STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

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

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S.C. Supreme Court

Auto-Owners Insurance Company.. . . . . Petitioner

v.

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

BRIEF OF RESPONDENT MARION L. EADON D/B/A C&B FABRICATION, C&B FABRICATIONS, INC., AND LOW COUNTRY SIGNS, INC.

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STATEMENT OF THE CASE

On December 12, 2001, Samuel W. Rhodes, Jr., and Piedmont Promotions, Inc. filed a civil action in Fairfield County against Marion L. Eadon d/b/a C&B Fabrication, alleging several causes of action, including breach of contract and negligence, resulting in damages to Mr. Rhodes' real property. On October 14, 2002, Plaintiff Auto-Owners Insurance Company filed its complaint for a declaratory judgment seeking 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. 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. Faced with bad faith allegations, 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 underlying 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. Subsequently, 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 coverage case was called to trial, Auto-Owners filed a motion for a continuance 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. Again, after the underlying verdict was rendered and a continuance granted, the insurance company then moved for leave to file a second

amended complaint, wherein – for the first time and four years after the complaint was filed – 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. R. 7. 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 insureds 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 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.

On or about November 21, 2006, Petitioner 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 in Rhodes v. Marion Eadon d/b/a C & B Fabrication and remanded it to transfer venue. 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 of Appeals 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 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-Owners' 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 in the underlying case. 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 this Court for certiorari. By Order of February 21, 2008, the Supreme Court denied certiorari in Rhodes v. Eadon d/b/a C & B Fabrication.

On April 10, 2007, Auto-Owners filed its Notice of Appeal to appeal the Trial Court's Order of November 7, 2006, R. 13-60, and that Court's Orders dated March 22 and 26, R. 61-62, 63-64 which supplement the Order of November 7.

On August 6, 2009, the Court of Appeals issued its decision in Auto-Owners Ins. Co. v. Rhodes, 385 S.C. 83, 682 S.E.2d 857 (Ct. App. 2009) R. 1551-1556. Auto-Owners petitioned for rehearing on August 21, 2009, R. 1567, which was denied on September 23, 2009. R. 1604.

Auto-Owners timely petitioned for certiorari to this Court, which was granted on March 12, 2012.

FACTS

The portions of the Tailored Protection Policy issued to C & B Fabricators, Inc. and Low Country Signs, Inc., for the period 9/17/2000-9/17/2001 that pertains to liability coverage are at R. 73-96. The Declarations, R. 75, 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.

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

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. 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.

> 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, R.1139, 1142-44, 1147-49, 1153, 1158, 1159,1164-65. Testimony of Eadon, 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 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-Owners' 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.

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), SCRCP.

ARGUMENT

I. THE COURT APPEALS CITED, AND APPLIED, THE APPROPRIATE STANDARD OF REVIEW.

The present action is for a declaratory judgment regarding the issue of whether there could be coverage under Auto-Owners CGL policy for damages in an underlying

tort action, Rhodes v. Eadon, C.A. No. 01-CP-20-334, in Fairfield County.[1] This Court has addressed the standard of review for such an action as follows:

> "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law. *Estate of Revis v. Revis*, 326 S.C. 470, 477, 484 S.E.2d 112, 116 (Ct. App. 1997). Thus, because this action involves the interpretation of a contract..., it is an action at law. *Barnacle Broad, Inc. v. Baker Broad, Inc.*, 343 S.C. 140 146, 538 S.E.2d 672, 675 (Ct. App. 2000). In an action at law tried without a jury, "our scope of review extends merely to the correction of errors of law." Id. Therefore, this Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings. *Townes Assoc., Ltd. v. City of Greenville,* 266 S.C. 81, 86, 221 S.E.2d 773, 776 (1976).

Auto-Owners Ins. Co. v. Rollison, 378 S.C. 600, 606-07, 663 S.E.2d 484, 487 (2008).

The Court of Appeals' opinion cites this same standard of review. Auto-Owners Ins. Co. v. Rhodes, 385 S.C. 83, 92, 682 S.E.2d 857, 862 (Ct. App. 2009). The substance of that opinion, addressed in more detail below, reflects that the Court of Appeals correctly sought to determine whether there was evidence available to reasonably support the Trial Court's order, rather than weighing the evidence. RV Resort and Yacht Club Owners Ass'n, Inc. v. Billy Bob's Marina, 386 S.C. 313, 321, 688 S.E.2d 555, 559 (2010).

> ("An action ...that seeks monetary damages is an action at law, and we will not disturb the trial court's findings unless they are unsupported by the evidence. *O'Shea v. Lesser*, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992) (citing *Townes Assocs. V. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976)). In contrast, an action [for] injunctive relief is an action in equity, and we may find the facts in accordance with our own view of the evidence. *Cedar Cove Homeowners Ass'n v. DiPietro*, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006)").

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[1] Auto-Owners' initial complaint in this action was filed on October 14, 2002. R. 67. The jury returned a verdict in the underlying case, Rhodes v. Eadon, on September 2, 2004. R. 638. As the underlying damages were prospective when Auto-Owners filed its original complaint, they are prospective now that the venue of the underlying action is in Clarendon County.

The Court of Appeals correctly found that there was reasonable evidence to support all of the holdings of the trial court, so its opinion should be affirmed.

II. PETITIONER'S BRIEF HAS MISAPPREHENDED AN IMPORTANT HOLDING OF THE TRIAL COURT.

Auto-Owners' brief takes the position that the Court of Appeals erred in holding that "the removal of the two signs that did not fall" constituted an "occurrence." [2] *See also*, Petitioners Brief, p. 21, n. 10, stating that the Court of Appeals' holding could cause a building inspector's order to be an "occurrence." Such statements betray a misapprehension as to the Court of Appeals' holding.

Both the trial court and the Court of Appeals held that there was one "occurrence," and that was the sudden, unexpected fall of one signpost onto the interstate highway. The trial court held as follows:

> In our case the defective design, fabrication and inspection (when one sign was discovered leaning) which proximately caused the sign to fall and the mandated (by public authority) removal, because of safety concerns, of the other two signs, caused damage to the real estate and loss of use of the signs. As cited *infra*, p. 19, the Policy defines, "property damage" to include loss of use. The claim here is "not simply a claim for the contractor's defective work" but the resulting damages beyond the defective work caused by the defective work, to property other than the defective work itself. The property damage sustained by Rhodes was not merely negligent construction damaging only the work product [one sign] itself.

R. 27.

> Auto-Owners has admitted there was an "occurrence." When Auto-Owners' First Summary Judgment Motion was heard (and denied) on January 22, 2004, counsel for Auto-Owners stated to the Court:
>
> The one sign that fell down and caused damages to the highway department and what not, I would contend that would be an occurrence because it is something that caused physical damage, a defect that caused physical damage to other property. (Transcript p. 6, lines 4-8) (Emphasis added.)
>
> An outdoor advertising sign falling on an interstate highway is an accident.

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[2] This is reflected in Petitioner's Issue on Appeal number 3.

R. 31.

The Court of Appeals, in upholding the circuit court's holding that there was an "occurrence," held as follows:

> The circuit court found there was an occurrence, distinguishing the case of *L-J v. Bituminous Fire & Marine Insurance Co.*, 366 S.E.2d 33 (2005).... 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 the 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. 193 N.H. 39, 648 A.2d 474 (1994).... 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 damage 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*. 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 (emphasis added).(footnote omitted)..

Auto-Owners, 385 S.C. at 100-02, 682 S.E.2d at 867.[3]

There was thus, under the circuit court's order, affirmed by the Court of Appeals upon the evidence, one "occurrence" – the falling of the first sign – and all of the adverse consequences that flowed from that initial collapse were damages to the property of Mr. Rhodes, not to the work or product of Auto-Owners' insured.

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3. This quotation from the Court of Appeals' opinion disposes of Petitioner's Issue on Appeal number 4.

III. THERE IS EVIDENCE OF RECORD TO SUPPORT THE TRIAL COURT'S AND COURT OF APPEALS' HOLDINGS THAT MARION EADON WAS AN INSURED UNDER AUTO-OWNERS' POLICY.

The "Who is an Insured" portion of Auto-Owners policy applicable to corporations includes the following: "your executive officers and directors are insureds, but only with respect to their duties as your officers or directors." R. 1313. Mr. Eadon was an executive officer of the Corporation." R. 1103, lines 4-11.

A. Mr. Eadon Performed a Variety of Executive Functions for C&B Fabrication.

C&B Fabrication was the name by which Mr. Eadon's corporation did business. R. 23. During its short existence, Mr. Eadon performed many executive functions for the corporation. He did not, however, personally design, manufacture, install or inspect the signpost, which activities Auto-Owners suggests were required for Eadon to be necessary for Eadon's actions to be "with respect to [his] duties as [C&B Fabrication's] officer or director." Auto-Owners' Brief, pp. 7, 11. The president and directors of such manufacturers as Ford, General Motors, Toyota, etc., however, are not directly engaged in the design or manufacture of automobiles. An executive in any corporation performs a variety of different functions that are not directly and hands-on related to the end product of the business, and Mr. Eadon was no exception. The record reflects several of these activities, all of which led to the installation – and perhaps the failure – of the signs.

Mr. Eadon basically convinced Mr. Rhodes to bring his business to C&B Fabrication. He met with Mr. Rhodes before their corporations entered into a contractual relationship. R. 1139, lines 11-23. Mr. Rhodes met with Mr. Eadon in the latter's office and thereafter toured the plant in which the signs were constructed. R. 1140, lines 1-5. Mr. Eadon then drove Mr. Rhodes to some locations where Eadon's corporation had

recently installed signs. R. 1140, lines 6-9, 21-23. Mr. Rhodes decided to sign the contract with Mr. Eadon because, "He [Eadon] assured me they build great signs, he could personally guarantee it.... He'd build me the best sign I could ever get." R. 1142, lines 1-5. Thereafter, Mr. Eadon, as president of C&B Fabrication, sent Mr. Rhodes a contract for fabrication, delivery, and installation of three, 130-foot H.A.G.L. signposts. R. 1142, line 17-1143, line 9. The contract showed Mr. Eadon's name as "President." When a question of altering the terms of the contract arose, Mr. Benehaley – the manager of C&B Fabrication – called Mr. Eadon for authorization to make the alteration, which was done under terms Mr. Eadon directed. R. 1144, lines 15-23. It was Mr. Rhodes' reliance on Mr. Eadon's words that caused him to accept C&B Fabrication's proposal. R. 1148, lines 22-25.

When problems started with the signs, i.e., one was found to be leaning, Mr. Rhodes contacted Mr. Eadon, as the corporate officer responsible, several times. R. 1153, lines 6-19. Mr. Rhodes thought that Mr. Eadon was going to get the leaning sign fixed. Id., lines 12-13. After the phone calls failed to get the problem resolved, Mr. Rhodes commenced to send letters to Mr. Eadon at C&B Fabrication. R. 1154, lines 3-5. On December 29, 2000, Mr. Rhodes sent a letter to Mr. Eadon stating that the middle sign was in need of immediate repair, as it was leaning. Mr. Rhodes requested that Eadon repair the sign immediately and asked for a prompt response. R. 1154, lines 21-24. Mr. Eadon replied, but did not get the problem rectified. R. 1155, line 8-1159, line 17.

The upshot of Mr. Rhodes' testimony is that he was dealing with Mr. Eadon as the principal in C&B Fabrication, in whatever business form that it existed.

Auto-Owners' assertion, in its Issue on Appeal number 8, that the Court of Appeals should have held that Mr. Eadon was judicially estopped from arguing in this declaratory judgment action that he was acting on behalf of the insured corporation should be rejected. As the Court of Appeals held, there is absolutely no evidence that Mr. Eadon had any intention of deceiving the trial court in this matter. Auto-Owners provides in its Brief *no* evidence of any intention to mislead the Court, but instead attempts to shift the burden to Mr. Eadon to present evidence that he did not intend to mislead the court. As the proponent for *de facto* stripping Mr. Eadon's defense, the burden should certainly fall on Auto-Owners to provide evidence to support that position. Auto-Owners' Issue on Appeal number 8 should be denied.

B. There is Evidence from which the Finder of Fact could Hold that Mr. Eadon's Actions as an Executive Led to the Occurrence of the Sign falling.

There is substantial, probative evidence from which a jury could reasonably determine that Mr. Eadon was negligent in his performance of his executive functions in the corporation and that those delicts caused or contributed to the occurrence. Specifically, it could be found that Mr. Eadon, as an executive of C&B Fabrication, was negligent in:

- Convincing Mr. Rhodes to engage C&B Fabrication when neither he nor his employees had the technical expertise to install the signs that they were required to install.

- In entering a business about which he did not know enough, as he admitted. R. 1155, lines 19-26.

- In entering a contract that was underbid by $22,000 and on which he lost $35,000, which inferably caused C&B Fabrication to go out of business on April 3, 2000. R. 1155, lines 16-23.

- In failing to respond adequately to Mr. Rhodes continued telephonic and written requests for immediate repair of the signs – which were a corporate responsibility. This was accentuated by his testimony that Mr. Rhodes "was a pain in the butt. You can't satisfy him." R. 1231, lines 18-24.

His actions belie his testimony that his only responsibilities were to provide money and insurance to the corporation. R. 1105, lines 4-6; 1114, lines 19-20. He did not negotiate any contracts, but he certainly invited the acceptance of one and had the final call as to whether to accept the terms.

Mr. Eadon, in fact, had several actual and necessarily implied duties with C&B Fabrication that were unquestionably executive, rather than employee, responsibilities. There is, in fact, a wealth of evidence to support the holding of the Trial Court to the effect that Mr. Eadon was an insured under the policy. R, 52-59, and that of the Court of Appeals to the same effect. Auto-Owners, 385 S.C. at 96-99, 682 S.E.2d at 864-866.

The cases cited by Auto-Owners, pp. 8-11, are fully distinguishable. In Bowie v. Home Ins. Co., 923 F.2d 705 (9th Cir. 1991), the court held that an E&O policy issued to one corporation did not cover actions of directors for actions they took on behalf of *another* corporation. Boso v. Erie Ins. Co., 669 N.E.2d 47 (Ohio Ct. App. 1995) stands for the proposition that a business liability policy does not cover a non-business liability – i.e., killing a person in a hunting accident – incurred by a person who is a named insured for business purposes only. Harrison v. Ohio Cas. Ins. Co., 199 F.Supp.2d 518 (S.D. Miss. 2000), addresses a situation in a buyer sued the former homeowners of the home

for foundation problems. The former owners, who had built the house, sought coverage from umbrella policy issued to a heating and air conditioning company of which the prior owners had been officers and directors. The court held that the sellers of the house were not "insureds" under the policy, issued to the heating and air conditioning company, for the sale of the house, which had nothing to do with the insured air conditioning company. In Carpenter v. Fed. Ins. Co., 637 A.2d 1008 (Pa. Super. Ct. 1974) the court held that a policy issued to one corporation did not cover an officer for liabilities he incurred as a result of actions he had taken for a separate partnership. Finally, Lomes v. Hartford Fin. Serv. Group, Inc., 105 Cal. Rptr.2d 471 (2001) addresses a defamation claim against a former director of a corporation long after he left the corporation. There was no coverage under the insurance policy for his defaming the insured corporation and the man who had taken control of it. Thus, none of these cases even approximates the situation in this case. They should be of no persuasive value.

The Louisiana case most heavily relied upon by Auto-Owners, Creel v. Louisiana Pest Control Ins. Inc., 723 So.2d 440 (La. Ct. App. 1998) likewise is of little persuasive value. In it, Mr. Slay, was definitely doing the job of an employee – going to spray a house for insects – when the accident occurred. That is not consistent with the situation here, in which Mr. Eadon was at all times functioning as the President/CEO of C&B Fabrication. It was the employees of the corporation that did the designing, manufacturing, installing and inspecting. Ironically, it appears to be Auto-Owners' position, Auto-Owners Brief, pp. 7, 11, that Eadon would be insured as a corporate officer only if he was directly involved in designing, manufacturing, installing or inspecting the signposts. If he had done those things, Creel would hold that he was not an insured. The same observation could be made regarding the other case cited by Auto-

Owners, Middlesex Mut. Ass. Co. v. Fish, 738 F. Supp.2d 124 (D. Me. 2010), as Defendant Fish was *not* performing executive duties.

Here, Mr. Eadon's actions – most especially regarding his response to Mr. Rhodes' reports and complaints about the leaning signpost – reflected performance of executive responsibilities that led to the occurrence. The evidence supports the Trial Court's and Court of Appeals' holdings that Mr. Eadon was an insured under the policy, contrary to Petitioner's Issue on Appeal number 1.

IV. THERE IS EVIDENCE IN THE RECORD THAT THE FALL OF ONE SIGNPOST CAUSED PROPERTY DAMAGE TO MR. RHODES' REAL PROPERTY.

Auto-Owners' brief also asserts that the only "property" in question is the three signposts constructed by its insured; it states "there is no 'other property'." Petitioner's Brief, p. 22. This mischaracterizes the whole lawsuit. The First Amended Complaint in the underlying tort suit provides in pertinent part as follows:

> 3. This Action arises out of a transaction involving injuries to real property situated in Fairfield County, South Carolina.
>
> 20. As a direct and proximate result of the foregoing, the Plaintiff has sustained injury and damage as follows:
>
> 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 Highway 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;
>
> 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 (emphasis added).

R. 124-25. It is unquestionable that the primary thrust of the underlying lawsuit is to obtain tort damages for the injury to Mr. Rhodes property[4] rather than contract damages for the signs' failing to comply with the contract.

Auto-Owners' policy provides coverage for property damage. Specifically, the policy's insuring agreement provides that, "We [Auto-Owners] will pay those sums that the insured becomes legally obligated to pay as damages because of 'property damage' to which this insurance applies." R. 1307. "Property damage" is a defined term in the policy, as follows:

> 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. 1319-20.

The policy, therefore, deems that all loss of use occurs at the moment of the physical injury or "occurrence" that caused it. In this case the moment of physical injury and the "occurrence" were the moment the first signpost fell.

There is evidence in the record that both forms of "property damage" resulted from the falling of that signpost. As the circuit court held:

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[4] It is recognized that the Court of Appeals' unpublished decision in Rhodes v. Eadon, 2006-UP-413, reversed the verdict of the trial court based on the holding that venue, which had been in Fairfield County under S.C. Code Ann. §15-7-30, was improper. That decision did not, however, hold that Mr. Rhodes' property was uninjured. It held that, under Coastal Mall v. Askins, 265 S.C. 307, 217 S.E.2d 725 (1975), that the "plaintiff's primary right" was for a contract or negligence claim that the signs were not constructed correctly. That opinion, in fact, held that "it was not sufficient [to establish venue under §15-7-30] to find an injury to real property has resulted from the actions of the defendant," which implies a recognition that there was injury to Mr. Rhodes' real property.

> 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.
>
> 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. With the signs 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]. Accordingly, even had the real estate not sustained physical injury, there has been a loss of use of that real estate.

R. 32. *See also*, R. 50-52 (discussion of covered damages). The record is replete with evidence that supports the Trial Court's holding that property damage, as defined by the policy, occurred.

A. The Fall of the Signpost caused Physical Injury to Mr. Rhodes' Tangible, Real Property.

When the signposts were installed on the property, with the bases being 27 feet deep, R. 1149, and with an expected life of 50 years, R. 1173, they become fixtures. R. 120-21. The signposts thereby became part of Mr. Rhodes' real property. Texaco, Inc. v. Warrington, 264, S.C. 18, 21, 212 S.E.2d 59, 60 (1975). Auto-Owners, in its Brief, admits that the signs "were affixed to and made part of the real estate," p. 22, which is *de facto* to admit they were fixtures. As part of Mr. Rhodes' real property, the signs added value to that property. When the one signpost fell, it caused property damage to that real property in several forms, including physical injury.

1. The Fall of the Signpost Directly Caused Physical Injury to Tangible Property.

The southernmost signpost fell into the southbound lanes of Interstate 77 on January 20, 2001. R. 1159, lines 10-19. The fall of that signpost caused immediate physical damage to tangible property: obstructing the roadway and tearing down a fence.

There were expenses related to immediately rectifying the situation, i.e., removing the sign, including cutting it loose, R. 1161, lines 4-9; renting a crane, R. 1162, lines 20-24; cleaning up the billboard and rebuilding fences damaged by the billboard's fall, R. 1168, lines 14-1169, line 20. The circuit court had evidence of the costs of those damages. In an Order of August 3, 2005, denying Auto-Owners' motion for summary judgment, the trial court cited as evidence the following:

> The affidavit of Carl Anders avers that the Plaintiff, Auto-Owners Insurance Company, paid invoices including:
>
> > (a) $300.00 for cutting the fallen sign into manageable sections while on the interstate;
> >
> > (b) $1,500.00 for removing the fallen sign from its property and repairing fences; and
> >
> > (c) $4,552.35 from the Department of Transportation for removing the fallen sign from the highway.[5]
>
> Also, the Plaintiff paid a bill from Varnadores Garage and Towing for removal of the fallen sign from the highway in the amount of $7,100.00.

R. 11.

2. After Mr. Rhodes' permit for having advertising signs on the property was revoked, the continued presence of the signposts diminished the value of the property. The costs to remove the signposts would be covered damages.

On January 23, 2001 – three days after the signpost fell – the property owner, Mr. Rhodes, received a certified letter from the South Carolina Department of Transportation that read as follows:

> Dear Mr. Rhodes:

[5] Though Auto-Owners paid for the cited damages, evidence of their having been incurred would be admissible in the trial against Mr. Eadon as they are a collateral source. Mr. Eadon would not receive a set-off of the amount paid by Auto-Owners for these damages. Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 171-73, 604 S.E.2d 385, 393 (2004). If the jury found recklessness in causing these damages, it could, of course, award punitive damages.

> The South Carolina Department of Transportation's ("SCDOT") has documented that the outdoor advertising structure (permit number 04-20-426994) located on I-77 in Fairfield County has been completely destroyed.
>
> The SCDOT has investigated and concluded that outdoor advertising structures permitted under permits 04-20-426995 and 04-20-42996 on I-77 in Fairfield County are unsafe and present a hazard to the motoring public.
>
> Pursuant to Section 57-25-130 (Declaration of Purpose), South Carolina Code of Laws, 1976 as amended, please accept this letter as the final notice of cancellation and the immediate removal of the advertising sign structures. If the signs are not removed, employees or agents of the Department may go upon the property upon which an illegal sign(s) is located for the purpose of removal.

R. 1251.

This letter provides evidence from which the finder of fact could hold that the fall of the signpost was the cause of the SCDOT coming to Mr. Rhodes' property to investigate – and condemn – the other two advertising signposts. The costs of removal of the two signposts would be consequential damages flowing from the "occurrence" of the first signpost falling.

The costs of removing the two, inferably damaged and unsafe, signposts from Mr. Rhodes' property would, under South Carolina law be damages covered by a CGL policy. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004). The Trial Court, R. 32-35, and the Court of Appeals, 385 S.C. at 103, 682 S.E.2d at 868, rely on Helena, and appropriately so, in their decisions. That case makes plain that cleanup costs are "damages," covered under CGL policies. Helena, *quoting* A.Y. McDonald Indus. Inc. v. Insurance Co. of N. Am., 475 N.W. 607, 619 (Iowa), held that, "[t]he policy language, 'all sums which the insured shall be 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…." 357 S.C. at 638, 594 S.E.2d at 458.

This broad language – consistent with South Carolina law providing that "rules of construction require... clauses of inclusion to be broadly construed"[6] – is certainly sufficiently broad to cover the expenses of removing from real property fixtures that have been rendered, by an occurrence, to be nuisances and a continuing source of injury to that real property.

Auto-Owners continues to place primary reliance on the Court of Appeals' opinion in Braswell v. Faircloth, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989), rather than on Helena. There are several reasons that this reliance is misplaced. First, Helena is a more recent opinion – filed 15 years after Braswell – by the definitive court in the State.

Second, Braswell uses a far narrower definition of "damages" than does Helena. For example, Barnwell holds that "[s]ampling and the performance of chemical tests do not constitute 'physical injury to or destruction of tangible property," 300 S.C. at 344, 387 S.E.2d at 710, so they were not covered damages. Under Helena, the costs of such activities arguably would be covered if the insured had to pay for them, as they would be within the parameters of "any claim asserted against the insured arising out of property damage, which requires the expenditure of funds." 357 S.C. at 638, 594 S.E.2d at 458.

Third, and most important, in Barnwell, it was held that there was no coverage for removal of stored chemical waste. The presence alone of this chemical waste on the lessor's land, "does not constitute property damage. Under the authority of Armco and Milliken and Company we hold the costs of removal of the stored waste is not covered." Braswell, 300 S.C. at 345, 387 S.E.2d at 711. The landowner is thus left with the expense of disposing of the lessee's chemical waste.

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[6] City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund, 382 S.C. 535, 549, 677 S.E.2d 574, 581 (2009) (citation omitted).

Braswell's statement that it relies on the authority of Armco and Milliken to hold that such removal is not covered certainly brings the holding of Braswell into serious question. This Court, in Helena, joined the Court of Appeals of Maryland, Bausch & Lomb, Inc. v. Utica Mut. Ins. Co., 330 Md. 758, 625 A.2d 1021 (1993), in "flatly reject[ing]" the "narrow, technical" meaning of "damages" put forth by Armco and Milliken. 357 S.C. at 637-38, 594 S.E.2d at 458. The clear implication of Helena is that this Court would not have held as the Braswell Court did regarding disposal of the waste left on the lessor's land, though the Braswell opinion was not directly brought to this Court.

In Helena, the Court notes that the Court of Appeals' decision in Braswell actually rested on a different foundation than that articulated in the published opinion. This Court held that Braswell, "clearly rested upon a finding that there was no 'property damage,' not on an interpretation of the term 'damages.'" 357 S.C. at 640, 594 S.E.2d at 459.

The holding in Braswell implicitly considers that there was not property damage to the entirety of the real property, but that property damage was limited to the field adjacent to the tank from which the chemicals had leaked. The only occurrence was the leak and the stored tanks of waste did not contribute to the damage from the leaks. By way of contrast, and a basis for distinguishing the situation in this case from that in Braswell, is that the entirety of Mr. Rhodes' property was damaged by the occurrence of the signpost falling. That accident caused the SCDOT to inspect Mr. Rhodes' property and condemn the two remaining signposts and cancel the permits for all three.

Moreover, when the SCDOT condemned the remaining two signs on Mr. Rhodes' property, that constituted damage to the property, as the unusable signposts were a

nuisance, an obstruction to other development of the property, and with a continuing risk of falling, raising the potential liability of the landowner. It should also be noted that the DOT specifically instructed Mr. Rhodes to remove the two remaining signposts. The removal of those two signs was physical injury – to the entirety of Mr. Rhodes' property – caused by the initial occurrence, as that initial fall caused the SCDOT to come inspect the two remaining signposts and condemn them. The costs of removing those two standing signposts are damages for which the insured would likely be responsible, caused by physical injury to tangible property.

3. There is residual physical damage to the real property.

The signposts, as fixtures, were, at the time of the occurrence integral to the property. As the circuit court's order, R. 36, reflects, the signposts were embedded 27-28 feet into the ground and had a height of over 21 feet above ground. R. 1149, lines 1-14; 1175, lines 3-12. The signposts were embedded in concrete. R. 1149, lines 2-8. When the signposts were removed, the "stumps," of the signposts – embedded in concrete – were not removed. Their continued presence in the property certainly precludes its use – without expensive work to rectify the situation – for many purposes. At the trial of this case, an expert could testify as to the cost of removing these three concrete-encased, 27-foot sections of steel from the property. That cost would be part of the immediate damages flowing from the signpost falling, and would be "property damage" as defined by the policy inasmuch as the portions of the signposts remaining on the property constitute obstructions to further development. Their continuing presence of the property constitutes physical injury to tangible property, which is "property damage" as defined by Auto-Owners' policy.

B. The Occurrence of the Sign Falling Caused Loss of Use of Tangible Property.

As pointed out above, Auto-Owners' policy provides that there are two forms of "loss of use" that constitute "property damage:" all resulting loss of use deriving from physical injury to tangible property; and all loss of use of tangible property that is *not* physically injured. Here, it is the real property that has been physically injured by the occurrence of the sign falling, so the first part of the policy's definition of "property damage" is applicable.

1. There has been loss-of-use damage to Mr. Rhodes' property caused by the falling of the road sign on January 20, 2011.

The Complaint in the underlying tort action, Paragraph 20, cites as damages the loss of the opportunity to use his property as a platform for the erection of advertising signs with the concomitant loss of revenue for many years that would flow from advertising signs on that property. R. 124. These damages are loss-of-use damages deriving from Mr. Rhodes' being deprived of the opportunity to use his property as he had been using it. These damages transcend the time that would have been required to replace the three signs inasmuch as the SCDOT revoked Mr. Rhodes' right to erect signs on the property in the future because the auto sales business that he had established on the property, Interstate Auto Sales, R. 1202, line 7-1203, line 16, was deemed to be "non-conforming use." R. 1196, lines 5-9; R. 1201, lines 15-16. However, as Mr. Melvin, the SCDOT official in charge of issuing permits testified, if the sign had not fallen or been leaning, SCDOT would not have gone on Mr. Rhodes' property and he would still have been able to use his signs. Mr. Melvin's testimony on this was as follows:

Q. Okay. If we remove from the factual equation that the signs were leaning or that the sign fell, would Mr. Rhodes still have the permit?

A. Yes.

Q. Would he still be able to have the signs up there or not?
A. He would.

* * *

The Court: Did you day he would?
Witness: He would.

R. 1204, lines 7-16.

There is evidence that if Mr. Rhodes had not lost the use of his property as a platform for advertising signs he would have had a significant stream of income for many years. An expert in economics, G. Richard Thompson, Ph.D., a professor of economics at Clemson University, testified as to his methodology and results as follows:

> Well, basically I had the contracts that he had that were in existence at the time the signs fell. I believe of the 12 faces that were available to be rented, there were eight rented. I had the rental rates on those. Basically the other data that I got was things like growth rates and inflation and that sort of thing, which comes from federal publications.

R. 1179, lines 2-8.

> I made three different sets of calculations. In one I assume that -- in the first set of calculations I used the rental rate that was in place and the vacancy rate, which was approximately one-third of the signs, or eight out of 12 signs were rented, four were not. I used that rental rate.

R. 1179, lines 11-16.

> I simply projected among the revenues, then, over a 10 year period of time, a 20 year period of time, a 30 year period of time, subtracting out his estimates of what the yearly cost was of maintaining those signs.
>
> And that point, that would give me a stream of income going over 10, 20 or 30 years in this particular scenario, and I would then reduce it back to present value.

R. 1180, lines 1-7.

> If you add up those 10-year periods of time, given the increases in the rental rate each year, it comes to a total of $1,115,020. Getting the next step to present value, basically that says that if the signs had only lasted 10 years and had he maintained a one-third vacancy rate and he simply had his contractual increased each year, he would have received $1.1 million over 10 years.

R. 1182, lines 18-25.

> Again, the second column of the $4,196,647 would be the amount that he would receive, less his costs, over that 20 year period of time, had the signs lived for 20 years. The present value of that is $2,470,502, which would be the present value....

R. 1183, line 17-21.

> Another, additional 10 years [a total of 30 years], which would give us a total gross of $12,189,594 at a present value of $4,212,386.

R. 1184, lines 2-3. Mr. Rhodes, moreover, testified that, "if [the signs are] built correctly, they should last 50 years or so." R. 1173, lines 20-21.

Therefore, there clearly is evidence to support the Trial Court's position that the loss of use was "property damage."

The loss of use of the property as a platform for advertising signs leads to another form of property damage to Mr. Rhodes' real property: diminution in value. An expert in real estate appraisal, Charles "Duke" Durden, testified at the trial of the underlying tort action. Mr. Durden testified, using an income/cash flow analysis, that on January 20, 2011 – while the signs were up – the property was worth $1.8 million. R. 1190, lines 10-21. After the signs were removed from the property, its value fell to $65,500. R. 1191, lines 1-8. Thus, the economic loss suffered by Mr. Rhodes because of the diminution in the value of the land because of the loss of use of it as an advertising platform was some $1.8 million. R. 1192, lines 2-5.

Auto-Owners in its brief, p. 26, cites Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc., 356 S.C. 156, 588 S.E.2d 112 (2003) for the proposition that CGL policies do not cover the diminution in value of property. That is a correct assessment of the holding of Carl Brazell in the situation that prevailed in that case, but that situation is distinguishable from the situation at hand. In Carl Brazell, there was no allegation of

physical injury to the property. In answering a certified question which emphasized that "the claims of the claimants which are economic in nature and based **solely** on ... diminution in value...," (emphasis added), the Brazell court held that there was no "occurrence" and no "property damages" as defined by the policy. Specifically, the court stated:

> We find the amended complaint in the underlying action does not allege any physical injury which meets the definition of "property damage" provided in the CGL policies. According to the Order of Certification, Claimants do not allege any physical injury to their property, but solely economic damages, particularly the diminished value of their property, as a result of Contractors' knowing sale of homes located on property containing hazardous materials. Under the unambiguous language of the policies, there is no property damage, and, therefore, **no covered occurrence.**

Brazell, 356 S.C. at 163, 588 S.E.2d at 115-16 (emphasis added).

It is important that in Brazell, there was no occurrence, which distinguishes that case from the present case. It was also important in Brazell that the claimant had made *no claim* for "loss of *use*." *See*, 356 S.C. at 163, n.2, 588 S.E.2d at 115, n.2. In this case, the underlying Plaintiffs have claimed damages for loss of use. Amended Complaint, ¶ 20d; R. 124.[7]

Brazell is, therefore, distinguishable from the case at hand, wherein both physical damages and loss of use are alleged to have been caused by an occurrence and for which there is evidence. Auto-Owners' Issue on Appeal number 6 should be denied.

2. Even if there were no loss-of-use of physically injured property, though there is, there is loss-of-use damage to physically uninjured property.

"Property damage" under the policy includes; "loss of use of tangible property that is not physically injured." If, for whatever reason, it is determined that there is

[7] The entire certified question was: " 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?" (emphasis added).

insufficient evidence that the real property was physically injured, there should nonetheless be coverage for the loss of use of the real property as a platform for advertising signposts. The loss of use would be covered under the policy because such loss of use was, as defined by the policy, property damage caused by the occurrence of the sign's falling, for which Auto-Owners' insured would likely be liable. There is evidence in the record to support the claim that there were damages for loss of use, for the happening of the accident – the "occurrence" – and that the insured could be legally liable for such damages.

V. NONE OF THE EXCLUSIONS IN THE POLICY PRECLUDE COVERAGE FOR THE CLAIMS OF RHODES AND PIEDMONT PROMOTIONS AGAINST MARION EADON D/B/A C&B FABRICATION.

Auto-Owners argues in its brief, Issue on Appeal number 2, pp. 11-14, and Issue on Appeal number 5, pp. 22-24, that exclusions n, k and l should exclude coverage for damages that may be awarded in the underlying Rhodes v. Eadon case. Auto-Owners' consideration of these three exclusions appears to be based on the idea that there is no property damaged other than the signs. As the insurance company's brief states, "[t]here is no 'other property'...." Brief, p. 22. That is incorrect, as pointed out above. The primary focus in the underlying action is "damage to real property." In ignoring this fact, Auto-Owners' consideration of these exclusions is excessively narrow, and consequently arrives at a result that is off the mark. Each of the exclusions is discussed immediately following:

A. Exclusion n does not preclude coverage for damages which may reasonably be awarded in this case.

Exclusion n provides as follows:

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.

Auto-Owners focuses only on the signs, and holds that this exclusion precludes coverage for removal and loss of use of the signs. Brief, p. 13 and Issue on Appeal number 7. However, the focus of the underlying tort action is on the real property. It was the loss of use of the property as an advertising platform that caused the greatest and the most long-term damage. Exclusion n does not exclude the loss of use damage for the real property or the removal of fixtures, no longer Respondent's work, from the real property.

If there is a general verdict in the trial of the underlying action, it cannot be determined whether the damages are awarded for loss of use of the property or of the signs. As this Court held in Auto-Owners Ins. Co. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) *reh'g denied*, "[a]lthough we reverse the trial court's decision to the extent that it orders recovery under the policy for the removal and replacement of stucco, there is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco." 385 S.C. at 198, 684 S.E.2d at 547.

The verdict in the prior tort action was $3 million actual damages and $3.5 punitive damages. 385 S.C. at 90, 682 S.E.2d at 861. Based on the evidence provided by the transcript and this damage award, the trial court reasonably held that:

> The jury found action damages of 3.0 million dollars as a consequence of the faulty workmanship and inspection which damaged the property of a third-party.

R. 27.

and

> 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 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 loss is damage to the real estate.

R. 47-48.

It is a reasonable expectation, given the same evidence, that the primary element of damage will again be Piedmont Promotion's loss of use of the real property for advertising purposes. The long-term loss of use would not be because of any problem with the signs, which could readily be replaced, but because of the DOT's determination that the property's use was not in conformity with the regulations. Exclusion n would not exclude coverage for these damages, as the property would not be "withdrawn or recalled from the market" because of a "known or suspected defect, deficiency, inadequacy or dangerous condition in it."

The Court of Appeals held that exclusion n was not applicable because the damages here "did not involve a product recall." 385 S.C. at 108, 682 S.E.2d at 871. This conclusion is certainly correct regarding the real property, which has not been withdrawn or recalled from the market, but only from its use as an advertising platform by Piedmont Promotions and Mr. Rhodes. The evidence in the record is clear that Mr. Rhodes/Piedmont lost the use of the property because their use of it was "non-conforming." R. 1173, lines 5-10; 1196, lines 5-24. In focusing only on the signs

themselves, Auto-Owners ignores the fact that, as the circuit court held,[8] based on and citing evidence, that the signposts had become fixtures. They were, therefore, integral to the property, not separable items for purpose of invoking a policy exclusion. *See also* Brief of Respondent's Marion L. Eadon d/b/a C&B Fabrication, R. 1500-1503 (discussion of signs as fixtures).

When exclusion n is construed narrowly in favor of coverage, as it must be, M and M Corp. of South Carolina v. Auto-Owners Ins. Co., 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010) ("exclusions in an insurance policy are construed against the insurer," *citing* Buddin v. Nationwide Mut. Ins. Co., 250 S.C. 332, 337, 157 S.E.2d 633, 635 (1967)), it is insufficient to preclude coverage for the damages to Mr. Rhodes' real property, including its loss of use. The fact that different courts have taken divergent views of the meaning of the exclusion n is evidence of its essential ambiguity. Helena Chem. Co., 357 S.C. at 639, 594 S.E.2d at 459 *citing* Greenville County v. Insurance Reserve Fund, 313 S.C. 546, 548, 443 S.E.2d 552, 554 (1994).

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[8] The circuit court held as follows:

> 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.

R. 36 (emphasis added).

If the exclusion is ambiguous, as n is,[9] it is to be construed against the insurer and in favor of coverage. American Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co., 378 S.C. 624, 628-29, 663 S.E.2d 492, 495 (2008). In this case, with the property damage to real property, of which the signposts were a constituent part, it should be held that exclusion n does not preclude coverage.

B. Exclusion K does not exclude coverage for the property damage to Mr. Rhodes' Real Property.

Exclusion K states that, "[t]his insurance does not apply to: K. 'Property damage' to 'your product' arising out of any part of it." R. 1310. This exclusion is not applicable in this case. As held by the trial court and Court of Appeals, the underlying Complaint primarily seeks recompense for damage to Mr. Rhodes' real property, not for damage to Mr. Eadon's product, the signposts themselves. The signposts, moreover, have lost their individual identity but, as fixtures, have "been made part of," Auto-Owners' Brief, p. 22, Mr. Rhodes' real property. The damages to the signs themselves, therefore, are one

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[9] The ambiguity in this exclusion is manifested in the very different interpretations which have been offered for it. *Compare* Auto-Owners Ins. Co. v. Newman, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546 (2009) (not mentioning exclusion n per SC, but reciting its wording) and Auto-Owners Ins. Co. v. Eadon, 385 S.C. 83, 108, 682, S.E.2d 857, 871 (cf. App 2009) (addressing exclusion n specifically, limiting it to product recall). *See also*, Auto-Owners Ins. Co. v. American Bldg. Mut., 2011 WL 1878236 (M.D. Fla. 2011) (discussion of exclusion n re defective drywall). *See also,* J. Mathias, J. Shugrue, T. Marrinson, Insurance Coverage Disputes, (2010) 6, 10.01 [2] [6], pp. 10-54.17-10.54-19 (The vast majority of courts have construed the sistership exclusion quite narrowly. For example, courts have found that the sistership exclusion does not exclude coverage for that damage caused by the failure of the insured's product which arouses apprehension about the quality of "sister" products. Nor does the sistership exclusion preclude recovery for policyholder's "withdrawal" of its product where the withdrawal was not merely a preventative measure, but takes place because actual damage from the product already had occurred. Courts have also found that the sistership exclusion does not preclude coverage for withdrawal of products where those products were not withdrawn by the policyholder.); B. Ostrager, T. Newman, Handbook on Insurance Coverage Disputes, (13th ed. 1994) § 7.02 [c], vol. I, pp. 389-391 (In *Stonewall Insurance Co. v. National Gypsum Co.,* 86 Civ. 9671 (JSM) (S.D.N.Y. May 27, 1992), the "sistership" exclusion was held inapplicable to asbestos property damage claims. The court ruled that the exclusion could not apply where the insured had not withdrawn a product and where the underlying claims alleged damage to property other than the insured's product. Slip op. at 45-46.)

aspect of the damage to the real property. Mr. Eadon's "product" obviously does not include the real property, so this exclusion has no application in the case at hand.

C. Exclusion l likewise has no application in this case.

In pertinent part, exclusion l provides that Auto-Owners' policy does not apply to "'property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard..'" R. 1310. The reasons cited immediately above for the inapplicability of exclusion k also apply to exclusion l. The "work" of Mr. Eadon – the design, manufacture and installation of the signposts – has been merged into Mr. Rhodes' real property. The damages to that work is now damage to Mr. Rhodes' real property. The lesser property is merged into the greater property and the owner seeks damages for injury to the entirety of his real property inasmuch as "[w]hen 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." Rhodes/Piedmont Promotions' First Amended Complaint, ¶9; R.120-21. The falling of the sign caused removal of the signs "pursuant to the mandate of the South Carolina Department of Transportation, [and] permanent fixtures on the Plaintiff's real property had to be removed...." First Amended Complaint, ¶20(e); R 125. This removal "has resulted in significant injury to the Plaintiff's real property and has significantly impaired its value and usefulness . . . ." Id.

The real property is not Mr. Eadon's "work," so exclusion l is not applicable to exclude Rhodes/Piedmont Promotions' claims against Mr. Eadon.

VI. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE TRIAL COURT'S DENIAL OF AUTO-OWNERS' MOTIONS UNDER RULE 60 (B) (4) AND (5) BASED ON THE REVERSAL OF THE JUDGMENT IN THE UNDERLYING TORT CASE.

The posture of this case is now the same as when Auto-Owners initiated this declaratory action on October 14, 2002. R. 67. On both occasions a declaratory action was being litigated to determine insurance coverage before a judgment was rendered in the underlying tort case. Earlier, the parties to this declaratory action were awaiting a jury verdict from Fairfield County; now those same parties are awaiting a jury verdict from Clarendon County. By initiating this declaratory action some two years before the Fairfield County verdict, Auto-Owners has waived its right, in equity, to assert that this present claim should be dismissed. There is no more reason to dismiss this present action than there was to dismiss the action in its prior iteration. The statutes of South Carolina and construing case law support the idea that a declaratory action can be maintained to construe a contract of insurance regarding coverage before damages are awarded.

South Carolina Code Ann. §15-53-30 provides in pertinent part that, "[a]ny person interested under a...contract...or whose rights are affected by a...contract...may have determined any question of construction...arising under the...contract...and obtain a declaration of rights...thereunder." This Court has, in construing §15-53-30, held that, "[w]here, as here, the insurance carrier denies coverage, a declaratory judgment action is necessary to establish whether coverage, in fact, exists ...." Graham v. State Farm Mut. Auto Ins. Co., 319 S.C. 69, 72, 459 S.E.2d 844, 845 (1995) (DJ action to determine whether there was UIM coverage before releasing at-fault driver from liability). *See also*, Horry County v. Insurance Reserve Fund, 344 S.C. 493, 497, 544, S.E.2d 637, 640 (Ct. App. 2001) ("An action to ascertain whether coverage exists under an insurance policy is an action at law") (citation omitted)).

South Carolina Code Ann §15-53-40, moreover, establishes that a contract may be construed via a declaratory action, "before or after there has been a breach thereof."

That statutory provision, by its plain wording, gives authorization for a declaratory action such as the one at hand. There is no reason to delay this action until Auto-Owners breaches the insurance contract by declining to indemnify Mr. Eadon.

The cases cited by Auto-Owners are fully distinguishable. Jourdan v. Boggs/Vaughn Contraction, Inc., 324 S.C. 309, 476 S.E.2d 708 (Ct. App. 1996) addressed equitable indemnity, not a written insurance contract. The Court of Appeals' decision reversed the summary judgment that the SC DOT had received against the contractor on its indemnity claim. It held that equitable indemnity should be decided by a jury. 324 S.C. at 313-14, 476 S.E.2d at 711. Jourdan has no precedential value for this case. The case cited in Jourdan, Griffin v. Van Norman, 302 S.C. 520, 524, 397, S.E.2d 378, 380 (Ct. App. 1990), likewise dealt with equitable indemnity, which is not based on a contract or other document amenable to construction in a declaratory action. Griffin, therefore, also lacks any precedential value for this case.

On the other hand, the Court of Appeals' opinion in this case provides a thorough, well-reasoned basis for denying Auto-Owners' motion to relieve it from the consequences of the Trial Court's order of Nov. 7, 2006, R. 13, under Rules 60 (b) (4) and (5). Auto-Owners' Issue on Appeal number 9 should be denied.

Any consideration of fairness should consider the legal expenses incurred by Defendant Marion Eadon in this litigation, which began over nine and one-half years ago. Many hours of legal work have been expended on Mr. Eadon's behalf in defending this declaratory action. A motion was made to the circuit court for an award of attorney fees under the holdings of Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978) and First Financial Ins. Co. v. Sea Island Sport Fishing Society, Inc., 327 S.C. 12, 16-17, 490 S.E.2d 257, 259 (1997) (when insured prevails in declaratory judgment action brought by

insurer, insured is entitled to recover attorney fees"). This motion was, however, mooted by the reversal of Rhodes v. Eadon and transfers to Clarendon County. **If the Court grants Auto Owners' motion to dismiss the circuit court's order, Defendant Eadon respectfully requests that the Court remand the action to the circuit court of York County to address the motion for attorney fees.**

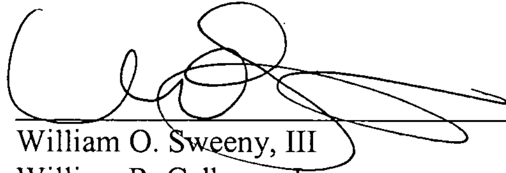
CONCLUSION

The Court of Appeals' holding should be affirmed. There is evidence in the record to support the Trial Court's Order, and the Court of Appeals has applied the appropriate standard of review. Evidence supports that Mr. Eadon, as an officer of the C&B Fabrication, was an insured under the policy in that many of the acts he took as an executive led to the occurrence of the sign falling. The sign's falling, according to the evidence, caused property damage to the real property in several forms, including the permanent loss of use of Mr. Rhodes' land as an advertising platform; immediate and residual physical injury to the real property; and diminution in value of the property because of the physical injury and loss-of-use injury to the land. None of the exclusions to coverage cited by Auto-Owners – exclusions n, k and l – are effective to obviate coverage for the primary damages Mr. Rhodes/Piedmont Promotions seeks, damages to the real property. Finally, there is no basis for granting relief to Auto-Owners under Rule 60 (b) (4) or (5) from the Trial Court's Order.

The Court of Appeals' opinion should be affirmed.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.



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Columbia, South Carolina
May 2, 2012

STATE OF SOUTH CAROLINA
In the Supreme Court

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

Case No.: 02-CP-46-2369

RECEIVED
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S.C. Supreme Court

Auto-Owners Insurance Company..Petitioner

v.

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

PROOF OF SERVICE

I certify that I have served the Brief of Respondents Marion L. Eadon, C&B Fabrications, Inc., and Low Country Signs, Inc. on Auto-Owners Insurance Company, Samuel W. Rhodes, Jr. and Piedmont Promotions, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on May 3, 2012, addressed to their attorneys of record, at the addresses shown below:

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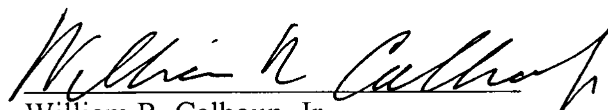

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May 3, 2012

Reply to: Main Office

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RECEIVED

MAY - 3 2012

S.C. Supreme Court

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

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

Dear Mr. Shearouse:

Enclosed are the original and sixteen (16) copies of Respondent Marion L. Eadon's Brief submitted in response to Auto-Owners Insurance Company's Brief pursuant to its petition for *certiorari*. Please return with the courier who delivers this correspondence one stamped copy of the Brief. An original Certificate of Service is also enclosed, along with a copy for stamping.

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

Respectfully,

SWEENY, WINGATE & BARROW, P.A.

William R. Calhoun, Jr.

WRC/bjp

CC: Alfred Johnston Cox, Esquire
John M. McCants, Esq.
Creighton B. Coleman, Esq.