

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM YORK COUNTY

Court of Common Pleas  
Lee S. Alford, Circuit Court Judge

Case No. 02-CP-46-2369  
Case Tracking Number 2009-143546

Auto-Owners Insurance Company

Petitioner

v.

Samuel W. Rhodes, Jr., Piedmont Promotions, Inc.,  
Marion L. Eadon d/b/a C&B Fabrication, C&B  
Fabrications, Inc., and Low Country Signs, Inc.

Respondents

BRIEF OF RESPONDENTS SAMUEL W. RHODES, JR.  
AND PIEDMONT PROMOTIONS, INC.

CREIGHTON B. COLEMAN  
120 Washington Street  
Post Office Box 1006  
Winnisboro, South Carolina 29180  
(803) 635-6884

PETERS, MURDAUGH, PARKER  
ELTZROTH & DETRICK, P.A.  
Bert G. Utsey, III  
123 S. Walter Street  
Walterboro, South Carolina 29488  
(843) 549-9544

and

Matthew V. Creech  
P.O. Box 2500  
110 West Wilson Street  
Ridgeland, South Carolina 29936  
(843) 726-6131

Attorneys for Respondents  
Samuel W. Rhodes, Jr. and  
Piedmont Promotions, Inc.

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## STATEMENT OF ISSUES ON APPEAL<sup>1</sup>

1. Is this declaratory judgment action ripe for resolution?
2. What is this Court's standard of review of the Court of Appeals' decision?
3. Did the Court of Appeals correctly affirm the trial court's ruling that Eadon is an insured under the Policy?
4. Is there evidence to support the finding that liability coverage is triggered under the Policy's insuring agreement?
5. Is there evidence to support the conclusion that coverage is not excluded under the Policy exclusions asserted by Auto-Owners?
6. Did the Court of Appeals correctly affirm the trial court's finding that diminution in value damages are covered under the Policy?

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<sup>1</sup> This Brief uses the same defined terms as the Court of Appeals' opinion: "Auto-Owners" means Petitioner; "Rhodes" means Respondent Samuel W. Rhodes; "Piedmont" means Respondent Piedmont Promotions, Inc. (Rhodes and Piedmont are collectively referred to as "Rhodes"); "Eadon" means Respondent Marion L. Eadon; "C&B" means Respondent C&B Fabrication, Inc.; "Lowcountry" means Respondent Low Country Signs, Inc.; and "Policy" means the insurance policy at issue.

## STATEMENT OF THE CASE

For the sake of brevity and convenience, Rhodes adopts by reference the Statement of the Case contained in the Brief of Respondent Marion Eadon.

## ARGUMENT

1. This declaratory judgment action is ripe for resolution.

Auto-Owners filed this action almost ten years ago, on October 14, 2002, contending “an actual and justiciable controversy exists between the parties”. (R. p. 68). It made the same allegation in its Amended Complaint filed on March 24, 2003 (R. p. 148) and its Second Amended Complaint filed on July 18, 2005. (R. p. 636).

Throughout these events, Auto-Owners was aware of the pending action alleging tort and other causes of action by Rhodes against Eadon and his companies (hereinafter, the “Underlying Action”); however, rather than suggesting the Underlying Action needed to be litigated with finality before the coverage dispute presented by this action could be resolved, it maintained its position that the coverage dispute was justiciable and, therefore, ripe for resolution. *See James v. Anne’s, Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010) (“a justiciable controversy” is one that is, among other things, ripe).

In fact, Auto-Owners continued to claim the present declaratory judgment action was ripe for adjudication through its trial on June 26, 2006, and the resulting Order dated November 7, 2006.

On December 28, 2006, *only after it lost this action at the trial court level* and the Court of Appeals shortly thereafter reversed the judgment in the Underlying Action, Auto-Owners for the first time took the position that this action was not ripe and should be stayed pending a final resolution of the Underlying Action. (R. p. 1023).

Now, although it never raised an objection to ripeness in the trial court until six months after trial and almost two months after the trial judge ruled, Auto-Owners cites ripeness as a basis to reverse the Order ruling against it. (Brief of Petitioner, p. 32).

This is a classic case of Auto-Owners wanting to “have its cake and eat it too”. Given Auto-Owners’ aggressive litigation of this declaratory judgment action for over four years before claiming it should not be decided before the Underlying Action, it is certainly doubtful Auto-Owners would have made the same argument if it had prevailed in the trial court on the coverage issues presented by this action.

This Court should not permit Auto-Owners to alter the course of this litigation – *which it initiated* – some ten years later because it does not like the result it received at trial. Given the time and expense incurred by Respondents, all of which was induced by Auto-Owners’ conduct in filing and pursuing this action predicated on the position that it is ripe for resolution, the Court should estop Auto-Owners from changing its position at this juncture.

In addition, it is clear this action is ripe for resolution under the South Carolina Declaratory Judgment Act.

Under the Declaratory Judgment Act, a party whose rights, status, or other legal relations are affected by a contract may seek a court's determination of any question of construction or validity of the contract and obtain a declaration of the party's rights, status, or other legal relations thereunder. The Declaratory Judgment Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships.

To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy. A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.

*Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 459 S.E.2d 844, 845 (1995) (citations omitted).

"A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970). "The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462, 466 (2004).

In the present case, there is an existing controversy which is real and substantial – Rhodes has filed the Underlying Action against Auto-Owners' insured. There is nothing contingent, hypothetical, or abstract about that. Eadon asserts he has coverage under the Policy for the damages claimed against him in the Underlying Action ("a definite assertion of legal rights") and Auto-Owners has denied coverage for at least some of those damages ("a positive legal duty which is denied by the adverse party"). Resolution of this action would assist the parties in settling their legal rights and responsibilities with respect to the Policy and, as a result, will likely have an effect on the resolution of the Underlying Action. This coverage dispute has all the hallmarks of a justiciable controversy under the Declaratory Judgment Act and is ripe for determination.

Nevertheless, even if Auto-Owners' argument were to have some superficial appeal, further reflection on the practical effect of a new trial in the Underlying Action reveals Auto-Owners' position lacks substance. The Underlying Action was reversed because it was tried in the wrong venue. Despite Auto-Owners' unsupported speculation

that “additional coverage issues may arise out of the retrial” or that “[t]here could be additional evidence ... that impacts” whether Eadon was an insured (Brief of Petitioner, p. 33), no one has suggested any valid reason to anticipate witnesses will change their testimony or proof at the new trial of the Underlying Action will differ. Importantly, the nature of Rhodes’ damages claims will be the same, so the question of whether they seek a covered recovery should not change either; rather, the only issue in the Underlying Action will be whether the defendant is liable for those damages.

As such, the declaratory judgment in this action is not “based upon” a prior judgment that has been reversed, as argued by Auto-Owners. It is based upon the nature of the damages claims asserted by Rhodes. While some of the evidence regarding those claims came from trial testimony in the Underlying Action (which the parties in this action submitted by consent to the trial judge in lieu of providing live testimony at trial (R. p. 23)), that evidence was not contingent on the resulting judgment in the Underlying Action. In short, the trial court decided this action on a factual record submitted by agreement of the parties; the fact some of the testimony came from a trial that produced a judgment which was reversed does not mean the trial court’s decision was “based upon” the now-reversed judgment.

Consequently, Rule 60(b)(5), SCRCP, is inapplicable and the Court of Appeals correctly affirmed the trial court’s denial of Auto-Owners’ motion based thereon.<sup>2</sup>

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<sup>2</sup> Although Auto-Owners’ argument heading on this issue indicates it is also relying upon Rule 60(b)(4), SCRCP – which it raised post-trial in the circuit court (R. p. 1022) – its argument is devoted entirely to Rule 60(b)(5), SCRCP. Rhodes has not addressed Rule 60(b)(4), SCRCP, because Auto-Owners has abandoned any argument based on it. *See Solomon v. City Realty Co.*, 262 S.C. 198, 203 S.E.2d 435 (1974).

2. Under the applicable standard of review, as correctly applied by the Court of Appeals, all findings below are supported by evidence in the record.

A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue. *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009); *Colleton County Taxpayers Ass'n v. School Dist. of Colleton County*, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. *Auto Owners Ins. Co. v. Hamin*, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006).

It has long been settled that the construction of an insurance contract is a matter of law for the Court. *Winchester v. United Ins. Co.*, 231 S.C. 432, 99 S.E.2d 34, 36 (1957). In an action at law, tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support. *Hamin*, 629 S.E.2d at 685. The judge's findings are equivalent to those of a jury in an action at law. *King v. PYA/Monarch, Inc.*, 317 S.C. 385, 453 S.E.2d 885 (1995); *see also Auto-Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008). An appellate court does not consider the weight of the evidence in an appeal in a law case. *Parnell v. Carolina Coca Cola Bottling Co.*, 231 S.C. 426, 98 S.E.2d 834 (1957). Therefore, on appeal, the Court's role merely is to determine whether there is *any* evidence to support the rulings below. If there is any evidence in the record that reasonably supports the trial court's conclusions, then the appellate court is bound to affirm the lower court's findings.

The standards above were precisely followed by the Court of Appeals in its decision below. On each issue raised and ruled upon, the Court of Appeals' rulings are based upon the existence of *some* evidence in the record. On the other hand, Auto-

Owners invites this Court to weigh the evidence in the record, rather than to test the record to confirm the existence of such evidence. On each issue addressed by the Court of Appeals, under this standard of review, it correctly affirmed the trial court.

3. There is evidence to support the conclusion that Eadon is an insured under the Policy.

Rhodes sued Eadon, individually and doing business as C&B Fabrication, because Eadon is the person with whom he dealt with respect to the signs at issue. He did not know about Eadon's plans or efforts to incorporate; he only knew he was dealing with a person, Eadon, on behalf of a business, C&B Fabrication.

Indeed, Eadon's sign business has been known at various times as:

- "M.L. Eadon d/b/a C&B Fabrications" (R. pp. 1132-33);
- "Marion Eadon d/b/a C&B Fabrications" (R. pp. 1133);
- "Marion L. Eadon, Jr. d/b/a C&B Fabrications" (R. pp. 1275);
- "C&B Fabricators, Inc." (R. p. 1102);
- "C&B Fabricators, Inc. d/b/a C&B Fabrication" (R. p. 1244);
- "C&B Fabrication" (R. pp. 1245, 1257, 1276);
- "C&B Fabrications" (R. p. 1102);
- "C&B Fabrications, Inc." (R. pp. 1102, 1280, 1337);
- "C&B Fabrication d/b/a Low Country Sign Fabrication, Inc." (R. pp. 1258-74);
- "Low Country Signs, Inc." (R. pp. 1114-18, 1280, 1337);
- "Low Country Signs and Fabrications, Inc." (R. p. 1115); and
- "Low Country Signs and (or "&") Fabrication, Inc. d/b/a C&B Fabrication" (R. pp. 1115, 1244).

Eadon himself – who admittedly conducted business without concern for detail for the formalities of business or corporate names ("I don't look at every 'I' or 'T'." R.

p. 1112, l. 7) – appeared in his testimony to be confused or indifferent at times and often interchanged names when testifying about the business. (*See, e.g.*, R. p. 1102, ll. 6-22; p. 1107, ll. 7-17; p.1111, ll. 8-13). This is forgivable, though, because there was only one business, regardless of what it may have been called at any point in time.

So, just as it is not surprising that Rhodes recognized the business as “Eadon d/b/a C&B Fabrication” during their transaction (and Eadon apparently would have acknowledged that as his business’ name), it is equally understandable that the same generalized approach prevailed when Eadon purchased insurance for his business.

Rather than dictating to his insurance agent, Mike Watson, the manner in which the Policy listed the named insured, Eadon instead told him he wanted “a complete insurance package” and had Watson review the “paperwork” and “everything” at the business for that purpose. (R. p. 1106, l. 4, to p. 1107, l. 25). Eadon intended for the Policy to cover his entire business operation, including himself and his affiliations, regardless of the name in which the business was conducted. (R. p. 1108, ll. 2-10; p. 1128, ll. 9-14). Consistent with Eadon’s desires, Watson confirmed to him that he was completely covered for everything he could think of, no matter what, and regardless of whether he was involved as a corporation or personally. (R. p. 1113, ll. 6-12 & ll. 19-25; p. 1120, ll. 16-25).

While Eadon signed the application for the Policy as the applicant (R. p. 1110, ll. 1-7), Watson had Auto-Owners list the named insureds on the Policy as “C&B Fabrications, Inc. and Low Country Signs, Inc.” (R. p. 1337), neither of which are actual corporate entities. Auto-Owners has recognized this was a mistake and has agreed the Policy was intended to insure the party doing business as C&B Fabrication. (R. p. 1244).

The trial court relied upon the simple fact that the parties intended to insure “d/b/a C&B Fabrication” as the basis for its conclusion that Eadon (one expression of “d/b/a C&B Fabrication”) was included as an insured under the Policy. In doing so, it considered the parties’ reasonable expectations, the language of the Policy with respect to corporate officers and directors, the parties’ interpretation of the Policy after it was issued, and case law dealing with misnaming businesses by trade names. (R. pp. 55-59).

The Court of Appeals applied most of these same concepts, albeit slightly differently, as reasons for affirming the trial court’s conclusion.

First, it noted the trial court’s finding that “it was the belief of all the parties privy to the Policy that it would serve as coverage for the sign-making business conducted by C&B and Eaton.” *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857, 865 (Ct. App. 2009). Since the facts showed Eadon did business as C&B and the parties stipulated the Policy should be reformed to insure the entities doing business as C&B, the Court of Appeals affirmed the trial court’s ruling that Eadon was an insured.

While there is an abundant factual foundation for the Court of Appeals’ ruling (discussed below), admittedly the legal basis for its ruling could have been articulated more clearly. Understanding the Court of Appeals’ legal rationale is arguably further complicated by its subsequent observation that the trial court’s discussion of the parties’ reasonable expectations did not mean it based its ruling upon the arguably discredited “reasonable expectations doctrine,” as described in *Allstate Ins. Co. v. Mangum*, 299 S.C. 226, 229, 383 S.E.2d 464, 466 (Ct. App. 1989). This lack of clarity is because the parties’ intent with respect to the Policy is legally significant for reasons that – if not implicit in the trial court’s Order – are additional grounds for sustaining its ruling.

Specifically, an insurance policy, like any other “contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it. A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended.” *George v. Empire Fire and Marine Ins. Co.*, 344 S.C. 582, 590, 545 S.E.2d 500, 504 (2001) (citations omitted). Given the facts of this case, Rhodes and Piedmont submit either that the trial court was relying upon the concept of reformation due to mutual mistake in making its ruling or that, at a minimum reformation due to mutual mistake serves as an additional sustaining ground under Rule 220(c), SCACR, to affirm the Court of Appeals’ affirmance of the trial court’s ruling.<sup>3</sup>

This is, of course, consistent with this Court’s past recognition of the proper way to deal with businesses operating under trade names. As it has noted: “A corporation, *as well as individuals*, may have or be known by several names in the transaction of its general business *so that it may enforce*, as well as be bound by, *contracts entered into in an adopted name* other than the regular name under which it was incorporated.” *Long v. Carolina Baking Co.*, 193 S.C. 225, 239, 8 S.E.2d 326, 332 (1939), *quoting* 13 Am. Jur. 270 [emphasis added]. To disregard this rule in favor of the hair-splitting distinction attempted by Auto-Owners in an effort to avoid its obligations under the Policy would

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<sup>3</sup> Although reformation, as an equitable remedy, would trigger a nominally different standard of review than that otherwise applicable in this action, the practical effect is the same. That is, this Court should affirm the Court of Appeals if there is any evidentiary support for the trial court’s ruling, *see Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976) (discussing the two-judge rule as the standard of review in an action at equity); here, as discussed above, there is evidence to support the conclusion the parties intended to insure all people and entities doing business as C&B.

reduce declaratory judgment actions like this one to the equivalent of “a children’s game” not designed to achieve a just result. *See Griffin v. Capital Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992).<sup>4</sup> When a party is named by a “d/b/a” or trade name “in such terms that every intelligent person understands who is meant, ... courts should not put themselves in the position of failing to recognize what is apparent to everyone else.” *Id.*, quoting *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947).

The secondary basis for the Court of Appeals’ affirmance of the trial court’s ruling that Eadon was an insured under the Policy was its analysis of the Policy’s definition of “who is an insured”. This was, in effect, an alternate ruling; in other words, even if Eadon were not a named insured by virtue of the fact he did business as C&B, he was nevertheless an insured by virtue of his relationship with the corporations that Auto-Owners stipulated were named insureds. There is evidence in the record that Eadon was acting in his capacity as an officer of his small, self-owned business throughout his dealings with Rhodes; in fact, that is the *only* basis on which Rhodes dealt with Eadon or for which he was sued. Therefore, the Court of Appeals correctly affirmed the trial court on this topic.

Specifically, the record shows numerous activities by Eadon on behalf of C&B, all of which promoted its business and helped secure the transaction with Rhodes. When Rhodes traveled to C&B to discuss having the signs designed, fabricated and installed, Eadon is the one who took him on the tour of the plant, showed him signs, and took him on a tour away from the facility in Eadon's car to show him installed signs C&B had

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<sup>4</sup> Similarly, the courts of this State have not accorded much tolerance to insurers who try to avoid their contractual obligations by seizing upon unintended mistakes in the issuance of insurance policies. *See, e.g., Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994).

built. (R. pp. 1139-1141). Rhodes testified: "I told him I wanted three 130-foot H.A. G.L. [Height Above Ground Level] stack unipoles, a turnkey job, that I wanted one person responsible for doing the whole job, and that included electrical hookups and everything. And he told me he could take care of that, and that's – and I wanted him to do everything, design and build them, install them, and have it ready to where all I had to do was put the advertising on them." (R. p. 1148). Eadon assured him C&B could do the job, "could build better signs than anybody had built," and "could build anything [Rhodes] wanted them to build." (R. pp. 1141, 1142, 1148). Eadon "told [Rhodes] that they built the best signs, and he would personally guarantee he would build [Rhodes] a great sign and nobody could build me a better sign than he could." (R. p. 1148). Eadon confirmed the exterior sign across the front of the building where the signs were made was "C&B Fabrication" (R. p. 1206) and the phone was answered "C&B Fab". (R. pp. 1206-07). Rhodes decided to contract with C&B to build the signs because "[Eadon] assured me they build great signs, he could personally guarantee it, he just - he knew how to build a sign and he'd build me the best sign that I could ever get." (R. p. 1142).

Eadon's activities on behalf of C&B continued after the initial sales efforts and throughout the negotiation, construction, and post-occurrence interactions. When Rhodes made a counter-proposal for a \$500.00 per sign reduction in the proposed contract, Benenhaley (C&B's employee) had to telephone Eadon to get that approval. Only Eadon had authority to make decisions for C&B. (R. p. 1144). Eadon sent crews to perform repairs and inspections before a sign fell and was the one who made the decision to attempt to fix the leaning structure. (R. p. 1226, l. 25, to p. 1230. L. 11; pp. 1249-50).

These activities were consistent with Eadon's typical functions as an executive for the business. This is not a case where a corporate officer or director stepped out of his normal environment of an office or boardroom and rolled up his sleeves to do work that was abnormal for him. What Eadon did was exactly what he always did, what Watson would have seen him doing when he inspected the business to insure it, and what the Policy was intended to insure. Auto-Owners' position would have this Court create an enormous grey area where small business owners would alternate in and out of liability coverage during the course of an ordinary work day, depending upon the nature of a specific task at a given moment and despite the fact the tasks are all ones they usually perform as business owners and operators.<sup>5</sup>

4. The finding that there was an "occurrence" triggering coverage under the Policy's insuring agreement is supported by the evidence.

In addressing the threshold inquiry into whether coverage exists, the Court of Appeals affirmed the trial court's determination that an "occurrence" took place. In

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<sup>5</sup> Auto-Owners argues Rhodes is judicially estopped from making the above arguments because of a position he took at the trial of the Underlying Action. (Brief of Petitioner, p. 29). However, judicial estoppel simply does not apply because all elements of that doctrine are not met; specifically, one can see without further analysis that Auto-Owners is neither a party to nor a privy of a party in the Underlying Action and that Rhodes has not succeeded in any position nor received any benefit in the Underlying Action since the judgment in that action has been vacated. *See Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004) ("[T]he following elements [are] necessary for the doctrine to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related *proceedings involving the same party or parties in privity with each other*; (3) *the party taking the position must have been successful in maintaining that position and have received some benefit*; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent." [emphasis added]).

Moreover, as the Court of Appeals held, there is no evidence any change in position was the product of an intentional effort to mislead the Court; rather, as discussed above, Rhodes' position has always been he dealt with Eadon's business and any individual versus corporate distinctions are the product of Auto-Owners' efforts to avoid coverage in light of its incorrect designation of the insured on the Policy.

arriving at this conclusion, both lower courts relied primarily on *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), and its favorable adoption of *High Country Assocs. v. New Hampshire Ins. Co.*, 139 N.H. 39, 648 A.2d 474 (1994). Auto-Owners now argues that the Court of Appeals' reliance on *L-J* conflicts with the post-*L-J* decisions of *Auto-Owners Ins. Co. v. Newman, supra*, and *Crossmann Communities of N.C. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) (both of which were also decided after the Court of Appeals' decision in this case).

On the contrary, the Court of Appeals' analysis of the issue not only comports squarely with *Newman* and *Crossmann*, its reasoning is ultimately strengthened by these later cases. Auto-Owners' argument is merely a flawed attempt to claim there was no evidence of damage to "other property," but rather all of the alleged damages are for faulty, defective workmanship and therefore not covered by the Policy. This is simply incorrect. *Crossmann's* specific holding is instructive as to the aims of Auto-Owner's false assertions: "In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute 'property damage,' but the defective construction would not." *Id.*, 395 S.C. at 50, 717 S.E.2d at 594.

The first, most basic, question on appeal is whether there is *any* evidence in the record to support the finding that the fallen, defective sign post was an "occurrence" or "accident" that resulted in "property damage."

The Policy defines an occurrence as "an accident...". (R. p. 1319). Because "accident" is not defined in the Policy, the Court of Appeals applied the Supreme Court's definition of "[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; supra, citing Green v. United Ins. Co. of America*, 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970). Under the Policy “property damage” is defined, in pertinent part, as:

- a. Physical injury to tangible property, including all resulting loss of use of that property...; or,
- b. Loss of use of tangible property that is not physically injured...

(R. pp. 1319-1320).

The occurrence, or accident, in this matter is simple. C&B erected three signs. The southernmost billboard fell across both southbound lanes of I-77, the fallen structure consisting of four ten-foot, six inches by thirty-six foot center-mount outdoor advertising signs stacked on a one hundred thirty foot high tower. This was a sudden, unexpected event with a harmful result, an accident. The accident caused damage to property of Rhodes other than the work product of C&B itself.

A general liability insurance (“CGL”) policy typically does not cover claims of faulty workmanship, but instead covers claims of faulty workmanship that causes an accident. *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1995), *aff’d* 321 S.C. 310, 468 S.E.2d 304 (1996). Faulty workmanship of C&B Fabrication caused the single 130' tower with the double stacked signs on top to fall on Rhodes property and onto I-77. "Faulty workmanship" caused the accident. In fact, Auto-Owners' counsel admitted in open court that the event of the sign falling on I-77 was an occurrence. (R. p. 1137; Tr. of January 22, 2004; First SJ hearing, p. 6, lines 4-8).

Far from calling *L-J* into question, *Newman* and *Crossmann* instead support both lower courts' reliance upon *L-J* and *High Country* and merely clarify that faulty workmanship – in and of itself – is not covered by a CGL. *Newman* cites, discusses, and

approves *L-J* and the *High Country* analysis which formed the basis of both lower courts' rulings.

In *Newman*, the Plaintiff claimed that a subcontractor's defective installation of stucco resulted in continuous water intrusion that damaged the home's sheathing and wooden framing. To determine whether there was coverage, the *Newman* court first analyzed the reasoning underlying *L-J*'s determination that the CGL at issue there did not cover the plaintiff's claims:

Specifically, the [*L-J*] Court found that the developer's claim alleged negligent construction causing damage only to the work product itself (i.e. the roadway), and that such a claim was merely one for faulty workmanship. Reasoning that "faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions," the Court held that the developer's claim did not allege an "occurrence" falling within the scope of coverage.

*Newman*, 684 S.E.2d at 544 [citations omitted].

*Newman* goes on to explain, however, that a CGL policy may provide coverage where a claim for faulty workmanship causes third party bodily injury or damage to other real property besides the defective work product itself. *Id.* To illustrate this concept, *Newman*, like *L-J*, relies upon *High Country*. Ultimately, relying on these predecessor cases, *Newman* holds that there was an occurrence and therefore coverage under the CGL because the homeowner had alleged "that there was 'property damage' beyond that of the work product itself," thereby extending the damage claims beyond that for faulty workmanship itself. *Newman*, 684 S.E.2d at 545-46.

Most recently, *Crossmann* confirmed and clarified this concept by stating that while a CGL does not cover faulty workmanship itself, damage caused to other property, or component parts of property, is covered. *Id.*, 395 S.C. at 50, 717 S.E.2d at 594.

Claims to “other property” or other component parts of his property, are precisely the damages Rhodes asserts. (R. p. 124-25; Amended Complaint, ¶ 20).

A claim against an insured under a CGL policy will invariably arise out of the insured’s “work” or the insured’s “work product.” That is the basis for the insurance. It is when the sole damage is to the “work or “work product” – and nothing more – that the CGL coverage will not apply. As noted by the Court of Appeals, and as discussed more fully below, the claims in the Underlying Action are not just for damages to the work product (the signs) but also for damages to “other property” of Rhodes.

A. The fallen billboard directly caused physical injury and damage to Rhodes’ real property.

Here, Rhodes adopts and fully endorses Eadon’s concise description of Auto-Owner’s argument that the only “property” damaged by the occurrence was the fallen sign itself: Its argument “mischaracterizes the whole lawsuit.”

Auto-Owners’ mischaracterization attempts to color all damages sought by Rhodes as mere claims for “defective workmanship” that did not injure “other property,” which would not be covered under *L-J* and its progeny. Auto-Owners’ argument ignores the allegations of the suit itself and the record before the Court. Substantial evidence exists to support the trial court’s conclusion that the Policy covers damages for the impairment of Rhodes’ damaged real property, impairment of property rights, and loss of use of his property, all of which resulted in substantial economic losses.

The clear terms of the Policy cover the following types of property damages:

- (1) “physical injury to tangible property, including all resulting loss of use of that property” (R. p. 1319; Policy, ¶12-a); and,

- (2) “loss of use of tangible property that is not physically injured... [and] [a]ll such loss of use shall be deemed to occur at the time of the ‘occurrence’ that caused it.”

(R. p. 1319-20; Policy ¶12-b).

The Court of Appeals correctly found that evidence in the record supports the conclusion that the occurrence of the fallen sign caused both “physical injury to tangible property [the real estate], including all loss of use of that property” (Policy ¶12-a) as well as “loss of use of tangible property that is not physically injured” (Policy ¶12-b).

In the Underlying Action, Rhodes specifically alleges physical injury to tangible property, including damages to the real property to which the signs had been attached.

That property includes, as fixtures, the signs. Specifically, he alleges the following:

3. This Action arises out of a transaction involving injuries to real property situated in Fairfield County, South Carolina.

...

9. When installed, each sign became a fixture on, and a part of, the Plaintiff's real property consequently enhancing the value and usefulness of the real property.

...

11. In December, 2000, it was observed that one of the three signs was leaning towards Interstate Highway I-77 and this was reported to the Defendant who was requested to correct the leaning and to inspect the other two signs and make any needed corrections to them. On or about Wednesday, January 17, 2001, the Defendant made adjustments to the sign that was leaning and purportedly checked the other two signs.

12. On the afternoon of Saturday, January 20, 2001, at approximately 5:30 p.m., one of the signs fell on Interstate Highway I-77 into both southbound traffic lanes. The sign that fell was not the sign that was leaning previously.

...

20. As a direct and proximate result of the foregoing, the Plaintiff has sustained injury and damage as follows:

- a. by having to remove the signs as aforesaid;

- b. the Plaintiff now has lost the opportunity to erect and maintain as an economic enterprise on his real property in Fairfield County the outdoor advertising billboard signs adjacent Interstate 1-77 as a

consequence of the cancellation of three permits by the South Carolina Department of Transportation.

c. the Plaintiff has lost the certainty of the revenue of the advertising that the signs would have displayed for years to come;

e. As a consequence of having to remove the signs pursuant to the mandate of the South Carolina Department of Transportation, permanent fixtures on the Plaintiff's real property had to be removed which has resulted in significant injury to the Plaintiff's real property and has significantly impaired its value and usefulness, which injury cannot be replaced or repaired under the current mandates of the South Carolina Department of Transportation prohibiting the use of signs at this location.

(R. pp. 1319-20).

Thus, it is clear the Underlying Action arises out damages in the form of physical damage to real property, the lost opportunity to erect and maintain an economic enterprise on that real property, lost revenue, and the reduction in value and usefulness of the real property because of the South Carolina Department of Transportation's mandated removal of all signs from it. (R. pp. 124-25).

Under the clear terms of the Policy, those damages are covered.

i. Evidence of physical injury and damage to Rhodes' tangible, real property exists within the record.

The three signs installed and erected on the property were intended to serve as permanent fixtures and by definition, such fixtures became part of the real property to which they are affixed. *Texaco, Inc. v. Warrington*, 264 S.C. 18, 21, 212 S.E.2d 59, 60 (1975). One of the signs fell into the interstate highway and blocked traffic, requiring expenses connected with removing the fallen sign, including: cutting it loose (R. p. 1161, ll. 4-9); renting a crane (R. p. 1162, ll. 20-24); cleaning up the billboard; and rebuilding fences damaged by the billboard's fall (R. p. 1168, l. 14 to p. 1169, l. 20). The costs of repair of the physical damages to the real property and the removal of the fallen sign are

evidenced by the Affidavit of Carl Anders; the existence of this evidence supports the finding that there was physical damage to Rhodes' real property. (See also, Respondent Eadon's Brief, p. 22).

Primarily, though, the damages claimed in the Underlying Action are for the damage to the real property upon which these three billboards and sign posts were installed as permanent fixtures. (R. 1149, lines 1-16).

- ii. Rhodes' property value was diminished by the presence of the signposts and the costs to remove all of the signposts should be covered.

There is ample evidence in the record to support Rhodes' claim that, as a direct result of the fallen sign, SCDOT investigated Rhodes' signage, cancelled Rhodes' permits, and demanded removal of the remaining advertising signs. (R. p. 1251). The costs of removing these signs as ordered by the SCDOT, are direct, consequential damages which flow from the occurrence of the fallen, faulty sign, as are the resultant damages to the real property occasioned by the mandate to remove the remaining signs.

The Court of Appeals, like the trial court, correctly analyzed this issue under the guidance of *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C.631, 594 S.E.2d 455 (2004). *Helena* incorporates a view of "damages" covered by CGL policies which is consistent with this state's rules of construction requiring "clauses of inclusion to be broadly construed." *City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 549, 677 S.E.2d 574, 581 (2009). In *Helena*, the Court stated that "all sums which the insured shall be legally obligated to pay as damages because of property damage can be reasonably interpreted to cover any claim asserted against the insured arising out of property damage which requires the expenditure of money..." *Helena*, 357 S.C. at 638, 594 S.E.2d at 458. Furthermore, in *Helena*, the Court rejected a

“narrow, technical” definition of “damages,” *id.* at 637-38, 594 S.E.2d at 458, in contrast to the approach of the case most heavily relied upon by Auto-Owners, *Braswell v. Faircloth*, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989).

Auto-Owners’ reliance on *Braswell* is misplaced. Again on this issue, Rhodes adopts and incorporates the well-reasoned analysis of Eadon’s Brief. (Brief of Eadon, pp. 23-26). Rather than rehash those same arguments here, Rhodes simply reiterates that *Helena*’s more inclusive view of term damages, discussed fifteen years after *Braswell*, at least inferentially overrules *Braswell*. Furthermore, the *Helena* opinion specifically concluded that *Braswell* “clearly rested upon a finding that there was no ‘property damage,’ not on an interpretation of the term ‘damages.’” *Helena*, 357 S.C. at 640, 594 S.E.2d at 459. The Court of Appeals’ analysis under *Helena* was therefore appropriate and the finding that the costs associated with Rhodes’ mandated removal of the final sign comports with the Policy’s broad definition of physical damages under section 12.a should be affirmed.

iii. Physical damage to the property remains.

As discussed throughout this brief, these enormous sign posts became permanent fixtures to Rhodes’ real property. The footings for the signs are concrete sign posts are embedded in the ground to a depth of approximately 28 feet. (R. p. 1149; R. p. 1175). The “stumps” of the sign posts remain on the property and extend approximately 21 feet into the air. (*Id.*) Rhodes alleges that these remaining structures devalue and have damaged the real property and certainly the removal of these would be consequential, direct “property damages” as a result of the occurrence.

B. Evidence exists that the fallen sign, the occurrence at issue, caused Rhodes to suffer loss of use of tangible property.

Rhodes obviously lost the use of the billboard that fell into I-77 which was a fixture upon his real estate. Rhodes also lost the use of the other two billboards, which were not physically injured but which had to be taken down on the grounds that they were unsafe. (R. p. 1160, ll. 1-15). As discussed elsewhere, this loss of use stems from physical damage to the real property as a whole. Such loss of use constitutes “property damage” under Section 12.a of the Policy and is covered. However, even if the Court were to conclude that there had been no physical injury to tangible property, under Section 12.b of the Policy, loss of use damages still were incurred and these are covered by definition within the Policy.

Rhodes’ complaint specifically alleges that as a result of C&B’s negligence, he lost the opportunity to use his real property and its fixtures as a platform for erecting advertising signs. (R. p. 124.) Rhodes claims he lost income as a result of this lost opportunity and the loss of use of his property.

The evidence in the record as to loss of use damages may be summarized as follows:<sup>6</sup>

As a result of the fallen sign, SCDOT inspected Rhodes’ property and rejected Rhodes’ permits for signage. (R. p. 1202; p. 1196). At trial a SCDOT representative acknowledged that had the first sign not fallen, Rhodes would still have his permits. (R. p. 1204, ll.7-16). Rhodes presented evidence through an expert economist that without the loss of use of his property as a platform for the advertising signs, Rhodes would have brought in a significant income stream from the signs for years. (R. pp. 1179-1184).

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<sup>6</sup> Rhodes also adopts and incorporates by reference the more detailed factual recitations and analysis of Eadon’s Brief on pages 27-30.

This concept of the loss of use of the property is also tied to another type of property damage sustained by Rhodes, the diminution in the value of his property. While this issue is addressed more fully later in this brief, the record reflects evidence of diminution in value damages which were presented through Rhodes' expert witness in real estate appraisal. Rhodes' appraiser testified that *with* the signs the property was worth approximately \$1.8 million but, after removal, the property's value fell to \$65,500.00. (R. pp. 1190-91).

Even if, somehow, there were a determination that Rhodes' real property was not physically damaged, Rhodes lost the use of it as a platform on which to construct advertising sign posts. (R. p. 1165, l. 12 to p. 1166, l. 8). This loss of use damage is covered under the Policy under section 12.b. Clearly, the record supports the Court of Appeals' findings of consequential property damage to real property – aside from the fallen sign itself - that flowed from the occurrence of the southernmost sign's falling.

5. The Court of Appeals correctly held that none of the exclusions found in the Policy preclude coverage for the claims against Auto-Owners' insured.

The trial court's order concluded that the cost of the work product itself – \$153,960.00 paid under contract for the sign posts – was excluded under the Policy but found that the remaining consequential damages to Rhodes' real property and business were not excluded. (R. p. 59). The Court of Appeals correctly affirmed the Policy's exclusions k, l, m, and n do not preclude coverage and affirmed the trial court's rulings.<sup>7</sup>

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<sup>7</sup> In its Brief, Auto-Owners does not address the Court of Appeals' ruling on exclusion "m" and it has therefore abandoned any argument based on this exclusion. *See Solomon v. City Realty Co.*, 262 S.C. 198, 203 S.E.2d 435 (1974). Nevertheless, to the extent the Court believes this argument has not been waived, Rhodes incorporates by reference its previous arguments on the issue (Final Brief of Respondent to Court of Appeals, pp. 42-44) and asserts that the Court of Appeals correctly analyzed the issue.

It is well-settled under South Carolina law that exclusionary clauses in insurance policies are to be narrowly construed so as to provide coverage to the insured if it is reasonable possible. *McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 426 S.E.2d 770, 771 (1993); *South Carolina Municipal Ins. and Risk Fund v. City of Myrtle Beach*, 368 S.C. 240, 243, 628 S.E.2d 276, 277 (Ct. App. 2006).

A. Exclusion “n” does not preclude coverage and the Court of Appeal’s findings are consistent with South Carolina precedent.

Auto-Owners contends the Court of Appeals’ decision regarding exclusion “n” conflicts with the South Carolina decision of *Auto Owners Ins. Co., Inc. v. Newman*, an opinion issued approximately one month after the ruling below. Auto-Owners’ arguments are without merit.

Exclusion “n” of the Policy provides as follows:

n. Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) “Your product”;
- (2) “Your work”; or,
- (3) “Impaired property”;

if such product, work or property is withdrawn or recalled from the market or from such use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

(R. p. 86).

First and foremost, the Court of Appeals’ analysis is not vitiated by the subsequent opinion of *Newman*. Based on existing precedent, the Court of Appeals noted that “the circumstances giving rise to the Tort action, without question, did not involve a product recall.” *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857, 871 (Ct. App. 2009). Furthermore, the Court noted the fact that such exclusions do not apply to

claims involving losses resulting from the failure of the insured's product or work when there is no evidence of general recall of similar products or materials from the market place. *Id.*, citing *Erie Ins. Exchange Co. v. Colony Dev. Corp.*, 736 N.E.2d 941 (Ohio App. 1999); *Standard Fire Ins. Co. v. Chester – O'Donley & Assocs., Inc.*, 972 S.W.2d 1 (Tenn. App. 1998).

*Newman* in no way addressed that exclusion in that policy as what historically has considered a "sistership" exclusion. Without question, exclusion n in the Policy is a classic sistership policy and its language *exactly* mirrors the provision addressed by the Tennessee Court of Appeals in *Chester-O'Donley*. Before arriving at the conclusion that the exclusion there did not apply in the construction defect setting, the Tennessee Court performed an erudite and exhaustive examination of the history of sistership exclusions:

This provision first appeared in general liability policies in 1966 and takes its name from the occurrences in the aircraft industry where enormous loss-of-use claims resulted from the grounding of all airplanes of the same type because one airplane crashed, and its "sisterships" were suspected of having a common defect. *See Arcos Corp. v. American Mut. Liab. Ins. Co.*, 350 F. Supp. 380, 383-385 (E.D. Pa. 1972); *Paper Machinery Corp. v. Nelson Foundry Co.*, 108 Wis.2d 614, 323 N.W.2d 160, 163-164 (1982).

The exclusion is designed to shield insurers from liability for the costs associated with unanticipated product recalls. *See Forest City Dillon, Inc. v. Aetna Cas. & Sur. Co.*, 852 F.2d 168, 173 (6<sup>th</sup> Cir. 1988); *Paper Machinery Corp. v. Nelson Foundry Co.*, 323 N.W.2d 160 at 164 (It does not apply to claims involving losses resulting from the failure of the insured's product or work, *see Imperial Cas. & Indem. Co. v. High Concrete Structures, Inc.* 858 F.2d at 136, n.9, or to claims that are not based on the withdrawal or recall of the insured's own product or work. *See Imperial Cas. & Indem. Co. v. High Concrete Structures, Inc.* 858 F.2d at 137; *Fitness Equip. Co. v. Pennsylvania Gen. Ins. Co.*, 493 So.2d 1337, 1343 (Ala. 1985).

The removal of defective products that failed after their installation does not come within the sistership exclusion of the insured's general liability policy because there has been no general withdrawal of similar products from the general marketplace. *Forest City Dillon, Inc. v. Aetna Cas. & Sur. Co.*, 852 F.2d 168,

173-174; *Marathon Plastics, Inc. v. International Ins. Co.*, 161 Ill. App.3d 452, 112 Ill.Dec. 816, 514 N.E.2d 479, 487 (1987).

*Chester-O'Donley*, 972 S.W.2d at 10-11.

The Court in *Newman* did not address that exclusion as a sistership exclusion. Nevertheless, the exclusion n at issue here is precisely such an exclusion and, based on the historical foundations and analysis of sistership exclusions, exclusion n has literally no applicability in the case at hand. The Court of Appeals, regardless of *Newman*, undertook the correct analysis and this Court, respectfully should address exclusion n for what it is – an inapplicable sistership exclusion. Furthermore, the Court should take the opportunity to clarify the validity of sistership exclusions and their inapplicability to commercial or residential construction policies.

Doubtless, in response to this request and argument Auto-Owners will advance a version of the “Chicken Little” argument and contend the Court’s acknowledgement and acceptance of the policy moorings of sistership exclusions and their inapplicability in cases such as this would cause tremendous confusion and a spike in litigation in CGL coverage questions in the construction industry. This is simply not true. The Court should adopt the Tennessee Court’s analysis of sistership exclusions and their purposes. To do so would clarify the purposes of this standard exclusion within CGLs which, in the context of the building industry, is inherently vague.

What is more, to the extent it can be inferred from *Newman* that this Court has chosen to deviate from the historical policies underpinning “sistership” exclusions, it is completely unnecessary for this Court to accept Auto-Owners’ argument. It is absolutely unnecessary because through *Crossmann* – without resort to any sort of policy exclusion

analysis<sup>8</sup> – this Court clearly and unequivocally held that CGLs will not cover damages for negligent or defective construction or the cost of replacing that defective work. Rather, resulting damage to otherwise non-defective components may constitute “property damage,” and only that would be covered. Thus, exclusion n should be determined to be a classic “sistership” exclusion that is not applicable here.

Even if the Court refuses to acknowledge the existence and purpose of so-called sistership exclusions, Auto-Owners’ arguments that loss of use, costs repair, removal, etc, are not covered widely miss their mark. Auto-Owners’ continued refusal to acknowledge the distinct types of losses and damages claimed by Rhodes in the Underlying Action, particularly the damages to the real property itself and to Rhodes’ business, are completely different than Auto-Owners’ focus on the signs themselves.

Based on the evidence adduced in the Underlying Action and submitted by agreement at the trial of this action, the trial court held:

The damages awarded in the [Underlying] action are not for loss, cost or expense for loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of “your product”, “your work”, or “impaired property”. The damages were to the real estate as a consequence of the event of the sign falling and the resulting mandate of the SCDOT requiring the other two signs to be removed. The loss claimed is not damage to “your product” or “your work”. The loss is damage to the real estate.

(R. pp. 47-48).

Exclusion n must be construed strictly against the insurer. *Buddin v. Nationwide Mut. Ins. Co.*, 250 S.C. 332, 337, 157 S.E.2d 33, 35 (1967). This inapplicable exclusion does not preclude coverage for the damages to Rhodes’ real property, including loss of use. As noted by Eadon in his Brief, “the fact that courts have taken divergent views of

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<sup>8</sup> In *Crossmann* the parties stipulated not to raise any policy exclusions. 395 S.C. at 50, 717 S.E.2d at 594.

the meaning and purpose of exclusion n is evidence of its essential ambiguity.” (Brief of Eadon, p. 34). *See also Helena Chem. Co.*, 357 S.C. at 639, 594 S.E.2d at 459; *Greenville County v. Insurance Reserve Fund*, 313 S.C. 546, 548, 443 S.E.2d 552, 554 (1994).

B. The Court of Appeals correctly held that Exclusions k and l do not apply since damages to Rhodes’ business and real property were not damages to “Your Product” or “Your Work.”

Auto Owners contends that Exclusion “k” precludes coverage for not only the contractual price of the signs, but also the “resulting loss of use of the signs.” The Court of Appeals correctly found this exclusion to be inapplicable because “the circuit court properly analyzed Exclusion k and determined that the majority, if not all, of the damages assigned by the jury in the Tort action corresponded to the damages inflicted on Rhodes’ business, rather than the actual work product – the signs – of C&B, which was properly excluded.” *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857, 870 (Ct. App. 2009).

Exclusion k states that the “insurance does not apply to... ‘property damage’ to ‘your [*i.e.*, the insured’s] product.’” (R. p. 1310). The Policy defines “your product” as any “good or products other than real property manufactured, sold, handled, distributed or disposed of by: (1) You [or] (2) Others trading under your name.” (*Id.*) The insured’s sole “product” in this case was the manufactured signposts. The exclusion pertains only to property damage to C&B’s product, which is separate and distinct from Rhodes’ business or real property. The damages to his business and real property which arose from the occurrence are not damages *to* the *insured’s* product.

Moreover, Rhodes’ primary claim is for damage to “real property,” which is specifically excluded from the definition of “your product.” (R. p. 96). Rhodes’ real

property was physically damaged by the fact that the “stumps” of the signs remain embedded in the ground, approximately 27-28 feet below the surface and 21 feet above the surface. (R. p. 1149, ll. 3-14; p. 1175, ll. 3-5). There is also loss of use of the real property as a platform for the erection of signs. (R. p. 1167, l. 22 to p. 1169, l. 16; p. 1172, ll. 11-23).

In fact, the Court of Appeals affirmed the trial court’s exclusion of the contractual price of the signs as an element of damages under exclusion k, which is the proper application of the exclusion. The Court of Appeals correctly determined though that the exclusion did not apply to the loss of use of the signs because the clear thrust of the Underlying Action and the damages claimed there are for damage to Rhodes’ real property and his business as opposed to damage to the signs themselves. Furthermore, as fixtures, the damage to the signs – in particular the two remaining signs which were required to be removed – were part of the real property itself. The removal of these fixtures caused physical damage to the real property, loss of some uses of the property, and diminution in its value. The Court of Appeals therefore correctly held that exclusion k was inapplicable.

With regard to exclusion l, the Court of Appeals’ analysis is equally correct. There is significant overlap between the analysis of exclusions k and l. Exclusion l’s “your work” exclusion provides that the Policy 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.” (R. p. 1310). However, as addressed throughout this Brief, under this unique factual scenario concerning the signs manufactured for outdoor advertising purposes, C&B’s work – the design, manufacturing, and installation of 130 foot sign

posts to be permanently affixed to Rhodes' real property and with a lifespan of 50 years, the very purpose of which is to allow advertising income to Rhodes and his business – lost its discrete nature as a “product” or “work” and legally became a fixture that was valued as a part of the real property itself and an improvement thereupon. The falling of one sign was the direct cause of SCDOT ordering that Rhodes remove all of the signs, which resulted in injury to the real property as a whole. The Court of Appeals correctly affirmed the trial court's determination that exclusion l “cannot serve as a broadly written catch-all exclusion that would prohibit recovery no matter what consequences ‘arise out of’ the product of the insured.” *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857, 870 (Ct. App. 2009).

With regard to exclusions k and l, Auto-Owners' attack on the Court of Appeals' citations in support of its reasoning bears mention. Auto-Owners is correct that neither *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989) nor *Colleton Preparatory Academy v. Hoover Universal, Inc.* 379 S.C. 181, 666 S.E.2d 247 (2008) are coverage cases addressing CGL insurance coverage law. The Court of Appeals does not rely on these cases for that purpose. While the Court of Appeals' decision admittedly does not explicitly state so, the importance of the *Kennedy* and *Colleton Preparatory* cases in the context of this case is to acknowledge that a builder may be liable to a party in tort despite the fact that only economic losses occurred. The loss of income and loss of use of the real property claimed here are economic losses. Moreover, it is C&B's liability in tort, as opposed to liability in contract only, which underlies the “occurrence” and “property damage” triggers for coverage that provide the basis for this appeal.

For these reasons, both the trial court and Court of Appeals correctly determined that none of the raised exclusions limit coverage afforded under the Policy.

6. The Court of Appeals correctly affirmed the trial court's finding that diminution in value damages are covered under the Policy.

Physical injury to property (real or personal) can directly cause a loss of use of the property, a diminution in the property's value, or both. However, as acknowledged by the Policy (R. pp. 95-96), physical injury is not necessary for a property owner to suffer either a loss of use of or diminished value in his property.

Moreover, a loss of use of property (caused by physical injury or not) will typically diminish the property's value, but does not always do so.

Thus, physical injury to property can directly cause a loss of use of property which, in turn, diminishes the property's value. In this instance, the physical injury has proximately caused a diminution in the property's value.

A property's value is not just its intrinsic value, but is a product of its economic usefulness. Thus, for example, when a business is operated on real property, it is appropriate to consider net earnings from the property to ascertain its fair market value before an event that affects the use of the property. *South Carolina State Highway Dep't v. Bolt*, 242 S.C. 411, 418, 131 S.E.2d 264, 267 (1963); *see also Gray v. South Carolina Dep't of Highways & Pub. Transp.*, 311 S.C. 144, 153, 427 S.E.2d 899, 904 (Ct. App. 1992) *overruled on other grounds, Hardin v. South Carolina Dep't of Transp.*, 371 S.C. 598, 607-08, 641 S.E.2d 437, 442-44 (2007).<sup>9</sup>

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<sup>9</sup> Distinctions among various types of "property damage" are the same in analyzing liability coverage, regardless of whether the action is for condemnation or tort damages. *See Horry County v. Ins. Reserve Fund*, 344 S.C. 493, 544 S.E.2d 637 (Ct. App. 2001).

Consequently, when an event negatively affects the use of property so as to prohibit or to hinder a business which previously enhanced its value, this loss of use equates to a diminution in the property's value. Stated differently, a physical injury can diminish a property's value by causing some loss of use of the property.

To be certain, diminution in a property's value can be caused purely by market-wide forces (which are, of course, not the product of an occurrence); but, aside from this, any other negative effect on the value of property can be traced back to some loss of the owner's use of his property, such as physical injury to some or all of the property (resulting from a man-made occurrence or by nature, such as erosion), regulation<sup>10</sup> or other restrictions imposed on its use, or obsolescence (in the case of personal property).

The Policy provides coverage for the following types of "property damage" if caused by an occurrence: (1) physical injury to tangible property; (2) loss of use of physically injured property resulting from the physical injury; and (3) loss of use of tangible property that is not physically injured. So, while the term "diminution in value" is not expressly specified in the Policy, if tangible property suffers diminution in value from an occurrence, that loss is covered "property damage" because, by definition, it is the product of a loss of use of the property resulting from the occurrence.<sup>11</sup>

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<sup>10</sup> Regulatory impacts on property may be caused by an occurrence or not. For example, an issue to be resolved in the Underlying Action is whether the sign failures resulted in Rhodes' lost use of his real property via his loss of the right to continue using that property for billboard sites. However, this causation issue need not be determined in the present action, as acknowledged by the Court of Appeals. *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857, 869 (Ct. App. 2009). Rather, this action need only resolve the question of whether there is coverage under the Policy if it is proven C&B's wrongful conduct caused an occurrence that resulted in this loss of use.

<sup>11</sup> Because it was produced by an occurrence, the diminution in value could not be the result of market-wide changes. Again, the only issue at that point would be whether the insured was responsible for the occurrence.

This discussion is necessary because both the trial court and the Court of Appeals discussed diminution in value in the context of loss of use without detailed explication of the concepts' relationship; as a result, Auto-Owners' brief attacks diminution in value damages without fairly defining the concept and by apparently considering it mutually exclusive from loss of use damages, thus enabling somewhat of a "straw man" argument.

The diminution in value damages claims in the Underlying Action are far simpler than Auto-Owners' hair-splitting analysis suggests. As discussed above, the fallen sign physically damaged Rhodes' property, the signs that had to be removed physically damaged Rhodes' property, the loss of all signs resulted in a loss of the primary use to which Rhodes put his property, and, consequently, the value of Rhodes' property (both intrinsically and as an income-producing asset) was diminished. (*See* pp. 18-23, *infra*.)

The diminution in value damages represent the economic effect of Rhodes' loss of use of physically injured property resulting from the physical injury and loss of use of tangible property that was not physically injured. Therefore, they are covered under the Policy.

The case relied upon by Auto-Owners, *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003) (*see* Petitioner's Brief, p. 26), does not change the Policy's language or the result of this analysis.

The *Carl Brazell* case is entirely distinguishable from the present case. There, the underlying claims involved allegations of negligent and/or fraudulent non-disclosure of latent property conditions, the presence of which decreased the claimants' property values; but, those claims did not assert any accident or covered occurrence. *Id.*, 588 S.E.2d at 115-16. Moreover, in *Carl Brazell*, the "Claimants [did] not allege any

physical injury to their property” nor did they allege loss of use of their property. *Id.*, 588 S.E.2d at 115 & n. 2.<sup>12</sup>

On the other hand, in the Underlying Action, the claims assert physical injury to property, loss of use of property, an accident, and a covered occurrence. Not only do these facts distinguish the *Carl Brazell* case, they also provide one with the ability to see that Rhodes’ diminution in value damages are simply the economic manifestation of the loss of use of his property (both that which was physically injured and that which was not) as a result of the accident/occurrence.

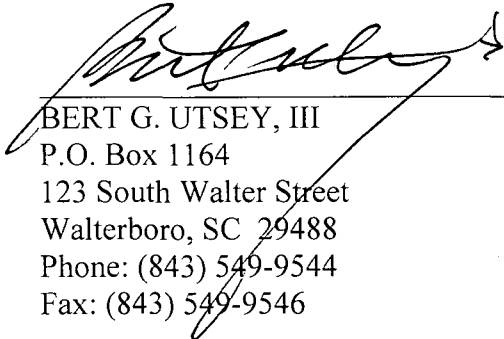
#### CONCLUSION

For the foregoing reasons, Respondents Rhodes and Piedmont Promotions, Inc. request that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

PETERS, MURDAUGH, PARKER,  
ELTZROTH AND DETRICK, P.A.

BY:

  
BERT G. UTSEY, III  
P.O. Box 1164  
123 South Walter Street  
Walterboro, SC 29488  
Phone: (843) 549-9544  
Fax: (843) 549-9546

MATTHEW V. CREECH  
P.O. Box 2500  
110 West Wilson Street  
Ridgeland, SC 29936  
Phone: (843) 726-6131  
Fax: (843) 726-6057

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<sup>12</sup> As one can see from reviewing footnote 2 in the *Carl Brazell* opinion, the Court did not reach the question of whether diminution in value damages could be covered as loss of use damages because no claim for loss of use was presented by the certified question.

and

CREIGHTON B. COLEMAN  
P.O. Box 1006  
120 Washington Street  
Winnsboro, SC 29180  
Phone: (803) 635-6884

September 7, 2012  
Walterboro, South Carolina

Attorneys for Respondents Samuel W.  
Rhodes, Jr. and Piedmont Promotions, Inc.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

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Opinion No. 4605 (S.C. Ct. App. filed August 6, 2009)

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Auto-Owners Insurance Company,

Petitioner

v.

Samuel W. Rhodes, Piedmont Promotions,  
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Low Country Signs, Inc.,

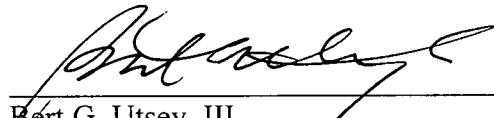
Respondents.

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CERTIFICATE OF COUNSEL

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The undersigned certifies that this Final Brief complies with Rule 211(b),  
SCACR.



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Bert G. Utsey, III  
PETERS, MURDAUGH, PARKER,  
ELTZROTH & DETRICK, P.A.  
Post Office Box 1164  
Walterboro, South Carolina 29488  
(843)549-9544  
Attorney for Respondent  
Samuel W. Rhodes

September 7, 2012  
Walterboro, South Carolina

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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
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PROOF OF SERVICE  
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I certify that I served three copies of the BRIEF OF RESPONDENTS  
SAMUEL W. RHODES, JR. AND PIEDMONT PROMOTIONS, INC. upon all parties  
by mailing same via U.S. First Class Mail, postage prepaid, on September 7, 2012,  
addressed to their attorneys of record

John McCants, Esquire  
ELLIS, LAWHORNE & SIMS, P.A.  
Post Office Box 2285  
Columbia, South Carolina 29202

A. Johnston Cox, Esquire  
GALLIVAN WHITE & BOYD, P.A.  
Post Office Box 7368  
Columbia, South Carolina 29202

Attorneys for Petitioner


and

William O. Sweeney, Esquire  
SWEENEY, WINGATE & BARROW, PA  
Post Office Box 12129  
Columbia, SC 29211  
Attorneys for Respondent Marion L.  
Eadon d/b/a C&B Fabrication, C&B  
Fabrications, Inc. and Low Country  
Signs, Inc.

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S.C. SUPREME COURT



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Bert G. Utsey, III  
PETERS, MURDAUGH, PARKER,  
ELTZROTH & DETRICK, P.A.  
Post Office Box 1164  
Walterboro, South Carolina 29488  
(843)549-9544  
Attorney for Respondent  
Samuel W. Rhodes

Walterboro, South Carolina

LAW OFFICES  
**PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK**  
PROFESSIONAL ASSOCIATION

JOHN E. PARKER  
J. PAUL DETRICK  
DANIEL E. HENDERSON  
MARK D. BALL  
RANDOLPH MURDAUGH, IV  
RONNIE L. CROSBY  
R. ALEXANDER MURDAUGH  
BERT G. UTSEY, III  
RANDOLPH MURDAUGH, III  
GRAHAME E. HOLMES  
LEE D. COPE  
MATTHEW V. CREECH  
LEAGUE B. CREECH  
STEVEN D. MURDAUGH  
WILLIAM F. BARNES, III

CLYDE A. ELTZROTH, JR.  
(INACTIVE)

123 WALTER STREET  
POST OFFICE BOX 1164  
WALTERBORO, SOUTH CAROLINA 29488  
TELEPHONE: (843) 549-9544  
TOLL FREE: (866) 943-2113  
FAX: (843) 549-9546  
WWW.PMPED.COM

RANDOLPH MURDAUGH, SR.  
(1887-1940)  
RANDOLPH MURDAUGH, JR.  
(1915-1995)  
J. ROBERT PETERS, JR.  
(1927-2008)

OTHER OFFICES:  
101 MULBERRY STREET EAST  
POST OFFICE BOX 457  
HAMPTON, SC 29924  
TELEPHONE (803) 943-2111  
FAX (803) 943-3943

110 WEST WILSON STREET  
POST OFFICE BOX 2500  
RIDGELAND, SC 29936-2500  
TELEPHONE: (843) 726-6131  
FAX: (843) 726-6057

September 7, 2012

**RECEIVED**

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Email: butsey@pmped.com

Daniel E. Shearouse, Clerk  
South Carolina Supreme Court  
Supreme Court Bldg.  
1231 Gervais Street  
Columbia, SC 29211

**S.C. SUPREME COURT**

Re: Auto Owners Insurance Company v. Samuel W. Rhodes, Piedmont Promotions, Inc. and Marion L. Eadon d/b/a C & B Fabrications, C & B Fabrications, Inc. and Low Country Signs  
Appeal from York County - Appellate Case No. 2009-143546

Dear Mr. Shearouse:

Enclosed please find original and fifteen copies of Respondents' Samuel W. Rhodes and Piedmont Promotions, Inc. Brief, together with proof of service in the above-referenced appeal. Please file the original and return one clocked copies to me in the provided self-addressed stamped envelope for my file.

By copy to counsel of record, I am providing all parties notice of this filing.

Thank you in advance for your kind assistance with this request.

Sincerely,

  
Bert G. Utsey, III

BGU, III/hd  
Enclosures

cc: John McCants, Esquire  
A. Johnston Cox, Esquire  
William O. Sweeney, Esquire  
Creighton B. Coleman, Esquire  
Matthew V. Creech, Esquire