THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

ON CERTIORARI FROM THE COURT OF APPEALS

Opinion No. 5061 (S.C. Ct. App. filed December 12, 2012)
401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012)

William and Mary Frances Walde
as assignees of Johnson Construction
Company of Aiken, Inc., Petitioners.

v.

Association Insurance Company, Respondent.

BRIEF OF RESPONDENT

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5. Did the Court of Appeals correctly construe the trial court's one-sentence footnote as limited to whether a breach of fiduciary duty claim can give rise to an "occurrence" and not an alternative finding to support a blanket grant of summary judgment where the insurer's entire appeal is premised on the lack of "property damage" caused by an "occurrence" and the unambiguous application of policy exclusions?

COUNTER-STATEMENT OF THE CASE

This appeal involves a claim for insurance coverage under a Commercial General Liability ("CGL") policy issued by Respondent Association Insurance Company ("AIC") to Johnson Construction Company ("Contractor"). Petitioners William and Mary Frances Walde ("Waldes") pursued claims against Contractor in an underlying arbitration. The Waldes settled the arbitration and then pursued the instant claim for coverage as assignees of Contractor.

The Waldes filed suit against AIC on October 14, 2009 in the Court of Common Pleas for Aiken County. On cross-motions for summary judgment, the Honorable Edgar W. Dickson granted partial summary judgment to the Waldes finding there was a duty to defend, and denied AIC's motion for summary judgment. On appeal, the Court of Appeals reversed. Walde v. Association Insurance Company, Op. No. 5061 (S.C. Ct. App. filed December 12, 2012). The Court of Appeals denied the Waldes' petition for rehearing on February 26, 2013. This Court granted the Waldes' petition for a writ of certiorari on June 25, 2014.

COUNTER-STATEMENT OF THE FACTS

This insurance coverage dispute arises out of an underlying arbitration demand brought by the Waldes against Contractor, who was insured under a CGL policy issued by AIC, policy number GLP 0003940 04, for the policy period July 11, 2008 to July 11, 2009. (R. p. 48). The Waldes' Demand for Arbitration described the nature of the dispute as follows:

> [Contractor] represented [the Waldes] before Aiken Board of Zoning Appeals to obtain variance to build paddock and stable for [the Waldes]. [Contractor] then built the building. [Contractor] obtained the variance but then built the wrong building in the wrong location and wrongly told [the Waldes] that an addition to the original plans was permissible. BZA has now ordered the building removed. [The Waldes] claim breach of contract, negligent misrepresentation, and breach of fiduciary duty seeking actual damages for money already paid to [Contractor], and the cost to demolish or move the building to the correct location.

(R. p. 106).

Contractor submitted the claim to AIC seeking coverage under his CGL policy. AIC denied coverage on September 25, 2008 after determining that there were no allegations of property damage caused by occurrence within the meaning of the policy and that various exclusions were applicable. Thirteen months later, on August 17, 2009, the Waldes filed their arbitration pre-trial brief ("Arbitration Brief"). (R. pp. 117-135). The introductory paragraph of the Arbitration Brief provides the following:

> This is a case about a contractor who promised absentee owners that he could and would build a stable in compliance with the zoning ordinance in the City of Aiken, South Carolina, told the absentee owners that he had obtained the necessary variances from the City to build the stable with a second story, and then built the stable, only to discover when it was near completion that the builder had violated the zoning ordinance by building the stable in the wrong location and by building a different structure than what had been allowed by the City.

(R. p.117). The introductory section concluded with the following:

> By this claim, the Waldes make claims directly against [Contractor] seeking a return of the money they over paid [Contractor], their costs and attorneys fees pursuant to their contract, and the expenses that they incurred for additional construction personnel to both appease the City and insure [*sic*] the stable was modified correctly.

(R. p. 118).

The Arbitration Brief sets forth the underlying sequence of events giving rise to the claims against Contractor. The Waldes own a second home in Aiken and wanted to build a stable and paddock on their property. (R. p. 118). "However, the City of Aiken has a strict zoning ordinance that required both a Special Exception to the Zoning Ordinance and a Variance to the Zoning Ordinance to allow the stable and paddock to be built." (R. p. 118-119). The Waldes hired Contractor based on assurances from him "that he was an experienced contractor in Aiken familiar with the City's Ordinance and the personnel enforcing the Ordinance." (R. pp. 119-120).

Contractor started his work for the Waldes in February 2008. (R. p. 119). That same month, he provided the Waldes with a construction proposal for a one-story stable and paddock, and drafts of his applications to the Board of Zoning Appeals ("BZA") for a variance and special exception required under the zoning laws to build the one-story stable and paddock. (R. p. 120). Contractor submitted the applications for the variance and special exception to the BZA on March 17, 2008. (R. p. 120). The applications included a sketch plan showing the stable and its proposed location. (R. p. 121). Beginning before the BZA meeting on March 25, 2008, the Waldes inquired about including an accessory apartment above the stable; Contractor "advised them that this would be no problem" and began working on the plan and preparing an estimate. (R. p. 121).

Contractor appeared at the BZA hearing on behalf of the Waldes on March 25, 2008 seeking approval for the one-story stable and paddock. (R. p. 121). At the hearing, the BZA inserted a condition specifying that the approval was for the one-story stable and paddock conceptually shown in Contractor's sketch plan attached to the application. (R. p. 121). On April 22, 2008, Contractor signed the construction contract to build a two-story stable and paddock with an accessory apartment above. (R. p. 122). The construction contract "emphasized the Waldes' reliance on [Contractor] for obtaining all necessary approvals by the local zoning authorities for what he was constructing[,]" and further provided that "[a]ll work shall be completed in a workmanlike manner, and shall comply with all applicable national, state and local building codes and laws." (R. p. 122).

On April 24, 2008, Contractor received the BZA's formal ruling granting approval of the variance and special exception to build the one-story stable and paddock shown in Contractor's sketch plan. (R. p. 122). Contractor never sought or received BZA approval to build the two-

story stable and paddock that he contracted with the Waldes to build. On May 2, 2008, Contractor applied for a building permit to construct the two-story stable with an accessory apartment. (R. p. 123). On June 27, 2008, when the construction was approximately 80% complete, the City of Aiken's building inspector determined that the stable did not comply with the variance or special exception. (R. p. 123). In July 2008, Contractor filed a second set of applications with the BZA seeking after-the-fact approval. (R. pp. 124-125). "After one BZA member said that 'they had never seen anything as ridiculous in 20 years,' the BZA unanimously denied the request. . . ." (R. p. 125).

In December 2008, the Waldes filed another application for approval, proposing that the accessory apartment be removed and the roof lowered so that the stable could stay in its current location. (R. p. 126). The BZA approved the proposal in January 2009. In late-March and early-April 2009, Contractor performed the "remedial work on the stable at no charge to the Waldes." (R. p. 126). The Waldes asserted in their Arbitration Brief that "the stable is not even now finished[,]" because Contractor "refused to complete the stable per the original intended agreement." (R. p. 127). Instead, "[w]hat they have is a one story barn with no paddock, no electricity, no driveway, no sink and plumbing fixtures in the tackroom, no hook up for the washer/dryer, no counters, no fencing, no irrigation, and no cleanup of the construction debris." (R. p. 127).

In section III of the Arbitration Brief, under the heading "DAMAGES CLAIMED BY THE WALDES[,]" the Waldes specifically identified all of the damages they sought from Contractor. The Waldes' damages included the costs of completing Contractor's unfinished work ($17,799.90 for painting, electrical, plumbing, landscaping, countertop, flooring, fencing and driveway); the difference between the amount the Waldes paid Contractor and the $85,000 barn

they received ($25,500 for overpayment to Contractor on the work he performed); prejudgment interest; attorneys fees and costs the Waldes incurred in their dealings with the BZA and the arbitration; the costs of professional services incurred in performing the remedial work; the Waldes' travel costs to attend the third BZA meeting; and the costs of the arbitration and the arbitrator's fee. (R. pp. 128-131).

The Waldes settled with Contractor the night before arbitration, and as part of the settlement, Contractor assigned to the Waldes any rights he had to insurance proceeds under the AIC policy. (R. p. 32). The Waldes filed suit against AIC on October 14, 2009, attaching the policy, Arbitration Demand and Arbitration Brief to the Complaint. (R. p. 26-38). The parties filed cross motions for summary judgment, with the Waldes seeking partial summary judgment on the duty to defend, and AIC seeking summary judgment as to all of the claims asserted in the Complaint. The trial court granted the Waldes' motion for partial summary judgment, finding that there was a duty to defend because the Waldes alleged "property damage" caused by an "occurrence" and no exclusions were applicable. (R. pp. 2-21).

The Court of Appeals reversed, recognizing that all of the damages specifically alleged by the Waldes were economic loss, which "does not by itself trigger coverage under the Policy." (Op., Appendix p. 8 n.7). Nonetheless, the Court of Appeals inferred from the allegations that the Waldes possibly alleged loss of use without physical injury. This inference was the sole basis for finding that the Waldes went "beyond alleging mere economic loss." (Op., Appendix p. 9). The Court of Appeals held that the Waldes established the possibility of an "occurrence" in alleging that Contractor wrongly said the plans complied with the BZA variance and exception, (Op., Appendix p. 11), but found that Exclusion A.2(j)(6), which excludes coverage for "'[p]roperty damage' to . . . [t]hat particular part of any property that must be restored, repaired or replaced

because 'your work' was incorrectly performed on it[,]" unambiguously applied. (Op., Appendix pp. 11-14).

ARGUMENTS

While AIC respectfully disagrees with the Court of Appeals' decision to even reach the policy exclusions absent a threshold showing of coverage – "property damage" caused by an "occurrence" – the conclusion reached by the Court of Appeals reaffirms the long-standing principle of South Carolina insurance jurisprudence that CGL policies are not intended to provide coverage for business risks such as this. To the extent the Court of Appeals was correct in finding that the Waldes alleged property damage without physical injury, the court's application of Exclusion A.2(j)(6) was fundamentally sound. Moreover, the independent application of Exclusion A.2(l) renders moot any argument that the distinction between property damage with and without physical injury was dispositive. Accordingly, this Court should affirm the conclusion reached by the Court of Appeals and find that AIC's policy does not provide coverage for the Waldes' claims.

I. Where Contractor applied for and received a variance and special exception to build a specific barn in a specific location, then inexplicably built the wrong barn in the wrong location after wrongly informing his clients that it would be proper to do so, the losses incurred to remediate Contractor's work are not "property damage" caused by an "occurrence."

The insuring agreement of the policy sets forth AIC's general obligation to provide coverage for the insured's legal obligation to pay damages because of "property damage" caused by an "occurrence." (R. p. 59). AIC submits as an initial matter that Exclusion A.2(j)(6) should not have been reached by the Court of Appeals because the losses the claimed by the Waldes do not constitute "property damage" and were not caused by an "occurrence," and as a result, the Waldes failed to meet their burden of showing the claims fall within the insuring agreement of

the policy. *See* Sunex Int'l, Inc. v. Travelers Indem. Co. of Ill., 185 F. Supp. 2d 614, 617 (D.S.C. 2001) ("The burden of proof is on the insured to show that a claim falls within the coverage of an insurance contract.") (*citing* Gamble v. Travelers Ins. Co., 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968).

A. To the extent the Court of Appeals erred, it was in finding that the Waldes sufficiently alleged any "property damage."

The initial inquiry is whether the Waldes sufficiently alleged "property damage" within the meaning of the policy. Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 49, 717 S.E.2d 589, 593 (2011) ("[I]t is only after 'property damage' has been alleged that the question of 'occurrence' is reached.").

AIC's policy defines property damage as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(R. p. 73).

For the Waldes to meet the threshold requirement of showing their claims fall within the insuring agreement of the policy, one or more of the following damages alleged in their Arbitration Brief must fall within the meaning of "property damage" as defined in the policy:

- the difference between the value of the barn they contracted and paid for and the value of the barn they received;
- the costs of completing Contractor's unfinished work called for in the contract;
- prejudgment interest;
- attorneys fees and costs;
- the costs of professional services incurred in performing the remedial work; and

- miscellaneous travel and arbitration costs.

(R. pp. 128-131).

(1) "Physical injury to tangible property."

As to the first type of "property damage," the only aspect of the Waldes' claims with any physical component that could possibly be construed as "[p]hysical injury to tangible property" was Contractor's own work in removing the accessory apartment and lowering the roof of the barn he built. The Waldes do not attribute any damages to this work itself because it was performed by Contractor "at no charge to the Waldes." (R. p. 126). Moreover, the costs of remediating Contractor's own work to bring the barn he built into compliance with the variance and special exception he obtained are not "property damage" within the meaning of a CGL policy.

As this Court explained in Crossmann, "[w]ith respect to the first quoted definition of 'property damage,' the critical phrase is 'physical injury,' which suggests the property was not defective at the outset, but rather was initially proper and injured thereafter." 395 S.C. at 49, 717 S.E.2d at 593. The Court emphasized the "difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.'" Id. The Waldes do not claim damage to any property beyond Contractor's own work. Any damage attributable to Contractor's own work, *i.e.*, removing the accessory apartment and lowering the roof of the barn he built, is precisely what this Court said is not "property damage" in Crossmann. *See* id. ("In the present case, the complaint did not allege property damage beyond the improper performance of the task itself.") (*citing* L–J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 124, 621 S.E.2d 33, 36 (2005)).

Further, the barn that Contractor built was never "uninjured at some previous point in time." Id. ("[T]he property allegedly damaged has to have been undamaged or uninjured at some previous point in time.") (*citing* Wm. C. Vick Constr. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 52 F. Supp. 2d 569, 582 (E.D.N.C. 1999), *aff'd*, 213 F.3d 634 (4th Cir. 2000) (unpublished table decision). Contractor applied for and received approval to build a specific barn in a specific location. Contractor thereafter undertook to build a different barn in a different location. From the moment Contractor broke ground in the unapproved location and started building the unapproved barn, it was not in compliance with the variance and special exception. That the BZA did not discover and enforce its zoning provisions until the barn was 80% complete does not change the fact that the barn was never in compliance with the variance and special exception.

The Waldes quibble with the characterization of Contractor's construction of the barn itself as faulty or defective. Whether the Waldes would have been satisfied with the barn that Contractor was constructing, the simple fact of the matter is that Contractor built the wrong barn in the wrong location, it did not comply with the variance and special exception, and remedial work had to be performed to bring it into compliance. Once Contractor corrected his own work (by removing the apartment and lowering the roof), the problem was remediated. This is no different than if Contractor had framed the barn in a manner that was structurally sound, but did not comply with the building code, and thus had to be corrected. The remedial work to the barn is no more "property damage" than the costs of repairing or replacing non-conforming framing work. *See* Crossmann, 395 S.C. at 49, 717 S.E.2d at 593 ("[C]laims alleging only damages for replacement of a defective component or correction of faulty installation do not allege 'property

damage.'") (*citing* Travelers Indem. Co. of America v. Moore & Assocs., Inc., 216 S.W.3d 302, 311 (Tenn. 2007)).

The Court of Appeals correctly found that the Waldes did not allege "property damage" within the meaning of "[p]hysical injury to tangible property." To the extent the Court of Appeals erred, it was in finding that the Waldes potentially alleged the second type of property damage, "[l]oss of use of tangible property that is not physically injured."

(2) "Loss of use of tangible property that is not physically injured."

There is nothing in the Waldes' arbitration pleadings that even remotely suggests a claim for loss of use damages. Indeed, the Waldes specifically itemized all of their damages in the Arbitration Brief, (R. pp. 128-131), and did not include, identify, or otherwise reference any costs they incurred for loss of use of the barn, any losses they sustained due to loss of use of the barn, or any other damages of the type associated with their inability to use the partially constructed barn during the time modifications were made, *e.g.* rental value, lost income, lost profits, or the equivalent.

The Court of Appeals appropriately recognized that all of the damages specifically alleged by the Waldes were economic loss, which "does not by itself trigger coverage under the Policy." (Op., Appendix p. 8); *Compare* (Op., Appendix p. 4) (describing the damages sought by the Waldes), *with* (Op., Appendix p. 8 fn.7) (characterizing all of those damages as economic loss). The court was unable to find any support for loss of use damages in the Waldes' arbitration pleadings, and only found that the Waldes raised the possibility of this second type of property damage by inferring that "[t]he Waldes could not fully use the property after the BZA informed them of the barn's noncompliance." (Op., Appendix p. 9). This inference was the sole basis for finding that Waldes went "beyond alleging mere economic loss." (Op., Appendix p. 9).

In doing so, the Court of Appeals overlooked the fact that the Waldes never had use of the barn *before* the BZA informed them of its noncompliance. The barn was only 80% complete when the City of Aiken's building inspector determined that the stable did not comply with the variance or special exception. (R. p. 123). The completion of the barn was delayed because of Contractor's failure to build the correct barn in the correct location, and his failure to complete the work called for in the contract.

The Waldes' passing reference in the Arbitration Brief to the fact that the partially constructed non-conforming barn was "unusable" does not support the inference that they were claiming any loss of use damages; this, and their assertion that "the stable is not even now finished[,]" are wholly attributable to Contractor's "refus[al] to complete the stable per the original intended agreement." (R. p. 127) ("[w]hat they have is a one story barn with no paddock, no electricity, no driveway, no sink and plumbing fixtures in the tackroom, no hook up for the washer/dryer, no counters, no fencing, no irrigation, and no cleanup of the construction debris.").

That the Waldes "lost use of the barn while they were required to tear down and place a new roof on its structure to comply with Aiken's height regulations because of [Contractor's] defective work[,]" (Op., Appendix pp. 13-14), is no different than a homeowner who has been delayed by the inability to obtain a certificate of occupancy because the contractor failed to comply with the building code. Both of these delays are attributable to the contractor's faulty work and failure to deliver what was promised. To find that such delays in completing a project constitute "property damage" within the realm of a CGL policy would effectively transform the policy into a performance bond covering the insured's own work.

As this Court has repeatedly explained,

> a CGL policy does not insure the insured's work itself but consequential risks that stem from the insured's work. CGL coverage is for tort liability for injury to persons and damage to other property and not for contractual liability of the insured for economic loss because the completed work is not that for which the damaged person bargained.

Bennett & Bennett Const., Inc. v. Auto Owners Ins. Co., 405 S.C. 1, 8-9, 747 S.E.2d 426, 430 (2013) (internal citations and quotations omitted).

The Waldes' claims for the costs they incurred in correcting Contractor's own defective, non-conforming work is not a claim for "property damage" of either type defined in the policy. Accordingly, this Court should hold that the Waldes failed to meet the burden of showing their claims against Contractor fell within the insuring agreement of AIC's policy, and affirm the conclusion reached by the Court of Appeals that AIC's policy does not provide coverage for Contractor's business risks.

B. To the extent the Court of Appeals erred, it was in finding that the losses alleged by the Waldes were caused by an "occurrence."

In the event this Court finds that the Waldes sufficiently alleged "property damage," AIC submits that the losses sustained as a result of a contractor failing to comply with a variance and special exception cannot be said to have been caused by an "occurrence" when it was that same contractor who applied for and received the variance and special exception, then inexplicably built a different building in a different location after wrongly advising his clients that it would be permissible to do so.

The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (R. p. 72). AIC recognizes that this Court found the expanded definition of "occurrence" to be ambiguous in Crossmann, 395 S.C. at 47, 717 S.E.2d at 589, and recently held in Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 603, 748 S.E.2d 781, 791 (2013), that this expansive view of occurrence is not limited to

progressive property damages cases. However, this case is not a progressive property damage case, or one that should be analyzed "under a continuum of an 'occurrence.'" Id. *See* id. ("Unlike the 'normal' defective construction case where damage from faulty workmanship is obvious and directly related, the mandated removal of the two additional signs in the instant case is more tangential.").

Rather, the question of whether the Waldes alleged an occurrence only requires construction of the word "accident," which this Court has defined as "[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." Rhodes, 405 S.C. at 601, 748 S.E.2d at 789-90 (*quoting* Green v. United Ins. Co. of Am., 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970)).

The Court of Appeals found that the Waldes established the possibility of an "occurrence" based on the allegation that "[Contractor] 'wrongly' said their plans complied with the BZA's variance and exception. . . ." (Op., Appendix p. 11). In doing so, the Court of Appeals overlooked the fortuity element required for there to be an "occurrence." Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. 187, 194, 684 S.E.2d 541, 545 (2009) ("[W]hether an 'accident' has occurred under the terms of a CGL policy requires a court to determine whether damages would have been foreseeable if the insured had completed the work properly.") (*citing* Travelers Indem. Co. of Am. v. Moore & Assocs., 216 S.W.3d 302, 309 (Tenn. 2007)).

The sequence of events set forth in the Arbitration Brief demonstrates that the losses the Waldes sustained were foreseeable to Contractor. The Waldes hired Contractor based on assurances from him "that he was an experienced contractor in Aiken familiar with the City's Ordinance and the personnel enforcing the Ordinance." (R. pp. 119-120). Contractor submitted applications for a variance and special exception to build a one-story barn, and attached a sketch

plan of the barn and its proposed location. (R. pp. 120-121). Contractor then advised the Waldes before he appeared at the BZA hearing that adding a second floor with an accessory apartment above would be "no problem." (R. p. 121). Contractor never sought to amend the original application for the one-story barn, or sought approval for a two-story barn, even after the BZA inserted the express condition that the approval was for the one-story barn conceptually shown in Contractor's sketch plan. (R. 121). Contractor signed a contract to build the two-story barn, then received BZA's formal ruling approving the one-story barn, and then applied for a building permit to construct the two-story barn. (R. pp. 122-23). When Contractor commenced building the two-story barn, not only was the barn itself unapproved, but Contractor built it in an unapproved location. (R. p. 123).

Simply put, where a contractor applies for and receives variance and special exception to build a specific structure in a specific location, then wrongly tells his clients that it would be acceptable to build a different structure in a different location, without seeking any further modification of the original approval he obtained, it is foreseeable that the relevant zoning authority will strictly enforce its variance and special exception and require remedial work to bring the structure into compliance. Based on the facts set forth in the Arbitration Brief, the Court of Appeals erred in finding that the Waldes alleged the possibility of an occurrence.

II. Notwithstanding whether the Waldes sufficiently alleged property damage with or without physical injury, the policy unambiguously excludes coverage for Contractor's work.

If the Waldes alleged the possibility of "property damage" caused by an "occurrence," AIC's policy unambiguously excludes coverage for property damage to "[Contractor's] work, arising out of it or any part of it[,]" and property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because [Contractor's work] was incorrectly

performed on it." Whether the purported "property damage" was within or outside of the "products-completed operations hazard," one or both of these exclusions operate to bar coverage. To find that damages to and caused by Contractor's own work are not excluded from coverage would result in AIC's policy insuring Contractor's work itself rather than the consequential risks that stem from such work. *See* Bennett & Bennett, 405 S.C. at 8-9, 747 S.E.2d at 430 ("[A] CGL policy does not insure the insured's work itself but consequential risks that stem from the insured's work.")

A. If the remedial work to the barn constitutes the physical injury type of "property damage" as the Waldes assert, the policy exclusion not reached by the Court of Appeals unambiguously excludes coverage for Contractor's work.

The Court of Appeals based its decision on Exclusion A.2(j)(6), which excludes coverage for "'[p]roperty damage' to . . . [t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." (R. pp. 62-63). Exclusion A.2(j)(6) "does not apply to 'property damage' included in the 'products-completed operations hazard.'" ("PCOH"). (R. p. 63).

The Waldes contend that the remedial work to the barn constitutes "[p]hysical injury to tangible property," and if the Court of Appeals had so found, the property damage would have been "deemed to occur at the time of the physical injury that caused it[,]" and therefore would have been included in the PCOH because the permitting work was complete when the BZA first approved the variance and special exception. (Brief of Pet. pp. 13-14). Accepting the premise of this argument – that the remedial work on the barn constitutes the physical injury type of property damage – the property damage *was included* in the PCOH, in which case Exclusion A.2(l) unambiguously applies to exclude coverage.

Exclusion A.2(l) excludes coverage for "'property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" (R. p. 63). Although the Court of Appeals found it unnecessary to address Exclusion A.2(l), its application renders moot any arguments by the Waldes that the distinction between property damage with and without physical injury is dispositive of whether AIC's policy excludes coverage.

As with any exclusion, Exclusion A.2(l) "must be read and applied independently of every other exclusion." Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. 187, 197, 684 S.E.2d 541, 546 (2009).

> 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, Inc. v. Aetna Cas. & Sur. Co., 295 S.C. 375, 378-79, 368 S.E.2d 674, 675-76 (Ct. App. 1988) (*quoting* Weedo v. Stone–E–Brick, Inc., 81 N.J. 233, 248, 405 A.2d 788, 795 (1979)).

The policy defines "your work" as follows:

> **22.** "Your work":
>
> **a.** Means:
>
> **(1)** Work or operations performed by you or on your behalf; and
>
> **(2)** Materials, parts or equipment furnished in connection with such work or operations.
>
> **b.** Includes:
>
> **(1)** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
>
> **(2)** The providing of or failure to provide warnings or instructions.

(R. p. 74).

Contractor's permitting work, the representations he made to the Waldes with respect to the fitness, quality, and use of his permitting work (that the plans complied with the BZA's variance and special exception), and his work in constructing the barn itself, all fall squarely within the meaning of "your work" as defined in the policy. Narrowly construing the term "arising out of" to mean "caused by," McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 320, 426 S.E.2d 770, 771 (1993), whether the remedial work to the barn was caused by Contractor's permitting work, his representations to the Waldes, or his construction of the barn itself, there is no question that any damage to the barn was damage to Contractor's own work that arose out of Contractor's work or some part of it.

The Waldes hired Contractor to obtain the necessary approval and construct the barn. Contractor represented to the Waldes that he had obtained the necessary approval, and he proceeded with constructing the barn. Because the barn he constructed was not approved, Contractor had to correct his own work by removing the accessory apartment and lowering the roof. But for Contractor's own work, the remedial work on the barn he built would not have been required. If Contractor had obtained the necessary approval, or built the approved barn in its correct location, there would have been no compliance issue. If Contractor had informed the Waldes that the necessary approval could not be obtained, the Waldes would not have had Contractor build the barn that he did. And, once Contractor corrected his own work, the problem was remediated.

There is no language in the policy to support the Waldes' contention that Exclusion A.2(l) is inapplicable simply because Contractor performed both the permitting work and the construction work. Logic dictates the opposite conclusion. The exclusion applies to "'property damage' to 'your work' arising out of it *or any part of it* . . . ." Contractor's permitting work, his

representations to the Waldes, and his construction of the barn, were all Contractor's work on a single project on a single job site, and the quality of his work in each respect was a business risk solely within Contractor's control. Indeed, as the Waldes pointed out in the Arbitration Brief, the construction contract "emphasized the Waldes' reliance on [Contractor] for obtaining all necessary approvals by the local zoning authorities for what he was constructing[,]" and further provided that "[a]ll work shall be completed in a workmanlike manner, and shall comply with all applicable national, state and local building codes and laws." (R. p. 122). Regardless of whether the Waldes entered into one contact or five, any damages alleged by the Waldes was to Contractor's own work, and arose out of it or some part of it.

B. If the Court of Appeals was correct in finding that the Waldes alleged loss of use without physical injury, coverage was properly excluded under Exclusion A.2(j)(6).

The Waldes largely take issue with the fact that the Court of Appeals even addressed the definition of "property damage," and its construction of "physical injury" that followed. These arguments are addressed below in Section III. As to the actual application of Exclusion A.2(j)(6) to loss of use without physical injury property damage, the Waldes first argue that "[f]or the exclusion to apply, the work to which is applies must have been performed on the damaged property to be repaired or replaced." (Brief of Pet. p. 14). However, this Court rejected the same argument based on an identical exclusion in Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 566, 561 S.E.2d 355, 358-59 (2002), *overruled in part on other grounds by* Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011) (rejecting the homeowners' argument that the exclusion for "property damage to '[t]hat particular part of any property that must be restored, repaired, or replaced because 'your work' was incorrectly performed on it,' should be interpreted to mean that only the work

that was incorrectly performed (the exterior stucco) is excluded and repairs to other parts of the property where the work was correctly performed (the substrate and substructure) are not excluded.").

The Waldes also contend that the Court of Appeals erred by "applying the Exclusion to the wrong occurrence." (Brief of Pet., p. 15). This argument misses the point. Exclusion A.2(j)(6) is not applied to an occurrence, but to "*property damage* to . . . [t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." Accepting that the Court of Appeals was correct in finding that the Waldes alleged property damage without physical injury, the court's application of this exclusion was fundamentally sound.

After finding that the "property damage" fell within the scope of Exclusion A.2(j)(6), the Court of Appeals turned to the definition of "property damage" to determine whether the loss of use without physical injury property damage was included in the products-completed operations hazard. The definition of "property damage" specifically provides that "[a]ll such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it." After applying this language to the only occurrence it found the Waldes potentially alleged, the court correctly concluded that the only type property damage it found the Waldes potentially was deemed by the policy to have occurred before the permitting work was complete. (Op., Appendix p. 13). Accordingly, the "property damage" was not included in the PCOH.

The policy unambiguously states that all loss of use to property that is not physically injured is deemed to occur at the time of the "occurrence" that caused it. The Waldes do not identify what other occurrence this language should have been applied to, and while they may disagree with its operative effect, they do not offer any alternative reading that is reasonably

supported by the express policy language. Accordingly, to the extent the Court of Appeals was correct in finding the Waldes alleged property damage without physical injury, the court was correct in applying Exclusion A.2(j)(6).

III. The Court of Appeals appropriately addressed the distinction between the two types of "property damage" defined in the policy in determining whether the Waldes alleged the possibility of "property damage" within the meaning of the policy and whether the policy excluded coverage for the "property damage" alleged.

The issue of whether "property damage" is alleged within the meaning of the policy is a fundamental aspect of the framework established by this Court for analyzing whether CGL policies provide coverage for underlying construction disputes. Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 49, 717 S.E.2d 589, 594 (2011) ("[I]t is only after 'property damage' has been alleged that the question of "occurrence' is reached.").[1]

While it seems obvious that the Court of Appeals would need to construe a policy definition when that defined term is a key issue in the appeal, the Waldes' lead argument is that the Court of Appeals should not have even addressed the policy definition of "property damage[,]"notwithstanding that it was their burden to show they sufficiently alleged "property damage" to trigger coverage under the insuring agreement. Sunex Int'l, Inc., 185 F. Supp. 2d at 617.

The Waldes claim that AIC failed to even raise the issue, despite that AIC included it in its Statement of Issues on Appeal, and specifically argued the issue in its Brief of Appellant

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[1] In fairness to both parties, the briefing phase of this appeal in the Court of Appeals took place entirely within the period between this Court's initial decision in Crossmann (Op. No. 26909, filed January 7, 2011), and the opinion issued after rehearing on August 22, 2011. The initial Crossmann opinion, which emphasized an occurrence-first analysis and declined to even address property damage, was subsequently withdrawn and replaced by an opinion that emphasized the policy term "property damage" and stressed that with respect to the first type of property damage defined in the policy, "the critical phrase is 'physical injury'. . . ." Crossmann, 395 S.C. at 49, 717 S.E.2d at 593.

under the heading "NO PROPERTY DAMAGE TOOK PLACE WITHIN THE MEANING OF 'PROPERTY DAMAGE' IN THE ASSOCIATION POLICY":

> "Building a structure in the 'wrong location,' as alleged in the Waldes' underlying Demand for Arbitration does not fall within the meaning of 'property damage,' above."
>
> * * *
>
> "[N]othing in the Demand sets forth any allegations that the building at issue was physically injured or that any 'loss of use' resulted."
>
> * * *
>
> "The mere economic hardship resulting from Johnson's inability to obtain the variance he promised to the Waldes does not constitute 'property damage' which would give rise to coverage."
>
> * * *
>
> "[N]o 'property damage' could be inferred from the Demand for Arbitration, no coverage was triggered under the subject policy, and Association owed no duty to defend Johnson in the claim."

(Brief of Appellant, pp. 22-24).

The Waldes further complain that "[i]f the Court of Appeals had not answered that unasked question, it could not have separated 'property damage' between 'loss of use' and 'physical injury'. . . ." (Brief of Pet., p. 6). In doing so, the Waldes implicitly concede that addressing what constitutes "property damage" necessarily requires the court to delve into the definition contained in the policy, which specifically includes two types of "property damage." The Court of Appeals did just that, and correctly held that remedial measures to bring the structure into compliance with Aiken's regulations did not fall within the meaning of "physical injury to tangible property." (Op., Appendix p. 9).

It was within this context that the Court of Appeals construed "loss of use without physical injury." If the Waldes alleged loss of use attributable to Contractor building an unapproved barn, the injury stemmed from the building inspector's determination that the barn

did not comply with the variance and special exception. This injury was legal or regulatory; it was unaccompanied by physical injury. Regardless of whether there was any physical component to the remedial work, the Waldes were not injured by Contractor removing the accessory apartment and lowering the roof; it was the remedial work that brought the barn into compliance and cured the injury.

The Court of Appeals properly focused on the injury component of physical injury in construing the term in the context of the Waldes' underlying claim because there was nothing physical about the injury itself, only the cure. While AIC respectfully disagrees that any "property damage" was alleged, the distinction by the Court of Appeals between property damage with and without physical injury was not an afterthought, but aptly described the only potential damages within the meaning of the policy that could be inferred from the Waldes' claims against Contractor.

IV. The Court of Appeals correctly construed the trial court's footnote in the context of the Order and properly declined the Waldes' invitation to avoid a decision on the merits.

As with their opening argument, the Waldes' closing argument again asserts that the Court of Appeals erred in deciding this appeal on the merits. Among the several "law of the case" arguments made by the Waldes and rejected by the Court of Appeals, they continue to maintain that the appeal should have been decided on a one-sentence footnote in the trial court's twenty-page Order. The Waldes assert that the trial court's finding in footnote four, that Contractor's breach of a fiduciary constituted an occurrence, was in fact a blanket grant of summary judgment on the duty to defend that was not appealed by AIC. (Brief of Pet., pp. 17-18).

The Court of Appeals properly disposed of this argument by considering the footnote in the context of the entire Order rather than reading the single sentence in a vacuum as the Waldes would have this Court do. (Op., Appendix p. 7 fn. 6). The footnote was contained in the trial court's discussion of whether an "occurrence" was alleged, and was devoid of any discussion whatsoever of whether there was "property damage" within the meaning of the policy or whether any exclusions were applicable.

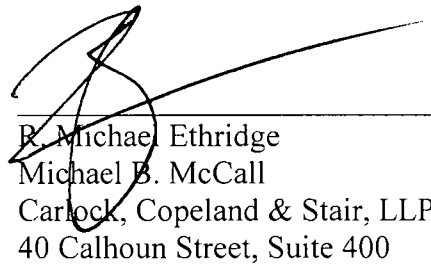
The trial court's citation to Unified Western Grocers, Inc. v. Twin City Fire Ins. Co., 457 F.3d 1106 (9th Cir. 2006) in the footnote provides further context. Although a pinpoint citation is not provided, the Ninth Circuit's discussion of breach of fiduciary duty involved whether the claim arose out of intentional and willful conduct. Id. at 1113-1114. *See* Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 578, 666 S.E.2d 897, 900 (2008) (in analyzing whether there has been an *occurrence*, the term accident does not include intentional and willful conduct).

To borrow from the Waldes, the footnote "simply cannot be read to create an absurd fiction." It would truly be absurd to read this footnote as an unappealed blanket grant of summary judgment when the premise of AIC's entire appeal is that there was no duty to defend because there was no occurrence, no property damage and the policy unambiguously excludes coverage.

CONCLUSION

For the reasons stated, this Court should affirm the decision of the Court of Appeals, or alternatively, affirm its conclusion that AIC's policy does not provide coverage, and remit this matter to the circuit court to enter judgment accordingly.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

ON CERTIORARI FROM THE COURT OF APPEALS

Opinion No. 5061 (S.C. Ct. App. filed December 12, 2012)
401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012)

William and Mary Frances Walde as assignees of Johnson Construction Company of Aiken, Inc., Petitioners.

v.

Association Insurance Company, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the Brief of Respondent upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to all parties of record as follows:

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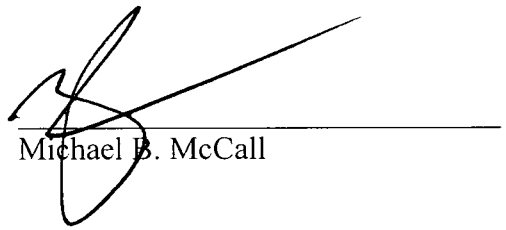
This 25th day of August, 2014



Michael B. McCall