

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
In the Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

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S.C. Supreme Court

Opinion No. 5061 (S.C. Ct. App. filed December 12, 2012)

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

v.

Association Insurance Company, Respondent.

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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INDEX

DECISION BY COURT OF APPEALS A

RESPONDENTS'/PETITIONERS' PETITION FOR REHEARING B

APPELLANT/RESPONDENT'S RETURN TO
RESPONDENTS'/PETITIONERS' PETITION FOR REHEARING C

RESPONDENTS'/PETITIONERS' REPLY TO APPELLANT/RESPONDENT'S
RETURN TO PETITION FOR REHEARING D

ORDER DENYING PETITION FOR REHEARING E

ORDER: PRECISION WALLS, INC. v. LIBERTY MUTUAL FIRE INS. CO. F

RECORD ON APPEAL FILED SEPARATELY

FINAL BRIEF OF APPELLANT/RESPONDENT FILED SEPARATELY

FINAL BRIEF OF PETITIONERS/RESPONDENTS FILED SEPARATELY

FINAL REPLY BRIEF OF APPELLANT/RESPONDENT FILED SEPARATELY

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

Association Insurance Company, Appellant.

Appellate Case No. 2010-172706

Appeal From Aiken County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5061
Heard June 20, 2012 – Filed December 12, 2012

REVERSED

R. Michael Ethridge and Jennifer B. McCoy, of Carlock
Copeland & Stair LLP, both of Charleston, for Appellant.

Benjamin E. Nicholson, V, of McNair Law Firm P.A., of
Columbia, for Respondents.

THOMAS, J.: On cross-motions for summary judgment, Association Insurance Company (AIC) appeals the grant of partial summary judgment, costs, and attorney's fees to William and Mary Frances Walde, as assignees of Johnson Construction Company of Aiken, Inc. (Johnson). AIC argues the trial court erred in finding AIC had a duty to defend Johnson against the Waldes' arbitration claims.

AIC further maintains the trial court erred in holding AIC was liable for costs and attorney's fees due to a breach of that duty because the court failed to find that AIC's refusal to defend was without reasonable cause. Because the provisions of Johnson's insurance policy with AIC are unambiguous, those provisions are the guideposts of our analysis below. We reverse.

FACTS AND PROCEDURAL HISTORY

The Waldes owned residential property in Aiken and planned to build a barn and paddock to accommodate their horses. A special exception from a city ordinance was required to allow the barn because the barn was not for commercial use. A variance from the ordinance was also needed to allow the barn to be built behind their home because the barn would be nearer to the neighbors' houses than permitted by the ordinance. To those ends, the Waldes contracted with Johnson for \$500 to represent them before Aiken's Board of Zoning Appeals (the BZA) in obtaining the necessary approval to build the barn and paddock (the Permitting Contract).¹

Johnson submitted applications for the variance and special exception to the BZA. Before and immediately after Johnson met with the BZA, Johnson's owner, Mike Johnson, affirmed to the Waldes that the variance and special exception being applied for would be sufficient for the desired barn, including an upstairs accessory

¹ In the order appealed from, the trial court found Johnson and the Waldes entered two separate contracts: the Permitting Contract and a contract to build a paddock and two-story barn-apartment. Thus, the trial court held Johnson's representation of the Waldes before the BZA was "separate and apart" from its construction of the barn itself. At the summary judgment hearing, AIC argued the parties entered only one contract that included permitting and construction. However, AIC's initial appellant's brief does not include an issue on appeal addressing this contention, does not argue the specific issue, and only briefly refers to this concern in its exclusion arguments without providing any supporting authority. Therefore, we do not address whether the trial court properly found the parties entered separate contracts. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *Fassett v. Evans*, 364 S.C. 42, 50 n.5, 610 S.E.2d 841, 846 n.5 (Ct. App. 2005) (holding that even if an argument could be construed as raising a separate issue on appeal, it was abandoned for being conclusory and failing to cite any supporting authority).

apartment, to comply with Aiken's ordinances. The BZA approved the variance and special exception, but those approvals were not sufficient to build the barn the Waldes desired.

The Waldes subsequently contracted with Johnson for the construction of a paddock and barn that included the upstairs apartment (the Construction Contract). Johnson had completed 80% of the barn by June 2008. That month, Aiken's building inspector notified Johnson the barn did not comply with the variance or special exception. The barn was not built in the location permitted by the special exception. Nor had the BZA approved the apartment, which caused the barn to contravene the height and size standards of Aiken's ordinances.

Johnson sought another variance and special exception with the BZA. The BZA denied the applications and directed the barn to be torn down. The Waldes consequently terminated the Construction Contract with Johnson. Without Johnson's help, they sought a variance and special exception for a third time, requesting that the barn remain if the apartment was removed. The BZA granted this request, and Johnson tore down the apartment to lower the barn's roof to remedy the problem.

In September 2008, the Waldes filed an arbitration demand with the American Arbitration Association. Johnson was insured by AIC under a comprehensive general liability policy (the Policy). Johnson notified AIC of the arbitration demand, and AIC denied any duty to defend or indemnify pursuant to the Policy. Johnson thereafter hired its own counsel to defend against the Waldes' allegations.

The Waldes also filed a brief with the arbitrator. Taken together,² the arbitration demand and arbitration brief specify claims for breach of contract, negligent

² The trial court considered both the arbitration demand and the Waldes' arbitration brief. The record does not indicate whether AIC objected to the consideration of the arbitration brief before the trial court ruled or in a subsequent Rule 59(e) motion. Thus, whether the trial court should have considered the arbitration brief is not properly before us, and we consider both the arbitration demand and the arbitration brief in deciding the issues. *See Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006) (when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCF, motion, the issue is not preserved for appellate review).

misrepresentation, breach of fiduciary duty, and unjust enrichment. They include a quote from Mike Johnson at the second BZA meeting that he "had no inkling, no intent," and "no idea" that the construction plans violated the size or height requirements of the variance and special exception. The gravamen of the Waldes' negligence, negligent misrepresentation, and breach of fiduciary duty claims alleged the same conduct by Johnson: negligent representation of them pursuant to the Permitting Contract to obtain the necessary approval of the desired barn, which included performing work before the BZA and advising them that the variance and special exception would permit the barn's height with the apartment. The Waldes' arbitration claims sought prejudgment interest; arbitration costs and fees; damages for the difference between the value of the barn they contracted for and the value of the barn they received; damages for the cost of paying additional professionals to supervise, plan, and survey construction of the property due to Johnson's negligence; travel costs; and punitive damages.

Johnson and the Waldes settled their dispute prior to arbitration. Part of the settlement agreement assigned to the Waldes any rights Johnson had to insurance proceeds under the Policy.

The Waldes thereafter filed a complaint against AIC, alleging AIC breached its duty to defend and indemnify Johnson. The complaint also attached the Policy, the arbitration demand, and the arbitration brief.

The Waldes moved for partial summary judgment that (1) AIC breached its duty to defend Johnson and (2) AIC was therefore liable to them under section 38-59-40(1) of the South Carolina Code (2002) for their costs and attorney's fees in suing AIC as well as Johnson's costs and attorney's fees in the prior arbitration.³ AIC filed a cross-motion for summary judgment in response. AIC maintained the Waldes' arbitration claims did not involve an "occurrence" giving rise to "property damage" and were precluded by "insured contract," "your work," "intentional acts," and "products-completed operations hazard" (PCOH) exclusions.⁴ Even if

³ The Waldes' motion did not seek a finding on the amount of costs or fees recoverable; it sought a finding on AIC's liability for those items.

⁴ We note the parties refer to exclusion A.2(j)(6) as the "Your Work exclusion" and exclusion A.2(l) as the "PCOH exclusion." While this practice may be helpful to the reader, we discuss the exclusions by referring to their particular subdivisions. We do this to emphasize that legal analysis addressing contractual provisions

AIC breached a duty to defend, moreover, AIC argued the Waldes were not entitled to costs or fees because they did not present any evidence AIC's refusal was without reasonable cause.

The trial court granted the Waldes' motion for partial summary judgment. It held AIC was obligated to defend Johnson in the arbitration because (1) the Waldes suffered "property damage" caused by an "occurrence" and (2) the alleged policy exclusions did not apply. The trial court lastly held that, because AIC failed to defend Johnson, AIC was liable for the fees and costs sought by the Waldes. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in finding AIC had a duty to defend Johnson?
2. Did the trial court err in finding AIC liable for fees and costs under section 38-59-40?

STANDARD OF REVIEW

"Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law." *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 379 S.C. 573, 576, 666 S.E.2d 897, 899 (2008). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id.* at 577, 666 S.E.2d at 899.

ANALYSIS

I. Duty to Defend

AIC asserts the trial court erred in finding AIC had a duty to defend Johnson against the Waldes' claims for multiple reasons. We address them below.

should focus on the language of the contract. In this case, the Policy frames the meaning of "occurrence," "property damage," "your work," and "PCOH" by using different, specific definitions. Those definitions only gain legal meaning through the insuring clause and exclusions of the Policy.

"Insurance policies are subject to the general rules of contract construction." *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). "The standard CGL policy grants the insured broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions. Each exclusion in the policy must be read and applied independently of every other exclusion." *Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 197, 684 S.E.2d 541, 547 (2009). We "interpret insurance policy language in accordance with its plain, ordinary, and popular meaning, except with technical language or where the context requires another meaning. Policies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer." *M & M Corp.*, 390 S.C. at 259, 701 S.E.2d at 35.

Here, the provisions of the Policy, and the manner in which they apply under the allegations at issue,⁵ are unambiguous. Thus, those provisions are the guideposts of our analysis below.

"Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the third party's complaint." *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15, 459 S.E.2d 318, 319 (Ct. App. 1994), *aff'd* 321 S.C. 310, 468 S.E.2d 304 (1996). In examining these allegations, the "court must look beyond the labels describing the acts to the acts themselves which form the basis of the claim against the insurer." *Collins Holding Corp.*, 379 S.C. at 577, 666 S.E.2d at 899. If these alleged acts create "a possibility of coverage under an insurance policy, the insurer is obligated to defend." *Isle of Palms Pest Control Co.*, 319 S.C. at 15, 459 S.E.2d at 319.

⁵ The Waldes contend the trial court found as alternative holdings that exclusion A.2.(j)(6) does not apply because it is "ambiguous as applied to these facts" and thus must be construed against AIC, the insurer. They contend AIC has not appealed these findings and they accordingly are the law of the case. However, AIC's entire appeal is clearly based upon an argument that the Policy unambiguously excludes coverage for the Waldes' claims. Therefore, the finding that this exclusion is "ambiguous as applied" is not the law of the case.

A. "Property Damage" Caused by an "Occurrence"

The Policy's insuring clause provides the following:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.
.....
- b. This insurance applies to . . . "property damage" only if:
 - (1) The . . . "property damage" is caused by an "occurrence"

Thus, AIC argues it did not have a duty to defend Johnson because the Waldes' claims failed to raise the possibility of "property damage" caused by an "occurrence."⁶

⁶ In defense of this argument, the Waldes contend the trial court's finding that AIC had a duty to defend Johnson is the law of the case. They first maintain the trial court made an unappealed finding in a footnote that AIC had a duty to defend based upon Johnson's breach of a fiduciary duty. However, the footnote is attached to the court's finding that an "occurrence" existed by virtue of Johnson's negligent statements to the Waldes pursuant to the Permitting Contract that the plans complied with the variance and special exception. We do not interpret the footnote to constitute an alternative finding to support a blanket grant of summary judgment on the duty to defend, including any consideration of whether "property damage" was alleged or any exclusions apply. In the footnote, the trial court held the allegations underlying the breach of fiduciary duty claim established an "occurrence."

1. *Property Damage*

AIC contends the trial court erred in finding the Waldes alleged "property damage" because their allegations do not establish "physical injury" or "loss of use." AIC argues the claims in fact allege economic loss resulting from faulty workmanship. We find the Waldes alleged "property damage" under the terms of the Policy.

The Policy defines "property damage" as the following:

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

In granting partial summary judgment, the trial court found the Waldes raised the possibility of more than mere economic loss because they claimed both (1) "physical injury" when the barn was partially torn down and (2) if no physical injury, "loss of use" of the barn when the BZA determined it failed to comply with Aiken's regulations. We hold the Waldes alleged loss of use without physical injury.

The Waldes' arbitration claims clearly allege economic loss that does not by itself trigger coverage under the Policy.⁷ However, this does not preclude AIC from having a duty to defend Johnson against the Waldes' claims. The Policy's insuring clause says AIC has a "duty to defend [Johnson] against any 'suit' seeking those damages" Johnson "becomes legally obligated to pay . . . because of . . . 'property damage' to which this insurance applies." Thus, AIC must defend Johnson in a suit

⁷ The Waldes' arbitration allegations raise several items that are economic loss, including prejudgment interest; arbitration costs and fees; damages for the difference between the value of the barn contracted-for and received; damages for the costs of travel and construction supervision, planning, and surveying of their property.

for damages so long as the Waldes' allegations raise the possibility that Johnson is obligated to pay those damages because of "property damage" caused by an "occurrence" that is not excluded by the Policy.

The seminal case in South Carolina addressing whether a party has alleged mere economic loss is *Auto-Owners Insurance Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003). In that case, third party homeowners sued multiple insureds on a number of theories for the failure to disclose the known presence of hazardous materials in the construction and sale of their homes. *Id.* at 159, 588 S.E.2d at 113. The homeowners alleged the insureds' failure to disclose the presence of the hazardous materials caused the homeowners to suffer lower property values and other economic damages. *Id.* The court held the insurer did not have a duty to defend the insureds because the homeowners' claims did not allege any "physical injury" that meets the definition of "property damage." *Id.* at 162-63, 588 S.E.2d at 115. The court reasoned the allegations of mere diminution in property value and other economic damages are purely economic loss. *Id.* at 163, 588 S.E.2d at 115.

Unlike the third parties in *Carl Brazell Builders, Inc.*, the Waldes have gone beyond alleging mere economic loss. They have raised the possibility of "property damage."

The Waldes' allegation that the barn had to be partially torn down to make it comply with Aiken's regulations does not raise the possibility of "physical injury to tangible property." "Physical injury" is not defined by the Policy, but an "injury" is generally considered the violation of another's legal right. *See Black's Law Dictionary* 856 (9th ed. 2009) (providing that an injury is "the violation of another's legal right, for which the law provides a remedy"). Under this definition, Johnson's partial tearing down of the barn's second story does not constitute an injury. This removal of the second story was a remedial measure Johnson performed to fix the injury he caused to the Waldes when the construction put them in violation of Aiken's ordinances.

Nonetheless, the Waldes' allegations do raise the possibility of "loss of use of tangible property" that has not been physically injured. The Waldes could not fully use the property after the BZA informed them of the barn's noncompliance. Thus, they have alleged property damage as defined under the Policy. Whether that claim of "property damage" is covered by the Policy is determined by whether it was caused by an "occurrence," and whether an exclusion applies.

We disagree with AIC's argument that the Waldes failed to allege "property damage" because the physical injury to the barn resulted from faulty or defective workmanship. Under the plain language of the Policy, whether "property damage" was caused by faulty workmanship is relevant in the Policy's exclusions and not the definition of "property damage." Further, the three cases raised by AIC in support of its argument are inapplicable to the property damage issue. See *Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 46, 50, 717 S.E.2d 589, 592, 594 (2011) (stating that the question before the court was whether the party's claims involved an "occurrence"; the parties stipulated the claims involved property damage and the parties would not argue any policy exclusions); *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 122-25, 621 S.E.2d 33, 36-37 (2005) (addressing whether a party's claims involved an "occurrence"); *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 563-65, 561 S.E.2d 355, 357-58 (2003) (stating that the parties stipulated the claims involved property damage and addressing whether a claim for cost of repair was excluded by a faulty workmanship exclusion), *overruled on other grounds by Crossmann Cmty. of N.C., Inc.*, 395 S.C. at 50, 717 S.E.2d at 594.

2. Occurrence⁸

The Waldes have consistently maintained an "occurrence" existed under the Policy due to Johnson's negligent representation of them before the BZA pursuant to the Permitting Contract. The trial court agreed with this assertion, finding three occurrences arising out of the Permitting Contract: (1) Johnson's incorrect advice to the Waldes before and immediately after the BZA meeting that their desired barn would comply with the ordinances, variance, and special exception; (2) Johnson's failure to obtain the necessary approvals from the BZA to build the desired barn; and (3) Johnson's failure to design the barn within the height and location requirements established by the BZA and Aiken ordinances.

On appeal, AIC maintains the Waldes' claims do not arise from an "occurrence" because the Waldes' arbitration demand asserted Johnson's advice was "wrongful."

⁸ Our supreme court has held the definition of "occurrence" is ambiguous in the progressive property damage context. *Crossmann Cmty. of N.C., Inc.*, 395 S.C. at 49, 717 S.E.2d at 594.

According to AIC, this allegation indicates the Waldes' claims are not based upon an "accident" that would give rise to an "occurrence." We disagree.

In the Policy, an "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." When left undefined in a CGL policy, "accident," means "[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." *Newman*, 385 S.C. at 192, 684 S.E.2d at 543 (alteration in opinion) (internal quotation marks omitted).

Here, the Waldes' allegations establish the possibility of an "occurrence." The Waldes' allegation that Johnson "wrongly" said their plans complied with the BZA's variance and exception could be construed as alleging Johnson was mistaken or acting "without due care." See *Black's Law Dictionary* 856 (9th ed. 2009) (defining a "wrong" as a "breach of one's legal duty"); *id.* (defining "wrongful" as "1. Characterized by unfairness or injustice . . . 2. Contrary to law; unlawful"); *id.* (defining "wrongful conduct" as "[a]n act taken in violation of a legal duty; an act that unjustifiably infringes on another's rights"); *Webster's New World College Dictionary* 1653 (4th ed. 2008) (defining "wrongly" as "in a wrong manner; . . . incorrectly; amiss"). Thus, regardless of whether a claim is made for "negligence," "negligent misrepresentation," or "breach of fiduciary duty," the Waldes sufficiently allege Johnson's erroneous representation of them before the BZA and provision of information was unintentional. Compare *Collins Holding Corp.*, 379 S.C. at 577-78, 666 S.E.2d at 899-900 (holding the trial court erred in finding a negligent misrepresentation claim created the possibility of an occurrence because the allegations underlying the claim could not be construed as accidental since they incorporated assertions the insured's conduct "systematic[ally]," "intentional[ly]," and "deliberate[ly]" violated the law and therefore could not possibly be construed as negligent in nature). Therefore, it could be an accident within the terms of the Policy. That accident caused loss of use, and the Waldes have sufficiently alleged "property damage" caused by an "occurrence."

B. Exclusion A.2(j)(6)

If the Waldes sufficiently alleged "property damage" caused by an "occurrence," AIC argues the trial court erred in finding AIC had a duty to defend Johnson because the Waldes' claims fall within exclusion A.2(J)(6). We agree.

Exclusion A.2(j)(6) provides the following:

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.

.....

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."

.....

"Your work" includes "[w]ork or operations performed by you or on your behalf" as well as "[w]arranties and representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work.'" PCOH includes all "property damage" (1) "occurring away from premises you own or rent" and (2) arising out of "your work" except:

- (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

- (c) 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.

The Waldes have alleged property damage not included in the PCOH. Regardless of whether the Permitting Contract was complete when the Waldes in fact lost use of the property, the Policy deems all loss of use unaccompanied by physical injury to have occurred at the time of the occurrence. In this case, the Waldes claim loss of use of the property arising out of Johnson's incorrectly performed obligations to advise them and obtain the necessary approval from the BZA to build the desired barn on the property under the Permitting Contract. The loss of use is deemed to have happened at the time of those incorrect performances. Therefore, the alleged loss of use happened before Johnson's work pursuant to the Permitting Contract was complete.⁹

Because the Waldes have alleged "property damage" not included in PCOH, the Policy indicates the Waldes' claims would be excluded from coverage under A.2(j)(6) if they claimed "property damage" to "that particular part of property that must be . . . replaced because 'your work' was incorrectly performed on it." In this case, A.2(j)(6) precludes coverage. The Waldes have alleged that they lost use of the barn while they were required to tear down and place a new roof on its structure to comply with Aiken's height regulations because of Johnson's defective

⁹ If this court were able to consider whether Johnson and the Waldes in fact entered two contracts, we may have been inclined to find that they did not. As a result, Johnson and the Waldes' contract would involve both the agreement to obtain the necessary approval from the BZA and the construction of the barn. In such a case, however, the Waldes' allegations would still allege property damage within the PCOH. Because the Waldes are deemed to have lost use of the barn during Johnson's representation of the Waldes before the BZA, the loss of use would have happened before all of the work in that contract—including the construction—was complete.

work. In other words, the Waldes have alleged property damage to that particular part of property that must be replaced because Johnson's permitting work was incorrectly performed on it.

The Waldes contend their claims are not excluded because the defective work occurred before the BZA rather than in the construction of the barn, i.e. they claim Johnson negligently performed the permitting work and did not negligently build the barn. However, this argument that their claims involve a permitting defect and not a construction defect cannot escape the exclusion mandated by A.2(j)(6). *Cf. Century Indem. Co.*, 348 S.C. at 565-67, 561 S.E.2d at 358-59 (providing an identical provision excluded coverage not only for (1) "property damage" to defective work caused by that defective work but also (2) "property damage" to non-defective work caused by the defective work), *overruled on other grounds by Crossmann Cmty. of N.C., Inc.*, 395 S.C. at 50, 717 S.E.2d at 594. As a result, the trial court erred in finding AIC had a duty to defend Johnson against the Waldes' allegations.

CONCLUSION

Because we find AIC had no duty to defend Johnson, we need not address AIC's remaining arguments and issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal). We reverse the trial court's grant of summary judgment to the Waldes. We find the Waldes successfully raised the possibility of "property damage" caused by an "occurrence" under the terms of the Policy. However, we hold the Waldes' allegations have not raised the possibility of coverage because they are unambiguously excluded. Thus, we hold AIC had no duty to defend Johnson against the Waldes' claims, and AIC is not liable for the fees and costs sought by the Waldes.

REVERSED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

2009-CP-02-02420

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

v.

Association Insurance Company, Appellant.

PETITION FOR REHEARING OF RESPONDENTS

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Pursuant to Rules 221 and 224, SCACR, Respondents respectfully submit this Petition for Rehearing. For the reasons set forth below, Respondents submit this Court should grant rehearing and issue an amended opinion that affirms the appealed orders and judgment.

ARGUMENTS FOR REHEARING

This Court reversed the appealed order based upon its conclusion that Exclusion A.2(j)(6) (“the Exclusion”) unambiguously applied to bar coverage. (Op., pp. 92-94) The Court to reach that exclusion held that Respondents only alleged loss of use injury when it held “Johnson’s partial tearing down of the barn’s second story does not constitute an injury.” (Op., p. 89). In doing so, the Court committed several errors.

1. First, the Court erred by its refusal to recognize that Appellant’s entire appeal was rendered moot by its failure to appeal the Trial Court’s holding in footnote 4 of its Order that provided a blanket statement for finding coverage.

2. Second, this Court erred by defining the term “physical injury” when Appellant did not ask it to do so.¹

3. Third, the Court erred by contradicting its prior precedent by too narrowly defining “physical injury to real property” as part of the definition of “property damage” under the Policy and misapplying the definition to the facts.

4. Fourth, the Court erred by then holding that the Walde’s “loss of use” damages were excluded under the facts in the Record and the Exclusion.

5. Fifth, the Court erred by holding that the Exclusion could be unambiguously applied to these facts.

¹ If there was “physical injury” alleged against Johnson, then the Exclusion would not apply under the Court’s logic that the Exclusion related back to loss of use damages. This is one of the major reoccurring themes in this Petition—that there was “physical damage” so that the Court’s use of the Exclusion is moot.

For the reasons set forth below, it is respectfully submitted that this Court erred in reversing the Trial Court. Accordingly, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion that fully affirms the appealed order.

I. The Court's erred by its failure to apply the "law of the case" doctrine to footnote 4 of the Trial Court's Order finding a blanket statement of coverage.

The Court at its footnote 6 interpreted the Trial Court's alternative finding that Appellant had a duty to defend based on the allegation of breach of fiduciary duty to apply only to whether breach of fiduciary duty was an occurrence. (Op., footnote 6, pp. 87-88.) However, the Trial Court did not say that. The Trial Court unambiguously stated "as an alternative basis for finding a duty to defend, the Court finds that the allegations of harm caused by Johnson's breach of fiduciary duty is covered."

While the Trial Court's footnote was found in a section where the occurrence issue was addressed, the footnote did by its express terms issued a blanket opinion that the allegations of harm were covered. A blanket finding by a trial court is just as effective as one that is explained by a trial court for purposes of appeal and error preservation. It was the Appellant's responsibility to seek a clarification of this ruling, but it did not do so. Therefore, the ruling is the law of the case.

II. The Court's ruling on the definition of "physical injury" in the Policy was not a point argued by Appellant and therefore was not properly as subject of interpretation by the Court.

Appellant never raised the definition of "physical injury" as a limitation to the Respondents' allegation of "property damage" to this Court. Appellant simply stated that no property damage was alleged, but made no argument that the definition of property damage barred coverage for the partial demolition of the barn. Therefore, this point cannot be the basis for a reversal. "[A]ppellate courts

in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” *Herron v. Century BMW*, 719 S.E.2d 640, 644 (S.C. 2011)

III. The Court ignored its own precedent that demolition and remedial action constitute “physical injury” as it appears in the Policy, improperly defined the term “Physical Injury,” and then improperly applied the term to the facts.

The Court in defining “physical injury” focused on the word “injury,” citing *Black’s Law Dictionary*. However, in doing so, the Court ignored its own precedent and set a new precedent that unduly limited the definition of “physical injury” in CGL insurance policies by ignoring the descriptive adjective “physical.”

The Court’s ruling directly contradicts its prior ruling in *Auto-Owners Insurance Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857 (Ct. App. 2009). In *Rhodes*, the Court held that where a billboard constructed by the insured and put on property owned by Rhodes fell onto a highway, and the South Carolina Department of Transportation (“SCDOT”) required Rhodes to remove another billboard erected by the insured that SCDOT deemed was unsafe, “the costs associated with Rhodes’ required removal of the final sign comports with the broader definition of damages or physical injury to tangible property defined in subsection 12.a.” 385 S.C. at 103-104, 682 S.E.2d at 868.

There is no distinction between the SCDOT’s order that billboard be removed in *Rhodes* and the BZA’s Order that the barn be partially demolished in the present case. In both cases, the result of the order of authority was the demolition and removal of property which each were “physical injury” as defined by the insurance policy. Thus, this Court has held in *Rhodes* that the definition of “physical injury” includes remedial demolition.

The controlling contractual language is not just the word “injury,” the language is the term “physical injury.” *Black’s Law Dictionary* 1032 (5th Ed. 1979) defined “physical injury as: “Bodily

harm or hurt, excluding mental distress, fright, or emotional disturbance. See also **Physical harm.**” (Bold in original.) Then, Black’s defines **Physical harm** stating “[t]he words ‘physical harm’ are used throughout the Restatement of Torts to denote *the physical impairment* of the human body, or of land *or chattels.*” (Italics added.) The partial demolition of the barn was a “physical impairment” by any definition.

Commentators have also recognized a broader definition of “physical injury to tangible property” in the standard CGL policy. “In relation to the first prong of the definition, property suffers physical, tangible injury when the property is altered in appearance, shape, color or in some other material dimension.” *9A Couch on Insurance* §129:6 (3rd Ed. 2012).

As stated, the Court improperly applied the definition of physical injury when it held that the remediation work performed by Johnson was not factually a “physical injury.” First, the primary injury was the demolition, not the remedial work. Second, even absent the controlling precedent of *Rhodes*, that the work was remediation work and that the work was performed by Johnson is irrelevant to the analysis.

For example, had Johnson not performed the remediation work, the barn would have been ordered torn down by the Board of Zoning Appeals anyway (the logical and only conclusion given the BZA’s Order). In such a case, there would be no “remediation work;” there would only be injury as the barn would have been torn down by someone other than Johnson. Under the Court’s reasoning, a third party tearing down the barn would create a “physical injury.” However, there is nothing in the definition of “physical injury” that restricts the damage created by the injury to be damage not remediated by the tortfeasor. Thus, the Court’s ruling on this point discourages the mitigation of damages by a tortfeasor; the tortfeasor would be incentivized to do nothing and allow a third party to take action so that the tortfeasor’s conduct was covered by its insurance.

Further, in the absence of such an express restriction, the Court must read the policy to favor the insured, so that the “physical injury” cannot exclude damage caused by the tortfeasor’s mitigation efforts. *Laidlaw Environ. Services (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 524 S.E.2d 874, 879 (Ct. App. 1999).

IV. The Court improperly applied the Exclusion.

The Exclusion does not apply pursuant to the “your work” definition (2)(a) which states that the “property damage” is damage *except* “(a) When all of the work called for in your contract has been completed.” The Permitting Contract was completed before the work under the Construction Contract began.

The Court erred by applying the Exclusion to the wrong occurrence. (Op., p. 93). The Court fell back into the trap of construing Johnson’s advice before the Board and its construction as one connected occurrence or series of events. However, the Court acknowledges that it could not do so in footnotes 1 and 9. (Op., pp. 82, 93). Thus, the “loss of use” to which the Exclusion would apply would only be a loss of use caused by an “occurrence” during the construction of the barn, such as a traditional construction defect. That is not the case here.

The Exclusion cannot apply to a loss of use from an occurrence unconnected with the construction of the barn. If a third party instead of Johnson had built the barn and it was torn down because of the BZA’s Order, there is no question but that the Exclusion would not apply. Since the Court must accept that Johnson engaged in two completely separate courses of conduct (per footnotes 1 & 9), the Exclusion could only apply to “loss of use” caused by Johnson’s work under the Permitting Contract, and since the work under the Permitting Contract was completed before Johnson undertook the separate contract to construct the barn.

Thus, the Court's logic was improper where it states: "[t]he loss of use is deemed to have happened at the time of those incorrect performances. Therefore, the alleged loss of use happened before Johnson's work pursuant to the Permitting Contract was complete." (p. 93). This is an incorrect statement of fact based on the Record and the Court's recognition at footnotes 1 & 9 that there were two contracts.

Johnson's work under the Permitting Contract was completed before he started work on the Construction Contract for the construction of the barn. Johnson could not start work under the Construction Contract until it completed its work under the Permitting Contract; that is, Johnson obtaining the proper BZA clearance. It was impossible to build the barn before the Permitting Contract was complete, so it was therefore impossible for a loss of use of the barn to occur before it was built. There simply could be no loss of use during the Permitting Contract. It is axiomatic that contracts will not be construed to result in absurd results. *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 452 S.E.2d 628, 631 (S.C. Ct. App. 1994); *Walters v. Summey Bldg. Sys., Inc.*, 311 S.C. 507, 510-11, 429 S.E.2d 854, 856 (Ct. App. 1993). The Policy cannot be read to create a fiction: that a loss of use occurred before the loss of use actually occurred. This construction at best is ambiguous, and if so, then it must be construed in favor of the insured so that the loss of use did not occur before the actual loss occurred. *Laidlaw Environ. Services (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 524 S.E.2d at 879.

V. The Court's improperly held that the Exclusion could be unambiguously applied to the facts.

The Court found that the Exclusion unambiguously applied and barred coverage. (Op., pp. 86, 93.) However, as the Court interpreted the Exclusion and the facts from the Record, the conclusion reached by the Court was that the "the alleged loss use happened before Johnson's work pursuant to the Permitting Contract was complete." (Op., p. 93). The Court's opinion

results in the interpretation of the Policy that a loss of use occurred before the loss of use actually occurred. The incongruity of the facts and the policy language render the Exclusion at best ambiguous as applied to this set of facts where the same policy holder has two different contracts and the work under one contract harms the work it performs under a separate contract. *Crossman Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 49, 717 S.E.2d 592, 594 (2011); *Laidlaw Environ. Services (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 524 S.E.2d at 879. Thus, the Exclusion must be construed to adversely to the Appellant.

CONCLUSION


For all of the foregoing reasons, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion that affirms the appealed order.

Respectfully submitted,

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January , 2013
Columbia, South Carolina

COLUMBIA 1101881v1

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-02-2420

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

v.

Association Insurance Company,.....Appellant.

RETURN TO PETITION FOR REHEARING

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Attorneys for Appellant

The Appellant files this Return to the Petition for Rehearing pursuant to South Carolina Appellate Court Rule 240. For the reasons stated below and based on the findings of this Court, Respondents' Petition for Rehearing should be denied in its entirety.

This Court's decision to reverse the lower court's grant of partial summary judgment in favor of Appellant was correct and should remain. This Court correctly found that Association Insurance Company ("AIC") had no duty to defend Johnson Construction Company of Aiken, Inc. ("Johnson").

I. The Court did not err in failing to apply the "law of the case" doctrine to footnote 4 of the Trial Court's Order.

The Court properly determined that the trial court's reference to breach of fiduciary duty was "attached to the court's finding that an 'occurrence' existed by virtue of Johnson's negligent statements to the Waldes pursuant to the Permitting Contract that the plans complied with the variance and special exception." (Op., footnote 6, p. 87.) Therefore, the Court correctly concluded that the footnote did not "constitute an alternative finding to support a blanket grant of summary judgment on the duty to defend." (Op., footnote 6, p. 87.)

Furthermore, Appellant believes it is disingenuous of Respondents to argue that Appellant failed to appeal the trial court's footnote discussing duty to defend relative to breach of fiduciary duty. Appellant's Final Brief stated that "it is clear that none of the Respondents' claims fell within the ambit of coverage. Therefore, no duty to defend on the part of Association was triggered." (Final Brief of Appellant, p. 18.) Furthermore, the issues related to footnote 4 and the breach of fiduciary duty were fully briefed in the

Final Reply Brief of Appellant. (Final Reply Brief of Appellant, p. 5-6.) The Court properly concluded that the “law of the case” doctrine does not apply to footnote 4.

II. The Court properly determined that Johnson’s remedial measures relative to the second story of the barn did not constitute physical injury.

Respondents claim that the Court improperly considered the definition of “physical injury” in its analysis of property damage, because Respondents claim this issue was never raised. However, Appellant’s Final Brief argues that “nothing in the Demand sets forth any allegations that the building at issue was physically injured . . .” (Final Brief of Appellant, p. 23.)

Furthermore, the South Carolina Supreme Court recently addressed the definition of physical injury relative to property damage in a CGL policy and specifically stated, “We emphasize the difference between a claim for the costs of repair or removing defective work, which is not a claim for property damage, and a claim for the costs of repairing damage caused by the defective work, which is a claim for property damage.” Crossmann Communities of North Carolina, Inc. v. Harleystown Mutual Ins. Co., 395 S.C. 40, 49, 717 S.E.2d 589, 593 (Aug. 22, 2011). The Court properly determined that Johnson’s remedial measures did not constitute physical injury.

II. The Court properly applied Exclusion A.2(j)(6) and properly found that Appellant has no duty to defend under the policy.

Pursuant to the plain language of the insurance policy, coverage is precluded; therefore, the Court properly concluded that Appellant has no duty to defend under the policy. The following relevant policy language applies to preclude coverage:

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.

...

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

...

16. "Products-completed operations hazard":

- a) Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

- 1. Products that are still in your physical possession; or
- 2. Work that has not yet been completed or abandoned. However "your work" will be deemed completed at the earlier of the following times:

- a) When all of the work called for in your contract has been completed.
- b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
- c) 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.

...

22. "Your work":

- a. Means:

- 1) Works or operations performed by you or on your behalf; and

- 2) Materials, parts or equipment furnished in connection with such work or operations.
- b. Includes
 - 1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”, and
 - 2) The providing of or failure to provide warnings or instructions.

...

The Court properly applied Exclusion A.2(j)(6), because the Respondents alleged property damage that would not be included in the Products Completed Operations Hazard pursuant to the facts and the plain language of the policy. Furthermore, the Respondents alleged property damage to “[t]hat particular part of property that must be . . . replaced because ‘your work’ was incorrectly performed on it.” “Your work” is defined in the policy as “[w]orks or operations performed by you or on your behalf” and includes “[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of ‘your work.’” The Court properly concluded that the Respondents “claim loss of use of the property arising out of Johnson’s incorrectly performed obligations to advise them and obtain the necessary approval from the BZA to build the desired barn on the property under the Permitting Contract.” (Op, p. 93). All of the work performed by Johnson meets the policy definition of “your work.” Appellant presented this argument in its Final Brief of Appellant. Specifically, in the Final Brief, the Appellant argued that the following actions by Johnson fall within the definition of “your work” in the policy:

The Demand for Arbitration alleges that “Respondents represented Claimants before Aiken Board of Zoning Appeals. [and] [r]espondents then built the building.” (Compl. Ex. B; R. p. 106). The Pre-Trial Brief alleges in its introduction that Johnson “promised that he could and would build a stable in compliance with the zoning ordinance then that the builder had violated the

zoning ordinance by building the stable in the wrong location and by building a different structure than what had been allowed...” (Compl. Ex. D, p. 1; R. p. 117). Finally, in their Complaint, Respondents allege that their damages arise from “the demolition of this accessory apartment and partial rebuilding of the stable as the BZA approved the location of the stable where it had been built so that the entire stable did not need to be torn down.” (Compl. ¶ 32; R. pp. 33-34). To the extent that the Waldes’ damages involve the repair or replacement of Johnson’s faulty workmanship, those damages would clearly not be covered.

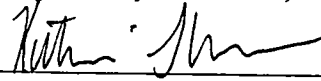
(Final Brief of Appellant, p. 26.) Appellant argued that all of Johnson’s actions, including the permitting work and the construction work, met the policy definition of “your work.”

The Court found that the Policy deemed all loss of use to have occurred at the time of the occurrence. If Johnson’s advising the Waldes regarding zoning approval constitutes an occurrence, then the loss of use would have occurred at the time such advice was rendered, and as such would not have been within the Products Completed Operations Hazard. The Court properly concluded that the alleged loss of use occurred before Johnson’s work was completed. (Op. p. 93 and footnote 9). Because Exclusion A.2(j)(6) operates to preclude coverage under the policy for property that must be repaired because Johnson’s work was performed incorrectly, the Court properly concluded that Appellant had no duty to defend Johnson.

CONCLUSION

In summary, Respondents’ Petition for Rehearing should be denied in its entirety. The Court properly concluded that Exclusion A.2(j)(6) operates to preclude coverage under the policy, and, therefore, Appellant had no duty to defend Johnson.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

2009-CP-02-02420

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

v.

Association Insurance Company, Appellant.

REPLY IN SUPPORT OF PETITION FOR REHEARING OF RESPONDENTS

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RECEIVED

JAN 30 2013

SC Court of Appeals

Pursuant to Rules 221 and 224, SCACR, Respondents respectfully submit this Reply in Support of their Petition for Rehearing.

REPLY ARGUMENTS

I. **The Appellant Did Not Properly Preserve Arguments on Footnote 4 so that the Trial Court's Findings Must be Law of the Case.**

Appellant argues that it properly preserved arguments opposing the Trial Court's alternative finding at footnote 4 of the Order that Respondents had stated a "duty to defend" by their allegation of breach of fiduciary duty. However, there is not a shred of argument anywhere in Appellant's Initial Brief regarding the breach of fiduciary duty finding. Appellant cites to a broad, non-specific statement that none of Respondents' arguments triggered a duty to defend. If such were permissible, why require a specific argument on a specific issue at all?

The law is clear that in order to preserve an issue for appeal, the appellant must specifically designate the issue appealed from and make specific arguments and citations to authority regarding that issue. *Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.C. 7, 17 n.5, 620 S.E.2d 326, 332 n.5 (2005)(Supreme Court held that an issue is abandoned if the appellant's brief treats it in a conclusory manner.) A mere assertion of error is too conclusory to present an issue for appellate review. *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E. 2d 513, 514 (1994)("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."); *Fields v. The Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E. 2d 283, 285 n.3 (Ct. App. 1993); *Peirson v. Calhoun*, 308 S.C. 246, 417 S.E.2d 604, 609 (Ct. App. 1992)(Mere assertion that court "abused discretion" insufficient.) Here, Appellant did neither.

Further, and to the contrary of that suggested by Respondent in its Return, a Reply Brief may not for the first time raise an appellate issue not raised by the appealing party's initial appellate brief. *Fields v. The Melrose Ltd. Partnership*, 439 S.E. 2d at 285, n.3 ("an appellant may not use

the reply brief to argue issues not argued in his brief in chief.”); *Bochette v. Bochette*, 300 S.C. 109, 386 S.E. 2d 475, 477 (Ct. App. 1989).

There is no ambiguity in the Trial Court’s Order; footnote 4 did not say that breach of fiduciary duty was an occurrence, rather, it said that breach of fiduciary duty was an alternative basis to find that Appellant had a duty to defend. The brevity of the note is irrelevant. *Porter v. Labor Depot*, 372 S.C. 560, 643 S.E. 2d 96, 100 (Ct. App. 2007). As the duty to defend was the heart of Respondents’ claim, the footnote was all-encompassing and the failure to appeal it renders all of Appellant’s other arguments moot.

II. Respondent’s Citation to *Crossman Communities* is Moot and Out of Context.

A. The Court Improperly Defined “Physical Injury.” an Issue Not Raised by Respondent.

Appellant simply did not raise this point specifically in its appeal. By its own admission, Appellant stated only in its Appellate Brief: “nothing in this Demand sets forth any allegations that the building at issue was physically injured...” (Return, p.3). That is the extent of Appellant’s ‘argument’ on this issue. This is not an argument properly reserved for an appeal. *Houck v. State Farm Fire and Cas. Ins. Co.*, 620 S.E.2d at n.5; *First Savings Bank v. McLean*, 444 S.E. 2d at 514; *Fields v. The Melrose Ltd. Partnership*, 439 S.E. 2d at 285 n.3.

The Supreme Court has stated “[w]e have held that the Court of Appeals may not decide an issue neither presented to the circuit court nor raised by proper exception on appeal.” *Connolly v. People’s Life Ins. Co. of South Carolina*, 299 S.C. 348, 384 S.E. 2d 38, 740 (1989)(Reversing Court of Appeals for basing its holding on matter not raised by appellant.) That is precisely what the Court did on raising and defining the issue of ‘physical injury’ in its Opinion.

B. Respondent's Reliance on *Crossmann Communities* is Misplaced.

Appellant cites *Crossman Communities of North Carolina, Inc. v. Harleystown Mutual Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589, 593 (2011) for the proposition that Appellants did not allege physical injury to the barn. However, the Supreme Court in *Crossmann Communities* noted a distinction between the cost to repair or remove defective work and the cost of damage caused by defective work when *all of the damage was part of the same occurrence*. Here, the occurrence that caused the damage was not defective construction of the barn, so that the defective construction had to be torn down and replaced; rather, the defective act was the advice given about the Board of Zoning Appeals and zoning laws. The damage was not the restoration of that defective advice, such as the cost to get an attorney and obtain a reversal by the Zoning Board of its holding, but rather the damage caused to a *separate project*—the barn itself.

The Court recognized that it is bound by the law of the case to recognize that there were two separate contracts and thus two separate courses of conduct—the Permitting Contract and then the Construction Contract. The occurrence as a result of acts taken under the former contract damaged the building constructed under the second contract. The result would be no different if the Waldes had used Johnson only for the Permitting Contract but elected to have another entity build the barn. In such a case, there would be no question but that the removal and remediation costs incurred by the Waldes to partially tear down the barn would be covered.

III. The Application of the “Your Work” Exclusion by Respondent for Loss of Use is Simply Illogical.

Appellant simply repeats the Court's holding in its third argument, concluding that “[i]f Johnson's advising the Waldes regarding zoning approval constitutes an occurrence, then the loss of use would have occurred at the time such advice was rendered...” (Return, p. 6). The illogicality of

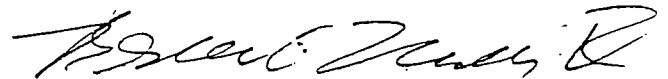
this argument, that a loss of use could occur before the use could have occurred, stands per Respondents' Petition for Rehearing.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion that affirms the appealed order.

Respectfully submitted,

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Attorneys for Respondents

January 30th, 2013
Columbia, South Carolina

The South Carolina Court of Appeals

William & Mary Frances Walde, as assignees of Johnson
Construction Company of Aiken, Inc., Respondents,

v.

Association Insurance Company, Appellant.

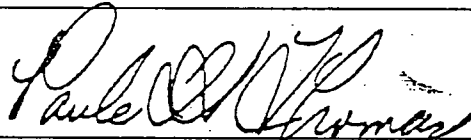
Appellate Case No. 2010-172706

ORDER

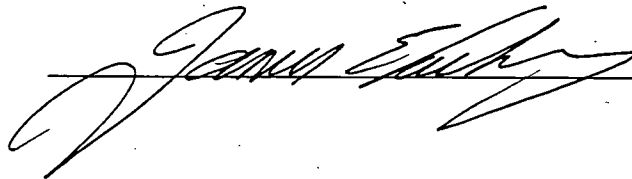
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Robert Michael Ethridge
Benjamin Edward Nicholson, V
Jennifer Blanchard McCoy
Katherine Walker Sullivan

FILED

February 26, 2013

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

FORM 412 CLERK OF COURT
 GREENVILLE, SC
 PAUL B. WICK
JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2011CP2302028

2013 FEB 19 P 3:42

Precision Walls Inc	Liberty Mutual Fire Insurance Co
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: <input checked="" type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (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; (formal order to follow) Statement of Judgment by the Court:
 This matter is before the Court as a non-jury trial. The only issue before this Court is whether or not Precision Walls, Inc.'s insurance policy covers the costs associated with tearing down and replacing a brick wall in order to replace defective tape used by Precision Walls. Precision Walls maintains a Commercial General Liability insurance policy with Liberty Mutual which contains a "property damage" clause. This Court finds property damage to mean "physical injury to tangible property" pursuant to *Walde v. Association Ins. Co.*, Op. No. 5061, Shearouse Advance Sheets (filed December 12, 2012). The property damage clause only applies if the damage is the result of an "occurrence." Based upon applicable statutes, case law, and arguments of counsel, this Court finds that the tearing down and replacing of the brick wall in order to replace faulty tape does not meet the definition of an occurrence. Further, this Court finds that Exclusion 2(j)(6) of the policy (which coverage for costs incurred as the result of faulty workmanship) excludes property damage coverage in this case. Therefore, this Court rules in favor of the Defendants and denies coverage to the Plaintiff.

formal order in accordance with this order.
Defendant may submit

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


Circuit Court Judge

2162 — 2/12/13
Judge Code Date

For Clerk of Court Office Use Only

This judgment was entered on 2/19/13, and a copy mailed first class or placed in the appropriate attorney's box on 2/19/13, to attorneys of record or to parties (when appearing pro se) as follows:

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