

The South Carolina Supreme Court

Bennett & Bennett Construction Inc , Respondent,

v

Auto Owners Insurance Company, Appellant

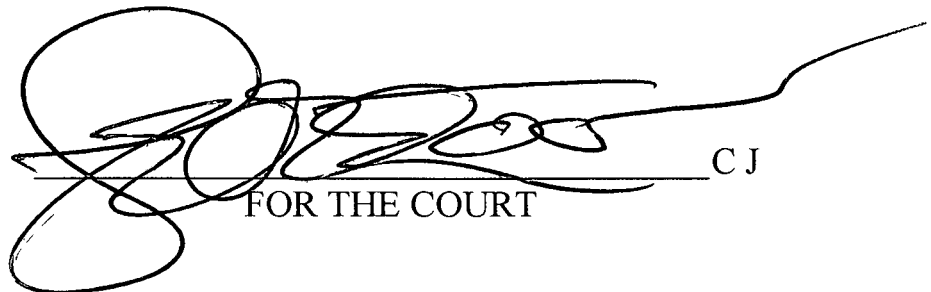
Appellate Case No 2011-183007

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court

Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court

IT IS SO ORDERED



FOR THE COURT CJ

Columbia, South Carolina

July 25, 2012

cc

Edwin Russell Jeter, Jr

John Lucius McCants

The Honorable Jenny Kitchings

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May 17, 2012

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SC Court of Appeals

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE Bennett & Bennett Construction, Inc v Auto-Owners Insurance Company,
American International Company, and M & M Construction of the Carolinas,
LLC
Civil Action No 2007-CP-40-7251
Appellate Docket No 2011183007
Our File No 000118-58205

Dear Ms Kitchings

Enclosed herein for filing please find an original and six (6) copies of a **Consent Agreement of Parties to Supplement the Record on Appeal**, together with an unbound original and sixteen (16) bound copies of the **Supplemental Record on Appeal** in the above-referenced matter. Please file the originals of each and return one (1) clocked-in copy of the Consent Agreement of Parties to Supplement the Record on Appeal and two (2) clocked-in bound copies of the Supplemental Record on Appeal to my office via our firm's courier.

Thank you for your assistance in this matter and should you otherwise have any questions or comments, please do not hesitate to contact me.

By copy of this letter to opposing counsel, I am hereby serving him today with a bound copy of the Record on Appeal.

With warm, kind regards, I am

Sincerely yours,


John L. McCants

JLM/sb

Enclosures



cc (w/ encl)
Edwin Russell Jeter, Esquire



The South Carolina Court of Appeals

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Re Bennett & Bennett v Auto Owners
Case Tracking # 2011186007

Dear Counsel

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules DO NOT staple spiral bind velobind or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1205 Pendleton Street Columbia, S C 29201. Thank you for your attention to this.

All parties are advised that the correct caption must be used on all future filings in this matter. The correct caption is

Bennett & Bennett Construction Inc ,

Respondent,

v

Auto Owners Insurance Company,

Appellant

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy
CLERK

JAK/ec

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 Co , Inc

Appellant

REPLY BRIEF OF APPELLANT

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REPLY ARGUMENTS

I THE TRIAL COURT ERRED AS A MATTER OF LAW ON THE APPLICATION OF EXCLUSION J(5) OF THE INSURANCE POLICY

Unable to collect from the mason who Respondent hired to lay and clean brick, in what was otherwise a straightforward breach of contract claim, Respondent turned to the mason's general liability insurer to pay the claim. In doing so, Respondent has woven a story that Respondent stated so much more simply in documents filed in Spartanburg County, and Respondent has transformed the facts into a convoluted story about its mason who damaged its own work while cleaning it. In its complaint filed in Spartanburg, Respondent pled, "Bennett & Bennett contracted with M&M to lay *and clean brick* " (Complaint ¶ 4). In the next paragraph, Respondent alleged, "[w]hile *cleaning the brick* M&M used a pressure cleaning process. As a result, Bennett & Bennett's brick was damaged " (Complaint ¶ 5). The Circuit Court in Spartanburg found, "[t]his matter arose out of a construction project in which the Plaintiff [Bennett & Bennett] hired a masonry contractor to install and clean brick " (Order dated March 6, 2006, Pg. 1). "In *cleaning the brick*, the Defendant [M&M] failed to follow the manufacturer's instructions and accepted industry practice. The pressure washer knocked the finish off the brick and left visible wand marks " (Order dated March 6, 2006, Pg. 1-2).

The pleadings filed by Respondent and the order filed in Spartanburg County clearly state that M&M damaged the brick while performing the cleaning part of its contract -- *or performing an operation*. The pleading and order did not need further explanation, testimony or clarification. The "duty to indemnify is based on evidence found by the factfinder " Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 314,

476 S E 2d 708, 711 (Ct App 1996), State Farm Fire and Cas Co v Weaver, 585 F Supp 2d 722 (D S C 2008) In insurance coverage litigation, parties are bound by determinations of liability and the amount of damages and may not relitigate these issues See Sims v Nationwide Mutual Ins Co, 247 S C 82, 145 S E 2d 523 (1965) Respondent did not address the Jourdan and Sims decisions or explain why the trial court should have considered Respondent's more lengthy explanation of the facts The trial court in not applying Exclusion J(5)

To summarize Respondents' position, its mason, M&M Construction of the Carolinas, LLC ("M&M") damaged the brick house while pressure washing the house during the punch-list phase of M&M's work The punch-list phase is, by definition, part of the Products-Completed Operations Hazard¹ If a contractor reaches the Products-Completed Operations Hazard phase of work, damage caused during such phase is insured regardless of another exclusion that bars coverage In effect, reaching the Products-Completed Operations Hazard phase is like crossing a "finish line" and damage which occurs after crossing the line is unconditionally covered by the insurance policy

Respondent's position disregards South Carolina Supreme Court authority that states that each exclusion must be read and applied independently of every other exclusion, exclusions are not read cumulatively Auto-Owners Insurance Co., Inc v Newman, 385 S C 187, 684 S E 2d 541 (2009) citing Engineered Products, Inc v Aetna Cas & Sur Co, 295 S C 375, 368 S E 2d 674, (Ct App 1988) (quoting Weedo v Stone-E-Brick, Inc, 81 N J 233, 405 A 2d 788, 795 (1979))("If any one exclusion

¹ The Products Completed Operations Hazard is part of the Commercial General Liability Coverage issued to M&M Construction of the Carolinas LLC See Tailored Protection Policy Declarations and the Commercial General Liability Coverage Form portions of the policy The term Products Completed Operations Hazard is defined in the policy at 11(a) on Page 13 of 14 of the Commercial General Liability Coverage Form

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.”) Respondent writes j(5) out of the policy on the basis that another portion of the policy may be applicable.

Respondent’s position disregards the plain meaning of the language in j(5). Insurance policies are subject to the general rules of contract construction. Century Indemnity Co. v. Golden Hill Builders, Inc., 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002). The Court must give policy language its plain, ordinary, and popular meaning. Century Indemnity, 348 S.C. at 565, 561 S.E.2d at 358. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. Century Indemnity, 348 S.C. at 565, 561 S.E.2d at 358.

J(5) reads as follows:

This insurance does not apply to property damage to [t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf **are performing operations**, if the ‘property damage’ arises out of those operations. (Bold added)

Respondent’s principal admitted to the substance of the exclusion at trial:

Q All right, once again, you agree that M&M damaged the brick while performing an operation of cleaning it, correct?

A Yes

(Transcript Pg. 78, L. 13-16)

Unlike other “business risk” exclusions, j(5) does not specifically include the Products-Completed Operations Hazard in either its primary text or any trailing language exception. (Insurance Policy – Commercial General Liability Form Page 4 of 14). In

addition to j(5), there are five other “business risk” exclusions that interrelate with the Products-Completed Operations Hazard. The exclusions are 1) Damage to Property - j(6), 2) Damage to Your Product - (k), 3) Damage to Your Work - (l), 4) Damage to Impaired Property or Property Not Physically Injured (m), and 5) Recall of Products, Work or Impaired Property – (n) (Insurance Policy – Commercial General Liability Coverage Form Page 4 of 14). Of these six exclusions, *only* two of them, Exclusions j(6) and (l), have the term Products-Completed Operations Hazard written in the text or in a trailing language exception. This is not a casual omission (Insurance Policy – Commercial General Liability Coverage Form Page 4 of 14). Unlike Exclusions j(6) and L, j(5) is not limited to the time period that is before or after the work is deemed completed. J(5) is only limited in time to those damages that occur while the insured is working on the job. Even if one characterizes the pressure washing in this case as a “service, maintenance, correction, repair or replacement”, negligently performing any one of these operations and causing damage at the same time triggers j(5).

Respondent does not refute the argument that Newman is on-point precedent for when a “business risk” exclusion bars coverage even when the Products-Completed Operations Hazard is in place. In Newman, the Supreme Court found that the subcontractor completed the installation of the stucco which meant that the Products-Completed Operations Hazard was in place. Id. Even with a “completed operation” in place, the Supreme Court found that Exclusion N barred coverage for those damages which were the cost to remove and replace the stucco. Newman, 385 S C at 197, 684 S E 2d at 546 (“Although the subcontractor exception preserves coverage for property damage that would otherwise be excluded as “your work,” another policy exclusion bars

coverage for damage to the defective workmanship itself") Note, like j(5), Exclusion N does include the term Products-Completed Operations Hazard in its text or in a trailing language exception (Insurance Policy – Commercial General Liability Coverage Form Page 4 of 14)

Respondent contends that Appellant's interpretation of the policy language is a narrow one, and Appellant should interpret coverage broadly Further, a court must resolve all ambiguities in favor of an insured Appellant is not reading the policy narrowly or otherwise as stated by Respondent Respondent is reading the policy in accordance with the "plain meaning" rule When one applies the "plain meaning" rule, j(5) makes logical sense - those damages caused while a contractor is *on the job performing work* are excluded from coverage Further, j(5) is not ambiguous The policy is a form prepared by Insurance Services Office, Inc ("ISO"), the same one subject in Newman and Crossmann, and used by insurers across the country ISO did not include the Products-Completed Operations Hazard in the text of or in trailing language for j(5) as it did for Exclusions j(6) and l If ISO had done so, Respondents position may have merit

Respondent addressed the five cases from foreign jurisdictions cited by the lower court for the position that j(5) and the Products-Completed Operations Hazard are mutually exclusive as a matter of law See Advantage Homebuilding, LLC v Maryland Cas Co 470 F 3d 1003 (10th Cir 2006), Acceptance Ins Co v Ross Contractors, Inc 2008-MN0723 117, p 18 (Minn Ct App 2008)(unpublished), Fisher v American Family Mut Ins Co., 579 N W 2d 599 (N D 1998), Alveson v Northwestern National, 559 N W 2d 234 (SD 1997), and Spears v Smith, 690 N E 2d 557 (Oh Ct App 1996) Again,

these decisions do not stand for such an absolute position and when one reads them closely, one sees that the facts and holdings actually support Appellant's position. Some courts and commentators may generalize that j(5) is the opposite of Products-Completed Operations Hazard and that generalization may be true in some cases, however, the generalization is not an absolute or true in every case. None of the five courts addressed the precise set of facts presented by Respondent -- that M&M damaged the brick, while cleaning it as punch-list work, which work was included, by definition, in the Products-Completed Operations. In the decisions where a court found coverage, the facts were that the contractor had left the job, not to return, and the progressive damages occurred later and over time -- as did the progressive damages in Newman and Crossmann. In the decisions where the court did not find coverage, the facts were that the contractor damaged the property, then and there, while on the job. It is not material that M&M left the job and came back a week or month later, what is material is that M&M damaged the brick while performing an operation, while on the job.

Respondent addressed the decision 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, Pa. 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) (*rehearing denied*) ("National Union Fire"). As argued by Appellant, National Union Fire illustrates the application of j(5) and the Products-Completed Operations Hazard in a fact pattern together. Like the repairs being performed to the tower during the Products-Completed Operation Hazard phase in National Union Fire,

the pressure washing performed during the Products-Completed Operation Hazard phase by M&M is barred by Exclusion j(5)

Respondent contends that National Union Fire is supportive of its position. Respondent argues that like National Union Fire Insurance Company, Appellant issued two different insurance coverages to M&M. The policy issued by Appellant has one coverage form – Commercial General Liability Coverage – and the term Products-Completed Operations Hazard is part of the Commercial General Liability Coverage Form (Insurance Policy – Tailored Protection Policy Declarations (2 pages) and Commercial General Liability Coverage Form). In contrast, the policy issued by National Union Fire had two distinct forms: 1) Commercial General Liability Coverage (CGL) Form, and 2) Products/Completed Liability Coverage (P-CO) Form. Id. at 1236.

In National Union Fire, the Court addressed the law and application of the facts to the two distinct forms separately in the Court’s decision. Id. at 1237. The CGL Form included the same exclusions as the one issued to M&M, including, Exclusions j(5) and j(6). In addressing the CGL Form, the Court discussed Exclusion j(5) and j(6), noting that j(6) included the “[products]-completed operations hazard”, whose definition was part of the CGL Form.² Id. at 1241. The Court stated, “[w]ith respect to exclusion j(5), since this Court has held that the tower is real property, the exclusion applies to the tower, if it is determined in later trials that the collapse *arose out of the actual repair operations*, as opposed to ‘out of’ the alleged defective rods.” Id. at 1240-41. Again, the repairs were performed during the Products-Completed Operations Hazard phase. Id. at 1241. The Court then specifically addressed Exclusion j(6) and found it inapplicable because the

² The CGL Form in National Union Fire is consistent with the Commercial General Liability Form in the policy issued to M&M.

“[products]-completed operations hazard” was a specific exception – in contrast to j(5) Id at 1241. As noted, the Court addressed the P-CO Form separately Id at 1241. Again, the P-CO Form and the CGL Form are two different forms in the policy subject in National Union Fire in contrast to the policy issued to M&M. Further, the P-CO Form in National Union Fire had its own exclusions which did not include Exclusions j(5) and j(6) Id at 1241-42. The findings respective to both the CGL Form and P-CO Form were carried forward and addressed separately and distinctly to each other again in the Court’s ruling Id at 1244. To compare “apples-to-apples”, or the policy in National Union Fire with the policy issued to M&M, one must refer to the portion of the National Union Fire decision that discusses the CGL Form and orders relief relative to the CGL Form, not the P-CO Form. When one does that, one sees how Exclusion j(5) and the Products-Completed Operation Hazard in the policy issued to M&M work together.

II THE TRIAL COURT ERRED AS A MATTER OF LAW ON THE APPLICATION OF EXCLUSION N OF THE INSURANCE POLICY

Even assuming Respondent’s set of facts, Exclusion N operates to bar coverage herein. With the facts inserted in brackets and the relevant language of the Exclusion in bold print, Exclusion N applies as follows:

This insurance does not apply to

Damages [the cost to remove and replace the bricks] **claimed for any loss, cost or expense incurred by others** [Bennett & Bennett] **for repair, replacement, removal or disposal of 2) ‘Your work’** [the installation of the bricks and cleaning] **if work is withdrawn from use** [removed and replaced] **by any person** [Bennett & Bennett] **because of a known or suspected defect, deficiency** [the brick was defective and deficient due to the pressure washing]

(Insurance Policy – Commercial General Liability Form Page 4 of 14)

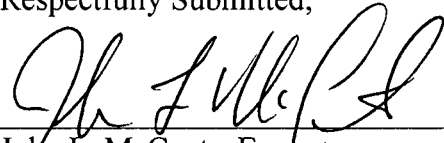
Respondent must concede that its claim was for the removal and replacement of the brick because of a known or suspected defect, i.e., the brick was defective or deficient due to the pressure washing. Again, for Exclusion N, it does not matter whether a subcontractor is involved or whether the Products-Completed Operations Hazard is applicable. See Newman, 385 S.C. 187, 684 S.E.2d 541. Unlike Exclusions j(6) and l, and like Exclusion j(5), Exclusion N is not modified or limited by whether a subcontractor does the work *or whether the job is completed or not*. (Insurance Policy – Commercial General Liability Form Page 4 of 14). The trial court erred in not applying Exclusion N.

Finally, Respondent's position on the facts fit squarely into the law of L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 366 S.C. 117, 621 S.E.2d 33 (2005) ("L-J"), Auto-Owners Insurance Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009) ("Newman") and Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co. 395 S.C. 40, 717 S.E.2d 589 (2011) ("Crossmann"). As stated in L-J and reiterated in Newman, "[t]he CGL policy may, however, provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, not in cases where faulty workmanship damages the work product alone." Id. at 123, n.4, 621 S.E.2d at 36, n.4. Here, M&M damaged its own work only, not another part of the building as in Crossmann and Newman. M&M did as the contractor did in L-J and caused damage to its own work.

CONCLUSION

The Court of Appeals should reverse the trial court.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John L. McCants", written over a horizontal line.

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March 1, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
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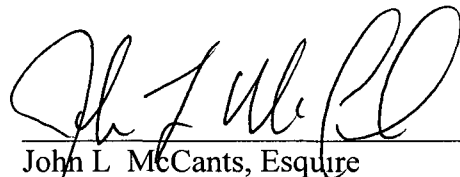
Auto-Owners Insurance Co , Inc

Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Reply Brief of Appellant on Bennett & Bennett Construction, Inc by depositing a copy of same in the United States Mail, postage prepaid, on March 1, 2012, addressed to its attorney of record, Edwin Russell Jeter, Jeter and Williams, P A , Post Office Box 7425, Columbia, South Carolina, 29202

March 1, 2012



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March 1, 2012

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The Honorable Tanya A. Gee
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RE Bennett & Bennett Construction, Inc. v. Auto-Owners Insurance Company,
American International Company, and M & M Construction of the Carolinas,
LLC
Civil Action No. 2007-CP-40-7251
Appellate Docket No. 2011183007
Our File No. 000118-58205

Dear Ms. Gee:

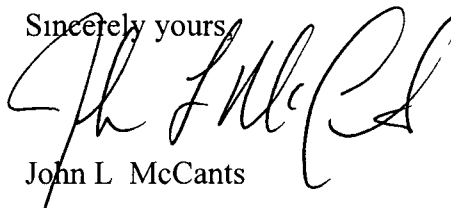
Enclosed herein for filing please find an original and two (2) copies of the **Reply Brief of Appellant** in the above-referenced matter. Please file the original and return a clocked-in copy of same to my office via our firm's courier.

Thank you for your assistance in this matter and should you otherwise have any questions or comments, please do not hesitate to contact me.

By copy of this letter to opposing counsel, I am hereby serving him with a copy of same.

With warm, kind regards, I am

Sincerely yours,



John L. McCants

JLM/sb

cc
Edwin Russell Jeter, Esquire

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
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Case No 2007-CP-40-7251

Bennett & Bennett Construction, Inc

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Auto-Owners Insurance Co , Inc

Appellant

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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."	9
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.	20
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STATEMENT OF ISSUES ON APPEAL

- I DID THE TRIAL COURT CORRECTLY DETERMINE THAT EXCLUSION J(5) DID NOT DEFEAT COVERAGE UNDER THE PRODUCTS-COMPLETED OPERATIONS COVERAGE OF APPELLANT'S CGL POLICY?
 - A WAS THE TRIAL COURT CORRECT THAT THE (J)(5) EXCLUSION APPLIES TO ON-GOING OPERATIONS PRIOR TO COMPLETION BUT DOES NOT DEFEAT COMPLETED OPERATIONS COVERAGE FOR DAMAGE CAUSED AFTER THE WORK IS "COMPLETE" AS DEFINED IN THE PRODUCTS-COMPLETED OPERATIONS COVERAGE?
 - B IF THE POLICY LANGUAGE IS AMBIGUOUS AND THE INSURED'S INTERPRETATION OF AMBIGUOUS POLICY LANGUAGE IS REASONABLE, THEN SHOULD THE INSURED PREVAIL AND COVERAGE BE FOUND TO EXIST?
- II DID THE TRIAL COURT CORRECTLY DETERMINED THAT EXCLUSION N WAS NOT APPLICABLE IN THIS CASE?

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 (Tr 46). 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")(Pltf Ex 1), 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 (Tr 46, line 22- p 48, line 3, Pltf Exs 4-6), 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 Pltf Ex 20). 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 (Tr 6, line 8- p 7, line 25). BBCI put the masonry work out for competitive bids, and M & M was the low bidder (Tr 6, 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 (Tr 6, line 17-20, Pltf Ex 3). The homeowner chose to use a decorative brick that would give her home a certain desired appearance (Tr 7, line 17-p 8, 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 (Tr 7, 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 (Tr 8, line 4-p 10, line19, p 51, line 17-22, Pltf Ex 7). They agreed that the line item in M & M's proposal for brick cleaning, would be deleted (Tr 12, line 9-25). M & M never invoiced BBCI for cleaning the brick as they laid it (Pltf Ex 21).

As agreed between BBCI and M & M, the brick cleaning contemplated by the contract was done soon after the brick was laid (Tr 9, line 15-25, p 51, line 17-22) BBCI inspected the work on a periodic basis and found it to be satisfactory (Tr 13, line 4-17, p 15, line 1-11, p 70, 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 (Tr 13, line 4-17, p 15, line 22-25, p 16, line 1-24, p 20, line 7-9, Pltf Ex 21 at p 5, Pltf Ex 10) 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 (Tr 20, line 10-21, p 69, line 20-p 70, 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 (Tr 20, line 10- p 22, line 12) BBCI called M & M to return to the job and correct these limited areas of concern (Tr 22, line 5-18)

On May 20 2002, (Tr 28, lines 8-12, page 73, lines 2-9, Pltf Ex 9) 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 (Tr 24, line 17- page 25, line 10, page 34, line 20- page 35, line 20, page 102, 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 (Tr 28, line 13- page 29, line 8, page 101, 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 (Tr 15, line 12- page 16, line 17, page 18, line 12- page 19, line 15, Pltf Ex 10) 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 (Tr 20, lines 10-21, page 69, line 20-page 70, 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 (Tr 86, lines 21-25, page 103, lines 1-11, page 105, line 6- page 106, 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 (Tr 37, lines 14-17, page 105, line 6- page 106, line 18, Pltf Ex 10) 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 (Tr 40, line 12- page 41, line 12, Pltf Ex 13) M & M tried to find replacement

brick for the damaged areas but could find no brick from the same lot as the existing brick (Tr 37, line 14- page 38, line 9, page 41, line 13- page 42, line 17, Pltf Ex 14 and 15) 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 (Tr 41, line 13- page 44, line 22 page 105, lines 6-13, Pltf Ex 14 and 15) 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 (Tr 45 lines 1-20, page 86, lines 21-25, page 106, line 19- page 107, line 9) Bennett denied that the brick was removed due to any installation issue, and the homeowner never objected on that basis (Tr 94, line 25- page 95, line 9, page 107, 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 (Def Ex 6, 7/25/2002 invoice) There was no report of an installation issue until BBCI had already started removing the brick to completely reclad the house (Tr 92, line 12- page 93, 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 (Pltf Ex 16, Tr 106, line 7- page 107, 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 (Pltf Ex 22 p 2). 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" [Ex 22, §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 ” [Ex 22, §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 [Ex 22, §(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 ” [Ex 22, §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 (Tr 10, line 9- page 11, 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 (Pltf Ex 21). 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 (Tr 101, 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 (Pltf Ex 9). 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 (Tr 97, 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) [Pltf Ex 22, §(V)(15), p 14] 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 [Ex 22, §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 Abbervill-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

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 coverage²

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

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 complete³ BBCI called M&M to return to the job and do corrective work (Order, FOF #4 p 3) 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?

³ (Order, 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 (Order, 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

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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-

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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 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 supports 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 (Tr 43, 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 (Tr 38, line 10- page 39, line 1, Pltf Ex 12). 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 ” (Order, Concl M, pp 10-11). That reasoning is correct.

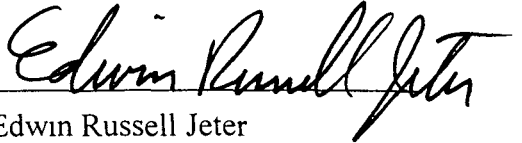
In summary, exclusion (n) does not bar coverage for the removal and replacement of the brick damaged by the defective work of the insured.

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,

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February 20, 2012

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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 Co , Inc

Appellant

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STATEMENT OF ISSUES ON APPEAL

- I DID THE TRIAL COURT ERR AS A MATTER OF LAW ON THE APPLICATION OF EXCLUSION J(5) OF THE INSURANCE POLICY?
- II DID THE TRIAL COURT ERR AS A MATTER OF LAW ON THE APPLICATION OF EXCLUSION N OF THE INSURANCE POLICY?

STATEMENT OF THE CASE

Respondent Bennett & Bennett Construction, Inc ("Respondent") commenced a civil action on October 31, 2007 seeking declaratory relief against Appellant Auto-Owners Insurance Company ("Appellant") Respondent alleged that Appellant must indemnify Respondent for a default judgment Respondent obtained against Defendant M&M Construction of the Carolinas, LLC ("M&M")¹ Appellant answered the complaint and denied that Respondent was entitled to indemnity² The civil action came before the Honorable J Ernest Kinard, Jr for a non-jury trial on October 18, 2010 The trial court declared there was insurance coverage and issued an order filed on December 2, 2010 in favor of Respondent for the full dollar amount of the prayer and interest for the total sum of \$124,665 84 Appellant moved to have the trial court reconsider its decision, and the trial court denied the motion by order filed on January 5, 2011 Appellant filed and served a Notice of Appeal on January 19, 2011 The appeal was staved for a period of time pending a final decision by the South Carolina Supreme Court in Crossmann Communities of North Carolina, Inc v Harleysville Mut Ins Co , --- S E 2d ----, 2011 WL 3667598 (2011)

¹ M&M did not appear in the declaratory judgment civil action or otherwise demand indemnity from Auto Owners

² Appellant issued an insurance policy to M&M with commercial general liability coverage effective for the period December 10 2001 to December 10 2002

STATEMENT OF FACTS

The claim giving rise to the declaratory judgment action was a construction defect claim. Respondent contracted with Joanne Epley ("Epley") to remove the stucco cladding on her house and replace it with brick. As part of its contract with Epley, Respondent agreed to install and clean the brick. Respondent, in turn, subcontracted with M&M to install and clean the brick. To clean the brick, M&M used a pressure washer. In using the washer, M&M used too much pressure and marred the face of some of the bricks. In addition, M&M apparently used a cleaning solution that contained too much acid and stained some of the bricks. After various disagreements with Respondent over how to fix the damages, M&M quit and left the job. Respondent then removed and replaced all of the brick on the house at Respondent's expense.

On April 13, 2005, Respondent commenced a civil action against M&M in the Court of Commons Pleas, Spartanburg County, to recover the costs to remove and replace the brick. In its complaint against M&M, Respondent alleged that "Bennett & Bennett contracted with M&M to lay *and clean brick*." In the next paragraph, Respondent alleged, "[w]hile *cleaning the brick* M&M used a pressure cleaning process. As a result, Bennett & Bennett's brick was damaged."

Respondent notified Appellant of the civil action, but Appellant did not provide a defense to M&M based on the allegations in Appellant's complaint.³ M&M did not demand a defense or indemnity from Appellant and did not appear in the civil action filed

³ The duty to defend is based on the allegations in the complaint. Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12-459, 2012 S.E.2d 318 (S.C. App. 1995), aff'd, 321 S.C. 310, 468 S.E.2d 304 (1996). An insurer is obligated to defend only actions involving claims covered by the insuring contract. Stroup Sheet Metal Works, Inc. v. Aetna Cas. & Sur. Co., 268 S.C. 203, 232 S.E.2d 885 (1977).

in Spartanburg County Respondent obtained a default judgment against M&M The Court issuing the default judgment stated, “[t]his matter arose out of a construction project in which the Plaintiff *[Bennett & Bennett]* hired a masonry contractor to install and clean brick ” “In cleaning the brick, the Defendant [M&M] failed to follow the manufacturer’s instructions and accepted industry practice The pressure washer knocked the finish off the brick and left visible wand marks ” Respondent obtained a default judgment against M&M for the sum of \$84,133 16 and demanded that Appellant pay the judgment

ARGUMENTS

I THE TRIAL COURT ERRED AS A MATTER OF LAW ON THE APPLICATION OF EXCLUSION J(5) OF THE INSURANCE POLICY

In a declaratory judgment action, “[t]he burden of proof is on the insured to show that a claim falls within the coverage of an insurance contract. The insurer bears the burden of establishing exclusions to coverage.” Sunex Intern, Inc v Travelers Indem Co of Ill., 185 F Supp 2d 614, 617 (D S C 2001) (internal citations omitted). Insurance policies are subject to the general rules of contract construction. Century Indemnity Co v Golden Hill Builders, Inc., 348 S C 559, 565, 561 S E 2d 355, 358 (2002). The Court must give policy language its plain, ordinary, and popular meaning. Century Indemnity, 348 S C at 565, 561 S E 2d at 358. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. Century Indemnity, 348 S C at 565, 561 S E 2d at 358. South Carolina law provides that each exclusion in a policy must be read and applied independently of every other exclusion; exclusions are not read cumulatively. Auto-Owners Insurance Co., Inc v Newman, 385 S C 187, 684 S E 2d 541 (2009) citing, Engineered Products, Inc v Aetna Cas & Sur Co., 295 S C 375, 368 S E 2d 674, (Ct App 1988) (quoting Weedo v Stone-E-Brick, Inc, 81 N J 233, 405 A 2d 788, 795 (1979)). Exclusions in an insurance policy are construed most strongly against the insurer. Century Indemnity, 348 S C 559, 565, 561 S E 2d 355, 358.

The South Carolina Supreme Court addressed comprehensive general liability (“CGL”) insurance coverage for a construction defect claim recently in Crossmann Communities of North Carolina, Inc v Harleysville Mut Ins Co, --- S E 2d ----, 2011 WL 3667598 (2011) (“Crossmann”) and previously in Auto-Owners Insurance Co., Inc

v. Newman, 385 S C 187, 684 S E 2d 541 (2009)(“Newman”) and L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 366 S C 117, 621 S E 2d 33 (2005)(“L-J”) While the facts in Crossmann, Newman and L-J may be different in some respects, e g , building envelope defects and road construction, to the facts in the present appeal, Appellant does not believe that the differences are material to this appeal. The three decisions otherwise set forth the law in South Carolina on CGL insurance coverage for a construction defect claim.

In L-J, a developer hired the insured contractor to perform site work and build the roads for a subdivision. The contractor, in turn, hired subcontractors to perform the work, including the clearing, grubbing, rough grading, fine grading and paving. The roads were completed in 1990, but by 1994, had cracked and settled prematurely due to deficiencies in the work of the subcontractors. On the issue of CGL insurance coverage, the Supreme Court held there was no coverage under the contractor’s insurance policy for the damaged roads. The Supreme Court held that damage to the insured’s own work product was not a covered loss. Id. at 123, n 4, 621 S E 2d at 36, n 4. The Supreme Court added, “[t]he CGL policy may, however, provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, not in cases where faulty workmanship damages the work product alone.” Id. at 123, n 4, 621 S E 2d at 36, n 4.

In Newman, a homeowner contracted with the insured builder to construct a house with a stucco cladding. The builder’s stucco subcontractor installed the stucco wrong, which allowed inclement weather, over time, to damage the wood sheathing and

framing installed by the framing subcontractor. The issues for coverage on appeal were whether the costs to repair the damaged wood framing and sheathing and the costs to remove and replace the stucco system were insured losses.

The Supreme Court in Newman held that the faulty installation of the stucco that resulted in damage to the sheathing and framing was an “occurrence” of “property damage” within the meaning of the insuring agreement section of the policy. Newman, 385 S.C. 187, 196, 684 S.E.2d 541, 545. The Supreme Court held that the damaged wood sheathing and framing was an insured loss not otherwise subject to an exclusion in the policy. The Supreme Court held that the costs to remove and replace the stucco were not an insured loss based on Exclusion N.

C Damages awarded for replacement of the defective stucco

Auto-Owners finally argues that even if an “occurrence” warrants recovery for the Homeowner's property damage, the trial court erred in determining that the CGL policy covered the arbitrator's itemized allowance for replacing and repairing the defective stucco itself as an incidental cost to repairing the damage to other property. We agree.

Although the subcontractor exception preserves coverage for property damage that would otherwise be excluded as “your work,” another policy exclusion bars coverage for damage to the defective workmanship itself. Specifically, the policy exclusion provides that the insurance does not cover damages “claimed for any loss, cost or expense for the repair, replacement, adjustment, removal or disposal of ‘Your product’, ‘Your work’, or ‘Impaired property’, if such product, work or property is withdrawn from use because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.” These terms unambiguously prohibit recovery for the cost of removing and replacing the defective stucco—even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy—and serve as one of the bases for this Court's acknowledgment that a claim solely for economic losses resulting from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover. See L-J 366 S.C. at 122, 621 S.E.2d at 35. Accordingly, we hold that any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy.

Newman, 385 S C 187, 197-98, 684 S E 2d 541, 546

Crossmann is factually similar to Newman in that the facts involved progressive water intrusion damages to the framing and sheathing of condominium buildings caused by deficiently installed exterior siding by subcontractors. The Supreme Court in Crossmann affirmed Newman on the main principle that a construction defect created by a subcontractor that causes damage to another part of a building is an "occurrence" of "property damage." Crossmann, pg *4. Of note, the parties in Crossmann elected to present their case on the "occurrence" issue only and stipulated that the Supreme Court would not address exclusions in the policy. Crossmann, pg *4. The same stipulation was not made in the present appeal.

Exclusion j(5) bars coverage for the judgment obtained in Spartanburg County or bars indemnity for the damages sought by Respondent. The exclusion reads as follows:

This insurance does not apply to property damage to [t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations.

The pleadings filed by Respondent and the order filed in Spartanburg County clearly state that M&M damaged the brick while cleaning it -- *or performing an operation*. The pleading and order did not need further explanation, testimony or clarification, and the trial court should have applied j(5) to bar coverage. The "duty to indemnify is based on evidence found by the factfinder." Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S C 309, 314, 476 S E 2d 708, 711 (Ct App 1996), State Farm Fire and Cas. Co. v. Weaver, 585 F Supp 2d 722 (D S C 2008). In insurance coverage litigation, parties are bound by determinations of liability and the amount of damages and

may not relitigate these issues See Sims v Nationwide Mutual Ins Co, 247 S C 82, 145 S E 2d 523 (1965)

At trial, Respondent pursued a position that the pressure washing that damaged the brick was “punchlist” or “corrective” work performed by M&M and therefore fell within the definition of “Products-Completed Operations Hazard”, thereby making j(5) inapplicable. The trial court agreed with Respondent. The trial court held since the damage fell within the “Products-Completed Operations Hazard”, j(5) could not be applicable to bar coverage. (Order filed November 23, 2010, pg. 8) In other words, j(5) and the “Products-Completed Operations Hazard” were mutually exclusive. The trial court reasoned as follows: 1) Respondent expected M&M to clean the brick as M&M installed it, 2) the brick installation itself was complete in late April 2002, 3) after the brick was installed, Respondent noticed that it still needed cleaning, 4) the status of construction at this point constituted “work that may need service, maintenance, correction, repair or replacement” or the “Products-Completed Operations Hazard” was applicable, 5) the pressure washing was performed by a subcontractor for M&M who damaged M&M's work.⁴ (Order filed November 23, 2010, pg. 7) The decision by the

⁴ The installation of the brick was M&M's work. The policy includes the following definition for the term “Your Work”:

15 “Your work” means

- a** Work or operations performed by you or on your behalf and
- b** Materials, parts or equipment furnished in connection with such work or operations

16 “Your work” includes

- a** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work” and
- b** The providing of or failure to provide warnings or instructions

trial court is wholly dependent on an interpretation of the policy that the "Products-Completed Operations Hazard" and j(5) cannot be applicable at the same time This interpretation of the policy is erroneous

Assuming arguendo the "Products-Completed Operations Hazard" may be applicable, this does not mean that Exclusion j(5) is inapplicable South Carolina insurance law required the trial court to apply j(5) independently of other provisions in the policy Engineered Products, 295 S C at 378, 368 S E 2d at 675

The Court of Appeals in Engineered Products stated the following

The flaw in Engineered Products' argument that Exclusion (a) renders the policy ambiguous is its apparent belief that exclusions should be read together and cumulatively The settled rule, however, is just the opposite Exclusions in an insurance policy are to be read independently of each other, they are not to be read cumulatively Weedo v Stone-E-Brick, Inc , 81 N J 233, 405 A 2d 788, 795 (1979) Indeed, as the New Jersey Supreme Court noted in Weedo, quoting Tinker, *Comprehensive General Liability Insurance-Perspective and Overview* 25 FED'N INS COUN Q 217, 223 (1975),

"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, 295 S C at 378, 368 S E 2d at 675

The plain meaning of the phrase "are performing operations" means that M&M was working on the job when the damages occurred David Bennett admitted the substance of the exclusion at trial

Q All right, once again, you agree that M&M damaged the brick while performing an operation of cleaning it, correct?

A Yes

Transcript Pg 78

Unlike the two other “work exclusions”, specifically Exclusion j(6) and Exclusion L, j(5) does not specifically include in its definition the "Products-Completed Operations Hazard" ⁵ J(5) is written without the term “Products-Completed Operations Hazard” or its limitation Further, j(5) specifically includes work performed by a subcontractor such that damage caused by a subcontractor while performing an operation, e g , pressure washing, is excluded by j(5) J(5) is not limited to the time period before work is completed or the "Products-Completed Operations Hazard" period J(5) is only limited (in time) to those damages that occur while the insured is working on the job Importantly, even if one characterizes the pressure washing as a "service, maintenance, correction, repair or replacement", negligently performing any one of these operations or tasks, and causing damage at the same time, triggers j(5) Unlike in L-J, Newman and Crossmann, where the damages occurred months and years after the contractor left the job, M&M damaged the brick while on the job

That the trial court committed a legal error is further supported by the analysis in Newman In Newman, the Supreme Court found that the subcontractor completed the installation of the stucco which meant that the "Products-Completed Operations Hazard" was applicable Id Even with a “completed operation” in place, the Supreme Court

⁵ Exclusion j(6) states 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

The trailing language to Exclusion j(6) states [p]aragraph (6) of this exclusion does not apply to ‘property damage included in the products completed operations hazard

Exclusion L states [p]roperty damage to your work arising out of it or any part of it and including the products completed operations hazard

found that Exclusion N applied to bar coverage for those damages which were the cost to remove and replace the stucco Newman, 385 S C at 197, 684 S E 2d at 546 ("Although the subcontractor exception preserves coverage for property damage that would otherwise be excluded as "your work," another policy exclusion bars coverage for damage to the defective workmanship itself ") The "Products-Completed Operations Hazard" does not trump j(5)

The decision 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, Pa 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)(*rehearing denied*) ("National Union Fire") illustrates the application of j(5) and the "Products-Completed Operations Hazard" in a fact pattern together

Structural Systems Technology, Inc ("SST") contracted with a company for the erection of a broadcasting tower SST contracted with LeBlanc & Royle Telcom, Inc ("LeBlanc & Royle") to supply steel rods to be used in the erection of the tower After erection of the tower, the owner began broadcasting from it or put the tower to its intended use Subsequently, defects were discovered in the tower with the rods supplied by LeBlanc & Royle, and SST began replacing the rods While replacing the rods, the tower collapsed and was destroyed along with the broadcasting equipment attached to it

The owner sued SST and LeBlanc & Royle for damages arising out of the collapse of the tower The complaint alleged negligent design, manufacture, and assembly of the tower, *and negligent repair and modifications to the towers* performed by SST The

complaint alleged damage to the tower and the attached broadcasting equipment SST tendered the defense of the civil action to National Union Fire, which had issued an insurance policy with commercial general liability coverage to SST⁶ National Union Fire filed a declaratory judgment action to determine its obligation to defend and indemnify SST for the damages alleged in the case The case came before the United States District Court for the Eastern District of Missouri pursuant to a motion for summary judgment filed by National Union Fire

The pertinent findings by the district court for the present matter are as follows The district court found that the "products-completed operations hazard" was in place because the tower was erected and put to its intended use The district court found that the work being performed by SST to replace the defective rods, when it collapsed, fell within the trailing language of, "work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed " Notwithstanding, the district court found that j(5) would preclude coverage if the trier of fact found that the reason for the collapse was negligent replacement of the rods being performed by SST when the collapse took place as opposed to the original installation or manufacturer of the defective rods

The district court found the following as to Exclusion j(5)

With respect to exclusion j(5), since this Court has held that the tower is real property, the exclusion applies to the tower, if it is determined in later trials that the collapse "arose out of" the actual repair operations, as opposed to "out of" the alleged defective rods Therefore, for purposes of this action, National has a duty to defend SST because of the potential for coverage However, if it is determined at a later date that the collapse "arose out of" the tower, this exclusion will apply and National will have no duty to indemnify as to the tower damage The Court further finds that

⁶ The relevant policy language in the National Union Fire policy is the same as that in the Auto Owners policy

exclusion j(5) does not apply to the other equipment, in that the transmission lines and antenna systems are not “real property”

Id at 1240-41

The trial court cited five cases for the proposition that j(5) does not apply to a “completed operation” See Advantage Homebuilding, LLC v Maryland Cas Co 470 F 3d 1003 (10th Cir 2006), Acceptance Ins Co v Ross Contractors, Inc 2008-MN0723 117, p 18 (Minn Ct App 2008)(unpublished), Fisher v American Family Mut Ins Co, 579 N W 2d 599 (N D 1998), Alveson v Northwestern National, 559 N W 2d 234 (SD 1997), and Spears v Smith, 690 N E 2d 557 (Oh Ct App 1996) The five cases, however, did not address the relation between j(5) and "Products-Completed Operations Hazard" as specifically addressed in National Union Fire In fact, the five cases support Appellant’s position herein

In two of the cases, Advantage Homebuilding and Alveson, the Courts addressed facts similar to the ones in the present matter and found there to be no coverage In Advantage Homebuilding, the mason scratched the windows when he dropped mortar on them The Court applied Exclusion j(5) to exclude coverage for the damages - the cost to replace windows Id In Alveson, the mason scratched the windows while cleaning dirt and mortar off them left on the windows during the brick installation The Court applied Exclusion j(6) to exclude coverage for the damages - the cost to replace windows Id In both cases, the mason damaged other property while working on the job

The other three cases are factually similar to Crossmann, Newman and L-J and were decided consistently with the three South Carolina decisions In none of the three foreign cases was the contractor working on the job at the time the damages took place In Fisher v American Family Mut Ins Co, the insured installed the floors After

installing the floors, the insured hired another party to sand the floors and apply a finish. The damages to the floors occurred months later after the house was occupied. Id. at 601 ("Within a few months [after the sanding], wide gaps began to appear between sections of the flooring and individual boards began splitting.") The Court stated, "[w]e, therefore, conclude exclusion j(5) excludes coverage only for property damage during the time Kensok worked upon the property." Id. at 604. The Court's conclusion that j(5) was inapplicable was correct.

The facts in Fisher are similar to the ones in Crossmann, Newman and L-J and implicate coverage for damages that occur after the contractor has left the job. In Newman and Crossmann, the installation of the stucco or siding was completed and the water damage to the framing and sheathing occurred months after the builder left the job. In L-J, the road did not settle and crack until years later. If the contractor in Fisher had damaged the floors by marring them or grinding them with the machine in the same manner that M&M "blasted" the brick with the pressure washer, one can reasonably conclude that the Fisher court would have barred coverage based on Exclusion j(5).

In Acceptance v. Ross Contractors, the owner contracted with the insured Ross Contractors to replace the roof on a building. Ross Construction completed the installation of the roof in February 1999. A year later, in February 2000, the owner discovered the roof was leaking and sued Ross Contractors for damages resulting from the improper installation of the roof, including damages to the interior of the building. The Court of Appeals reversed the grant of summary judgment in favor of the insurer and remanded the case for further proceedings. The reasoning used by the Court of Appeals is consistent with the reasoning in Crossmann, Newman and L-J and as described above.

In Spears, the insured contractor built a house for the Spears. After moving into the house, the Spears noticed "sponginess", depressions and that the floor sank. Id. at 558. As a result of the floor sinking, the home's walls and floor separated, the drywall cracked and cabinets separated, among other things. The Court of Appeals of Ohio reversed the grant of summary judgment in favor of the insurer. Id. at 561. The reasoning used by the Court of Appeals is consistent with Crossmann, Newman and I-J.

Even if one is to assume that the "Products-Completed Operations Hazard" and j(5) are mutually exclusive, the "Products-Completed Operations Hazard" is inapplicable to the facts in the case. The "Products-Completed Operations Hazard" is inapplicable because M&M had not finished its contract when M&M damaged the brick. David Bennett for Respondent testified at trial that cleaning the brick was part of M&M's contract.

Q Did you consider this to be within the scope of what they were supposed to do in their contract?

A Yes

(Transcript pg. 23)

By definition, "your work is deemed completed (1) "when all of the work called for in your contract has been completed." See Section V - Definitions 11 b (1). As an alternative, ¶ 11 b (3) provides "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." See Section V - Definitions 11 b (3).⁷ In addition, there is the trailing language of the definition of "Products-Completed Operations Hazard" that has been cited herein.

⁷ The policy provides that the earlier of the two definitions is applicable.

Just as Respondent was obligated to clean the brick by its own contract with Epley, M&M was contractually obligated to clean the brick for Respondent. In other words, Respondent delegated this task to its subcontractor. Whether M&M cleaned the brick as it installed them or cleaned all the brick at the end of the job, no one disputes that M&M was required to clean the brick (whether Respondent paid M&M for the task or not). Respondent pled in its complaint filed in Spartanburg County and the Default Order reads – Respondent contracted with M&M to lay and clean the brick. Accordingly, the "Products-Completed Operations Hazard" does not apply to the facts of the case. The case is simply a breach of contract between a general contractor and its subcontractor.

II THE TRIAL COURT ERRED AS A MATTER OF LAW ON THE APPLICATION OF EXCLUSION N OF THE INSURANCE POLICY

Exclusion N is applicable to bar coverage herein. Of note, Exclusion N in the present insurance policy is the same one (or language) as the one in Newman. For the purposes of Exclusion N, it does not matter whether a subcontractor is involved or whether the "Products-Completed Operations Hazard" is applicable. See Newman, 385 S.C. 187, 684 S.E.2d 541 (a subcontractor installed stucco for the insured builder and completed the installation of the stucco, notwithstanding, Exclusion N was applicable). Unlike exclusion I, Exclusion N is not modified or limited by whether a subcontractor does the work *or whether the job is completed or not*.

Respondent hired an engineering firm to inspect M&M's work, unrelated to the marred/stained brick damage.⁸ The engineer found that M&M installed the brick wrong, and Respondent needed to be remove and replace all the brick on that basis. The amount spent to remove and replace the brick, because the bricks were installed incorrectly, is a

⁸ In fact, the engineer's fee in the amount of \$3,374.31 is part of the judgment against M&M.

claim for faulty workmanship only and is not covered by a commercial general liability insurance policy Newman, 385 S C at 194, 684 S E 2d at 544 (applying Exclusion N and stating, "subcontractor's negligent application of the stucco does not on its own constitute an 'occurrence' ")

With the facts for the present matter inserted in brackets and the relevant language of the Exclusion in bold print, Exclusion N applies as follows

This insurance does not apply to

Damages [the cost to remove and replace the bricks] **claimed for any loss, cost or expense incurred by others** [Bennett & Bennett] **for repair, replacement, removal or disposal of 2) 'Your work'** [the installation of the bricks] **if work is withdrawn from use** [removed and replaced] **by any person** [Bennett & Bennett] **because of a known or suspected defect, deficiency** [Epley suspected instability and collapse, the brick was installed wrong according to the engineer, or the brick was damaged by pressure washer while M&M was cleaning it]

The application of Exclusion N to the facts herein is no different than the application of the Exclusion in Newman. The failure of M&M to fulfill its contract to clean its own work properly or install the brick correctly is 'a claim solely for economic losses resulting from faulty workmanship [that] is part of an insured's contractual liability which a GGL policy is not intended to cover" Newman, 385 S C at 197-198, 684 S E 2d at 546

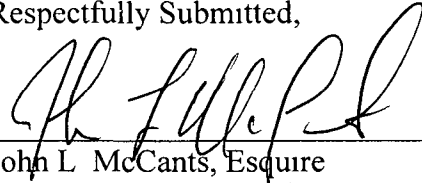
Finally, the facts of the present case fit squarely into the law of L-J, Newman and Crossmann. As stated in L-J and reiterated in Newman, "[t]he CGL policy may, however, provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, not in cases where faulty workmanship damages the work product alone" Id at 123, n 4 621 S E 2d at 36, n 4. Here, M&M

damaged its own work only not another subcontractor's work as in Crossmann and Newman M&M did as the contractor did in L-J – caused damage to its own work product

CONCLUSION

The Court of Appeals should reverse the trial court

Respectfully Submitted,



John L. McCants, Esquire
Ellis, Lawhorne & Sims, PA
1501 Main Street, 5th Floor
Post Office Box 2285
Columbia, South Carolina 29201
(803) 254-4190
Attorney for Appellant

January 20, 2012

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 Co , Inc

Appellant

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD OF APPEAL**

Respondent proposes the following be included in the Record on Appeal in addition to the matter designated by Appellant

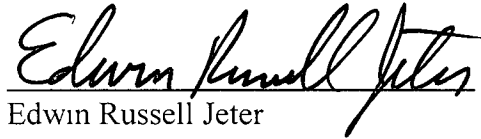
1	Pltfs Trial Ex 1	Order dated March 6, 2006
2	Pltfs Trial Ex 3	Insurance Certificate for M&M Construction of the Carolinas, LLC
3	Pltfs Trial Ex 4	Letter dated May 23, 2005
4	Pltfs Trial Ex 5	Letter dated October 24, 2005
5	Pltfs Trial Ex 6	Letter dated February 23, 2006
6	Pltfs Trial Ex 7	Brick placard
7	Pltfs Trial Ex 9	May 23, 2002 ACORD claim form
8	Pltfs Trial Ex 10	June 19, 2002 fax
9	Pltfs Trial Ex 11	June 27, 2002 letter
10	Pltfs Trial Ex 12	July 2, 2002 letter
11	Pltfs Trial Ex 13	July 3, 2002 letter
12	Pltfs Trial Ex 14	July 9, 2002 letter
13	Pltfs Trial Ex 15	July 10, 2002 letter
14	Pltfs Trial Ex 16	July 23, 2002 letter
15	Pltfs Trial Ex 19	Photographs
16	Pltfs Trial Ex 20	Interest on judgment calculation
17	Pltfs Trial Ex 21	M&M invoices

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SC Court of Appeals

18 Pltfs Trial Ex 22 CGL Policy
19 Def Trial Ex 6 Richtex invoices including invoices for 7/11/02 and 7/25/02

I certify that this designation contains no matter which is irrelevant to this appeal

Respectfully submitted,

A handwritten signature in black ink, reading "Edwin Russell Jeter", written over a horizontal line.

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

February 20, 2012

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,

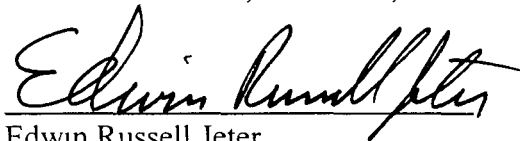
v

Auto-Owners Insurance Co , Inc

Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal on Appellant by depositing a copy of same in the United States Mail, postage prepaid, on February 20, 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

February 20, 2012

Jeter & Williams, P A

ATTORNEYS AND COUNSELORS AT LAW

Edwin Russell Jeter
Daryl L. Williams

1204 Main Street Suite 200 (29201)
Post Office Box 7425
Columbia South Carolina 29202

Tel 803/765 0600
Fax 803/765 0619

February 21, 2012

Via Hand Delivery

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

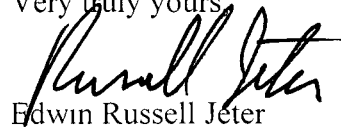
Re Bennett & Bennett Construction, Inc v Auto-Owners Ins Co, Civil Action No 2007-CP-40-7251,
Appellate Docket No 2011183007

Dear Ms. Gee

Enclosed for filing please find an original and two (2) copies of the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal in the above-captioned matter. Please file the original and return a clocked in copy of same to my office via the delivery person.

Please accept my high regards

Very truly yours,



Edwin Russell Jeter

cc John L. McCants Esquire

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FEB 21 2012
SC Court of Appeals

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

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JAN 20 2012
SC COURT OF APPEALS

Bennett & Bennett Construction, Inc

Respondent,

v

Auto-Owners Insurance Co , Inc

Appellant

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

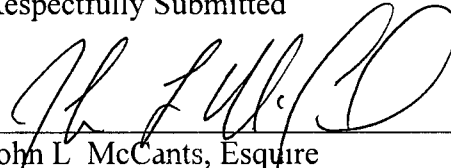
Appellant proposes the following be included in the Record on Appeal

- 1 Complaint filed in Civil Action No 2007-CP-40-7257,
- 2 Answer filed in Civil Action No 2007-CP-40-7257,
- 3 Complaint filed in Civil Action No 2005-CP-42-1118,
- 4 Order filed March 6, 2006 in Civil Action No 2005-CP-42-1118,
- 5 Invoice dated January 21, 2003 – M&M Construction of Carolinas, LLC,
- 6 Construction Contract (BCCI and Joanne Epley) dated January 28, 2002,
- 7 Insurance Policy,
- 8 Letter dated July 31, 2002 - Charles I Pollack, Esq to Boyd B Nicholson, Esq ,
- 9 Letter dated August 13, 2002 - Charles I Pollack, Esq to Boyd B Nicholson,
- Esq ,
- 10 Letter dated August 23, 2002 – William H Riddle to David Bennett,
- 11 Letter dated August 23, 2002 - Charles I Pollack, Esq to Boyd B Nicholson,
- Esq ,
- 12 Letter dated December 9, 2002 – William H Riddle to David Bennett,
- 13 Masonry Inspection Report dated December 6 2002 by Builders Engineering
- Corp ,
- 14 Brick Clearing Instructions for Richtex Brick,
- 15 Judgment/Order filed November 23, 2010

16 Motion to Alter or Amend, Motion to Reconsider Pursuant to S C R Civ P 59(e),
17 Order filed January 4, 2011, and
18 Trial Transcript of October 18, 2010

I certify that this designation contains no matter which is irrelevant to this appeal

Respectfully Submitted

A handwritten signature in black ink, appearing to read 'J. L. McCants', written over a horizontal line.

John L. McCants, Esquire
Ellis Lawhorne & Sims, PA
1501 Main St 5th Floor
P O Box 8825
Columbia, SC 29201
(803) 212-4959

Attorney for Appellant

January 20 2012

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

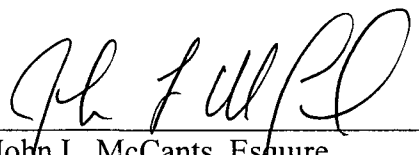
Auto-Owners Insurance Co , Inc

Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Initial Brief of Appellant and Designation of Matter to Be Included in the Record on Appeal on Bennett & Bennett Construction, Inc by depositing a copy of same in the United States Mail, postage prepaid, on January 20, 2012, addressed to its attorney of record, Edwin Russell Jeter, Jeter and Williams, P A , Post Office Box 7425, Columbia, South Carolina, 29202

January 20, 2012



John L. McCants, Esquire
Ellis, Lawhorne & Sims, PA
1501 Main Street, 5th Floor
Post Office Box 2285
Columbia, South Carolina 29201
(803) 254-4190
Attorney for Appellant

ELLIS:LAWHORNE

JOHN L. McCANTS
Direct Dial 803 712 4959
jmccants@ellislawhorne.com

January 20, 2012

Via Hand Delivery

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE Bennett & Bennett Construction, Inc. v. Auto-Owners Insurance Company,
American International Company, and M & M Construction of the Carolinas,
LLC
Civil Action No. 2007-CP-40-7251
Appellate Docket No. 2011183007
Our File No. 000118-58205

Dear Ms. Gee:

Enclosed herein for filing please find an original and two (2) copies of the **Initial Brief of Appellant** and **Designation of Matter to be Included in the Record on Appeal** in the above-referenced matter. Please file the original and return a clocked-in copy of same to my office via our firm's courier.

Thank you for your assistance in this matter and should you otherwise have any questions or comments, please do not hesitate to contact me.

With warm kind regards, I am

Sincerely yours


John L. McCants

JLM/sb

cc
Edwin Russell Jeter, Esquire

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JAN 20 2012

SC Court of Appeals

The South Carolina Court of Appeals

Bennett & Bennett Construction Inc , Respondent,

v

Auto Owners Insurance Company, Appellant

The Honorable J Ernest Kinard, Jr
Richland County
Trial Court Case No 2007-CP-40-07251

ORDER

For good cause having been shown, the time for serving and filing the Appellant's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until January 20, 2012

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc John L McCants, Esquire
Edwin Russell Jeter, Esquire

FILED

12/30/11

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

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DEC 08 2011
S.C. Court of Appeals

Bennett & Bennett Construction, Inc

Respondent,

v

Auto-Owners Insurance Co , Inc

Appellant

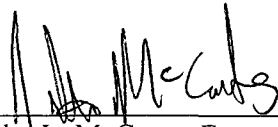
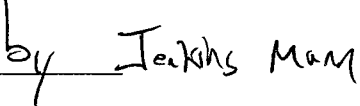
**APPELLANT'S MOTION FOR EXTENSION OF TIME
TO FILE INITIAL BRIEF AND DESIGNATION OF MATTER**

Pursuant to Rules 240 and 263(b), SCACR, Appellant Auto-Owners Insurance Co , Inc hereby moves for a 30-day extension of time in which to file and serve its Initial Brief and Designation of Matter to be Included in the Record on Appeal which, at present, is due December 21, 2011. The grounds for this Motion are that counsel's workload will prevent preparation of these documents within the time required by Rules 208(a) and 209(a) SCACR. This motion is not made for purposes of undue delay or any other improper purpose. Counsel for Appellant certifies that Respondent's counsel consents to the extension requested in this motion.

Accordingly, Appellant requests an Order extending the time to file its Initial Brief and Designation of Matter to be Included in the Record on Appeal for thirty (30) days or until January 20, 2012.

12-21-11
1-20-12

Respectfully Submitted,

 by 
John L. McCants, Esquire
Ellis Lawhorne & Sims, PA
1501 Main St., 5th Floor
P O Box 8825
Columbia, SC 29201
(803) 212-4959
E-mail jmccants@ellislawhornec.com

ATTORNEY FOR APPELLANT

December 8, 2011

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

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DEC 08 2011

SC Court of Appeals

Bennett & Bennett Construction, Inc

Respondent,

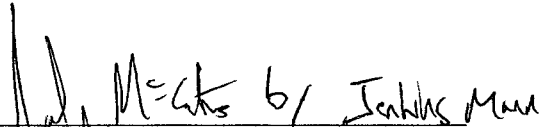
v

Auto-Owners Insurance Co , Inc

Appellant

CERTIFICATE OF SERVICE

I certify that I have served Appellant's Motion for Extension of Time to File Initial Brief and Designation of Matter on Respondent, Bennett & Bennett Construction, Inc by depositing a copy of it in the United States Mail, postage prepaid, on December 8, 2011, addressed to its attorney of record, Edwin Russell Jeter, Jeter & Williams, P A Post Office Box 7425, Columbia, South Carolina 29202


John D. McCants, Esquire
Ellis Lawhorne & Sims, PA
1501 Main St 5th Floor
P O Box 8825
Columbia, SC 29201
(803) 212-4959
E-mail jmccants@ellislawhornec.com

ATTORNEY FOR APPELLANT

December 8, 2011

ELLIS:LAWHORNE

JOHN L. MCCANTS
Direct Dial 803 212 4959
jmccants@ellislawhome.com

December 8, 2011

Via Hand Delivery

Tanya A. Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE Bennett & Bennett Construction, Inc. v. Auto-Owners Insurance Company,
American International Company, and M & M Construction of the Carolinas,
LLC
Civil Action No. 2007-CP-40-7251
Appellate Docket No. 2011183007
Our File No. 000118-58205

Dear Ms. Gee:

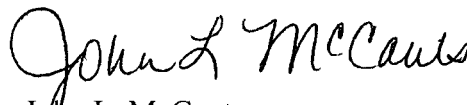
Enclosed herein for filing please find an original and seven (7) copies of Appellant's Motion for Extension of Time to File Initial Brief and Designation of Matter in the above-referenced matter. Please file the original and return a clocked-in copy of same to my office using the enclosed self-addressed, postage paid envelope. Our firm's check in the amount of \$25.00 is included herein for the required filing fee.

By copy of this letter and attached Certificate of Service, I am hereby serving opposing counsel with a copy of same.

Thank you for your assistance in this matter and should you otherwise have any questions or comments, please do not hesitate to contact me.

With warm, kind regards, I am

Sincerely yours,


John L. McCants

JLM/sb

cc
Edwin Russell Jeter, Esquire

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DEC 08 2011
SC Court of Appeals

ELLIS:LAWHORN

JOHN L. MCCANTS
Direct Dial 803 212 4959
jmccants@ellislawhorne.com

November 23, 2011

Via Hand Delivery and Facsimile (803) 734-1839

Tanya A. Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

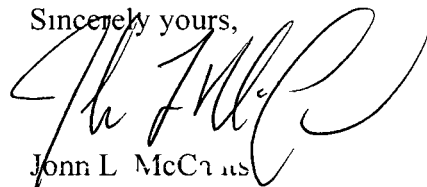
RE Bennett & Bennett Construction, Inc. v. Auto-Owners Insurance Company,
American International Company, and M & M Construction of the Carolinas,
LLC
Civil Action No. 2007-CP-40-7251
Appellate Docket No. 2011183007
Our File No. 000118-58205

Dear Ms. Gee:

Pursuant to the Order of the Court entered on October 11, 2011 in the above-referenced matter, I am writing to advise the Court that the trial transcript has been produced by the court reporter and was received in my offices on Monday, November 21, 2011.

Should you otherwise have any questions or comments, please do not hesitate to contact the parties.

Sincerely yours,



John L. McCants

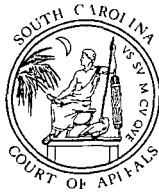
JLM/sb

cc
Edwin Russell Jeter, Esquire

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NOV 23 2011

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29 11
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

October 11, 2011

John L McCants, Esquire
Ellis Lawhorne & Sims PA
P O Box 2285
Columbia, SC 29202

Re Bennett & Bennett v Auto-Owners
Case Tracking # 2011183007

Dear Counsel

The following Order has been endorsed on "Appellant's Motion to Adjust Deadlines" in the above entitled case on appeal

"Granted

John Cannon Few C J
For the Court

By s/ Tanya A Gee
Clerk

October 11, 2011 "

Counsel is requested to immediately inform the Court of the date the transcript is received from the Court Reporter so that timelines may be set accordingly

Very truly yours,

Tanya A Gee / ec
CLERK

TAG/ec

cc Edwin Russell Jeter, Esquire

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
OCT 05 2011

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE J ERNEST KINARD, JR , CIRCUIT COURT JUDGE

Civil Action No 2007-CP-40-7251
Case Tracking # 2011183007

Bennett & Bennett Construction, Inc

Respondent

v

Auto-Owners Insurance Company

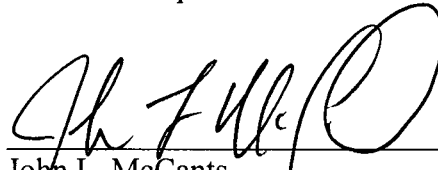
Appellant

APPELLANT'S MOTION TO ADJUST DEADLINES

By Order of the Honorable Jasper M Cureton, filed February 3, 2011, the appeal was remanded to the trial court, and the appeal was held in abeyance pending the trial court's ruling on Appellant's post-trial motion. By letter from the South Carolina Court of Appeals dated September 29, 2011, the Clerk of Court advised Appellant and Respondent that the appeal is no longer in abeyance, and advised Appellant to file and serve Appellant's Initial Brief and Designation of Matter no later than thirty (30) days from September 29, 2011.

As stated in Rule 208(a) SCACR, the deadline for Appellant's Initial Brief and Designation of Matter is triggered by the delivery of the transcript. Appellant held in

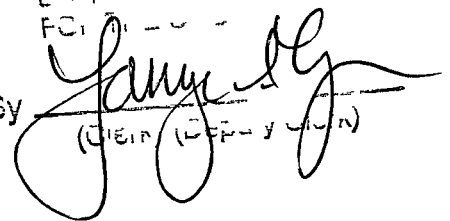
abeyance the ordering of the transcript, as with the initial briefing Appellant respectfully requests the Court adjust the deadlines for Appellant's Initial Brief and Designation of Matter to allow for the ordering of the transcript, and Appellant requests that the deadline in which to file and serve Appellant's Initial Brief and Designation of Matter be adjusted accordingly to correspond with the delivery of the transcript



John L. McCants
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1501 Main Street, 5th Floor
P O Box 2285
Columbia, SC 29202
Telephone (803) 254-4190
Facsimile (803) 799-8479

ATTORNEY FOR APPELLANT

Columbia, South Carolina
October 5, 2011

GRANTED
BY 
(CLERK) (DEPUTY CLERK)

FILED
10/11/11

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE J ERNEST KINARD, JR , CIRCUIT COURT JUDGE

RECEIVED
OCT 05 2011
SC Court of Appeals

Civil Action No 2007-CP-40-7251
Case Tracking # 2011183007

Bennett & Bennett Construction, Inc

Respondent

v

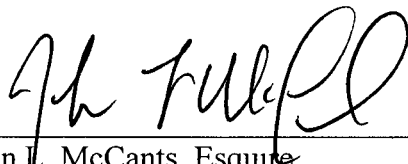
Auto-Owners Insurance Company

Appellant

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Motion to Adjust Deadlines on Bennett & Bennett Construction, Inc by depositing a copy of it in the United States Mail, postage prepaid, on October 5, 2011, addressed to its attorney of record, Edwin Russell Jeter, Jeter and Williams, P A , Post Office Box 7425, Columbia, South Carolina, 29202

October 5, 2011



John L. McCants, Esquire
Ellis Lawhorne & Sims, PA
1501 Main St , 5th Floor
P O Box 8825
Columbia, SC 29201
(803) 254-4190
Attorney for Appellant

ELLIS:LAWHORNE

JOHN L. MCCANTS

Direct Dial 803 212 4959

jmccants@ellislawhorne.com

October 5, 2011

RECEIVED

OCT 05 2011

SC Court of Appeals

Via Hand Delivery

The Honorable Tanya Gee
Clerk of Court, S C Court of Appeals
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

RE Bennett & Bennett Construction, Inc v Auto-Owners Insurance Company,
American International Company, and M & M Construction of the Carolinas,
LLC

Civil Action No 2007-CP-40-7251

Case Tracking No 2011183007

Our File No 118-58205

Dear Ms Gee

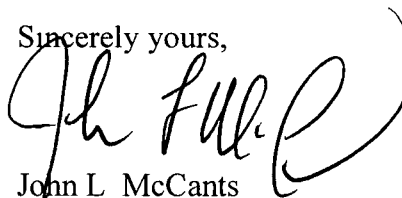
Enclosed herein for filing in the above-referenced matter please find an original and seven (7) copies of **Appellant's Motion to Adjust Deadlines**. Please file the original and return a clocked-in copy of same to my office via my firm's courier. Our firm's check in the amount of \$25.00 is attached hereto for payment of the required filing fee.

By copy of this letter and attached Proof of Service, I am hereby serving opposing counsel with a copy of same.

Should you otherwise have any questions or comments, please do not hesitate to contact me.

With warm personal regards, I am

Sincerely yours,



John L. McCants

JLM/sb

Enclosure

cc (w/ encl)

Edwin Russell Jeter, Esquire

ELLIS:LAWHORNE

JOHN L. McCANTS

Direct Dial 803 212 4959

jmccants@ellislawhome.com

October 5, 2011

Via Certified Mail and U.S. Mail

Deborah M. McCurdy
1403 Geiger Avenue
Columbia, SC 29201-1713

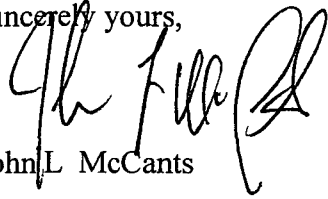
RE Bennett & Bennett Construction, Inc. v. Auto-Owners Insurance Company,
American International Company, and M & M Construction of the Carolinas,
LLC
Civil Action No. 2007-CP-40-7251

Dear Ms. McCurdy

The civil action was tried non-jury before the Honorable J. Ernest Kinard, Jr. on October 18, 2010. I am hereby requesting a copy of the trial transcript. Please advise of any payment you may require in advance. Thank you very much.

Should you otherwise have any questions or comments, please do not hesitate to contact me.

Sincerely yours,


John L. McCants

JLM

cc

Edwin Russell Jeter, Esquire
V. Claire Allen, Deputy Clerk of Court
Office of Court Administration

RECEIVED

OCT 06 2011

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 116 9
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

September 29, 2011

John L. McCants, Esquire
Ellis Lawhorne & Sims PA
P O Box 2285
Columbia, SC 29202

Edwin Russell Jeter, Esquire
Jeter & Williams, J A
P O Box 7425
Columbia, SC 29202

Re Bennett & Bennett v Auto-Owners
Case Tracking # 2011183007

Dear Counsel

We have received Mr. McCants' letter of September 20, 2011 regarding the issuance of Judge Kinaid's letter in the above matter.

All parties are advised that this matter is no longer held in abeyance. Counsel for the Appellant is advised that the Appellant's Initial Brief and Designation of Matter must be served and filed no more than thirty days from the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

ELLIS:LAWHORNE

JOHN L. MCCANTS

Direct Dial 803 212 4959
jmccants@ellislawhorne.com

September 20, 2011

RECEIVED

SEP 21 2011

SC Court of Appeals

The Honorable Jasper Cureton
Judge, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

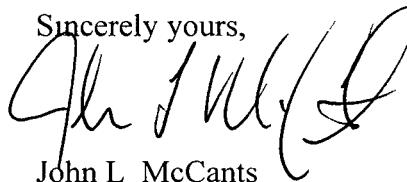
RE Bennett & Bennett Construction, Inc v Auto-Owners Insurance Company,
American International Company, and M & M Construction of the Carolinas,
LLC
Civil Action No 2007-CP-40-7251
Appellate Docket No 2011183007

Dear Judge Cureton

Attached hereto please find a copy of an Order recently entered by Judge Kinard in connection with the above-referenced matter disposing of the Second Motion to Alter or Amend and Motion to Reconsider previously filed on behalf of Auto-Owners Insurance Company. Accordingly, the stay can be lifted and the parties can proceed with the appeal.

Should you otherwise have any questions or comments, please do not hesitate to contact the parties.

Sincerely yours,



John L. McCants

Edwin Russell Jeter, Esquire
The Honorable J. Ernest Kinard, Jr.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO 2007CP4007251

SEP 21 2011

SC Court of Appeals

Bennett & Bennett Construction Inc

vs

Auto Owners Insurance Company

Plaintiff

Defendant

CHECK ONE

- ☐ **JURY VERDICT** This action came before the court for a trial by jury The issues have been tried and a verdict rendered
- ☐ **DECISION BY THE COURT** This action came to trial or hearing before the court The issues have been tried or heard and a decision rendered
- ☐ **ACTION DISMISSED (CHECK REASON)** ☐ Rule 12(b), SCRCP, ☐ Rule 41(a), SCRCP
 SCRCP (Vol Nonsuit) ☐ Rule 43(k), SCRCP (Settled) ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON)** ☐ Rule 40(j) SCRCP ☐ Bankruptcy
- ☐ Binding arbitration subject to right to restore to confirm vacate or modify arbitration award
- ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**☐ Affirmed, ☐ Reversed, ☐ Remanded ☐ Other

NOTE ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IT IS ORDERED AND ADJUDGED

☒ See attached order☐ Statement of Judgment by the Court

Dated at Columbia, South Carolina, this _____ day of _____, 2011

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2011, and a copy mailed first class this 15 September 2011, to attorneys of record or to parties (when appearing pro se) as follows

Edwin Russell Jeter Jr

ATTORNEY(S) FOR THE PLAINTIFF(S)John Lucius McCants
O Carlisle Edwards Jr_____
ATTORNEY(S) FOR THE DEFENDANT(S)

SCRCP APP-24/FORM 4

Clerk of Court

SCANNED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Bennett & Bennett Construction, Inc ,
Plaintiff,

vs

Auto Owners Insurance Company,
American International Company, and
M & M Construction of the Carolinas,
LLC,

Defendants

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO 2007-CP-40 7251

ORDER

2011 SEP 13 AM 11 17
JENNIFER W. HARRIS
CCP & GS

The civil action comes before Court on Auto-Owners Insurance Company's ("Auto-Owners") Second Motion to Alter or Amend, Motion to Reconsider Pursuant to S C R Civ P 59(e)("Motion"), to reconsider the Judgment and Order entered on December 2, 2010, and the Order Denying Motion to Alter or Amend, Motion to Reconsider, filed on January 4, 2011, and received by Auto-Owners on January 7, 2011. Auto-Owners previously appealed the Court's Orders, and the South Carolina Court of Appeals remanded the appeal for the Court to hear the Motion in light of the South Carolina Supreme Court decision in Crossman Communities of North Carolina, Inc v Harleysville Mutual Insurance Company, S C Sup Ct Order dated January 7, 2011 pg 32 (Shearouse Adv Sh No 1)("Crossman I"). Parties petitioned the Supreme Court to rehear the Crossman I decision, and Supreme Court granted the petitions. The Supreme Court reheard the decision and issued a new decision Crossman Communities of North Carolina, Inc v Harleysville Mutual Insurance Company, S C Sup Ct Order dated August 22, 2011 pg 15 (Shearouse Adv Sh No 28) ("Crossman II"). Auto-Owners believes that the Crossman II decision moots the Motion before the Court. Accordingly,

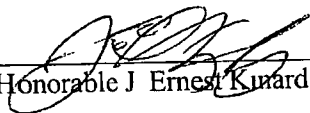


SCANNED

Order on Motion to Reconsider
Civil Action No 2007 CP 40 7251

IT IS ORDERED THAT the Motion is denied by the Court

AND IT IS SO ORDERED


The Honorable J. Ernest Kinard, Jr

September 17, 2011

JOHN L. MCCANTS

Direct Dial 803 212 4959
jmccants@ellislawhorne.com

August 25, 2011

Via Hand Delivery

The Honorable Jasper Cureton
Judge, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

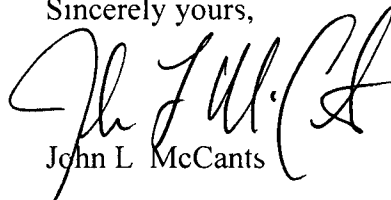
RE Bennett & Bennett Construction, Inc v Auto-Owners Insurance Company,
American International Company, and M & M Construction of the Carolinas,
LLC
Civil Action No 2007-CP-40-7251
Appellate Docket No 2011183007

Dear Judge Cureton

Pursuant to the Order of the Court filed on February 8, 2011, I am writing to provide the current status of the above-referenced matter. The Honorable J. Ernest Kinard, Jr. held the ruling on the post-trial motion in abeyance pending a final decision by the South Carolina Supreme Court in Crossman Communities of North Carolina, Inc v Harleysville Mut. Ins. Co., -- S.E.2d -- 2011 WL 93716, S.C., January 07, 2011 (No. 26909). On August 22, the Supreme Court issued Crossman Communities of North Carolina, Inc v Harleysville Mutual Insurance Company, S.C. Sup. Ct. Order dated August 22, 2011, pg. 39 (Shearouse Adv. Sh. No. 28). I believe it is prudent to wait until the time for any petition for rehearing expires for decision issued this week. I believe the parties to the Crossman appeal have fifteen (15) days to petition for a rehearing. Assuming there is no petition, we will be in a position to dispose of the Motion to Reconsider that is pending before Judge Kinard and proceed from there.

Should you otherwise have any questions or comments, please do not hesitate to contact the parties.

Sincerely yours,



John L. McCants

Edwin Russell Jeter, Esquire *Via E-Mail*
The Honorable J. Ernest Kinard, Jr. *Via Email*

RECEIVED
AUG 25 2011
SOUTH CAROLINA COURT OF APPEALS

ELLIS:LAWHORNE

JOHN L. MCCANTS

Direct Dial 803 212 4959

jmccants@ellislawhorne.com

June 28, 2011

Via Hand Delivery

The Honorable V. Claire Allen

Deputy Clerk, South Carolina Court of Appeals

P.O. Box 11629

Columbia, South Carolina 29211

RE Bennett & Bennett Construction, Inc. v. Auto-Owners Insurance Company
American International Company, and M & M Construction of the Carolinas,
LLC

Civil Action No. 2007-CP-40-7251

Claim No. 36-1195-02

Our File No. 118-5-8205

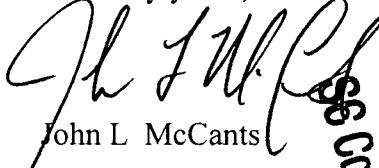
Dear Ms. Allen:

Pursuant to the Order of the Court filed on February 8, 2011, I am writing to provide the current status of the above-referenced matter. The Honorable J. Ernest Kinard, Jr. held the ruling on the post-trial motion in abeyance pending a final decision by the South Carolina Supreme Court in Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co., -- S.E.2d -- 2011 WL 93716, S.C., January 07, 2011 (No. 26909). The Supreme Court heard oral arguments on the Petitions for Rehearing on Monday, May 23, 2011, but the Supreme Court has not yet published a decision. At present, I am still of the assumption that Judge Kinard will continue to hold the post-trial motion in abeyance until a final decision by the Supreme Court. By copy of this letter to Judge Kinard, I am asking him to advise me if he wishes to proceed differently.

Should you otherwise have any questions or comments, please do not hesitate to contact me.

With warm personal regards, I am

Sincerely yours,


John L. McCants

Enclosure

Edwin Russell Jeter, Esquire *Via E-Mail*

The Honorable J. Ernest Kinard, Jr. *Via Email*

RECEIVED
JUN 28 2011
SC Court of Appeals

ELLIS:LAWHORNE

JOHN L. MCCANTS

803 212 4959

jmccants@ellislawhorne.com

May 26, 2011

RECEIVED

MAY 26 2011

SC Court of Appeals

Hand Delivery

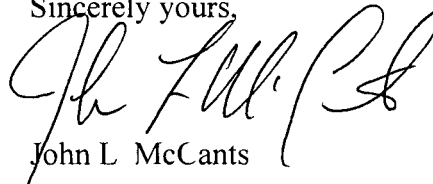
The Honorable V. Claire Allen
Deputy Clerk, South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

RE Bennett & Bennett Construction, Inc. v. Auto-Owners Insurance Company,
2011183007

Dear Ms. Allen:

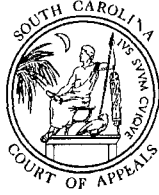
In response to your request, I am providing the following status: The Honorable J. Ernest Kinard, Jr. held the ruling on the post-trial motion in abeyance pending a final decision by the South Carolina Supreme Court in Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co., -- S.E.2d -- 2011 WL 93716, S.C., January 07, 2011 (No. 26909). The Supreme Court granted Petitions for Rehearing in the Crossman Communities appeal, and the Supreme Court heard oral arguments on the Petitions on Monday, May 23, 2011. The Supreme Court has not published a decision. At present, I assume Judge Kinard will continue to hold the post-trial motion in abeyance until a final decision by the Supreme Court. I am copying Judge Kinard herein on this letter should his honor wish to do differently.

Sincerely yours,



John L. McCants

The Honorable J. Ernest Kinard, Jr. (Via Email)
Edwin Russell Jeter, Esq. (Via Email)



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

May 24, 2011

John L McCants, Esquire
Ellis Lawhorne & Sims PA
P O Box 2285
Columbia, SC 29202

Re Bennett & Bennett v Auto-Owners
2011183007

Dear Counsel

Please provide the Court with a written report on the status of the trial court's ruling on your post-trial motion within ten (10) days of the date of this letter

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ma

cc Edwin Russell Jeter, Esquire

ELLIS:LAWHORNE

JOHN L. MCCANTS

Direct Dial 803 212 4959

jmccants@ellislawhorne.com

March 22, 2011

Via Hand Delivery

The Honorable Jasper Cureton
Judge, S C Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE Bennett & Bennett Construction, Inc v Auto-Owners Insurance Company,
American International Company, and M & M Construction of the Carolinas,
LLC
Civil Action No 2007-CP-40-7251
Claim No 36-1195-02
Our File No 118-5-8205

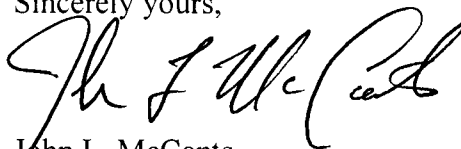
Dear Judge Cureton

In accordance with the Order filed on February 8, 2011, I am reporting to the Court on the status of the remand to the Honorable J Ernest Kinard Jr

The South Carolina Supreme Court granted the Petitions for Rehearing in the Crossman Communities of North Carolina, Inc v Harleysville Mutual Insurance Company, S C Sup Ct Order dated January 7, 2011 pg 32 (Shearouse Adv Sh No 1) The Order of the Supreme Court states that the Supreme Court will hear oral arguments on the Petitions on May 23 2011 Accordingly, Judge Kinard will have the present motion on remand under advisement until after oral arguments

Should different or further action be required, I would appreciate the Court advising counsel herein

Sincerely yours,



John L. McCants

RECEIVED

MAR 23 2011

SC Court of Appeals

Edwin Russell Jeter, Esquire (Via-email)
The Honorable J Ernest Kinard, Jr (Via-email)

The Supreme Court of South Carolina

Crossmann Communities of
North Carolina, Inc , Beazer
Homes Investment Corp , and
Daniel Rogers,

Respondents/Appellants,

v

Harleysville Mutual Insurance
Company, Cincinnati Insurance
Company, and Associated
Insurors, Inc , of Myrtle Beach,

Defendants,

of whom Harleysville Mutual
Insurance Company is

Appellant/Respondent

ORDER

This Court issued an opinion in the above-captioned matter on January 7, 2011. Respondents/Appellants have petitioned for a rehearing. We grant the petition for rehearing and direct that this case be reargued to this Court.

Due to the unusual nature of this case, we will permit oral argument by several amici curiae. The amici have been grouped below

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MCNAUL LAW FIRM, PA.

RECEIVED

MAR 23 2011

SC Court of Appeals

according to their commonalities of interest The members of each group shall decide among themselves the manner in which the time allotted to each group will be shared The groups are

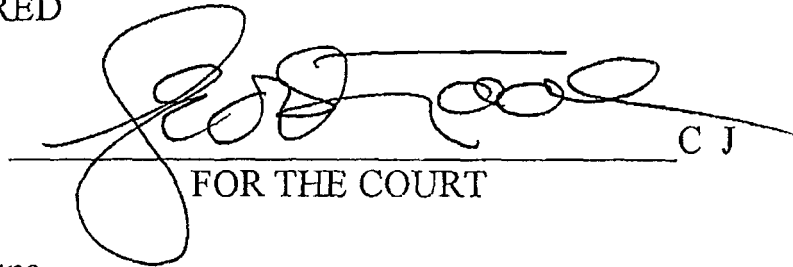
- 1 Property Casualty Insurers Association of America
- 2 Associated General Contractors of America, Inc and Carolinas AGC, Inc , Associated Builders and Contractors of the Carolinas, Inc , Leading Builders of America, American Subcontractors Association of the Carolinas and Mechanical Contractors Association of South Carolina, Home Builders Association of South Carolina and National Association of Home Builders
- 3 Ledgestone Court Residents of York County, Riverwalk at Arrowhead Country Club Property Owners Association, Inc , et al , Medical University of South Carolina, Coastal Carolina University Student Housing Foundation, Community Associations Institute and the South Carolina Chapter of the Community Associations Institute
- 4 The School District of Greenville County and the Charleston County School District

Oral arguments will be held in this matter on Monday, May 23, 2011, at 10 00 a m in the Supreme Court Building in Columbia, South Carolina The argument order and times are as follows

Respondent/Appellant 30 minutes
Appellant/Respondent 30 minutes
Recess
Amicus Group 1 15 minutes
Amicus Group 2 15 minutes

Amicus Group 3 15 minutes
Amicus Group 4 10 minutes
Reply by Appellant/Respondent 10 minutes
Reply by Respondent/Appellant 10 minutes

IT IS SO ORDERED



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, is written over a horizontal line. To the right of the signature, the initials "C J" are printed.

C J

FOR THE COURT

Columbia, South Carolina

March 9, 2011

ELLIS:LAWHORNE

JOHN L. MCCANTS

Direct Dial 803 212 4959
jmccants@ellislawhorne.com

March 1, 2011

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MAR 01 2011

SC Court of Appeals

Via Hand Delivery

The Honorable Jasper Cureton
Judge, S C Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

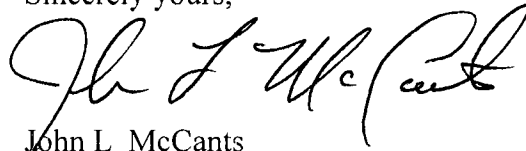
RE Bennett & Bennett Construction, Inc v Auto-Owners Insurance Company,
American International Company, and M & M Construction of the Carolinas,
LLC
Civil Action No 2007-CP-40-7251
Claim No 36-1195-02
Our File No 118-5-8205

Dear Judge Cureton

In accordance with the Order filed on February 8, 2011, I am reporting to the Court on the status of the remand to the Honorable J Ernest Kinard, Jr. As the Court will recall, the remand was granted in order for Judge Kinard to consider the South Carolina Supreme Court decision, Crossman Communities of North Carolina, Inc v Harleysville Mutual Insurance Company, S C Sup Ct Order dated January 7, 2011 pg 32 (Shearouse Adv Sh No 1). Parties in the Crossman Communities appeal filed Petitions for Rehearing. Because of the Petitions for Rehearing, the underlying parties agreed to hold the matter remanded to Judge Kinard in abeyance until the Petitions for Rehearing are ruled upon by the Supreme Court. Advance Sheet No 7 dated February 28, 2011, reflects that Petitions for Rehearing are pending.

Should different or further action be required, I would appreciate the Court advising counsel herein.

Sincerely yours,



John L. McCants

Edwin Russell Jeter, Esquire (Via-email)
The Honorable J Ernest Kinard, Jr (Via-email)

The South Carolina Court of Appeals

Bennett & Bennett Construction Inc , Respondent,

v

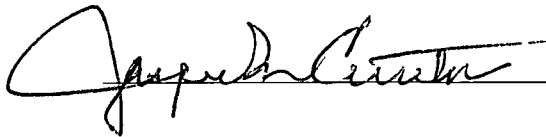
Auto Owners Insurance Company, Appellant

The Honorable J Ernest Kinard, Jr
Richland County
Trial Court Case No 2007-CP-40-07251

ORDER

Appellant has filed a motion to stay this appeal and remand the action to the trial court for a hearing on a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Respondent filed a return, opposing the motion. After carefully considering the motion and return, we grant Appellant's motion. This appeal will be held in abeyance pending the trial court's ruling on Appellant's post-trial motion. Appellant shall provide this Court with a status report thirty days from the date of this order, and every thirty days thereafter until Appellant's post-trial motion is resolved.

AND IT IS SO ORDERED

 A J

Columbia, South Carolina

cc John L. McCants, Esquire
 Edwin Russell Jeter, Esquire

FILED




The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

February 3, 2011

John L McCants, Esquire
Ellis Lawhorne & Sims PA
P O Box 2285
Columbia, SC 29202

Re Bennett & Bennett v Auto-Owners
Case Tracking # 2011183007

Dear Counsel

Enclosed is a copy of an Order of the Court regarding the above case

Very truly yours,

V Claire Allen, Deputy
CLERK

TAG/ec

cc Edwin Russell Jeter, Esquire

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

RECEIVED
JAN 26 2011
SC Court of Appeals

Auto-Owners Insurance Co , Inc

Appellant,

v

Bennett & Bennett Construction, Inc

Respondent

**RETURN TO MOTION FOR EXPEDITED RELIEF
MOTION TO STAY APPEAL, INCLUDING ANY TIME LIMITS REQUIRED BY THE
APPELLATE COURT RULES, AND MOTION TO REMAND THE CASE TO THE
HONORABLE J ERNEST KINARD, JR**

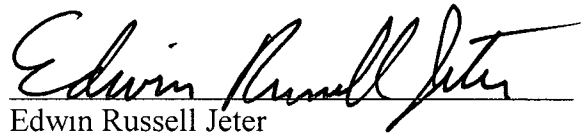
The motion for a stay of appeal and remand of the case should be denied for two reasons. The decision of the trial court to deny the first motion to alter, amend or reconsider, which was filed on January 5, 2011, prior to the ruling of the Supreme Court in *Crossman Communities of North Carolina Inc v Harleysville Mutual Insurance Company*, S C Sup Ct Order dated January 7, 2011, p 32 (Shearouse Adv Sh No 1) (hereinafter “*Harleysville*”), did not overlook any existing precedent. The Court of Appeals will have a full record and the benefit of briefs on the law and facts in its review of that decision, and will be in a position to determine the effect, if any, of *Harleysville* upon the trial court’s decision. The Court of Appeals will be able to perform

its review without a remand, since the effect of a recent change in the case law upon a previously decided case, is an issue especially suited to appellate consideration and does not require trial court input. Second, under South Carolina precedent, *Harleysville* should be applied prospectively and only to cases filed after the decision. While Respondent believes the facts in this case meet the definition of an “occurrence”, the effect of *Harleysville* on the facts of this case is not an issue that should be reached. The great majority of decisions which have announced changes of existing law have applied those changes prospectively only. As examples, the abolition of parental immunity was given prospective effect, *Brooks v Winecoff*, 284 S C 58, 324 S E 2d 339 (Ct App 1984), as were decisions recognizing a cause of action for a doctor’s breach of the duty of confidentiality, *McCormick v England*, 328 S C 627, 494 S E 2d 431 (S C App 1997), abolishing the causes of action for alienation of affections and criminal conversation, *Russo v Sutton*, 310 S C 200, 422 S E 2d 750 (S C 1992), and amending the assumption of the risk defense to remove the all or nothing aspect of the defense, *Steinke v South Carolina Dept of Labor Licensing and Regulation*, 336 S C 373, 520 S E 2d 142 (S C 1999). In addition, cases that fall short of establishing or abolishing a cause of action or defense also require prospective application. The creation of a new presumption in construing a settlement agreement, *Austelle v Austelle*, 294 S C 19, 362 S E 2d 181 (S C 1987), and the application of a higher burden of proof in parental rights termination cases, *South Carolina Dept of Social Services v Martell*, 279 S C 289, 307 S E 2d 601 (S C 1983), have been held to apply prospectively only. Since *Harleysville* essentially creates a change in the manner of construing the term “occurrence” in an insurance contract, and creates a higher hurdle in proving coverage, means that precedent requires prospective application of the ruling. Accordingly, the

Harleysville decision should have no impact upon the current appeal

In conclusion, Respondent Bennett & Bennett Construction, Inc asks that the Motion be denied and that the appeal move forward without any delay or remand

Respectfully submitted,

A handwritten signature in black ink, reading "Edwin Russell Jeter", written over a horizontal line.

Edwin Russell Jeter
JETER & WILLIAMS, P A
Post Office Box 7425
Columbia, South Carolina 29202
Telephone 803-765-0600
Facsimile 803-765-0619
E-mail ejeter@jeterandwilliams.com
Attorneys for Respondent

January 26, 2011
Columbia, South Carolina

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

RECEIVED
JAN 26 2011
SC Court of Appeals

Auto-Owners Insurance Co , Inc

Appellant,

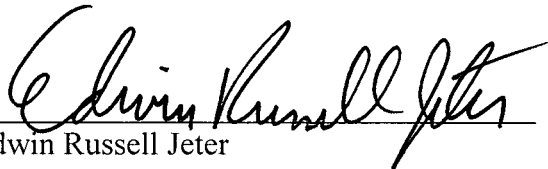
v

Bennett & Bennett Construction, Inc

Respondent

PROOF OF SERVICE

I certify that I have served the Return to Motion for Expedited Relief Motion to Stay Appeal, Including any Time Limits Required by the Appellate Court Rules, and Motion to Remand the Case to The Honorable J Ernest Kinard, Jr , on the Appellant by United States Mail, postage prepaid, on January 26, 2011, addressed to its attorney of record, John L McCants, Ellis, Lawhorne & Sims, P A , 1501 Main Street, 5th Floor, Post Office Box 2285, Columbia, South Carolina 29202


Edwin Russell Jeter
JETER & WILLIAMS, P A
Post Office Box 7425
Columbia, South Carolina 29202
Telephone 803-765-0600
Facsimile 803-765-0619
E-mail ejeter@jeterandwilliams.com
Attorneys for Respondent

January 26, 2011
Columbia, South Carolina



The South Carolina Court of Appeals

TANYA A GEE
CLERK
V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 116 9
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COLUMBIA, SOUTH CAROLINA 29201
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January 19, 2011

John L McCants, Esquire
Ellis Lawhorne & Sims PA
P O Box 2285
Columbia, SC 29202

Edwin Russell Jeter, Esquire
Jeter & Williams, J A
P O Box 7425
Columbia, SC 29202

Re Bennett & Bennett v Auto-Owners
Case Tracking # 2011183007

Dear Counsel

This will acknowledge receipt of Mr McCants' "Motion for Expedited Relief, Motion to Stay Appeal, Including any Time Limits Required by the Appellate Court Rules, and Motion to Remand the Case to the Honorable J Ernest Kinard, Jr" in the above entitled matter

By copy of this letter, opposing counsel is requested to file an original and six (6) copies of a return to this motion no later than January 26, 2011 Upon receipt of the return, the matter will be taken under consideration and you will be notified as soon as action has been taken

The time limits for perfecting the appeal will be held in abeyance pending the Court's decision

Very truly yours,

V Claire Allen, Deputy
CLERK

TAG/ec

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

RECEIVED
JAN 19 2011
SC Court of Appeals

Auto-Owners Insurance Co , Inc

Appellant,

v

Bennett & Bennett Construction, Inc

Respondent

**MOTION FOR EXPEDITED RELIEF
MOTION TO STAY APPEAL, INCLUDING ANY TIME LIMITS REQUIRED BY THE
APPELLATE COURT RULES, AND MOTION TO REMAND THE CASE TO THE
HONORABLE J ERNEST KINARD, JR**

Appellant Auto-Owners Insurance Company, Inc ("Appellant"), by and through the undersigned counsel, hereby moves to stay the appeal and remand the case to the Honorable J Ernest Kinard, Jr In addition, Appellant respectfully seeks expedited relief

The Honorable J Ernest Kinard, Jr issued an order/judgment which was entered on December 2, 2010 Appellant received notice of the order/judgment on December 6, 2010 Appellant served a Motion to Alter or Amend, Motion to Reconsider Pursuant to S C R Civ P 59(e) on December 14, 2010 The Honorable J Ernest Kinard, Jr issued an Order/Judgment entered on January 5, 2011 denying the Motion to Alter or Amend/Motion to Reconsider Appellant received notice of the filing of the Order/Judgment on January 7, 2011 On January 7,

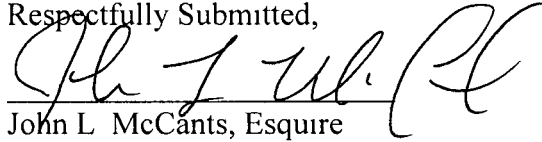
2011, the South Carolina Supreme Court published Crossman Communities of North Carolina, Inc v Harleysville Mutual Insurance Company, S C Sup Ct Order dated January 7, 2011 pg 32 (Shearouse Adv Sh No 1) Appellant contends that the Opinion is determinative of the issues in the subject case, which concern commercial general liability insurance coverage for a construction defect claim Accordingly, Appellant served a Second Motion to Alter or Amend, Motion to Reconsider Pursuant to S C R Civ P 59(e) on January 11, 2011

The Honorable J Ernest Kinard, Jr communicated with counsel for Appellant and Respondent and indicated that he will hear oral arguments on the Second Motion, however, due to the Honorable J Ernest Kinard, Jr 's court schedule, which has him out of Richland County, he will be unable to hear oral arguments until February 15 or 17, 2011 The deadline to file a Notice of Appeal is February 6, 2011 The requirement to file a Notice of Appeal is jurisdictional and must be filed in accordance with Rule 203 SCACR within thirty (30) days after receipt of written notice of entry of the order granting or denying the motion to alter or amend judgment pursuant to S C R Civ P 59(e) See Rule 203(b)(1) SCACR, Elam v South Carolina Department of Transportation, 361 S C 9, 14-15, 602 S E 2d 772, 775 (2004) Under the circumstances, Appellant has filed a Notice of Appeal At the same time, Appellant request that the Court of Appeals stay the appeal and remand the case for further review by the Honorable J Ernest Kinard, Jr , pursuant to S C R Civ P 59(e) and to consider the subject case in light of Crossman Communities of North Carolina, Inc v Harleysville Mutual Insurance Company, S C Sup Ct Order dated January 7, 2011 pg 32 (Shearouse Adv Sh No 1)

Wherefore, Appellant moves to stay the appeal and stay any time limits imposed by the South Carolina Appellate Court Rules, and Appellant moves to remand the case to The Honorable J Ernest Kinard, Jr granting him jurisdiction to hear the Second Motion to Alter or

Amend, Motion to Reconsider Pursuant to S C R Civ P 59(e) Appellant also request expedited relief from the Court of Appeals

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John L. McCants", with a large, stylized flourish to the right.

John L. McCants, Esquire
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Post Office Box 2285
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Phone (803) 212-4959
Fax (803) 779-4749
E-mail jmccants@ellislawhorne.com
Attorney for Appellant

January 18, 2011
Columbia, South Carolina

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

RECEIVED

JAN 19 2011

SC Court of Appeals

Bennett & Bennett Construction, Inc

Respondent,

v

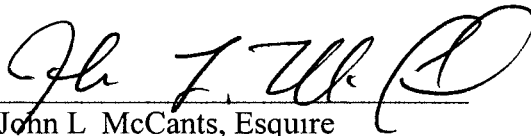
Auto-Owners Insurance Co , Inc

Appellant

PROOF OF SERVICE

I certify that I have served the Motion for Expedited Relief, Motion to Stay Appeal, Including any Time Limits Required by the Appellate Court Rules, and Motion to Remand the Case to the Honorable J Ernest Kinard, Jr , on Bennett & Bennett Construction, Inc by depositing a copy of it in the United States Mail, postage prepaid, on January 18, 2011, addressed to its attorney of record, Edwin Russell Jeter, Jeter and Williams, P A , Post Office Box 7425 Columbia, South Carolina, 29202

January 18, 2011


John L. McCants, Esquire
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(803) 254-4190
Attorney for Appellant

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

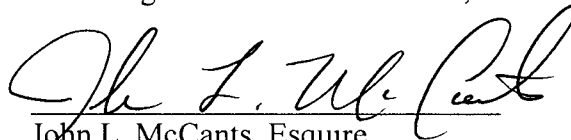
Auto-Owners Insurance Co , Inc

Appellant

NOTICE OF APPEAL

Auto-Owners Insurance Co , Inc , appeals the Orders/Judgments of the Honorable J Ernest Kinard, Jr entered on December 2, 2010 and January 5, 2011 Appellant received written notice of entry of the Orders/Judgments on December 6, 2010 and January 7, 2011 respectively

January 18, 2011



John L McCants Esquire
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Other Counsel of Record
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ejeter@jeterandwilliams.com
Attorney for Bennett & Bennett Construction, Inc

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

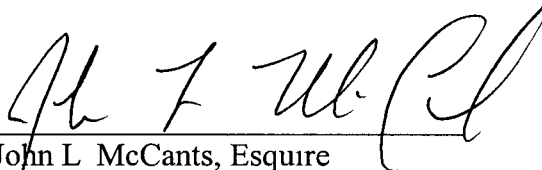
Auto-Owners Insurance Co , Inc

Appellant

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Bennett & Bennett Construction, Inc by depositing a copy of it in the United States Mail, postage prepaid, on January 18, 2011, addressed to its attorney of record, Edwin Russell Jeter, Jeter and Williams, P A , Post Office Box 7425, Columbia, South Carolina, 29202

January 18, 2011



John L. McCants, Esquire
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Attorney for Appellant

RECEIVED

JAN 19 2011

SC COURT OF APPEALS

ELLIS:LAWHORNE

JOHN L. MCCANTS

803 212 4959

jmccants@ellislawhorne.com

January 18, 2011

RECEIVED

JAN 19 2011

SC Court of Appeals

Hand Delivery

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

RE Bennett & Bennett Construction, Inc v Auto-Owners Insurance Company,
American International Company, and M & M Construction of the Carolinas, LLC
Civil Action No 2007-CP-40-7251
Our File No 118-5-8205

Dear Ms Gee

Enclosed for filing please find the original and two (2) copies of a Notice of Appeal and an original and seven (7) copies of a Motion for Expedited Relief, Motion to Stay, Motion to Remand in the above-referenced matter Also enclosed are the following

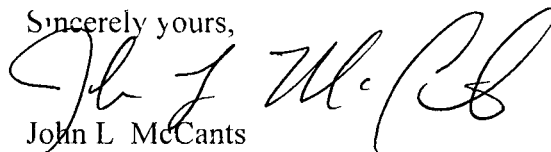
- 1 Proof of Service of the Notice of Appeal
- 2 A copy of the Judgments/Orders which are to be challenged on appeal
- 3 A filing fee of \$100,
- 4 A motion fee of \$25 00, and
- 5 Proof of Service of Motion for Expedited Relief, Motion to Stay, Motion to Remand

Please file the original and return the filed copies to me in the envelope provided

By copy to the Richland County Clerk of Court and Edwin Russell Jeter, Esq I am filing and serving these documents upon same I am also providing copies to The Honorable J Ernest Kinard Jr

With warm personal regards, I am

Sincerely yours,



John L. McCants

Enclosures

cc/enc

The Honorable J Ernest Kinard, Jr
The Honorable Jeanette W McBride, Richland County Clerk of Court
Edwin Russell Jeter Esq

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF RICHLAND

CASE NO 2007CP4007251

IN THE COURT OF COMMON PLEAS

Bennett & Bennett Construction Inc

vs

Auto Owners Insurance Company

Plaintiff

Defendant

CHECK ONE

- ☐ **JURY VERDICT** This action came before the court for a trial by jury The issues have been tried and a verdict rendered
- ☐ **DECISION BY THE COURT** This action came to trial or hearing before the court The issues have been tried or heard and a decision rendered
- ☐ **ACTION DISMISSED (CHECK REASON)** ☐ Rule 12(b), SCRPC ☐ Rule 41(a)
 SCRPC (Vol Nonsuit) ☐ Rule 43(k) SCRPC (Settled) ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON)** ☐ Rule 40(j) SCRPC ☐ Bankruptcy
☐ Binding arbitration subject to right to restore to confirm vacate or modify arbitration award
☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**☐ Affirmed, ☐ Reversed ☐ Remanded ☐ Other

NOTE ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

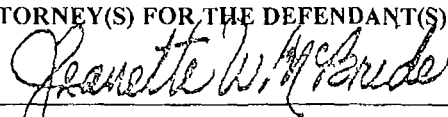
IT IS ORDERED AND ADJUDGED

☒ See attached order☐ Statement of Judgment by the Court

Dated at Columbia, South Carolina, this _____ day of _____, 2010

PRESIDING JUDGEThis judgment was entered on the _____ day of _____ 2010 and a copy mailed first class this 2nd day of December 2010, to attorneys of record or to parties (when appearing pro se) as follows

Edwin Russell Jeter Jr

John Lucius McCants
O Carlisle Edwards Jr_____
ATTORNEY(S) FOR THE PLAINTIFF(S)_____
ATTORNEY(S) FOR THE DEFENDANT(S)_____
Clerk of Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Bennett & Bennett Construction, Inc ,)
)
Plaintiff,)

Civil Action No 2007-CP-40 7251

v)

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

Auto Owners Insurance Company,)
American International Company, and)
M&M Construction of the Carolinas)
LLC,)

Defendants)

RICHLAND COUNTY
FILED
2010 NOV 23 PM 9 34
JEANE L. G. S.
C.C.P. & G.S.
11/23/2010

This matter came before the Court for a non jury trial on October 18, 2010¹. The Court heard testimony from two witnesses David Bennett, owner of the Plaintiff, and Sam Phillips attorney for the homeowner. The Court received exhibits into evidence, and was provided with proposed orders containing arguments from both sides. After giving careful consideration to the evidence and the arguments, this Court now issues its Findings of Fact and Conclusions of Law. To the extent that a finding of fact is deemed to be a conclusion of law or a conclusion of law is deemed to be a finding of fact they should be treated accordingly.

FINDINGS OF FACT

This Court makes the following findings of fact

¹ Defendant M & M Construction of the Carolinas LLC, was never served and Defendant American International Company was dismissed from the case by Plaintiff. All other parties were present and represented by counsel.



1 It is undisputed that on March 6, 2006, Bennett & Bennett Construction, Inc ("BBCI") was awarded a default judgment in the amount of \$84,133.16 against M & M Construction of the Carolinas, LLC ("M & M"), that Plaintiff had offered M & M's insurer, defendant Auto Owners Insurance Company ("Auto-Owners"), the opportunity to defend the suit and keep its insured out of default, and then notified it of the time and place of the damages hearing, but Auto Owners chose to deny coverage and took no part in the prior suit, that after obtaining the default judgment, BBCI instituted this declaratory judgment action to determine whether Auto Owners' policy covered the judgement and that, as of the day of trial the amount of the judgment was \$124,097.75 which was increasing by \$16.71 per day in accrued interest.

2 BBCI was hired to remove a synthetic stucco cladding and replace it with brick. BBCI put the masonry work out for competitive bids, and M & M was the low bidder. 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 CGL policy identified as policy GL 16509. The homeowner chose a decorative brick that would provide a certain look to the home. 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 replace the brick. BBCI and M & M agreed 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, that the brick cleaning would be done soon after the brick was laid, and not at the end of the job. They agreed that the line item in M & M's proposal of \$1,875 for brick cleaning, would be deleted. M & M never invoiced BBCI for brick cleaning.



3 As agreed between BBCI and M & M, the brick cleaning contemplated by the contract was done soon after the brick was laid. BBCI inspected the work on a periodic basis and found it to be satisfactory.

4 After M & M took down its scaffolding, left the job, sent BBCI a final invoice and stated the work was complete, BBCI inspected M & M's work. 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. 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. BBCI called M & M to return to the job and correct these limited areas of concern. On May 20, 2002, 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. Both the lack of coating and the discoloration destroyed the appearance of the home for which the homeowner had paid BBCI. The default judgment determined that this cleaning technique violated the brick manufacturer's instructions as well as accepted industry practices.

5 The two man pressure washer crew which M & M used at the end of the job were subcontractors hired by M & M, as a matter of fact and law. While there was no direct evidence that the crew were subcontractors, there was sufficient circumstantial evidence, and inferences flowing therefrom, to persuade this Court that it was more probable than not that the crew were subcontractors. M & M filed no reports with the Employment Security Commission indicating it



had any employees during the relevant time period. The inference from the failure to file for the first and second quarters of 2002, is that M & M had nothing to report. It may be that M & M was a contractor that utilized subcontractors for all of its labor needs, that it had no employees, and that its officers were partners or principals, and not employees. This conclusion certainly makes sense in that the evidence was that non local contractors (such as M & M) commonly use local labor for a job in order to be competitive in bidding. Since M & M is from Campobello, it would have made sense on a bid job such as the Epley home in Columbia, as Bennett testified, to hire local subcontractors to do the work in order to save on housing, transportation and food. Bennett testified he did not recognize the masons on this job, although he had worked with M & M on another job. Bennett also testified that at the moment that Swayze showed up at the jobsite just after the pressure washing incident, Bennett angrily confronted him about responsibility for the damage, and Swayze said he would make sure the pressure cleaning crew would be responsible for the damage. This comment made in the heat of the moment of a major event on the job,² makes sense if the crew were subcontractors, but would be an unusual thing to say if they were employees. Bennett also testified that his sense of the matter, after speaking with Swayze, was that the crew were subcontractors.³ Auto Owners offered no evidence in rebuttal that the men were employees.

6 The reason the brick was replaced in its entirety was that no other remedy had proven satisfactory in terms of appearance. Therefore a total replacement was required to repair

² This testimony was admitted into evidence as an excited utterance under Rule 803(2)

³ Although this testimony was not material to this Court's decision that the men were subcontractors, it is admissible evidence under Rule 701

the damaged appearance of the home. 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 recladding the home. M & M tried staining the brick, but the result was an unsatisfactory appearance. BBCI, the homeowner and M & M then agreed to try to find replacement brick, but further agreed that if that brick was not satisfactory, then the entire house would be stripped of all brick. M & M tried to find replacement brick for the damaged areas, but could find no brick from the same lot as the existing brick. 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. The fact that M & M and then BBCI later retained attorneys, that both parties 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. Bennett denied that the brick was removed due to any installation issue. There was no mention of an installation issue until BBCI had already started removing the brick to completely reclad the house. BBCI held off on making a final decision until M & M had an opportunity to present everything it wanted to offer, but nothing M & M offered changed the decision to remove all brick for appearance reasons.

7 The damage to the brick was an unintentional result of a crew who spoke limited English and apparently did not understand the proper way to clean this type of brick. M & M's principal was not on the job at the time it happened, and BBCI's superintendent had left the site to get some materials. The homeowner, who was living in the home at the time, saw water being



forced under her front door, and rushed out to try to stop them but they could not understand her. The damage to the brick was unintentional and unexpected on the part of M & M, as shown by its remorseful and cooperative attitude during the initial weeks after the incident. BBCI certainly was surprised at the unexpected event of using a pressure washer.

8 The defective work by M & M was not its installation of the brick, and not its cleaning of the brick as it was laying the brick, but the pressure washing of the brick by the crew during the corrective cleaning.

CONCLUSIONS OF LAW

A This Court concludes that the Plaintiff has carried the burden of proving insurance coverage for this incident.

B The burden then shifts to Auto Owners to establish an exception from coverage. Exclusions are to be narrowly read, *Auto Owners Insurance Company v Rhodes*, 385 S C 83, 682 S E 2d 857, 864, 869 (S C App 2009), and are construed “most strongly” against the insurance company. *Owners Ins Co v Clayton*, 364 S C 555, 614 S E 2d 611, 614 (2005).

C The policy defines an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same harmful conditions.” While the policy does not define an “accident,” the Supreme Court has defined an “accident” as an “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.” *Auto Owners v Newman*, 684 S E 2d 541, 546, 385 S C 187 (2009).

D This incident meets the tests of an occurrence. This Court concludes that there



was an "occurrence" under the policy

E BCCI asserts that the pressure washing of the brick is covered as a completed operation under the products completed operations hazard. Basically, this hazard provides coverage for claims arising on job sites, once the contractor's operations are considered to be complete.

F The test for completed operations, which Defendant's policy utilizes, Policy, § (IV)(11)(b), has two provisions, either one of which will provide coverage if established. First, the job is deemed complete "when that part of the work done at a job site has been put to its intended use by any person other than the contractor or subcontractor working on the same project." Policy, §IV(11)(b)(3). Second, the trailing language which applies to all tests for completeness states "Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete will be treated as completed." Policy §IV(11)(b). 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. The M & M work was "complete" as the Defendant's policy defines that term. With respect to the test in the trailing language, the masons cleaned the brick as they went along, and then took down the scaffolding, left the job, and sent in a final invoice for payment. M & M considered its work to have been completed. There were areas that needed to be touched up after the masons left the job. Thus, the cleaning of the brick was in the nature of a repair or correction to the poor appearance of the brick. The pressure washing of the brick was a completed operation as the policy defines that term.

G Auto Owners argues that the cleaning was not a completed operation since the



contract called for cleaning Auto-Owners is incorrect. 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. 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.

H. Auto Owners argues that exclusion (j)(5) is applicable and bars coverage for this claim. Exclusion j(5) reads:

“Property damage to 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.”

It argues that since BBCI was still performing cleaning operations called for by the contract that (j)(5) applies. However, the (j)(5) exclusion in M & M's policy is referring to M & M's operations, not to BBCI's operations. Regardless, as a matter of law in construing this exclusion the cleaning that was going on when the pressure washer incident occurred was not the cleaning intended by the contract but was incidental to the contract in that it was required after completion only because M & M spilled mortar on the completed work. Thus, the issue is whether or not (j)(5) applies after M & M's work is completed.

I. The language of (j)(5) indicates that the exclusion is inapplicable to claims arising after operations are completed. By using the present tense, the exclusion applies only where M & M employees or subcontractors “are performing operations.” Here they were not since the job had been completed by M & M, and they were called back to the job to do incidental corrective or repair work. In addition, this Court has not found any case law from this State in support of Auto Owner's position that “completed operations’ coverage is excluded by (j)(5).” Every case

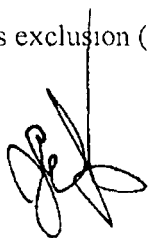


that this Court has found that has examined the meaning of the (j)(5) exclusion has found that the exclusion does not apply to operations which occur after the work was completed *Lennar Corp V Great American Ins Co* 230 S W 3d 251 (Tex Ct App 2006) *Advantage Homebuilding LLC v Maryland Cas Co* 470 F 3d 1003, 1011 (10th Cir 2006), *Acceptance Ins Co V Ross Contractors Inc*, 2008 MN 0723 117, p 18 (Minn Ct App 2008) (unpublished), *Fisher v American Family Mut Ins Co*, 579 N W 2d 599 (N D 1998) *Alverson v Northwestern National*, 559 N W 2d 234 (SD 1997), *Spears v Smith*, 690 N E 2d 557 (Oh Ct App 1996) These cases stand for the proposition that where work is deemed “complete” there is coverage regardless of the (j)(5) exclusion In this case, M & M’s work was “complete” at the time of the incident Thus the (j)(5) exclusion does not apply In addition, since the policy defined the work as ‘complete’ at the time of the occurrence, (j)(5) would not apply to products-completed operations coverage in this case Resolving all ambiguities in (j)(5) against the insurer, this Court concludes that the (j)(5) exclusion does not apply to BBCI’s claim

J Auto Owners next argues that exclusion (n) bars coverage since the reason for the removal of the brick was defective installation of the brick Exclusion (n) states

“Damages claimed for any loss, cost or expense incurred by you or others for the loss of use withdrawal recall, inspection repair, replacement adjustment, removal or disposal of (1) ‘Your product’, (2) ‘Your work’, or (3) Impaired property’, if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency inadequacy or dangerous condition in it”

However this Court has found that the reason for the brick removal was the unsatisfactory appearance of the brick Thus exclusion (n) would not bar coverage for BBCI’s judgment



K Auto-Owners then argues that if the pressure washing damage was the reason for the removal only economic damages resulted which are not covered under exclusion (n) This Court disagrees Exclusion (n) is known as the “sistership” or “recall” exclusion The “sistership” exclusion had its origins in the aircraft industry where if one aircraft suffered an accident because of a defect it was the practice to recall all similar aircraft until the defect could be inspected and repaired if necessary The exclusion was originally designed to exclude coverage for damages arising from the defect, other than those arising from the defect in the aircraft that was involved in the accident ” *Olympic Steamship Co Inc v Centennial Ins Co* 811 P 2d 673, 676 (Wash 1991)

L In *Auto Owners v Newman* 684 S E 2d 541, 546, 385 S C 187 (2009), Auto Owners argued that the removal and replacement of its insured’s defective stucco was not covered because of exclusion (n) In that case, the removal of the stucco was necessary to repair the damage to the framing and sheathing caused by the defective stucco The Supreme Court agreed It stated “ another policy provision bars coverage for damage to the defective workmanship itself ” *Id* In *Newman*, the excluded defective product or work was the stucco Coverage was available for the other damaged work

M In this case 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 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.

N Auto Owners argues that exclusion (l) applies since the cleaning was part of the contract, rather than a correction or repair. Exclusion (l) reads

“‘Property damage’ to ‘your work’ arising out of it or any part of it and including in the ‘products completed operations hazard’

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.’

Auto Owners also argues that BBCI failed to prove that the pressure washing was done by subcontractors. The cases have held that exclusion (l) is a completed operations exclusion that could apply to the pressure washing incident. However, exclusion (l) will not apply if the pressure washing was done by subcontractors.

O If the subcontractor provision in exclusion (l) is to be narrowly read and construed most strongly against Auto Owners, and is considered to be one of the terms of the exclusion, then Auto Owners has the burden of proof of establishing the work was done by employees rather than subcontractors. Auto Owners offered no evidence that the persons who performed the pressure washing were employees rather than subcontractors of M & M.

P If the subcontractor provision is read as being an exception to exclusion (l) then



BBCI must show that the pressure washing was performed by subcontractors *Helena Chemical Company v Allianz Underwriters Insurance Company*, 357 S C 631, 594 S E 2d 455, 460 (fn 5) (2004) This Court finds that BBCI met that burden When BBCI subpoenaed M & M's records at the Employment Security Commission concerning its employees from February 1 through May 30 2002 which M & M had a duty under South Carolina law to report S C Code Ann §§41 27-210 41 31 160, and Reg 47-15, the ESC responded by stating that it had no such records The law presumes that people will normally know and obey the law *Laurens Tel Co v Enterprise Bank* 90 S C 50 72 S E 878, 882 *Poole v Southern Ry Co* 250 S C 213 157 S E 2d 175 This inference along with the other factual findings made by this Court lead to the conclusion, as a matter of law and fact, that the men who performed the pressure cleaning were subcontractors to M & M and that exclusion (l) does not apply to BBCI's claim

Q The policy provides that the (j)(6) exclusion "does not apply to 'property damage' included in the 'products completed operations hazard'" Policy §I(A)(2)(j) Exclusion (j)(6) reads

"Property damage to That particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed upon it

"Paragraph 6 of this exclusion does not apply to 'property damage included in the 'products completed operations hazard

Exclusion (j)(6) does not apply to BBCI's claim and therefore the claim is not excluded by (j)(6)

R Exclusion (a) is not applicable because Auto Owners failed to prove that the pressure washing damage was an intentional or expected result Exclusion (a) reads

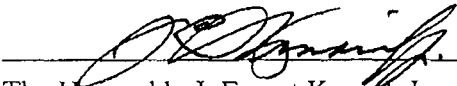


“‘Bodily injury’ or ‘property damage’ expected or intended from the standpoint of the insured. This exclusion does not apply to ‘bodily injury’ resulting from the use of reasonable force to protect persons or property.’

S Based on the foregoing, there are no exclusions from coverage that apply in this case. This Court concludes and declares that under the terms of the policy issued by Auto-Owners, there is coverage for the amount of the judgment.

WHEREFORE, this Court having concluded and declared that Defendant Auto Owners Insurance Company's CGL policy provides coverage for the BBCI judgment, it is the judgment of this Court that Auto Owners must pay BBCI the amount of that judgment. The judgment, including interest, is in the amount of \$ 124,665.84 as of this date, and is accruing interest at the rate of 7.25% per day, until a new interest rate is determined in January, 2011.

AND IT IS SO ORDERED


The Honorable J. Ernest Kinard, Jr.
Resident Judge, Fifth Judicial Circuit

Camden, South Carolina

11/22, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO. 2007CP400120

Bennett & Bennett Construction Inc

Plaintiff

RECEIVED

JAN 19 2011

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

Date 01/19/11

CHECK ONE

SC Court of Appeals

- ☐ JURY VERDICT This action came before the court for a trial by jury. The issues have been decided and a verdict rendered.
- ☐ DECISION BY THE COURT This action came to trial or hearing before the court. The issues have been decided and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON) ☐ Rule 12(b) SCRCP ☐ Rule 41(c) SCRCP
☐ SCRCP (Vol. Nonsuit) ☐ Rule 43(k) SCRCP (Settled) ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON) ☐ Rule 40(j) SCRCP ☐ Bankruptcy
☐ Binding arbitration subject to right to restore to confer and modify award
☐ Other _____

- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK / REASON)

☐ Affirmed ☐ Reversed, ☐ Remanded ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT TRIAL JUDGE, OF ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING AFTER APPEAL.

IT IS ORDERED AND ADJUDGED

☒ See attached order

☐ Statement of Decision by the Court

Dated at Columbia, South Carolina, this _____ day of _____, 2011.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2011, and a copy mailed first class January 19, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Edwin Russell Jeter Jr

ATTORNEY(S) FOR THE PLAINTIFF(S)

John H. Clausen
Of Counsel Law Firm

ATTORNEY(S) FOR THE DEFENDANT(S)

Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Bennett & Bennett Construction, Inc.

Plaintiff

vs

Auto Owners Insurance Company
American International Company and
M&M Construction of the Carolinas

Defendant

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

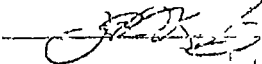
CIVIL ACTION NUMBER 2007-00725

ORLE

Subsequent to an Order executed on November 22, 2010 and filed on November 22, 2010 an 11 page Motion to Alter or Amend was forwarded on December 14th, 2010 to the Plaintiff Auto Owners followed by a brief reply dated December 16, 2010 from Bennett & Bennett which asked that the Order be amended. That reply was followed by another 10 page reply dated December 21, 2010 from Auto Owners and another reply dated December 29, 2010 from Bennett & Bennett. I have carefully read all memos and attached cases and I do not fully understand reasonable minds can differ on the application of cases cited and the issues presented and further recognize that in a winner take all situation the losing side would not accept any ruling I might have made. I believe the Order previously issued fully addressed the issues presented so all Motions to Alter, Amend or Reconsider are hereby denied.

AND IT IS SO ORDERED

Camden SC
December 30, 2010


Linest Kina JJ
Circuit Court Judge

SCANNED