

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

173108

Precision Walls, Inc. Appellant,

v.

Liberty Mutual Fire Insurance Co. Respondent.

APPELLANT'S PETITION FOR REHEARING

Charles H. McDonald
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August 5, 2014

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SC Court of Appeals

STATEMENT OF ISSUES ON REHEARING

- I. BECAUSE PRECISION WALLS PERFORMED NO WORK AT ALL ON THE DAMAGED PROPERTY, THE COURT MISAPPLIED THE POLICY'S "YOUR WORK" EXCLUSION, WHICH APPLIES ONLY WHERE THE INSURED'S WORK HAS BEEN INCORRECTLY PERFORMED ON THAT PARTICULAR PART OF THE PROPERTY SUFFERING DAMAGE.

- II. PRECISION WALLS' REMAINING ISSUES ON APPEAL, WHICH THE COURT DECLINED TO REACH, SHOULD BE ADDRESSED ON REHEARING.¹
 - A. Whether the Trial Court erred in finding that tearing down a brick veneer wall was not "physical injury to tangible property" so as to constitute "property damage" as that term is defined in the insurance policy?

 - B. Whether the Trial Court erred in finding that in the absence of any evidence of negligent or faulty workmanship by the insured, the loss of adhesion of the insulation joint tape was not an "accident" so as to constitute an "occurrence" as that term is defined in the insurance policy?

REQUEST FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellant Precision Walls, Inc. respectfully petitions this Court to rehear this appeal. As set forth below, grounds for rehearing exist as there are particular factual and legal points which this Court has overlooked, misconstrued or misapprehended in issuing its ruling filed on July 23, 2014 (Opinion No. 5250).

¹ Precision Walls incorporates herein by reference the arguments set forth in its briefs on these issues.

ARGUMENT

- I. **In holding that the insurance policy’s “Your Work” exclusion applied, the Court misconstrued the plain language of the exclusion which applies only where the insured’s work has been incorrectly performed on that particular part of the property suffering damage.**

The policy exclusion at issue in this case, referred to by the Court as the “Your Work” exclusion, states as follows:

2. Exclusions

This insurance does not apply to:

j. Damage to Property

“Property Damage” to:

(6) that particular part of any property that must be restored, repaired, or replaced because “your work” was incorrectly performed on it.

(Liberty Mutual Ex. 1—Section I—Coverages, part 2—Exclusions-subpart j; R. pp. 224-225)

In holding that the exclusion applied, the Court overlooked two critical parts of this exclusion. First, the exclusion only applies when the insured’s work was incorrectly performed on the damaged property. Second, the exclusion is very specific in that it limits the application to that particular part of the damaged property on which the insured was performing its work. Under the facts of this case, it is impossible for either of these elements to be met.

In this case, the property that suffered damage and required restoration was the brick veneer wall. The brick veneer wall was constructed after Precision Walls installed the exterior insulation board and applied Seam and Seal tape to the joints, so Precision Walls’s work was obviously not performed on the brick veneer wall itself. (Doherty Aff.; R. pp. 333-336) Therefore, because Precision Walls performed no work on that

particular part of the property that was damaged, the “Your Work” exclusion cannot apply. Under the facts of this case, to construe this exclusion otherwise would require ignoring its plain meaning and would further require a broad, expansive interpretation of the policy exclusion in favor of the insurer. Neither interpretation is a proper construction of an insurance policy exclusion. See *Walde v. Association Insurance Co.*, 401 S.C. 431, 439, 737 S.E.2d 631, 635 (Ct. App. 2012), quoting *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010)(“[p]olicies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer.”)

A. The cases cited by the Court are readily distinguishable from Precision Walls’ claim for coverage.

1. *Century Indemnity Co. v. Golden Hills Builders*

The Court cites *Century Indemnity Company v. Golden Hills Builders*, 348 S.C. 559, 561 S.E.2d 355 (2002), as being instructive on the issue of whether policy exclusion “j(6),” referred to by the Court as the “Your Work” exclusion, bars coverage. The Court’s reliance on *Golden Hills* is misplaced in two respects. First, the continuing validity of *Golden Hills* is in doubt after the South Carolina Supreme Court’s opinion in *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), where the court overruled *Golden Hills* without limitation. Second, *Golden Hills* cannot be reconciled with the more recent case of *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009). In *Newman*, the South Carolina Supreme Court held that property damage to the framing and exterior sheathing behind an improperly installed synthetic stucco exterior was a covered loss under the CGL policy. *Id.* In stark contrast, under an almost identical factual scenario, the South

Carolina Supreme Court held in *Golden Hills* that the GCL policy did not cover damage to the home's substrate and framing caused by an improperly installed synthetic stucco exterior. This discrepancy was resolved in *Crossman* when the court stated that it "elected to adhere to our precedent in *Newman*." *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594, n.6 (2011). Therefore, it would appear that *Golden Hills* has little to no precedential value after *Newman* and *Crossman*.

Even if there is any continuing validity to the analysis in *Golden Hills*, the facts in this case are very different than those in that case. *Golden Hills* involved a synthetic stucco exterior incorrectly installed on exterior framing and substrate. *See Century Indemnity Company v. Golden Hills Builders*, 348 S.C. 559, 561 S.E.2d 355 (2002). Here, the exact opposite situation is presented. The brick veneer wall had to be torn down, not because Precision Walls's work had been performed on it, but because it had to be removed in order for Precision Walls to have access to repair its own defective work. Moreover, there is no evidence in this case that Precision Walls incorrectly or improperly performed its work with respect to applying the joint tape to the exterior insulation boards. Instead, the record in this case strongly supports the conclusion that the joint tape's loss of adhesion was caused by a defect with the tape itself rather than the workmanship of Precision Walls in installing the tape.

2. *Walde v. Association Insurance Co.*

The Court also cited its recent opinion in *Walde v. Association Insurance Co.*, 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012), as support for its finding that Precision

Walls's claim is barred by policy exclusion "j(6)."² This Court held in *Walde* that the "(j)(6)" policy exclusion applied to bar coverage because the property damage was to that particular part of the property on which the insured incorrectly performed its work. *Walde*, 401 S.C. at 447, 737 S.E.2d at 639. In *Walde*, the property damage that had to be replaced (i.e. the walls and roof of the offending upstairs apartment) was the insured's own work. The *Walde* court found that the property damage was excluded by policy exclusion "(j)(6)" because it constituted "that particular part of property that must be replaced because [the insured's] permitting work was incorrectly performed on it." *Id.* However, in this instance, because Precision Walls performed no work on the brick veneer wall (i.e. the property damage) which was installed after Precision Walls had already performed its relevant work, the "(j)(6)" exclusion cannot apply. Therefore, *Walde*'s analysis simply does not apply to the unique facts of this case.

3. *Bennett & Bennett Const., Inc. v. Auto Owners*

In *Bennett & Bennett Const., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 747 S.E.2d 426 (2013), the South Carolina Supreme Court addressed policy exclusions different from the one at issue in this case. Therefore, the reasoning of the court in *Bennett* as to the application of those different exclusions is of no assistance in determining the application of the exclusion at issue here. See *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 197, 684 S.E.2d 541, 546 (2009) citing *Engineered Products, Inc. v. Aetna Cas. & Sur. Co.*, 295 S.C. 375, 378–79, 368 S.E.2d 674, 675–76 (Ct.App.1988) ("Each exclusion in the policy must be read and applied independently of every other exclusion.") Moreover, as to the "j(5)" exclusion addressed by the court in *Bennett*, the application of

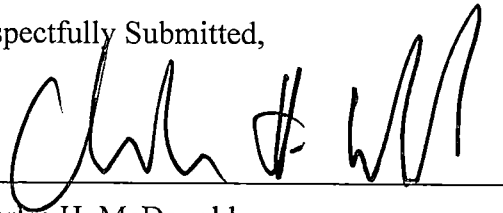
² The South Carolina Supreme Court recently granted the Waldes' petition for writ of certiorari on June 25, 2014.

that exclusion likewise requires that the insured have been performing operations on that particular part of the property suffering damage. *Id.*, 405 S.C. at 5, 747 S.E. 2d at 428. As set forth above, that is not the case in this instance.

CONCLUSION

For the reasons set forth above, Precision Walls petitions the Court to vacate its opinion and to issue a new opinion addressing all of the issues raised by Precision Walls on appeal. Precision Walls seeks a reversal of the ruling of the trial court and remand for a determination of whether an “occurrence” caused the “property damage” in question, triggering the claimed coverage under the CGL policy.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Charles H. McDonald', written over a horizontal line.

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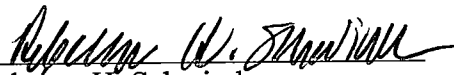
Precision Walls, Inc.Appellant,

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Liberty Mutual Fire Insurance Co.Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing by having a copy hand-delivered to the Respondent's attorney of record, Steven Wayne Ouzts, Turner, Padget, Graham & Laney, P.A., Bank of America Plaza, 1901 Main Street, 17th Floor, Columbia, SC, 29201.


Rebecca H. Schwind
Paralegal to Charles H. McDonald

August 5, 2014

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Via Hand Delivery

The Honorable Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
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**Re: Precision Walls, Inc. v. Liberty Mutual Fire Insurance Co.
Appellate Case No. 2013-000787**

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellant's Petition for Rehearing in the above referenced appeal, with proof of service and filing fee attached. I would appreciate you filing the original and six copies and returning the seventh copy clocked-in with our courier.

Thank you for your assistance in this matter.

Sincerely,

ROBINSON, MCFADDEN & MOORE, P.C.

Rebecca H. Schwind
Paralegal to Charles H. McDonald

RHS/rhs

Enclosures

cc: Steven Wayne Ouzts – w/encl.
Precision Walls, Inc. – w/encl.

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