THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J Ernest Kinard, Jr , Circuit Court Judge

Case No 2007-CP-40-7251

Bennett & Bennett Construction, Inc Respondent,

v

Auto-Owners Insurance Company Appellant

BRIEF OF RESPONDENT

Edwin Russell Jeter
Jeter & Williams, P A
1204 Main Street, Suite 200 (29201)
P O Box 7425
Columbia, SC 29202
(803) 765-0600

Attorneys for Respondent

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STATEMENT OF FACTS

This Statement of the Facts is heavily drawn from the trial court order, and consequently provides citations to the record for many of the findings in the trial court order

Almost ten years ago, on May 20, 2002, the insured, a masonry subcontractor, damaged finished brick by using a pressure washer to remove some stray mortar and slurry off the bricks Unable to match or stain the bricks in a manner suitable to the owner, the contractor had to remove the existing bricks and replace them with new bricks The insured refused to pay for the damage Its insurer, Auto-Owners, refused to pay for the damage Therefore, the contractor, Dave Bennett of Bennett & Bennett Construction, Inc ("BBCI"), had to pay to remove the bricks he had purchased, had to buy a second set of bricks, and had to pay a second mason to install them The total cost of all expenses was over $80,000, which was about a year's income for this small contractor (R 82) Thus began an odyssey for BBCI

The following is undisputed on March 6, 2006, BBCI was awarded a default judgment in the amount of $84,133 16 against M & M Construction of the Carolinas, LLC ("M & M") (R 3), the Plaintiff offered M & M's insurer, defendant Auto-Owners Insurance Company ("Auto-Owners"), the opportunity to defend the suit and to keep its insured out of default, and then the Plaintiff notified Auto-Owners of the time and place of the damages hearing (R 82, line 22- R 84, line 3, R 291-302), but Auto-Owners chose to deny coverage and took no part in the initial suit, after obtaining the default judgment, BBCI instituted this declaratory judgment action to determine whether Auto-Owners'

policy covered the judgement, and, as of the day of trial, October 18, 2010, the amount of the judgment was $124,097 75 which was increasing by $16 71 per day in accrued interest (as calculated from R 303) On November 22, 2010, the trial court issued its decision finding that Auto-Owners owed BBCI indemnity for its judgment in the amount of $124,665 80, plus interest

BBCI was hired to remove a synthetic stucco cladding on a residence and replace it with brick (R 42, line 8- R 43, line 25) BBCI put the masonry work out for competitive bids, and M & M was the low bidder (R 42, line 15-16) As a condition of doing the work, BBCI required M & M to provide a certificate of insurance which M & M obtained from its insurance agency addressed to BBCI, as certificate holder, showing that Auto-Owners had issued a $1 million commercial general liability ("CGL") policy identified as policy GL 16509 (R 42, line 17-20, R 234) The homeowner chose to use a decorative brick that would give her home a certain desired appearance (R 43, line 17- R 44, line12) Thus, appearance of the home was an important issue to the homeowner, as would naturally be expected BBCI purchased the brick and hired M & M to provide the labor to remove and replace the brick (R 43, line 7-16) Since the homeowner had chosen a specialty brick with a baked on sandy finish which needed to be brush cleaned soon after the brick was laid and while the scaffolding was still up, BBCI and M&M agreed that the brick cleaning would be done soon after the brick was laid and not at the end of the job (R 44, line 4- R 46, line19, R 87, line 17-22, R 290) They agreed that the line item in M & M's proposal for brick cleaning, would be deleted (R 48, line 9-25) M & M never invoiced BBCI for cleaning the brick as they laid it (R 309-313)

As agreed between BBCI and M & M, the brick cleaning contemplated by the contract was done soon after the brick was laid (R 45, line 15-25, R 87, line 17-22) BBCI inspected the work on a periodic basis and found it to be satisfactory (R 49, line 4-17, R 51, line 1-11, R 106, line 11-13)

After M & M took down its scaffolding and left the job, on April 19, 2002, it sent BBCI a final invoice and stated the work was complete BBCI inspected M & M's work (R 49, line 4-17, R 51, line 22-25, R 52, line 1-24, R 56, line 7-9, R 313 at p 5, R 244) While it found that the brick had been installed satisfactorily and had been cleaned properly, there were some limited areas where mortar and a mortar-slurry mix were on the brick (R 56, line 10-21, R 105, line 20- R 106, line 3) It appeared to BBCI that mortar and slurry might have fallen on the brick as the scaffolding was taken down or as the masons were cleaning their tools (R 56, line 10- R 58, line 12) BBCI called M & M to return to the job and correct these limited areas of concern (R 58, line 5-18)

On May 20, 2002, (R 64, lines 8-12, R 109, lines 2-9, Pltf R 243) while performing this cleaning, which was incidental to the contract work which had been completed and was in the nature of a punchlist or corrective task caused by their carelessness in dropping mortar or slurry on the cleaned brick, the crew working on behalf of M & M used a pressure washer that knocked the coating off the face of the brick and also exposed the brick to an acid/water mix which discolored the brick (R 60, line 17- R 61, line 10, R 70, line 20- R 71, line 20, R 138, lines 14-25) Both the lack of coating and the discoloration destroyed the appearance of the home for which the homeowner had paid BBCI (Id)

The homeowner was occupying the house, and the brick was performing its intended function of protecting the home, at the time the pressure cleaning of the brick was begun (R 64, line 13- R 65, line 8, R 137, lines 3-13) The cleaning of the brick was in the nature of a repair or correction to the poor appearance of the brick The cleaning intended by the contract had already been performed, the work had been completed, M & M had left the job, and M & M had sent a final invoice (R 51, line 12- R 52, line 17, R 54, line 12- R 55, line 15, R 244) Here, the pressure washing was incidental to the work called for by M & M's contract and was required only because M & M spilled mortar on the brick (R 56, lines 10-21, R 105, line 20- R 106, line 3)

The reason the brick was replaced in its entirety was that no other remedy provided a satisfactory appearance to the homeowner Therefore, a total replacement was required to repair the damaged appearance of the home (R 122, lines 21-25, R 139, lines 1-11, R 141, line 6- R 142, line 18) The testimony of Dave Bennett, and Sam Phillips, the attorney who was representing the homeowner at the time and who dealt with M & M and BBCI, established that the damaged appearance was the reason for the total replacement The documents in evidence lend further support to this reason for re-cladding the home M & M tried staining the brick, but the result was an unsatisfactory appearance (R 73, lines 14-17, R 141, line 6- R 142, line 18, R 244) BBCI, the homeowner, and M & M then agreed to try to find replacement brick, but further agreed that if the replacement brick was not satisfactory, then the entire house would be stripped of all brick (R 76, line 12- R 77, line 12, R 248) M & M tried to find replacement brick for the damaged areas, but could find no brick from the same lot as the existing brick (R 73, line 14- R 74, line 9, R 77, line

13- R 78, line 17, R 249 and 250) The brick that was delivered was noticeably different from the brick that was on the house, therefore, replacement of only damaged brick was not a suitable solution (R 77, line 13- R 80, line 22, R 141, lines 6-13, R 249 and 250) While M & M, and then BBCI, later retained attorneys and utilized consultants to gain further leverage for their respective positions, does not change this finding that the actual reason for removing the brick was not an installation problem, but the damaged appearance of the brick (R 81, lines 1-20, R 122, lines 21-25, R 142, line 19- R 143, line 9) Bennett denied that the brick was removed due to any installation issue, and the homeowner never objected on that basis (R 130, line 25- R 131, line 9, R 143, lines 5-9) BBCI ordered a substantial amount (almost half of the amount of brick used on the original installation) of the brick needed to begin the re-cladding process in July, a month before the late August report which mentioned installation issues (R 252 and 253) There was no report of an installation issue until BBCI had already started removing the brick to completely reclad the house (R 128, line 12- R 129, line 19) BBCI did not make a final decision to remove the brick until M & M had an opportunity to present every alternative option it wanted to offer Nothing M & M offered changed the homeowner's decision to remove all brick for appearance reasons (R 251, R 142, line 7- R 143, line 9)

LEGAL ARGUMENT

I THE TRIAL COURT CORRECTLY DETERMINED THAT EXCLUSION J(5) DID NOT DEFEAT COVERAGE UNDER THE PRODUCTS-COMPLETED OPERATIONS COVERAGE OF APPELLANT'S CGL POLICY

This case involves the interplay between the Products-Completed Operations coverage ("P-CO coverage") and exclusion j(5) (known as the "on-going work" exclusion) of a commercial general liability ("CGL") policy Exclusion j(5), using the present tense, excludes any damages while the insured is "performing operations " Auto-Owners drafted its policy to state that those "operations" come to an end when the project reaches completion, essentially defined as either final completion, substantial completion, or when one site of a multi-site project is completed In addition, any repair or corrective work is also considered to fall under completed operations At the point work is deemed "completed," exclusion j(5) no longer has any application since the "operations" have ended, and the P-CO coverage, which is a separate coverage from the CGL coverage, takes effect

In this case the CGL policy with P-CO coverage was issued to a masonry contractor who left the job for a month after completing his work (including cleaning the brick), and then sent a crew back to do some corrective cleaning of the brick, at which time they damaged the brick The homeowner was using the brick cladding for its intended purpose during this time Contractors and manufacturers often purchase CGL policies to cover themselves for damage to the property of third-parties caused by their products or by their work Manufacturers are looking to protect themselves "after they

relinquish control of their products when manufacturing defects, defective designs, or inadequate instructions or warnings have caused their product not to be reasonably safe Similarly, most claims brought against general contractors and developers are for property damage occurring after their project has been completed " *New Appelman Law of Insurance Liability*, Vol 3, §16 02(2)(a) (2011)

How does one know when the contractor has completed his work? Auto-Owners' policy states that "Your work" is deemed complete when certain tests are met, including when the owner is using the work for its intended purpose (essentially upon "substantial completion" as that term is normally defined) If "Your work" requires corrections or repairs, it is still deemed complete

"Your work" is 'work or operations' performed by the insured or on its behalf (emphasis added) Thus, when "Your work" is deemed complete, it follows that "operations" must be deemed complete, since if operations were still on-going, "Your work" would still be ongoing

The fact that operations are completed, means that exclusion j(5) is not applicable since this on-going operations exclusion applies when the contractor or his subs "are performing operations " If they are not performing operations, but instead are in the Completed Operations phase, then exclusion j(5), by its terms, does not apply The trial court was correct in determining that the P-CO coverage applied to this loss, and that Auto-Owners owed BBCI indemnity for its judgement against the insured

Auto-Owner's interpretation of its own policy language takes the narrowest possible approach to coverage, resolves all ambiguities in favor of Auto-Owners, renders

other terms of the policy meaningless, and ignores the trial court's reasonable interpretation of the policy language which found in favor of coverage In addition, Auto-Owners, substitutes its own factual version for the facts found by the trial court It makes no attempt to meet the standard of review for factual findings

A The CGL policy covers damage from punchlist work since that work occurs after the job is "complete," as the Completed Operations coverage defines completed operations The (j)(5) exclusion applying to damage from on-going operations prior to completion, does not defeat Completed Operations coverage for damage caused after the work is "complete "

Auto-Owner's appeal argues that exclusion j(5), known as the "on-going work" exclusion, bars coverage for this claim, even if it was a Products-Completed Operations claim Exclusion j(5) reads "That particular part of real property on which you or any contractors working directly or indirectly on your behalf are performing operations, if the property damage arises out of those operations " (Emphasis added) When M&M, the insured, purchased the CGL policy, in the same policy it also purchased Products-Completed Operations coverage from Auto-Owners with an aggregate limit of $1,000,000, which was separate from the CGL limits (R 180) The Completed Operations coverage in the Auto-Owners policy covers "'property damage' occurring away from premises you own or rent and arising out of 'your work' except (2) Work that has not yet been completed or abandoned " [R 201, §V(11)(a)] Thus, the P-CO coverage takes effect upon the work's completion The Auto-Owners policy defines "Your work" as follows "'Your work' means a Work or operations performed by you or on your behalf and b Materials, parts or equipment furnished in connection with such work or operations " [R 202,

§V(15)] (emphasis added) In the context of this case, the completed operations coverage would apply to property damage that occurred on a job site after completion of M&M's work and which arose out of M&M's work

How does one determine whether the work was "complete" such that exclusion j(5) would not apply and there would be coverage for the judgment? According to Auto-Owners' Products-Completed Operations coverage [R 201, §(V)(11)(b)], "Your work," and the operations it includes, are "deemed completed" when the work is completely finished, or alternatively when it is being put to its intended use, or when repairs and corrections are being made Specifically, the policy states

> "b 'Your work' will be deemed completed at the earliest of the following times (1) When all of the work called for in your contract has been completed (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project
>
> Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed " [R 201, §V(11)(b)]

Cases and commentators have reached the same conclusion that j(5)'s exclusion for on-going operations does not apply to work done after "completion " While the reasoning in each case may vary to some degree, the general view is that the exclusion is written in the present tense, and applies only while the work is on-going Once the work is completed, the Products-Completed Operations coverage goes into effect, and the exclusion does not apply to work that is "completed" In *American States Insurance Company v Powers*, 262 F Supp 2d 1245, 1251 (D Kan 2003), the District Court stated, "In other words exclusion j(5) applies to damages involving 'works in progress' and does

not apply to completed operations " In *Advantage Homebuilding LLC v Maryland Cas Co* , 470 F 3d 1003, (10th Cir 2006), the Court also noted that exclusion j(5) "applies only to damage from on-going work, and not damage after completion " (*Advantage* used slightly different reasoning than *American States*, focusing on when the damage occurs rather than when claims are filed, but agreed on the basic point that exclusion j(5) did not apply after "completion" Since the claims in *Advantage* involved damage from work done prior to "completion", it held exclusion j(5) did apply on the facts of that case) *Lennar Corp v Great American Ins Co* 230 S W 3d 651, 686 (Tex Ct App 2006) ("Giving the exclusion its plain meaning, the use of the present tense indicates the exclusion applies only to "property damage" arising while Lennar is currently working on a project ") *Acceptance Ins Co v Ross Contractors Inc* , 2008-MN-0723 117, p 18 (Minn Ct App 2008) (unpublished), *Spears v Smith*, 690 N E 2d 557, 559 (Oh Ct App 1996) ("the phrase 'are performing operations' [in exclusion j(5)] is written in the present tense Thus, in unambiguous terms exclusion 2(j)(5) bars coverage only for damage involving 'works in progress '") See also, Patrick J O'Connor, Jr , *Insurance Law & Construction*, 19-APR Construction Law 5, 8 (April 1999), quoted by *American States* at 1251

The trial court held, and the evidence establishes, that the insured, M&M, had "completed" its work as the Auto-Owners' policy defines that term, prior to the incident which damaged the brick, thus the Products-Completed Operations coverage was applicable M&M's work was to provide masonry labor only, M&M did not furnish any materials M&M cleaned the brick as it laid the brick, following the manufacturer's

recommendations and the general contractor's expectation and instruction With the high gables on the house, it made no sense to take down and then re-construct scaffolding to do cleaning, and the mortar could not dry for long before being cleaned up, as it had to be done with a brush (R 46, line 9- R 47, line 23) On inspecting the work, the general contractor was satisfied with the laying and cleaning of the brick M&M finished its work, including cleaning, took down the scaffolding, left the job with its equipment, and wrote a letter demanding payment of its final invoice by April 19, 2002 (R 313) The incident which damaged the brick on the home, occurred after M&M was called back to the jobsite to clean up some mortar that had fallen on the brick, apparently when M&M was breaking down its scaffolding The homeowner was using the brick cladding for its intended use during this time (R 137, lines 11-13) Upon BBCI's demand that they return and clean up the minor problems with the brick, M&M sent the crew out to do the punchlist cleaning on or about May 20, 2002, which is when the incident occurred (R 243) Thus, by the day of the incident, on or about May 20, 2002, the homeowner had been using the brick cladding on the house, and M&M had completed its work and had been away from the jobsite for approximately one month (R 133, lines 1-10)

Auto-Owners argues that "The plain meaning of the phrase 'are performing operations' means that M&M was working on the job when the damages occurred " (Brief of Appellant, p 10) Therefore, Auto-Owners is saying exclusion j(5) applies even after completion on grounds that the repairs or corrections were "operations" to which exclusion j(5) applies Of course, this position flies in the face of the conclusions reached by the case law already cited It also contradicts Auto-Owners' own policy language

which states that "your work" and all of its included "operations" are deemed complete upon substantial completion or during repairs and corrections The term that exclusion j(5) uses, "Operations," is also found in the "Your work" definition which states it is "Work or operations performed by you or on your behalf " (emphasis added) [R 202,§(V)(15)] Since "operations" is part of the definition of "Your work," it follows that after "your work" is deemed "completed," any other repairs or corrections are not "operations," as that term is used in Exclusion (j)(5) To hold otherwise, as Auto-Owners would have this Court do, would mean that "your work" would not be "deemed complete" when that work is performing its intended function or while repairs and corrections are on-going, since there would still be "operations" being conducted That interpretation would directly contradict Auto-Owners' language defining when "your work" and its operations are deemed completed [R 201, §V(11)(b)] Since conflicting terms in an insurance contract should be construed strictly against the insurer, *Spinx Oil Co Inc v Federated Mut Ins Co* , 310 S C 477, 427 S E 2d 649 (1993) rehearing denied, operations cannot be construed to include repairs, corrections or other activities covered by any of the tests of completion or in the trailing language in the P-CO coverage

This construction, that "operations" end when the work is deemed "complete", is also consistent with the use of the present tense in exclusion (j)(5), which is triggered while "you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations " (Emphasis added) The present tense is consistent with exclusion j(5) applying to on-going operations prior to completion, but the present tense is inconsistent with exclusion j(5) applying after completion when operations are no

longer on-going Accord, *Lennar Corp v Great American Ins Co* 230 S W 3d 651, 686 (Tex Ct App 2006) By arguing that "operations" should be construed to include "completed operations" despite the use of the present tense, Auto-Owners takes an undefined term, gives it the narrowest meaning possible with respect to coverage, even going to the extent of nullifying other policy language in Products-Completed Operations which would grant coverage, and tries to use this narrow, unfavorable construction to deny coverage Exclusions are to be construed strictly against the insurer, *Abernathy v Prudential Ins Co of America*, 274 S C 388, 264 S E 2d 836 (1980), and are to be construed narrowly and in favor of coverage *McPherson By and Through McPherson v Michigan Mut Ins Co* , 310 S C 316, 426 S E 2d 770 (1993) Further, any ambiguity must be construed in favor of coverage and against the insurer *Henderson v Abbeville-Greenwood Mut Ins Assn* , 96 S C 430, 81 S E 171 (1914)

The *National Union* case,[1] discussed at length in Auto-Owners' brief (at pp 12-13), actually held, despite the existence of exclusion j(5), that the insurer owed the insured P-CO coverage for damages caused by repairs after completion In *National Union*, the parties stipulated that the insured contractor, SST, had completed its work under three contracts to erect and perform other work on a radio tower, and that it had been paid in full Subsequently defects were discovered in the tower and repairs were started

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[1] *National Union Fire Ins Co of Pittsburgh Pennsylvania v Structural Systems Technology Inc* , 756 F Supp 1232 (E D Mo 1991) *amended by National Union Fire Ins Co of Pittsburgh Pennsylvania v Structural Systems Technology Inc* , 764 F Supp 145 (E D Mo 1991) *affirmed by National Union Fire Ins Co of Pittsburgh Pennsylvania v Structural Systems Technology Inc* , 964 F 2d 759 (8th Cir 1992)

The District Court divided its analysis into two parts, stating "This policy is divided into two separate forms, the Commercial General Liability Form (CGL), and the Products-Completed Operations Form (P-CO) The Court will address these separately " *Id* at 1237

National Union analyzed exclusion j(5) as it applied to the CGL coverage only The portion of *National Union* quoted in Auto-Owners' brief is from the discussion about the CGL coverage There was no discussion in the CGL section of the case concerning whether the work was complete, nor whether or not the P-CO coverage applied, nor how exclusion j(5) would interact with the P-CO coverage The quoted language merely holds that with respect to CGL coverage only, and omitting any discussion of P-CO coverage, exclusion j(5) would exclude any repair damages

After completing its discussion of the CGL coverage issues, *National Union* then analyzed the P-CO coverage *Id* at 1291 It looked at the test for completed operations and determined that P-CO coverage was triggered because the work was complete and the repair work was also a covered P-CO activity Then *National Union* began exploring how the exclusions effected the P-CO coverage, including for damages from the repairs It examined the "custody, care and control" exclusion [exclusion k], the "your product" exclusion [exclusion j(4)], and the "your work" exclusion [exclusion (l)] With respect to each of these exclusions, *National Union* found that they did not destroy coverage [2]

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[2] Auto-Owners makes the irrelevant argument that it is significant that exclusion j(5) does not expressly state that it does not apply to P-CO coverage (Brief of Appellant, p 11) There are reasons of definition that require exclusions j(6) and (L) to specifically mention P-CO, which needs do not apply to the other exclusions As the *National Union* discussion of

Exclusion j(5) is not mentioned in the P-CO section of *National Union* The attorneys in the case, who were fully aware of P CO coverage, apparently found it not worth the paper to argue that exclusion j(5) excluded repair damages under P-CO coverage Accordingly, *National Union* concluded "National has a duty to defend and indemnify with respect to the alleged property damage to the tower and other equipment, pursuant to the products-completed operations liability form of the insurance contract " *Id* at 1242

National Union completely contradicts Auto-Owners' position in this case How could *National Union* have found P-CO coverage for the property damage resulting from repairs if exclusion j(5) applied? It could not Whether or not the other exclusions applied, j(5) would have destroyed coverage and changed the result of the case if *National Union* found it applied to repair damages after completion

Auto-Owners contends that exclusion "j(5) is only limited (in time) to those damages that occur while the insured is working on the job " (Brief of Appellant, p 11) This reasoning is wrong for three reasons First, as stated above, as long as the damage occurred after the job was "complete" as defined by the P-CO coverage, it does not matter whether M&M was still on the job or not If the homeowner is using the brick for its intended use, or if the work is in the nature of a repair or a correction, there is coverage even if M&M was still on the job Second, the trial court found, and Auto-Owners has not challenged this finding, that M&M took down its scaffolding, left the job, sent BBCI

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exclusions j(4) and (k) illustrates, the failure to mention P-CO coverage has no relevancy to whether or not they exclude coverage under P-CO

an invoice, and stated its work was complete [3] BBCI called M&M to return to the job and do corrective work (R 8, FOF #4) The damage occurred one month after M&M left the job That places this claim squarely within the category (damage occurring after the insured is no longer working on the job) that Auto-Owners admits is not subject to exclusion j(5) Third, by giving the exclusion such a broad definition that "operations" continue even after "your work" is deemed "completed," and by rendering meaningless the substantial completion test for completed work when the work is being used for its intended purpose, Auto-Owners has created a conflict in policy language Since repugnant or conflicting clauses must be construed against the insurer, the term "operations" cannot be construed to include "completed operations " Where an insurance policy contains internal contradictions or repugnant clauses, the policy is rendered ambiguous and the court must resolve that ambiguity in favor of coverage *BLG Enterprises Inc v First Financial Ins Co* , 328 S C 374, 491 S E 2d 695 (Ct App 1997)

How can Auto-Owners argue that M&M was still on the job when it had packed up and left the job for a month? Is Auto-Owners saying a month is not long enough?

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[3] (R 8, FOF#4) The trial court concluded that the M&M's work was "complete" as the Defendant's policy defines that term, and that the pressure washing of the brick was a completed operation as the policy defines that term (R 12, Concl F) By challenging the trial court's finding that the work was "complete," Auto-Owners is making a factual challenge to the judgment A declaratory judgment action to determine coverage is an action at law The standard of review of factual findings by a court sitting without a jury in a law case is that factual findings will not be disturbed unless found to be without evidence that reasonably support's the judge's findings *Auto-Owners v Newman*, 684 S E 2d 541, 543, 385 S C 187 (2009) Auto-Owners ignores this standard of review and makes no attempt to demonstrate a lack of reasonable evidentiary support for the findings Because Auto-Owners' argument is factually inconsistent with the judgment, the argument must fail

Would the claim be covered if M&M had waited several months, a year, or two years, before returning and doing corrective work that damaged the brick? Even Auto-Owners would have to admit that a delay of months or a year or two after completion before doing corrective work would mean that corrective work was covered (Brief of Appellant, p 11) Where does Auto-Owners expect the Court to draw the line? According to Auto-Owners, a month off the job before returning is not covered because of exclusion j(5), but months or a year or two before returning is covered despite exclusion j(5) That position draws an arbitrary line between coverage and non-coverage that has no basis in law or in policy language

Is Auto-Owners trying to argue that it is critical that M&M had not yet received final payment from BBCI when the damage occurred? If so, what happens to coverage since BBCI never paid M&M the balance of the contract until it was deducted at the default damages hearing? What if BBCI had only partially paid them before they returned years later? Auto-Owners' policy does not address that issue How does time of payment effect the tests for completion which Auto-Owners uses in its policy? It is not mentioned in Auto-Owners' tests for completion Where does exclusion j(5) mention payment? It does not What case law supports the proposition that the time of payment is critical? There is none

Auto-Owners argues that the P-CO coverage "is inapplicable because M&M had not finished its contract when M&M damaged the brick " (Brief of Appellant, p 16) This argument has no merit Any repair or corrective work involves doing or re-doing something that was within the original scope of the engagement Saying M&M was re-

doing work that was within the scope of its original contract, says nothing Were the repairs done after the policy says the job was complete? Perhaps even a year or two later? If so, then exclusion j(5) would not apply The fact that the work comes within the original scope has no effect on whether or not exclusion j(5) applies

Auto-Owners' argument that work within the original scope is subject to exclusion j(5), would also result in the Court nullifying all but one of the tests for determining when the job is "completed" Work that needs service, maintenance, repair, correction or replacement will always be re-working, replacing, correcting, etc , work that was within the original scope Thus the trailing language would never apply since exclusion j(5) would exclude coverage in every case In fact, each test of "completed" work under the Completed Operations coverage would be nullified except for the final completion test This Court cannot accept any construction of an exclusion that is so narrow that it renders other policy provisions meaningless *Auto Owners Ins Co Inc v Newman*, 385 S C 187, 684 S E 2d 541, 545 (2009)

With respect to the case law cited by Auto-Owners, it should be noted that the Supreme Court has not addressed exclusion j(5) in either *L-J v Bituminous Fire and Marine Ins* 366 S C 117, 621 S E 2d 33 (2005) *Auto-Owners Ins Co Inc v Newman* 385 S C 187, 684 S E 2d 541 (2009), nor *Crossman Communities of North Carolina Inc v Harleysville Mutual Ins Co* Op 26909 (S C Sup Ct filed Aug 22, 2011) (Shearouse Adv Sht No 28 at 15) In *L-J*, the Supreme Court ruled there was no "occurrence" in the case, thus it was not necessary to consider any exclusions In *Newman*, the Court found an "occurrence," and in doing so addressed the "your work" exclusion in rejecting the narrow

definition of "occurrence" argued by Auto-Owners *Newman* then addressed the intended or expected damage exclusion argued by Auto-Owners, eventually concluding that Auto-Owners' argument was unreasonable Finally, *Newman* considered the effect of exclusion (n) on damages, an issue that is relevant in section II but not to the current discussion *Crossman* involved a CGL policy, with no mention of P-CO coverage in the case The issue was the definition of an "occurrence," an issue which is not on appeal in this case

In summary, the cases hold that exclusion j(5) does not exclude from coverage damages occurring after "completion" of the work The policy test for work being deemed "completed" states that work being used for its intended purpose, and repair and corrective work, are deemed to be "completed " Not only is there is nothing in the language of exclusion j(5) or in the definition of "your work" or in the Products-Completed Operations coverage, that contradicts that result, but the language of the policy compels coverage in this case Since the trial court's findings establish the work was completed, coverage exists and the trial court judgment should be affirmed

B If the policy language is ambiguous and the insured's interpretation of ambiguous policy language is reasonable, then the insured must prevail and coverage exists It matters not whether the insurer also has a reasonable interpretation that would defeat coverage

For the reasons stated in the previous argument, the policy language is unambiguous that the work performed by M&M which damaged the brick was done after "completion" of its work and is therefore covered However, if this Court determines that there is an ambiguity in the language due to the conflicting constructions of the policy, the

law concerning the interpretation and construction of insurance contracts is clear and well understood The issue in determining coverage becomes solely whether or not the insured is arguing a reasonable interpretation If the insured's interpretation is reasonable, it must prevail *Helena Chemical Co v Allianz Underwriters Ins Co* , 357 S C 631, 594 S E 2d 455 (2004), since all ambiguities are to be resolved strictly against the insurer *USAA Property and Cas Co v Clegg*, 377 S C 643, 661 S E 2d 791 (2008)

Auto-Owners argues a construction of the policy language in exclusion j(5) and the Products-Completed Operations coverage, that is different from BBCI's reading of the policy It reads exclusion j(5) as applying until the insured physically leaves the job, and argues that if the corrective or repair work was within the scope of the contract, it is an "operation" and not a "completed operation," so it is excluded by j(5) However, Auto-Owners does not make the case that the interpretation offered by BBCI, that exclusion j(5) covers only on-going operations and not completed operations, is unreasonable If both the insured and the insurer have placed reasonable competing constructions on the language, thus making the language ambiguous, then all ambiguities are resolved against the insurer

II THE TRIAL COURT CORRECTLY DETERMINED THAT EXCLUSION N WAS NOT APPLICABLE IN THIS CASE

Auto-Owners argues that "Exclusion N is applicable to bar coverage herein " (Brief of Appellant, p 17) First, it argues, in the face of the findings of fact to the contrary, that the reason for the removal of the brick was not the pressure washing, but the

alleged defective installation of the brick As a result, Auto-Owners claims only economic damages resulted which are not covered under exclusion (n) This argument fails as a matter of fact because the trial court's finding that BBCI's brick was removed because of the cleaning, not the installation, will not be disturbed unless found to be without evidence that reasonably support's the judge's findings *Newman supra* at 543 Auto-Owners ignores this standard of review and makes no attempt to demonstrate a lack of reasonable evidentiary support for the findings M&M installed the brick to BBCI's satisfaction, except for the slurry or mortar that splashed on the brick, apparently when M&M was taking its scaffolding down After the cleaning incident the brick had to be removed and replaced There is no evidence that BBCI's brick were removed because of faulty installation The brick were removed because they were damaged

The trial court heard from both Dave Bennett and from Sam Phillips, the attorney for the homeowner, about the reason for replacing the brick The contemporaneous exhibits support this testimony Both men explained that appearance was the sole reason for replacing the brick Bennett testified that he was already removing the brick before he even received the report talking about installation issues, the Richtex invoices prove that BBCI was ordering about half the brick it would need for the entire house, a month in advance of installation issues ever being raised Auto-Owners offers nothing to dispute or undercut this testimony It has made no attempt to argue there is no reasonable basis in the evidence for the factual findings of the trial court Because Auto-Owners' argument is factually inconsistent with the judgment, the argument must fail

Auto-Owners' other factual red herring is that it seems to argue that instability of

the brick may have caused its removal (Brief of Appellant, p 18) That is factually incorrect The instability that was discussed concerned M&M's efforts to remove and patch some of the brick rather than remove all brick However, in areas where a large number of bricks would have to be removed to allow patching, the remaining brick would become unstable when the supporting bricks were removed for patching (R 79, lines 1-24) The brick were stable as is, it was the repair process which would render them unstable

Auto-Owners also seems to argue that the cleaning had to be removed, and that any cost in removing the cleaning is barred by exclusion (n) (Brief of Appellant, p 18) However, it was not the cleaning that was removed, it was the damaged brick owned by BBCI which had to be removed In other words, the cleaning caused damage to a third party's property which then had to be removed In *Auto-Owners v Newman*, 684 S E 2d 541, 546, 385 S C 187 (2009), the Supreme Court applied exclusion (n) to the cost of "replacing and repairing the defective stucco itself as an incidental cost to repairing the damage to other property " *Id* at 546 So, the only thing *Newman* excluded from coverage was the damage to the defective product itself Coverage was available for the other damaged work

Exclusion (n) applies to bar coverage for the cost if "your work" or "your product" is defective and has to be removed The insured did not supply a product, BBCI did that when it bought the brick In addition, no one was withdrawing the cleaning from use, as exclusion (n) requires What was being withdrawn was a third party's brick that had been damaged by the insured's work The trial court concluded that " the only defective

workmanship was touch-up cleaning services provided by M & M, through its subcontractors Accordingly, exclusion (n), which applies only to the removal of defective work, would not apply to the installation of the brick, which was non-defective, nor to the brick itself, which was owned by BBCI and was not defective (R 74, line 10- R 75, line 1, R 247) The damage to the face of the brick, and the discoloration, constitute property damage to which exclusion (n) would not apply Even if under *Newman*, Auto-Owners is entitled to the amount paid for the defective cleaning, and the amount paid for any new touchup cleaning during the replacement process, there was no evidence of the value of these services As for the touchup cleaning during the original brick work, that work--the cleaning--was gone Accordingly, this Court concludes that exclusion (n) does not relieve Auto-Owners of its indemnity obligations for the judgment " (R 15-16, Concl M) That reasoning is correct

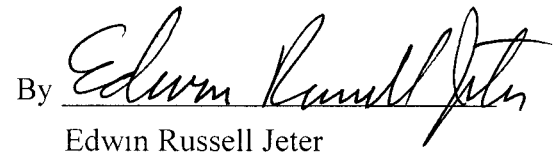
In summary, exclusion (n) does not bar coverage for the removal and replacement of the brick damaged by the defective work of the insured

CONCLUSION

In conclusion, Auto-Owners has not met the standard for reversing the trial court's findings of fact The conclusions of law which follow from those facts are well-reasoned and correct The trial court's order should be affirmed

Respectfully submitted,

JETER AND WILLIAMS, P A

By 

Edwin Russell Jeter

S C Bar #2997
Post Office Box 7425
Columbia, South Carolina 29202
Telephone 803-765-0600
Facsimile 803-765-0619

April 18, 2012

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J Ernest Kinard, Jr , Circuit Court Judge

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Bennett & Bennett Construction, Inc — Respondent,

v

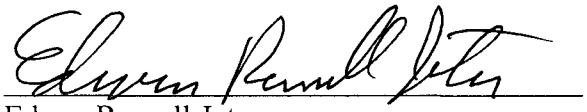
Auto-Owners Insurance Co , Inc — Appellant

RULE 211(b) CERTIFICATION

Edwin Russell Jeter
Jeter & Williams, P A
1204 Main Street, Suite 200 (29201)
P O Box 7425
Columbia, SC 29201
(803) 765-0600

Attorneys for Respondent

Counsel for Respondent hereby certifies that the Brief of Respondent complies with Rule 211(b), SCACR



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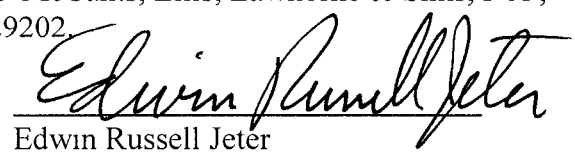
CERTIFICATE OF SERVICE

I certify that I have served a copy of the Brief of Respondent and Rule 211(b) Certification by depositing a copy of same in the United States Mail, postage prepaid, on April 18, 2012, addressed to its attorney of record, John L McCants, Ellis, Lawhorne & Sims, P A , Post Office Box 2285, Columbia, South Carolina, 29202.



Edwin Russell Jeter
Jeter & Williams, P A
1204 Main Street, Suite 200 (29201)
P O Box 7425
Columbia, SC 29201
(803) 765-0600

Attorneys for Respondent

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