THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

Precision Walls, Inc. ..... Petitioner,

v.

Liberty Mutual Fire Insurance Co. ..... Respondent.

PETITION FOR CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 23, 2014.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR BY FINDING THAT THE CGL POLICY'S "YOUR WORK" EXCLUSION APPLIED WHEN THE RECORD IS CLEAR THAT THE INSURED PERFORMED NO WORK ON THE PROPERTY SUFFERING DAMAGE?

II. DID THE COURT OF APPEALS ERR BY FAILING TO ADDRESS PRECISION WALLS' REMAINING ISSUES ON APPEAL?

STATEMENT OF THE CASE

This case presents the novel and important question of whether an insured under a Commercial General Liability (CGL) insurance policy has coverage for the costs it is legally obligated to pay for damage done to the property of a third party in order to gain access to repair the insured's defective work. Specifically, the issue in this case is whether Precision Walls has coverage under its CGL policy for the costs of removing and replacing a brick veneer wall constructed by another contractor which had to be torn down in order to gain access for Precision Walls to repair its defective work.

Precision Walls commenced this action on March 23, 2011, seeking a declaratory judgment that its loss was a covered claim under the applicable CGL policy issued by Liberty Mutual Fire Insurance Company. On December 1, 2011, Precision Walls amended its complaint to assert additional causes of action for breach of the insurance contract and violation of S.C. Code Ann. § 38-59-40. Precision Walls voluntarily dismissed its claim for relief under S.C. Code Ann. § 38-59-40 with prejudice and proceeded to trial on its causes of action for a declaration that coverage existed under the CGL policy and for damages for breach of the insurance contract. Precision Walls' claim was for $97,500.00 together with interest thereon at the prevailing prejudgment rate. Liberty Mutual filed answers to the pleadings asserting defenses that Precision Walls' claim was not covered under the CGL policy. Specifically, Liberty Mutual asserted that the claim did not trigger coverage under the insuring agreement of the CGL policy, and, alternatively, that certain policy exclusions applied to bar coverage.

The parties presented this matter to the trial court based upon a stipulated record setting forth the undisputed facts. The Honorable Letitia H. Verdin conducted a

summary bench trial based on the stipulated record on February 6, 2013. The Court filed a Form 4 Order on February 19, 2013, granting judgment in favor of Liberty Mutual which counsel for Precision Walls received on February 22, 2013. On March 4, 2013, Precision Walls filed its Motion for Reconsideration under Rule 59(a), SCRCP, and, alternatively, under Rule 59(e), SCRCP. On April 10, 2013, the Court entered its Form 4 Order denying Precision Walls' Motion for Reconsideration and entering its final order of judgment in favor of Liberty Mutual. Precision Walls received notice of this order on April 12, 2013, and filed its Notice of Appeal on April 16, 2013.

The Court of Appeals issued its opinion affirming the order of the trial court on July 23, 2014. Precision Walls filed its Petition for Rehearing on August 5, 2014, and the Court of Appeals issued its order denying the Petition for Rehearing on October 23, 2014. Petitioner now seeks a writ of certiorari for the Court, asserting that the Court of Appeals erred for the reasons set forth herein.

STATEMENT OF FACTS

Precision Walls was a subcontractor to the general contractor, SYS Constructors, Inc., on a project in Easley, South Carolina known as Tri-County Tech Occupational Building (the "Project"). Precision Walls' scope of work included installing light gauge metal framing, building insulation, and "taped & sealed blue board insulation on exterior." (Affidavit of D.J. Doherty, III, ¶ 5, Ex.1; R. p. 333; pp. 337-350)

Precision Walls made submittals for review by SYS Constructors and the project architect relative to certain materials to be used by Precision Walls in the performance of its work. One of the submittals by Precision Walls related to the proposed use of a "Seam & Seal" Tape manufactured by Berry Plastics for use in taping and sealing the

joints of the blue board insulation. This submittal was reviewed by the architect for the Project and SYS Constructors without objection and Precision Walls proceeded with taping the insulation joints with the "Seam & Seal" tape. (Doherty Aff. ¶ 6, Ex. 2; R. p. 334; pp. 351-361)

The exterior wall for the Project was brick veneer. SYS Constructors subcontracted with Pride Masonry to provide the labor and materials needed to construct the brick veneer wall. (Doherty Aff. ¶ 7; R. p. 334) Before the brick veneer wall could be constructed, Precision Walls had to install the blue board insulation and tape and seal each of the joints of the insulation boards. Each insulation board is approximately 4 feet by 8 feet in size which required significant taping and sealing of joints. Precision Walls had nothing to do with the construction of the brick veneer wall, which could only be constructed after Precision Walls had finished its work of installing, taping and sealing the insulation boards. (Doherty Aff. ¶ 8; R. p. 334)

Prior to the completion of the brick veneer wall, SYS Constructors' field personnel observed that some of the tape sealing the joints at the insulation board was losing adhesion and coming loose. Upon further investigation by SYS Constructors, it was observed that tape was also coming loose in areas which were covered by the brick veneer wall. The investigation conducted by SYS Constructors did not determine the reason why the tape was coming loose. (Doherty Aff. ¶ 9; R. pp. 334-335) Further, while Precision Walls did not know why the tape was losing adhesion and coming loose, it believed the problem to be a defect in the tape itself rather than its own workmanship. (Deposition of Kevin Howell at p. 50, lines 1-25, p. 51 Lines 1-4; R. p. 73, lines 1-25; p. 74, lines 1-4)

Taped insulation joints were essential to the integrity of the building envelope and were a requirement for preventing air and moisture intrusion into the interior of the building, among others things. Both the Owner of the Project and SYS Constructors were unwilling to allow unsealed joints to remain behind the brick veneer wall. Accordingly, SYS Constructors directed Precision Walls to comply with its subcontract requirements and provide taped and sealed joints at all locations. (Doherty Aff. ¶ 10, Ex. 3; R. p. 335; pp. 362-363)

The only feasible way to access the areas where tape was coming loose behind the brick veneer wall was to remove the brick. SYS Constructors engaged its masonry subcontractor to remove the brick veneer wall in place and then build a new wall once Precision Walls had removed the tape in place and sealed the insulation joints with new tape. (Doherty Aff. ¶ 11, Exs. 4, 5 and 6; R. p. 335; pp. 364-369) SYS Constructors compiled all of the costs associated with the tape problem and issued a deductive change order to the Precision Walls' subcontract. The original change order prepared by SYS Constructors was in the amount of $108,845.00. Through negotiations with Precision Walls, SYS Constructors agreed to reduce the amount to $97,500.00. A final deductive change order in that amount was issued to Precision Walls on or about November 15, 2011. (Doherty Aff. ¶ 12, Ex. 7; R. p. 336; pp. 370-372)

While Precision Walls incurred substantial costs of its own in removing and replacing the defective joint tape, those costs are not a part of the SYS deductive change order. Further, Precision Walls is not seeking indemnity for these costs from Liberty Mutual as Precision Walls recognizes those costs are not covered losses under the CGL policy.

STANDARD OF REVIEW

Because declaratory judgment actions are neither legal nor equitable, the standard of review depends on the nature of the underlying issues. *Auto-Owners Ins. Co. v. Hamin,* 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. *Id.* When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. *WDW Props. v. City of Sumter,* 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court owes no particular deference to the trial court's legal conclusions. *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth.,* 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999); *see also Duke Power Co. v. Laurens Elec. Coop., Inc.,* 344 S.C. 101, 104, 543 S.E.2d 560, 561-62 (Ct. App. 2001).

ARGUMENT

I. In holding that the CGL policy's "Your Work" exclusion applied, the Court of Appeals misconstrued the plain language of the exclusion, which applies only where the insured's work has been incorrectly performed on that particular part of the property suffering damage.

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

> 2. Exclusions
>
> This insurance does not apply to:
>
> j. Damage to Property
>
> "Property Damage" to:
>
> (6) that particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it.

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

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

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

part of the property that was damaged, the "Your Work" exclusion cannot apply. Under the facts of this case, to construe this exclusion otherwise would require ignoring its plain meaning and would improperly effect an expansive interpretation of the policy in favor of the insurer. *See M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010)("[p]olicies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer").

A. The cases relied upon by the Court of Appeals in its opinion are readily distinguishable from Precision Walls's claim.

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

The Court of Appeals cites *Century Indemnity Company v. Golden Hills Builders*, 348 S.C. 559, 561 S.E.2d 355 (2002), as being instructive on the issue whether policy exclusion "j(6)", the "Your Work" exclusion, bars coverage. The Court's reliance on *Golden Hills* is misplaced because the analysis of coverage in that case cannot be reconciled with the more recent case of *Auto Owners Ins. Co. v. Newman,* 385 S.C. 187, 684 S.E.2d 541 (2009). In *Newman*, this Court held that property damage to the framing and exterior sheathing behind an improperly installed synthetic stucco exterior was a covered loss under the CGL policy. *Id.* In stark contrast, under an almost identical factual scenario, this Court previously held in *Golden Hills* that the GCL policy did not cover damage to the home's substrate and framing caused by an improperly installed synthetic stucco exterior. This Court resolved the discrepancy in *Crossman* when it overruled *Golden Hills,* specifically stating that it "elected to adhere to our precedent in *Newman.*" *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594, n.6 (2011). Therefore, the Court of Appeals erred

in failing to rely upon the more recent analysis set forth in *Newman* as to the scope of coverage under a CGL policy.

Even if there is any continuing validity to the analysis in *Golden Hills,* the facts in this case are very different than those in that case. *Golden Hills* involved a synthetic stucco exterior incorrectly installed **on** exterior framing and substrate. *See Century Indemnity Company v. Golden Hills Builders*, 348 S.C. 559, 561 S.E.2d 355 (2002). Here, the exact opposite situation is presented. The brick veneer wall had to be torn down, not because Precision Walls's work had been performed on it, but in order to gain access for the repair of Precision Walls's defective work.

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

In *Bennett & Bennett Const., Inc. v. Auto Owners Ins. Co.,* 405 S.C. 1, 747 S.E.2d 426 (2013),*reh'g denied* (Sept. 6, 2013), this Court addressed policy exclusions different from the one at issue in this case. Therefore, the reasoning of this Court in *Bennett* is of no assistance in examining the application of the exclusion at issue here. *See Auto Owners Ins. Co. v. Newman,* 385 S.C. 187, 197, 684 S.E.2d 541, 546 (2009) citing *Engineered Products, Inc. v. Aetna Cas. & Sur. Co.,* 295 S.C. 375, 378–79, 368 S.E.2d 674, 675–76 (Ct.App.1988) ("Each exclusion in the policy must be read and applied independently of every other exclusion"). Moreover, as to the "j(5)" exclusion addressed by this Court in *Bennett*, the application of that exclusion likewise requires that the insured have been performing operations **on** that particular part of the property suffering damage. *Id.,* 405 S.C. at 5, 747 S.E. 2d at 428. As set forth above, that is not the case in this instance.

II. The Court of Appeals erred by failing to address Precision Walls's remaining issues on appeal.

A. This Court should find that the facts of this case established the existence of "property damage" under the CGL policy.

In *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), this Court, on rehearing, reversed its prior opinion regarding insurance coverage for defective construction. In so doing, the Court reviewed its treatment of insurance coverage for construction claims in prior opinions and stated as follows:

> In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute "property damage," but the defective construction would not.

Id. at 50, 717 S.E.2d at 594. This clarification is particularly instructive in this case. While the issue here is defective construction, rather than negligent construction, it is clear that Precision Walls's claim seeks coverage for damage to other, non-defective components (i.e. the brick veneer wall) and not the defective construction itself (i.e. the joint tape). No part of Precision Walls's claim involves its own costs in removing and replacing the defective joint tape.

Moreover, in *L-J II*, this Court stated that "[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.*" *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 123, 621 S.E.2d 33, 36, n.4 (2005)(emphasis in original); *see also Auto Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 100-101, 682 S.E.2d 857, 866-67 (Ct. App. 2009), *aff'd in part, rev'd in part,* 405 S.C. 584, 748 S.E.2d 781 (2013). Therefore, it is clear that under South

Carolina law, CGL policies may provide coverage when defective or faulty workmanship causes third-party property damage.

In its order, the trial court cites *Crossman* in support of the proposition that the cost of repairing or removing **defective work** is not "property damage" under a standard CGL policy. While this is a correct statement of the holding in *Crossman*, the trial court misapplied this concept to the facts in this instance. Here, it is clear that Precision Walls' claim is not for the repair or removal of defective construction. It is undisputed that no part of Precision Walls' claim is for the cost of removing or replacing the defective tape. Instead, the claim is for the costs related to damage to **non-defective components** (i.e. the brick veneer wall) which this Court, both in *L-J II* and *Crossman*, has made clear may constitute "property damage." Therefore, based on the facts presented in this case, the trial court erred in finding that Precision Walls' claim was not for "property damage."

B. This Court should find that the facts of this case established an "occurrence" as that term is defined in the CGL policy.

The CGL policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Liberty Mutual Ex. 1 at Section V.-Definitions, part 13; R. 234) The policy does not define the term "accident." Within the context of a CGL policy, this Court has defined "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." *E.g. Auto Owners Ins. Co. v. Newman,* 385 S.C. 187, 192, 684 S.E.2d 541, 543 (2009); *Auto Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 100, 682 S.E.2d 857, 867 (Ct. App. 2009). Under the undisputed facts of this case, it is clear that the loss of adhesion of the joint tape was an accident. The Berry Plastics Seam & Seal tape was approved for use in

taping the insulation board joints and there is no evidence that the tape was applied improperly. Neither SYS Constructors nor Precision Walls knows why the tape lost its adhesion and came loose. These events fall squarely within any accepted definition of the word "accident" and establish that an "occurrence" has taken place for purposes of satisfying this element of the insuring agreement of the CGL policy. Moreover, after this Court's pronouncement in *Crossman* that the standard CGL policy definition of "occurrence" is ambiguous and must be construed in favor of the insured, the error in the trial court's finding that no "occurrence" existed in this instance is even further magnified. *See Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011).

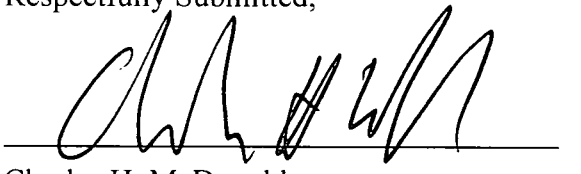
III. This Court should grant the petition in order to address the Court of Appeals coverage analysis in *Walde v. Association Insurance Co.*

The Court of Appeals cited its opinion in *Walde v. Association Insurance Co.*, 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012), as support for its finding that Precision Walls's claim is barred by policy exclusion "j(6)." During the pendency of Precision Walls's appeal, this Court granted the Waldes' petition for writ of certiorari in that matter. While the petition was rendered moot by the parties' recent consent dismissal of the matter (*see* Order, Appellate Case No. 2013-000614, entered on November 17, 2014), Precision Walls respectfully submits that this Court should grant its petition so it may now address the Court of Appeals's opinion in *Walde*, as it was previously inclined to do, within the context of this case. Because the analysis of coverage in *Walde* was central to the decision of both the trial court and the Court of Appeals, this petition presents the opportunity to address that coverage analysis and correct any errors with respect to such analysis as it relates to Precision Walls's claim.

CONCLUSION

For the reasons set forth above, Precision Walls respectfully submits that this Court should grant certiorari and review the novel issues presented in this insurance coverage case. Without action by this Court, the Court of Appeals's fundamental misapplication of a common CGL policy exclusion will be left to stand thereby creating the real possibility of future harm to other insureds who are denied coverage based upon this same policy exclusion.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA

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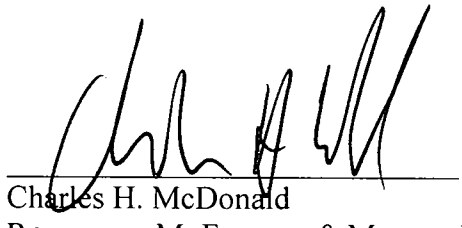
PROOF OF SERVICE

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



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November 21, 2014

Via Hand Delivery

The Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29211

Re: Precision Walls, Inc. v. Liberty Mutual Fire Insurance Co.
Case No. 2011-CP-23-02028

Dear Mr. Shearouse:

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

Thank you for your assistance in this matter.

Very truly yours,

ROBINSON, MCFADDEN & MOORE, P.C.

Charles H. McDonald

CHM/rhs

Enclosures

cc: Steve W. Ouzts – *via hand delivery*

The Supreme Court of South Carolina

Robinson, McFadden & Moore 11/24/2014

RECEIPT #74256

Case No:	2014-002503
Case Short Title:	Precision Walls v. Liberty Mutual Fire Ins.
Event:	
Fee Type:	Case Initiation Fee
Amount:	$100.00
Payment Type:	Check
Reference No:	32340
Check/Money Order Date:	11/20/2014
Comments:	