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 Company .....Respondent.

RETURN TO PETITION FOR CERTIORARI

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December 19, 2014

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ADHERE TO SUPREME COURT PRECEDENT BY AFFIRMING THE JUDGMENT OF THE TRIAL COURT WHICH FOUND THE LOSSES CLAIMED BY PRECISION WALLS FOR THE REPAIR AND REPLACEMENT OF ITS DEFECTIVE WORK ARE EXCLUDED FROM COVERAGE UNDER THE COMMERCIAL GENERAL LIABILITY INSURANCE POLICY ISSUED BY LIBERTY MUTUAL FIRE INSURANCE COMPANY?

II. AFTER AFFIRMING THE JUDGMENT OF THE TRIAL COURT BASED UPON A POLICY EXCLUSION, WAS THE COURT OF APPEALS REQUIRED TO ADDRESS THE REMAINING ISSUES ON APPEAL?

III. IS THE CONSENT DISMISSAL OF CERTIORARI IN AN UNRELATED CASE RELEVANT TO THE PETITION IN THIS CASE?

STATEMENT OF THE CASE

The Appellant, Precision Walls, Inc. ("Precision Walls"), filed a petition on November 21, 2014 requesting this Court to issue a writ of certiorari under Rule 242, SCACR to review the final decision of the Court of Appeals, which affirmed the judgment of the trial court in favor of Respondent Liberty Mutual Fire Insurance Company ("Liberty Mutual"). Precision Walls argues that certiorari should be granted because the case presents a novel question of law and, purportedly, is in conflict with a prior decision of the Supreme Court. Liberty Mutual opposes the Petition. The decision of the Court of Appeals is not novel and follows established precedent of the Supreme Court. Rule 242 states that certiorari "will be granted only where there are special and important reasons." There are no such reasons favoring a writ of certiorari in this case.

In its opinion issued July 23, 2014, the Court of Appeals held that a commercial general liability insurance policy issued by Liberty Mutual to Precision Walls (the "Policy," R. at pp. 158-237) excluded coverage for certain losses claimed by Precision Walls for the costs of repair and replacement of deficient construction work performed by Precision Walls during a building project in Easley, South Carolina ("the Project"). Specifically, the Court of Appeals found coverage was excluded by Policy exclusion j(6), which provides, in pertinent part, that "[t]his insurance does not apply to . . . '[p]roperty damage' to . . . [t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." Because it found exclusion j(6) dispositive, the Court of Appeals affirmed the judgment on that basis alone, without consideration of other issues.

STATEMENT OF FACTS

In the trial court, the case was tried non-jury on a stipulated evidentiary record, which is reproduced in the Record on Appeal. The material facts are undisputed.

Precision Walls was a subcontractor on the Project for SYS Constructors, Inc. ("SYS"). (Subcontract, R. pp. 338-350). The scope of work to be performed by Precision Walls was described as follows in the subcontract:

> "Scope of work includes all material, labor, equipment and supervision of the following: all light gauge metal framing of walls, roof trusses and decking, building insulation, densglass on exterior, taped and sealed blue board insulation on exterior, installation of door frames. . . . Exterior insulation to be sealed so as to prevent air infiltration."

(Subcontract, Section 2, R. p. 338). The total Subcontract Price was $582,587.00 "for the full and complete performance of the work in accordance with SYS Terms and Conditions." (Subcontract, Section 3, R. p. 338).

Section 6 of the subcontract sets forth certain express warranties made by Precision Walls, in pertinent part, as follows:

> "(a) The Subcontractor expressly warrants that all materials, work and equipment incorporated in the Work shall conform to the specifications, drawings, samples and other descriptions set forth in the Subcontract and the Contract Documents and will be of good materials and workmanship and free from defect and warrants that all materials and equipment are both merchantable and fit for the purposes for which they are intended to be used under the Contract Documents. . . . Upon receipt of written notice from Contractor or Owner of any breach of warranty during the applicable warranty period, Subcontractor shall correct the affected work and all costs incurred as the result of breach of warranty shall be borne by Subcontractor. Should Subcontractor fail to make the necessary correction promptly, Contractor may perform or cause to be performed the necessary work at Subcontractor's expense."

(Subcontract, Section 6, R. p. 341).

While construction was in progress, D.J. Doherty, III, who was the Project Manager for SYS, invoked Section 6 to direct Precision Walls to correct a deficiency in its work under the subcontract. Mr. Doherty described the defect and the corrective action to be taken in a letter he wrote on February 12, 2010 to Kevin Howell, Project Manager for Precision Walls. The letter stated, in pertinent part, as follows:

> "Please be advised that pursuant to Section 1. Scope of Work: of the Subcontract and the other related contract documents, Precision Walls, Inc. ("Precision") agreed to provide a 2" rigid insulation taped and sealed system. As stated in my prior e-mail, we have determined that the tape installed is losing adhesion and is not functioning as required.
>
> As such, pursuant to Section 6: Warranty and Inspection (c): We demand that Precision, at its own expense, immediately replace or correct such defect by making the same comply strictly with all requirements thereof.

(Letter from D.J. Doherty, III to Kevin Howell (2/12/2010), R. p. 363). The letter instructed Precision Walls to provide a method of correcting the defect and to begin corrective measures, failing which, "SYS will begin correction of the deficiency and will look to Precision for any losses incurred as a result thereof." (Letter, R. p. 363).

Mr. Doherty elaborated on the facts and circumstances surrounding Precision Walls' non-conforming work and the ensuing corrective action in an affidavit introduced at trial. (Affidavit of D.J. Doherty, III, of R. pp. 333-72, including Exhibits 1-7). Paragraph 5 of Mr. Doherty's Affidavit recites the scope of work that required Precision Walls to provide "taped & sealed blue board insulation" on exterior wall framing. (Affidavit, R. p. 333-34). Paragraph 9 describes how it was determined prior to completion of the brick veneer wall that "some of the tape sealing the joints at the

insulation board was losing adhesion and coming loose" and "that tape was also coming loose in areas which were covered up by the brick veneer wall." (*Id.* at pp. 334-35). Paragraph 10 explains that "[b]oth the Owner of the Project and SYS Constructors were unwilling to allow unsealed joints to remain behind the brick veneer wall," and "[a]ccordingly, SYS Constructors directed Precision Walls, Inc. to comply with its subcontract requirements and provide taped and sealed joints at all locations." (*Id.* at p. 335) Paragraph 11 explains that "[t]he only feasible way to access the areas where tape was coming loose behind the brick veneer wall was to remove the brick," and "SYS Constructors engaged its masonry contractor to remove the brick veneer wall in place and then build a new brick veneer wall once Precision Walls had removed the tape in place and sealed the insulation joints with new tape." (*Id.)* Finally, as explained in paragraph 12, the costs of the removal and rebuilding of the brick wall by the masonry subcontractor, including additional project management and supervision time, dumpster bills, and attorney fees, together totaling $97,500.00, were deducted by change order from Precision Walls' subcontract. (*Id.* at pp. 336, 371).

Before SYS directed the removal of the brick veneer it was fully intact and there was no damage, according to the testimony of Precision Walls' Project Manager, Kevin Howell. (Deposition of Kevin Howell, R. p. 67, lines 11-17). The only reason SYS required the removal of the brick veneer was to allow access to the insulation board underneath so the seal tape could be replaced. (*Id.* at R. p. 88, lines 9-16). There was nothing wrong with the brick veneer itself. (*Id.*)

Precision Walls seeks to recoup from Liberty Mutual the costs deducted by SYS from Precision Walls' subcontract. Precision Walls admits that the additional costs it

incurred to remove and replace the seal tape "are not covered losses under the CGL policy" and it makes no claim for those losses. (Final Brief of Appellant, p. 5). It also is undisputed that the removal and replacement of the brick veneer was necessary only as a means to correct the seal tape that was coming loose behind the brick. The Court of Appeals followed well-established precedent in holding that coverage for the costs of repairing and replacing Precision Walls' defective work were excluded under the Policy.

ARGUMENT

I. The Court of Appeals adhered to Supreme Court precedent by affirming the judgment of the trial court which found the losses claimed by Precision Walls for the repair and replacement of its defective work are excluded from coverage.

A. The Court of Appeals correctly applied exclusion j(6) of the Policy according to its plain and ordinary meaning.

The basic premise of Precision Walls' argument is that exclusion j(6) does not apply because Precision Walls did not install the brick that had to be removed in order to replace Precision Walls' defective work on the underlying insulation board. It cites no authority from South Carolina or any other state that would support its tortured interpretation.

The fallacy in Precision Walls' argument is that the brick was not the object of the plan of repair. It did not require restoration, repair or replacement, but was removed and rebuilt at the direction of SYS only as necessary to implement the plan for Precision Walls to correct its own defective work on the underlying wall insulation. The expense incurred by Precision Walls through the change order deduction was simply part of the cost of bringing its own work into compliance with the requirements of its subcontract. The loss resulted from a business risk which, according to South Carolina law, is the responsibility of Precision Walls, not its liability insurance provider.

It is clear from the opinion of the Court of Appeals that it understood the facts and followed the law. The reasoning of the Court of Appeals as to the application of the plain and ordinary meaning of exclusion j(6) is set forth succinctly and cogently:

> "The exclusion applies to property that must be restored, repaired or replaced. The exclusion specifically includes materials furnished in connection with such work. Here, the contract between SYS and Precision required Precision to 'correct the affected work and all costs incurred as the result of [a] breach of warranty . . . .' We find the defective tape, and all costs associated with its replacement, fall squarely within the exclusion."

Id. at 109.

As the Court of Appeals correctly discerned, the defective tape furnished by Precision Walls and all costs associated with its replacement, including the removal of the brick veneer, were part of the work of Precision Walls. Under South Carolina law, coverage was excluded under the plain and unambiguous language of exclusion j(6).

B. The Court of Appeals' decision follows established precedent of the Supreme Court and is not in conflict with prior decisions.

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

One of the primary cases relied upon by the Court of Appeals is *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002), *overruled in part on other grounds, Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (2011). In *Century Indemnity*, the homeowners sought coverage under a contractor's commercial general liability policy for property damage to the wall sheathing and substrate of their home caused by water intrusion through an exterior stucco cladding that was improperly installed. The insurance policy contained the same exclusion as the one at issue in this case. Like Precision Walls in this case, the

homeowners in *Century Indemnity* argued that the exclusion applied only to the defective work (i.e., the stucco cladding) and not the damage to the underlying substrate because the work on the underlying substrate was not performed incorrectly. 348 S.C. at 566, 561 S.E.2d at 359. The court rejected the argument, holding that "[t]his type of insurance is not intended to insure business risks, *i.e.* risks that are the normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage. . . . Specifically, the policies do not insure [an insured's] work itself, but rather, they generally insure consequential risks that stem from that work." 348 S.C. at 565-66, 561 S.E.2d at 358 (internal citations omitted).

Precision Walls tries to challenge the validity of *Century Indemnity* by arguing, incorrectly, that *Century Indemnity* was overruled entirely in *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011)("*Crossman II*"). In *Crossman II,* however, no policy exclusion was at issue because the parties stipulated that none would be argued. 395 S.C. at 46, 717 S.E.2d at 592. The question there was whether the allocation of liability coverage under successive policies should be "joint and several" or "pro rata" based upon time on the risk. *Century Indemnity* was partially overruled only because it had adopted a "joint and several" or "all sums" method of allocation that "relied on a single trigger theory, rather than on the modified continuous trigger theory adopted in *Joe Harden*." *Crossman II*, 395 S.C. at 59, 717 S.E.2d at 599.

Crossman II's rejection of the "joint and several" method of allocation did not affect *Century Indemnity's* separate and distinct analysis of policy exclusions. In *Century Indemnity*, it was stipulated that there was "property damage" caused by an "occurrence"

within the policy period. The Court's holding that coverage was excluded under the "faulty workmanship" exclusion is still valid. In fact, since *Crossman II*, both the Supreme Court and the Court of Appeals have recognized the continued validity of *Century Indemnity* regarding the same or similar exclusions. *See, Bennett & Bennett Construction, Inc. v. Auto Owners Insurance Co.*, 405 S.C. 1, 8 747 S.E.2d 426, 430 (2013)(citing *Century Indemnity* in support of the principle that "CGL coverage is 'not for contractual liability of [the] insured for economic loss because [the] completed work is not that for which the damaged person bargained."); and *Walde v. Association Insurance Co.*, 401 S.C. 431, 447 737 S.E.2d 631, 639 (Ct. App. 2012)(citing *Century Indemnity* for exclusion not only of (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).

Precision Walls' second challenge to *Century Indemnity* is based upon the erroneous argument that it cannot be reconciled with the more recent case of *Auto Owners Insurance Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009). The simple answer to Precision Walls' argument is that the facts and the policy exclusions at issue in *Auto Owners v. Newman* were different. In *Century Indemnity*, as in this case, the alleged "property damage" arose while the property was still in physical possession of the contractor, before the work was complete. Therefore, exclusion j(6) was applicable since the "property damage" was not included in the "products completed operations hazard."[1] *See, Century Indemnity*, 348 S.C. at 568, 561 S.E.2d at 359-60 (finding that the "products

[1] The Policy says that exclusion j(6) does not apply to "property damage" included in the "products completed operations hazard." Precision Walls does not contend that the damage alleged in this case fits within the "products completed operations hazard."

completed operations hazard" did not restore coverage excluded under the "faulty workmanship exclusion" when the property was still in the physical possession of the contractor and the work was not complete).

By contrast, *Auto Owners v. Newman* involved a post-construction claim by homeowners that arose after the work had been completed and possession of the property relinquished to the owners. *See,* 385 S.C. at 195, 684 S.E.2d 545 (discussing a different policy exclusion that applied only to property damage arising post-construction out of completed work and contained an exception for work performed by a subcontractor).[2] The Court distinguished *Century Indemnity* for this very reason, noting that the contractor in *Century Indemnity* was still in possession of the home. *Id.* at n.2. The effect of the distinction in *Auto Owners v. Newman* is evident from the Court's observation that "the subcontractor exception preserves coverage for property damage that would otherwise be excluded as 'your work' . . . . 385 S.C. at 197, 684 S.E.2d at 546.

In summary, *Auto Owners v. Newman* and *Century Indemnity* are not inconsistent or irreconcilable, but are concerned with different policy exclusions and different facts. Disregarding these important differences, Precision Walls' arguments are illusory and

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[2] The Court's discussion of the exclusion in *Auto Owners v. Newman* is *dicta* and it did not set forth the entire provision in the opinion. The reference is to the standard ISO exclusion designated in the Liberty Mutual Policy as exclusion "l," which states as follows:

> "This insurance does not apply to:
> 'Property damage' to 'your work' arising out of it or any part of it and included in the 'products completed operations hazard.'
>
> This exclusion does not apply if the damage work or the work out of which the damage arises was performed on your behalf by a subcontractor."

misleading. The Court of Appeals correctly followed *Century Indemnity* in this case. *Auto Owners v. Newman* is not on point.

2. ***Bennett & Bennett Construction, Inc. v. Auto Owners Insurance Co.***

Precision Walls misses the point of the Court of Appeal's discussion of *Bennett & Bennett Construction, Inc. v. Auto Owners Insurance Co.*, 405 S.C. 1, 747 S.E.2d 426 (2013). Although the exclusions were variant forms of faulty work exclusions, the guiding principle is the same, as expressed in the following quotation from *Bennett*: "As we have repeatedly explained, a CGL policy does not insure the insured's work itself but consequential risks that stem from the insured's work." *Precision Walls, Inc. v. Liberty Mutual Fire Insurance Company,* Op. No. 5250 (S.C. Ct. App. filed July 23, 2014)(Shearouse Adv. Sh. at 109), *quoting with approval, Bennett & Bennett Construction, Inc. v. Auto Owners Insurance Co.*, 405 S.C. at 8, 747 S.E.2d at 430.

II. After affirming the judgment of the trial court based upon an insurance policy exclusion, the Court of Appeals was not required to address the remaining issues on appeal.

The Court of Appeals decided to affirm the judgment of the trial court based upon Policy exclusion j(6) and, in doing so, declined to address the remaining issues on appeal. *Precision Walls, Inc. v. Liberty Mutual Fire Insurance Company,* Op. No. 5250 (S.C. Ct. App. filed July 23, 2014)(Shearouse Adv. Sh. at 109), *citing Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). Under Rule 220(c), SCACR, "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." The Court of Appeals acted within its authority and discretion and issued a narrowly drawn opinion based upon clear legal precedent. It was not required to do more.

The scope of certiorari could not be limited to exclusion j(6), however, because the judgment of the trial court stands on various independent grounds not reached by the Court of Appeals. Specifically, the trial court found there was no "property damage" and no "occurrence" under the insuring agreement of the Policy. (Order, R. at pp. 6-13). Either finding, standing alone, would preclude coverage for Precision Walls' claims. If certiorari were granted, all issues must be considered.

A. The losses alleged by Precision Walls are not "property damage."

The trial court found that the losses claimed by Precision Walls are not "property damage" under subpart "a" of the Policy definition, which defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property." (*Id.* at p. 9). Subpart "b," which pertains to "loss of use of tangible property that is not physically injured," is not at issue because Precision Walls makes no claim for coverage under subpart "b." (*Id.*) In accordance with *Crossman II* and *Walde*, the trial court reasoned that the losses claimed by Precision Walls were not for "physical injury to tangible property" but were instead economic losses for the costs of removing and repairing defective work for the remedial purpose of bringing it into compliance with subcontract specifications. (*Id.* at p. 10).

In the Respondent's brief on appeal, Liberty Mutual provided a full exposition of case law from South Carolina and other jurisdictions where courts have denied coverage under similar circumstances based upon findings that costs incurred for the repair or replacement of defective work of an insured are not "property damage." *See, e.g., New Hampshire Ins. Co. v. Vieira,* 930 F.2d 696, 699 (9th Cir. 1991)(finding that "the nature of repairs cannot create coverage where none exists."); *Traveler's Ins. Co. v. Eljer*

Manufacturing, Inc., 197 Ill.2d 278, 757 N.E.2d 481 (2001)(finding economic loss from removal and replacement of defective plumbing system flows from disappointed commercial expectations in system performance and is not "physical" in nature); and *Fireman's Ins. Co. of Newark v. National Union Fire Ins. Co.*, 387 N.J. Super. 434, 904 A.2d 754 (A.D. 2006)(holding damages caused by removal and replacement of substandard fire walls were not covered "property damage" under commercial general liability policy). Although the Court of Appeals declined to address the issue, the trial court's finding of no "property damage" is an independent basis upon which the judgment should be affirmed if the issue is reached.

B. The losses alleged by Precision Walls were not caused by an "occurrence."

The trial court found that the losses claimed by Precision Walls' did not result from an "occurrence," defined in the Policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Order, R. at pp. 10-11). In accordance with *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), the trial court reasoned that Precision Walls' claim was for money damages to compensate for repairing its own faulty workmanship, and did not result from an accident. Therefore, there was no "occurrence."

As explained in the Respondent's Brief on appeal, this case is like *L-J* and differs from *Crossman II*, where the claim was for progressive damages and involved the issue of whether or not the damages were the result of "continuous or repeated exposure to substantially the same general harmful conditions." Precision Walls does not assert losses caused by progressive damage. Here the costs incurred by Precision Walls to correct its defective work as required under its subcontract were an expected consequence

of faulty work, as the Court held in *L-J*, and not an "accident." The Court of Appeals declined to address the issue, but the trial court's finding of no "occurrence" is an independent basis upon which the judgment should be affirmed if the issue is reached.

III. The consent dismissal of the writ of certiorari in *Walde v. Association Insurance Company* is no reason for the Court to grant certiorari in this case.

In the final section of its Petition, Precision Walls suggests that certiorari should be granted in this case as a surrogate for *Walde v. Association Insurance Co.*, 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012), in which certiorari was recently dismissed by consent of the parties. Precision Walls argues that *Walde* was "central" to the decision of the trial court and the Court of Appeals and should be reviewed within the context of this case. The argument is conjectural, overstates the significance of *Walde* to the decision in this case, and ignores important factual and legal differences.

Precision Walls imagines that this Court's reasons for granting certiorari in *Walde* would also apply in this case, but the issues involved in *Walde* were more varied and, in some respects, more controversial. For example, on the question of whether or not there was "property damage," the *Walde* court found the plaintiffs did not allege a claim for losses resulting from "physical injury to tangible property," but they did assert a claim for loss of use of property that was <u>not</u> physically injured, which met subpart "b" of the definition of "property damage." *Walde*, 401 S.C. at 443, 737 S.E.2d at 637. Unlike *Walde*, Precision Walls has no claim for loss of use and has disavowed any claim for coverage under subpart "b," insisting that its claims arose out of "physical injury to tangible property." (Transcript of Record, at R. 117, lines 2-13.). As previously explained, the Court of Appeals did not address the issue in this case, but decided the appeal on narrower grounds.

On the question of whether or not there was an "occurrence," *Walde* focused on plaintiffs' allegations of negligence, negligent misrepresentation, and breach of fiduciary duty based upon the contractor's failure to secure the proper zoning variances and exceptions. The court followed the analysis of *Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 576, 666 S.E.2d 897, 899 (2008)*, which involved a claim for negligent misrepresentation. *Walde* has no bearing on the analysis pertaining to "occurrence" in this case.

The Court of Appeals' reference to *Walde* in this case pertains only to its analysis of exclusion j(6), but there is nothing in its opinion to indicate that the Court of Appeals found *Walde* controlling or "central" to its decision. In fact, the opinion alludes to certain factual differences, noting that the claim in *Walde* arose from the "builder's negligence in the permitting process." *Precision Walls, Inc. v. Liberty Mutual Fire Insurance Company,* Op. No. 5250 (S.C. Ct. App. filed July 23, 2014)(Shearouse Adv. Sh. at 109).

In summary, there is nothing in this record to indicate that the dismissal of *Walde* has any bearing on the Petition of Precision Walls.

CONCLUSION

This case does not satisfy the criteria for certiorari under 242, SCACR. The Petition should be denied.

TURNER, PADGET, GRAHAM & LANEY, P.A.

December 19, 2014

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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

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v.

Liberty Mutual Fire Insurance Company .....Respondent.

PROOF OF SERVICE

The undersigned certifies that he has served a copy of the Respondent's Return to Petition for Certiorari by personal delivery to the Petitioner's attorney of record, Charles H. McDonald, at his office at Robinson, McFadden & Moore, P.C., 1901 Main Street, Suite 1200, Columbia, South Carolina 29201, on December 19, 2014.

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