. Tr. I, p. 72, line 3- p. 73, line 5; R. 1154, line 3- 1155, line 5. Over the course of a month or so, Mr. Eadon was called upon to make right the corporate obligation of C&B Fabrication, the trade name for Auto-Owner's named insured. Tr. I, p. 72, line 6 – p. 76, line 14; R. 1154, line 6 -1158, line 14. Mr. Eadon's own testimony does not contradict Mr. Rhodes' testimony about Eadon's reaction to the notice of the leaning sign. Tr. III, p. 159, line 25 – p. 163, line 11; p. 167, lines 12-24; R. 1226, line 25- 1230, line 11; 1231, lines 12-24.

Both parties inferably accepted that the obligation was a corporate one, as Mr. Rhodes wrote to Mr. Eadon at C&B Fabrication, Tr. I, p. 72, lines 6-8; R. 1154, lines 6-8; or Carolina Fabricators, Tr. I, p. 73, lines 3-5; R. 1155, lines 3-5, and Mr. Eadon, in responding to Mr. Rhodes about rectifying the problem, stated that "a lawsuit is a waste of time due to the fact that C&B Fabrication went out of business ... and does not have any assets." Tr. I, p. 74, lines 1-4; R. 1156, lines 1-4.

There is, therefore, plenty of evidence from which the Trial Court could reasonably have concluded that Mr. Eadon's actions with respect to inducing Mr. Rhodes to accept the proposal of C&B Fabrication, approving the price of the signs, and his alleged inaction in responding to Mr. Rhodes' complaints were acts or omissions "with respect to [his] duties as [the corporate insured's] officer," and thus an insured under the policy.

The phrase "with respect to ..." is broader than other alternative phrases that the insurance company could have used.

Our law requires that phrases that expand coverage should be construed broadly. Because the phrase "with respect to their duties as officers" expands coverage to include more people, it should be construed broadly. Our Supreme Court has addressed this point and the corollary that provisions of exclusion are to be construed narrowly, as follows:

We are of the opinion that the foregoing is the correct result under the plain and clear language of the policy which we regard as being free of any ambiguity. But if there conceivably be any doubt thereabout, the doubt or ambiguity, of course, has to be resolved against the defendant. We quote the following from 13 Appleman Insurance Law and Practice 106, Sec. 7405:

'The courts have frequently stated that provisions limiting liability of the insurer – such as exceptions from coverage, exclusions, restrictions, and conditions – are particularly deserving of strict construction so as not to cut down the coverage which the insured believed he was purchasing.'

Cited as authority for the foregoing are cases from twenty-two states, including the South Carolina case of Wheeler v. Globe & Rutgers Fire Ins. Co., (1923), 125 S.C. 320, 118 S.C. 609. Also in 13 Appleman at page 170, Sec. 7439, we find the following:

'And subordinate conditions and provisos of a health policy limiting liability should be strictly construed against the insurer, since they limit the purpose of the principal object for which the policy was taken out.' Thompson v. Mutual Benefit Health & Ass'n, 209 N.C. 678, 184 S.E. 695; McArthur v. Mass. Hosp. Service, Inc., 343 Mass. 670, 180 N.E.2d 449; Hunt v. Hospital Service Plan of N.J., 33 N.J. 98, 162 A.2d 561, 81 A.L.R.2d 919.

'The courts have uniformly held that where the clause is one of inclusion it should be broadly construed for the benefit of the insured while in exclusion cases the same clause is given a more restricted interpretation. Jamestown Mutual Ins. Co. v. Nationwide Mutual Ins. Co., 266 N.C. 430, 146 S.E.2d 410. This is necessary because in both situations the courts favor an interpretation in favor of

coverage.’ Buddin v. Nationwide Mutual Ins. Co., 250 S.C. 332, 157 S.E.2d 633.

For the foregoing reasons, the judgment of the lower court is reversed and the cause remanded for entry of judgment in favor of the plaintiff in accordance with the views herein expressed.

Millstead v. Life Ins. Co. of Virginia, 256 S.C. 449, 452-53, 182 S.E.2d 867, 868-69 (1971).

Therefore, in the case at hand, the phrase, “but only respect to their duties as your officers....” should be construed in a manner as to provide coverage for the insured, Mr. Eadon. It should be noted that the phrase does *not* say “arising out of their duties as your officers,” which would entail a greater degree of causal relationship between the insured’s duties as an officer and the damages for which coverage is sought. The phrase, “with respect to...”, is broad enough to include **any** activity by the insured that has any connection to his duties as an officer of the named insured, while “arising out of” implies that the damage has flowed from or is connected with the insured’s performance of his duty as an officer. Our Supreme Court has held that if the phrase “arising out of” is being construed broadly, to provide coverage, it means more than “caused by.” When used broadly, “in a clause of inclusion,” the phrase “arising out of...connotes ‘incident to,’ ‘flowing from’ or ‘having connection with’ as well as ‘causal relation to.’” Town of Duncan v. State Budget and Control Bd., 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997) quoting McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 426 S.E.2d 770 (1993).

If “arising out of” is to be construed this broadly in a clause of inclusion, the even-broader phrase “with respect to” should be construed to mean “having any connection to or relationship with” the business of the named insured. In this case, the insurance policy, on the declarations page, states that the business of the named insured is

"Sign Manufacturer." Mr. Eadon should, therefore, under our law be an insured for any damages resulting from the manufacture and sale of signs.

The evidence is that it was Mr. Eadon's intention, regarding the policy, that it covered him for everything that happened in the sign business and it was his testimony, which was not contradicted, that Auto-Owners' agent, Mike Watson, had that same intention. Mr. Eadon's deposition testimony as to the intentions of the parties was as follows:

Q. If the policy was issued to C&B Fabrications...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.

* * *

Q. Did you go in there intending to insure any other type of business entity, other than your corporation that built signs?

A. No.

Deposition of Eadon, p. 19, lines 2-10, 15-18; R.1108, lines 2-10, 15-18.

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...the corporation and me included.

Q. You as an officer of the corporation?

A. Right.

Deposition of Eadon, p. 26, lines 13-19; R. 1112, lines 13-19.

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

A. He assured me 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."

* * *

- Q. Did you ask him about what persons may or may not be covered by the policy?
- A. No.
- Q. Did you ask him about ...any things that may be excluded under the terms of the policy?
- A. He said I was covered for anything no matter what. He said I had \$5 million [and] should be able to do business for that company. He said, "That covers everything that you can think of."

Deposition of Eadon, p. 27, lines 6-12, 16-25; R. 1113, lines 6-12, 16-25.

Under the law of South Carolina, the intentions of the parties are a factor to be strongly considered in construing a policy of insurance. As this Court has held regarding insurance contracts, "[t]he purpose of all rules of construction is to ascertain the intention of the parties to the contract." Hansen ex rel. Hansen v. United Services Auto. Ass'n, 350 S.C. 62, 68, 565 S.E.2d 114, 116 (Ct. App. 2002) *citing* Bruce v. Blalock, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962). The intentions of Mr. Eadon and the man who sold him the Auto-Owners' policy to cover Mr. Eadon's sign business are important factors to consider in adjudicating this case. Contrary to the implications in Appellant's Brief, to consider the intentions of the parties is not to apply the Doctrine of Reasonable Expectations. That Doctrine exalts the expectations of the parties, or party, over the words of the insurance policy. South Carolina law does not support that Doctrine and the Trial Court did not rely upon it. Here, the intentions of Marion Eadon and Mike Watson, the agent selling the policy, are consistent with the words of the policy, correctly construed, as to who is an insured under the policy.

Auto-Owners has stated or implied that there is no coverage for Mr. Eadon because the jury did not find C&B Fabrications, Inc. or Low Country Signs, Inc. liable for damages. That erroneous conclusion is premised on the idea that Mr. Eadon is

covered only for vicarious liability, liability derived from the liability of the corporation itself. That is incorrect. The policy provides coverage for Mr. Eadon's individual liability for anything that has any connection with the business of the insured. The "who is an insured" provision quoted above says **absolutely nothing from which one could conclude that there was no coverage for Mr. Eadon unless the corporation itself was liable.** The sentence in issue – "Your executive officers ... are insureds, but only with respect to their duties as your officers. ..." – cannot reasonably be construed to mean that there must be a finding of liability against the corporation before an executive officer is an insured. Auto-Owners, having failed to state such in the policy, should not be allowed to rely on the cited extra-contractual concept.

Courts in other jurisdictions have addressed this issue. The Supreme Court of Missouri held that the chief operator of a city's water treatment plant was an "executive officer" whose liability was covered by the commercial general liability policy purchased by the city. Martin v. United States Fidelity and Guaranty Co., 996 S.W.2d 506 (Mo.1999). The chief operator had personally installed a joint pipe flange assembly that exploded, injuring another employee. The employee obtained an \$800,000 judgment against the chief operator, and the liability insurer declined coverage. Reversing the trial court, the Supreme Court held that the chief operator was an insured under the policy and that the policy covered his personal liability. The Court held as follows:

As noted above, executive officers are insureds under the policy only with respect to their "duties as officers." USF & G argues, and the trial court agreed, that the conduct complained of in Mr. Martin's petition, the installation of a pipe, was not managerial or administrative in character and, therefore, not within the scope of his duties as an officer. While USF & G does not contest that Mr. Cauthon's actions in installing the pipe were within his job responsibilities as chief operator, USF & G argues

that “duties as officers” include only those portions of an officer’s position that are managerial in character. **Mr. Martin argues that all job responsibilities performed by executive officers are included in their duties as officers, whether or not the character of the particular act at issue was managerial. Again, the insurance policy on this point is ambiguous, at best, and the Court is bound to construe it against the insurer and in favor of coverage.** Melvin Cauthon was an “executive officer” of Boonville, and because he was performing his duties as such when his allegedly negligent conduct occurred, he was an insured under the city’s commercial liability insurance policy with USF & G.

Martin, 996 S.W.2d at 509-510 (emphasis added).

The Tenth Circuit of the United States Court of Appeals has also addressed the situation which prevails here. Marathon Ashland Pipe Line LLC v. Maryland Cas. Co., 243 F.3d 1232 (10th Cir. 2001).

In Marathon Ashland, the Court addressed a situation in which a temporary worker brought an action against Marathon Ashland, which was an additional insured under a commercial general liability policy issued by Maryland Casualty to Steel Structures, Inc. (“SSI”). Maryland Casualty denied coverage on the ground that : 1) the injury did not “arise out of” SSI’s activities; and 2) it asserted that the named insured, SSI, must be primarily negligent, and the additional insured no more than vicariously liable for there to be coverage. The Tenth Circuit rejected both of Maryland Casualty’s positions. Its holdings on these issues were as follows:

Although we have agreed with the district court thus far, we reject its holding that Marathon’s liability did not “arise out of” SSI’s activities. Our review of the undisputed facts convinces us there was a sufficient causal connection between SSI’s operations and Mr. Berg’s injuries to trigger the additional insured endorsement. Under Wyoming law, “arising out of” language as used in insurance contracts carries a “natural consequence” level of causation.... Applying this standard, Marathon’s liability must be “the natural and reasonable incident or consequence of” SSI’s ongoing operations for Marathon, “the causal connection being

reasonably apparent.” Coverage will not lie, however, if Marathon’s liability “was directly caused by some independent or intervening cause **wholly disassociated from, independent of or remote from**” SSI’s operations for Marathon.... Therein lies the real crux of this dispute: while Marathon argues that Mr. Berg’s injuries arose out of SSI’s activity of employing persons who worked at Marathon’s direction and control, Maryland Casualty contends that Mr. Berg’s injuries arose solely out of Marathon’s activities, independent and remote from SSI’s operations. Because the “arising out of” language is “plain and unequivocal,” this is a question of law for this court to resolve.... We are persuaded that SSI’s act of hiring and paying Mr. Berg at Marathon’s request and then sending him out to work under Marathon’s sole direction and control was an ongoing operation out of which Mr. Berg’s injuries were a natural consequence. We therefore disagree with the district court’s ruling that Marathon was not an additional insured for purposes of its liability to Mr. Berg.

243 F.3d at 1239-40 (citations omitted)(emphasis added). Under the standards of Marathon Ashland, and considering that the current case has the broader “with respect to” wording rather than the narrower “arising out of,” Mr. Eadon would certainly be an insured.

The Court also held that an insured was covered for his own negligence as well as negligence he incurred through the corporation. It held as follows:

Finally, Maryland Casualty asserts that the named insured must be primarily negligent, with the additional insured no more than vicariously liable, for this endorsement provision to apply. Under this theory, Mr. Berg’s injuries did not arise out of SSI’s operations because SSI was not negligent. We have held, however, that an endorsement provision with identical language provides coverage for an additional insured’s liability arising out of its own negligence. See *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir.1993) (applying Kansas law). In *McIntosh*, we were faced with the same additional insured endorsement provision at issue here and concluded the language was “ambiguous as to whose negligence is covered and whose negligence is excluded from coverage.” *Id.* at 254. We therefore interpreted the policy as providing coverage for the additional insured’s liability arising out of its sole negligence. *Id.* This appears to be the majority rule. Accord *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487,

499 (5th Cir.2000) (rejecting argument that identical policy language limited endorsement's coverage to additional insured's liability arising from named insured's negligence); *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex.Ct.App.1stDist.1999) (interpreting identical policy language and holding that coverage provided for additional insured's sole negligence resulting in injuries to named insured's employee) (citing *McIntosh* holding as the majority rule); *Acceptance Ins. Co. v. Syufy Enterprises*, 69 Cal.App.4th 321, 81 Cal.Rptr.2d 557, 561-62 (1999) (identical policy language does not allocate coverage based on named insured's fault. We are not persuaded the language presented here is clearer on that point, and we conclude this policy language does not limit coverage to the additional insured's vicarious liability).

243 F.3d at 1240. The fact that C&B Fabrication or Low Country Signs was not found liable in the underlying action is, therefore, irrelevant. Mr. Eadon is an insured under the policy, covered for his own negligence in the manufacture, sale and installation of advertising signs.

Under the unambiguous words of the policy, construed consistently with South Carolina and general law, Mr. Eadon is an insured.

To the extent that the definition of "Who is an Insured," is ambiguous, that ambiguity must be construed in favor of coverage of the insured and strictly against the insurer. *South Carolina Farm Bureau Mut. Ins. Co. v. Courtney*, 349 S.C. 366, 370 n.4, 563 S.E.2d 648, 650 n.4 (2002) ("any ambiguity in an insurance policy must be construed liberally in favor of the insured"); *Coakley v. Horace Mann Ins. Co.*, 363 S.C. 147, 152-53, 609 S.E.2d 537, 540 (Ct. App. 2005) ("ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer").

Mr. Eadon is unambiguously an insured under Auto-Owners' policy based on the terms of the policy, as construed under the law of South Carolina, and the undisputed evidence. The Trial Court did not err in so holding.

III. THE TRIAL COURT CORRECTLY HELD THAT THERE WAS AN "OCCURRENCE" UNDER THE POLICY.

As quoted *supra*, p. 7, Auto-Owners' policy defines "occurrence" in a standard manner, with the term's basic meaning being "an accident." The Auto-Owners' policy does not define "accident." In the absence of a definition in the policy, our Supreme Court has prescribed the following definition of "accident": "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...." Auto-Owners Ins. Co. v. Newman, Op. No. 26450 (S. C. Sup. Ct filed March 10, 2008) (Shearouse Adv. Sh. 9 at 63, 66) [2008 WL 648546] (addressing standard ISO CGL policy virtually identical to policy in this case.).

Under South Carolina law, the term, "accident," is defined from the perspective of the victim, not the insured. Peagler v. USAA Ins. Co., 368 S.C. 153, 161, 628 S.E.2d 475, 479 (2006) *citing* State Farm Mut. Auto. Ins. Co. v. Moorer, 330 S.C. 46, 56-59, 496 S.E. 875, 881-82 (Ct. App. 1998). In the case at hand the victims were Mr. Rhodes and his company, Piedmont Promotions, Inc.

It is undisputed that one of Mr. Rhodes' signs fell into the interstate highway. It is also undisputed that the fall of the sign was unexpected, sudden and with harmful results not intended by Mr. Rhodes. *See* Tr. II, p. 112, line 22 – p. 113, line 10; R. 1171, line 22- 1172, line 10. It was, therefore, an accident and consequently an "occurrence" as defined by the policy.

It is ironic that Auto-Owners cites L-J, Inc. v. Bituminous Fire and Marine Ins. Co., 366 S.C. 117, 621 S.E.2d 33 (2005) regarding whether there was an “occurrence” under a CGL policy, Appellant’s Brief pp. 36-37, rather than Auto-Owners Ins. Co. v. Newman, *supra.*, in which it was a party, represented by the same attorneys. In Newman, our Supreme Court, distinguishing L-J, held, contrary to Auto-Owner’s position, that negligent construction, *i.e.*, negligent application of stucco, resulted in an “occurrence” of water intrusion. Shearouse Adv. Sh. 9 at 70.

In the current case, the uncontradicted evidence is that the signs were not built as designed and did not meet industry standards or code requirements. They consequently were incapable of withstanding code-prescribed wind loads. Tr. II, p. 249, line 8 – p. 250, line 25; R.1176, line 8 - 1177, line 25. The wind loads constitute “[t]he same generally harmful conditions” mentioned in the policy’s definition of “occurrence.” The sudden, unexpected fall of the sign posts which could not withstand repeated exposure to the requisite wind-loads was, therefore, an “occurrence” under both aspects of the policy’s definition.

IV. THE TRIAL COURT PROPERLY HELD THAT THE FALL OF THE SIGN POST CREATED PROPERTY DAMAGE AS DEFINED BY THE POLICY.

As quoted in full *supra.*, p. 8, the policy’s definition of “property damage” has two aspects: 1) physical injury to tangible property and its loss of use; and 2) loss of use of tangible property that is not physically injured. The Trial Court properly held that evidence supported claims for property damage in both of the cited aspects. There is uncontradicted evidence in the record that supports his holding.

A. There was Physical Injury to Tangible Property.

As for physical injury to tangible property, the uncontradicted evidence is that one of the signs fell into the interstate highway and was blocking traffic, Tr. I, p. 82, lines 10-19; R. 1159, lines 10-19. There were expenses connected with removing the sign, including cutting it loose, Tr. I, p. 86, lines 4-9; R. 1161, lines 4-9; renting a crane, Tr. I, p. 87, lines 20-24; R. 1162, lines 20-24; cleaning up the billboard and rebuilding fences damaged by the billboard's fall, Tr. I, p. 95, line 14-p. 96, line 20; R. 1168, line 14- 1169, line 20; and – primarily – damage to real property upon which the billboards were installed as fixtures. Tr. I, p. 60, lines 1-16; R. 1149, lines 1-16.

In Rhodes v. Eadon d/b/a C & B Fabrication, Mr. Rhodes and Piedmont Promotions specifically did allege – and prove to a jury – physical injury to tangible property including damage to the real property to which the signs had been attached. That property included, as fixtures, the signs. Specifically in their First Amended Complaint, the Plaintiffs alleged the following:

3. This Action arises out of a transaction involving **injuries to real property** situated in Fairfield County, South Carolina.

9. When installed, **each sign became a fixture on, and a part of, the Plaintiff's real property** consequently enhancing the value and usefulness of the real property.

11. In December, 2000, it was observed that one of the three signs was leaning towards Interstate Highway I-77 and this was reported to the Defendant who was requested to correct the leaning and to inspect the other two signs and make any needed corrections to them. On or about Wednesday, January 17, 2001, the Defendant made adjustments to the sign that was leaning and purportedly checked the other two signs.

12. On the afternoon of Saturday, January 20, 2001, at approximately 5:30 p.m., one of the signs fell on Interstate Highway I-77 into both southbound traffic lanes. The sign that fell was not the sign that was leaning previously.

20. As a direct and proximate result of the foregoing, the Plaintiff has 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 of the advertising that the signs would have displayed for years to come;**
- d. the Plaintiff has paid for three signs which are worthless to him because they cannot be used. They cannot be used because they were not built according to the design plans and as built they are non-functional, useless, unsafe, and hazardous.
- e. 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.

First Amended Complaint, Rhodes v. Eadon; R. 119, 120-21, 124-25(emphasis added).

Under South Carolina law, there is a four-part test for determining whether an item of personal property continues to be personal property or becomes a fixture on the real property to which it is attached. Carroll v. Britt, 227 S.C. 9, ___, 86 S.E.2d 612, 615 (1955). The four factors that govern this determination are: 1) the mode of attachment or annexation; 2) the character of the structure; 3) the intention of the party making the

annexation; and 4) the relationship of the parties. Id. Here, all four of the factors support the idea that the sign posts were fixtures on the land.

Regarding the first factor, there was testimony that the base of the signs was inserted 27 feet into the ground, Tr., Vol. I, pp. 59, 60, R. 1148, 1149, and the signs were considered to have at least a 50-year useful life. Tr., Vol. II, p. 116, R. 1173, lines 17-21. That is virtually the same life span as many houses. It has been held by a South Carolina court that a mobile home, with a much diminished attachment to the land and shorter expected longevity, was a fixture. In re Rebel Manufacturing and Marketing Corp., 54 B.R. 674 (Bankr. D.S.C. 1985).

Regarding the second factor, the character of the structure, the sign posts were constructed on site using various components, permanently joined. They could not be removed or transported in one piece, but required destructive disassembly. In Rebel Manufacturing and Marketing, the Court considered it significant that the mobile home "would have to be completely divided in order to be transported." 45 B.R. at 676. Far more extensive, and destructive, work would be – and was – required to dismantle the signs in this case and transport their components.

As to the third factor – the intention of Mr. Rhodes – it was expressly his intention that the signs were to be fixtures and to be in service for 50 years. Tr., Vol. I, p. 60; Vol. II, p.116; R. 1149, lines 9-14; 1173, lines 15-22.

As to the fourth factor, the relationship of the parties was that Mr. Eadon's company was hired to fulfill the intention of Mr. Rhodes, so they inferably had the same intention regarding the sign posts becoming fixtures. Inasmuch as Mr. Rhodes owned

both the land and the signs, after their installation, Tr., Vol. I, p. 60; R. 1149, lines 9- 16, his stated intention would clearly apply to both.

Therefore, Mr. Rhodes' testimony, in light of the law, confirms that the sign posts were fixtures on the land. Because the sign posts were fixtures on the land, they had become an integral part of the land. Under South Carolina law, fixtures are real property. Texaco, Inc. v. Warrington, 264 S.C. 18, 21, 212 S.E.2d 57, 60 (1975). There was physical injury to the real property by the failure of a fixture on it. There was also loss-of-use of that real property as discussed immediately *infra*.

B. The Fall of the Billboard Caused the Loss of Use of that Billboard, the Other Two Billboards and, Consequently, the Loss of Use of the Real Property.

Mr. Rhodes obviously lost the use of the billboard that fell into Interstate Highway 77. There was also loss of use of the other two billboards, which were not physically injured but which had to be taken down because of an order from the Department of Transportation on the grounds that they were unsafe. Tr. I, p. 83, lines 1-15; R. 1160, lines 1-15. To the extent that the real property was not physically injured, Mr. Rhodes lost the use of it as a platform on which to construct advertising sign posts because the State Department of Transportation revoked his permit to erect advertising signs on the property. Tr. I, p. 90, line 12 – p. 91, line 8; R. 1165, line 12- 1166, line 8.

Clearly, as the Trial Court held, there was consequential property damage to property – other than the fallen sign itself – that flowed from the accident of the southernmost sign falling.

The quantum of the property damage is, at this moment, undetermined because the Fairfield County jury's verdict is of no effect. The uncontradicted evidence, however,

is that there was property damage – as defined by the policy – that was caused by the “occurrence” of one of the signs suddenly and unexpectedly, that is, accidentally, falling to the interstate highway. The Trial Court was correct in so holding.

C. The Trial Court was Correct in Holding that the Policy Covered all Damages Except the Cost of the Signposts.

The Trial Court was also correct in holding that Auto-Owner’s policy covered all of the damages which were incurred as a consequence of the signpost’s falling other than the cost of the signs, which were the insured’s “product” or “work,” as discussed *infra.*, themselves, \$153,960.00. Order, p. 47; R. 59.

The remaining two categories of damages – consequential damages and punitive damages – are covered under the policy. Our Supreme Court has stated the general rule regarding coverage by CGL policies of consequential damages, as follows:

A comprehensive general liability policy, such as the one at issue, provides coverage “for all the risks of legal liability encountered by a business entity,” with coverage excluded for certain specific risks. Rowland H. Long, LL.M., *The Law of Liability Insurance*, §3.0-6[1] (2001). This type of insurance “is not intended to insure business risks, i.e., risks that are the normal, frequent, or predictable consequences of doing business, and which business manager can and should control or manage.” *Id.* §10.01 [1]. 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, 458 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); *Sapp v. State Farm Fire & Cas. Co.*, 226 Ga. App. 200, 486 S.E.2d 71, 75 (1997) (noting risk intended to be insured is possibility that work of insured, once completed, will cause bodily injury or damage to property other than to completed work itself, and for which insured may be found liable; coverage applicable under CGL policy is for tort liability for injury to persons and damage to other property and not for contractual liability of insured for

economic loss because completed work is not that for which the damages person bargained).

Century Indemn. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 565-66, 561 S.E.2d 355, 358 (2002). The Supreme Court's recent holding in Auto-Owners v. Newman, *supra.*, affirmed that CGL policies cover property damage resulting from an occurrence "to other property not the work product." Shearouse Adv. Sh. 9 at 68.

The insurance company asserts that damages incurred in taking down the other two signs were for "economic losses." Appellant's Brief, pp. 43-44. That assertion is incorrect under our law. A leading South Carolina case on economic loss, and the lack of coverage for it, is Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc., 356 S.C. 156, 588 S.E.2d 112 (2003). In that case, our Supreme Court answered the following certified question from the South Carolina District Court:

Do the subject CGL policies obligate the plaintiffs to indemnify and defend the corporate defendants for the claims of the claimants which are economic in nature and based solely on the diminution in value of the claimants' respective properties?

In Carl Brazell, a declaratory action brought by Auto-Owners Insurance Company, the claimant-defendants had brought claims against the builder-defendants based on the presence of World War II explosives on the property where the claimants had purchased homes. They alleged that the value of their homes had been diminished. It was important to the Court that the claimants had not alleged "any physical injury to their property," 356 S.C. at 63, 588 S.E.2d at 115-16, so they had no "property damage" under the policy. *Id.* The situation at hand in this case is very much different. The Claimants have alleged physical injury to their property.

The general law is that all damages that are causally related to “property damages” as defined in a CGL policy are covered by the policy. The following extract from the treatise, *Handbook on Insurance Coverage Disputes*, explains and provides examples of its application:

The standard post-1973 CGL policy, which covers “damages because of ... property damage,” defines “property damage” as: (1) the physical injury to or destruction of tangible property which occurs during the policy period including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period. “[T]he most sensible reading of the ... phrase, ‘damages because of ... property damage,’ requires the insurer to pay all damages which are causally related to an item of ‘property damage’ which satisfies either of the policy’s definitions. Federated Mut. Ins. Co. v. Concrete Units, Inc., 363 N.W.2d 751, 757 (Minn. 1985).

Thus, courts must initially determine whether consequential damages follow either a direct physical injury to tangible property, or a loss of use of tangible property ... [I]f either of the two prongs of the “property damage” definition have been satisfied, consequential damages may constitute property damage. *See, e.g. Westchester Fire. Ins. Co. v. Bell Lumber & Pole Co.*, No. 86 C 8948 (N.D.Ill. Oct. 23, 1991) (consequential damages were causally related to the railroad company’s loss of use of its rail cars); Central Armature Works, Inc. v. American Motorists, Ins. Co., 520 F.Supp. 283, 289 (D.D.C. 1980) (lost profits stemming from loss of use of a shredder resulting from property damage inflicted by acts of the insured were covered by CGL policy.); Minnesota Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175, 182 (Minn. 1990) (“Damages which are causally related to covered ‘property damage’ should also be covered under the language of the policy.”); Cyprus Amax Minerals Co. v. Lexington Ins. Co., 74 P.3d 294 (Colo. 2003) (under excess liability policies, “property damage” can include the costs of repairing a mine and the loss of use after a landslide); Federated Mut. Ins. Co. v. Concrete Units, *supra*, 363 N.W.2d at 756-57 (the loss of use of a grain elevator resulted in consequential damages); Marley Orchard Corp. v. Travelers Indem. Co., 50 Wash. App. 801, 750 P.2d 1294, 1297, *review denied*, 110 Wash.2d 1037

(1988) (stress to tress constituted property damages were covered by the insured's CGL policy).

A loss arising from "property damage" is recoverable, whether or not the loss itself is tangible. *See, e.g. Ferrell v. West Bend Mut. Ins. Co.*, 393 F.3d 786 (8th Cir. 2005) (lost profits resulting from crop failure are recoverable); *Dewitt Constr. Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1136 (9th Cir. 2002) ("intangible economic injuries may result from physical injury to tangible property" and such injuries are recoverable if they flow directly from the property damage); *Aetna Casualty & Sur. Co. v. General Time Corp.*, 704 F.2d 80, 83 (2d Cir. 1983) (lost profits resulting from defective motors incorporated into zone valves); *Central Armature Works, Inc. v. American Motorists Ins. Co.*, *supra*, 520 F.Supp. at 289 (lost profits resulting from negligently repaired scrap metal shredder); *City of Burlington v. Association of Gas & Elec. Ins. Servs, Ltd.*, 170 Vt. 358, 368, 751 A.2d 284, 291 (2000) (noting an exception to the general rule that purely economic losses are not covered by insurance provisions covering damage to tangible property in cases "when occurrence causes the loss of use of tangible property, and the loss of use, in turn, then causes economic losses such as lost profits"); *DiMambro-Northend Assocs. v. United Constr. Ins.*, 154 Mich.App. 306, 310, 313-16, 397 N.W.2d 547, 548, 550-51 (1986), *appeal denied*, 428 Mich. 893 (1987) (lost profits, additional overhead and labor costs following fire in a tunnel under construction); *General Ins. Co. of Am. v. Gauger*, 13 Wash.App. 928, 538 P.2d 563, 566 (1975) (lost profits resulting from defective crop seed); *Safeco Ins. Co. v. Munroe*, 165 Mont. 185, 527 P.2d 64, 68-69 (1974) (lost profits following injury to a wheat crop).

Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* §7.03[b] at 425-26 (13th Ed. 2006). *See also, First Newton Nat'l Bank v. General Cas. Co. of Wisconsin*, 426 N.W.2d 618, 626 (Iowa 1988) ("Our conclusion is in step with the conclusions reached by the majority of courts that have interpreted similar provisions in the fact of similar arguments Tangible property rendered useless is injured and hence is covered, since the definition of damages includes loss of use property resulting from property damage"); *W.E. O'Neil Constr. Co. v. National Union Fire Ins. Co.*, 721 F.Supp. 984, 991-93 (N.D. Ill. 1989) ("National Union also contends that it is not liable

because 'property damage' does not include economic losses, and that the only losses claimed by the Owner against O'Neil are such economic losses. The Court rejects National Union's argument that economic losses are not covered, based on two independent grounds. First, the policy specifically defines "property damage" as including "loss of use of tangible property which has not been physically injured or destroyed." Second, the Court disagrees with National Union's position that the case law has interpreted "property damage" as excluding all types of economic losses...").

It, therefore, appears that a majority of courts hold that a CGL policy provides coverage for damages for lost profits and diminution in value if they are caused by "property damage" as defined by the policy. That is entirely consistent with the South Carolina Supreme Court's holding in Century Indem. Co. v. Golden Hills Builders, *supra*, which essentially holds that CGL policies provide coverage for all tort liability, unless excluded, but not for the insured's **contractual** liability for economic loss.

The losses that Auto-Owners is being asked to cover are, therefore, not "economic losses" but are consequential damages from a tort. Such damages are generally within the intended coverage of a CGL policy.

D. The Policy would Provide Coverage for Punitive Damages.

Auto-Owner's policy does not in any way exclude coverage for punitive damages. South Carolina does not, as a matter of public policy, hold that punitive damages are outside of coverage by liability insurance policies. In fact, under the automobile liability insurance section of our statutes, "damages" is specifically defined to include punitive damages, S.C. CODE ANN. § 38-77-30 (4) (2002) ("Damages" includes both actual and

punitive damages”). Our public policy, therefore, supports the proposition that liability insurance covers punitive damages.

The insuring statement in Auto-Owners’ policy, in pertinent part, states that, “[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.” Policy, p. 1 of 14; R. 83. This statement does not limit coverage to actual or compensatory damages. In similar circumstances, South Carolina courts have held that general liability policies cover punitive damages. South Carolina State Budget & Control Board v. Prince, 304 S.C. 241, 403 S.E.2d 643 (1991). The Prince Court held as follows:

The policy under consideration did not limit recovery to actual or compensatory damages. The language of the policy here is sufficiently broad ... to cover liability for punitive damages as such damages are included in the ‘sums’ which the insured is legally obligated to pay as damages because of bodily injury within the meaning of the policy. [Carroway v. Johnson, 245 S.C. 200, 205, 139 S.E.2d 908, 910 (1965)] Here, as in Carroway, the policy does not limit recovery to actual damages. Instead, the policy uses broader language which, under the rules of construction and interpretation of insurance policies, must be read as encompassing punitive damages. The Fund is obligated, under the language of its policy, to provide coverage for any punitive damages awarded against Prince.

304 S.C. at 249, 403 S.E.2d at 648. *See also*, State Farm Mut. Auto. Ins. Co. v. Hamilton, 326 F. Supp. 931, 935-36 (D.S.C. 1971) (affirming that coverage of punitive damages is consistent with the public policy of South Carolina, based on State statutes and Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965). Quotes *Appleman Insurance Law and Practice* to effect that “[l]iability policies have been held to cover punitive, as well as compensatory, damages”).

In the policy here, as in Prince, the phrase, "those sums the insured becomes legally obligated to pay as damages," is sufficiently broad to encompass punitive damages. If there is one dollar (\$1.00) in covered actual damages, then all the punitive damages should also be covered. Even excluding the primary loss-of-use damages, there was obviously more than one dollar in actual damages, including, *inter alia*, damage to the fence, Tr., Vol. I, p. 96; R. 1169, lines 17-22; \$300 for "cutting sign loose on I-77," Tr. Vol. I, p. 86; R. 1161, lines 20-22; \$1835 for the use of a crane to "aid in sign removal," Id. at pp. 87-88; R. 1162, line 19- 1163, line 9; \$5590 for 10 hours use of a crane to "take the third sign down," Id. at pp. 88-89, R. 1163, line 16- 1164, line 1. There appears to be no South Carolina case that holds that a general liability policy with such broad wording fails to provide coverage for punitive damages. Auto-Owners' policy here, under the law of South Carolina, covers the award of punitive damages against Mr. Eadon.

The majority of other jurisdictions also hold that CGL policies cover punitive damages unless they contain words that unambiguously exclude them. The treatise, 2 Barry R. Ostrager and Thomas R. Newman, *Handbook on Insurance Coverage Disputes*, §14.02 [a] pp. 1009-1010, states the following:

The majority of courts have held that an insurance policy which provides coverage for "damages" includes coverage for punitive damages unless such coverage is specifically excluded elsewhere in the policy. See e.g. Ridgeway v. Gulf Life Ins. Co., 578 F.2d 1026 (5th Cir. 1978) (Texas law); South Carolina State Budget & Control Bd. Div. of Gen. Servs., Ins. Reserve Fund v. Prince, 304 S.C. 241, 249, 403 S.E.2d 643, 648 (1991); Southern Am. Ins. Co. v. Gabbert-Jones Inc., 13 Kan. App. 2d 324, 327-28, 769 P.2d 1194, 1197 (1989); Hensley v. Erie Ins. Co., 168 W. Va. 172, 283 S.E.2d 277 (1981); Dayton Hudson Corp. v. American Mut. Liab. Ins. Co., 621 P.2d 1155 (Okla. 1980); Harrell v. Travelers Indemn. Co., 279 Or. 199, 567 P.2d 1013 (1977); Scott v. Instant Parking,

Inc., 105 Ill. App. 2d 133, 245 N.E.2d 124 (1st Dist. 1969); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W2d 1 (1964).

In reversing a trial court's holding that an award of punitive damages was not covered by CGL policy, the Washington State Court of Appeals held as follows:

A review of case law from other jurisdictions interpreting virtually identical policy language shows that the trial court's rationale is the minority rule. Most courts do not focus on the meaning of "because of"; they look instead to the phrase "all sums that the insured becomes legally obligated to pay as damages" and interpret it as providing coverage for punitive damages. See, e.g., Lazenby v. Universal Underwriters Ins. Co.; Price v. Hartford Acc. & Indemn. Co.; Abbie Uriguen Olds. Buick, Inc. v. United States Fire Ins. Co.; Northfolk & Western Ry. Co. v. Hartford Acc. & Indemn. Co.; Harrell v. Travelers Indemnity Co.; State v. Glens Falls Ins. Co.; Hensley v. Erie Ins. Co.; Skyline Harvestore Systems, Inc. v. Centennial Ins. Co.; Providence Wash. Ins. Co. v. Valdez; Brown v. Maxey; South Carolina State Budget & Control Board v. Prince; *But see* Heartland Stores, Inc. v. Royal Ins. Co.

The majority rule emphasizes the absence of a specific exclusion for punitive damages and the absence of any other distinction in the policy between compensatory and punitive damages.

Fluke Corp. v. Hartford Acc. & Indemn. Co., 7 P.3d 825, 828-29 (Wash. Ct. App. 2000) (emphasis added)(footnote omitted).

In this case, Auto-Owners' policy did not exclude punitive damages and it "could have explicitly excluded coverage for punitive damages had they intended such an outcome." Mathias, J. *et al.*, *Insurance Coverage Disputes* §9-20.9[c] citing, *inter alia*, South Carolina State Budget & Control Board v. Prince, 304 S.C. 241, 249, 403 S.E.2d 643, 648 (1991). Given Auto-Owners' failure to exclude coverage for punitive damages, and that the policy expressly provides coverage for damages "that the insured becomes

legally obligated to pay,” there should be coverage under the policy for an award of punitive damages.

V. THE TRIAL COURT WAS CORRECT IN HOLDING THAT NONE OF THE POLICY’S EXCLUSIONS PRECLUDED COVERAGE FOR CONSEQUENTIAL PROPERTY DAMAGE CAUSED BY THE FALL OF ONE SIGNPOST, BUT PRECLUDED COVERAGE ONLY FOR THE COST OF THE SIGNPOSTS THEMSELVES.

The Trial Court’s order of November 7, 2006 included a lengthy, detailed analysis of the possible applicability of exclusions k, l, m, and n in Auto-Owner’s policy. Order of 11/7, pp. 24-38; R. 36- 50. That court reached the correct conclusion that only the cost of the work product itself – the \$153,960.00 paid for the sign posts – was excluded. Order of 11/7, p. 47; R. 59. The remainder of the property damage was consequential damage to other property caused by the accident of one sign post falling into the interstate highway. Appellant’s Brief, pp. 45-50, provides a much less thorough and compelling analysis of the applicability of exclusions k, l, m, and n than does the Trial Court’s order. Each of the cited exclusions will be addressed *infra*.

Under South Carolina law, exclusionary clauses are to be narrowly construed so as to provide coverage to the insured if that is reasonably possible. McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993); South Carolina Municipal Ins. and Risk Fund v. City of Myrtle Beach, 368 S.C. 240, 243, 628 S.E.2d 276, 277 (Ct. App. 2006). The term “arising out of” when used in a policy exclusion is to be narrowly construed to mean, “caused by.” Owners Ins. Co. v. Clayton, 364 S.C. 555, 561, 614 S.E.2d 611, 614 (2005) *citing* McPherson, supra.

A. Exclusion k does not Preclude Coverage of the Property Damage Caused by the Falling of the Sign Post.

As quoted *supra.*, p. 6, exclusion k states that the policy does not apply to “property damage” to “your [i.e., the insured’s] product.” “Property damage” and “your product” are defined terms in the policy, as quoted *supra.*, p. 8.

The insured’s sole product in the current case was the sign posts. The use to which Mr. Rhodes put the sign posts was not C&B Fabrication’s “product” or any part of it. The exclusion pertains solely “to property damage to C&B Fabrication’s product,” which does not include Mr. Rhode’s business. The damage to Mr. Rhode’s business is consequential damage arising from the occurrence, not damage to the insured’s product.

Mr. Rhode’s primary claim, moreover, was for damage to “real property,” which is specifically excluded from the definition of “your product.” R. 96. There was both physical damage to real property, *e.g.* the fact that the “stumps” of the signs remain embedded in the ground, approximately 27-28 feet below the surface and 21 feet above the surface, Order of 11/7, p. 24; R. 36; Tr. I, p. 60, lines 3-14; R. 1149, lines 3-14; Tr. II, p. 237, lines 3-5; R. 1175, lines 3-5, as well as loss of use of the real property as a platform for the erection of signs. *See, e.g.* Tr. I, p. 94, line 22 – p. 96, line 16; R. 1167, line 22- 1169, line 16; Tr. II, p. 113, lines 11-23; R. 1172, lines 11-23; Tr. III, p. 95, line 12 – p. 97, line 14; R. 1195, line 12 -1197, line 14.

Under the holding of Auto-Owners Insurance Company v. Newman, *supra.*, there would be coverage for the costs of removal of the “stumps” of the sign posts that were taken down. Though they are part of the insured’s work product, their removal is a cost of remedying the property damage caused by the occurrence to the real property. In Newman, our Supreme Court reviewed, *inter alia*, the award of an arbitrator, affirmed by a circuit court, to a construction company and homeowner for the cost of removing and

replacing the negligently-applied stucco, which was the work product primarily in issue in the legal action. The arbitrator and lower court held that the cost of removal and replacement of the insured's product was covered damaged. The Supreme Court affirmed, holding as follows:

[T]he arbitrator recognized the existence of the underlying water damage to the home resulting from the defectively-applied stucco. Because this underlying moisture damage could neither be assessed nor repaired without first removing the entire stucco exterior, the trial court correctly concluded that the arbitrator's allowance for replacement of the defective stucco was covered by the CGL policy as a cost associated with remedying the other property damage that result from an "occurrence."

Newman, Opinion 26450 (S.C. Sup. Ct. filed March 10, 2008) (Shearouse Adv. Sh. 9 at p. 72).

Remediation of the real property injured by the occurrence here requires the removal of part of the insured's work product. That should be a covered cost under Auto-Owner's policy.

Exclusion k does not obviate coverage under Auto-Owner's policy, as the Trial Court correctly held, other than as to the contractual cost of the sign posts.

B. Exclusion l does not Preclude Coverage of the Property Damage Caused by the Falling of the Sign Post.

Exclusion l, quoted *supra.*, p. 6, excludes coverage for "property damage" to "your [the insured's] work." As mentioned previously, "property damage" is a defined term, *supra.*, p. 8, as is "your work." *Id.* Inasmuch as the sign posts were both C&B Fabrication's "product" and "work," exclusion k and l overlap. In a case such as this, analysis of the effectiveness of these exclusions is virtually identical, with minor exceptions not pertinent here.

As pointed out *supra.*, pp. 40-41, regarding exclusion k, there was in this case extensive property damage – including both physical injury and loss of use – to much property other than the insured’s work. The insured’s only work was the sign posts themselves; all other damages were consequential damages to property other than the insured’s work. Mr. Rhode’s primary claim is that the fall of the sign post, which was alleged to have been defectively constructed, caused substantial and enduring damage to his real property. Such damages, including remediation of the real property and its loss of use, are not excluded by exclusion l. The holding of Auto-Owners Ins. Co. v. Newman is equally applicable regarding this exclusion.

C. Exclusion m does not Preclude Coverage of the Consequential Damages Incurred by Mr. Rhodes/Piedmont Promotions, Inc., arising from the Occurrence of the Falling of the Sign Post Installed by Auto-Owner’s Insured.

Exclusion m is quoted *supra.*, p. 6. It excludes coverage for property damage to “impaired property,” (which is defined *supra.*, p. 7) or property that has not been physically injured, caused by a defect, deficiency, inadequacy or dangerous condition in the insured’s “product” or “work.” There is an exception to exclusion m that is very important in this case. The exception states that exclusion m does not apply to the loss of use of other property arising out of sudden and accidental physical injury to the insured’s “product” or “work” after it has been put to its intended use.

The exception is fully applicable in this case to obviate the exclusion. As pointed out *supra.*, the loss of use of the real property is Mr. Rhodes’ primary claim. Rhodes’

loss of use of the real property – and of the two other sign posts – did have a causal connection to or flowed from³ the accidental fall of the sign post.

That the fall of the sign was sudden, or unexpected,⁴ and accidental is manifested in Mr. Rhodes' testimony, as follows:

Q. Sam, when you first got the telephone call that that sign had fallen in the interstate, what was your reaction?

A. I was scared. I got a call and I had left town, and when I left they had the metal structure tied up to a crane and they were re-welding and straightening it out. Then I get a call saying that the sign had fallen in the interstate, which I didn't know could happen. And not only was it not the one that I had a problem with, it was one below that, and I was informed that the middle sign was leaning again and that the traffic was stopped in the interstate. They couldn't move anywhere because the sign was blocking the interstate, and the sign was leaning. One had already fallen in the interstate, and I was scared that the other one was going to fall and kill somebody.

Tr. II, p. 112, line 22 – p. 113, line 10; R. 1171, line 22- 1172, line 10. There is no evidence to the contrary.

There is also no dispute that the sign posts had been put to their intended use, as they had advertising signs on them. Tr. I, p. 60, line 19 – p. 63, line 25; R. 1149, line 19- 1152, line 25. There is no evidence that the sign posts were not being used as intended.

³ Because the exception to the exclusion restores coverage, the broader meaning of the term, "arising out of," is to be used. McPhearson v. Michigan Mut. Ins. Co., 310 S.C. 316, 319-20, 426 S.E.2d 77-, 771 (1993). As McPhearson states, "where the words of a policy are capable of two reasonable interpretations, that construction will be adopted which is most favorable to the insured." *Id.*

⁴ Our Supreme Court has construed "sudden" in an exception to an exclusion to mean "unexpected." Greenville Country v. Insurance Reserve Fund, a Div. of the S.C. Budget and Control Bd., 313 S.C. 546, 548, 443 S.E.2d 552, 553 (1994) *reh'g denied.*

The exception to exclusion m is, therefore, fully applicable to the situation at hand. It obviates any exclusionary effect that exclusion m would have in the situation at hand.

Even if the exception did not consume the exclusion in this case, exclusion m should not be effective to exclude coverage for Mr. Rhodes' primary damage claim, the loss of use of real property. When the exclusion is construed narrowly – to give as much coverage as reasonably possible – as our law requires, Owners Ins. Co. v. Clayton, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) *reh'g denied*, and construing “arising out of” as “caused by,” as must be done in an exclusion, *Id.* at 561, 614 S.E.2d at 614 *citing* McPhearson v. Michigan Mut. Ins. Co., *supra.*, exclusion m is inapplicable. The property damage, specifically the loss of use, was not caused to the real property by a defect, deficiency, inadequacy or dangerous condition in the sign posts – which would be required for exclusion m to be applicable. The loss of use was caused by the State not allowing signs to be re-erected on the property, as testified by the Director of Outdoor Advertising for the South Carolina Department of Transportation, Mr. Keith C. Melvin. Tr. III, p. 111, line 15 – p. 115, line 13; R. 1200, line 15- 1204, line 13. For purposes of inclusion within coverage, such damage was a consequence of the occurrence – it “flowed from” the occurrence or was “causally related” to it – but it was not “caused by” the defect in the insured’s work, as required to exclude coverage.

D. Exclusion n does not Exclude Coverage in the Circumstances of this Case.

Exclusion n is quoted *supra.*, pp. 6-7. In the context of this case, if applicable, it would exclude damages claimed, *inter alia*, for loss of use of the sign posts (C&B Fabrication’s “work” or product) or “impaired property” if the sign posts or impaired property were withdrawn or recalled from the market or from use by a person or

organization because of a defect, deficiency, inadequacy or dangerous condition in the sign posts or in the "impaired property."⁵

The real property at issue is not "impaired property" under the definition because it cannot be restored to its intended use by removing or repairing the sign posts. The real property is also not the insured's "work" or "product," so it fits into none of the three categories of property to which exclusion n applies. Exclusion n is, therefore, inapplicable.

As pointed out above, moreover, the primary damage to the real property for which Mr. Rhodes seeks recompense – its loss of use – was not because of a defect or deficiency in the sign posts. Their loss of use was because of the South Carolina Department of Transportation's **withdrawal of Rhode's permit** to erect advertising signs on the real property. The permits were withdrawn because the business on the property was determined to be a sham. As Mr. Melvin, the S.C. DOT's director of outdoor advertising, testified, Mr. Rhodes would still have his permit to erect signs on that real property if the signs did not fall or start leaning, Tr. III, p. 115, lines 7-13; R. 1204, lines 7-13, which caused the DOT inspectors to come onto the property and observe the condition of the business. They would not otherwise have come onto the property. Losing the permit was, therefore, a consequence of the sign's falling but their loss was not "because of" the defect in the insured's work or product.

⁵ "Impaired property" is defined *supra*, p. 7. It means tangible property, other than the insured's "work" or "product" that cannot be used or is less useful because it incorporates the insured's "work" or "product" that is thought to be defective or dangerous if the property can be restored to use by, *inter alia*, removal of the insured's "work" or "product."

When the exclusion is construed narrowly in favor of coverage, as it must be, Horry County v. Insurance Reserve Fund, 344 S.C. 493, 499, 544 S.E.2d 637, 640 (Ct. App. 2001),⁶ exclusion n is insufficient to preclude coverage of the damages to Mr. Rhodes' real property, including its loss of use. If the exclusion is ambiguous, moreover, as it is, resulting from the exclusions' use of the term, "because of," it is construed against the insurer and in favor of coverage. South Carolina State Budget and Control Bd., Div. of Gen'l Svcs. Ins. Reserve Fund v. Prince, 304 S.C. 241, 145-46, 403 S.E.2d 643, 646 (1991).

Auto-Owners as the insurer bears the burden of establishing the applicability of exclusions in its policy. Owners Ins. Co. v. Clayton, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) citing Boggs v. Aetna Cas. and Sur. Co., 272 S.C. 460, 252 S.E.2d 565 (1979). In the case at hand, Auto-Owners has failed to meet its burden of establishing the applicability of exclusions k, l, m, or n. Not one of these four exclusions is effective to deny coverage for the uncontradicted damages brought forth in Mr. Rhodes' lawsuit against Auto-Owners' insured, as the Trial Court correctly held.

CONCLUSION

The Trial Court's Order of November 7, 2006, R.13-60, and two Orders supplementing that Order, R. 61-62, 63-64, should be affirmed. The Trial Court correctly ruled, based on uncontradicted evidence, that Mr. Eadon was an insured; the fall of the sign post was an occurrence; property damage to other property was caused by the occurrence; and no exclusions in the policy were effective to destroy coverage. There is

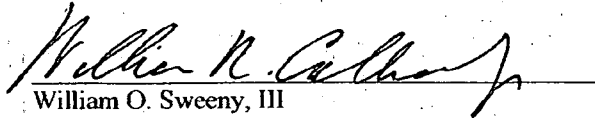
⁶ The Horry County Court stated, "[e]xclusions in an insurance policy are to be interpreted narrowly and to the benefit of the insured."

evidence in the record, e.g. sworn testimony and exhibits, which supports the holding of the Trial Court, who tried this declaratory action in a bench trial. The Trial Court's Orders are not based on an error of law. This Court should, therefore, affirm the Trial Court's holding and remand the case for consideration of Mr. Eadon's motion for costs and attorney fees.

The Trial Court's Order should be affirmed.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



William O. Sweeny, III
William R. Calhoun, Jr.
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803)256-2233

Attorneys for Marion L. Eadon, C&B Fabrications,
Inc. and Low Country Signs, Inc.

Columbia, South Carolina
November 17, 2008

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No.: 02-CP-46-2369

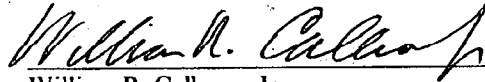
Auto-Owners Insurance Company..... Appellant

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),
SCACR.



William R. Calhoun, Jr.
Post Office Box 12129
Columbia, South Carolina 29211
(803)256-2233
Attorney for Marion L. Eadon, C&B Fabrications,
Inc. and Low Country Signs, Inc.

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SC Court of Appeals

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Auto-Owners Insurance Company, Appellant,

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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,

FINAL REPLY BRIEF OF APPELLANT AUTO-OWNERS
INSURANCE COMPANY

ELLIS, LAWHORNE & SIMS, P.A.

A. JOHNSTON COX
JOHN M. MCCANTS
Post Office Box 2285
Columbia, South Carolina 29202
(803) 254-4190

ATTORNEYS FOR APPELLANT
AUTO-OWNERS INSURANCE COMPANY

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REPLY ARGUMENT

I. RESPONDENTS IGNORE THE UNAMBIGUOUS LANGUAGE OF THE POLICY AND THE DISTINCTION BETWEEN AN INDIVIDUAL AND A CORPORATION IN SUPPORT OF THEIR ARGUMENTS THAT MARION L. EADON MEETS THE DEFINITION OF AN INSURED UNDER THE FACTS OF THIS CASE.

There has never been an issue of fact in this case concerning whether the named insureds on the Auto-Owners policy are corporations. The policy is clear on its face that the policy was issued to corporations. The entities named on the policy both have "Inc." included in their names and the Declarations Page specifically states that the entities insured are "corporation." (R. pp. 1296-1339). Because the policy is clear on its face and there is no ambiguity, there is no need to look beyond the terms of the policy. Even if there were some type of ambiguity, Eadon states that he intended for the policy to insure a corporation and no other type of entity. (R. pp. 1107-1109). When he signed the insurance application, he signed it on behalf of the corporation as an officer of the corporation. (R. pp. 1110-1111). The only issue of fact identified by the trial court concerned the correct names of the corporations being insured, which the stipulation between the parties resolved.

As previously stated, the parties to the policy reformed the policy to reflect the named insureds to be "C&B Fabricators, Inc. and Low Country Signs & Fabrication, Inc. both d/b/a C&B Fabrication, trade name of these corporations." Respondent Eadon's dismissal of the distinction between an individual and a corporation is summed up by his statement that "The effect of this stipulation was that, in considering coverage, the judgment in Rhodes v. Marion L. Eadon d/b/a C&B Fabrication was deemed to be awarded against Rhodes v. Marion L. Eadon d/b/a/ C&B Fabricators, Inc." (Eadon's Initial Brief, p.2). Somewhat differently, but to the same end, Rhodes, never conceding that the policy insures corporations, states, "Therefore, C&B Fabrication [not a corporate entity] is insured. (Rhodes Initial Brief, p. 19).

These pronouncements ignore that "C&B Fabrication" is not an entity in itself. It is a fiction. It has no significance apart from what precedes the "d/b/a." If a judgment is rendered against Marion L. Eadon d/b/a C&B Fabrication (who is not listed as a named insured), it will be a judgment rendered against an individual doing business under a fictitious trade name. This is entirely different from a corporation doing business under a trade name.

Eadon's argument is that because both Marion L. Eadon and a corporation do business under the same trade name, Marion Eadon is the corporation; they are one and the same. However, this is a legal impossibility – as stated in Auto-Owners' initial Brief, an individual can not be a corporation and a corporation can't be an individual. They are separate and distinct legal entities. Hunting v. Elders, 359 S.C. 217, 597 S.E.2d 803 (S.C.App. 2004) (corporation is an entity, separate and distinct from its officers and stockholders).

Rhodes admits in his Initial Brief that he never intended to sue a corporation, that the corporation (C&B Fabricators, Inc.) went out of business, "[h]owever, C&B Fabrication was still in business as it had been all along." (Rhodes Initial Brief, p. 10, 17-18). It has been Rhodes' position throughout both cases that Marion Eadon d/b/a C&B Fabrication is a separate and distinct entity from the corporations insured under the policy. This is because, for some reason, he was concerned that the defense "ploy" in the Rhodes case was to "deflect liability onto a defunct corporate entity with no assets (C&B Fabricators, Inc.)." (Rhodes Initial Brief, p. 10).

There is simply no escaping the fact that Rhodes and Piedmont intended to sue an individual and avoid suing and receiving a verdict against a "defunct" corporation. They went after Eadon personally, and what they will receive, if they are successful, is a personal judgment against Marion L. Eadon, who is not listed as a named insured on the policy issued by Auto-Owners.

That being the case, the Respondents have the duty to prove that Marion L. Eadon, the individual, meets the definition of an insured under the facts of this particular case. They failed to do so, and the trial court's determination on this issue was an error of law.

Eadon argues that the phrase "with respect to their duties as your officers and directors" means that if he is sued for anything having to do with the corporation's business, he automatically meets the policy definition of an insured. This argument requires that the Court adopt an interpretation of the policy that renders the policy definition of an insured meaningless.

It is true that corporate officers and directors are insureds under the policy, "but only with respect to their duties as your officers and directors." This limiting phrase, when read in conjunction with the remainder of the Who Is An Insured definition, is clear. The definition goes on to state,

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.

(R. pp. 1312-1314).

Unlike other employees, it is not enough for an officer to be acting within the scope of his employment with the corporation to meet the definition of an insured. An executive officer is only insured with respect to his duties as an officer. See, Creel v. Louisiana Pest Control Insurance, Inc., 723 So.2d 440 (La. Ct. App. 1998). Auto-Owners does not contend that there must be a finding of liability against a corporation before an executive officer meets the definition of an insured. However, the policy requires that an executive office claiming to be an insured must prove that he was acting with respect to his duties as a corporate officer.

Eadon failed to make the requisite showing. By his own admission, the negligent acts alleged in Rhodes and Piedmont's amended complaint are not within his duties as an officer. 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. 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 of any of the employees. He did not personally design, build, repair or inspect any signs. It was not within his duties as an officer of the corporations to design signs, build signs or repair signs. (R. pp. 1103-1105, 1114, 1205-1209).

Although it is alleged that Eadon met and spoke with Rhodes about contracting to build the signs and that Eadon approved a price reduction, Eadon was not sued for making the deal or reducing the price. As Judge Dennis put it, "the deal is not the tort." (R. pp. 1238-1239). He was sued for negligently fabricating, erecting, inspecting and repairing the signs. None of these activities were within his knowledge, experience or duties as an officer of the corporation, nor was he personally involved in any of these actions. (R. pp. 1103-1105, 1114, 1205-1209). Furthermore, Eadon testified that he did not undertake any action with regard to Rhodes within his duties as an officer of LowCountry Signs & Fabrication, Inc. (R. pp. 1117-1118).

The cases cited by Eadon as persuasive authority are distinguishable. In Martin v. USF&G Co., 996 S.W.2d 506 (Mo. 1999), the officer claimed that the installation of a pipe was within his duties as an officer. Id. at 509-510. In our case, Eadon specifically denies that the actions he was sued for are within his duties as an officer. His testimony

could not be more clear on this point. There is no ambiguity in the policy to be resolved under the facts of our case.

Marathon Ashland Pipe Line LLC v. Maryland Cas. Co., 243 F.3d 1232 (10th Cir. 2001) has no bearing on the issue before the Court. Marathon Ashland does not involve an executive officer seeking coverage, nor does it discuss the policy provision at issue in this case. The analysis in Marathon Ashland regarding coverage for the negligence of an additional insured is not applicable to our situation. Auto-Owners' definition of an insured specifically states that an executive officer is only covered with respect to his duties as an officer of the insured corporation. Auto-Owners references the cases cited in its Initial Brief as the applicable persuasive authority on this issue.

Furthermore, the trial court erred in applying the reasonable expectations doctrine to defeat the unambiguous terms of the policy. Eadon agrees in his Initial Brief that the doctrine has been rejected in South Carolina, but that the trial court only used the word "expectations" in the context of determining the parties intentions. (Eadon Initial Brief, p. 20). Rhodes, in error, contends that South Carolina has adopted the reasonable expectations doctrine. However, whether you apply the reasonable expectations doctrine or the rule of construction championed by Eadon,

[w]here the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements of any of the parties to it, made contemporaneously with or prior to its execution, is inadmissible to contradict, add to, subtract from, vary or explain its terms, in the absence of fraud, accident or mistake in its procurement.

Bruce v. Blalock, 241 S.C. 155, 127 S.E.2d 439 (1962). As previously discussed, the trial court did not identify any ambiguity in the policy, and there is no ambiguity in the policy, that would warrant examination of Eadon's expectations. Even if there were, his testimony is clear that he intended to insure a corporate entity.

II. AUTO-OWNERS HAS NOT WAIVED, NOR SHOULD IT BE ESTOPPED FROM SEEKING A DETERMINATION OF WHETHER MARION L. EADON MEETS THE DEFINITION OF AN INSURED UNDER THE FACTS OF THIS CASE.

Rhodes and Piedmont raise as an additional ground that Auto-Owners either waived the right to raise, or should be estopped from seeking a determination of, whether Marion L. Eadon meets the definition of an insured under the facts of this case. First, Rhodes and Piedmont have no standing to raise these issues. They are not a party to the contract with Auto-Owners and are not insureds under the policy. See, In re Estate of Anderson, 559 S.E.2d 222 (N.C. App. 2002) ("an estoppel operates neither in favor of, nor against, strangers-that is persons who are neither parties nor privies to the transaction out of which the estoppel arose."); 28 Am.Jur.2d *Estoppel and Waiver* § 115 (1966).

Eadon, the person claiming to be an insured under the policy, does not raise the issues of waiver or estoppel in his Initial Brief, and therefore has abandoned the issue. Ion, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716 (2000) ("[a] respondent may abandon an additional sustaining ground ... by failing to raise it in an appellate brief."). Therefore, these issues are not properly before this Court.

Furthermore, an insurance company cannot waive into coverage by omitting a coverage issue from a reservation of rights letter or failing to inform an insured of a known coverage issue. South Carolina courts have repeatedly held that waiver does not apply in the insurance coverage context. "Waiver cannot create coverage and cannot bring into existence something not covered in the policy." Alverson v. Minnesota Mut. Life Ins. Co., 287 S.C. 432, 524 S.E.2d 140, 142 (Cl. App. 1985); Laidlaw Environmental Services (TOC), Inc. v. Aetna Cas. & Sur. Co. of Illinois, 338 S.C. 43, 524 S.E.2d 847 (Cl. App. 1999); Johnson v. Wabash Life Ins. Co., 244 S.C. 95, 135 S.E.2d 620 (1964) (holding the doctrine cannot be invoked by an insured to create a primary liability of the insurer for which all elements of a binding contract are necessary.)

In Laidlaw, the insured attempted to argue that an adjuster for Aetna made certain admissions regarding coverage in a letter resulting in a waiver of a coverage defense. In adhering to the long-standing rule of law in South Carolina, the court rejected the argument, finding that an insurance company cannot waive into coverage. Laidlaw, 524 S.E.2d at 852. The Laidlaw court also discussed that there could be no waiver because Aetna, just like Auto-Owners in the present case, repeatedly reserved all of its rights under the terms of the policy. Id. Therefore, the doctrine of waiver does not apply in this case and can not be used to prevent Auto-Owners from pursuing a valid coverage position in this case.

Rhodes and Piedmont also argue that Auto-Owners should be estopped from arguing that Eadon is not an insured as defined by the policy. Under South Carolina law, the essential elements of estoppel are divided between the estopped party and the party claiming estoppel. Southern Dev. Land and Golf Co., Ltd. v. South Carolina Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 748 (1993). As to the estopped party, the essential elements are: (1) conduct amounting to a false representation or concealment of material facts, or conduct calculated to convey the impression that the facts are otherwise than, and inconsistent with, the party's subsequent assertions; (2) intention or expectation that such conduct be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. Id.

As to the party claiming estoppel, the essential elements are (1) lack of knowledge or the means of acquiring, with reasonable diligence, knowledge of the true facts; (2) reasonable reliance on the other party's conduct; and (3) a prejudicial change in position. Id.

Rhodes and Piedmont had no right to rely on any statement made by Auto-Owners to Eadon. They are not insureds under the policy. In addition, none of the Respondents have made a showing of or even argued a prejudicial change in position

as a result of any action taken by Auto-Owners. Eadon has testified that even if he had known that he would not be covered under the policy for a jury award, he would not have settled the case with Rhodes. He also has testified that he does not know what, if anything he would have done differently. (R. pp. 1122-1126). It is Eadon's burden to prove the affirmative defense of estoppel. Provident Life and Acc. Ins. Co. v. Driver, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994).

Furthermore, Respondent's claims as to when the issue of Eadon's status as an insured was first raised is disingenuous. Auto-Owners served several requests to admit upon Rhodes on March 5, 2004. In response, Rhodes admitted that C&B Fabrications, Inc. and Low Country Signs, Inc. were not defendants in the Rhodes case and that they did not allege that "Eadon was acting as an officer, director, employee or agent of C&B Fabrications, Inc. or Low Country Signs, Inc. at the time of the events which are the subject of the allegations in the complaint." (R. pp. 1086-1088). Eadon also served responses to the Request to Admit. (R. p. 1090).

In addition, Rhodes and Piedmont served their own Requests to Admit upon Auto-Owners regarding this issue. This Request to Admit was forwarded to Eadon's counsel as well as to the Plaintiff. Rhodes sought the following admission:

The Plaintiff's policy of insurance, effective September 17, 2000, identified in the Complaint in this action, which named as the insured "C&B Fabrications Inc. & Low Country Signs Inc" 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 as either C&B Fabrications Inc, or C&B Fabrication, or C&B Erectors, Inc., or Low Country Signs Inc.

Auto-Owners reply was: "Denied as stated. The Plaintiff craves reference to its policy as to who is an insured under the terms of the policy." (R. pp. 1091-1092). Eadon's status as an insured was clearly an issue well before the Rhodes trial in August 2004.

Rhodes also argues that Auto-Owners admitted that Eadon was an insured by way of pleadings contained in a complaint filed in this case. That complaint was amended and is not the pleading upon which this case proceeded to trial. In addition, the allegations referenced were denied by the Respondents. (Complaint and Answers to Complaint). "Mere allegations, denied by the other party, are not evidence." Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (1991); see also Vermeer Carolinas, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (1999)("Allegations in a [c]omplaint denied in answer are evidence of nothing.").

Based upon the foregoing, Auto-Owners requests that the Court decline to entertain the issues of waiver and estoppel. The issues are not properly before the Court, and even if they were, there is no evidence in the record to support waiver or estoppel.

III. EADON'S MOTION FOR COSTS IS NOT PROPERLY BEFORE THIS COURT AND HAS NO MERIT.

Eadon raises in his Initial Brief that the trial court did not rule on his motion for costs and asks the Court to do so. This issue of attorneys fees and costs incurred as a result of the proceedings before the lower court is not properly before this Court. That is a matter to be decided by the trial court if (1) Eadon is ultimately determined to be the prevailing party in this litigation and (2) an award of attorneys fees and costs is deemed appropriate by the trial court under the circumstances.

Even if the issue were properly before the Court, the motion should be denied. First, Eadon did not plead a basis for the recovery of attorneys fees and costs. He did assert a counterclaim in response to Plaintiff's Amended Complaint or Plaintiff's Second Amended Complaint seeking attorneys fees and costs. (R. pp. 716-721). Therefore, he has failed to plead a basis for the recovery of attorneys fees and costs, and his motion should be denied.

In addition, no basis exists for the imposition of fees and costs against Auto-Owners. "As a general rule, attorney's fees are not recoverable unless authorized by contract or statute." Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978). Eadon does not assert a right to recover attorneys fees under any statute. Eadon has not asserted a counterclaim for relief pursuant to § 38-59-40(1). (R. pp. 716-722). In addition, the policy contains no basis upon which to grant Eadon's motion for attorneys fees.

Furthermore, Hegler provides no basis upon which to grant Eadon's motion for costs. In Hegler, the insurance company contended that it had no duty to defend the insured. Id. The Court reasoned that the insurance company had a contractual duty to defend that insured, and therefore had a duty to reimburse the insured his attorneys fees and costs for successfully requiring the company to continue to defend.

Hegler is distinguishable from this case. In this case, there is no issue regarding the duty to defend, only the duty to indemnify. Auto-Owners has defended the Rhodes action and continues to do so. Auto-Owners' contractual duty regarding indemnification is that it only has a duty to indemnify an insured for damages covered by the terms of the policy. This action is to determine if the jury's verdict represents covered damages against an insured.

South Carolina law does not support requiring Auto-Owners to pay Eadon's attorneys fees and costs in this action. The General Assembly's passage of S.C. Code Ann. § 38-59-40(1) is evidence of this. Section 38-59-40(1) provides, in pertinent part:

In the event of a claim, loss, or damage which is covered by a policy of insurance ... and the refusal of the insurer ... to pay the claim within ninety days after a demand has been made by the holder of the policy ... and a finding on suit of the contract made by the trial judge that the refusal was without reasonable cause or in bad faith, the insurer ... is liable to pay the holder, in addition to any sum or any amount otherwise recoverable, all reasonable attorneys' fees for the prosecution of the case against the insurer ... The amount of reasonable attorneys fees must be determined

by the trial judge ... The amount of the attorneys' fees may not exceed one-third of the amount of the judgment.

Our Supreme Court has stated,

Clearly, it was not the intent of the legislature to require payment of attorney fees in every contested case won by the insured. Attorney fees may be allowed the plaintiff only when the refusal to pay is "... without reasonable cause or in bad faith," Every case must be determined on its own facts. The plaintiff would not necessarily be entitled to have his attorney's fees paid by the company merely because a verdict was directed in favor of the plaintiff.

Baker v. Pilot Life Ins. Co., 268 S.C. 609, 235 S.E.2d 300, 302 (1977). See also, Spinx Oil Co., Inc. v. Federated Mut. Ins. Co., 310 S.C. 477, 427 S.E.2d 649 (1993)("As a prerequisite to awarding attorneys' fees, Section 38-59-40(1) requires a finding that the insurer's refusal to honor the claim was without reasonable cause or done in bad faith.").

If an insured is entitled to attorneys fees and costs in every action in which it prevails under the common law, there would be no need for § 38-59-40(1). Clearly, Auto-Owners has a right to litigate whether a claim for damages is covered under the terms of its policy. Under South Carolina law, an insurance company is not saddled with the burden of paying for attorneys fees and costs for bringing an action in good faith to receive guidance from the court regarding its duty to indemnify an insured for damages not covered under the insurance policy.

For these reasons, Auto-Owners requests that the Court decline to entertain this issue. If the Court considers the motion at this time, Auto-Owners requests that it be denied.

IV. RESPONDENTS' ARGUMENTS FAIL TO ADDRESS THE FACT THAT THE ONLY PROPERTY DAMAGE THAT OCCURRED IN THIS CASE IS THE DAMAGED SUSTAINED TO THE PRODUCT OF EADON'S FAULTY WORKMANSHIP AND THEREFORE NO COVERAGE IS AVAILABLE UNDER THE POLICY.

Respondents assert that Auto-Owners should have directed this court's attention to the Supreme Court of South Carolina's March 10, 2008 decision in Auto Owners Ins. Co., Inc. v. Newman, --- S.E.2d ---, 2008 WL 648546 (2008) as an authority on

particular issues in this appeal. However, Auto-Owners did not direct the Court to this authority because Newman decision issued on March 10, 2008 is not a final order. The decision has not been released for publication in the reporters. On the contrary, the Supreme Court recently granted a petition for rehearing in Newman on August 10, 2008, and the opinion is still subject to revision or withdrawal. Nevertheless, Newman would demand a reversal of the circuit court in this case as well, since Respondents have failed to allege or show "third party bodily injury or damage to **other property**." Newman, 2008 WL 648546, at *3 (emphasis added).

In this case, it is alleged that one of the three signs fell on the interstate as the result of the faulty workmanship of Eadon. (R. p. 269). There is no dispute that the two other signs had to be removed by order of the South Carolina Department of Transportation, because the DOT deemed the signs unsafe, even though they did not fall. (Respondent Rhodes' Initial Brief, p. 7; Respondent Eadon's Initial Brief, p. 9). Rhodes alleges that as a result of Eadon's poor work, he lost millions of dollars in revenue from lost use of the signs and the diminution of the real estate because it no longer had the signs upon it. (R. pp. 1192, 1173-1174, 1178-1186). Rhodes also had to pay to have the signs removed. (R. pp. 1143, 1161-1163).

The trial court in this case concluded that all damages sustained by Rhodes as a result of Eadon's faulty workmanship, except for the \$153,960.00 paid from Rhodes to Eadon for three signs themselves, is a covered loss under Eadon's CGL policy. However, the circuit court erred in its decision because 1) none of the alleged "property damage" stems from an "occurrence" because no "other property" was damaged besides Eadon's own product or work; 2) all of the alleged damages arise solely out of physical damage and loss of use of Eadon's work product, all of which is unambiguously excluded under the policy.

A. "PROPERTY DAMAGE" THAT ARISES OUT OF FAULTY WORKMANSHIP AND DAMAGES ONLY THE WORK PRODUCT OF THE INSURED IS NOT THE RESULT OF AN "OCCURRENCE" UNDER A CGL POLICY PURSUANT TO SOUTH CAROLINA LAW.

In L-J v. Bituminous Fire & Marine Insurance Co., 366 S.C. 117, 621 S.E.2d 33 (2005) the Court found that although the deterioration to the roadways may have constituted "property damage" under the policy, the various negligent acts of the subcontractors upon which the developer based its claim did not constitute an "occurrence" for which the CGL policy provided coverage. Id. at 123, 621 S.E.2d at 36. Specifically, the Court found that the developer's claim alleged negligent construction causing damage only to the work product itself (i.e. the roadway), and that such a claim was merely one for faulty workmanship. Id. Because damages to the work product alone resulting from faulty workmanship could not typically be said to have been "caused by an accident or by exposure to the same general harmful conditions," the Court reasoned that such claims for faulty workmanship did not constitute an "occurrence" falling within the policy's coverage. Id.

1. Respondents must show "damage to other property," or else no "occurrence" may be found.

The Respondents may establish an "occurrence" where a claim for faulty workmanship results in either "third party bodily injury" or "damage to other property." Id. n. 4. Respondents have failed to allege or show any third party bodily injury. Therefore, to establish an occurrence, Respondents must demonstrate "damage to other property," or no occurrence triggering coverage exists in this case. Id.

Respondents first attempt to satisfy this requirement by baldly asserting that, because one of the signs fell, then an "occurrence" must have taken place triggering coverage of all the Rhodes claims. This, however, is insufficient to establish damage to "other property" in light of L-J and C.D. Walters Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, 281 S.C. 593, 596, 316 S.E.2d 709, 711 (Ct.App.1984) An "accident" will not

be found where faulty workmanship causes the workman's product to fail, injuring itself alone. Id. Falling over is how a faultily constructed and erected sign fails, just like cracking and deteriorating is how a faultily constructed road fails. The fact that the work product itself failed and was damaged is insufficient to establish an occurrence. Id.

There is no evidence that the sign that fell damaged any "other property" of Rhodes when it fell. The sign fell on the Interstate, but Respondents failed to show that the interstate suffered "property damage" when the sign fell. Eadon asserts that "accident" is defined "from the perspective of the victim..." (Respondent Eadon's Initial Brief, p. 25) (citing Peagler v. USAA Ins. Co., 368 S.C. 153, 161, 628 S.E.2d 475, 479 (2006)). Therefore, Rhodes must show that his property, other than the work product of Eadon, suffered "property damage" when the sign fell. If Respondent's cannot show some "property damage" to Rhodes' "other property," this case is indistinguishable from L-J, and no "occurrence" exists.

Respondents try to show "damage to other property" by showing that Rhodes undertook expenditures to address the failure of the signs. However, Respondents cite to no authority that shows that the expenditure of money constitutes "damage to other property." Indeed, the victim in L-J certainly expended money to address the deteriorated road. However, this expenditure was insufficient to establish "damage to other property." Therefore, Respondents cannot meet their burden by relying on Rhodes' expenditures.

Respondents then try to meet this requirement by showing that Rhodes lost the use of his signs, costing him money. However, the loss of use of the work product itself is not "damage to other property." Rather, the victim in L-J certainly lost the use of the road while it was deteriorated and in disrepair. Nevertheless, the loss of use of the property itself was insufficient to show that "other property" had been damaged.

Therefore, Respondents cannot meet their burden by relying on Rhodes' loss of use of the signs.

Respondents finally try to meet this requirement by arguing that Rhodes suffered some damage to his "real estate" or "real property" to establish damage to "other property." However, the substance of this argument is nothing more than the "signs injured themselves." Respondents stress to this Court that the signs became "fixtures" once they were attached to the land, and thus the signs become part of the "real property." Assuming this is true, this is a distinction without a difference. Even if the signs were transformed in the eyes of the law into "real property" by their joinder to the land, this does not make an injury to those signs suddenly "damage to other property." The signs' classification as fixtures do not change the fact that the signs are still Eadon's work product.

On the contrary, when the signs became fixtures and thus indistinguishable from the real property upon which they were erected, the signs and the surrounding real property should be treated as Eadon's work product. L-J and C.D. Walters support this result. Certainly, the road in L-J was a fixture and an improvement to the real property. Moreover, the real property was certainly worth more with a functioning road than without one. However, an injury to the road itself, without more, was insufficient to establish "damage to other property," regardless of any devaluation or impediment to the use of the dirt underneath it. Similarly, the Court of Appeals in C.D. Walters did not distinguish the land from the trees.

Likewise, in this case, the signs remain Eadon's work product and do not constitute "other property" whether or not they are considered fixtures. If they are considered fixtures, the fact that the land they sat on was worth more with the signs than without them does not constitute damage to "other property." The signs still only damaged themselves, and no "other property," whether they were real property or

chattel. Therefore, Respondents cannot meet their burden by relying on Rhodes' loss of use of the signs or the diminution of value of the surrounding "real property."¹

Respondents fail to establish one other piece of Rhodes' property, separate from the signs themselves, that was damaged in this case. This case is indistinguishable from L-J in this regard. South Carolina has established that "any liability that is incurred because of faulty workmanship is part of the insured's contractual liability, not an insurable event under a CGL policy." L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 122 621 S.E.2d 33, 35 (2005) (citing Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 16, 459 S.E.2d 318, 320 (Ct.App.1994) (emphasis added). Therefore, no liability is triggered under the policy for Rhodes alleged damages.

2. **The court should not conflate the facts in this case to require only the showing of one "occurrence," as Rhodes' alleged damages are divisible.**

Respondent Rhodes seeks to establish an occurrence triggering coverage for all of his alleged damages by the single event of one of the signs falling on January 20, 2001. (R. pp. 269-274). However, even if this was an "occurrence" it is not an occurrence that would trigger coverage for the damages stemming from the removal other two signs, as required under the policy. See 1(b). The falling sign is not an "accident" that directly "caused" the two still-standing signs' removal, as required by the policy. See 1(b) (emphasis added). Rather, it was the faulty workmanship of Eadon that caused the two still-standing signs to be removed by order of the South Carolina Department of Transportation.

The Respondents have not shown that the signs would not have had to be removed "but-for" the falling of the first sign. See Oliver v. S.C. Dep't of Hwys. & Pub.

¹ It is telling that Rhodes diminution in value claim was calculated using the "Income Approach" to real estate evaluation. The "income" was derived solely from the fact that the signs were fixtures on the property. The appraiser used the billboard leases as the basis to determine income. (R. pp. 1188-1189).

Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992) (defining "causation in fact" utilizing the "but for" method). On the contrary, the undisputed facts in this case establish that there is every reason to believe that the signs would have had to be removed regardless of the falling of the first sign, since one of the two still-standing signs was already previously leaning towards the highway, and the DOT had already ordered Rhodes to repair it. (R. pp. 1198-1199).

All of the damages relating to the two still-standing signs stem from Eadon's faulty workmanship and the subsequent order of removal by the Department. This causative chain includes no "occurrence," even if the falling of the first sign is an "occurrence" for the damages stemming from the loss of that sign.² Therefore, no coverage is triggered for any damages stemming from the removal of the two remaining signs.

B. EVEN IF THE COURT FINDS AN "OCCURRENCE," THE DAMAGES ARE STILL EXCLUDED BY THE PROVISIONS OF THE CONTRACT.³

Appellant's policy with Respondent Eadon is not ambiguous and could not be any clearer; Exclusions K, L, and M exclude any "property damage" to Eadon's "product," Eadon's "work," or any "impaired property" that incorporates Eadon's "property" or "work." Moreover, Exclusion N excludes any coverage for any "damages" arising out of "the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal, or disposal" of Eadon's "product," Eadon's "work," or any "impaired property." Taken together, these four exclusions completely bar Eadon from seeking

² Respondent Eadon makes this very point in his argument on Exclusion N: "Their loss of use was because of the South Carolina Department of Transportation's **withdrawal of Rhode's** (sic) **permit** to erect advertising signs on the real property. The permits were withdrawn because the business on the property was determined to be a sham." (Respondent Eadon's Initial Brief, pp. 44-45) (emphasis in original). If this argument is true, then no "occurrence" exists that triggers coverage for this loss of use.

³ Throughout this portion of the brief, Auto-Owners refers to "Eadon's faulty" or "defective" work. Auto-Owners acknowledges that there has been no finding that Eadon did anything wrong or that the work performed was faulty. The phrase is used for the sake of simplicity only.

coverage under the CGL policy for the damages sought by Rhodes. Appellant has discussed the application of these exemptions in detail in its initial brief, and rather than reciting its arguments in this memorandum, Appellant will merely rebut the fallacious arguments raised by Respondents in their briefs for the court's convenience.

1. The CGL Policy is not a performance bond, and should not be construed to operate like a performance bond.

Respondent Rhodes attempts to convince the court that these exclusions mean there "would never be a covered claim" under a CGL policy because the CGL "policy insures the very thing" the exclusions purport to exclude. (Respondent Rhodes Initial Brief, p. 37). This statement is patently incorrect. Our Supreme Court has established that the purpose of a CGL policy is not to provide coverage for the insured's faulty work and product, or the loss of use of that faulty work and product. Rather, it is intended to insure against faulty work that causes an accident that causes damage to something other than the insured's work or product. L-J, Id. at 123, 621 S.E.2d at 36 (citing State Farm Fire & Cas. Co. v. Tillerson, 777 N.E.2d 986, 991 (Ill. App. 2002)). Similarly, a CGL policy is not intended to cover economic loss resulting from faulty workmanship. Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 563-64, 561 S.E.2d 355, 357 (2002). CGL insurers are not obligated to provide coverage for an insured in cases that do not involve accidental injury to property other than that on which insured was performing its work. C.D. Walters Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, New Jersey, 281 S.C. 593, 316 S.E.2d 709 (Cl.App.1984).

2. If the "loss of use" of the signs is "property damage," it is excluded under Exclusions K-N, whether or not you also call the loss of the use of those signs "consequential damages."

Respondents attempt to avoid the exclusions by stating that "the damage to Mr. (Respondent Eadon's Initial Brief, p. 39). Simply titling Rhodes' "loss of use" of the signs as "consequential damages" is not determinative of the issue of coverage. Coverage is

determined by looking at whether there is a provision of the policy that allows or excludes coverage for the specific "property damage" at issue. The loss of use of the signs is the very damage that Respondents rely upon to establish the existence of "property damage" in their briefs. Assuming, *arguendo*, that the loss of use of the signs is "property damage," it is "property damage" that is unambiguously excluded under Exclusion K through N⁴. Referring to it as "consequential damages" in this portion of Eadon's argument is merely a red herring.

3. **The fact that the signs may qualify as "fixtures" or "real property" does not avoid Exclusion K and L, since the signs remain Eadon's work and product even if they are "fixtures" or "real property."**

Next, Respondents assert that Rhodes' primary claim is for damage to "real property" or the "real estate." (Respondent Eadon's Initial Brief, p. 39); (Respondent Rhodes Initial Brief, pp. 36). As discussed above, the fact that the signs may have been transformed in the eyes of the law from chattel to real property because Eadon affixed them to the ground does not change the fact that a sign is still a sign, and these signs are still Eadon's "work" and "product." See 14(a)-(b) & 15(a)-(b). Rhodes, at best, has shown nothing more than "property damage" to the signs, which includes the loss of their use. Exclusions K and L disclaim any coverage for Eadon's faulty product and faulty work, including any loss of use of that product or work, and therefore no coverage is available for the loss of the signs, whether they be real property or chattel.

4. **Assuming that there is a devaluation of "other" real estate than the signs themselves, which Appellant denies, Exclusions M and N completely bar any coverage for the devaluation of any "other" real estate that was caused by the incorporation and subsequent removal of the signs from the ground.**

⁴ If, on the other hand, the loss of use of the signs is not "property damage," then there is no covered loss under the policy, and the court need not even consider whether the exclusions apply. See 1(b); see Appellant's Initial Brief, pp. 42-44.

Exclusion M specifically disclaims the devaluation of any property, in this case the real estate incorporating Eadon's defective work and otherwise injured by Eadon's failure to comply with the terms of his agreement with Rhodes. Eadon's attempt to apply an exception to Exclusion M is ineffective. (Respondent Eadon's Initial Brief, pp. 42-43.) First, the exception requires the loss of use of "other property." Eadon fails to identify the loss of use of "other property," aside from the signs itself – his remaining real estate is entirely "usable." Second, Respondents again conflate the falling of the first sign with the Department of Transportation's order to remove the other two signs, which was not **caused** by an "accident" at all, as required by the exception. (Respondent Rhodes' Initial Brief, p. 39); (Respondent Eadon's Initial Brief, p. 42). Rather, it was caused by the Department of Transportation's order to remove Eadon's faulty work product before any "accident" could take place involving those two signs. Exclusion M applies in full force without exception in this case.

Respondents also state that a portion of Eadon's work product, the "stumps" of the signs, still requires removal. (Respondent Eadon's Initial Brief, p. 40). Eadon then asserts that the presence of these stumps "requires the removal of part of the insured's work product. This should be a covered cost under Auto-Owner's policy." (Respondent Eadon's Initial Brief, p. 41). First, this damage would be excluded by K and/or L. In addition, Exclusion N explicitly states that "removal" or "recall" of Eadon's work product is not covered. If Eadon desired to have the removal of his faulty work product covered, he should have either negotiated for Exclusion K to be removed from his agreement with Auto-Owners, or he should have purchased a performance bond, which is designed to cover Eadon's faulty workmanship.

Respondents argue that Exclusion N should not apply, but misconstrue the scope of Exclusion N in his argument. (Respondent's Eadon's Initial Brief, p. 44). As stated above, Exclusion N exempts any coverage for any "damages" arising out of "the

loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal, or disposal" of Eadon's "product," Eadon's "work," or any "impaired property." Assuming, *arguendo*, that Rhodes has suffered "property damage" to other "real property" (besides his signs, which are clearly "your work" or "your property") in this case, the "real property" falls squarely within the definition of "impaired property": "tangible property other than your product or your work that cannot be used or is less useful because it incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate, or dangerous." See 5(a). Exclusion N does not allow for any damages resulting to Rhodes "real property" because it was harmed by having Eadon's faulty work product incorporated with it.

5. Respondent Eadon's contradictory argument, if accepted, conclusively demonstrates that there can be no finding of an occurrence, and so the court need not reach the issue of whether exclusion N applies.

Finally, Eadon attempts to argue that Exclusion N does not apply by making an argument that completely destroys the possibility of an "occurrence" giving rise to coverage for any "loss of use" of the signs in this case. (Respondent Eadon's Initial Brief, pp. 44-45). Eadon asserts that the loss of use of the real property was "not because of a defect in the sign posts," but rather "because of the South Carolina Department of Transportation's withdrawal of Rhodes' permit to erect advertising signs on the real property." According to Eadon, the testimony in the Rhodes trial established that if Rhodes was not running a sham business on his property, the signs would still be there. That being the case, there is no occurrence, because Rhodes' "loss of use" was not "**caused**" by an "occurrence" as required by 1(b), but rather Rhodes' "loss of use" is the proximate result of his sham operations. *Oliver*, 309 S.C. at 316, 422 S.E.2d at 130. Therefore, the court need not even reach the issue of whether Exclusion N applies, because the requisites of coverage are not met in the first instance.

CONCLUSION

Based upon the foregoing discussion, Auto-Owners requests that it be granted relief from the trial court's Order and the case be remanded to the trial court with the instruction that it be stayed until the Rhodes case is concluded; or that the Court issue an Order finding that Marion L. Eadon does not qualify as an insured under the policy and that the policy provides no coverage for the damages sought by Rhodes and Piedmont.


ELLIS, LAWHORNE & SIMS, P.A.

A. JOHNSTON COX
JOHN M. MCCANTS
1330 Lady Street, Fourth Floor
Post Office Box 2285
Columbia, South Carolina 29202
TEL: (803) 254-4190

ATTORNEYS FOR APPELLANT
AUTO-OWNERS INSURANCE COMPANY

November 26, 2008

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

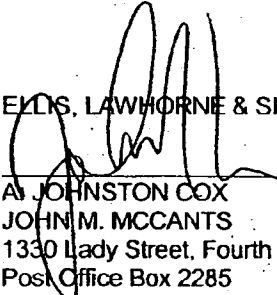
Case No. 02-CP-46-2369

Auto-Owners Insurance Company, Appellant,
v.
Samuel W. Rhodes, Piedmont Promotions, Inc.,
Marion L. Eadon d/b/a C&B Fabrication, C&B
Fabrications, Inc., and Low Country Signs, Inc., Respondents,

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b),
SCACR.

ELLIS, LAWHORNE & SIMS, P.A.



AT JOHNSTON COX
JOHN M. MCCANTS
1330 Lady Street, Fourth Floor
Post Office Box 2285
Columbia, South Carolina 29202
TEL: (803) 254-4190

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AUTO-OWNERS INSURANCE COMPANY

November 26, 2008

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Auto-Owners Insurance Company, Appellant,

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.

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 4605
Heard June 10, 2009 – Filed August 6, 2009

AFFIRMED AS MODIFIED

A. Johnston Cox and John L. McCants, both of
Columbia, for Appellant.

Creighton Coleman, of Winnsboro and Hoover
C. Blanton and William O. Sweeny, both of
Columbia, for Respondents.

HEARN, C.J.: Auto-Owners Insurance Company appeals from the denial of its motion to vacate and/or stay this declaratory judgment action to determine coverage under an insurance policy, following this court's reversal and remand of the companion tort action for damages. In the alternative, Auto-Owners contends the circuit court erred in finding Marion Eadon d/b/a C&B Fabrication an insured under the policy, there was an occurrence resulting in property damage, and that none of the argued exclusions contained in the policy apply. We affirm as modified.

FACTS/PROCEDURAL HISTORY

Marion Eadon is the sole owner and shareholder of the businesses C&B Fabrication, Inc. (C&B) and Lowcountry Signs, Inc. (Lowcountry), which both conducted business under the name C&B Fabrication. Samuel Rhodes is the sole owner and shareholder of Piedmont Promotions, Inc. (Piedmont), which owns or leases outdoor advertising space in various locations. In 1999, Rhodes entered into discussions with Eadon and C&B to design, fabricate, and erect three outdoor advertising signs on property owned by Rhodes that bordered Interstate 77 in Fairfield County, South Carolina. In addition, Rhodes obtained the necessary permits in the name of Piedmont with the South Carolina Department of Transportation (SCDOT) to erect the three signs. As a result of those discussions, C&B

agreed to complete the signs for \$153,960. Throughout the period of fabrication and installation of Rhodes' signs, C&B and Lowcountry held a Commercial General Liability Policy (the Policy) with Auto-Owners Insurance Company (Auto-Owners).

Approximately ten months following the installation of the signs, the middle sign was discovered to be leaning towards I-77. Rhodes contacted Eadon, informing him of the problem, and Eadon eventually sent a crew to address the issue. Three days after the crew visited the site, one of the other signs fell across I-77, blocking both lanes of southbound traffic. Rhodes immediately requested that Eadon remove all three signs; however, Eadon removed only the one that previously had been leaning, refusing to take down the sole remaining sign. SCDOT investigated the incident, requiring Rhodes to remove all the signs, and also revoked Piedmont's permits to maintain signs on the property in the future. Accordingly, Rhodes had the remaining sign removed.

Subsequently, Auto-Owners sent a reservation of rights letter to Eadon regarding the incident, stating it was unsure as to whether a claim existed under the Policy. Over the next few months, Auto-Owners paid several claims for damages caused by the fallen sign, but stated the Policy did not cover the majority of expenses that would be incurred following the loss. Thereafter, Rhodes and Piedmont brought suit (Tort action) against Eadon d/b/a C&B Fabrication, alleging damages to the real estate owned by Rhodes and lost income by Piedmont due to the negligent design, fabrication, and erection of the signs by C&B, which led to the destruction of the three signs and the loss of the SCDOT permits. While the Tort action was pending, Auto-Owners filed this declaratory judgment action (DJ action) against Rhodes, Piedmont Promotions, Eadon, and Lowcountry, to determine coverage provided under the Policy. Auto-Owners contended there had been no occurrence, as defined under the policy, or alternatively, that certain exclusions contained within the Policy avoided coverage. The complaint also sought a stay of the Tort action pending the resolution of the DJ action. It does not appear that this request for a stay was ever considered by the court, and, in fact, the DJ action was deferred pending the resolution of the Tort action.

The Tort action resulted in a jury verdict in Rhodes' favor for three million dollars in actual damages and three million five hundred thousand dollars in punitive damages. Following the verdict, Auto-Owners moved to continue the DJ action in order to obtain a copy of the Tort action transcript, which was granted. Thereafter, all parties to the DJ action made motions for summary judgment. Auto-Owners also made a motion to amend its complaint, which was granted. In its amended complaint, Auto-Owners proposed changing its caption from "Marion L. Eadon d/b/a C&B Fabrications, Inc." to "Marion L. Eadon d/b/a C&B Fabrication," as well as contending in its pleadings for the first time that Eadon d/b/a C&B was not insured under its policy. The circuit court denied all motions for summary judgment.

The DJ action was set for a jury trial with respect to one issue; however, prior to the introduction of any evidence, the parties entered into a stipulation which, for the purposes of the DJ action only, reformed the named insureds on the Policy to reflect the fact that Eadon had insured several different companies under the Policy over its life, and each of the companies was understood to have done business under the name C&B Fabrication.

The circuit court then decided the remaining issues before it non-jury, finding: there was an "occurrence" under the Policy that resulted in property damage to Rhodes; none of the argued exclusions applied; Eadon d/b/a C&B Fabrication was an insured under the Policy, and with the exception of the actual contractual cost of the three signs, the judgment

rendered in the Tort action should be paid by Auto-Owners up to the Policy's limits; and post-judgment interest would accrue on the jury verdict until such time as Auto-Owners paid, offered to pay, or deposited a sum certain with the court.

While the litigation in the DJ action continued, and before the order of the circuit court referenced above was published, Eadon appealed the verdict in the Tort action to this court. In an unpublished opinion, the verdict was reversed based on the trial court's failure to grant Eadon's motion to transfer venue, and the matter was remanded for a new trial in Eadon's county of residence, Clarendon County. Rhodes v. Eadon, Op. No. 2006-UP-413 (S.C. Ct. App. filed Dec. 15, 2006). In light of this development, Auto-Owners filed a supplemental Rule 59(e), SCRCP, motion,[1] and/or in the alternative, a Rule 60(b)(2), (4) and (5), SCRCP motion, contending that because the underlying verdict in the Tort action had been reversed by this court, the court's order in the DJ action was also null and void, based on the order's reliance on the evidence and testimony of the vacated action.

The circuit court took the matter under advisement, and thereafter issued a supplemental, and then a revised supplemental order. Based on this court's reversal of the Tort action, the circuit court granted Auto-Owners' motion in part, striking the portion of its order referencing the money damages awarded by the jury; however, the remaining portions of the order, including the determination that Eadon d/b/a C&B Fabrication was an insured, there was an occurrence, and that none of the exclusions applied, remained in full force and effect.[2] Auto-Owners now appeals this determination.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Hardy v. Aiken, 369 S.C. 160, 164-65, 631 S.E.2d 539, 541 (2006) (citations omitted). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." Auto Owners Ins. Co., Inc. v. Hamin, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006). "When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law." Epworth Children's Home v. Beasley, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). "[T]he appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings." Hamin, 368 S.C. at 540, 629 S.E.2d at 685.

LAW/ANALYSIS

I. RULE 60(b)(2), (4), and (5), SCRCP, MOTION

Auto-Owners contends the circuit court erred in denying its post-trial motion under Rule 60(b)(2), (4), and (5), SCRCP, to both vacate its prior order and/or stay the case pending the resolution of the Tort action. Auto-Owners maintains that, because the underlying Tort action was reversed by this court, no duty to indemnify exists, and the retrial of the underlying action could produce a verdict for Auto-Owners, under which no duty to indemnify would exist. Auto-Owners further contends that, based on the only partial-vacation of the circuit court's order, there still exists repeated reliance on findings of the jury in the Tort action to support its rulings, which amounts to cause for relief under Rule 60. We disagree.

A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). Whether to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial court. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). On review, we are limited to determining whether the trial court abused its discretion in granting or denying such a motion. Saro Invs. v. Ocean Holiday P'ship, 314 S.C. 116, 124, 441 S.E.2d 835, 840 (Ct. App. 1994).

Rule 60(b) states in pertinent part:

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:

... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

... (4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or 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.

Rule 60(b)(2), (4), and (5).

While there is authority elsewhere^[3] that a DJ action is not ripe for adjudication until the underlying action for damages has been resolved, this does not appear to be the law in South Carolina. In order to state a cause of action under the Uniform Declaratory Judgments Act,^[4] a party must demonstrate a justiciable controversy. Power v. McNair, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Id. "The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy." Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). In Peoples Federal Savings & Loan Ass'n of South Carolina v. Resource Planning, the supreme court affirmed a previous holding from this court to the effect that a case or controversy regarding the validity of a pre-emptive right does not accrue until the right has been asserted. 358 S.C. 460, 596 S.E.2d 51 (2004) (concurring in the result reached in Webb v. Reames, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997)). Here, under the Peoples Federal court's reading of a justiciable controversy, a right has been asserted against Eadon and C&B, the alleged insureds under the Policy; therefore, this DJ action appears to be ripe for review.

Additionally, several South Carolina courts have tacitly approved the ripeness of a DJ action during the pendency of the underlying action for damages. In Isle of Palms Pest Control Co. v. Monticello Insurance Co., this court discussed a general liability policy in a DJ action, determining the insurance company had a duty to defend an underlying action, and that if the damages alleged in the complaint in the underlying action were proven, the insurance

company had a duty to indemnify the insured. 319 S.C. 12, 14-20, 459 S.E.2d 318, 319-22 (Ct. App. 1994).

Moreover, the supreme court was faced with a very similar procedural scenario in Owners Insurance Co. v. Clayton, when the underlying tort action was filed by a third party, and the insurer defended the insured under a full reservation of rights. 364 S.C. 555, 557, 614 S.E.2d 611, 612-13 (2005). Prior to the trial for damages, the insurer filed a DJ action to determine its liability under the policy. Id. at 557-58, 614 S.E.2d at 613. The underlying action was tried to a verdict, and the jury awarded the third party \$1.25 million dollars. Id. While the DJ action was pending, the verdict was appealed and ultimately affirmed. The court in the DJ action found the insurer had a duty to indemnify the insured, and that order was both appealed and affirmed during the pendency of the appeal from the underlying jury award. Id. Clayton is illustrative of the approach this court should take in the case at bar. Although there is no indication that any party in Clayton requested a stay, or otherwise challenged the continued validity of the DJ action as not being ripe, the situation presented in Clayton is extremely similar to the situation presented here, with the exception that the underlying action was not reversed on appeal. While certiorari was still pending in the underlying action, the supreme court affirmed the insurer's duty to indemnify the insured; accordingly, we address the merits of this appeal, even in the absence of a specified damages award. [5]

Considerations of fairness and judicial economy also dictate that Auto-Owners' request to set aside or stay the judgment in the DJ action should be denied. It was Auto-Owners itself that filed this DJ action, and it was Auto-Owners that requested in its complaint that the Tort action be stayed pending resolution of this action. Auto-Owners obviously believed at that time that its DJ action could and should be resolved independent of what transpired in the Tort action. It would be a waste of judicial time and resources to set aside the judgment in the DJ action simply because the jury verdict in the Tort action was reversed and remanded. The propriety of the circuit court's resolution of the coverage issues can be addressed whether or not a judgment against Rhodes is in place. Accordingly, the circuit court's denial of Auto-Owners' Rule 60(b) motion is affirmed, and this court will review the substantive arguments Auto-Owners presents on appeal.

However, the continued inclusion of references to the Tort action jury, verdict, and damages in the circuit court's order is moot in view of the reversal of that verdict. We therefore vacate the portions of the order under "The Policy Provisions" section, referencing the Tort action.

II. EADON d/b/a C&B'S STATUS AS AN INSURED UNDER THE POLICY

Auto-Owners contends the circuit court erred in concluding "Marion L. Eadon d/b/a C&B Fabrication" is an insured under the Policy. Auto-Owners alleges error in finding: Marion L. Eadon d/b/a C&B Fabrication is the same entity as C&B Fabricators, Inc. and LowCountry Signs & Fabrication, Inc.; Eadon met the definition of an insured based on his actions being on behalf of the corporations listed on the policy; and Eadon reasonably expected to be covered for his actions regardless of what entity was actually listed as the named insured.

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. & 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 two 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 the parties privy to the Policy that it would serve as coverage for the sign-making business conducted by C&B and by Eadon.

The Policy sets out who is considered an insured under Section II:

Who is an insured

1. If you are designated in the Declarations as:

c. An organization other than a partnership or joint venture, you are insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors.

The circuit court found the foregoing provision controlling, as C&B Fabrication was listed under the Policy as a corporation. Moreover, based on the testimony, evidence, and pleadings presented at trial, it was established that Eadon d/b/a C&B Fabrication served as the contact person for the contract with Rhodes and Piedmont for the fabrication, delivery and installation of the three outdoor billboard signs. Eadon also served as the conduit for acquiring the necessary insurance coverage for C&B. 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.

Auto-Owners' contention centers around its argument that Eadon fails to meet the definition of an insured under the contract because none of the activities for which he was sued in the Tort action fall within his duties as an officer of the corporation. Auto-Owners relies on several cases from other jurisdictions to support this argument, primarily Creel v. Louisiana Pest Control Insurance, Inc., 723 So.2d 440 (La. App. 3. Cir. 1998). In Creel, the Louisiana court found that under the plain meaning of the policy, "an executive officer is precluded from being an employee and, thus, an insured except when performing his executive duties." Id. at 443. Because the facts leading to the action involved an accident that occurred when the executive in question was en route to spray a house for insects and pests, the Creel court found he was not performing his duties as an "executive" when the accident occurred, thus the language of the policy excluded his coverage under any duties he conducted as an "employee." Id. Auto-Owners argues we should infer a similar result here because the allegations contained in the Tort action related only to the negligent fabrication and installation of the billboard signs, with which Eadon did not participate.

In order to reach a similar result, this court would have to find, for what appears to be the first time in South Carolina, that the duties of an officer and those of an employee, as delineated by a general commercial liability policy, are mutually exclusive. We decline to make that distinction the law in South Carolina. As a natural by-product of any contention regarding the activities that Eadon undertook, Auto-Owners additionally maintains Rhodes and Piedmont should be judicially estopped from arguing that coverage under the Policy

should be applied to Eadon because he was acting on behalf of the corporation. In the Tort action, Rhodes sued Eadon as an individual, and was in the first instance successful, arguing that Eadon should be liable for negligence because he was not acting on behalf of the corporation in contracting for the signs. Auto-Owners maintains that Rhodes should be estopped from now arguing the exact opposite to this court. However, Auto-Owners' contention fails the fourth element of the test^[6] for judicial estoppel: the inconsistency must be part of an intentional effort to mislead the court. While it is true that during the Tort action against Eadon, Rhodes argued Eadon had acted in an individual capacity, in this DJ action, Rhodes is a party only by virtue of having been included by Auto-Owners, and is not in privity with either party under the Policy at issue. While we are mindful of the implications a decision that Eadon is an insured under the Policy could have on Rhodes' case in the retrial of the Tort action, such implications may not influence our analysis of the legal issues before us. Instead, we are required to answer the questions before us based on the facts alleged. 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.

Auto-Owners also contends the circuit court erred in applying the reasonable expectations doctrine, because it has been rejected and generally discredited as a basis for interpreting a contract that is found to be ambiguous. A close reading of the circuit court's opinion reveals several instances where it refers to the expectations of both parties; however, the order goes on to clearly state that any potential ambiguity arising from the confusion of the corporations and trade names of the parties involved in the litigation was resolved with the parties' stipulation prior to the case's submission to the court. The court's order clearly finds coverage based on Eadon's actions as a director of the corporation. As a result, Auto-Owners' contention is without merit, and coverage under the policy was not based on the reasonable expectations of the parties.

III. EXISTENCE OF AN OCCURRENCE

Auto-Owners contends the circuit court erred in finding an occurrence took place, as defined under the Policy, because the alleged damage sustained was only to the fabricated signs as a result of the insured's own faulty workmanship.

The Policy in this case reads, in pertinent part:

Coverage A. Bodily Injury and Property Damage Liability

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage

territory."

Section V – Definitions

9. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

12. "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.

An occurrence, as described above, means an accident, although that term is not specifically defined in the Policy; however, the term has been defined by the supreme court in a case concerning an identical commercial general liability policy as "[a]n 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." Green v. U. Ins. Co. of America, 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970).

The circuit court found there was an occurrence, distinguishing the case of L-J v. Bituminous Fire & Marine Insurance Co., 366 S.C. 117, 621 S.E.2d 33 (2005). In L-J, the supreme court found the alleged damage did not constitute property damage under a similar commercial general liability policy, because the claim was merely one for faulty workmanship that resulted in damages to the work product alone. Id. at 123, 621 S.E.2d at 36. However, the supreme court did note that a commercial general liability policy could provide coverage when a claim for faulty workmanship alleged third party bodily injury or damage to other property. Id. n. 4.

The L-J court examined the case of High Country Associates v. New Hampshire Insurance Co., in which a condominium homeowners' association sued the condominium builder seeking damages due to the negligent construction of the buildings. 648 A.2d 474 (N.H. 1994). The High Country case dealt with the alleged continuous moisture intrusion from a subcontractor's defective installation of siding resulting in moisture seeping into the buildings, which caused pervasive decay of the interior and exterior walls and loss of structural integrity of the condos. Id. at 476. The High Country court found the claim under a similar commercial general liability policy was not simply one for damages resulting from faulty workmanship, but rather, was a claim for negligent construction resulting in property damage to the other property. Id. at 477. This amounted to an occurrence for which coverage would be provided. Id. at 478.

Finding a parallel between the facts in this case and those present in High Country, the

circuit court found the damage alleged by Rhodes to not merely be damages sustained to the work product alone, due to faulty workmanship, but also to the "other property" of Rhodes. We find the circuit court's analysis of the alleged damages to Rhodes' property to be a proper extension of the supreme court's notation in L-J of the potential for recovery under facts similar to High Country.^[7] As a result, 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.

IV. FALLING OF THE SIGN CREATED PROPERTY DAMAGE

Auto-Owners contends the property damages found by the circuit court did not comport with the definition of "property damage" in the policy. Auto-Owners also maintains that any alleged damage stemming from Rhodes' inability to reinstall signs on the property should be excluded because the evidence introduced in the Tort action is that SCDOT's refusal to reissue the necessary licenses resulted from its determination that Rhodes was conducting a sham business.

As previously described above, the Policy provides that property damage is defined as:

12. "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.

Auto-Owners contends the circuit court erred in failing to apply the principles of Braswell v. Faircloth, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989) to this case. In Braswell, an insured lessee left hazardous waste on the lessor's property when it vacated the premises. Id. at 339, 387 S.E.2d at 708. The corrosive chemicals that were left ate through the valve of the storage tank that held them, releasing 1000 gallons of chemicals into an adjacent field. Id. at 340, 387 S.E.2d at 708. DHEC issued an order requiring the lessor to clean up the property, and thereafter, when the lessor sued the lessee, the insurer defended and denied coverage. Id. at 340-41, 387 S.E.2d at 708. Affirming in part the grant of summary judgment in favor of the insurer, this court found an occurrence under the policy, but determined that any "damages" attributable to the costs of removing the stored wastes and chemicals that had not yet leaked were not recoverable, since no property damage had yet resulted. Id. at 345, 387 S.E.2d at 711. This court relied upon two Fourth Circuit cases for its holding: the first held that an insurer was not obligated to indemnify an insured under a commercial general liability policy when the underlying action was a suit by the federal government to seek compliance with the directives of regulatory agencies. Maryland Cas. Co. v. Armco Inc., 822 F.2d 1348 (4th Cir. 1987). The second held that an insurer was not obligated to indemnify its insured in a suit to recover the response costs of removing hazardous wastes. Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979 (4th Cir. 1988).

However, the holding in Braswell has since been modified by the supreme court, which specifically rejected the reasoning of Armco and Milliken. Helena Chem. Co. v. Allianz

Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004). In Helena, a business involved in the agricultural chemicals market was required by the Environmental Protection Agency (EPA) and State Department of Health and Environmental Control (DHEC) to clean up three sites that had been contaminated. Id. at 634, 594 S.E.2d at 456. Thereafter, the business sought reimbursement from its insurance company for the cost of the clean-up required by the EPA and DHEC; however, the trial court granted insurers summary judgment on the claims. Id. at 635, 594 S.E.2d at 457.

In reversing the trial court on appeal, the supreme court rejected the reasoning found in the Armco and Milliken cases that the clean-up costs were not "damages" as defined by the insurance policy. Id. at 638-41, 594 S.E.2d at 458-60. The supreme court found the fourth circuit cases too narrowly construed the term damages within an insurance contract. Instead, the Helena court cited to a Maryland case which had also rejected the reasoning of the fourth circuit cases, finding "the insurer's pledge to pay damages will apply generally to compensatory outlays of various kinds, including expenditures made to comply with administrative orders or formal injunctions." Id. at 638, 594 S.E.2d at 458 (quoting Bausch & Lomb Inc. v. Utica Mut. Ins. Co., 625 A.2d 1021 (1993)). 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.

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. Furthermore, the current law of this state appears to be that a commercial general liability policy is intended to provide coverage for tort liability for physical damage to property of others, but not for the insured's contractual liability which causes economic losses. See Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 566, 561 S.E.2d 355, 358 (2002) (citing 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)).

Auto-Owners, meanwhile, contends the circuit court ignored the evidence it presented that the reason Rhodes could not reinstall the signs on his property was not that SCDOT found them to be unsafe, but rather because Rhodes was conducting a sham business. See Rhodes v. Eadon, Op. No. 2006-UP-413 (S.C. Ct. App. filed Dec. 15, 2006) (detailing in the Facts portion of the opinion that Rhodes' application to SCDOT for new permits was denied because the Interstate was not a qualifying commercial business, but was being operated as a sham. Rhodes appealed the denial to the Administrative Law Court, which affirmed SCDOT's finding of a sham activity). However, this information and argument does not negate the existence of evidence of property damages under the Policy, requiring our affirmance of the circuit court under our standard of review on appeal. Rather, the evidence that Rhodes' application for a new license was denied as a sham is evidence that should be introduced and properly weighed by the jury in the retrial of the Tort action.

V. APPLICATION OF EXCLUSIONS FOUND IN THE POLICY

Finally, Auto-Owners contends the circuit court erred in finding none of exclusions k, l, m, and n applicable to preclude coverage under the Policy. We disagree.

"Rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed." Laidlaw Env. Serv. (TOC) v. Aetna Cas. & Sur. Co. of Ill., 338 S.C. 43, 47, 524 S.E.2d 847, 849 (Ct. App. 1999) (quoting McPherson v. Mich. Mut. Ins. Co., 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993)).

The Policy provides:

2. Exclusions

This insurance does not apply to:

k. "Property damage" to "your product" arising out of it or any part of it.

l. "Property damage" to "your work" arising out of it or any part of it and including [sic] in the "products-completed operations hazard."

m. "Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

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, or 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.

Section V – Definitions

5. "Impaired Property" means tangible property other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

a. The repair, replacement, adjustment or removal of "your product" or "your work";

11.a. "Products-completed operations hazard"

Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned.

b. "Your work will be deemed completed at the earliest of the following times:

(1) When all of the work called for in your contract has been completed.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete,

will be treated as completed.

14. "Your product" means:

a. Any good or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(1) You

(2) Others trading under your name; or

"Your product" includes:

a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"

15. "Your work" means:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes:

a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"

Auto-Owners first contends that, although the circuit court was correct in excluding the contractual price of the signs, it erred in failing to find Exclusion k prohibits damages resulting from the loss of use of the signs. The circuit court properly analyzed Exclusion k and determined that the majority, if not all, of the damages assigned by the jury in the Tort action corresponded to the damages inflicted on Rhodes' business, rather than the actual work product – the signs – of C&B, which was properly excluded. We find evidence supports this determination.

Auto-Owners next assigns error to the circuit court's analysis of Exclusion I, which again addresses the "property damage" or "your work", but does so in the context of a "products-completed operations hazard." The circuit court discussed the case Kennedy v. Columbia Lumber & Manufacturing Co., 299 S.C. 335, 384 S.E.2d 730 (1989), in the context of when a builder has violated a legal duty under a negligence action. The supreme court in Kennedy stated:

A builder may be liable to a home buyer in tort despite the fact the buyer

suffered only "economic losses" where: (1) the builder has violated an applicable building code; (2) the builder has deviated from industry standards; (3) the builder has constructed housing that he knows or should know will pose serious risks of physical harm.

Id. at 346-47, 384 S.E.2d at 737-38; see also Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc., 379 S.C. 181, 666 S.E.2d 247 (2008) (discussing the exception to the economic loss rule in the context of a home buyer). 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 I 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.

Auto-Owners next contends the circuit court erred in finding Exclusion m does not apply. Exclusion m expressly states that: "[t]his exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use." The circuit court found, and we agree, that a sudden and accidental physical injury to Eadon's product is precisely what precipitated the events that led to the filing of this DJ action. Therefore, the caveat provided in the Policy itself prevents the applicability of Exclusion m under the facts of this case.

Finally, Auto-Owners contends the circuit court erred in failing to apply Exclusion n. As discussed by the circuit court, exclusions like n are commonly referred to as "sistership" exclusions. 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., 736 N.E.2d 941 (Oh. Ct. App. 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.

CONCLUSION[8]

We find it appropriate, in the interest of judicial economy and fairness, as well as the previous positions taken by parties to this action, for this court to reach the merits of this DJ action, rather than to stay the case pending the retrial of the Tort action. However, as noted above, we 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. As a result, the decision of the circuit court is

AFFIRMED AS MODIFIED.

KONDUROS, J., and JONES, A.A.J., concur.

[1] Prior to the reversal of the verdict in the Tort action, Auto-Owners had filed both an initial and an amended Rule 59(e) motion, as well as a motion for a new trial.

[2] This court's unpublished reversal was later appealed to the supreme court, which denied certiorari.

[3] See Certain Underwriters at Lloyd's, London v. Boeing Company, 895 N.E.2d 940, 959 (Ill. App. Ct. 2008) (an insurer's duty to indemnify was not ripe, because an actual controversy, e.g. a legal obligation to pay damages in the underlying action, did not yet exist). In addition, other courts have held that in order to eliminate the risk of inconsistent factual determinations that could prejudice an insured, a stay of a DJ action pending resolution of a third-party suit is appropriate when the coverage question turns on facts to be litigated in the underlying action. See Montrose Chem. Corp. v. Superior Court, 861 P.2d 1153 (Cal. 1993); Cal. Ins. Guarantee Ass'n v. Superior Court, 231 Cal. Rptr. 104 (Cal. Ct. App. 1991); Gen. of Am. Ins. Co. v. Lilly, 65 Cal. Rptr. 750 (Cal. Ct. App. 1968); Constitution Assocs. v. N.H. Ins. Co., 930 P.2d 556 (Colo. 1996); Citizens Communications Co. v. Am. Home Assurance Co., 2004 WL 423059 (Me. 2004); Chantel Assocs. v. Mount Vernon Fire Ins. Co., 656 A.2d 779 (Md. 1995).

[4] S.C. Code Ann. §§ 15-53-10 to -140 (Supp. 2008).

[5] This case is easily distinguishable from the situation faced by the supreme court in Park v. Safeco Insurance Co. of America, 251 S.C. 410, 162 S.E.2d 709 (1968). In Park, the supreme court held that a DJ action was not ripe for judicial pronouncement due to the lack of a justiciable controversy, when the third-party, injured plaintiff brought suit against the insurer prior to filing a legal complaint against the alleged at-fault insured. Finding the injured third party lacked the contractual privity to preemptively sue to establish the parties' liabilities under the insurance contract, the court found the insured must first become liable for damages before any rights vested in the injured party. The case before us is substantially different than Park, because here, the insured instituted this action after the Tort action complaint had been filed, against both Eadon and Rhodes; therefore, an actual controversy exists, and the Park court's concerns over privity are not present.

[6] The elements of judicial estoppel include: (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. Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

[7] We note the supreme court has considered a case with facts similar to those in High Country, in Auto-Owners Insurance Co. v. Newman, Op. No. 26450 (S.C. filed March, 10 2008), reaching the same result as the circuit court in this case. However, although an opinion in Newman was issued, rehearing was subsequently granted by the court, and after arguments were held November 8, 2008, no substitute opinion has been published to date. Therefore, while the previously-released opinion is favorable to the result reached by the circuit court, we did not rely on it for considerations of this appeal.

[8] Auto-Owners also presents several additional bases of error by the circuit court. First,

Auto-Owners contends the circuit court erred in relying on findings of facts unsupported by the record before it; specifically, where the order is inconsistent with the transcript of the Tort action. This argument is without merit because the circuit court, as trier of fact in an action without a jury, is entitled to make its own findings of fact. Epworth, 365 S.C. at 164, 616 S.E.2d at 714 ("When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law."). Second, Auto-Owners contends the circuit court erred in finding C&B is entitled to payment from Auto-Owners for the expense it incurred in the removal of the final sign left standing. As discussed above, Helena is instructive as to whether the costs of taking down the third sign, in order to comply with SCDOT's mandate, falls under the ambit of the plain and ordinary definition of the word damages. 357 S.C. 631, 594 S.E.2d 455 (2004). Under our standard of review, there exists evidence in the record to support the circuit court's determination on this matter; therefore we will not set aside this finding on appeal. See Hamin, 368 S.C. at 540, 629 S.E.2d at 685 ("[T]he appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings."). Moreover, although Auto-Owners states neither Eadon nor C&B pursued a claim for reimbursement in the DJ action, Eadon and C&B's amended answer and counterclaim specifically prays for the costs incurred by the Respondents in rectifying the consequential damages caused by the removal of the signs.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

PETITION FOR REHEARING OF APPELLANT

Appellant Auto-Owners Insurance Company ("Auto-Owners"), pursuant to Rule 221 of the South Carolina Appellate Court Rules, requests that this Honorable Court grant rehearing as set forth herein. Appellant respectfully asserts that the issues set out below were misapprehended by the Court and warrants reconsideration.

STANDARD FOR A PETITION FOR REHEARING

According to Rule 221(a), SCACR, a properly drawn petition for rehearing must state "the points supposed to have been overlooked or misapprehended by the court." See Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 564 S.E.2d 322 (2001); see also James A. Atkins, 16 S.C. JUR. APPEAL AND ERROR § 147 (2007). "The purpose of such a petition (for rehearing) is to aid the court in deciding correctly a case heard by it."

Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933).

In applying the aforementioned notion of "overlooked or misapprehended," the South Carolina Supreme Court has suggested that rehearing may be appropriate where the court issued a decision without keeping a material principle "fully in mind." Green v. E.B. Gresham Co., 168 S.C. 395, 167 S.E. 659 (1933) (implying that decision by a court "unmindful" of legal principle, such as the availability of an affirmative defense, may be a candidate for rehearing).

ARGUMENTS

I. THE COURT OF APPEALS MISAPPREHENDED THE LAW ON THE PREREQUISITES FOR AN AWARD OF INDEMNIFICATION WHEN IT REFUSED TO GRANT AUTO-OWNERS RELIEF UNDER RULE 60(B)(5), SCRPC.

Auto-Owners requests that the Court of Appeals reconsider its decision to uphold the trial court's denial of its Rule 60(b)(5) motion.¹ 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), SCRPC:

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), SCRPC, provides relief for a party from a judgment based on a previous ruling that is

¹ Auto-Owners incorporates by reference the arguments made in Argument I of its Final Brief.

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).²

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.

² 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).

The Court of Appeals' opinion ignores its earlier statements of law in Griffin and Jourdan, *supra*, regarding the prerequisites to an award of indemnity. Rule 60(b)(5), SCRCF, 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.³ Therefore, Auto-Owners requests that the Court of Appeals reconsider its Opinion, reverse the trial court, and remand this action to the trial court with the instruction to stay the DJ action until a judgment is entered in the Tort action. Only this course of action will allow the trial court to make proper findings of facts necessary to determine the indemnity issue in this case.

II. THE COURT MISAPPREHENDED THE FACTS OF THIS CASE WHEN IT DETERMINED THAT RHODES IS NOT JUDICIALLY ESTOPPED FROM CLAIMING EADON WAS ACTING ON BEHALF OF THE COVERED ENTITIES.

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." (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

³ 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, 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 determination under Rule 60(b)(5), SCRCF, 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 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 corporation 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."⁴

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.⁵ 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.

⁴ 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.")

⁵ 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.

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 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.⁶ Therefore, there is no justification for the Court to carve out an exception for Rhodes and Piedmont's conduct 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.

III. THE COURT OVERLOOKED A PORTION OF THE POLICY WHEN IT DETERMINED THAT THIS CASE REQUIRED A NOVEL LEGAL HOLDING AS A REQUISITE TO HOLDING THAT EADON IS NOT AN INSURED UNDER THE POLICY.

The Court overlooked specific facts in the record that demonstrate Eadon does not meet the definition of an insured in this particular instance. The Court need not decide the novel issue it identifies in its Opinion, for it is not necessary for the Court to find that "the duties of an officer and those of an employee, as delineated by a general commercial liability policy, are mutually exclusive" to find Eadon is not an insured for the acts of negligence asserted against him. Auto-Owners has not asked the Court to reach such a

⁶ The record contains no evidence that Rhodes or Piedmont ever filed a motion under Rule 21, SCRPC, 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.

broad conclusion and doing so is not necessary under the facts of this case.

Auto-Owners requests that the Court reconsider its holding that Eadon meets the definition of an insured under the policy under the facts of this case that appear in the record before it. The Court agrees with Auto-Owners that the Tort action was brought against Eadon as an individual and not against any corporate entity. The Court also agrees with Auto-Owners that named insureds on the policy are corporations. Further, the Court agrees with Auto-Owners that the following policy of who is an insured is controlling on this issue:

Section II – WHO IS AN INSURED

... 1. If you are designated in the Declarations as:

... 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.

However, the Court overlooked an additional portion of the definition which is also controlling on the issue of who is an insured:

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. . . .

(R. p. 1313.) When these two portions of the definition are read together, as they must be,⁷ it is clear that the policy treats employees and executive officers differently. Executive officers are only covered “with respect to their duties as your officers and

⁷ Am. Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co., 378 S.C. 623, 629, 663 S.E.2d 492, 495 (2008) (“Insurance policies are subject to the general rules of contract construction”); Buice v. WMA Securities, Inc., 380 S.C. 149, 157668 S.E.2d 430, 434 (Ct.App.2008) (“[I]n determining the intent of the contracting parties, the court should construe the contract as a whole, and read together different provisions dealing with the same subject matter.”)

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.

Auto-Owners agrees that an officer’s duties may overlap his duties as an employee; for instance, an officer may see his duties as an employee and officer as being identical. 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 C&B or supervising in any manner that aspect of the business.⁸ (R. pp. 1103-05, 1114-15). He has admitted that he is not responsible for insuring that these functions are carried out correctly and there is no evidence in the record to the contrary. (Id.) In fact, there is no evidence that his duties as an employee (as opposed to an officer) include these responsibilities. Further, there is no evidence that he was personally involved in this aspect of the business.

If Eadon had testified that his duties as an officer included these aspects of the business, he would be considered an insured under the policy. He did not. To find that Eadon is an insured in this case requires that the Court disregard the definition of an insured under the policy and Eadon’s sworn testimony. This is error.

The Court has found that Eadon was acting on behalf of the corporation when interacting with Rhodes during the procurement of the contract. From this finding, the Court mistakenly concludes that he is an insured and personally liable for all acts of the corporation, even for those that he has no personal involvement and are not within his duties as an officer of the corporation. However, the act of speaking with a potential

⁸ In fact, Eadon testified that his duties as an employee of the business do not even include these things. Those aspects were handled by someone else. (R. pp. 1103-05, 1114-15).

client regarding the terms of the contract does not make the officer or employee of the corporation individually liable for its breach or individually liable for negligence occurring during the manufacturing process. As Judge Dennis pointed out at the first trial, "the deal is not the tort." (R. p. 1239).

If the Court believes it is proper to decide this case before the liability of Eadon is determined and a judgment rendered against him, then it must be bound by the facts that appear in the record before it. The record is absolutely devoid of any evidence that Eadon personally participated in the design, manufacture, installation or inspection of the signs. If he did not personally participate in these acts performed by the corporation, he can not be held individually liable for any alleged defects. Furthermore, if he did not personally participate in these activities and it was not within his duties as an employee or officer to perform the activities for which he has been sued, he can not be considered an insured under the unambiguous terms of the policy.

IV. THE COURT MISAPPREHENDED THE LAW IN FINDING THE EXISTENCE OF AN "OCCURRENCE".

In finding the existence of an occurrence in this construction defect case, the Court of Appeals relied primarily on L-J, Inc. v. Bituminous Fire and Marine Ins. Co., 366 S.C. 117, 621 S.E.2d 33 (2005) (hereinafter "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 Court in L-J also referred to a decision of the Supreme Court of New Hampshire to illustrate what the Court believes may be an insured loss in a construction defect case. The Court stated, “we find the analysis used by the New Hampshire Supreme Court helpful in distinguishing between a claim for faulty workmanship versus a claim for damage to the work product caused by the *negligence of a third party*.” L-J citing High Country Assocs. v. New Hampshire Ins. Co., 648 A.2d 474 (N.H. 1994). Although there has been much debate over the application of L-J and High Country together, the Court of Appeals approved the Rhodes trial court’s reliance on High Country and its conclusion that there was “other property” damaged to trigger insurance coverage.

The analysis is a flawed one. First, a critical part of L-J’s reference to High Country is that there is “negligence of a third party”. To find coverage, the contractor causing the damage must be someone other than the insured – which is clearly not the case herein. High Country is inapplicable. Second, there is no “other property” in the Rhodes case. There is the sign real estate project only, which has generated multiple forms of damages arising out of and flowing from it. The focus on the different forms of damages has caused the courts herein to reach an incorrect coverage decision.

Third, it is not enough that there is bodily injury or property damage to a third party. There still must be an accident – and one other than the faulty workmanship.⁹ The

⁹ The Court of Appeals cited Green v. United Ins. Co. of Am., 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970) (an “accident” is defined to be “an unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the one

faulty construction only triggers the initial or underlying basis for liability of a contractor to a third party. "The [CGL] policy does not cover ... faulty workmanship, *but rather faulty workmanship which causes an accident.* C.D. Walters Constr. Co. v. Fireman's Ins. Co. of Newark, N.J., 281 S.C. 593, 597, 316 S.E.2d 709, 712 (Ct.App.1984). Courts must distinguish faulty workmanship that causes property damage versus faulty workmanship that causes an accident and then leads to property damage. In this case, there was no accident. No one suffered an accident because the sign fell; fortunately, no third person collided with the fallen sign and suffered bodily injury or property damage. The sign falling is not an accident. The present facts are no different in substance than the ones in L-J, wherein a roadbed fell in because of cracking and settlement. The only difference between the facts in Rhodes and the facts in L-J is that the alleged faulty construction broke down suddenly (a falling sign) and not overtime (a settling road) --- there is not a substantive legal difference.

If one installs a billboard wrong, it may fall down. Falling down is a normal, foreseeable and expected consequence of constructing the billboard wrong in the first place. If the sign falls down, there may be grounds for the owner of the sign to sue the contractor who installed it if the contractor did something wrong. If the sign falls down, the owner may incur various types of damages as allowed by law. The damages may include direct ones, e.g., the cost of the signs themselves; special ones, e.g., clean up and hauling away debris; or consequential ones, e.g., lost profits and/or loss of use that accrue because the sign is out-of-commission and not producing advertising income for the owner. In the case of permanent injury to real estate, the proper measure of damages (suffering the harm or hurt"). There is nothing unexpected about the sign falling down if one builds it wrong.

under South Carolina law is diminution in value. As to the consequential damages, as is done in the construction industry and specifically provided for by the Uniform Commercial Code, a commercial contractor may limit consequential damages by inserting waivers or other limitations in its contracts. Good contracting is the method in which commercial parties protect themselves from commercial economic losses, not CGL insurance.

V. THE COURT MISAPPREHENDED THE LAW TO FIND THAT THE COST TO REMOVE THE TWO STANDING SIGNS, AND ENSUING ECONOMIC LOSSES, WAS AN OCCURRENCE OF PROPERTY DAMAGE.

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.

The Court of Appeals' misapprehension of Braswell v. Faircloth, 300 S.C. 338, 387 S.E.2d 707 (1989) and Helena v. Allianz Underwriters Insurance, 357 S.C. 631, 594 S.E.2d 455 (2004) 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. The Supreme Court did not reverse the holding in Braswell. The conclusion in Braswell that there was some "property damage" is a sound one and was upheld by the Court in Helena. 357 S.C. at 640, 594 S.E.2d at 459 n.3.¹⁰

¹⁰ As an aside, Helena cannot be relied on entirely herein because the decisions rest on an environmental/pollution exclusion too 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

In Braswell, Pepper Industries, Inc. ("Pepper") entered into a contractual agreement with Braswell Shipyards Inc. ("Braswell") for the lease of property on which several storage tanks were located. Pepper purchased a general liability 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 cleanup 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

Helena was "tackling" the split in authority among jurisdictions over whether federal and state environmental cleanup costs constitute "damages" under an insurance policy.

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.E.2d 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 cost 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 its 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; 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).¹¹ Id. at 635, 594 S.E.2d at 457.

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

¹¹ 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 who has a legal claim for damages. Id. (citation omitted). In Milliken, the Fourth Circuit applied South Carolina law and followed Armco's reasoning.

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. 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 this court's 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 Opinion of the Court of Appeals will be a bad precedent. The Court has said that an administrative order directing a contractor to correct faulty workmanship is an occurrence of property damage. To analogize, assume the road in L-J had not failed or suffered from alligator cracking; assume the SCDOT (for whatever reason) 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.

VI. THE COURT OF APPEALS MISAPPREHENDED THE LAW IN FINDING THAT THE PROPERTY DAMAGE WAS AN INSURABLE LOSS.

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.¹²

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

¹² Since the Tort action was reversed by the Court of Appeals, the disputed facts determined by the jury are once again allegations. Unless a fact is not in dispute, it is not for this court or the circuit court, hearing the DJ action, to decide the facts that support or do not support liability and damages relative to the Plaintiffs and Defendants in the Tort Action. However, the Court may be permitted to rely on a fact for the purposes of the DJ action if the fact is otherwise undisputed by the parties. Samuel Rhodes and Piedmont Promotions may be bound by their positions on the facts.

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.¹³ 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.¹⁴ 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

¹³ 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.)

¹⁴ 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 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.

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. 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 power that it once did with the signs 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 Eadon is at fault – an issue that a jury in the Tort 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, 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 L-J, which requires one to, at least, find damage to "other property" -- something other than the signs affixed to the real estate. This conclusion is 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).

In rejecting Exclusion L, the Court of Appeals made the following statement:

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 I 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.

First, the citation to Kennedy is largely irrelevant in the DJ action. Kennedy is at best pertinent to the Tort action, where Rhodes and Piedmont may cite the case as authority for the legal obligations of a contractor building a structure -- albeit the case is a residential construction case. Second, the circuit court in the present action did not, and should not have, determined that Eadons violated "all three of these conditions" set forth in Kennedy. Such determination is one for the jury in the Tort action. Also, to clarify, the Court of Appeals was incorrect in stating the circuit court in the DJ action adjudicated Eadon liable under Kennedy. In discussing Kennedy, the circuit in the DJ action was referring to what the court/jury did or adjudicated in the Tort action, which is now moot.

Finally, and importantly, Auto-Owners did not argue for a broad interpretation of Exclusion L. L is a limited exclusion. The exclusion excludes damage to your work, including any resulting loss of use, that takes place in the completed operations period, i.e., after the job is completed and put to its intended use. Note, whether the alleged damages took place after the signs were put their intended use was not in dispute between the parties.¹⁵ Rhodes and Piedmont allege that they suffered loss of use damages after the signs were installed and put to their intended use. Auto-Owners' contention is that the loss of use damages associated with the signs is excluded by Exclusion L. Even the trial court in the DJ action 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).

Loss of use claims associated with the contractor's work are not insured claims. To illustrate, in T.E. Ibberson Company v. Am. & Foreign Ins. Co., 346 N.W.2d 659 (Minn.App. 1984), the Court addressed the issue of a loss of use claim in a faulty workmanship claim. The underlying damages arose from the negligent construction of a grain elevator, which resulted in the loss of the elevator's use to its owners. T.E. Ibberson Company (TEI) was engaged in the business of building concrete grain elevators. American & Foreign Insurance Company ("American") issued TEI a comprehensive general liability policy. TEI completed an elevator for Farmers Elevator Cooperative ("Farmers"). Farmers had to close the elevator for a period of time to repair the cracks caused by the negligence of TEI.

Farmers sued TEI alleging TEI's negligent work caused the failure of the

¹⁵ The Court will note that the "j" exclusions address events during the course of the construction—not after completion.

elevator. Farmers claimed damages for repair costs, lost profits, and loss of use of the elevator. TEI asked American to defend them; however, American refused to defend, claiming the policy's work product exclusions relieved them of the duty. TEI then filed a declaratory judgment action to establish American's duty to defend. The loss of use claim was at issue between the parties. The trial court granted American's motion for summary judgment, finding that the work product exclusions negated the loss of use claims. Id. at 660. The Court of Appeals of Minnesota affirmed the decision stating:

Work product exclusions, generally found in comprehensive liability insurance policies, are intended to deny coverage to the insured when the insured's own negligence gives rise to the damage. While one can purchase insurance that will protect a party from its own mistakes, such general liability policies as this do not serve that purpose. The policy definition of "property damage" includes "... loss of use thereof" TEI admitted that the elevator was solely its work and its product.

Exclusion (n) applies to exclude coverage for property damage (including, by definition, claims of loss of use) to TEI's product.

Exclusion (o) applies to exclude coverage for property damage (including, by definition, claims of loss of use) to work performed by TEI or out of materials, parts or equipment furnished by TEI.

Exclusion (p) excludes coverage for damages claimed for the loss of use of TEI's products or work if they are withdrawn from use because of any known or suspected defect or deficiency.

Id. at 661.

The court continued:

"[W]hen TEI entered into its contract to design and construct the concrete grain elevator, it assumed certain business risks. Primarily, it assumed the business risk that it might fail to live up to its contractual obligations to perform its work in a good, substantial and workmanlike manner, and to provide an acceptable end product. To protect Farmers and to insure the quality of its work and product, TEI was required to furnish a performance bond. To protect those who might sustain bodily injury or damage to other property, TEI obtained insurance coverage of the type at issue herein, i.e., a comprehensive general liability (CGL) insurance.

Id. The Construction of the elevator was the work and product of TEI. Negligence of TEI in construction, giving rise to the claim of loss of use, is excluded by the work product exclusions of the insurance policy. Id. at 663. The insurance company had no duty to defend TEI. Id. at 663.

In follow up to the decision in Auto-Owners v. Carl Brazwell Builders, Inc., *supra*, the homeowners amended their pleadings to allege that they were unable to enjoy the full use of their property, without first conducting geographical surveys to determine the extent of waste contamination on their property and taking steps to remove such materials. In brief, the homeowners tried to characterize their economic damages for diminution in value as loss of use damages. See Auto-Owners Ins. Co. v. Essex Homes Southeast, Inc., 136 Fed. Appx. 590 (4th Cir. 2005). Before the federal court, the insurers argued that the loss of use claims were not covered damages. The court ruled in favor of the insurers and the Fourth Circuit Court of Appeals affirmed the decision. The Fourth Circuit held that exclusion "m," which excludes coverage for property damage to "impaired property" or property that has not been physically injured "arising out of" (1) a defect, deficiency, inadequacy or dangerous conditions in "your product" or "your work" applied in the case to preclude coverage.

The Court of Appeals stated the following:

The circuit court found, and we agree, that a sudden and accidental physical injury to Eadon's product is precisely what precipitated the events that led to the filing of this DJ action. Therefore, the caveat provided in the Policy itself prevents the applicability of Exclusion m under the facts of this case.

The caveat in Exclusion M that the exclusion does not apply to loss of use arising out of "sudden and accidental physical injury" applies, at most, to the one sign that fell down.

The loss of use associated with the other two signs, which did not fall down, is excluded plainly by the language of the exclusion. Again, the remaining two signs were not physically injured, but were removed because the SCDOT deemed them to be unsafe—only faulty workmanship. Notwithstanding the above, Exclusion M does not apply even to the one sign that fell down. This is because the loss of use claim that arises from the “accidental and sudden physical injury” must be to “*other property*” to fulfill the caveat. Again, the one sign that fell down is not “other property”, but is the work/product of the alleged insured. The rationale of L-J applies in this analysis. Similarly, the rule set forth in Century Indemnity applies: 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) (emphasis added).

VII. THE COURT MISAPPREHENDED EXCLUSION “N” IN FINDING THE EXCLUSION DID NOT APPLY TO THE FACTS HEREIN.

The Court of Appeals held that Exclusion N did not apply because the case did not involve a product recall. The Court of Appeals stated the following:

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.

There are, of course, cases where Exclusion N is applied to product recall cases situations; but product recall cases are only an example. The exclusion is not drafted for these situations only. As an aside, the exclusion has its roots apparently in the aircraft

industry. To illustrate, in the event of an airplane crash, the FAA may mandate that the particular airline ground its other like model airplanes in order to investigate whether the same "problem" exist with all the airplanes. Under these circumstances, one can imagine the large commercial economic loss of use claims that may arise when grounded airplanes are not "making money." Starting in the 1960s, to address these potentially huge claims, the insurance industry began excluding these economic damages and did so in an exclusion that is largely like Exclusion N in the subject policy. However, Exclusion N is not limited to a product recall only or even the aircraft industry. It may have equal applicability to the construction industry.

There are myriad of facts and circumstances that may otherwise arise in commercial cases that may invoke Exclusion N. The courts in South Carolina should look to "plain and ordinary" language of the exclusion to see whether the exclusion applies to the facts. One will recall that the Supreme Court rejected a narrow, technical definition of the word "damages" in *Helena, supra*. To limit the exclusion to a particular industry or situation, "goes against South Carolina precedent which holds that this Court must give policy language its plain, ordinary, and popular meaning." *Id.* at 638, 594 S.E.2d at 458 (citing *Century Indem.*, 348 S.C. at 565, 561 S.E.2d at 358). A "plain and ordinary" reading of Exclusion N shows it excludes the damages alleged by Rhodes and Piedmont. Because the SCDOT deemed the two standing signs unsafe, the SCDOT made Piedmont Promotions take them down. That is the very allegation made by Rhodes and Piedmont. 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. Exclusion N is applicable to exclude the damages herein.

The risk of replacing and repairing defective materials or poor workmanship is considered a commercial risk, which is not passed on to the liability insurer. The Court of Appeals' decision to award damages for the cost to remove and dispose of the signs is in direct contravention to reported South Carolina decisions. This Court has stated, "[b]ased on the law of this State, coverage for the repair and/or replacement of the substrate and substructure of the home is excluded by the faulty workmanship provision." Century Indem. Co., 348 S.C. 559, 566, 561 S.E.2d 355, 359 (2002) (addressing a stucco clad house and the work was performed by a stucco subcontractor); see also Engineered Prods., Inc. v. Aetna Cas. & Sur. Co., 295 S.C. 375, 368 S.E.2d 674 (Ct.App.1983) (under policy excluding coverage of insured's liability for damages resulting from restoration, repair, or replacement of its own defective work, insurer had no duty to defend its insured in action seeking compensation for replacement of rack system lost in storm).

To recall, the Court in Helena found an occurrence of property damage, but then applied an exclusion to bar coverage. Helena, 594 S.E.2d at 462. "Exclusions in an insurance policy are to be read independently of each other; they are not to be read cumulatively." Engineered Products, Inc., 295 S.C. at 378, 368 S.E.2d at 675. "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)). If there is no ambiguity, the insurance policy's terms must be interpreted and enforced according to their plain, ordinary, and popular meaning. George v. Empire Fire and Marine Ins. Co., 336 S.C. 206, 519 S.E.2d 107 (S.C. App. 1999).

In C.D. Walters, this Court addressed the fundamental principles of the Commercial General Liability policy in its citation to the seminal construction defect insurance coverage case. 281 S.C. at 598, 316 S.E.2d 709 (discussing Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (N.J. 1979)). In Weedo, New Jersey gave an excellent comparison of "business risks" assumed by the insured-contractor in the ordinary, normal course of business and "insurable risks" assumed by the ... insurance company [under a comprehensive general liability policy]....

The insured-contractor can take pains to control the quality of the goods and services supplied. At the same time he undertakes the risk that he may fail in this endeavor and thereby incur contractual liability whether express or implied. The consequence of not performing well is part of every business venture; the replacement or repair of faulty goods and works is a business expense, to be borne by the insured-contractor in order to satisfy customers. See Tinker, ["Comprehensive General Liability Insurance-Perspective and Overview", 25 Feder.Ins.Coun.Q. 217, 224 (1975); Henderson, "Insurance Protection for Products Liability and Completed Operations-What Every Lawyer Should Know," 50 Neb.L.Rev. 415, 441 (1971).]

There exists another form of risk in the insured-contractor's line of work, that is, injury to people and damage to property caused by faulty workmanship. Unlike business risks of the sort described above, where the tradesman commonly absorbs the cost attendant upon the repair of his faulty work, the accidental injury to property or persons substantially caused by his unworkmanlike performance exposes the contractor to almost limitless liabilities. While 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 risks as a matter of insurance underwriting.

* * * * *

The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.

C.D. Walters, 281 S.C. at 596-97, 316 S.E.2d at 711-12 (citing Weedo v. Stone-E-Brick, 405 A.2d at 791) (further citations omitted).

The decision of the Court of Appeals is against good policy. In rejecting the claim in L-J as an insurable loss, the Court stated, "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." Id. at 123, 621 S.E.2d at 36. Here, C&B Fabricators, Inc.¹⁶ was paid on its contract and allegedly required to construct the signs in accordance with certain plans and specifications. If this was not done, Piedmont Promotions may have a cause of action under South Carolina law for breach of contract, breach of warranty or negligence against C&B Fabricators, Inc. To allow C&B Fabricators, to be compensated through insurance for its breach of contract or negligence is to, in fact, pay it twice.

Compensating a party by providing coverage under a CGL policy to repair or

¹⁶ Auto-Owners draws to the Court of Appeals' attention that the Opinion accidentally refers to this entity as "C&B Fabrication, Inc." in the first sentence of its "Facts/Procedural History."

replace a job which was deficient from the outset essentially serves as double compensation for the negligent party. Interpreting a CGL policy as providing coverage for work-product deficiencies would enable a contractor to receive initial payment for his work and then receive subsequent payment from his insurance company to repair and correct deficiencies in his own work. The framework set up by the Court herein serves as a disincentive for contractors to perform their work correctly and provides them an unjust windfall at the expense of the CGL insurer that was not included in the negotiated price of the CGL policy. A contractor who hires poor laborers or who otherwise mismanages his laborers should bear responsibility for those actions.

Damages to compensate a party for typical commercial losses versus damages to compensate one for an accident are two different things. "The accidental injury to property or persons substantially caused by his unworkmanlike performance exposes the contractor to almost limitless liabilities." C.D. Walters, 281 S.C. 593, 316 S.E.2d 709. "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." Id. at 596, 316 S.E.2d at 711-12 (quoting Weedo, 405 A.2d at 791) (emphasis added).

What is the likelihood that a grading contractor will fail to tamp the soil well and a motorist wrecks because the pavement is displaced or cracked because of the faulty workmanship? What is the likelihood that a sign may fall down and personally injure a passing motorist? The issue is not altogether one of foreseeability as some courts suggest. It is more an issue of risks assessment. Who get hurts - a child or an adult? How badly

are they hurt - serious or minor injury? What is the value of any property damage - expensive or inconsequential? These are examples of potential claims. It is the possibility that the contractor's defective work will cause an accident that leads to bodily injury or property damages that exposes the contractor to unlimited liabilities and unexpected costs. These types of liabilities may otherwise bankrupt the contractor. One purchases liability insurance to guard against these uncertain risks.

In contrast, defective work resulting in damage to the work itself and the commercial damages that flow directly from the work does not entail the same uncertainty. The damages to the project itself are more certain. The contractor will know the extent of the exposure that may occur to its work or product because of the contractor's faulty workmanship. C&B Fabricators, Inc. knows the value of the materials and labor used for the erection of the signs. Did C&B Fabricators, Inc. choose to use good quality labor and materials? What is the likelihood that the grading contractor fails to tamp the soil and this act or omission causes the pavement to settle or crack and require replacement? What is the likelihood that the contractor installs the sign wrong, the signs falls down and is out of commission for a period of time causing the owner to lose revenues?

C&B Fabricators, Inc. can best control these types of risks by hiring competent employees. C&B Fabricators, Inc. can also control these risks by using good quality materials that will last a sufficient period of time to limit the number of warranty call backs. If a road cracks or a sign falls, the contractor can reasonably foresee that the contractor will be called back to replace the poor work and answer for the consequences.

In setting its price for construction, a contractor factors in the risk that some faulty work may require repair or remediation, which is an expected cost of doing business.

VIII. THE COURT OF APPEALS MISAPPRHENDED THE RECORD WHEN IT DETERMINED THAT AUTO-OWNERS MUST INDEMNIFY C&B FOR THE EXPENSE IT INCURRED IN REMOVING A SIGN.

Auto-Owners also requests the Court reconsider its finding that C&B is entitled to payment from Auto-Owners for the expense it incurred in removing one of the signs that did not fall. In reaching this conclusion, the Court stated that "Eadon and C&B's amended answer and counterclaim specifically prays for the costs incurred by the Respondents in rectifying the consequential damages caused by the removal of the signs."

The Court's statement regarding the Amended Complaint and Counterclaim is incorrect. The Amended Complaint and Counterclaim referred to by the Court does not exist. The Record reveals that Auto-Owners filed an Amended Complaint on March 14, 2003. (R. p. 147). Eadon and C&B filed an Answer to the First Amended Complaint on July 17, 2003. (R. p. 202). This pleading included no counterclaim. The Amended Answer and Counterclaim referred to by the Court is an exhibit to a Motion to Amend Answer and Counterclaim filed by Eadon and C&B on September 7, 2004. (R. p. 213). This motion to amend was never heard and was withdrawn by Eadon and C&B prior to the trial Court's decision to grant Auto-Owners' motion to continue the case in order to obtain the Tort action trial transcript. There is no Order in the Record (or otherwise) granting the proposed amendment and counterclaim. In short, the Amended Answer and Counterclaim referenced by the Court never became a pleading in this case.

The truth of this is further 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). Again, Eadon and C&B did not assert a counterclaim against Auto-Owners. This is the last responsive pleading filed by Eadon and C&B in this case. It contains no counterclaim. There was no counterclaim presented to the circuit court and therefore no claim presented by C&B to warrant or justify the circuit court or this Court's finding.

Furthermore, a review of the Record reveals that there was no argument or evidence presented to the circuit court regarding any duty Auto-Owners had to reimburse C&B for costs incurred for removing the sign. There was no evidence presented as to what those costs were. The issue was never raised and Auto-Owners never had a chance to respond to it. The only issue before the Court was (and is) whether Auto-Owners' has a duty to indemnify Eadon for the damages asserted against him by Rhodes and Piedmont. For this reason, Auto-Owners requests that the Court reconsider its ruling on this issue and strike the circuit court's finding that Auto-Owners must reimburse C&B for the costs incurred in removing the sign.¹⁷

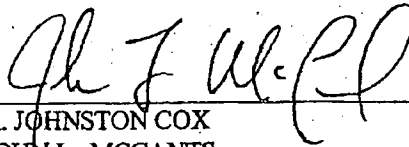
CONCLUSION

For the reasons set forth above, Auto-Owners respectfully asserts that ample grounds exist for a rehearing of this matter pursuant to Rule 221, SCACR. Accordingly, Auto-Owners prays that the Court grant its Petition and schedule a rehearing on the merits of the Opinion to allow Auto-Owners an opportunity to address the issues discussed herein.

¹⁷ Even if this issue were properly before the Court, C&B would not be entitled to reimbursement for costs incurred in removing its own defective product and/or work. That is a business risk to be borne by the insured.

Respectfully Submitted,

ELLIS, LAWHORNE & SIMS, P.A.

A handwritten signature in black ink, appearing to read "John L. McCants", written over a horizontal line.

A. JOHNSTON COX
JOHN L. MCCANTS
1501 Main Street, Fifth Floor
Post Office Box 2285
Columbia, South Carolina 29202
Tel: (803) 254-4190

ATTORNEYS FOR APPELLANT

August 21, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

AUG 21 2009

APPEAL FROM YORK COUNTY
Court of Common Pleas

SC Court of Appeals

Lee S. Alford, Circuit Court Judge

Case No. 02-CP-46-2369

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,

PROOF OF SERVICE

I, the undersigned paralegal of the law offices of Ellis Lawhorne & Sims, P.A., attorneys for Appellant Auto-Owners Insurance Company, do hereby certify that I have served all counsel in this action with a copy of the Petition for Rehearing via first-class mail of same to the following address(es) as indicated below on the 21st day of August, 2009:

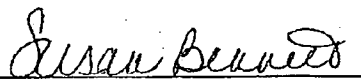
Creighton B. Coleman, Esquire
Coleman & Tolen, LLC
Post Office Box 1006
Winnsboro, South Carolina 29180

Hoover C. Blanton, Esquire
McCutchcon Blanton Johnson & Barnette, LLP
Post Office Drawer 11209
Columbia, South Carolina 29211-1209

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

William O. Sweeney, III, Esquire
Sweeny Wingate & Barrow, PA
Post Office Box 12129
Columbia, South Carolina 29211

Attorney for Respondents Marion L. Eadon d/b/a C&B Fabrications, C&B Fabrications, Inc. and
Low Country Signs, Inc.


Susan Bennett, Paralegal

Columbia, South Carolina

The South Carolina Court of Appeals

Auto-Owners Insurance Company, Appellant,

v.

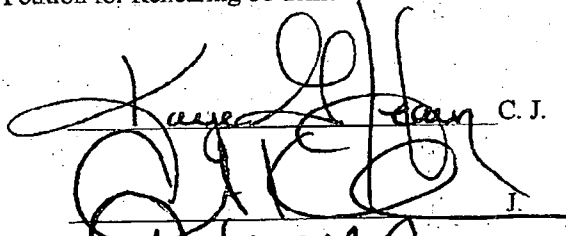
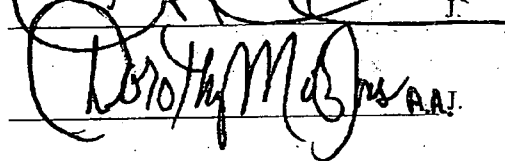
Samuel W. Rhodes, Piedmont
Promotions, Inc. and Marion L. Eadon
d/b/a C&B Fabrications, C&B
Fabrications, Inc. and Low Country
Signs, Inc., Respondents.

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

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.


Kaye L. Dean C. J.

Dorothy M. Jones A.J.

Columbia, South Carolina
September 23, 2009

cc: A. Johnston Cox, Esq.
John L. McCants, Esq.
Creighton Coleman, Esquire
Hoover C. Blanton, Esq.
William O. Sweeny, Esq.