THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

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

v.

Virginia T. Newman and Trinity Construction, Inc., ... Respondents.

AMICUS BRIEF OF BITUMINOUS CASUALTY CORPORATION

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STATEMENT OF THE CASE

On March 3, 2000, Virginia T. Newman ("Newman") filed a civil action in the Court of Common Pleas for Charleston County against Trinity Construction, Inc. ("Trinity"), alleging defective construction of her home. Upon referral to binding arbitration by both parties, the arbitrator issued a written award. Thereafter Auto-Owners, which had provided Trinity a Commercial General Liability ("CGL") insurance policy, sought a declaratory judgment to the effect that the damages determined by the arbitrator were not covered losses under the policy. In an order dated December 14, 2005, The Honorable B. Hicks Harwell, Jr., found most damages, but not all, came within the policy's coverage. An appeal was taken, and this Court issued Auto Owners Insurance v. Newman and Trinity Construction, Op. No. 1383 (S.C. Sup. Ct. Filed March 10, 2008)(Shearhouse Adv. Sh. No. 9 at 63) affirming the lower Court. Auto-Owners has filed a petition to rehear, and Bituminous has filed this Amicus brief in support of the Auto-Owners position due to its significant interest in the outcome, and to the Court's reference in Newman to a Bituminous case currently pending in federal court.

STATEMENT OF FACTS

Newman entered a contract with Trinity Construction to construct her residence. After completion, disputes arose leading to inspections which uncovered numerous construction defects.

Newman sued Trinity seeking the cost to correct the defects, alleging in part that the stucco had been applied in a defective manner so as to allow water to infiltrate to the interior structure and cause rot and other damage. Newman alleged in her complaint causes of action for breach of contract, negligence, and breach of warranty.

Pursuant to the CGL policy issued to Trinity, Auto-Owners defended the claim under a reservation of rights. Newman and Trinity referred the action to binding arbitration. The arbitrator awarded certain damages against Trinity, including the cost of repairing the rotted wood and replacing the exterior stucco.

Auto-Owners thereafter brought a declaratory judgment action seeking to determine its rights and obligations under the CGL policy. Auto-Owners contended that the damages were not covered under the policy because the damages did not arise from an "occurrence" as required in the insuring agreement, and that even if certain of the damages were found to arise from an occurrence, those damages were barred by one or more exclusions in the policy.

The trial court found coverage for the cost of repairing the water damage and replacing the exterior stucco, but excluded four other components of the claim from coverage.

ARGUMENT

I THE COURT ERRED IN FINDING THAT DEFECTIVE CONSTRUCTION CAUSING DAMAGE TO ITSELF CONSTITUTES AN "OCCURRENCE" UNDER A STANDARD CGL POLICY

The ultimate question at bar is whether business decisions made by a general contractor which lead to premature deterioration of that structure are to be considered accidental and subject to coverage under a standard CGL insurance policy.[1] The majority of courts which have examined

[1] For those who may ask that if the CGL policy issued to a general contractor does not cover the cost of remedying defective construction, then *"what does it cover?"* the answer is to remember that the CGL is an *accident* policy. For example, where an insured contracts to build an interstate bridge over a river, and the bridge collapses years later because the joints were

this issue have ruled that premature deterioration due to the improper workmanship over which the insured has control is not an accident, and South Carolina precedent up through the L-J decision supports the same result.[2]

Sound reasoning and the policy terms support the general rule that where an insured undertakes to perform a certain work but performs it improperly, the cost of redoing that work arises from the insureds failure to exercise proper control over the way the work was performed, and does not arise from an "accident" as that word is ordinarily defined. The insured's exercise of control over the work is not an accident whether the result of the improper performance is a cosmetic defect and is visible immediately, such as applying the wrong color paint, or whether the improper performance leads to premature deterioration of the work after repeated exposure to expected weather conditions.

The error in the current version of Newman stems from failing to recognize the relationship between the insured's control over performance of the work and the policy's accident requirement. The correct analysis recognizes that a CGL policy is not a Performance Bond purchased to guarantee that the work will be performed in a satisfactory manner. As stated in the opening paragraphs of the CGL where the policy sets the basic limits of coverage, the policy applies only if the damage is caused by an "occurrence" – that is, an *accident*. In contrast with a Performance Bond, the CGL policy does not cover costs to remedy unsatisfactory work, because unsatisfactory

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welded rather than riveted, the CGL policy covers the death and destruction caused to people and vehicles, not the cost of rebuilding the bridge. Where the insured contracts to build a hotel which includes an overhead skywalk, and the skywalk later collapses during a party due the use of fewer braces than were necessary, the CGL policy covers the dead and wounded party-goers and their personal property, not the cost of rebuilding the skywalk. Where the insured contracts to build a residence, and the roof later collapses due to the use of too few supports, the insured's CGL policy covers the cost of the people injured and personal property lost in the collapse of the roof, not the cost of repairing the residence. In each example, the damages to persons and property are considered accidental because they are beyond the scope of what can be controlled and managed by the insured as a cost of doing business. Replacement of the defective work, however, is an expected part of doing business, and those costs are a business risk, not an accident.

[2]L-J v. Bituminous Fire & Marine Insurance Co., 366 S.C. 117, 621 S.E.2d 33 (2005)

work is not an accident. In L-J, this Court correctly held that the loss to the insured's work was not covered and pointed out that "the 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.*" [emphasis in original].[3] This correctly emphasizes the point that the purpose of the CGL policy is not to replace substandard work, but to compensate accidental losses to persons or property that were not contemplated in the scope of the insured's work.

Where damages are sought in a claim for costs to repair defective construction, the observation that the CGL is an *accident* policy that does not cover damage to "*the work product alone*" logically requires one to determine not only the *cause* of the damage but the scope of the insured's work. In determining of the scope of work the insured agreed to undertake (*i.e.* its work product) it *is not relevant* whether the insured used employees or subcontractors to carry out that responsibility, any more than it is relevant how much or how often the insured paid the workers who performed the work.[4] What *is relevant* is that the deteriorated property was part of an agreement the insured agreed to undertake to a certain standard of care. If the deteriorated property was within the scope of the insured's undertaking and control, and the repair is required because of the insured's improper control over workmanship, then the damage is classified as an uninsured business risk rather than an accident subject to coverage.[5] Deterioration losses to property that the insured agreed to provide may, depending on the facts and other terms of the policy, be subject

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[3] L-J, footnote 4.

[4] To those who would say that the existence or number of subcontractors is relevant to whether an accident has occurred *"because the exception to exclusion L says so,"* see Sections B and C below, *because the policy does not say that.*

[5] "Damages to the work product alone resulting from faulty workmanship [are] not typically [...] said to have been "caused by an accident or by exposure to the same general harmful conditions..." Newman, at 67. This is logical because the insured exercised control over how the work was performed, so that premature deterioration of the work arises from failure to exercise that control in a workmanlike manner, not because of an accident.

to coverage, but not if the cause of that deterioration was improper workmanship.[6] Regardless of the exclusions, however, the keys to the analysis always remain: (1) the CGL policy only covers *true accidents*, and (2) *improper performance causing damage to work the insured agreed to provide is a business risk – not an accident.*

The current version of Newman fails to identify that *where the insured is a general contractor for a residence, it is the residence in its entirety that is the insured's work.* This Court decided in L-J that the "faulty workmanship damaged the roadway *system* only."[emphasis added] L-J at 36. The work of the insured was *the roadway system as a whole*, not just the subgrade or just the paving. In the case at bar, which as in L-J involves a general contractor using subcontractors, the insured has agreed to build a residence, and the work of the insured is the *residence as a whole.* The insured in L-J had control and responsibility for the proper construction of the entire roadway system, and the insured here had control and responsibility for the proper construction of the entire residence.

In determining whether damage has occurred beyond "the work product alone," it is error to look to the question of *whose workers performed* the work rather than to the question of *who was responsible for the result.* This error seems to have been made *because of the mistaken argument that the policy itself looks to that question.* The argument goes that, read in isolation, the exception to Exclusion L appears to shift the focus of coverage away from *whether the damage arose from an accident* and in favor of focusing on *who performed the work.* However, this argument ignores the fact that regardless of whether the insured used employees or subcontractors, the insured agreed to see that the entire work was performed properly, and the

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[6] As will be seen later in this brief, before 1986 Exclusion L barred coverage for damage to the work even if that damage arose from an accident. The subcontractor exception limits the operation of this bar so that *true accidents* caused by subcontractors may still be covered. Once again, however, coverage will be *dependent upon an accidental cause*, not including poor workmanship. In other words, the subcontractor exception was added, not to *cover costs arising from improper workmanship* when subcontractors are involved, but to *cover costs arising from true accidents* where subcontractors are involved.

insured's control over the result means that the result is not an accident.[7]

Also, the argument that Exclusion L extends coverage falls of its own weight because, in a mistaken effort to give meaning to the subcontractor exception *in isolation and under non-accidental circumstances it was never meant to address*, it can achieve its goal *only by completely obliterating the "accident" requirement.* This result fully frustrates the Court's intent to give meaning to the entire policy and creates *the opposite* of an accident policy. Perversely, the new rule allows an insured responsible for defective construction to contend that any reading of the policy that fails to cover *any* losses involving a subcontractor, *no matter why they occurred,* renders the entire policy of no force and effect.

The error in Newman rests squarely on the contention that the subcontractor exception has no logical and proper place within an accident policy framework. This error leads the Court to contradict an extensive line of prior South Carolina precedent, to place South Carolina outside the majority of jurisdictions which have examined this issue, and to open a breach in the fortuity requirement that is fundamental to the economic existence of accident policies. In order to untangle this issue, we must return to the question of the scope of the insured's work and show how Exclusion L applies to the fundamental *accident* requirement of the policy.

A. Where the Insured is a General Contractor, The Entire Project is the Insured's Work

In the current version of Newman, this Court holds:

> "These findings, in our opinion, clearly establish that there was property damage beyond that of the negligently applied stucco itself. Although the stucco subcontractor's negligent application is not on its own sufficient to constitute an "occurrence," we find that under the reasoning of High Country - adopted by this Court in L-J - the continuous water intrusion into the home resulting from the subcontractor's negligence qualifies as an "accident" involving "continuous or

[7]Note the policy definition of "Your Work", which means "work or operations performed by you *or on your behalf.*"

repeated exposure to substantially the same harmful conditions." Newman, at 68.

Let us first be clear about what is *not* being said here. It would clearly be error to conclude that the basis of coverage is simply that the damage arises from continuous and repeated exposure to substantially the same harmful conditions (rainfall). Exposure of the structure to rainfall and moisture is *expected* and not an accident. The "continuous and repeated" language makes clear that the harm does not have to be *sudden, but it does not remove the accident requirement.* As stated in another section of the same Rowland Long treatise cited in Newman:

> The standard comprehensive liability insurance policy provides coverage for "occurrences." This term may be understood as an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. Clearly, an understanding of the term will assist in understanding the nature of an "accident," which can determine whether particular activities are covered under automobile insurance policies.
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> *The nature of occurrence coverage is to include within the scope of the policy protection only those claims which arise from accidents. This requirement goes to the intent of the insured in performing or failing to perform the acts in question. It is this intent that is critical to the determination of coverage. An "accident" within the meaning of a liability policy is never present when a deliberate act is performed unless some additional unexpected, independent, and unforeseeable happening occurs which produces or brings about damage, including injury or death.* [emphasis added. Rowland H. Long, *The Law of Liability Insurance*, § 4.20(1) (2007)

Implicit in this Court's High Country references is that the analysis turns on the fact that one part of the work lead to damage to another part, and that the different parts of the work were performed by separate subcontractors. This analysis is erroneous because it leaps past more fundamental questions: *Did the claim result from an accident? Was the property damaged part of the work the insured had undertaken to provide? Did the damage result because the insured failed to exercise proper control, i.e., exercise good workmanship, in carrying out its obligation to construct the entire building in good condition?* It is difficult to tell whether the underlying record

in High Country answered these questions for the court in that case, but only by first identifying the insured's scope of the work can it be properly determined (under High Country or any other facts) whether the damage claim arises from what is fundamentally a failure to control the quality of performance or fundamentally an accident. Identifying the scope of work is required because premature deterioration damages that arise in a construction setting are generally a direct function of conscious cost/benefit choices made as to design, methods, materials, and supervision of the project.

In every construction undertaking, discretionary decisions are necessary as to the purpose of the project, its expected useful life, and the design, means, methods, and costs to be incurred in the course of construction. Every construction project must take into consideration the inevitable deteriorating effects of age and the wear and tear of the elements on the structure. Deterioration *will* occur over time, but the *pace* of deterioration is within the control of the owner and contractor. The use of more expensive materials, more elaborate means, smarter methods, and more costly designs can postpone the deterioration that will naturally occur. But because every building raised by man – regardless of construction method – will at some point leak, fade, rot, crack, or crumble, it is never proper to consider leaking, fading, rotting, cracking, or crumbling alone to be "accidents" without evaluating *why it occurred.*

When instances of leaking, fading, rotting, cracking, or crumbling are observed after completion of a project, additional questions must be asked before the deterioration can be considered accidental. Those questions include: *"Is this decay premature?" "Would this decay have been delayed or prevented during the expected life of the structure by a different method of construction?" "If a better method existed and would have produced a better result, would that method have been economical?" "If the better method existed and had been economical, did the parties involved in this particular project choose it, or did they elect a less expensive but inherently less durable method for other reasons?" "What, in fact, did the insured agree to construct?"* In

other words, if it is determined that less durable construction was not agreed upon by the owner and contractor for cost reasons, *"Was the cause of the premature deterioration an accident as that term is normally understood, or was the cause a business risk within the scope of the insured's control to avoid?"*

The essential defect in the Newman reasoning is that where the insured general contractor is responsible for the entire work, the decision to use employees or subcontractors to perform different parts of the work is of no consequence to whether the cause of the defective construction is accidental. What *is* of consequence is whether or not the insured in fact agreed to provide a workmanlike stucco exterior but failed to control the work to make sure that the stucco was applied properly. For that analysis, it is not relevant whether the hand that applied the stucco was attached to an employee of the insured or an employee of a subcontractor.

Looking to the identity of the person who performed the work, rather than to who is responsible for it, creates additional difficulties depending on how many levels of subcontractors are used. Under the current Newman reasoning, what if the *entire* project had been subcontracted to a *single* subcontractor that performed all the work? In that event, the same entity would clearly have performed both the improper work and the proper work that suffered the water damage, and the separation of worker analysis in High Country would seem inapplicable. Can a general contractor convert an accident policy into a performance bond merely by organizing its workers into multiple corporations and drafting subcontracts with them to perform the work? Such distortions are inevitable if the focus is changed from the question of *"Who was responsible to exercise control to see that the work was done correctly?"* to *"Who physically performed the work?"*

This difficulty can be resolved by looking to the rule in those situations where the proper application of coverage is undisputed and applying that rule here. Had Trinity Construction been the subcontractor retained merely to apply the stucco, and had the framing wood that was rotted been the work of another contractor, there would be no controversy. In that situation, framing

which was the property of another and beyond the scope of what Trinity contracted to provide would have been damaged. Trinity's CGL policy would provide coverage to repair the framing, but not for the cost to replace the stucco. Had Trinity been a plumbing contractor whose pipes had leaked and caused the framing wood to rot, again Trinity's policy would cover the repair to the framing, because the framing was not a part of the scope of the plumber's work, but not the cost of repairing the plumbing. Under both circumstances, the CGL policy would cover the cost of repair of the damaged framing caused by another, but leave to the at-fault party the cost of replacing its own defective work.[8] Thus the rule requires that fundamental focus must always be on whether the property that was damaged was part of the work that the insured agreed to provide in good and workmanlike condition. Here, Trinity agreed to provide the entire residence, so the CGL policy would not provide coverage for repairing the residence, Trinity's work.

It is also important to recognize that the standard CGL policy exclusions referenced by the Court in Newman are not so much *construction-specific* as *business-risk-specific*.[9] As the Court observed, CGL policies have a long history, but it would not be correct to view the CGL policy as written exclusively for the construction industry. Because the CGL form is used to cover many types of business operations, its terms and definitions must be broad enough to apply in a variety of contexts, not just construction.

Over the years, South Carolina courts have construed CGL policies numerous times for insureds other than general contractors in the building trade, and policy revisions have never altered the fundamental principle that CGL policies insure only against fortuities. It cannot be stressed strongly enough that each time a South Carolina court has visited this issue, it has found

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[8]"Consequently, our holding today ensures that ultimate liability falls to the one who performed the negligent work--the subcontractor--instead of the insurance carrier." L-J, at 37.

[9]"Several construction-specific exclusions in the standard CGL policy exclude from coverage certain types of property damage attributable to risks outside the scope of CGL recovery." Newman, at 69.

coverage only where the damage was *both* accidental *and* beyond the costs of repairing work undertaken by the insured.

For example, CGL coverage for the work of a *roofing subcontractor* was analyzed in Stroup S.M. Wks. v. Aetna, 268 S.C. 203, 232 S.E.2d 885 (1977). There, this Court was asked to find coverage for improper construction of a school roof and associated damage to the structure underneath. In Stroup, the roof failed because panels in the roof deck ruptured, requiring that most of the deck and roof be torn out and replaced. This Court rejected the contention that the general liability policy covered the roofing contractor for this loss, finding that the facts did not constitute an "occurrence" as defined in the policy:

> The amended complaint should have been delivered to Aetna, but such failure was of no real significance. *Neither complaint alleged an occurrence or accident as defined in the policy.* [emphasis added]
> ....
>
> There is nothing in the policy provision that would warrant the conclusion that Aetna is obligated to pay for faulty workmanship, and that is the gist of Taylor's claim against Stroup throughout the entire transcript before this Court. The terms of the policy, quoted hereinabove, protect Stroup against "an accident . . . which results ... in ... property damage neither expected nor intended from the standpoint of the insured."
> Stroup, at 888.

Thus a CGL policy issued to a roofing contractor would not cover a claim for replacement of the insured's defective roof.

The same principle of CGL coverage was applied to a *grading contractor* in C.D. Walters Construction Company v. Fireman's Fund, 281 S.C. 593, 316 S.E.2d 709 (Ct.App.1984). There, the grading contractor sought coverage for damaging trees that should not have been touched as part of its assignment to clear a road and prepare a pond on a customer's property. Based on the reasoning cited previously in this memorandum, the court concluded that a general liability policy "does not cover .... faulty workmanship, but faulty workmanship which causes an accident," and that there was no coverage for the trees that were damaged in the course of other work. Thus a CGL policy issued to a grading contractor would not cover a claim for costs to remedy its own

defective grading.

The same rationale was applied to CGL coverage for a *mechanical contractor* in Engineered Products v. Aetna, 295 S.C. 375, 368 S.E.2d 674 (1988). There, the insured under a general liability policy sought coverage to repair and replace an assembly of high-rise storage racks which had collapsed during a violent storm. The underlying plaintiff alleged that the collapse and resulting damage to the racks were caused by the insured failing to comply with anchoring specifications set forth in the contract. The court then cited C.D. Walters, which it summarized as holding that a "comprehensive general liability policy excluded property damage to work performed by the insured arising out of the work and [not involving] accidental injury to property other than that on which the insured performed its work." Engineered Products, at 676. Thus a CGL policy issued to a mechanical contractor would not cover a claim for repair of its own defective mechanical work.

In a case applying CGL coverage principles to another *mechanical contractor*, our Court of Appeals in Carolina Production Maintenance v. USF&G, 310 S.C. 32, 425 S.E.2d 39 (Ct. App.1992), again cited the Engineered Products analysis. There, however, the court addressed the fundamentally different issue of coverage for damage to property that was *not* a part of the insured's work: "Here, on the other hand, the evidence, when viewed in the light most favorable to CPM, reasonably suggests that CPM was responsible for only certain parts of the grinding machine *and not for the entire thing.*" [emphasis added] Carolina Production Maintenance, at 42. As a result, the court denied summary judgment to the insurer, finding that property *other than that provided by the insured* had been damaged. Thus the mechanical contractor was not entitled to coverage for his defective mechanical work, but was entitled to coverage for parts of the machinery beyond its own work that were damaged by its defective performance. Significantly, the court pointed out that the reason coverage had not been provided in the Engineered Products case was that in the former case "the insured was responsible for the entire system from design to installation." Carolina Production Maintenance, at 42.

CGL provisions applicable to another *roofing contractor* were examined in Nautilus Insurance v Long, 315 S.C. 79, 431 S.E.2d 624 (Ct.App.1993). There, the property owner sued the roofing contractor alleging that improper installation of a roof had resulted in both rain damage to the hospital's equipment as well as loss of a twenty-year warranty on the roof. The Court of Appeals affirmed the special master's ruling that the insurer had a duty to defend the negligence action, presumably on the basis of the damage to the hospital's equipment. However, the court affirmed the master's ruling that the loss of the warranty on the roof -- the insured's product -- was *not* covered under the policy. The court rejected the hospital's argument that the warranty constituted separate "property damage" such as would be covered under the policy:

> The property damage in question, which is the loss of the right to the twenty year warranty, was to the very work performed by the roofing company and it clearly arose out of the work. ... Nautilus did not provide coverage for contractual liability of the insured for any type of economic loss resulting from the failure of the product or completed work not being that for which the hospital board bargained. [*citing* C.D. Walters]
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> ...
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> Because of the roofing company's faulty workmanship, namely, its failure to shield the roof surface against rain and its allowing the roofing material to get wet, the roof that it installed cannot now carry this warranty. As in Stroup Sheet Metal Works, Inc. v. Aetna Casualty & Surety [cite omitted] "there is nothing in the policy provision that would warrant the conclusion that [the insurer] is obligated to pay for faulty workmanship...."

The same principle has been applied previously to homebuilding contractors in a way that is particularly instructive to the case at bar. In Century Indemnity v. Golden Hills Builders, 348 S.C. 559, 561 S.E.2d 355 (2002), the underlying plaintiffs alleged that the framing and structure of their home had been damaged by water intrusion arising from an improperly-applied exterior finish system. In this case, the parties did not litigate the applicability of the policy definitions of "occurrence" or "property damage" but instead focused on the dates of damage and policy exclusions. This Court summarized the analysis framework by noting that 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 management can and should control or

manage." Century Indemnity, at 358. Most importantly, the answer to certified question three makes clear that this Court considered the entire residence to be the work of the general contractor. In answering whether the faulty workmanship exclusion barred coverage for the cost of repair to the framing of that house as a result of faulty work by a subcontractor, this Court went straight to the definition of "your work" and noted that it was defined to mean 'work or operations preformed by you or on your behalf and ... .materials, parts or equipment furnished in connection with such work or operations." Century Indemnity, at 358. Despite the fact that the owner argued that the policy should cover at least that part of the work that was performed correctly, this Court held that "given the purpose of CGL policies as pointed out above, Homeowner's argument cannot be sustained," noting that Engineered Products and C.D. Walters both supported that result. Century Indemnity, at 359. This conclusion was clearly reached on the premise that the entire house was the work of the general contractor.[10]

Each of these prior cases in which CGL policies were applied illustrates that where an insured contracts to perform particular work that proves to be defective, and the contractors own work is damaged by the defective workmanship, such damages are a business risk that do not constitute an occurrence as is defined in the CGL policy. This is because those losses result from faulty workmanship over which the insured had control, not from an accident. Where the general contractor is responsible for the entire project, the CGL policy does not cover the project as a whole if that project has prematurely deteriorated due to decisions for which the insured is responsible. It is only where a general contractor's poor workmanship damages property *other than the work which the contractor has itself agreed to provide in a workmanlike manner* that the "occurrence"

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[10]Bituminous acknowledges that in Footnote 3 of the Newman opinion, the Court states that it rejects the analysis of the United States District Court in Bituminous v R.C. Altman Builders, Inc., 2006 U.S. Dist. LEXIS 53354 (D.S.C. 2006), in which Judge Norton used Century Indemnity to support the argument that the entire residence was the work of the general contractor. However, this Court states that the reason for this disagreement is that Judge Norton's reading would render the "your work" exclusion meaningless. This is error because as shown in Section C below, the exception to Exclusion "L" is entirely consistent with the insuring intent of the CGL policy.

definition is triggered.

B. The Exception to Exclusion "L" Does Not Create Coverage.

The argument that non-accidental damage is covered where a subcontractor is involved fails for several reasons. First, it violates settled principles of law that coverage can be created by an exception to an exclusion. Likewise, Auto-Owners' reading of the subcontractor exception is not so restrictive as to render the policy meaningless, nor does it require a reading which effectively eliminates either the subcontractor exception *or the accident requirement* from the policy.

As a threshold issue, it is settled law in South Carolina that exceptions to an exclusion cannot create coverage. As our Court of Appeals held when another insured attempted to assert that coverage can be created by an exception to an exclusion:[11]

> The settled rule, however, is just the opposite. Exclusions in an insurance policy are to be read independently of each other; they are not to be read cumulatively. Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 405 A.2d 788 (1979). Indeed, as the New Jersey Supreme Court noted in Weedo, [cite omitted],
>
> "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."
> Engineered Products, at 378.

If Newman stands as written, this settled principle of South Carolina will be essentially overturned, because the alleged problem posed by Exclusion L is at the root of the current analysis. Such a drastic departure from precedent should certainly be entertained only in extreme circumstances. The current controversy in no way justifies such a result because a proper reading of Exclusion L shows that it is entirely consistent with the overall insuring intent of the policy and

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[11] It should be noted that this same case and principle were cited in the preliminary version of this Court's decision in the L-J case, before the petition for rehearing was granted and a revised order was issued. Even though not included in the final opinion, the cite and reasoning remain sound.

the "accident" requirement.

C. *Exclusion "L" is of Valid Force and Effect and Therefore a Contrary Reading is not Required.*

It is erroneous to conclude that any decision other than the current holding in Newman would fail to give effect to the policy changes introduced in 1986. This concern is unfounded because the policy as written is internally consistent once Exclusion L is properly applied *only to those damages which arise from an accident.* In simplest terms, it is necessary to recognize that the subcontractor exclusion to Exclusion L comes into play *only when the damage for which coverage is sought is caused by a true accident.* Such circumstances arise from instigating events that clearly happen in ways that reasonable persons acknowledge to be accidental, such as where a nail inadvertently hammered into an electrical wire causing a short and a fire to develop later, or where the object falls onto a plumbing fixture causing a leak and water damage to develop later. In such unforeseen situations, coverage for the fire or water damage to the work of the insured general contractor would be accidental. *The essential point to recognize is that although such accidents would be accidents and subject to coverage under the main insuring agreement, they were barred from coverage by Exclusion L before the 1986 amendment.* In other words, Exclusion L's subcontractor exception is a saving provision that prevents Exclusion L from barring coverage for a true accident caused by a subcontractor.

Because of the importance of showing that Exclusion L is a consistent part of the whole accident-based insurance policy, even in the context of building construction, a more elaborate scenario containing both covered and non-covered damages may be useful:

(1) Columbia Church retains Jones Construction to construct a church that includes (a) a vinyl-sided foyer with an interior chandelier, and (b) an auditorium with a stucco exterior.

(2) Jones Construction contracts with Smith Framing to build the foyer and the frame of the auditorium, with Brown Lighting to install the chandelier, and with Green

Exteriors to install the exterior stucco.

(3) At the time he installed the chandelier, Brown Lighting's employee drilled a support screw into a hidden strand of electrical wiring. Jones' supervisor made regular inspections of the work being performed by all its subcontractors, but as the electrical wire was hidden neither the supervisor nor the Brown Lighting employee noticed that the wire had been struck, and the mistake was not caught.

(4) At the time he installed the stucco, Green Exteriors' employee failed to install any flashing over the auditorium windows. Jones' supervisor also made regular inspections of the auditorium work, and the fact that the flashing was missing was clearly visible, but the supervisor took no action to require Green Exteriors to change its installation method and place the flashing. At completion, Jones Construction turned over the building to Columbia Church as a properly completed project.

(5) Over the next several years water seeps in where the flashing was omitted and parts of the framing begin to rot.

(6) Five years after the church is completed, the chandelier wiring short-circuits, starting a fire and destroying the foyer but not the auditorium. After the fire, Columbia Church has the entire structure inspected in preparation for rebuilding the foyer, and discovers that the missing flashing has allowed water intrusion to rot parts of the auditorium framing.

(7) Columbia Church sues, alleging that Jones Construction is responsible for all the defective work, and obtains a judgment for the entire cost of replacing the foyer, tearing off the stucco, repairing the framing, and replacing the stucco, this time using proper flashing.

Proper application of the CGL to these facts illustrates both the limiting effects of the accident requirement and the beneficial effects of the subcontractor exception to Exclusion L. The entire building, including foyer and auditorium, are Jones Construction's responsibility and work. Because the insured exercised control over how the church was built, the CGL policy would not provide coverage for the costs to repair the church arising from Jones Construction's improper workmanship. The damages to the chandelier and foyer, however, were not caused by an act that would normally be considered a workmanship issue, but by an *accident* – mistakenly drilling a screw into hidden wiring. As in the original examples cited above, if the pre-1986 wording of Exclusion L were still in place, not even the damages to the foyer arising from the accidental cutting of the wire would be covered, because Exclusion L bars coverage for the insured's work, and the

foyer was part of the insured's work. *Due to the addition of the subcontractor exception of Exclusion L*, however, Jones Construction's CGL policy *does* provide coverage for the cost of replacing the foyer and the chandelier *because that damage to the foyer both (a) arose from an accident and (b) was caused by work performed by a subcontractor.*

In contrast, the cost of repairing the damage to the auditorium framing caused by failure to place the flashing is not covered. This is because even though the work was performed by a subcontractor, the costs of repair arose from failure to ensure that the flashing was placed. That failure was a business decision controlled by Green Exteriors in performing the work and Jones Construction in approving the work – *it did not arise from an accident*.

To emphasize, under this scenario there is coverage for the foyer because that damage both arose from an accident *and* was caused by a subcontractor, but there is no coverage for the auditorium damage, because that claim *does not arise from an accident*, even though it was caused by a subcontractor. This illustration shows that contrary to the contention that it is meaningless at best and contradictory at worst, the addition of the subcontractor exception to Exclusion L *provides valuable additional coverage that would not be present had the exception been omitted.*[12] Even *with* the exception to the exclusion, however, the CGL policy does not cover costs of correcting inadequate performance that does not result from an accident, regardless of whether that inadequate work was performed by a subcontractor.

Because Exclusion L has a consistent and fully operative effect in the application of CGL coverage, the argument that the insurer is misconstruing Exclusion L must fail. "An insurance contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). "The meaning of a particular word or phrase is not determined by

[12] For those who might be concerned about the absence of coverage for accidents committed by the insured's own employees, the answer is – *That is why other forms of coverage, including performance bonds, are available.*

considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract. Id." Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 579 S.E.2d 132 (2003).

This Court should recognize that a full and fair reading of the policy as a whole requires a finding that coverage is only granted to accidents, and that no other reading of the policy is consistent with the fair meaning and intent of the policy as a whole.[13]

E. The Holding in Newman Contradicts L-J And Longstanding South Carolina Precedent.

As discussed above, South Carolina courts have long recognized the business risk doctrine that the failure of an insured to exercise proper control to verify that its product is workmanlike does not constitute an accident. In C.D. Walters Construction Company v. Fireman's Fund, 316 S.E.2d 709 (Ct.App.1984), the court held:

> 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.* [cites omitted] C. D. Walters, at 712. [emphasis added]

This Court followed the C.D. Walters rationale in reaching the decision in L-J, fully

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[13] It is also instructive to note that in another context a South Carolina appellate court interpreted "occurrence" in a manner that rejected an argument that an exclusion modified the meaning of "occurrence." In Manufacturers and Merchants Mutual Insurance Co. v. Harvey, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998), the court held that the analysis of coverage for sexual abuse of a child stopped at the definition of "occurrence" because of the deliberate nature of the act that is involved in the abuse. Due to this interpretation of "occurrence," the court held that it did not have to address the effect of the policy's "intentional act" exclusion.

embracing the fundamental nature of the insurance contract and the public policy reasons supporting it:

> 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. Consequently, our holding today ensures that ultimate liability falls to the one who performed the negligent work--the subcontractor--instead of the insurance carrier. It will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract. L-J, at 37.

In further support of the majority rule, L-J cited three cases that are consistent with the position taken by Auto-Owners in the case at bar. In Monticello Insurance Co. v. Wil-Freds Construction, Inc., 661 N.E.2d 451 (Ill. App. Ct. 1996) an insured general contractor sought coverage for an underlying claim which alleged that faulty work permitted water intrusion damaging the interior of the structure, among other defects. The general contractor asserted that the construction defects were attributable to its subcontractors. The court found no occurrence because the complaint did not allege a claim for damage to property *other than the building itself.* This Court in L-J summarized Monticello as "finding that improper construction by a contractor and its subcontractors does not constitute an occurrence when the improper construction leads to defects." L-J, at 36. Monticello held that the "construction defects set forth in the . . . complaint are for the natural and ordinary consequence of the improper construction techniques of [insured] and its subcontractors, and thus, do not constitute an occurrence." Monticello, at 456. Since the damage was to the insured's project, without damage to other property or bodily injury, the complaint did not state an occurrence. Like L-J, the Monticello court distinguished between damage to the project itself and damage to property other than the insured's work product, such as cars. Id. Finally, Monticello supported its result by warning against turning CGL policies into "something akin to a performance bond." Id. at 460.

L-J also cited Heile v. Herrmann, 736 N.E.2d 566, 568 (Ohio 1999) for the proposition that

"faulty workmanship does not constitute an occurrence when the damage is to the work product only." L-J, at 35. Heile involved an insured home builder seeking coverage on a underlying suit for defective construction. The court viewed CGL policies as intending "to insure the risks of an insured causing damage to other persons and their property, . . . [but not] the risks of an insured causing damage to the insured's own work product." Heile, 736 N.E.2d at 568. Heile concluded that the damage alleged in the underlying complaint all related to the work of insured or its subcontractors, "not to any consequential damages stemming from that work." Id.

Similarly, L-J cited Pursell Construction Inc. v. Hawkeye-Security Insurance Co., 596 N.W.2d 67 (Iowa 1999), which addressed an insurer's obligations for faulty work performed by the insured general contractor on sidewalks. The claim was for the faulty work, not the damage resulting from that work. The court found no occurrence because the "damages . . . are limited to the very property upon which [insured] performed work." Pursell, 596 N.E.2d at 72.

If the L-J rule is not to be applied in Newman, we must determine what special circumstances, if any, exist in the case at bar that did not exist in L-J. This Court noted that L-J, Inc. had hired subcontractors to perform the work on building the road, but that the road deteriorated prematurely due to negligent design, preparation, and construction. A close reading of L-J indicates that the subcontractor's fundamental error involved failure to remove tree stumps from the roadbed prior to laying the asphalt surface, as a result of which the roadbed subsided and cracked as the stumps deteriorated over time. The implication of these facts is that certain areas of the resulting roadway, such as the roadbed in those areas where stumps had properly been removed, was constructed properly and performed acceptably, but that those areas were damaged when the areas where stumps existed subsided as the stumps deteriorated. Thus L-J involved a project performed by subcontractors in which certain parts of the work were performed improperly, leading to the premature deterioration of parts of the work that had been properly performed.

Under the facts of the case at bar, one area of the house – the stucco exterior – was

improperly flashed, allowing water to infiltrate the structure and causing the wooden interior frame to rot. Thus, as in L-J, a construction process executed improperly in one section (the unflashed stucco, as with the roadbed laden with stumps) caused premature deterioration and resulting damage (the rotted structural framing, as with the subsiding roadbed with cracked asphalt) leading to costs of repair in both situations. It therefore appears that there is no essential distinction between the facts of L-J and the facts of the case at bar. In each case, the fundamental cause of the resulting damage was not an accident but the failure of the insured to exercise proper control of its workmanship on the project. Because the reasoning of L-J is sound and there is nothing in the facts of the current case to justify a different result, Newman should be revised to adopt the findings urged by Auto-Owners.

F. The Holding in Newman Is Contrary to the Majority Rule.

Although conflict with long South Carolina precedent is the most urgent reason to revise Newman, it is also relevant that the majority of jurisdictions that have examined this issue in recent years have held that defective construction resulting in damage only to itself is not an occurrence. Such jurisdictions include *Arkansas* (Essex Ins. Co. v. Holder, ___ SW3rd ___, 2008 WL 598160) ("Faulty work is not an accident; instead it is a foreseeable occurrence, and performance bonds exist in the marketplace to insure the contractor against claims for the cost of repair or replacement of faulty work."); *Iowa* (Pursell Constr., Inc. v. Hawkeye-Security Ins. Co., 596 N.W.2d 67, 71 (Iowa 1999) ("We agree with the majority rule and now join those jurisdictions that hold that defective workmanship standing alone, that is, resulting in damages only to the work product itself, is not an occurrence under a CGL policy"); *Indiana* (Amerisure, Inc. v. Wurster Constr. Co., Inc., 818 N.E.2d 998, 1004 (Ind.Ct.App.2004) (holding that faulty workmanship is not an accident and therefore not an occurrence); *Ohio* (Heile v. Herrmann, 136 Ohio App.3d.351, 736 N.E.2d 566, 568 (1999) (holding that faulty workmanship does not constitute an occurrence when the damage is to the

work product only); *Illinois* (Monticello Ins. Co. v. Wilfred's Constr., 277 Ill.App.3d 697, 214 Ill.Dec. 597, 661 N.E.2d 451, 456 (1996) (finding that improper construction by a contractor and its subcontractors does not constitute an occurrence when the improper construction leads to defects); *North Dakota* (ACUITY v. Burd & Smith Const., Inc. 721 N.W.2d 33, 39 (N.D.2006) ("We conclude property damage caused by faulty workmanship is a covered occurrence to the extent the faulty workmanship causes bodily injury or property damage to property other than the insured's work product."); *West Virginia* (Corder v. William W. Smith Excavating Co. 210 W.Va. 110, 116, 556 S.E.2d 77, 83 (W.Va., 2001) ("Poor workmanship, standing alone, cannot constitute an 'occurrence' under the standard policy definition of this term as an 'accident including continuous or repeated exposure to substantially the same general harmful conditions.'"); *Nebraska* (Auto-Owners Ins. Co. v. Home Pride Cos., Inc., 268 Neb. 528, 684 N.W.2d 571, 576-79 (2004) (CGL policy does not provide coverage for faulty workmanship that damages only the insured's work product); *Pennsylvania* (Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co. 589 Pa. 317, 335-36, 908 A.2d 888, 899 (Pa.2006) ("We hold that the definition of 'accident' required to establish an 'occurrence' under the policies cannot be satisfied by claims based upon faulty workmanship ."); and *Massachusetts* (Commerce Ins. Co. v. Betty Caplette Builders, Inc. 420 Mass. 87, 92-93, 647 N.E.2d 1211, 1213-14 (Mass.1995) (no coverage is provided under a CGL for damages suffered by the homeowners in the underlying actions due to faulty construction or workmanship).

It is true that some jurisdictions have reached the opposite result, but the rule in the minority of states is improvident for the reasons discussed in this memorandum, and should be rejected because it cannot be reconciled with the terms of the policy, with L-J, or with a long line of prior precedent in this state.

II. THE COURT ERRED IN FINDING THAT DAMAGES AWARDED FOR REPLACEMENT OF DEFECTIVE WORK THAT WAS NOT ITSELF DAMAGED ARE COVERED BY THE STANDARD CGL POLICY

In failing to identify in the case at bar that the entire residence was the insured's work, and failing to identify that the insured's failure to exercise proper control over that work did not constitute an accident, this Court has unleashed in Part C of the current opinion an even more improvident error. Despite the fact that Newman itself stresses the fundamental principle that the CGL policy does not cover the cost of replacing work that is itself merely faulty, Newman finds that a CGL policy should *cover costs to replace of the insured's own non-defective work.* The Court is impelled to this conclusion if the underlying error as to occurrence is accepted, because it is difficult to escape that if the insured is responsible for all costs necessary to repair the damage, and that necessity arose from an accident, then all consequential costs of that accident should be covered by the CGL policy. The inherent contradiction in this logic, however, is that the cost that is incurred to access damaged work stems directly from the insured's faulty work, and the insured's failure to control the building process to produce a workmanlike result *is not an accident.*

Finding coverage for the costs of redoing non-defective work is essentially an amplification of the basic error discussed above. The contradiction is even more extreme in this section of the opinion, however, because now the Court has moved to finding coverage for the costs of replacing work that is neither damaged nor faulty, but work that is damaged only by the process of ripping it out to get to other work.

Even if this Court should disagree with the foregoing part of this memorandum, Bituminous would still urge this Court to step back from finding that costs to redo *non-defective work* are covered under a CGL policy. Precedent for stepping back can be found in such opinions as French v. Assurance Co. of America, 448 F.3rd 693, 701 (4th Cir. 2006), United States Fire Insurance Co. v. J.S.U.B., Inc., No. 05-1295, --- So.2d ----, 2007 WL 4440232 (Fla. Dec. 20, 2007), and Auto-Owners Ins. Co. v. Pozzi Window Co.,--- So.2d ----, 2007 WL 4440389 (Fla. Dec 20. 2007).

A finding that the costs of replacing non-defective work are covered by a CGL policy would complete the mutation of the policy from its original intent of fortuity-based coverage into a performance bond, violating L-J, long-established South Carolina precedent, and the terms of the policy. Though the Court may feel impelled in this direction by its underlying ruling on the occurrence issue, the better course would be to revisit the occurrence issue and revise Newman in its entirety to make it consistent with the policy, with L-J, and with prior South Carolina law.

CONCLUSION

The current version of the Newman opinion does more than merely align South Carolina with a minority of jurisdictions and contradict lengthy South Carolina precedent. The new principles that will follow from Newman will completely sever the CGL policy from fortuity requirement, which is the necessary requisite for its economic existence. Henceforth, the touchstone of coverage under CGL policies will not be fortuity, but whether the insured can argue that it was not responsible for its actions because it used subcontractors rather than its own employees to perform its work. This argument will not dissuade a jury from finding that the general contractor is responsible in tort to the owner for its failure to supervise and inspect the entire project, and it should not dissuade this Court from finding that the at-fault party must bear the cost of correcting improper workmanship under its control. It cannot be in the public interest of South Carolina to hold that those responsible for substandard work can – simply by using a subcontractor rather than an employee – shift to an insurer the cost of providing a workmanlike product.

Other bitter fruit will grow from the seeds planted by Newman. Contractors which might otherwise fix punch list problems promptly upon discovery will be provided the incentive to call their insurer and litigate rather than address those problems as a cost of doing business. Problems that all would agree are the contractor's responsibility to repair or replace *during* construction will be conveniently transmuted into the insurer's responsibility *after* construction. The absence of flashing that should be caught and fixed during construction will, only days after the project is completed

and the first rains come, be deemed a ticket to pass to the insurer costs that would have been a cost of business for the contractor days before. And to add extra moral hazard to the equation, the insurance claim may include, not only the cost of materials that were omitted, but overhead and profit beyond that which was negotiated by the owner and contractor originally.[14]

The better course would be for this Court to adhere to prior South Carolina precedent and to the public policy rules applied in L-J. This Court should revise Newman and clarify that in determining whether coverage applies under a CGL policy it is essential to establish both the cause of the damage and the scope of the insured's work.

The correct analysis is to first establish the scope of work, from which it can then be determined whether the expenses in dispute are limited to property within that scope of work. If the damaged property was not provided within the scope of the insured's work, those costs of repair may be covered, subject to other terms of the policy. If the damaged property was provided within the scope of the insured's work and was damaged because of poor workmanship, then those repair costs would not be covered because faulty workmanship damaging the work product alone is not an accident but a business risk. In the event the damaged property was within the scope of the insured's work but was damaged by a true accident rather than by improper workmanship under the insured's control, then coverage may be available if that accident involved a subcontractor.

This analysis gives each of the terms of the policy appropriate force and effect, resolves the contradictions inherent in the current verison of Newman, comports with the existing South Carolina precedent and follows the law of the majority of jurisdictions. Further, it fulfills the important public policy consideration of providing coverage for losses that are truly accidental without providing any incentive to cut corners by providing substandard workmanship.

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[14] *See* calculation of damages by Arbitrator, Attachment to Lower Court Order appealed from in the case at bar, where 20% overhead and profit were included.

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April 21, 2008

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing AMICUS BRIEF OF BITUMINOUS CASUALTY CORPORATION was served upon all counsel of record by depositing a true and correct copy of same in the United States Mail, proper postage affixed thereto, on the 21st day of April, 2008, addressed as follows:

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