

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law

1320 Main Street / 17th Floor / Columbia, SC 29201

Tel: 803.799.2000 Fax: 803.255.9025

www.nelsonmullins.com

C. Mitchell Brown

Tel: 803.255.9595

Fax: 803.255.9025

mitch.brown@nelsonmullins.com

September 11, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RECEIVED

SEP 12 2008

S.C. SUPREME COURT

RE: Auto Owners v. Virginia T. Newman
Our File No. 00470/01571

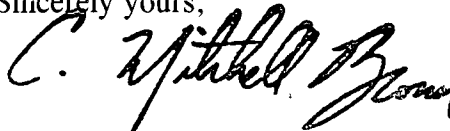
Dear Mr. Shearouse:

I will be making the oral argument on behalf of Auto-Owners in this matter. Pursuant to the Notice dated September 5, 2008, please be advised that if possible, I would appreciate it if the Court would not set the oral argument in this matter for November 19, 2008. I have a Firm Executive Committee meeting on that date. If this date is necessary, however, I certainly understand the Court's matters have priority.

Thank you for your consideration of this request.

With kind regards, I remain

Sincerely yours,



C. Mitchell Brown

CMB:lpw

cc: Joseph K. Qualey, Esquire
Frank M. Cisa, Esquire
George E. Mullen, Esquire
Michael S. Seekings, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggan, Esquire
John L. McCants, Esquire

The Honorable Daniel E. Shearouse

September 11, 2008

Page 2

Lawrence M. Hunter, Jr., Esquire

Stephen P. Groves, Sr., Esquire

Keating L. Simons III, Esquire

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9025
www.nelsonmullins.com

C. Mitchell Brown
Tel: 803.255.9595
Fax: 803.255.9025
mitch.brown@nelsonmullins.com

September 11, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RECEIVED
SEP 11 2008
S.C. SUPREME COURT

RE: Auto-Owners Insurance Co., Inc. v. Virginia T. Newman and
Trinity Construction, Inc.
Civil Action No. 2002-CP-10-4390
Our File No. 00470/01571

Dear Mr. Shearouse:

Enclosed please find the original and one copy of a Notice of Appearance. Please file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of this notice.

With kind regards, I remain

Sincerely yours,

Mitch Brown

C. Mitchell Brown

CMB:lpw
Enclosures

cc: Joseph K. Qualey, Esquire
Frank M. Cisa, Esquire
George E. Mullen, Esquire
Michael S. Seekings, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggan, Esquire
John L. McCants, Esquire

The Honorable Daniel E. Shearouse

September 11, 2008

Page 2

Lawrence M. Hunter, Jr., Esquire

Stephen P. Groves, Sr., Esquire

Keating L. Simons III, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Virginia T. Newman and Trinity Construction, Inc., ... Respondents,

v. .

Auto-Owners Insurance Co., Inc., ... Appellant.

NOTICE OF APPEARANCE

You will please take notice that C. Mitchell Brown from the Columbia, South Carolina law offices of Nelson Mullins Riley & Scarborough, L.L.P., hereby enters his appearance as additional counsel of record for Appellant, Auto-Owners Insurance Co., Inc.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: C. Mitchell Brown by AUB
C. Mitchell Brown
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Additional Counsel for Auto-Owners Insurance Co.,
Inc.

Columbia, South Carolina
September 11, 2008

RECEIVED

SEP 11 2008

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Virginia T. Newman and Trinity Construction, Inc.,..... Respondents.

v.

Auto-Owners Insurance Co., Inc., ... Appellant,

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Notice of Appearance

Counsel Served:

Joseph K. Qualey, Esquire
W. Peter Beck, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, SC 29401

RECEIVED

SEP 11 2008

S.C. SUPREME COURT

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29464

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, SC 29938

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath Bouch & Crawford, LLP
Post Office Box 59
Charleston, South Carolina 29402

Kenneth E. Ormand, Jr., Esquire
Ormand Ashley & Gibbons
117 Alpine Cir. #700
Columbia, South Carolina 29223

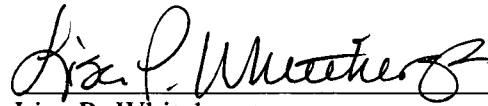
Laura A. Foggan, Esquire
Parker J. Lavin, Esquire
Wiley Rein, LLP
1776 K Street NW
Washington, DC 20006

John L. McCants, Esquire
Ellis Lawhorn & Sims, PA
Post Office Box 2285
Columbia, SC 29202

Lawrence M. Hunter, Jr., Esquire
Hunter & Foster, P.A.
Post Office Box 10309
Greenville, SC 29603

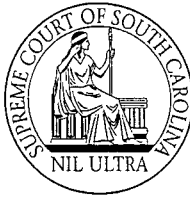
Stephen P Groves, Sr., Esquire
Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC 29401

Keating L. Simons III, Esquire
Simons & Dean
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412

A handwritten signature in cursive script, appearing to read "Lisa P. Whitehurst", written over a horizontal line.

Lisa P. Whitehurst
Administrative Assistant

September 11, 2008



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 11, 2008

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath, Bouch & Crawford, LLP
P O Box 59
Charleston, SC 29402

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

This is to acknowledge receipt of your letter requesting a copy of the recording of the hearing of January 23, 2008 and your Check No. 11826 in the amount of \$20.00.

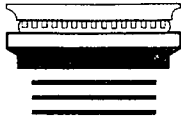
Enclosed is a copy of the tape of the hearing.

Very truly yours,



CLERK

DES/jjp



LEATH, BOUCH & CRAWFORD LLP
PRACTICE LIMITED TO COMMERCIAL LITIGATION & CREDITORS RIGHTS
WITH EMPHASIS ON CONSTRUCTION & ENVIRONMENTAL LAW

September 2, 2008

VIA FACSIMILE AND U.S. MAIL

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Auto Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 2002-CP-10-4390

Dear Mr. Shearouse:

Enclosed please find a firm check in the amount of \$20.00 for a duplication of the audio recording of the hearing which took place on January 23, 2008 in the above-referenced matter. This recording will need to be transcribed and reviewed prior to the rehearing which has been granted and respectfully request expedited handling on the duplicate recording.

Should you have any questions or concerns, please do not hesitate to contact our office.

Yours truly,

LEATH, BOUCH & CRAWFORD, LLP

Stephanie A. Saporita

Stephanie A. Saporita, ALS
Paralegal to Michael S. Seekings

RECEIVED

Enclosure SEP 11 2008

S.C. SUPREME COURT

LEATH BOUCH & CRAWFORD, LLP

92 BROAD STREET
CHARLESTON, SC 29401
PHONE (843) 937-8811
FAX (843) 937-0606

FACSIMILE TRANSMITTAL SHEET

TO: The Honorable Daniel E. Shearouse

FAX NO.: (803) 734-1499

FROM: Stephanie A. Saporita, ALS
Paralegal to Michael S. Seekings

RE: Auto Owners Insurance Company v. Virginia T. Newman

FILE NO.: N/A

DATE: September 2, 2008

TOTAL NUMBER OF PAGES (INCLUDING THIS SHEET): 3

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

THIS FACSIMILE MESSAGE IS CONFIDENTIAL. IT IS INTENDED SOLELY FOR THE USE OF THE INDIVIDUAL NAMED BELOW. IF YOU ARE NOT THE INTENDED RECIPIENT, OR THE PERSON RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY ADVISED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS PROHIBITED. IF YOU HAVE RECEIVED THIS FACSIMILE MESSAGE IN ERROR, PLEASE IMMEDIATELY NOTIFY THE SENDER BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO THE SENDER BY U.S. MAIL.

DOCUMENT(S) ATTACHED: LETTER DATED 09/02/08

RECEIVED
SEP 9 2008
S.C. SUPREME COURT



LEATH, BOUCH & CRAWFORD LLP
PRACTICE LIMITED TO COMMERCIAL LITIGATION & CREDITORS RIGHTS
WITH EMPHASIS ON CONSTRUCTION & ENVIRONMENTAL LAW

September 2, 2008

VIA FACSIMILE AND U.S. MAIL

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Auto Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 2002-CP-10-4390

Dear Mr. Shearouse:

Enclosed please find a firm check in the amount of \$20.00 for a duplication of the audio recording of the hearing which took place on January 23, 2008 in the above-referenced matter. This recording will need to be transcribed and reviewed prior to the rehearing which has been granted and respectfully request expedited handling on the duplicate recording.

Should you have any questions or concerns, please do not hesitate to contact our office.

Yours truly,

LEATH, BOUCH & CRAWFORD, LLP

Stephanie A. Saporita

Stephanie A. Saporita, ALS
Paralegal to Michael S. Seekings

Enclosure

RECEIVED

SEP 9 2008

S.C. SUPREME COURT

**LEATH, BOUCH & CRAWFORD, LLP
OPERATING ACCOUNT**P.O. BOX 50 843-837-8811
CHARLESTON, SC 29402NBSC
THE NATIONAL BANK OF SOUTH CAROLINA
CHARLESTON, SOUTH CAROLINA 29402

87-88532

11826

8/25/2008

PAY TO THE ORDER OF SC Judicial Department

\$20.00

Twenty and 00/100

DOLLARS

SC Judicial Department

MEMO

Auto Owners

⑈011826⑈ ⑆053200666⑆280683428401⑈

SECURITY FEATURES INCLUDED. DETAILS ON BACK.

LEATH, BOUCH & CRAWFORD, LLP OPERATING ACCOUNT

SC Judicial Department

8/25/2008

11826

20.00

RECEIVED

SEP 9 2008

S.C. SUPREME COURT

NBSC - Operating Acc Auto Owners

20.00



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO 734-1080

To: C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Matthew D. Patterson, Esquire
A. Mattison Bogan, Esquire

From: Daniel E. Shearouse

Date: September 05, 2008

RE: November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 4, 5, 6, 18 and 19, 2008. Please notify this office in writing prior to September 12, 2008 as to any scheduling conflicts for the November term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: David E. Dukes, Esquire
William C. Wood, Jr., Esquire
From: Daniel E. Shearouse
Date: September 05, 2008
RE: November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 4, 5, 6, 18 and 19, 2008. Please notify this office in writing prior to September 12, 2008 as to any scheduling conflicts for the November term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Frank M. Cisa, Esquire
From: Daniel E. Shearouse
Date: September 05, 2008
RE: November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 4, 5, 6, 18 and 19, 2008. Please notify this office in writing prior to September 12, 2008 as to any scheduling conflicts for the November term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
From: Daniel E. Shearouse
Date: September 05, 2008
RE: November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 4, 5, 6, 18 and 19, 2008. Please notify this office in writing prior to September 12, 2008 as to any scheduling conflicts for the November term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: John L. McCants, Esquire
From: Daniel E. Shearouse
Date: September 05, 2008
RE: November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 4, 5, 6, 18 and 19, 2008. Please notify this office in writing prior to September 12, 2008 as to any scheduling conflicts for the November term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Joseph K. Qualey, Esquire
From: Daniel E. Shearouse
Date: September 05, 2008
RE: November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 4, 5, 6, 18 and 19, 2008. Please notify this office in writing prior to September 12, 2008 as to any scheduling conflicts for the November term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Keating L. Simons, III, Esquire
From: Daniel E. Shearouse
Date: September 05, 2008
RE: November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 4, 5, 6, 18 and 19, 2008. Please notify this office in writing prior to September 12, 2008 as to any scheduling conflicts for the November term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Kenneth E. Ormand, Jr., Esquire
From: Daniel E. Shearouse
Date: September 05, 2008
RE: November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November, 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 4, 5, 6, 18 and 19, 2008. Please notify this office in writing prior to September 12, 2008 as to any scheduling conflicts for the November term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Laura A. Foggon, Esquire
Parker J. Lavin, Esquire
From: Daniel E. Shearouse
Date: September 05, 2008
RE: November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 4, 5, 6, 18 and 19, 2008. Please notify this office in writing prior to September 12, 2008 as to any scheduling conflicts for the November term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Lawrence M. Hunter, Jr., Esquire
From: Daniel E. Shearouse
Date: September 05, 2008
RE: November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 4, 5, 6, 18 and 19, 2008. Please notify this office in writing prior to September 12, 2008 as to any scheduling conflicts for the November term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
From: Daniel E. Shearouse
Date: September 05, 2008
RE: November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 4, 5, 6, 18 and 19, 2008. Please notify this office in writing prior to September 12, 2008 as to any scheduling conflicts for the November term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Stephen Peterson Groves, Sr., Esquire
From: Daniel E. Shearouse
Date: September 05, 2008
RE: November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 4, 5, 6, 18 and 19, 2008. Please notify this office in writing prior to September 12, 2008 as to any scheduling conflicts for the November term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

August 22, 2008

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

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

Enclosed is the order granting the petition for rehearing in the above entitled matter.

This case will be reheard during the November term of Court. Court will meet the days of November 4, 5, 6, 18 and 19, 2008. You will be advised at a later date as to the specific day.

Very truly yours,

Daniel E. Shearouse
CLERK _{DS}

DES/jjp

cc: Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Matthew D. Patterson, Esquire
A. Mattison Bogan, Esquire
David E. Dukes, Esquire
William C. Wood, Jr., Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggon, Esquire
Parker J. Lavin, Esquire
Lawrence M. Hunter, Jr., Esquire
Stephen Peterson Groves, Sr., Esquire
Keating L. Simons, III, Esquire

The Supreme Court of South Carolina

Auto Owners Insurance
Company, Inc.,

Appellant,

v.

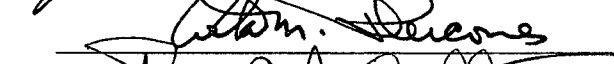
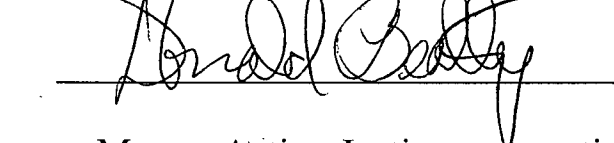
Virginia T. Newman and
Trinity Construction, Inc.,

Respondents.

ORDER

The petition for rehearing is granted and this matter shall be scheduled for oral argument.

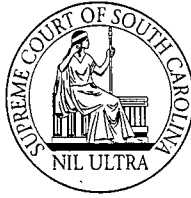
IT IS SO ORDERED.

 C.J.
 J.
 J.
 J.

Moore, Acting Justice, not participating.

Columbia, South Carolina

August 22, 2008



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

July 10, 2008

Lawrence M. Hunter, Jr., Esquire
Hunter & Foster, PA
P O Drawer 10309
Greenville, SC 29603

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

The following Order has been endorsed on your Petition of Bituminous Casualty Corporation for Leave to File Amicus Curiae Brief in the above entitled case on appeal.

"Petition granted.

s/ Jean H. Toal C.J.
For the Court

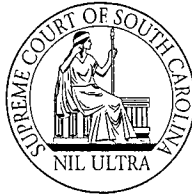
July 10, 2008."

Very truly yours,

CLERK

DES/jjp

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Matthew D. Patterson, Esquire
A. Mattison Bogan, Esquire
David E. Dukes, Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggon, Esquire
Parker J. Lavin, Esquire
Stephen Peterson Groves, Sr., Esquire
Keating L. Simons, III, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

July 10, 2008

C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Matthew D. Patterson, Esquire
A. Mattison Bogan, Esquire
Nelson Mullins Riley & Scarborough
P O Box 11070
Columbia, SC 29211

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

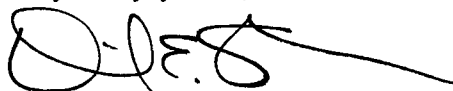
The following Order has been endorsed on your Motion of Harleysville Mutual Insurance Company for Leave to File a Brief as Amicus Curiae in Support of Appellant's Petition for Rehearing in the above entitled case on appeal.

"Motion granted.

s/ Jean H. Toal C.J.
For the Court

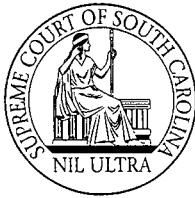
July 10, 2008."

Very truly yours,


CLERK

DES/jjp

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
David E. Dukes, Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggon, Esquire
Parker J. Lavin, Esquire
Lawrence M. Hunter, Jr., Esquire
Stephen Peterson Groves, Sr., Esquire
Keating L. Simons, III, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

July 10, 2008

Stephen Peterson Groves, Sr., Esquire
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402

Re: Auto Owners v. Newman, Virginia

Dear Mr. Groves:

The following Order has been endorsed on your Motion for Leave to File Brief of Amicus Curiae on behalf of Builders Mutual Insurance Company in Support of Petition for Rehearing in the above entitled case on appeal.

"Motion granted.

s/ Jean H. Toal C.J.
For the Court

July 10, 2008."

Very truly yours,



CLERK

DES/jjp

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
David E. Dukes, Esquire
C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Matthew D. Patterson, Esquire
A. Mattison Bogan, Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggon, Esquire
Parker J. Lavin, Esquire
Lawrence M. Hunter, Jr., Esquire
Keating L. Simons, III, Esquire

HUNTER & FOSTER, P.A.

Attorneys At Law

123 BROADUS AVENUE (29601)
POST OFFICE BOX 10309
GREENVILLE, SOUTH CAROLINA 29603
TELEPHONE (864) 242-2111
FACSIMILE (864) 255-4433

LAWRENCE M. HUNTER, JR., P.C.*
LEE BRELAND FOSTER

INTERNET: WWW.HFPPA.COM

* ALSO ADMITTED IN GEORGIA

April 21, 2008

BY HAND

The Hon. Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

Re: Auto Owners Insurance v. Newman and Trinity Construction,
Op. No. 1383 (S.C. Sup. Ct. Filed March 10, 2008) (Shearhouse Adv. Sh. No. 9 at 63)

Dear Mr. Shearouse:

Pursuant to Rule 213, South Carolina Appellate Court Rules, I am filing herewith the Petition of Bituminous Casualty Corporation For Leave To File Amicus Curiae Brief in the above matter.

Enclosed please find the original and 10 copies of the Petition along with a check in the amount of twenty-five (\$25.00) to cover the filing fee. Please file the original Petition, retain six copies for the Court, and return four filed copies with my courier.

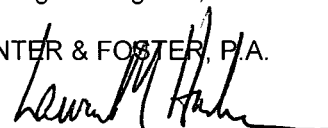
Also, as allowed by Rule 213, I am conditionally filing herewith the original and 20 copies of the Brief of Amicus Curiae Bituminous Casualty Corporation. Please file the original Brief, retain 15 copies for the Court, and return five filed copies with my courier.

I respectfully request that the Court consider this Petition and, if approved, order that the conditionally filed Amicus Brief be accepted as of that date.

I am by copy of this letter serving the Petition and Amicus Brief upon the counsel of record, as listed below, pursuant to the Certificates of Service.

With highest regards,

HUNTER & FOSTER, P.A.


Lawrence M. Hunter, Jr.

LMH/abs

Enclosures

cc: Joseph K. Qualey, Esquire
Frank M. Cisa, Esquire
George E. Mullen, Esquire
Michael S. Seekings, Esquire
Kenneth E. Ormand, Jr., Esquire
David E. Dukes, Esquire
Laura A. Foggan, Esquire
John L. McCants, Esquire

RECEIVED

APR 21 2008

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc.

..... Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc.,

..... Respondents.

PETITION OF BITUMINOUS CASUALTY CORPORATION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

Petition granted.

[Signature]
for the Court

July 10, 2008.

Lawrence M. Hunter, Jr.
Hunter & Foster, P.A.
123 Broadus Avenue
Post Office Box 10309
Greenville, South Carolina 29603
(864) 242-2111
Email: LMH@hfppa.com
S.C. Bar No. 011808

ATTORNEY FOR AMICUS PETITIONER
BITUMINOUS CASUALTY CORPORATION

Pursuant to South Carolina Rules of Appellate Procedure Rule 213, Petitioner Bituminous Casualty Corporation ("Bituminous") respectfully requests leave to file an *Amicus Curiae* brief in support of the positions taken by Respondent Appellant Auto-Owners Insurance Co. Inc. in its Petition for Rehearing in the matter of Auto Owners Insurance v. Newman and Trinity Construction, Op. No. 1383 (S.C. Sup. Ct. Filed March 10, 2008) (Shearhouse Adv. Sh. No. 9 at 63).

In support of this petition, Bituminous would show as follows:

Bituminous was the insurer which brought the action leading to this Court's decision in L-J v. Bituminous Fire & Marine Insurance Co., 366 S.C. 117, 621 S.E.2d 33 (2005), which is the subject of close review in the case at bar. As noted in the opinion which is the subject of this petition, the L-J decision is advanced by all parties in the case at bar in support of their respective positions. The interpretation of L-J is of great significance to Bituminous and the insurance industry as a whole, as seen by the many citations that have been made in other jurisdictions to the L-J opinion. As a party to the original L-J dispute, and as an insurer in the business of applying Commercial General Liability policies to insureds in South Carolina, Bituminous has a special interest in the outcome of the current case.

Further, the prospective opinion in the current case contains reference to another action currently pending in the United State Fourth Circuit Court of Appeals, Bituminous Cas. Corp. v. R.C. Altman Builders, Inc., 2006 WL 2137233, 2006 U.S. Dist. LEXIS 53354, (D.S.C.2006). In that case, a United States District Court judge has issued a ruling interpreting the L-J opinion in a manner contrary to the opinion at bar. Bituminous is involved in numbers of other cases in addition to R.C. Altman to which any modification of the L-J holding is critically relevant.

By its *Amicus Curiae* brief, Bituminous proposes to address several subject areas of central importance to this appeal, including:

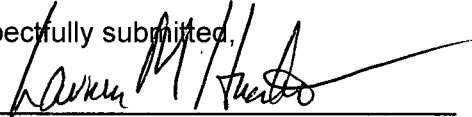
- (1) a showing that the subcontractor exception to Exclusion L is a consistent and

meaningful part of the overall CGL policy that implements, rather than contradicts, the overall insuring intent that the CGL policy cover only accidents, and

- (2) a showing that the proper application of a CGL policy requires that the insured's work be identified as that product which the insured is responsible for providing, regardless of whether that work is performed by an employee or a subcontractor.

The matters addressed in the *amicus curiae* brief are of great concern to Bituminous and to the many businesses that purchase CGL policies for economical protection against true accidents, which can be catastrophic in size. Bituminous contends that the result reached in the current version of the case at bar is improvident and will have significant adverse consequences to insurers, insureds, and to the general public. Bituminous therefore urges the Court to revise the current opinion and find that the facts in the case at bar do not constitute an "occurrence."

Respectfully submitted,



Lawrence M. Hunter, Jr.
HUNTER & FOSTER, PA
123 Broadus Avenue
P.O. Box 10309
Greenville, South Carolina 29603
S.C. Bar No. 011808
(864) 242-2111

April 21, 2008

Attorney for Amicus Bituminous Casualty Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing PETITION OF BITUMINOUS CASUALTY CORPORATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF was served upon all counsel of record by depositing a true and correct copy of same in the United States Mail, proper postage affixed thereto, on the 21st day of April, 2008, addressed as follows:

Joseph K. Qualey, Esquire
W. Peter Beck, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, South Carolina 29401

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, South Carolina 29464

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, South Carolina 29938

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath Bouch & Crawford, LLP
Post Office Box 59
Charleston, South Carolina 29402

Kenneth E. Ormand, Jr., Esquire
Ormand Ashely & Gibbons
117 Alpine Circle, #700
Columbia, South Carolina 29223

David E. Dukes, Esquire
William C. Wood, Jr., Esquire
Nelson Mullins Riley & Scarborough
Post Office Box 11070
Columbia, South Carolina 29211

Laura A. Foggan, Esquire
Parker J. Lavin, Esquire
Wiley Rein, LLP
1776 K Street NW
Washington, DC 20006

John L. McCants, Esquire
Ellis, Lawhorne & Sims, P.A.
1501 Main Street, 5th Floor
Columbia, South Carolina 29201

HUNTER & FOSTER, PA

By: Allison B. Seigler
Allison B. Seigler
Legal Assistant to Lawrence M. Hunter, Jr.

Greenville, SC

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law

1320 Main Street / 17th Floor / Columbia, SC 29201

Tel: 803.799.2000 Fax: 803.255.9025

www.nelsonmullins.com

C. Mitchell Brown

Tel: 803.255.9595

Fax: 803.255.9025

mitch.brown@nelsonmullins.com

April 21, 2008

RECEIVED

APR 21 2008

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: Virginia T. Newman and Trinity Construction, Inc. v. Auto-Owners Insurance Co.
Civil Action No. 2002-CP-10-4390

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Motion of Harleysville Mutual Insurance Company for Leave to File a Brief as Amicus Curiae in Support of Appellant's Petition for Rehearing in regard to the above-referenced matter. Also enclosed for filing is the original and sixteen copies of the Amicus Brief of Harleysville Mutual Insurance Company. We would ask that you file the original and return clocked-in copies to us via our courier. Our check for \$25.00 is enclosed for the filing of the motion. By copy of this letter to counsel of record, we are serving them with copies of these pleadings.

With kind regards, I remain

Sincerely yours,



C. Mitchell Brown

CMB:lpw

Enclosures

cc: Joseph K. Qualey, Esquire
Frank M. Cisa, Esquire
George E. Mullen, Esquire
Michael S. Seekings, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggan, Esquire
John L. McCants, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

RECEIVED

APR 21 2008

S.C. SUPREME COURT

Virginia T. Newman and Trinity Construction, Inc., ... Respondents,

v.

Auto-Owners Insurance Co., Inc., ... Appellant.

**MOTION OF HARLEYSVILLE MUTUAL INSURANCE COMPANY
FOR LEAVE TO FILE
A BRIEF AS AMICUS CURIAE IN SUPPORT OF
APPELLANT'S PETITION FOR REHEARING**

Pursuant to Rules 213, 221, and 224, SCACR, Harleysville Mutual Insurance Company ("Harleysville") submits this motion for leave to file an amicus curiae brief in support of appellant Auto Owners Insurance Company Inc.'s petition for rehearing in the above referenced matter. Harleysville's brief is conditionally filed with this motion.

Harleysville Mutual Insurance Company ("Harleysville") Harleysville is a casualty insurance company that writes property and casualty insurance policies around the country, including in South Carolina. Harleysville has substantial experience with the specific coverage issues in this case. Harleysville was the prevailing party in Brosnahan Builders, Inc. v. Harleysville Mut. Ins. Co., 137 F. Supp. 2d 517 (D. Del. 2001) in which the United States District Court for the District of Delaware found that a subcontractor's faulty work did not constitute an occurrence and, therefore, there was no coverage under the CGL policy. To date, Harleysville has been involved in hundreds of disputes

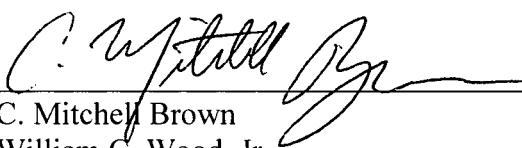
involving the issue of whether faulty work constitutes an occurrence under an insurance agreement. Moreover, Harleysville is currently involved in several matters pending in South Carolina in which the same issues are in dispute. In those actions, Harleysville's CGL policies contain identical language to the CGL policy in dispute in this case, including the "subcontractor's exception" to the "your work" exclusion.

Because of its extensive experience in similar litigation, Harleysville is very familiar with circumstances and background of the claims at issue in this case and it is respectfully submitted that Harleysville's experience with the coverage questions in this case would be of assistance to the Court. Therefore, Harleysville asks that this Court grant it leave to file an amicus curiae brief.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

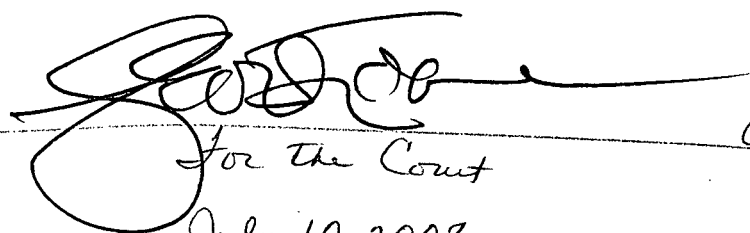
By:


C. Mitchell Brown
William C. Wood, Jr.
Matthew D. Patterson
A. Mattison Bogan
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Harleysville Mutual Insurance Company

Columbia, South Carolina
April 21, 2008

Motion granted.


For the Court
July 10, 2008. 

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc., ... Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc., ... Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Amicus Curiae Harleysville Mutual Insurance Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Motion of Harleysville Mutual Insurance Company for
Leave to file a Brief as Amicus Curiae in Support of
Appellant's Petition for Rehearing

Counsel Served:

Joseph K. Qualey, Esquire
W. Peter Beck, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, SC 29401

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29464

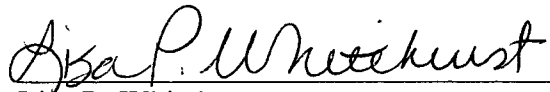
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, SC 29938

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath Bouch & Crawford, LLP
Post Office Box 59
Charleston, South Carolina 29402

Kenneth E. Ormand, Jr., Esquire
Ormand Ashley & Gibbons
117 Alpine Cir. #700
Columbia, South Carolina 29223

Laura A. Foggan, Esquire
Parker J. Lavin, Esquire
Wiley Rein, LLP
1776 K Street NW
Washington, DC 20006

John L. McCants, Esquire
Ellis Lawhorn & Sims, PA
Post Office Box 2285
Columbia, SC 29202



Lisa P. Whitehurst
Administrative Assistant

April 21, 2008

April 18, 2008

Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29202

RECEIVED

APR 21 2008

S.C. SUPREME COURT

Re: **Auto-Owners Insurance Company, Inc. v. Virginia
T. Newman and Trinity Construction, Inc.**

Civil Action No.: 2002-CP-10-4390

Appeal from the Charleston County Court
of Common Pleas

NP File No.: 032595-00000

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Dear Mr. Shearouse:

Enclosed please the original and seven copies of a **Motion for Leave to File Amicus Brief of Amicus Curiae Builders Mutual Insurance Company** submitted on behalf of the amicus curiae, Builders Mutual Insurance Company, in the above-referenced appeal. I also enclose the original and one copy of a **Proof of Service** indicating service of the **Motion for Leave to File Amicus Brief of Amicus Curiae Builders Mutual Insurance Company** upon all counsel in this appeal. I also enclose our firm check in the amount of \$25.00 to cover the applicable motion filing fee. Lastly, I enclose the original and 15 copies of the conditionally filed **Brief of the Amicus Curiae Builders Mutual Insurance Company**.

N P

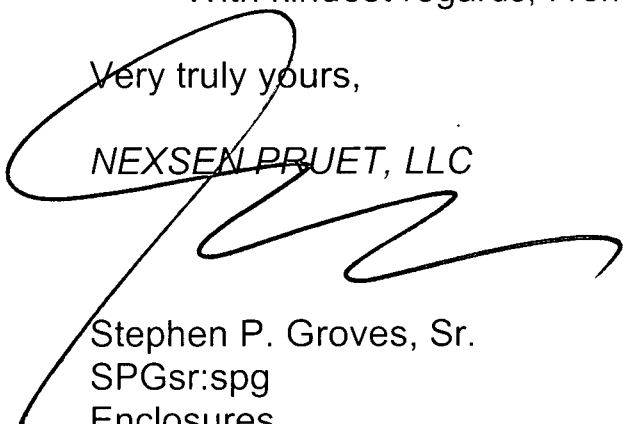
Hon. Daniel E. Shearouse
Clerk of Court
April 18, 2008
Page 2

I would appreciate you kindly filing the **Motion**, the **Proof of Service**, and the **Amicus Brief** with the Supreme Court and returning a stamped copy of each to my attention in the enclosed self-addressed, stamped envelope.

If you need anything else or I otherwise may be of any assistance to you regarding this matter, please feel free to contact me at your convenience.

With kindest regards, I remain

Very truly yours,


NEXSEN PRUET, LLC

Stephen P. Groves, Sr.
SPGsr:spg
Enclosures
CCE

John L. McCants, Esquire
Michael S. Seekings, Esquire/Amy E. Melvin, Esquire
Joseph K. Qualey, Esquire
Frank M. Cisa, Esquire
George E. Mullen, Esq./Daniel F. Oberklein, Esq.
Kenneth E. Ormand, Jr., Esquire
David E. Dukes, Esquire/William C. Wood, Jr., Esquire
Laura A. Foggan, Esquire/Parker J. Lavin, Esquire

STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

RECEIVED

APR 21 2008

S.C. SUPREME COURT

Appeal from the Court of Common Pleas
For Charleston County
Honorable B. Hicks Harwell, Jr., Circuit Court Judge
Case No.: 2000-CP-10-1054

Auto-Owners Insurance Company, Inc.,

Appellant,

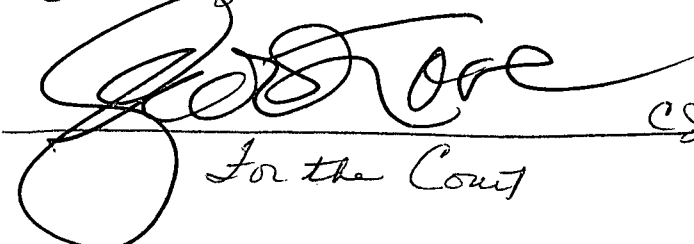
v.

Virginia T. Newman and Trinity
Construction, Inc.,

Respondents.

MOTION FOR LEAVE TO FILE
BRIEF OF THE *AMICUS CURIAE*,
BUILDERS MUTUAL INSURANCE COMPANY
IN SUPPORT OF PETITION FOR REHEARING

Motion granted.


For the Court
July 10, 2008.

Stephen P. Groves, Sr., Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206

*Attorneys for the Amicus Curiae,
Builders Mutual Insurance Co.*

TO: THE HONORABLE JUSTICES OF THE SOUTH CAROLINA
SUPREME COURT:

COMES NOW the proposed Amicus Curiae, Builders Mutual Insurance Company (hereinafter "Builders Mutual" or "BMIC"), pursuant to Rule 213 of the South Carolina Appellate Court Rules , and respectfully requests this Supreme Court to grant it leave to file its amicus brief which has been conditionally filed with this motion. This brief is being submitted to assist this Supreme Court and in support of the Petition for Rehearing filed by the Appellant, Auto-Owners Insurance Company, Inc.

Builders Mutual is a small privately held insurance company located in Raleigh, North Carolina. It is licensed to write insurance coverage in South Carolina, North Carolina, Virginia, and Tennessee. Builders Mutual has provided more than 20 years of uninterrupted insurance coverage exclusively to the home building industry. While BMIC grew out of the North Carolina Home Builders Association to provide workers' compensation to eligible members, Builders Mutual's lines of coverage have expanded and its territory has broadened to include, among other coverage lines, workers' compensation, commercial general liability, commercial automobile, commercial property, builders risk, and umbrella liability.

Builders Mutual continues to maintain close ties to the Home Builders Association, both in North Carolina and in other states so as to ensure continuous financial stability and to maintain Builders Mutual's goal of providing superior coverage and customer service to the residential construction industry.

This appeal and this Supreme Court's recent decision in Auto-Owners Insurance Company, Inc. v. Newman¹ is very important to Builders Mutual because it concerns a number of issues involved in a great many of the insurance policies Builders Mutual has already issued to general contractors and/or subcontractors located and/or conducting operations in the State of South Carolina. Equally importantly, the Auto-Owners v. Newman decision will certainly affect insurance policies which Builders Mutual may eventually write for South Carolina insureds from this date forward. This includes whether such coverage will be (a) offered in the future, (b) offered, but significantly restricted, and/or (c) offered, but otherwise diminished due to the Auto-Owners v. Newman decision.

¹ See Auto-Owners Insurance Company, Inc. v. Newman, __ S.C. __, __ S.E.2d __ (2008) (2008 WL 648546, filed March 10, 2008).

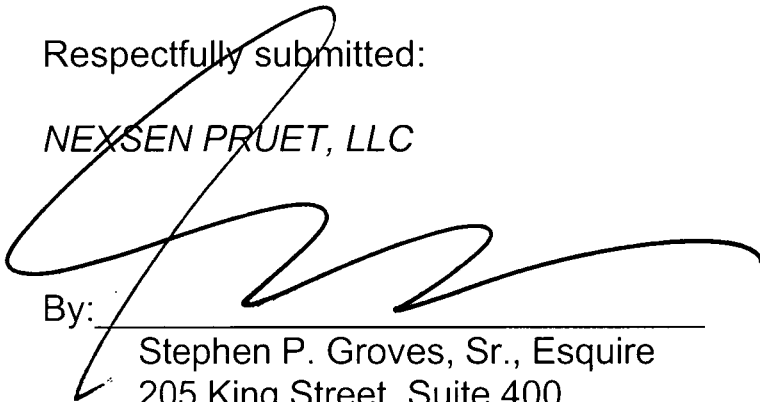
Builders Mutual believes that, in contrast to the focused legal analysis contained in the appellate briefs, Petition for Rehearing, and/or Returns of the Appellant, Auto-Owners Insurance Company, Inc. (hereinafter "Auto-Owners"), and the Respondents, Virginia T. Newman (hereinafter "Ms. Newman"), and Trinity Construction, Inc. (hereinafter "Trinity Construction"), Builders Mutual has identified some of the broader concerns invoked by the Auto-Owners v. Newman decision.

Builders Mutual² believes its position as an insurer for the construction industry gives it special expertise in the legal, policy, and insurance-related issues presented in this appeal. Additionally, Builders Mutual believes its brief will provide relevant and important material to this Supreme Court which has not been previously provided by any of the parties hereto. Consequently, Builders Mutual respectfully submits the legal arguments set forth in its Amicus Brief in hopes to assist this Supreme Court in ultimately resolving this case.

² While Builders Mutual does not agree with this Supreme Court's decision in **Sections A and B** of the Auto-Owners v. Newman decision, Builders Mutual has primarily addressed issues and concerns raised by **Section C** of Auto-Owners v. Newman.

Respectfully submitted:

NEXSEN PRUET, LLC

By: 

Stephen P. Groves, Sr., Esquire
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.577.9440
Telecopier: 843.414.8206

*Attorneys for the Amicus Curiae,
Builders Mutual Insurance Company*

Charleston, South Carolina

April 21, 2008

NPCHAR1:409104.1-APL-(SPG) 032595-00000

**STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT**

Appeal from the Court of Common Pleas
For Charleston County
Honorable B. Hicks Harwell, Jr., Circuit Court Judge
Case No.: 2000-CP-10-1054

Auto-Owners Insurance Company, Inc.,

Appellant,

v.

Virginia T. Newman and Trinity
Construction, Inc.,

Respondents.

**PROOF OF SERVICE
for the
MOTION FOR LEAVE TO FILE
BRIEF OF THE *AMICUS CURIAE*,
BUILDERS MUTUAL INSURANCE COMPANY
IN SUPPORT OF PETITION FOR REHEARING**

Stephen P. Groves, Sr., Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206

*Attorneys for the Amicus Curiae,
Builders Mutual Insurance Co.*

I, Stephen P. Groves, Sr., Esquire, hereby certify that on April 21, 2008, I served a copy of the **Motion for Leave to File Brief of the Amicus Curiae Builders Mutual Insurance Company in Support of Petition for Rehearing (with conditionally foiled Amicus Brief)** submitted by the Amicus Curiae, Builders Mutual Insurance Company, on counsel for all of the parties to this appeal via United States Mail, postage pre-paid, and addressed as follows:

John L. McCants, Esquire
ELLIS, LAWHORNE & SIMS, P.A.
1501 Main Street,
Fifth Floor
Columbia, South Carolina 29201

*Attorneys for the Appellant,
Auto-Owners Insurance Company, Inc.*

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
LEATH, BOUCH & CRAWFORD, LLP
92 Broad Street
Charleston, South Carolina 29401

Joseph K. Qualey, Esquire
QUALEY LAW FIRM, P.A.
23 Broad Street
Charleston, South Carolina 29401

*Attorneys for the Respondent,
Virginia T. Newman*

Frank M. Cisa, Esquire
CISA & DODDS, LLP
622 Johnnie Dodds Boulevard,
Mount Pleasant, South Carolina 29464

*Attorneys for the Respondent,
Trinity Construction, Inc.*

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
MULLEN WYLIE, LLC
70 Arrow Road, Suite 1
Hilton Head Island, South Carolina 29938

*Attorneys for the Amicus Curiae,
South Carolina Community Associations Institute*

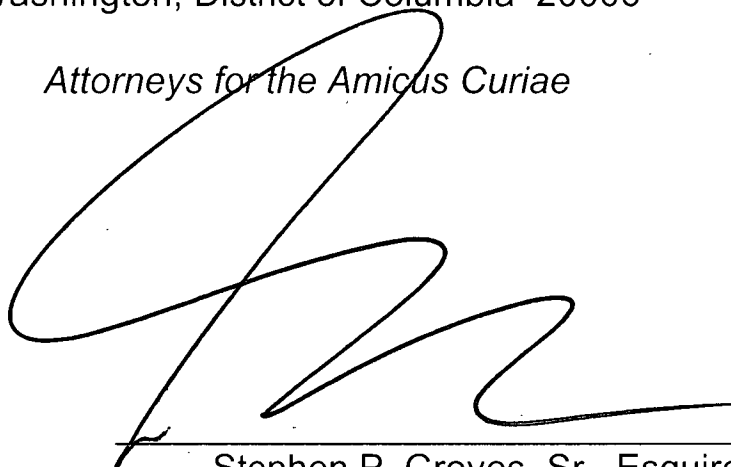
Kenneth E. Ormand, Jr., Esquire
ORMAND ASHLEY & GIBBONS
117 Alpine Circle, Suite 700
Columbia, South Carolina 29223

*Attorneys for the Amicus Curiae,
National Association of Home Builders and
Home Builders Association of South Carolina*

David E. Dukes, Esquire
William C. Wood, Jr., Esquire
NELSON MULLINS RILEY & SCARBOROUGH
Post Office Box 11070
Columbia, South Carolina 29211

Laura A. Foggan, Esquire
Parker J. Lavin, Esquire
WILEY REIN, LLP
1776 K Street NW
Washington, District of Columbia 20006

Attorneys for the Amicus Curiae

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

April 21, 2008

NPCHAR1:409104.1-APL-(SPG) 032595-00000

**STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT**

RECEIVED

APR 21 2008

S.C. SUPREME COURT

Appeal from the Court of Common Pleas
For Charleston County
Honorable B. Hicks Harwell, Jr., Circuit Court Judge
Case No.: 2000-CP-10-1054

Auto-Owners Insurance Company, Inc.,

Appellant,

v.

Virginia T. Newman and Trinity
Construction, Inc.,

Respondents.

**PROOF OF SERVICE
for the
BRIEF OF THE *AMICUS CURIAE*,
BUILDERS MUTUAL INSURANCE COMPANY
IN SUPPORT OF PETITION FOR REHEARING**

Stephen P. Groves, Sr., Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206

*Attorneys for the Amicus Curiae,
Builders Mutual Insurance Co.*

I, Stephen P. Groves, Sr., Esquire, hereby certify that on April 21, 2008, I served three copies of the **Brief of the Amicus Curiae Builders Mutual Insurance Company in Support of Petition for Rehearing** submitted by the Amicus Curiae, Builders Mutual Insurance Company, on counsel for all of the parties to this appeal via United States Mail, postage pre-paid, and addressed as follows:

John L. McCants, Esquire
ELLIS, LAWHORNE & SIMS, P.A.
1501 Main Street,
Fifth Floor
Columbia, South Carolina 29201

*Attorneys for the Appellant,
Auto-Owners Insurance Company, Inc.*

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
LEATH, BOUCH & CRAWFORD, LLP
92 Broad Street
Charleston, South Carolina 29401

Joseph K. Qualey, Esquire
QUALEY LAW FIRM, P.A.
23 Broad Street
Charleston, South Carolina 29401

*Attorneys for the Respondent,
Virginia T. Newman*

Frank M. Cisa, Esquire
CISA & DODDS, LLP
622 Johnnie Dodds Boulevard,
Mount Pleasant, South Carolina 29464

*Attorneys for the Respondent,
Trinity Construction, Inc.*

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
MULLEN WYLIE, LLC
70 Arrow Road, Suite 1
Hilton Head Island, South Carolina 29938

*Attorneys for the Amicus Curiae,
South Carolina Community Associations Institute*

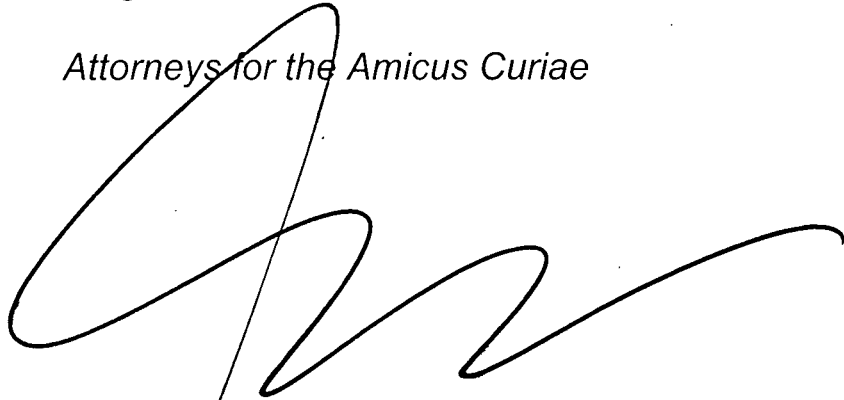
Kenneth E. Ormand, Jr., Esquire
ORMAND ASHLEY & GIBBONS
117 Alpine Circle, Suite 700
Columbia, South Carolina 29223

*Attorneys for the Amicus Curiae,
National Association of Home Builders and
Home Builders Association of South Carolina*

David E. Dukes, Esquire
William C. Wood, Jr., Esquire
NELSON MULLINS RILEY & SCARBOROUGH
Post Office Box 11070
Columbia, South Carolina 29211

Laura A. Foggan, Esquire
Parker J. Lavin, Esquire
WILEY REIN, LLP
1776 K Street NW
Washington, District of Columbia 20006

Attorneys for the Amicus Curiae

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

April 21, 2008

NPCHAR1:408747.1-APL-(SPG) 032595-00000

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 21 2008

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Honorable B. Hicks Harwell, Jr.

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc. Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc. Respondents.

APPELLANT'S PETITION FOR REHEARING

John L. McCants, Esquire
Ellis Lawhorne & Sims, PA
1501 Main St., 5th Floor
P.O. Box 2285
Columbia, SC 29201
(803) 254-4190
Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities	iii
Arguments	1
I. THE COURT ERRED IN HOLDING THE DAMAGES IN THE ARBITRATION AWARD WERE A CGL INSURABLE LOSS BECAUSE THE DAMAGES WERE NOT CAUSED BY AN OCCURRENCE	1
A. The Insuring Agreement Requires There To Be An Accident	1
B. Prior Legal Precedent in South Carolina is Determinative That There Was Not An Occurrence in <u>Newman</u>	2
C. The Facts in <u>L-J</u> and Newman Are Materially the Same	4
D. Legal Precedent Cited in <u>L-J</u> Supports Appellant	8
E. The <u>Newman</u> Decision Departs From Established Insurance Law Principles stated in <u>L-J</u> and Is Against Public Policy	9
F. Continuous and Repeated Exposure To Substantially The Same General Harmful Conditions Must Be Accidental	11
II. PURE CONTRACT INTERPRETATION LEADS TO THE CONCLUSION THAT THERE IS NO COVERAGE FOR THE DAMAGES AWARDED IN THIS CASE	17
A. The Court Disregarded Fundamental Principles of Insurance Contract Law in that the Exclusion Does Not Create Coverage	17
B. Appellant's Interpretation of the Policy Does not Render the Policy Meaningless	19
III. THE COURT ERRED IN CONCLUDING THAT THE REMOVAL AND REPLACEMENT OF THE STUCCO WAS A COVERED LOSS ..	24
A. The Cost to Remove and Replace the Stucco is Not Supported by Applicable Law as an Insurable Loss	24

B.	The Arbitration Award Does Not Support the Finding Of The Court	30
	Conclusion	31
	Certificate of Service	32

TABLE OF AUTHORITIES

CASES

<u>Acuity v. Burd & Smith,</u> 721 N.W.2d 33 (N.D. 2006)	4, 25, 28
<u>Am. Family Mut. Ins. Co. v. American Girl, Inc.,</u> 673 N.W.2d 65 (Wis. 2004)	29
<u>Auto Owners v. Newman</u> , Op. No. 26450, (S.C.Sup.Ct. filed March 10, 2008) (Shearhouse Adv. Sh. No. 9 at 63)	1, 4, 6-11, 12, 14, 19, 21, 24-25, 30
<u>Auto-Owners Insurance Company, Inc. v. Pozzi Window Company,</u> No. SC06-779, 2007 WL 4440389 (Fla., Dec. 20, 2007)	10, 29
<u>Auto-Owners Ins. Co. v. Home Pride Cos.,</u> 684 N.W.2d 571 (Neb. 2004)	4
<u>Burlington Ins. Co. v. Oceanic Design & Constr. Inc.,</u> 383 F.3d 940 (9th Cir. 2004)	4
<u>C.D. Walters Const. Co., Inc. v. Fireman's Ins. Co. of Newark,</u> 281 S.C. 593, 316 S.E.2d 709 (Ct.App.1984)	21, 22
<u>Century Indem. Co. v. Golden Hills Builders, Inc.,</u> 348 S.C. 559, 561 S.E.2d 355 (2002)	1, 24
<u>Cincinnati Ins. Co. v. Venetian Terrazzo, Inc.,</u> 198 F.Supp.2d 1074 (E.D.Mo. 2001)	29
<u>Columbia Mut. Ins. Co. v. Epstein,</u> 239 S.W.2d 667 (Mo.Ct.App. 2007)	28
<u>Commerce Ins. Co. v. Betty Caplette Builders, Inc.,</u> N.E.2d 1211 (Mass. 1995)	4
<u>Corder v. William W. Smith Excavating Co.,</u> 556 S.E.2d 77 (W. Va. 2001)	4
<u>DCB Const. Co., Inc. v. Travelers Indem. Co. of Ill.,</u> 225 F. Supp. 2d 1230 (D. Colo. 2002)	29
<u>Dodson v. St. Paul Ins. Co.,</u> 812 P.2d 372 (Okla. 1991)	4

<u>Engineered Products Prods., Inc. v. Aetna Cas. & Sur. Co.,</u> 295 S.C. 375, 368 S.E.2d. 674 (Ct.App.1988)	18, 24
<u>Essex Ins. Co. v. Holder</u> , 2008 WL 598160138 (Ark. March 6, 2008)	3
<u>French v. Assurance Co. of Am.</u> , 448 F.3d 693 (4th Cir. 2006)	25, 27
<u>Gaylord Chemical Corp. v. Propump, Inc.</u> , 753 So.2d 349 (La. Ct. App. 2000)	28
<u>Green v. United Ins. Co. of Am.</u> , 254 S.C. 202, 174 S.E.2d 400 (1970)	2, 14, 21
<u>Heile v. Herrmann</u> , 736 N.E.2d 566 (Ohio 1999)	9
<u>High Country Assoc. v. New Hampshire</u> , 648 A.2d 474 (N.H. 1994)	6-8
<u>Kennedy v. Columbia Lumber and Mfg. Co., Inc.</u> , 299 S.C. 335, 284 S.E.2d 730 (1989)	16
<u>Kvaerner Metals Div. of Kvaerner United States, Inc. v. Commercial Union Ins. Co.</u> , 908 A.2d 888 (Pa. 2006)	3, 4
<u>L-J, Inc. v. Bituminous Fire and Marine Ins. Co.</u> , 366 S.C. 117, 621 S.E.2d 33 (2005)	3-10, 12, 14, 18
<u>Lennar Corp. v. Great Am. Ins. Co.</u> , 200 S.W.3d 651, 679-680 (Tex. App. 2006)	29
<u>McCall v. Batson</u> , 285 S.C. 243, 329 S.E.2d 741 (1985)	4
<u>McDonald Constr. Co. v. Bituminous Cas. Co.</u> , 632 S.E.2d 420 (Ct.App.2006)	25, 28
<u>Monticello Ins. Co. v. Wil-Freds Const., Inc.</u> , 661 N.E.2d 451 (Ill. App. Ct. 1996)	8-9
<u>MW Builders, Inc. v. Safeco Ins. Co. of Am.</u> , 2008 WL 422222 (9th Cir. Feb. 15, 2008)	24, 28
<u>Nabholz Const. Co. v. St. Paul Fire and Marine Ins. Co.</u> , 354 F. Supp. 2d 917 (E.D. Ark. 2005)	24, 28-29
<u>Oak Crest Const. Co. v. Austin Mut. Ins. Co.</u> , 998 P.2d 1254 (Or. 2000)	18

<u>OneBeacon Ins. Co. v. Metro Ready-Mix, Inc.,</u> 242 Fed. Appx. 936 (4th Cir. 2007)	26-28
<u>Peerless Ins. Co. v. Brennon,</u> 564 A.2d 383 (Me. 1989)	4
<u>Pursell Constr. Inc. v. Hawkeye-Security Ins. Co.,</u> 596 N.W.2d 67 (Iowa 1999)	4
<u>Sawhorse, Inc. v. Southern Guar. Ins. Co. of Ga.,</u> 604 S.E.2d 541 (Ga.Ct.App. 2004)	29
<u>Stewart Interior Contractors, L.L.C. v. Metalpro Indus., L.L.C.,</u> 969 So.2d 653 (La.Ct. App. 2000)	28
<u>Sunex Intern., Inc. v. Travelers Indem. Co.,</u> 185 F. Supp. 2d 614 (D.S.C. 2001)	1
<u>Travelers Indem. Co. v. Miller Bldg. Corp.,</u> 97 Fed. Appx. 431 (4th Cir. 2004)	4, 19
<u>Travelers Indem. Co. of Am. v. Moore & Assoc., Inc.,</u> 216 S.W.3d 302 (Tenn. 2007)	29
<u>United Capitol Ins. Co. v. Special Trucks, Inc.,</u> 918 F. Supp. 1250 (N.D. Ind. 1996)	25, 29
<u>United States Fire Ins. Co. v. J.S.U.B., Inc.,</u> 2007 WL 4440232 (Fla., filed Dec. 20, 2007)	3, 13, 14, 28, 29
<u>Viking Constr. Management, Inc. v. Liberty Mut. Ins. Co.,</u> 831 N.E.2d 1 (Ill. 2005)	28
<u>Wausau Underwriters, Inc. v. United Plastics Group,</u> 512 F.3d 953 (7th Cir. 2008)	28
<u>Woodfin Equities Corp. v. Hartford Mut. Ins. Co.,</u> 678 A.2d 116 (Md. Ct. Spec. App. 1996)	26-27
<u>Yarborough v. Phoenix Mut. Life Ins. Co.,</u> 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976)	17

Law Review and Periodicals:

Gregory Froom, <i>New Decision on CGL Case Clears Up Confusion from L-J Case, South Carolina Lawyers Weekly</i> , Vol. 7, No. 29, March 17, 2008 available at 2008 WLNR 5305309	13
Stewart MaCaulay, <i>Justice Traynor and The Law of Contracts</i> , 13 Stan.L.Rev. 812, 825-26 (1961)	27

Appellant hereby petitions the Court, pursuant to Rule 221 SCACR, to rehear the appeal and change or modify Auto Owners v. Newman, Opinion No. 26450 (S.C.Sup.Ct. filed March 10, 2008) (Shearhouse Adv.Sh. No. 9 at 63) (hereinafter "Newman") to make findings consistent with the arguments below. The Court held "that the subcontractor's negligence led to an "occurrence" invoking coverage under the CGL policy for the resulting "property damage" to other property not the work product." Auto Owners v. Newman, Op. No. 26450, pg. 5 (S.C.Sup.Ct. filed March 10, 2008) (Shearhouse Adv.Sh. No. 9 at 63). Appellant contends the Court misapprehended or overlooked existing legal precedent in this jurisdiction and other persuasive precedent and the terms and conditions of the subject insurance policy.

ARGUMENT

I. THE COURT ERRED IN HOLDING THE DAMAGES IN THE ARBITRATION AWARD WERE A CGL INSURABLE LOSS BECAUSE THE DAMAGES WERE NOT CAUSED BY AN OCCURRENCE.

A. The Insuring Agreement Requires There to be an Accident.

Insurance policies are subject to the general rules of contract construction. Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002) (internal citations omitted). The Court must give policy language its plain, ordinary, and popular meaning. Id. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. Id. "An insurer's obligation under a policy of insurance is defined by the terms of the policy and cannot be enlarged by judicial construction." Sunex Intern., Inc. v. Travelers Indem. Co., 185 F. Supp. 2d 614, 617 (D.S.C. 2001).

The Insuring Agreement portion of the policy states Auto-Owners Insurance "will pay those sums that the insured becomes legally obligated to pay as damages because of...'property damage' to which this insurance applies." (R. p. 237, See 1(a)). The policy states that "this insurance applies to...'property damage' only if: (1)...the 'property damage' is caused by an 'occurrence' ...; and (2)...'property damage' occurs during the policy period." (R. p. 237, See 1(b)). The Policy then has a number of exclusions that may be applicable to a construction defect claim.¹

The term "property damage" is defined by the Policy as "physical injury to tangible property, including all resulting loss of use of that property." (R. p. 246, See 12(a)). The Policy defines the word "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." (R. p. 245, See 9).

To be covered under the policy, "property damage" must be caused by an "occurrence." (R. p. 237, See 1(a)). The word "occurrence" is defined in the Policy to mean an accident, but the word "accident" is not defined in the Policy. In absence of a definition, the Court in Newman, correctly looked to prior judicial precedent, which defined "accident" to be "an unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the one suffering the harm or hurt." Green v. United Ins. Co. of Am., 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970).

B. Prior Legal Precedent in South Carolina is Determinative That There Was Not an Occurrence in Newman.

¹ See Exclusion J, K, L M and N of the Policy.

The Court previously stated, “[t]he CGL policy may provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, not in cases where faulty workmanship damages the work product alone.” L-J, Inc. v. Bituminous Fire and Marine Ins. Co., 366 S.C. 117,123, 621 S.E.2d 33, 36 n.4 (2005) (hereinafter “L-J”). The Court in L-J also held, “[w]e find these negligent acts constitute faulty workmanship, which damaged the roadway system only. And because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence.” Id. at 36.

L-J has since been followed by the Supreme Court for the State of Pennsylvania to find that faulty or defective work was not an occurrence under a CGL policy. See Kvaerner Metals Div. of Kvaerner United States, Inc. v. Commercial Union Ins. Co., 908 A.2d 888 (Pa. 2006) (citing to L-J and finding that faulty work of subcontractors did not constitute an occurrence under the CGL policy). Furthermore, as recognized by the Pennsylvania Supreme Court, “the majority of Courts have held that coverage under a CGL policy is not triggered by poor workmanship which causes injury to the work product itself.” Id. at 899. L-J has since been cited by the Florida Supreme Court as the “opposing” (but majority) view, which finds defective construction that damages the work product itself does not constitute an occurrence. See United States Fire Ins. Co. v. J.S.U.B., Inc., 2007 WL 4440232 (Fla. Dec. 20, 2007).

This majority analysis set forth in L-J has been consistently recognized for several years and courts from many states have declined to find coverage for faulty work under CGL policies. See Essex Ins. Co. v. Holder, 2008 WL 598160 138 (Ark.

Mar. 6, 2008) (finding that faulty work did not constitute an occurrence under the CGL policy); See also Burlington Ins. Co. v. Oceanic Design & Constr. Inc., 383 F.3d 940, 948-49 (9th Cir. 2004) (predicting Hawaii courts would find no coverage); Travelers Indem. Co. v. Miller Bldg. Corp., 97 Fed. Appx. 431, 434 (4th Cir. 2004) (predicting North Carolina courts would find coverage only to extent defects damage carpet supplied by owner, not builder); Acuity v. Burd & Smith, 2006 ND 187, 721 N.W.2d 33, 39 (N.D. 2006); Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 589 Pa. 317, 908 A.2d 888, 899-900 (Pa. 2006); Auto-Owners Ins. Co. v. Home Pride Cos., 268 Neb. 528, 684 N.W.2d 571, 577 (Neb. 2004); Corder v. William W. Smith Excavating Co., 210 W. Va. 110, 556 S.E.2d 77, 82 (W. Va. 2001); Pursell Constr. Inc. v. Hawkeye-Security Ins. Co., 596 N.W.2d 67, 70 (Iowa 1999); Commerce Ins. Co. v. Betty Caplette Builders, Inc., 420 Mass. 87, 647 N.E.2d 1211, 1214 (Mass. 1995); Dodson v. St. Paul Ins. Co., 1991 OK 24, 812 P.2d 372, 378 (Okla. 1991); Peerless Ins. Co. v. Brennon, 564 A.2d 383, 386 (Me. 1989).

C. The Facts in L-J And Newman are Materially the Same.

The facts in L-J and in Newman are materially the same from a construction industry and real property law standpoint. The Court should follow the precedent established in L-J, as a matter of *stare decisis*. See McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741, 747 (1985). Respectfully, precedent requires that, when facts are the same, the law should be applied the same.

The CGL policy addresses property interests without regard to the kind of property. The policy speaks in general terms of real property and personal property. The facts in L-J, of course, involved the construction of a roadway system by a general

contractor. A house and a road are real property interests and both involve a single project.

In L-J, the general contractor (L-J, Inc.) subcontracted with Eagle Creek which, in turn, subcontracted with U.S. Construction Co., Inc., to clear, grub, rough grade, fine grade and construct the sub-base for the roadway. L-J, Inc. v. Bituminous Fire and Marine Insurance Co., 350 S.C. 549, 551, 567 S.E.2d 489, (Ct.App. 2002) *reversed* L-J 621 S.E.2d 33. Eagle Creek also subcontracted with Tidelands Utilities Co. to construct and install a water drainage system for the roadway. 567 S.E.2d at 490. Another subcontractor, Sanders Brothers Construction, Inc. laid the asphalt or pavement. 567 S.E.2d at 490.

Tidelands constructed the drainage system incorrectly and U.S. Utilities left tree stumps in the roadbed underneath the pavement. Id. at 551, 567 S.E.2d at 49. The stumps prevented the soil from being adequately compacted and allowed surface water and moisture to seep into the road base, damaging the pavement (installed by Sanders Brothers). Id. The pavement was physically injured due to the construction defects with the subsurface work portion performed by a subcontractor and the water drainage work portion performed by a subcontractor which allowed repeated exposure to rainwater to deteriorate the pavement. Id. at 554, 567 S.E.2d at 492. ("In this case, it is undisputed that repeated exposure to surface water runoff caused the pavement to fail.").

In fact, in L-J one subcontractor's poor work damaged another subcontractor's finished work. The Court found that the pavement was in fact physically injured ("alligator cracking") and, therefore, did meet the definition of "property damage" in the

policy. L-J, 366 S.C. at 123, 621 S.E.2d at 36. However, the Court held that the physical injury was only to the general contractor's roadway or project; therefore, the claim was not an insurable loss. Id. at N.4.

The facts in Newman are materially the same. As in L-J, the commercial general liability policy in Newman was issued to a general contractor. As in L-J, the purported "property damage" in Newman was only to the particular real property. As in L-J, multiple subcontractors in Newman constructed the improvements to the real property. As in L-J, subcontractor (the stucco applicator) in Newman purportedly failed to perform its work correctly. The construction defects allegedly allowed repeated exposure to rainwater to physically injure another subcontractor's work, i.e., the wood sheathing and framing installed by the framing subcontractor. As in L-J, one subcontractor damaged another subcontractor's work, all within the general contractor's project itself. The result regarding coverage in Newman then should be same as in L-J.

The Court in Newman cited High Country Associates v. New Hampshire Insurance Co., 648 A.2d 474 (N.H. 1994) to distinguish the facts in L-J and illustrate what the Court believes is an insurable loss. The Court in Newman stated the distinction is that L-J involved only "a claim for faulty workmanship versus a claim for damage to the work product caused by the negligence of a third party." Auto Owners v. Newman, Op. No. 26450 at 67 (citing L-J, 366 S.C. at 123, 621 S.E. at 36.) Further, "[g]iven our analysis of High Country in the L-J opinion, it should be clear that this Court intended the 'third party' language to refer to subcontractors who are not a party to the CGL policy between the insurer and the contractor." Auto Owners v. Newman,

Op. No. 26450 at 67. Appellant respectfully submits that subcontractors too caused the damage in L-J, so that there is no material distinction between the key underlying facts in L-J and High Country. In fact, it is likely that the New Hampshire Supreme Court would have decidedly L-J differently or found coverage for the damaged pavement using that Court's analysis of the policy.

Appellant contends any factual distinction between the construction of a roadway and the construction of a condominium is immaterial for the purposes of analyzing coverage particularly given subcontractors caused the damage in each case; and the principles cited to deny coverage in L-J are equally applicable in Newman. As discussed herein, the roadway and condominium are both "projects" and application of the policy language should be the same in either claim. The Court in Newman stated, the High Country Court found, the "claim [was] for negligent construction resulting in damage to other property." However, the only "other property" involved in High Country was the condominium building or project itself, which means that the underlying accident was the negligent construction and the resulting water infiltration. Those were exactly what this Court in L-J rejected as being covered under a CGL policy. The High Country decision is also dependent on a finding by the New Hampshire Supreme Court that the word "accident" is ambiguous, which the Court in Newman and L-J did not find; and Appellant believes is a finding made by a very minority of courts in the United States.

In fact, the High Country case is illustrative of the line of authority that finds negligent construction resulting in water infiltration to the project only is an insured loss. The Court in L-J seemingly rejected this principle or theory on the one hand but

subscribed to it on the other hand. The ultimate issue is whether this Court is going to find coverage (even with subcontractors performing the work) for a common water infiltration construction defect case where the damage is only to the project or the real property itself. In L-J, the Court said “no”. In Newman, the Court seemingly reversed course to find that the water infiltration was an “accident” or that negligent construction led to an “occurrence”- which was the water infiltration.

D. Legal Precedent Cited in L-J Supports Appellant.

In analyzing the word “occurrence”, the Court in L-J cited, with approval, at least two other cases that are consistent with Appellant’s position and inconsistent with the High Country theory for coverage. L-J, 366 S.C. at 121, 621 S.E.2d. at 35. In Monticello Ins. Co. v. Wil-Freds Constr., Inc., 661 N.E.2d 451 (Ill. App. Ct. 1996) an insured general contractor sought coverage for an underlying claim which alleged that faulty work permitted water intrusion damaging the interior of the structure, among other defects. The general contractor asserted that the construction defects were attributable to its subcontractors. The court found no occurrence because the complaint did not allege a claim for damage to property *other than the building itself*.

Importantly, L-J summarized Monticello as “finding that improper construction by a contractor and its subcontractors does not constitute an occurrence when the improper construction leads to defects.” L-J, 621 S.E.2d at 36. Monticello held that the “construction defects set forth in the . . . complaint are for the natural and ordinary consequence of the improper construction techniques of [insured] and its subcontractors, and thus, do not constitute an occurrence.” Monticello, 661 N.E.2d at 456. Since the damage was to the insured’s project, without damage to other property

or bodily injury, the complaint did not state an occurrence. Like L-J, the court distinguished between damage to the project itself and damage to property other than the insured's work product, such as cars. Id. Finally, Monticello supported its result by warning against turning CGL policies into "something akin to a performance bond." Id. at 460.

L-J also cited Heile v. Herrmann, 736 N.E.2d 566, (Ohio 1999) for the proposition that "faulty workmanship does not constitute an occurrence when the damage is to the work product only." L-J, 366 S.C. at 121, 621 S.E.2d at 35. Heile involved an insured home builder seeking coverage on a underlying suit for defective construction. The court viewed CGL policies as intending "to insure the risks of an insured causing damage to other persons and their property, . . . [but not] the risks of an insured causing damage to the insured's own work product." Heile, 736 N.E.2d at 568. Heile concluded that the damage alleged in the underlying complaint all related to the work of the insured or its subcontractors, "not to any consequential damages stemming from that work." Id.

E. The Newman Decision Departs From Established Insurance Law Principles Stated in L-J and Is Against Public Policy.

With the decision in Newman, the Court departed from established insurance law principles stated in L-J. First, in L-J the Court stated, "the damage in the present case did not constitute an 'occurrence'. If we were to hold otherwise, the CGL policy would be more like a performance bond, which guarantees the work, rather than like an insurance policy, which is intended to insure against accidents." Id. at 123, 621 S.E.2d at 36. In brief, the Court in Newman will allow Trinity to be indemnified for almost the entirety of its defective work.

In L-J, the Court focused on ensuring that the ultimate responsibility for the damage resulting from the faulty work is to be borne by the one causing the damage – the subcontractor. Id. at 124, 621 S.E.2d 37. As this Court found in L-J, the ultimate liability should fall “to the one who performed the negligent work--the subcontractor--instead of the insurance carrier. It will. . . encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract.” L-J, 366 S.C. at 124, 621 S.E.2d at 37. The Newman decision now eviscerates any need for a general contractor to carefully choose a subcontractor. Each and every instance of faulty work performed by a subcontractor resulting in damage to the work, including the subcontractor’s own work will now be covered by the policy issued to the general contractor. The subcontractor will never bear the responsibility.

Trinity was paid on its contract and required by the building code to make sure the stucco was installed correctly, including that it be weatherproof, to protect the rest of the house from the elements. To allow Trinity to be compensated through insurance for what amounts to warranty work is to, in fact, pay it twice. Compensating a party by providing coverage under a CGL policy to repair or replace a job which was deficient from the outset essentially serves as double compensation for the negligent party. See Auto-Owners Insurance Company v. Pozzi Window Company, No. SC06-779, 2007 WL 4440389 (Fla. Dec. 20, 2007) (internal citations omitted) (finding that interpreting the CGL policy as providing coverage for construction deficiencies would enable a contractor to receive initial payment for the work from the homeowner, then receive subsequent payment from his insurance company to repair and correct

deficiencies in his own work, and finding such an approach improper). The framework set up by the Court in Newman serves as a disincentive for general contractors to supervise the work of their subcontractors. A general contractor who hires poor quality subcontractors, who fails to ensure that they have insurance to cover their own work, or who otherwise mismanages his subcontractors should bear responsibility for those actions.

The underlying facts in Newman illustrate the poor result that Newman will likely secure in the future. In Newman, the dispute between Newman and Trinity began during construction and continued right through and after completion of the house in May 1999. By only September 1999, Newman's expert, Robert Sisnroy, had issued a report identifying the various construction deficiencies that would become the basis for the arbitrator's award. (R. p. 287). The Court should remember that Robert Sisnroy reported no water damage as of the time he issued his report -- only conditions that may lead to common water infiltration at some later date. (R. pp. 287 – 293). In brief, Trinity had this report within months of completing the house and well within its one year builder's warranty period. Yet, Trinity failed to fulfill its contractual or warranty obligations to install the stucco correctly. Instead, Trinity turned the matter over to Appellant on an allegation made that there may be water infiltration -- which it turned out to be a very small percentage of the overall problem.

F. Continuous and Repeated Exposure to Substantially the Same General Harmful Conditions Must Be Accidental.

To find there was an "occurrence", the Court in Newman looked to the phrase "including continuous or repeated exposure to substantially the same general harmful conditions" that is included in the policy definition of the word "occurrence." It is

important to note again that the word “accident” is generally defined to be “usually suddenly” or immediately in time. To avoid an interpretation that the CGL policy only applies to events that occur suddenly, the drafters included the particular phrase in order to include (accidental) events which occur over time. Accordingly, the phrase “including, continuous or repeated exposure...” was added to the definition of the word “occurrence” as a temporal addition to the word “accident.” However, the underlying event must still be accidental. In other words, the court must still find that any “continuous or repeated exposure” was accidental or “an unexpected happening or event, which occurs by chance ..., with harmful result, not intended or designed by the one suffering the harm or hurt.”

The repeated and continuous exposure of the roadway to rainwater overtime was not deemed to be an accident or an “occurrence” in L-J as a matter of law. It is important to note that the special referee in L-J made a specific finding that the repeated exposure to rainwater causing the physical injury to the roadway was an “occurrence.” See L-J, 567 S.E.2d at 491. The special referee also made a finding of fact that the physical injury was neither expected nor intended from the standpoint of the general contractor. L-J, 567 S.E.2d at 491. Yet, this Court in L-J put aside these factual findings because the Court found, as a matter of law, that the property damage to the project itself was not an occurrence.

The Court in Newman, however, took a u-turn and inexplicably was influenced by the fact that there was purported water damage from rainwater. The Court took pains to distinguish the construction defect itself from the rainwater. Sound logic would recognize that it is going to rain at some point onto a roadway, just as it will a house.

No credible contractor would maintain that it does not anticipate adverse weather conditions or that it does not construct homes to protect against the same. Moreover, the building code requires the same as testified to by respondent's expert. To follow the analysis, if the water infiltration rots a piece of wood incorporated into the project, there is an occurrence of property damage.

The Courts that find water infiltration is an "occurrence" do so essentially on the flawed basis that the rainwater is an unexpected or unpredicted event in the construction industry by the general contractor. These courts acknowledge that an expected and predicted event is not an accident or "occurrence." See United States Fire Ins. Co. v. J.S.U.B., Inc., 2007 WL 4440232 (Fla. Dec. 20, 2007). While finding that the existence of a construction defect alone is not an "occurrence", these Courts then add the concept of water infiltration then change the result and find coverage. As noted by counsel for an Amicus Curie brief herein (submitted in favor of coverage), the "accident" is ultimately dependent on the weather. "For example, the court said there was no occurrence until water penetrated the faulty stucco. 'If the same contractor built this house out in Arizona, where it never rains, there's never an occurrence'." Gregory Froom, *New Decision on CGL Case Clears Up Confusion from L-J case*, *South Carolina Lawyers Weekly*, Vol. 7, No. 29, March 17, 2008 available at 2008 WLNR 5305309. In short, the trigger for coverage may be governed by geography or the weather, which surely should not control coverage under the policy.

The flaw in the analysis is that water infiltration is an accident or unexpected event in the construction industry (particularly if caused by a subcontractor) from the standpoint of the general contractor. Put aside there is (or is not) "property damage"

and focus on the word “accident”. Whether there is “property damage” or not is a separate consideration under the policies and is not determinative of whether there is an accident. Again, there are two types of accidents — the sudden one and the repeated or continuous one. In this case, the focus is on the later one. One must ask whether the repeated or continuous one is accidental within the meaning of Green.

To continue, the theory behind the line of authority such as United States Fire Ins. Co. v. J.S.U.B., Inc. and now Newman is that the general contractor does not expect the faulty work by the subcontractor—or the consequences. First, the Court in Newman stated, “In our opinion, and in the absence of any evidence otherwise, it is unreasonable to believe that Trinity expected or intended its subcontractor to perform negligently.” Second, the Court in Newman stated, “Trinity could not have expected or intended the resulting property damage.”). Auto Owners v. Newman, Op. No. 26450 at 71.

The two statements above go to the crux of the issue regarding the requirement of an accident and why the majority position set forth in L-J and other decisions makes sense. To paraphrase the above, Trinity did not expect either: 1) the faulty work; or 2) the water infiltration. If the first point is true, then the fact that subcontractor did faulty work (in and of itself) must be an “accident”. The Court stated, Trinity did not expect its subcontractor to install the stucco incorrectly. Yet, this Court correctly recognized the universal CGL principle in stating, “the stucco subcontractor’s negligent application is not on its own sufficient to constitute an “occurrence”. Auto Owners v. Newman, Op. No. 26450 at 68. This decision is made as a matter of law. Appellant does not believe that any court has found that faulty construction alone is an occurrence.

If one took Trinity to the house to examine the conditions, Trinity would believe it is equally "unexpected" that: 1) the stucco is too thin; or 2) the stucco is too thin and is leaking. The issue boils down to this; is the "water infiltration" anymore unexpected than the construction defect itself from the standpoint of Trinity? Appellant submits that it is not anymore unexpected than the former. If, as a matter of law, the construction defect alone is not an "occurrence", Appellant submits that the equally unexpected rainwater infiltration should, as a matter of law, not be an "occurrence". Neither the means nor the results are accidental because the acts which caused the purported physical injury were the result of the normal consequences of the acts.

The conversation between the trial judge and Newman's expert bear this point out.

Expert: You have to follow the rules and install the materials, and make sure all the items that have to be there are there.

The Court: And meet those specifications.

Expert: Yes, your honor.

The Court: You can predict you're going to have problems if you don't.

Expert: Absolutely, your honor.

(R. p. 112)

Expert: I would expect water intrusion rot and rot if the system is installed improperly.

(R. p. 158, lines 12-21).

Counsel for Appellant: And you believe a builder such as Trinity is required to build and construct a home in accordance with the code. (pg. 143)

Expert: That's correct.

Counsel for Appellant: And they built the exterior walls with the approved materials designed to install and to provide a barrier against water, correct? (pg. 143)

Expert: That's correct.

Counsel for Appellant: All right. And the obvious consequence of not doing this, building it to resist water is wood rot underneath? (pg. 144)

Expert: Water intrusion and wood rot there.

(R. pp. 143-144).

Further, in cases like the present one, South Carolina construction law essentially imputes liability to Trinity for the acts and omissions of its subcontractors. In the seminal residential construction case in South Carolina, Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 284 S.E.2d 730 (1989), this Court discussed the various theories of liability that attach to residential homebuilding and putting a house into the stream of commerce. The Court has repeatedly held builders to a high standard in residential construction particularly in cases factually similar to the present one. See Kennedy, 299 S.C. at 343, 384 S.E.2d at 736. ("We have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce.") The Court practically negated the "economic loss" rule in favor of a negligence cause of action in residential homebuilding cases (where the building code is universally applicable) discounting the need to find physical harm (e.g., water damage) to a house. Id. at 346, 384 S.E.2d 737. ("Any builder who violates such a duty should justly be held accountable for the losses that his breach caused, whether they be physical harm or the diminution in the value of the house."). The Court stated, "[a] builder is no less blameworthy in such a case where lady luck has smiled upon him and no physical harm has yet occurred." Id.

In one legal forum, Trinity was found liable by the arbitrator for its subcontractor's faulty work on the basis of warranty and contract principles. Trinity placed the house in the stream of commerce, constructed it for Respondent Newman or sold it to Respondent Newman and on these bases was held liable for the work of its subcontractor. Since a subcontractor installed the stucco, (it was not Trinity's work or "your work"), the arbitrator imputed liability to Trinity basically a respondeat superior theory or principle. While in another court, on the same set of facts, Trinity is excused because Trinity could not have expected its subcontractor to apply the stucco incorrectly and could not have expected lady luck to frown on him with the rains.

II. PURE CONTRACT INTERPRETATION LEADS TO THE CONCLUSION THAT THERE IS NO COVERAGE FOR THE DAMAGES AWARDED IN THIS CASE.

A. The Court Disregarded Fundamental Principles of Insurance Contract Law in that the Exclusion Does Not Create Coverage.

The Court held that as a matter of pure contract interpretation, the CGL policy covers the damage resulting ultimately from the negligent acts of the subcontractor. The Court cited the general principle of insurance coverage law, "[i]n construing the provisions of an insurance policy, the Court must consider the policy as a whole and adopt a construction that gives effect to the whole instrument and to each of its various parts and provisions. Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976). In brief, the Court found the stucco subcontractor applied the stucco too thin, which led to the "accident" of water intrusion that damaged another subcontractor's work at the house. This conclusion is reached in part by turning to Exclusion L and its exception and inferring that the language must mean something to be there in the policy.

First, even in reading the policy as a whole, one must still adhere to the other principles of insurance coverage law. In short, “an exclusion does not create coverage but limits coverage.” Engineered Products Prods., Inc. v. Aetna Cas. & Sur. Co., 295 S.C. 375, 379, 368 S.E.2d. 674, 676 (Ct.App.1988) (further citations omitted). Further, the law provides, “[l]f any one exclusion applies there should be no coverage, regardless of inferences that might be argued on the basis of exceptions or qualifications contained in other exclusions. There is no instance in which an exclusion can properly be regarded as inconsistent with another exclusion, since they bear no relationship with one another.” Id. at 378, 368 S.E.2d at 675. The principles in the foregoing paragraph must be utilized in reading the policy as a whole. The principles are not inconsistent with reading the policy as a whole. In considering the exception to Exclusion L, it must be acknowledged that you only reach the exception to an exclusion if the insuring agreement is first met. There must first be “property damage” caused by an “occurrence.” In L-J, the Court held that the “occurrence” definition had not been met and stated that “[b]ecause we find that the faulty workmanship does not constitute an ‘occurrence,’ we do not address Issues II and III to determine whether the policy exclusions apply.” Id. at 125, 621 S.E.2d at 37.

Second, a number of courts have held faulty work is not an “occurrence” and that there is not coverage for construction defects under policies containing the subcontractor’s exception to the “your work” exclusion. An Oregon Supreme Court case, Oak Crest Construction Co. v. Austin Mutual Insurance Co., 998 P.2d 1254 (Or. 2000), is just one example. The plaintiff in that case was a general contractor that had to remove and replace its subcontractor’s defective painting work. The court ruled in

favor of the insurer, noting that the term “‘accident’ has a tortious connotation,” meaning that there must be a breach of a duty of due care. Id. at 1257 (internal citation omitted). Absent such a breach, there cannot be an accident. As a result, the court correctly denied coverage under the policy.

The United States Court of Appeals for the Fourth Circuit, applying Virginia law, has also recently ruled that an exclusion cannot create coverage. In Travelers Indem. Co. v. Miller Bldg. Corp., 142 Fed. Appx. 147 (4th Cir. 2005), a subcontractor was hired to perform site development and selected defective fill material. Id. at 148. Like South Carolina, Virginia law holds that breaches of contract and construction defects do not constitute “occurrences”. Id. at 149. The policyholder nonetheless contended that exclusion L in the policy created coverage. The court rejected this argument, stating: “Because the damage to the Wal-Mart store was not unexpected and, therefore, not an ‘occurrence,’ and because an exception to an exclusion does not grant or extend coverage, Travelers is not required under this policy to indemnify Miller for Wal-Mart’s damages.” Id. at 150.

B. Appellant’s Interpretation of the Policy Does not Render the Policy Meaningless.

The Court in Newman stated, “[t]o interpret the term ‘occurrence’ as narrowly as Auto-Owners suggests would mean that any time a subcontractor’s negligence damaged any part of the contractor’s overall project, a CGL insurer could deny coverage under the policy. This would render the ‘your work’ exclusion and the subcontractor’s exception to the ‘your work’ exclusion in the policy meaningless.” Auto Owners v. Newman, Op. No. 26450 at 69-70. Appellant disagrees with this statement.

The following is an example illustrating what may be a covered loss and where there is damage to the house itself. The claim was an actual construction defect lawsuit filed in Lexington County, South Carolina. Builder constructed a house for the owner. Builder used subcontractors to construct the house. The plumber installed the water and sewage pipes in the walls correctly. While installing the custom bookcases against the wall in the den, the finish carpenter subcontractor unknowingly drove a nail into the plumbing pipes. The pipes ultimately leaked sewage and water into the wall cavity and physically damaged the framing. In that situation, the accident was the act of unknowingly puncturing the pipe with the nail, and the claim involved subsequent repeated exposure to the sewage and water in the wall.

On the one hand, if the stucco subcontractor installs the stucco too thin or does not install the particular drainage features (e.g., weeps and flashing) (R. pp. 288-289) to manage rainwater, one is going to have rotten wood — one knows it is going to rain, at least in South Carolina. The subcontractor made a conscience decision to use improper materials or leave the materials out altogether, which may have been driven by what Trinity was willing to pay the subcontractor. The **sole** reason that the subcontractor was supposed to install these features according to the building code is to guard against water infiltration. There is nothing fortuitous or unexpected about the consequences of not producing a workmanlike product, especially in a manner that a building code is violated.

On the other hand, the finish carpenter performed its work in a way that would generally be considered reasonable, even though he unknowingly nailed his work into a pipe that was another contractor's work. With regard to this work, there is no

complaint the carpenter used inferior materials, or that the work failed in and of itself or does not meet the building code or an industry standard. The bookcases are built correctly and do not need additional work or materials to bring them up to some standard. In nailing into the plumber's work, there was "an unexpected happening or event, which occurs by chance ... harmful result, not intended or designed by the one suffering the harm or hurt." Green, 254 S.C. at 206. 174 S.E.2d at 402. In this example, the builder will be held liable because its subcontractor's negligent work proximately caused the water and sewage damage. Also there will be an insurable claim because: 1) there is an "occurrence" in the act causing the repeated exposure to the sewage and water; that 2) resulted in "property damage" to portions of the house; and 3) the damaged work or the work out of which the damage arose was performed on the builder's behalf by a subcontractor. This example also illustrates that if the builder had not used subcontractors, the damage would have arisen from an "accident" but would still have been excluded by the original version of Exclusion L because it was work performed by or on behalf of the insured. The addition of the subcontractor exception in 1986, however, saved coverage in this instance because the accident was committed by a subcontractor.

Although the Court in Newman distinguished the C.D. Walters decision because of the date of the policy in that case, a statement made in C.D. Walters remains true today. "The accidental injury to property or persons substantially caused by his unworkmanlike performance exposes the contractor to almost limitless liabilities." C.D. Walters Const. Co., Inc. v. Fireman's Ins. Co. of Newark, 281 S.C. 593, 316 S.E.2d 709 (Ct.App.1984). "It may be true that the same neglectful craftsmanship can be the

cause of both a business expense of repair and a loss represented by damage to persons and property, the two consequences are vastly different in relation to sharing the cost of such risk as a matter of insurance underwriting." C.D. Walters, 281 S.C. 593, 596, 316 S.E.2d 709, 711-712. These principles survive the 1986 amendments to the base ISO CGL policy, CG 0001.

What is the likelihood that a grading subcontractor will fail to tamp the soil well and an automobile wrecks because the pavement is displaced or cracked over time? What is the likelihood that the roofing subcontractor will install the slate shingles wrong and the slate falls from the roof and injures a third party? Who get hurts—a child or an adult? How badly are they hurt- serious or minor injury? What is the value of any property damage--expensive or inconsequential? These are examples of potential claims. It is the possibility that the subcontractor 's defective work will result in an event that exposes the general contractor to unlimited liabilities and unexpected cost to a third person or property that is within the purpose of the CGL policy. These types of liabilities may bankrupt the general contractor.

Contrast defective work resulting in damage to the work itself. The damages to the project itself are more certain. The general contractor will know the extent of the exposure that may occur to the rest of the project because of a subcontractor's faulty workmanship. Trinity knows the value of the materials and labor used in the project. Did Trinity build a one million dollar house or one hundred thousand dollar house? One does not need an actuary to calculate this kind of risk associated with damage to the house. What is the likelihood that a roofing subcontractor installs the shingles wrong and this act or omission results in a leak into the building? What is the likelihood that

the grading contractor fails to tamp the soil and this act or omission causes the pavement to settle or crack and require replacement?

Trinity can best control these risks by hiring competent subcontractors and properly supervising and coordinating its subcontractors' work. Trinity can also control these risks by using good quality materials that will last a sufficient period of time to limit the number of excessive call backs. If the roof leaks, the road cracks or the stucco leaks, the general contractor can reasonably foresee that the contractor will be called back to replace the poor work. In setting its price for construction, a general contractor factors in the risk (through contingencies) that some faulty work, including physical harm, (where lady luck leaves the contractor), will require repair or remediation which is an expected cost of doing business.

At issue is the allocation of risks and assignment of responsibility for certain losses between the contractor and insurer. The law often overlooks fundamental concepts central to the maintenance of a balanced market for insurance. Central to a balanced market is the insured's ability to reasonably finance risk control mechanisms. The availability of affordable insurance in large part depends on an insurer's avoidance of underwriting "morale hazards". A "morale hazard" is a condition that increases the frequency and severity of loss resulting from behavior that is reckless or indifferent. An insurer that wishes to remain solvent incorporates the avoidance of "morale hazards" into its underwriting philosophy. The transfer of traditional "business risk" to the penumbra of "insurable risk" is an endorsement of the unacceptable transfer of risk for "morale hazards". By ignoring the reality that defective construction of the type involved

in this claim encourages losses from “morale hazards”, this Court has changed the landscape of risks and the ability to reasonably control risks in South Carolina.

III. THE COURT ERRED IN CONCLUDING THAT THE REMOVAL AND REPLACEMENT OF THE STUCCO WAS A COVERED LOSS.

A. The Cost to Remove and Replace the Stucco is not Supported by Applicable Law as an Insurable Loss.

This Court’s decision to award damages for the cost to repair/replace the defective stucco work in its Newman opinion is in direct contravention to other reported South Carolina decisions. This Court has stated, “[b]ased on the law of this State, coverage for the repair and/or replacement of the substrate and substructure of the home is excluded by the faulty workmanship provision.” Century Indem. Co., 348 S.C. 559, 566, 561 S.E.2d 355, 359 (2002) (addressing a stucco clad house and the work was performed by a stucco subcontractor); see also Engineered Prods., Inc. v. Aetna Cas. & Sur. Co., 295 S.C. 375, 368 S.E.2d 674 (Ct.App.1988) (under policy excluding coverage of insured’s liability for damages resulting from restoration, repair, or replacement of its own defective work, insurer had no duty to defend its insured in action seeking compensation for replacement of rack system lost in storm).

The decision places South Carolina in an extreme minority position on this issue. A number of courts around the country have found that direct repair/replacement costs for the defective or faulty workmanship itself is not covered by a standard CGL policy, even where other resulting damage may be covered. MW Builders, Inc. v. Safeco Ins. Co. of Am., 2008 WL 422222 (9th Cir. Feb. 15, 2008) (holding that costs for actual replacement of EIFS stucco was not covered by CGL policy despite coverage for other damages caused by defective installation); Nabholz

Const. Co. v. St. Paul Fire and Marine Ins. Co., 354 F.Supp.2d 917 (E.D.Ark. 2005) (cost of repair of defectively installed roof not covered by CGL policy although Plaintiff could recover damages resulting from roof leak); United Capitol Ins. Co. v. Special Trucks, Inc., 918 F.Supp. 1250 (N.D. Ind. 1996) (cost arising from repair of defectively-built truck not covered under CGL policy despite coverage for other damages arising from crash); Acuity v. Burd & Smith Construction, Inc., 721 N.W.2d 33 (N.D. 2006) (finding damages for repair or replacement of a defective roof were not covered under CGL policy, but damages to interior of building caused by the faulty roof were covered); McDonald Constr. Co. v. Bituminous Cas. Co., 279 Ga. App. 757 (Ga. App. 2006) (cost for replacing defectively installed tiles not covered under CGL policy).

The Court in Newman relied heavily on the Fourth Circuit Court of Appeals decision in French v. Assurance Co. of Am., 448 F.3d 693 (4th Cir. 2006). Yet, the Newman decision is significantly opposite to the French decision with regard to coverage for removal and replacement of the stucco. The facts in French involved a subcontractor's negligent application of EIFS stucco which resulted in moisture intrusion and water damage to the structure and walls of a house. See Auto Owners v. Newman, Op. No. 26450, pp. 69-70 citing French. The homeowners sued the contractor who subsequently sought coverage under his CGL policy for the cost of repair of the non-defective walls/structure and the stucco which was defectively applied by the subcontractor. French at 696.

Although the Court ultimately held that the damage to the structure and walls was covered under the CGL policy, the cost of replacement of the stucco itself was not covered. In so ruling, the Court said:

For analytical purposes, we deem it necessary to divide the property damage to the French's home into two categories. The first category is the defective EIFS exterior. The second category is the damage to the nondefective structure and walls of the French's home directly resulting from moisture intrusion through the defective EIFS exterior. . . We hold that just as the defective application of the building's stone facade in Lerner did not constitute an 'accident,' and, therefore, not an 'occurrence' under the materially similar CGL policies at issue in Lerner, so does the defective application of the EIFS exterior to the French's home not constitute an 'accident,' and therefore, not an 'occurrence' under the 1986 ISO CGL Policies. . . 'The obligation to repair the facade itself is not unexpected or unforeseen under the terms of the sales contract. Therefore, the repair or replacement damages represent economic loss and consequently would not trigger a duty to indemnify under a CGL policy.'

Id. at 703.

In OneBeacon Ins. Co. v. Metro Ready-Mix, Inc., 242 Fed. Appx. 936 (4th Cir. 2007) (*per curiam*), the Fourth Circuit Court of Appeals addressed an insured's claim against its insurance carrier arising out of a defective grout product produced by the insured which required the "demoli[tion] [of] certain portions of . . . new construction and [the] installa[tion] [of] new pilings with new grout. OneBeacon 242 Fed. Appx. 936, 938.

The Court of Appeals set forth the parties' respective arguments and positions:

OneBeacon . . . contend[ed] that Metro's defective grout did not damage any other property. Metro, on the other hand, argue[d] that the defective grout effectively damaged other property because the caps and columns that were placed on top of the [defective] grout were required to be removed. Because that [third-party] property had to be destroyed to repair the defect, Metro contend[ed] it represent[ed] unintended property damage.

OneBeacon , 242 Fed. Appx. 936, 940.

Neither the District Court nor the Court of Appeals agreed with Metro's position. Looking to the Maryland Court of Special Appeals' decision in Woodfin Equities Corp.

v. Hartford Mut. Ins. Co., 678 A.2d 116 (Md.Ct.Spec.App. 1996), *overruled in part on procedural grounds*, 344 Md. 399, 687 A.2d 652 (1997).² the Fourth Circuit stated:

The caps and columns that had to be removed or destroyed to remedy the defect in Metro's [grout] product are on all fours with the carpeting and drywall that had to be removed or destroyed in Woodfin Equities Corp. v. Hartford Mutual Insurance Co. to remedy the defect in the HVAC units.

* * *

. . . any harm to the caps and columns occurred as a result of replacing the [insured's] defective grout. This damage was not unforeseen [to the insured] insofar as the term has been interpreted with respect to CGL policies under . . . longstanding principles of insurance law . . .

OneBeacon Ins. Co. v. Metro Ready-Mix, Inc., 242 Fed. Appx. 936, 940-941 (*citing* Macaulay, *Justice Traynor and the Law of Contracts*, 13 Stanford Law Review 812, 825-826; French v. Assurance Co. of Am., 448 F.3d 693, 701).

Consequently, the Fourth Circuit concluded "[a]ny damage done to the pile caps and columns while remedying Metro's defective grout cannot be deemed caused by an occurrence under the CGL policy 'because the so-called damage was not accidental.'"

OneBeacon Ins. Co. v. Metro Ready-Mix, Inc., 242 Fed. Appx. 936, 941 (*citing* Woodfin Equities Corp. v. Hartford Mut. Ins. Co., 678 A.2d 116, 132 n.8. Moreover, the Court of Appeals also concluded "[j]ust as a company must be presumed to foresee that it will be forced to pay for any defects in its own property, the **company must also foresee that it will be forced to pay for incidental costs that are incurred in remedying**

² In Woodfin Equities, the insured defectively installed an HVAC system in a hotel. In order to repair the HVAC system, certain "carpeting and drywall had to be destroyed to remedy the defect." OneBeacon Ins. Co. v. Metro Ready-Mix, Inc., 242 Fed. Appx. 936, 940, (*citing* Woodfin Equities Corp. v. Hartford Mut. Insurance Co., 678 A.2d 116, 121, 131). After the repairs were completed, the "insured sought coverage for the costs of the carpeting and drywall [and the] Maryland court [concluded] the insurer was not required to cover the property damage because pulling up carpeting and breaking through drywall to access the HVAC system was not property damage, but rather the '**cost incurred in replacing and repairing the HVAC systems.**'" OneBeacon Ins. Co. v. Metro Ready-Mix, Inc., 242 Fed. Appx. 936, 940, (*citing* Woodfin Equities Corp. v. Hartford Mut. Ins. Co., 678 A.2d 116, 121, 131) (Emphasis added).

those defects." OneBeacon Ins. Co. v. Metro Ready-Mix, Inc., 242 Fed. Appx. 936, 941 (emphasis added).

Additionally, the United States Court of Appeals for the Ninth Circuit, in MW Builders, Inc. v. Safeco Ins. Co. of America, 2008 WL 422222 (9th Cir. Feb. 15, 2008), addressed damages to a hotel due to defectively installed EIFS and the insured's claims for coverage for those damages. The Ninth Circuit, interpreting Oregon law, concluded the applicable CGL Policy covered the "damages [which] occurred to the . . . Hotel . . . as a result of the faulty installation of [the EIFS, but, on the other hand, did not cover] any damages associated with the actual replacement of the EIFS" ³ MW Builders, Inc. v. Safeco Ins. Co. of Am., 2008 WL 422222 *1 (9th Cir. Feb. 15, 2008).

The Florida Supreme Court, in United State Fire Ins. Co. v. J.S.U.B., Inc., 2007 WL 4440232 (Fla. Dec. 20, 2007), addressed an insured general contractor's claims for coverage for damages caused to residential structures by certain subcontractors' defective work. While finding insurance coverage for property damages caused by the defective work, the Florida Court declined to cover removal, repair, and/or replacement of the defective work itself.⁴ United State Fire Ins. Co. v. J.S.U.B., Inc., 2007 WL

³ See also generally Wausau Underwriters, Inc. v. United Plastics Group, 512 F.3d 953, 957 (7th Cir. 2008) (citing Viking Construction Management, Inc. v. Liberty Mutual Insurance Co., 358 Ill.App.3d 34, 294 Ill.Dec. 478, 831 N.E.2d 1 (2005)) (no coverage for cost of repairing or replacing defective product); Columbia Mutual Insurance Company v. Epstein, 239 S.W.2d 667, 674 (Mo.App. E.D. 2007) (same); Stewart Interior Contractors, L.L.C. v. Metalpro Industries, L.L.C., 969 So.2d 653, 661 (La.App. 4th Cir. 2007) (citing Gaylord Chemical Corp. v. Propump, Inc., 753 So.2d 349, 353 n.5 (La.App. 1 Cir. 2000)) (court recognized that a CGL Policy "unambiguously exclude[d] coverage for damage to the work or product itself or for repair or replacement of the insured's defective work or product.").

⁴ See also generally ACUITY v. Burd & Smith Construction, Inc., 721 N.W.2d 33, 41 (N.D. 2006) (Court found coverage applied to damages caused by defectively installed roof, but no coverage to repair or replace the defective roof); McDonald Construction Company, Inc. v. Bituminous Casualty Corporation, 279 Ga.App. 757, 761-762, 632 S.E.2d 420, 423-424 (2006) (Coverage exists for property damage caused by the defective product, not for repair or replacement of the defective product itself); Nabholz Construction Corporation v. St. Paul Fire & Marine Insurance Company, 354 F.Supp.2d 917,

440232, *14). In reaching this conclusion, the Florida Supreme Court stated, “. . . courts have also recognized that there is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for ‘property damage’, and a claim for the costs of repairing damage caused by the defective work, which is a claim for ‘property damage’.”⁵ United State Fire Insurance Company v. J.S.U.B., Inc., 2007 WL 440232, *14).

This Court also overlooked the clear language of the CGL policy that bars coverage for the cost to repair, replace, remove, or dispose of your product or your work even when the work is performed on your behalf. Exclusion 2 (n) of the CGL policy specifically provides that “[t]his insurance does not apply to”:

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 the product is . . . withdrawn from use by any person . . . because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

921-922 (E.D. Ark. 2005) (no coverage to repair/replace defectively installed roof, although coverage for damages caused by leaking roof); Sawhorse, Inc. v. Southern Guaranty Insurance Company of Georgia, 269 Ga.App. 493, 496-497, 604 S.E.2d 541, 545 (2004) (same); DCB Construction Company, Inc. v. Travelers Indemnity Company of Illinois, 225 F.Supp.2d 1230 (D.Colo. 2002) (no coverage for repairing and replacing defective walls installed in an airport hotel); United Capitol Insurance Company v. Special Trucks, Inc., 918 F.Supp.2d 1250 (N.D. Ind. 1996).

⁵ (citing Cincinnati Insurance Co. v. Venetian Terrazzo, Inc., 198 F.Supp.2d 1074, 1079 n. 1 (E.D.Mo. 2001) (concluding that costs of repair and replacement of an improperly installed floor was not covered “property damage”); Lennar Corp. v. Great American Insurance Co., 200 S.W.3d 651, 679-680 (Tex.App. 2006) (distinguishing between costs to remove and replace defective stucco as a preventative measure, which were not “damages because of . . . property damage,” and the costs to repair water damage that resulted from the application of the defective stucco, which were “damages because of . . . property damage”); Travelers Indemnity Co. of America v. Moore & Associates, Inc., 216 S.W.3d 302, 310 (Tenn. 2007); American Family Mutual Insurance Company v. American Girl, Inc., 268 Wis.2d 16, 673 N.W.2d 65, 74-75 (Wis.2004)). See also generally Auto-Owners Insurance Company, Inc. v. Pozzi Window Company, 2007 WL 4440389 (Fla.).

(R. p. 239). The policy also defines “your work” to mean “work or operations performed by you or on your behalf.” (R. p. 246).

Accordingly, even if the Court was correct in finding the events giving rise to this action constitute an occurrence, the plain language of the policy does not cover the arbitrator’s award for the cost of “hav[ing] the stucco replaced.” (R. p. 11; Auto Owners v. Newman, Op. No. 26450, pp. 71-72 (S.C.Sup.Ct. filed March 10, 2008). The cost to replace, repair, remove or dispose is not covered under this policy even if another party performed the work “on your behalf” – i.e. a subcontractor.

B. The Arbitration Award Does Not Support The Finding Of The Court.

The Court in Newman surmised that the only way to access the purported water damage was to remove and replace the entire stucco cladding. In drawing their conclusion, the Court in Newman went beyond the four corners of the arbitrator’s letter. In a two page typed letter, the arbitrator plainly awarded the cost to remove and replace the stucco because it was applied too thin. The Arbitrator found as follows:

“I believe the stucco system is defective because it is most probably Portland Stucco and was not applied in conformity to the Code. The system may be functional now, but I have to assume that there is a good reason why the Code requires additional thickness. I also feel that there are sufficient other problems with the installation- lack of weep holes, flashing, etc.—that allowance needs to be made for replacement of the system.” (R. p. 11)

These conclusions by the arbitrator was based on the report wherein the Newman’s expert wrote the following:

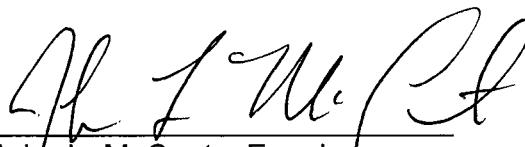
Since the polymer base finish was installed on the Portland cement stucco application, the only remediation option is to remove the entire exterior Portland cement stucco cladding and reinstall to the proper ¾ inch thickness as required by the CABO Code.... (R. p. 291).

The allowance for water damage is a small one or approximately two (2%) percent of the total award. The Court should also recall that the arbitrator basically cut Newman's claim for "water damage" from \$5,500.00 to \$1,000.00. (R. p. 12 and p. 327). One can infer that such a nominal amount does not require the wholesale removal of the stucco. However, one does not need to infer one way or the other. The actual findings are contained within the four corners of the two-page award. The arbitrator found that one has to remove and replace the stucco because the stucco is too thin, and because of other construction defects with the system itself, which is only faulty workmanship. Moreover, the arbitrator made a specific itemization or allowance for water damage. In short, there is no guess work in this case; and no special interrogatories are required in this case. The damages can easily be segregated without drawing any inferences.

CONCLUSION

For the foregoing reasons, the Court should reconsider its Opinion and on rehearing make findings consistent with the arguments herein.

RESPECTFULLY SUBMITTED



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

Columbia, South Carolina
21st day of April, 2008

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc. Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc. Respondents.

CERTIFICATE OF SERVICE

I, Melissa Jumpp, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I served a copy of our Petition for Rehearing this the 21st day of April, 2008 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

Joseph K. Qualey, Esquire
W. Peter Beck, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, SC 29401

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29464

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, SC 29938

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath Bouch & Crawford, LLP
Post Office Box 59
Charleston, South Carolina 29402

Kenneth E. Ormand, Jr., Esquire
Ormand Ashley & Gibbons
117 Alpine Cir. #700
Columbia, South Carolina 29223

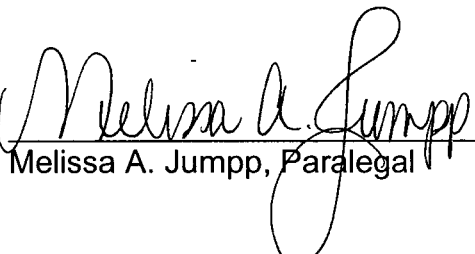
David E. Dukes, Esquire
William C. Wood, Jr., Esquire
Nelson Mullins Riley & Scarborough
Post Office Box 11070
Columbia, South Carolina 29211

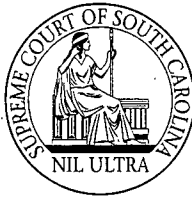
Laura A. Foggan, Esquire
Parker J. Lavin, Esquire
Wiley Rein, LLP
1776 K Street NW
Washington, DC 20006

RECEIVED

APR 21 2008

S.C. SUPREME COURT


Melissa A. Jumpp, Paralegal



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 19, 2008

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

Re: Auto Owners v. Newman, Virginia and Trinity Construction

Dear Counsel:

The following Order has been endorsed on your Motion for an Extension of Time to File a Petition for Rehearing in the above entitled case on appeal.

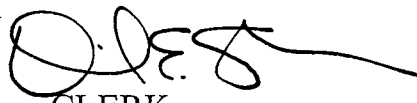
"Granted.

s/ Jean H. Toal C.J.
For the Court

March 19, 2008."

The Petition for Rehearing should be served and filed no later than April 21, 2008.

Very truly yours,


CLERK

DES/jjp

cc: Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
David E. Dukes, Esquire
Williams C. Wood, Jr., Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggon, Esquire
Parker J. Lavin, Esquire
Keating L. Simons, III, Esquire

ELLIS:LAWHORNE

JOHN L. MCCANTS

803 212 4959

jmccants@ellislawhorne.com

RECEIVED

MAR 17 2008

March 17, 2008

S.C. SUPREME COURT

Hand Delivery Via Firm Courier

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

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
Civil Action No.: 02-CP-10-4390

Dear Mr. Shearouse:

Enclosed are an original and seven (7) copies of our Motion and Memorandum in Support of Motion for an Extension of Time to File a Petition for Rehearing in the referenced matter. Please return a clocked copy of the same to us via our firm's courier. Our check in the amount of \$25 is enclosed to cover the filing fee.

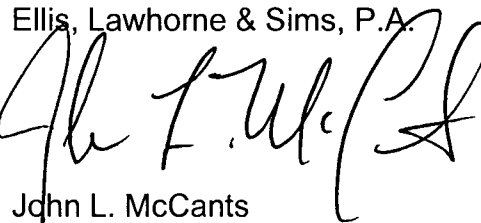
By copy of this letter, counsel of record are being provided with a copy of the Motion.

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

With warm personal regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.



John L. McCants

JLM/sb

cc: George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Kenneth E. Ormand, Jr., Esquire

David E. Dukes, Esquire
William C. Woods, Jr., Esquire
Laura A. Foggan, Esquire
Parker J. Lavin, Esquire
Enclosures

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAR 17 2008

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable B. Hicks Harwell, Jr.

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc. Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc. Respondents.

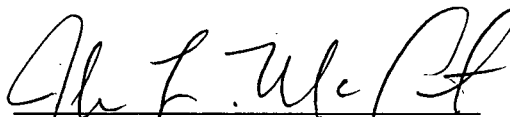
**MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR AN
EXTENSION OF TIME TO FILE A PETITION FOR REHEARING**

Appellant, by and through the undersigned counsel, hereby moves before the Supreme Court for an extension of time to file and serve a petition for rehearing regarding the Court's Opinion No. 26450 filed on March 10, 2008. The motion is made pursuant to Rule 224 SCACR. According to Rule 221 SCACR, a petition for rehearing must be actually received by the Court no later than fifteen (15) days after the filing of an opinion. Given the noted filing date, the fifteen (15) day deadline is on March 25, 2008. Appellant requests additional time to analyze the opinion and prepare a satisfactory brief with any petition.

Appellant requests a twenty-five (25) day extension beyond the current deadline which will then make the new deadline to file any petition for rehearing on April 21, 2008.

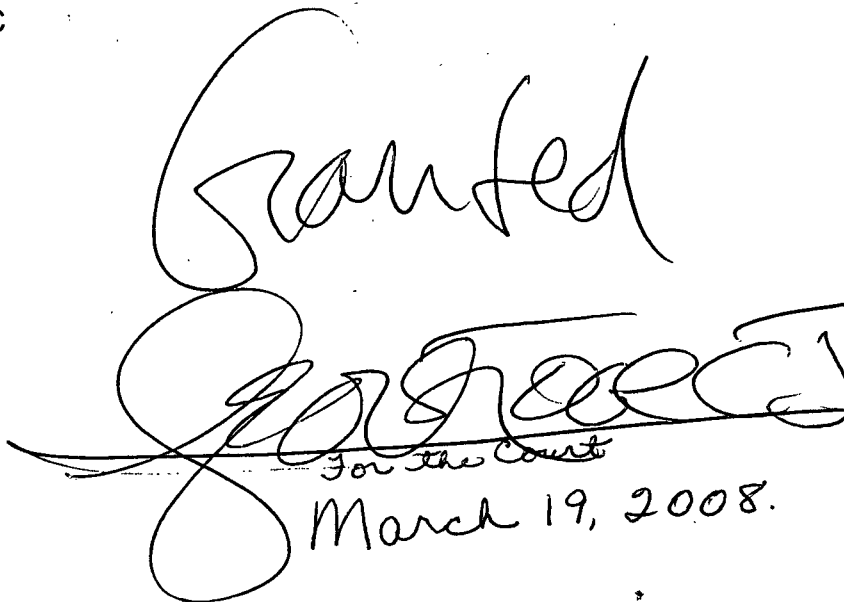
Appellant respectfully requests the extension of time.

RESPECTFULLY SUBMITTED



John L. McCants, Esquire
Ellis Lawhorne & Sims, PA
1501 Main St., 5th Floor
P.O. Box 2285
Columbia, SC 29201
(803) 254-4190
Attorneys for Appellant

March 17, 2008
Columbia, SC



For the Court
March 19, 2008.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc. Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc..... Respondents.

CERTIFICATE OF SERVICE

I, Susan Bennett, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I served a copy of our Motion and Memorandum in Support of Motion for an Extension of Time to File a Petition for Rehearing this the 17th day of March 2008 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

Joseph K. Qualey, Esquire
W. Peter Beck, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, SC 29401

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29464

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, SC 29938

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath Bouch & Crawford, LLP
Post Office Box 59
Charleston, South Carolina 29402

Kenneth E. Ormand, Jr., Esquire
Ormand Ashley & Gibbons
117 Alpine Cir. #700
Columbia, South Carolina 29223

David E. Dukes, Esquire
William C. Wood, Jr., Esquire
Nelson Mullins Riley & Scarborough
Post Office Box 11070
Columbia, South Carolina 29211

Laura A. Foggan, Esquire
Parker J. Lavin, Esquire
Wiley Rein, LLP
1776 K Street NW
Washington, DC 20006



Susan Bennett, Paralegal

Columbia, South Carolina.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Auto Owners Insurance Company, Inc.,	Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc.,	Respondents.

Appeal from Charleston County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 26450
Heard January 23, 2008 – Filed March 10, 2008

AFFIRMED

John L. McCants, of Ellis Lawhorne & Sims, of Columbia, for Appellant.

Frank M. Cisa, of Cisa & Dodds, of Mt. Pleasant, Joseph K. Qualey, of Qualey & Beck, of Charleston, Michael S. Seekings and Amy E. Melvin, both of Leath Bouch & Crawford, of Charleston, for Respondents.

George E. Mullen and Daniel F. Oberklein, both of Mullen Wylie & Seekings, of Hilton Head Island, Kenneth E. Ormand, Jr., of Ormand Ashley & Gibbons, of Columbia, and David E. Dukes and Williams C. Wood, Jr., both of Nelson Mullins Riley & Scarborough, of Columbia, Laura A. Foggan and Parker J. Lavin, both of Wiley Rein, of Washington, D.C., for Amici Curiae.

CHIEF JUSTICE TOAL: The issuer of a homebuilder's commercial general liability policy sought a declaratory judgment to determine whether the policy covered a homeowner's claim for damages caused by the negligence of a construction subcontractor. The trial court determined that the homeowner's claim fell within the policy's coverage and this appeal followed. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Respondent Trinity Construction, Inc. ("Trinity") completed the construction of a home for Respondent Virginia Newman ("Homeowner") in May 1999. Shortly thereafter, the Homeowner filed a claim against Trinity for breach of contract, negligence, and breach of warranty, alleging defective construction primarily related to the installation of the stucco siding. Based on the report of an engineer hired by the Homeowner to inspect the home's construction, the Homeowner alleged that the application of the stucco did not conform to industry standards and that these nonconforming aspects of the stucco installation allowed water to seep into the home causing severe damage to the home's framing and exterior sheathing. The Homeowner and Trinity referred the action to binding arbitration in which an arbitrator issued the Homeowner an award of itemized damages due to the defective construction totaling \$55,898.

At the time of construction, Trinity held a commercial general liability (CGL) policy issued by Appellant Auto-Owners Insurance Company ("Auto-Owners"). Following arbitration, Auto-Owners sought a declaratory judgment to determine its rights and obligations under the CGL policy, contending that the damages awarded by the arbitrator were not covered under the policy. The trial court determined that the policy covered the damages because they resulted from an "occurrence" and because Auto-Owners failed to show that any policy exclusions applied. Accordingly, the trial court determined that the CGL policy covered all but four items of the damages provided for in the arbitration award. Auto-Owners appealed.

This Court certified the case, and Auto-Owners raises the following issue for review:

Did the trial court err in holding that the damages awarded by the arbitrator for negligent construction were covered under a CGL policy?

STANDARD OF REVIEW

A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue. *Colleton County Taxpayers Ass'n v. Sch. 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. Haman*, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006). In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them. *Id.*

LAW/ANALYSIS

A. Negligent construction as an "occurrence" under the policy

Auto-Owners argues that the arbitrator's award for the Homeowner's property damage is not covered by the policy. Specifically, Auto-Owners argues that pursuant to this Court's opinion in *L-J v. Bituminous Fire & Marine Insurance Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), the subcontractor's defective installation of stucco did not cause an "accident" constituting an "occurrence" subject to coverage under the policy. We disagree.

The CGL policy issued by Auto-Owners in this case is the standard Insurance Services Office (ISO) CGL policy used since 1986, and is identical to that reviewed by this Court in *L-J*. The relevant policy provisions state that Auto Owners will "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The policy further explains that the

insurance applies to such "bodily injury" or "property damage" only if it is caused by an "occurrence."

The CGL policy defines many of the particular terms used to outline the scope of its coverage. The policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property," and defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." The policy does not define the term "accident," however, and this Court has found that in the absence of a prescribed definition in the policy, the definition of "accident" is "[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." *Green v. U. Ins. Co. of America*, 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970).

We begin our analysis in this case with a review of *L-J*, which all parties, as well as the trial court, assert in support of their respective resolutions of the issue. In *L-J*, a developer hired L-J, Inc. as contractor for the site development and road construction in a subdivision development. 366 S.C. at 119, 621 S.E.2d at 34. L-J hired subcontractors to perform most of the work and four years after construction was completed, the roads began to deteriorate due to negligent road design, preparation, and construction. *Id.* The developer sued L-J and the parties settled. L-J subsequently sought indemnification from Bituminous Fire and Marine Insurance Company ("Bituminous") and three other insurance companies who insured L-J under various CGL policies. *Id.* Bituminous refused to indemnify L-J and brought a declaratory judgment action to determine whether its CGL policy issued to L-J covered the damage to the roads caused by the negligent construction. *Id.* at 120, 621 S.E.2d at 34.

This Court found that although the deterioration to the roadways may have constituted "property damage" under the policy, the various negligent acts of the subcontractors upon which the developer based its claim did not constitute an "occurrence" for which the CGL policy provided coverage. *Id.* at 123, 621 S.E.2d at 36. Specifically, the 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. *Id.* Because damages to the work product alone resulting from faulty workmanship could not typically be said to have been “caused by an accident or by exposure to the same general harmful conditions,” the Court reasoned that such claims for faulty workmanship did not constitute an “occurrence” falling within the policy’s coverage. *Id.*

The *L-J* court went on to explain, however, that a CGL policy may provide coverage where a claim for faulty workmanship alleges third party bodily injury or damage to other property. *Id.* n.4. To illustrate this theory, the Court examined the case of *High Country Associates v. New Hampshire Insurance Co.*, in which a condominium homeowners’ association sued the condominium builder seeking damages allegedly due to negligent construction of the condominium buildings. 648 A.2d 474, 476 (N.H. 1994). The complaint alleged that the continuous moisture intrusion resulting from a subcontractor’s defective installation of siding resulted in moisture seeping into the buildings, which caused widespread decay of the interior and exterior walls and loss of structural integrity over a nine-year period. *Id.* The *High Country* court found that the complaint was not simply a claim for faulty workmanship seeking damages to repair the defective work product itself, but rather, was a claim for negligent construction resulting in damage to other property. *Id.* at 477. The court determined that the continuous exposure to moisture due to the defective installation of siding constituted an “occurrence” under the policy and that, in this way, the homeowners’ association had properly “alleged negligent construction that resulted in an occurrence, rather than an occurrence of alleged negligent construction.” *Id.* at 478. Accordingly, *High Country* held that the CGL policy would cover the homeowners’ association’s claim against the builder, if successful. *Id.*

This Court’s attempt to distinguish an “occurrence” of alleged negligent construction, such as that which took place in *L-J*, from negligent construction resulting in an “occurrence,” such as that which took place in *High Country*, has apparently caused confusion in other courts’ interpretations of the ultimate holding in *L-J*. See, e.g., *Bituminous Cas. Corp. v. Altman Builders, Inc.*, 2006 U.S. Dist. LEXIS 53354, at *10 (D.S.C. 2006). In *L-J*, we phrased this distinction as “a claim for faulty workmanship versus a claim for damage to the work product caused by the negligence of a third party,” noting that the latter could be covered under a CGL policy. 366

S.C. at 123, 621 S.E.2d at 36. Given our analysis of *High Country* in the *L-J* opinion, it should be clear that this Court intended the “third party” language to refer to subcontractors who are not a party to the CGL policy between the insurer and the contractor.

In this vein, we find *High Country* equally instructive in determining whether a CGL policy provides coverage for property damage in the instant case. The arbitrator in this case determined that the Homeowner suffered damage as a result of the negligent application of stucco by Trinity’s subcontractor. Specifically, the arbitrator found that the defective stucco allowed for continuous moisture intrusion resulting in substantial water damage to the home’s exterior sheathing and wooden framing.¹ These findings, in our opinion, clearly establish that there was property damage beyond that of the negligently applied stucco itself. Although the stucco subcontractor’s negligent application is not on its own sufficient to constitute an “occurrence,” we find that under the reasoning of *High Country* – adopted by this Court in *L-J* – the continuous water intrusion into the home resulting from the subcontractor’s negligence qualifies as an “accident” involving “continuous or repeated exposure to substantially the same harmful conditions.” Accordingly, we hold that the subcontractor’s negligence led to an “occurrence” invoking coverage under the CGL policy for the resulting “property damage” to other property not the work product. *See also Penn. Mfrs. Assoc. Ins. Co. v. Dargan Constr. Co.*, 2006 U.S. Dist. LEXIS 53366 (D.S.C. July 13, 2006); *Okatie Hotel Group v. Amerisure Ins. Co.*, 2006 U.S. Dist. LEXIS 2980 (D.S.C. Jan. 13, 2006).

Moreover, as a matter of pure contract interpretation, we hold that the CGL policy covers the damage resulting from the negligent acts of the subcontractor in this case. On this matter, a brief history of CGL policies is instructive. A CGL policy in the home construction industry is designed to

¹ According to expert testimony from the consulting engineer hired by the Homeowner, the subcontractor’s application of stucco did not meet applicable building code requirements and deviated from industry standards. The expert testified that the subcontractor did not apply the stucco to the required thickness; failed to install a weep system or flashing around doors and windows; and used improper caulking and banding methods.

cover the risks faced by homebuilders when a homeowner asserts a post-construction claim against the builder for damage to the home caused by alleged construction defects. See Rowland H. Long, *The Law of Liability Insurance*, § 3.06(1) (2007). Several construction-specific exclusions in the standard CGL policy exclude from coverage certain types of property damage attributable to risks outside the scope of CGL recovery. See *id.* The primary exclusion is the “your work” exclusion which provides that the policy will not cover “‘property damage’ to ‘your work.’” In 1986, the insurance industry amended the “your work” exclusion to provide that even if the property damage is to the builder’s own work, the “your work” exclusion does not apply “if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.” See *French v. Assurance Co. of America*, 448 F.3d 693, 701 (4th Cir. 2006) (discussing the evolution of the standard CGL policy). In doing so, the insurance industry extended liability coverage for property damage to the contractor’s completed work arising out of work performed by the subcontractor. *Id.*

The facts of this case establish exactly the type of property damage the CGL policy was intended to cover after the 1986 amendment to the “your work” exclusion. In construing the provisions of an insurance policy, the Court must consider the policy as a whole and adopt a construction that gives effect to the whole instrument and to each of its various parts and provisions. *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976). To interpret the term “occurrence” as narrowly as Auto-Owners suggests would mean that any time a subcontractor’s negligence damaged any part of the contractor’s overall project, a CGL insurer could deny coverage under the policy. This would render both the “your work” exclusion and the subcontractor’s exception to the “your work” exclusion in the policy meaningless.² See *French*, 448 F.3d at 705-06. Accordingly, we

² *C.D. Walters Construction Co., Inc. v. Fireman’s Insurance Co.*, cited by Auto-Owners in support of its argument, is distinguishable from the instant case because it denied coverage under a CGL policy based on the “your work” policy exclusion before the 1986 modification to cover damage resulting from subcontractor negligence. 281 S.C. 593, 597-98, 316 S.E.2d 709, 712 (Ct. App. 1984).

hold that the stucco subcontractor's faulty workmanship led to an "occurrence" justifying coverage for the resulting property damage under the terms of the CGL policy.

The presence of the subcontractor exception to the "your work" exclusion also establishes the scope of "work product" for purposes of determining whether a CGL policy covers a homeowner's negligent construction claim in cases arising out of a subcontractor's faulty workmanship. In cases of subcontractor negligence, consideration of whether a homeowner's complaint alleges property damage to other property or property damage to the work product alone must be limited to the subcontractor's own work product, and not extended to the contractor's entire project. To hold otherwise would obviate the purpose of the subcontractor exception to the "your work" exclusion in post-1986 CGL policies.³

For these reasons, we hold that the trial court correctly found that the negligent application of stucco resulted in an "occurrence" of water intrusion, causing property damage that is covered under Trinity's CGL policy.

B. Operation of policy exclusion to exclude damages awarded for replacing the substrate

Auto-Owners argues that even if the subcontractor's negligent application of stucco resulted in an "occurrence" under the CGL policy, coverage for the resulting property damage is nevertheless barred by a policy exclusion. We disagree.

³ For this same reason, we disagree with the reasoning set forth in *Bituminous Cas. Corp. v. Altman Builders, Inc.*, in which the federal district court interpreted this Court's decision in *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002), to mean that a homebuilder's CGL policy would not cover damage to any work product component of a construction project when the damage resulted from the negligence of a subcontractor. 2006 U.S. Dist. LEXIS 53354, at *14-*17.

An exclusion found in the standard CGL policy prohibits coverage for “‘property damage’ expected or intended from the standpoint of the insured.” Auto-Owners claims that pursuant to this exclusion, damages awarded by the arbitrator related to the framing and exterior sheathing of the home are not covered by the CGL policy because a construction professional would expect substantial moisture intrusion from defective stucco to result in these types of damages. In our opinion, and in the absence of any evidence otherwise, it is unreasonable to believe that Trinity expected or intended its subcontractor to perform negligently. Therefore, Trinity could not have expected or intended the resulting property damage.⁴ Accordingly, we hold that the property damage to the home’s exterior sheathing and framing was not expected or intended by Trinity, and therefore, coverage of the Homeowner’s damages is not barred by any exclusion within the CGL policy.

C. Damages awarded for replacement of the defective stucco

Auto-Owners finally argues that even if an “occurrence” warrants policy coverage for damages to other property, the arbitrator’s itemized allowance for replacing and repairing the defective stucco itself constitutes property damage to the work product alone. Auto-Owners therefore contends that the allowance for replacing the stucco is not covered under the CGL policy because it did not arise out of an “occurrence.”

In support of its argument, Auto-Owners points to the arbitrator’s decision concluding that the Homeowner was “entitled to have the stucco replaced” based on its defective application and because there were “sufficient other problems with the installation . . . [such] that allowance need[ed] to be made for replacement of the system.” Auto-Owners contends that this amounts to a finding of damage to the work product alone which is

⁴ Auto-Owners asserts a similar argument urging this Court to find that the moisture intrusion was not an “accident,” generally defined as “an unexpected happening or event,” and therefore did not constitute an “occurrence” to bring the claim within policy coverage in the first instance. For the same reasons discussed in reference to the “expected or intended” policy exclusion, we find this argument to be unpersuasive.

not covered under CGL policies. Noting that the award of an arbitrator is a final judgment, *see Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 494, 593 S.E.2d 480, 485 (Ct. App. 2004), Auto-Owners argues that it was not within the trial court's discretion to displace these findings with those of its own by determining that the policy covered the replacement of the defective stucco.

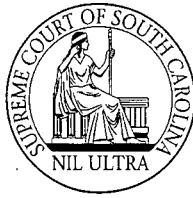
In our opinion, the analysis set forth by Auto-Owners is incomplete. The arbitrator's award itself "is the best evidence of its meaning, and the construction of its provisions is a matter for the courts." *Renaissance Enters. v. Ocean Resorts, Inc.*, 330 S.C. 13, 19 n.4, 496 S.E.2d 858, 861 n.4 (1998) (citing Rueben I. Friedman, Annotation, *Admissibility of Affidavit or Testimony of Arbitrator to Impeach or Explain Award* 80 A.L.R.3d 155 (1977)). For this reason, we find that the trial court correctly determined that the arbitrator's specific awards for rough carpentry, windows and doors, thermal and moisture protection, and interior and exterior finishes, establishes that the arbitrator recognized the existence of the underlying water damage to the home resulting from the defectively-applied stucco. Because this underlying moisture damage could neither be assessed nor repaired without first removing the entire stucco exterior, the trial court correctly concluded that the arbitrator's allowance for replacement of the defective stucco was covered by the CGL policy as a cost associated with remedying the other property damage that resulted from an "occurrence."

Accordingly, we hold that the arbitrator's allowance for replacement of the defective stucco is covered under the terms of the CGL policy.

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision finding that the CGL policy issued by Auto-Owners to Trinity covers the damages awarded by the arbitrator to the Homeowner.

MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 22, 2008

Justin O'Toole Lucey, Esquire
P.O. Box 806
Mt. Pleasant, SC 29465

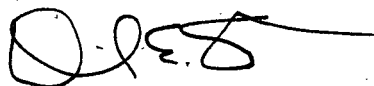
Re: Auto Owners v. Newman, Virginia

Dear Mr. Lucey:

We have received your letter requesting a copy of the tape of the oral argument hearing of January 23, 2008 in the above matter and your check in the amount of \$20.00.

Enclosed is a copy of the oral argument tape.

Very truly yours,



CLERK

DES/jjp

JUSTIN O'TOOLE LUCEY, P.A.

ATTORNEYS AT LAW

415 MILL STREET, MT. PLEASANT, SC 29464

PHONE: 843.849.8400 • FAX: 843.849.8406 • office@lucy-law.com

Justin Lucey
Amy K. Meyer

Reply to:
P.O. Box 806
Mt. Pleasant, SC 29465

February 20, 2008

Via FedEx

Brenda F. Shealy
Deputy Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

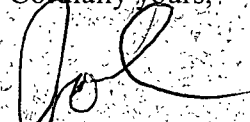
**Re: Auto Owners Insurance Company, Inc., Appellant, v. Virginia T. Newman and
Trinity Construction, Inc., Respondents.**

Dear Ms. Shealy:

Please provide us with a copy of the tape containing the oral hearing that was heard in the above referenced matter on January 23, 2008. Enclosed is our check in the amount of \$20 to cover the costs associated with this request.

Thank you for your assistance with this matter. Please do not hesitate to call should you have any questions.

Cordially yours,



Justin Lucey

JOL:nm
Enclosure

RECEIVED

FEB 21 2008

S.C. SUPREME COURT

RECEIVED
FEB 04 2008

CISA & DODDS, LLP
ATTORNEYS AND COUNSELORS AT LAW
858 Lowcountry Boulevard, Suite 101
Mt. Pleasant, South Carolina 29464
Telephone (843) 881-6530 Fax (843) 881-5433

FRANK M. CISA
JOHN J. DODDS, III
ROBERT S. DODDS

frank@cisadodds.com
john@cisadodds.com
robert@cisadodds.com

January 31, 2008

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

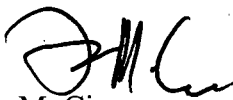
RE: Auto Owners v. Newman, Virginia
Our file: 99-748

Dear Mr. Shearouse:

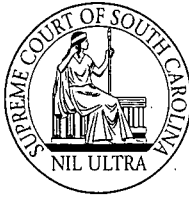
I would appreciate you making a note in your file that my address has now changed to the address shown on my letterhead.

With kindest regards, I am

Very truly yours,


Frank M. Cisa

FMC/alp



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 4, 2008

Keating L. Simons, III, Esquire
Simons & Keaveny
147 Wappoo Creek Dr.,
Ste. 604
Charleston, SC 29412

Re: Auto Owners v. Newman, Virginia

Dear Mr. Simons:

We have received your request for a copy of the oral argument tape and your check in the amount of \$20.00.

Enclosed is a copy of the oral argument tape.

Very truly yours,

Daniel E. Shearouse
CLERK *BS*

DES/jjp

SIMONS & DEAN

ATTORNEYS AT LAW

147 WAPPOO CREEK DRIVE, SUITE 604 | CHARLESTON, SC 29412 | 843.762.9132 | FAX: 843.406.9913

Keating L. Simons, III klsimons@charlestonattorneys.net

Derek F. Dean dfdean@charlestonattorneys.net

January 29, 2008

Daniel E. Shearouse
Supreme Court Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

RE: Auto Owners Insurance Company, Inc., Appellant, v. Virginia T. Newman and Trinity Construction, Inc., Respondents.

Dear Mr. Shearouse:

The above-referenced matter was argued Wednesday, January 23, 2008 in the Supreme Court. I write this letter to you requesting an audio cassette tape of the oral argument. Please find enclosed a check in the amount of \$20.00 for the cassette tape. Thank you for your assistance.

With kind regards, I am

Sincerely yours,

RECEIVED

Schuyler A. Quinn

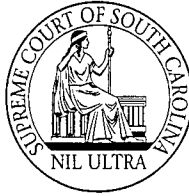
FEB 01 2008

Schuyler A. Quinn, Paralegal to
Keating L. Simons, III, Esquire

S.C. SUPREME COURT

/saq

Enclosure



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 25, 2008

David E. Dukes, Esquire
Williams C. Wood, Jr., Esquire
Nelson Mullins Riley & Scarborough
P O Box 11070
Columbia, SC 29211

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

The following Order has been endorsed on your Motion for Admission Pro Hac Vice of Laura A. Foggan in the above entitled case on appeal.

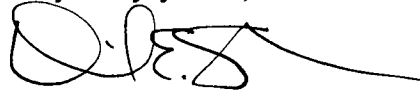
"Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

January 25, 2008."

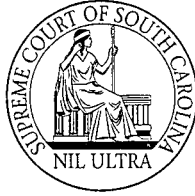
Very truly yours,



CLERK

DES/jjp

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggon, Esquire
Paker J. Lavin, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 25, 2008

David E. Dukes, Esquire
Williams C. Wood, Jr., Esquire
Nelson Mullins Riley & Scarborough
P O Box 11070
Columbia, SC 29211

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

The following Order has been endorsed on your Motion for Admission Pro Hac Vice of Parker J. Lavin in the above entitled case on appeal.

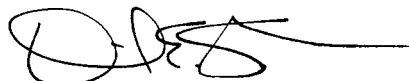
"Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

January 25, 2008."

Very truly yours,



CLERK

DES/jjp

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggon, Esquire
Paker J. Lavin, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-0384

January 23, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, S.C. 29211

RE: Auto-Owners Insurance v. Newman, et al.
Case Number: 2002-CP-10-4390
Supreme Court No.: 200634231

Dear Mr. Shearouse:

I certify that the Office of Bar Admissions has received verified applications requesting Parker J. Lavin and Laura A. Foggan be admitted *pro hac vice* in the above matter. The \$250 filing fee for each applicant has been paid.

Yours truly,

Deputy Clerk for Bar Admissions

GBW/sp

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc.,

Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc.,

Respondents.

MOTION FOR ADMISSION PRO HAC VICE OF
LAURA A. FOGGAN, ESQ.

Pursuant to Rule 404 of the South Carolina Appellate Court Rules, David E. Dukes and William C. Wood, Jr., members in good standing of the South Carolina Bar, hereby move this Court for an Order admitting Laura A. Foggan, Esquire to appear *pro hac vice* to practice before this Court for the sole purpose of appearing on behalf of Amicus Curiae Complex Insurance Claims Litigation Association in association with undersigned counsel in the above-captioned civil action.

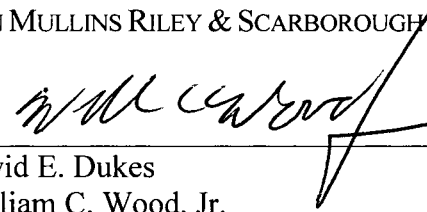
In support of this Motion, the attached Verified Application for Admission *Pro Hac Vice* of Laura A. Foggan, which is incorporated into this motion at Exhibit 1, sets forth her qualifications for admission *pro hac vice* and her agreement to abide by the ethical standards governing the practice of law in this Court.

RECEIVED

JAN 18 2008

S.C. SUPREME COURT

NELSON MULLINS RILEY & SCARBOROUGH LLP

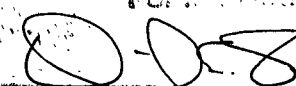
By: 

David E. Dukes
William C. Wood, Jr.
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Complex Insurance Claims
Litigation Association

Columbia, South Carolina

1/18, 2008

GRANTED
Jean H. Tool C.J.
For the Court
By: 
Clerk

January 25, 2008.

**VERIFIED APPLICATION FOR ADMISSION PR 4C VICE
THE STATE OF SOUTH CAROLINA**

Trial Court Case No.

Auto-Owners Insurance

2002-CP-10-4390

Supreme Court of South Carolina

Plaintiff

Case No.

Court

vs.

Mailing Address of Court: Supreme Court of South Carolina

Newman

P.O. Box 11330

Defendant

Columbia, SC 29211

Comes now Laura A. Foggan
following:

, applicant herein, and respectfully represents, that

RECEIVED

JAN 18 2008

1. Applicant resides at:

3342 Stephenson PLace, N.W.

Street Address

Washington

D.C.

20015

S.C. SUPREME COURT

City

County

State

Zip Code

202-363-4555

Telephone

2. Applicant is an attorney and a member of the law firm of (or practices law under the name of)

Wiley Rein LLP

, with offices at, at

1776 K Street, N.W.

Street Address

Washington

D.C.

20006

City

County

State

Zip Code

202-719-7000

Telephone

202-719-7049

Fax Number

3. Applicant has been retained personally or as a member of the above named law firm by the Complex

Insurance Claims Litigation Assnais to provide legal representation in connection with the above case now
pending before the above named court of the State of South Carolina.

4. Since December of 1983

, applicant has been, and presently is, a
member in good standing of the bar of the highest court of the District of Columbia or the State of
where applicant regularly practices law. Attached is a certificate of good standing.

5. Applicant has been admitted to practice before the following courts: (List all of the following courts

applicant has been admitted to practice before: United States District Courts; United States Circuit Courts of Appeals; the
Supreme Court of the United States; and courts of other states or the District of Columbia.)

Court:

Date Admitted:

U.S. District Court for D.C.	1/3/84
U.S. Court of Appeals for D.C. Circuit	2/16/84
District of Columbia Court of Appeals	12/19/83
United States Supreme Court	3/23/87
United States Court of Appeals for the First Circuit	2/7/007
United States Court of Appeals for the Second Circuit	9/21/89
United States Court of Appeals for the Third Circuit	4/17/89
United States Court of Appeals for the Fourth Circuit	2/18/86
United States Court of Appeals for the Fifth Circuit	1/24/89
United States Court of Appeals for the Sixth Circuit	12/7/899
United States Court of Appeals for the Seventh Circuit	9/25/92
United States Court of Appeals for the Eighth Circuit	12/18/85
United States Court of Appeals for the Ninth Circuit	11/25/88
United States Court of Appeals for the Tenth Circuit	8/14/95
United States Court of Appeals for the Eleventh Circuit	4/8/88

Applicant is presently a member in good standing of the bars of those courts listed above, except as listed below:
(List any court named in the preceding paragraph that applicant is no longer admitted to practice before.)

N/A

6. Applicant presently is not subject to any suspension or disbarment proceedings, and has not been formally notified of any complaints pending before a disciplinary agency, except as provided below (give particulars, e.g., jurisdiction, court, date):

N/A

7. Applicant never has had any application for admission *pro hac vice* in this or any other jurisdiction denied or any *pro hac vice* admission revoked, except as provided below (give particulars, e.g., date, court, docket number, judge, circumstances; attach a copy of any order of denial or revocation):

N/A

8. Applicant never has had any certificate or privilege to appear and practice before any administrative body suspended or revoked, except as provided below (give particulars, e.g., date, administrative body, date of suspension and reinstatement):

N/A

9. Local counsel of record associated with applicant in this case is David C. Dukes, of the Nelson Mullins law firm, which has offices at:

Meridian, 17th Floor, 1320 Main Street

Street Address

Columbia

City

803-799-2000

Telephone

County

SC

State

29201

Zip Code

If applicable list all other firms/attorneys you are associated with in this matter

N/A

10. Applicant has previously filed an application to appear *pro hac vice* in the following South Carolina cases (give case name and status of litigation, date of application, local counsel of record in each case, and state whether application is pending or was granted).

N/A

11. Applicant agrees to comply with the applicable statutes, laws and rules of the State of South Carolina and will familiarize him/herself with and comply with the South Carolina Rules of Professional Conduct. Applicant consents to the jurisdiction of the South Carolina courts and Commission on Lawyer Conduct.

12. Applicant respectfully requests to be admitted to practice in the above named court for this case only.

DATED this 16th day of January, 2008.


APPLICANT

VERIFICATION

STATE OF Washington DC

COUNTY OF _____)

I, Laura A. Foggan, do hereby swear or affirm under penalty of perjury that I am the applicant in the above styled matter, that I have read the foregoing application and know the contents thereof; and that the contents are true of my own knowledge, except as to those matters stated on information and belief, and that as to those matters I believe them to be true.

Laura A. Foggan
APPLICANT/AFFIANT

Subscribed and sworn to before me this 16 day of January, 2008.

[Signature]

Notary Public for the State of Washington DC

My Commission Expires: 6-14-10

LOCAL COUNSEL CONSENT

I hereby consent, as local counsel of record, to the association of applicant in this cause pursuant to Rules Governing Admission *Pro Hac Vice* to the South Carolina Bar.

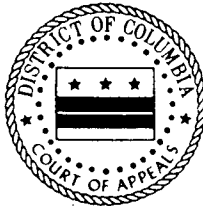
DATED this 18 day of January, 2008.

[Signature]
LOCAL COUNSEL OF RECORD

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this application upon the South Carolina Supreme Court by hand delivery ~~mail~~ addressed to: South Carolina Supreme Court Office of Bar Admissions, PO Box 11330, Columbia, SC 29211, accompanied by payment of the \$250 filing fee payable to the South Carolina Supreme Court on this 18 day of January, 2008.

[Signature]
APPLICANT/AFFIANT



District of Columbia Court of Appeals
Committee on Admissions
500 Indiana Avenue, N.W. — Room 4200
Washington, D. C. 20001
202 / 879-2710

RECEIVED

JAN 23 2008

S.C. SUPREME COURT

I, GARLAND PINKSTON, JR., Clerk of the District of Columbia
Court of Appeals, do hereby certify that

Laura A. Foggan

was on the 19th day of December, 1983

duly qualified and admitted as an attorney and counselor and
entitled to practice before this Court and is, on the date
indicated below, an active member in good standing of this Bar.

In Testimony Whereof, I have
hereunto subscribed my name
and affixed the seal of this
Court at the City of
Washington, D.C., on January
22, 2008.

GARLAND PINKSTON, JR., CLERK

By:

M. Charles
Deputy Clerk



THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc.,

Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc.,

Respondents.

CERTIFICATE OF SERVICE

I, Jennifer Lee, an employee of the law firm of Nelson Mullins, do hereby certify that I served one copy of MOTION FOR ADMISSION PRO HAC VICE OF LAURA A. FOGGAN, ESQ. this the 18th day of January, 2008, upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

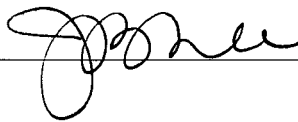
Joseph K. Qualey, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, South Carolina 29401

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mount Pleasant, south Carolina 29464

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, South Carolina 29938

Michael S. Seekings, Esquire
Leath, Bouch & Crawford, LLP
Post Office Box 59
Charleston, South Carolina 29402

John L. McCants, Esquire
Eliis Lawhorne & Sims, PA
1501 Main Street, Fifth Floor
Post Office Box 8825
Columbia, South Carolina 29201



THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
B. Hicks Harwell, Jr., Circuit Court Judge

RECEIVED

JAN 18 2008

Case No. 2002-CP-10-4390

S.C. SUPREME COURT

Auto-Owners Insurance Co., Inc.,

Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc.,

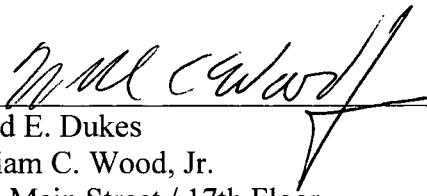
Respondents.

MOTION FOR ADMISSION PRO HAC VICE OF
PARKER J. LAVIN, ESQ.

Pursuant to Rule 404 of the South Carolina Appellate Court Rules, David E. Dukes and William C. Wood, Jr., members in good standing of the South Carolina Bar, hereby move this Court for an Order admitting Parker J. Lavin, Esquire to appear *pro hac vice* to practice before this Court for the sole purpose of appearing on behalf of Amicus Curiae Complex Insurance Claims Litigation Association in association with undersigned counsel in the above-captioned civil action.

In support of this Motion, the attached Verified Application for Admission *Pro Hac Vice* of Parker J. Lavin, which is incorporated into this motion at Exhibit 1, sets forth his qualifications for admission *pro hac vice* and his agreement to abide by the ethical standards governing the practice of law in this Court.

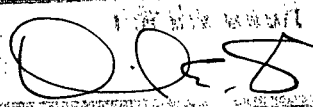
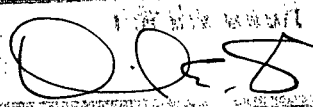
NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
David E. Dukes
William C. Wood, Jr.
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Complex Insurance Claims
Litigation Association

Columbia, South Carolina

1/18, 2008

GRANTED.

By: 
Clerk

January 25, 2008.

VERIFIED APPLICATION FOR ADMISSION PRO HAC VICE
THE STATE OF SOUTH CAROLINA.

Auto-Owners Insurance
Plaintiff

2002-CP-10-4390
Case No.

Supreme Court
Court

vs.

Mailing Address of Court: Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Newman, et al.
Defendant

RECEIVED

Comes now Parker J. Lavin, applicant herein, and respectfully represents the following:

JAN 18 2008

1. Applicant resides at:

1021 N. Garfield St., Apt. 640

S.C. SUPREME COURT

Street Address

Arlington

VA

22201

City

County

State

Zip Code

434-825-2821

Telephone

2. Applicant is an attorney and a member of the law firm of (or practices law under the name of) Wiley Rein, LLP, with offices at, at 1776 K Street, N.W.

Street Address

Washington

D.C.

20006

City

County

State

Zip Code

202-719-7000

Telephone

202-719-7049

Fax Number

3. Applicant has been retained personally or as a member of the above named law firm by Complex Ins. Claims Litigation Ass'n to provide legal representation in connection with the above case now pending before the above named court of the State of South Carolina.

4. Since 1st of November 2007, applicant has been, and presently is, a member in good standing of the bar of the highest court of the District of Columbia or the State of Virginia where applicant regularly practices law. Attached is a certificate of good standing.

5. Applicant has been admitted to practice before the following courts: (List all of the following courts applicant has been admitted to practice before: United States District Courts; United States Circuit Courts of Appeals; the Supreme Court of the United States; and courts of other states or the District of Columbia.)

Court:

Date Admitted:

N/A	N/A

Applicant is presently a member of the good standing of the bars of those courts and above, except as listed below:
(List any court named in the preceding paragraph that applicant is no longer admitted to practice before.)

N/A

6. Applicant presently is not subject to any suspension or disbarment proceedings, and has not been formally notified of any complaints pending before a disciplinary agency, except as provided below (give particulars, e.g., jurisdiction, court, date):

N/A

7. Applicant never has had any application for admission *pro hac vice* in this or any other jurisdiction denied or any *pro hac vice* admission revoked, except as provided below (give particulars, e.g., date, court, docket number, judge, circumstances; attach a copy of any order of denial or revocation):

N/A

8. Applicant never has had any certificate or privilege to appear and practice before any administrative body suspended or revoked, except as provided below (give particulars, e.g., date, administrative body, date of suspension and reinstatement):

N/A

9. Local counsel of record associated with applicant in this case is David E. Dukes of the Nelson Mullins law firm, which has offices at:
Meridian, 17th Floor; 1320 Main Street

Street Address

Columbia

S.C.

29201

City

County

State

Zip Code

803-799-2000

Telephone

If applicable list all other firms/attorneys you are associated with in this matter

N/A

10. Applicant has previously filed an application to appear *pro hac vice* in the following South Carolina cases (give case name and status of litigation, date of application, local counsel of record in each case, and state whether application is pending or was granted).

N/A

11. Applicant agrees to comply with the applicable statutes, laws and rules of the State of South Carolina and will familiarize him/herself with and comply with the South Carolina Rules of Professional Conduct. Applicant consents to the jurisdiction of the South Carolina courts and Commission on Lawyer Conduct.

12. Applicant respectfully requests to be admitted to practice in the above named court for this case only.

DATED this 17th day of January, 2008.

[Signature]
APPLICANT

VERIFICATION

STATE OF Washington DC

COUNTY OF _____)

I, Parber Lavin, do hereby swear or affirm under penalty of perjury that I am the applicant in the above styled matter; that I have read the foregoing application and know the contents thereof; and that the contents are true of my own knowledge, except as to those matters stated on information and belief, and that as to those matters I believe them to be true.

[Signature]
APPLICANT/AFFIANT

Subscribed and sworn to before me this 17 day of January, 2008.

[Signature]
Notary Public for the State of Washington DC

My Commission Expires: 6-14-10

LOCAL COUNSEL CONSENT

I hereby consent, as local counsel of record, to the association of applicant in this cause pursuant to Rules Governing Admission *Pro Hac Vice* to the South Carolina Bar.

DATED this 18 day of January, 2008.

[Signature]
LOCAL COUNSEL OF RECORD

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this application upon the South Carolina Supreme Court by mail addressed to: South Carolina Supreme Court Office of Bar Admissions, PO Box 11330, Columbia, SC 29211, accompanied by payment of the \$250 filing fee payable to the South Carolina Supreme Court on this 18 day of January, 2008.

[Signature]
APPLICANT/AFFIANT

Howard W. Martin, Jr., President
Crenshaw, Ware & Martin, P.L.C.
1200 Bank of America Center
Norfolk, VA 23510-2111
Telephone: (757) 623-3000

Manuel A. Capsalis, President-elect
Capsalis, Bruce & Reaser, P.L.C.
2200 Wilson Boulevard, Suite 800
Arlington, VA 22201
Telephone: (703) 358-9620

Karen A. Gould, Immediate Past President
McSweeney, Crump, Childress & Gould, P.C.
11 South Twelfth Street
Richmond, VA 23219
Telephone: (804) 545-2415

George W. Chabalewski
Bar Counsel



Virginia State Bar

Eighth and Main Building
707 East Main Street, Suite 1500
Richmond, Virginia 23219-2800
Telephone: (804) 775-0500

Facsimile: (804) 775-0501 TDD: (804) 775-0502

Thomas A. Edmonds
Executive Director and
Chief Operating Officer

Mary Yancey Spencer
Deputy Executive Director

Elizabeth L. Keller
Assistant Executive Director
for Bar Services

Susan C. Busch
Assistant Executive Director
for Administration

RECEIVED

JAN 23 2008

November 13, 2007

S.C. SUPREME COURT

CERTIFICATE OF GOOD STANDING

***THIS IS TO CERTIFY THAT PARKER JAMES LAVIN IS AN ACTIVE
MEMBER OF THE VIRGINIA STATE BAR IN GOOD STANDING. MR.
LAVIN WAS LICENSED TO PRACTICE LAW IN VIRGINIA ON OCTOBER
17, 2007, AFTER SUCCESSFULLY PASSING THE BAR EXAMINATION
GIVEN BY THE VIRGINIA BOARD OF BAR EXAMINERS.***

SINCERELY,

**THOMAS A. EDMONDS
EXECUTIVE DIRECTOR AND
CHIEF OPERATING OFFICER**

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc.,

Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc.,

Respondents.

CERTIFICATE OF SERVICE

I, Jennifer Lee, an employee of the law firm of Nelson Mullins, do hereby
certify that I served one copy of MOTION FOR ADMISSION PRO HAC VICE OF
PARKER J. LAVIN, ESQ. this the 18th day of January, 2008, upon all counsel of
record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

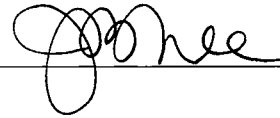
Joseph K. Qualey, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, South Carolina 29401

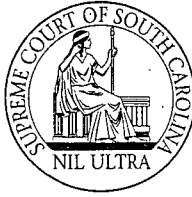
Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mount Pleasant, south Carolina 29464

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, South Carolina 29938

Michael S. Seekings, Esquire
Leath, Bouch & Crawford, LLP
Post Office Box 59
Charleston, South Carolina 29402

John L. McCants, Esquire
Eliis Lawhorne & Sims, PA
1501 Main Street, Fifth Floor
Post Office Box 8825
Columbia, South Carolina 29201





The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 22, 2008

David E. Dukes, Esquire
Williams C. Wood, Jr., Esquire
Nelson Mullins Riley
& Scarborough
P O Box 11070
Columbia, SC 29211

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

The following Order has been endorsed on your Motion of Amicus Curiae
Complex Insurance Claims Litigation Association for Leave to Appeal in Support
of Appellant in the above entitled case on appeal.

“Granted.

s/ Jean H. Toal C.J.
For the Court

January 22, 2008.”

Your amicus curiae brief has been filed as of this date and has been given to the
members of the Court.

David E. Dukes, Esquire
Re: Auto Owners v. Newman, Virginia
January 22, 2008
Page two

We note that Laura A. Foggan and Parker J. Lavin, of Wiley Rein, LLP, of Washington, D.C. are also listed as counsel on your brief. You will be advised by the Office of Bar Admissions when their applications for admission pro hac vice have been acted upon. The Office of Bar Admissions has advised that they are waiting for the certificates of good standing.

The motions for admission pro hac vice of Laura A. Foggan and Parker J. Lavin filed in this office will be acted upon after the applications in the Bar Admissions Office have been processed.

Very truly yours,

A handwritten signature in black ink, appearing to be "D.E.D.", written in a cursive style.

CLERK

DES/jjp

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggan, Esquire
Parker J. Lavin, Esquire

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

RECEIVED

JAN 18 2008

S.C. SUPREME COURT

Auto-Owners Insurance Co., Inc.,

Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc.,

Respondents.

MOTION OF AMICUS CURIAE
COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION
FOR LEAVE TO APPEAR
IN SUPPORT OF APPELLANT

Pursuant to Rule 213, SCACR, the Complex Insurance Claims Litigation Association ("CICLA"), by its undersigned attorneys, hereby moves the Court for leave to appear as amicus curiae in support of appellant Auto-Owners Insurance Company and to file the accompanying proposed brief. CICLA only recently learned that two amici curiae briefs have been filed in support of the policyholder in this case, with no counter-balancing brief in support of the insurer. In those briefs, the policyholder amici claim that failure to find coverage would have a "significant adverse effect on the south Carolina home building industry." CICLA seeks to

appear to balance those presentations, and address the State's policy interests in ensuring that liability contracts are enforced as written and not transformed into surety bonds. In doing so, CICLA's proposed brief provides a broader understanding of these different types of contracts, and the deleterious effects of failing to enforce the contracts as written.

INTEREST OF AMICUS CURIAE

CICLA is a trade association that represents major property and casualty insurance companies that write property and casualty insurance policies around the country, and specifically in South Carolina.¹ CICLA members provide a substantial percentage of the liability coverage written in South Carolina. Accordingly, CICLA is vitally interested in the judicial interpretation of liability policies. CICLA also seeks to assist courts in the resolution of important insurance coverage questions by providing courts with a unique national perspective on the importance of proper contractual and statutory interpretation to the nation's insurance industry. This case presents critical questions about whether contract liability can be shoehorned into liability coverage for tort damages.

CICLA, or its predecessor Insurance Environmental Litigation Association ("IELA"), has participated in numerous cases throughout the country, including several cases before this Court and the Court of Appeals.² In fact, in 2007 alone,

¹ This motion is filed on behalf of the following CICLA members: AIG Insurance Companies; Arrowpoint Capital Corp. (formerly Royal & SunAlliance); Chubb & Son, a Division of Federal Insurance Company; Liberty Mutual Insurance Company; The Riverstone Group, Inc.; St. Paul Fire and Marine Insurance Company; and Travelers Casualty & Surety Company.

² See, e.g., Century Indem. Co. v. Golden Hills Builders Inc., 348 S.C. 559, 561 S.E.2d 355 (2002); Greenville County v. Ins. Reserve Fund, 131 S.C. 546, 443 S.E.2d

three state high courts and another state intermediate appellate court expressly relied on arguments made by CICLA. See, e.g., Federated Mut. Ins. Co. v. Abston Petroleum, Inc., No. 1051589, 2007 WL 1098564, at *6 (Ala. Apr. 13, 2007) (quoting CICLA's brief and praising its "well-reasoned approach"); ACMAT Corp. v. Greater N.Y. Mut. Ins. Co., 282 Conn. 576, 593 n.14 (2007) (finding CICLA's argument "more persuasive" and quoting its brief with approval); EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's, No. 2006-745, slip op. at 5 (N.H. Oct. 18, 2007) (noting and agreeing with allocation argument made by CICLA); St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc., 738 N.W.2d 401, 411 (Minn. Ct. App. 2007) (stating that CICLA's brief "sheds additional light on the important issues and considerations of the insurance industry, which pervasively affects the public" and "provides citations to relevant precedent, arguments, and policy considerations not included in the primary briefs"); see also Auto Owners Ins. Co. v. Potter, No. 06-1232, 2007 WL 2046832, at *4 n.4 (4th Cir. July 13, 2007) (North Carolina law) (expressly acknowledging CICLA's arguments concerning the practical effect of the policyholder's argument and agreeing with CICLA's argument); Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co., 959 P.2d 265, 282 (Cal. 1998) (quoting the Association's brief with approval); Am. Motorists Ins. Co. v. ARTRA Group, Inc., 659 A.2d 1295, 1308 (Md. 1995) (citing the Association's argument with approval).

As a trade association with a broad outlook on the insurance contract interpretation and public policy considerations before the Court, CICLA is uniquely positioned to address issues related to whether liability coverage extends to breaches

552 (1994); and Harleysville Mut. Ins. Co. v. R.W. Harp & Sons, Inc., 305 S.C. 492, 409 S.E.2d 418 (Ct. App. 1991)

of contract and faulty workmanship claims. CICLA will share the knowledge and perspective it has developed regarding the various judicial decisions and approaches this Court and other courts have taken in interpreting faulty workmanship and breach of contract claims in relation to general liability policies, and the meaning of the terms “occurrence” and “property damage” in particular. CICLA respectfully submits that its participation also will serve to balance the presentation of the issues to the Court, as two policyholder-oriented amici already have appeared in this case.

ARGUMENT

I. CICLA’S PROPOSED SUBMISSION WILL ASSIST THE COURT BY PRESENTING ITS UNIQUE PERSPECTIVE ON THE EFFECT OF THE TRIAL COURT’S OPINION

CICLA’s proposed brief addresses broad issues related to the structure of liability policies and their relationship to construction defect claims. The proposed brief will demonstrate that faulty workmanship damaging only the policyholder’s own work product does not constitute an “occurrence” under a general liability policy. CICLA will show that, where there is no third-party damage from faulty workmanship and where the only damage is to the policyholder’s own work product, any claim sounds under contract and is a breach of contract issue. Such breach of contract claims do not fall under a general liability policy as there has been no “occurrence” as required by the policy because no fortuitous event has taken place. Liability for damages to a contractor’s own work from its defective work arises simply from a breach of contract, *i.e.*, the policyholder’s failure to perform according to the construction contract terms. Claims from faulty workmanship are considered the costs of doing business, not tort claims for damages due to third-party bodily injury or property damage that a liability policy was meant to cover.

Moreover, if the Court looks beyond the “occurrence” issue, CICLA’s proposed brief will show that any damages occurring from a breach of contract are economic losses as they relate to the failure to perform and the cost to replace or remedy the faulty workmanship. Also, CICLA will show that something that was never constructed properly in the first place has not been “damaged.”

CICLA will further address the amici briefs that argue an exception to an exclusion in the insurance policy grants the policyholder coverage. In fact, where there has been no occurrence causing property damage, an exclusion cannot create coverage that is not otherwise within the initial grant of the policy.

Lastly, CICLA will explain that a general liability policy should not be treated as a surety, or performance, bond. To find that a liability policy grants coverage to a breach of contract claim resulting from faulty workmanship would erroneously transform such a liability policy into a performance bond.

II. CICLA SHOULD BE GRANTED LEAVE TO APPEAR AS AMICUS CURIAE

Through its proposed submission, CICLA seeks to highlight to this Court the important issues at stake, as well as the policy considerations involved in addressing the policyholder’s attempts to extend coverage for breaches of contract.

CICLA’s brief provides the Court with policy considerations relating to policyholder’s attempts to extend breach of contract coverage into the general liability policy coverage realm. CICLA is well-positioned to discuss these public policy issues because of the diverse knowledge and experience of its members. Commentators have stressed that an amicus is often in a superior position to “focus the court’s attention on the broader implications of various possible rulings.” Bruce

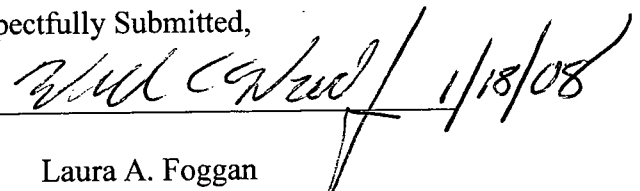
Ennis, Effective Amicus Briefs, 33 Cath. U. L. Rev. 603, 608 (1984), quoted in Robert L. Stern et al., Supreme Court Practice §13.13 (7th ed. 1993). Numerous courts have recognized that "the classic role of amicus curiae" is fulfilled by "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." Miller-Wohl Co. v Comm'r of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982). Accordingly, CICLA is qualified to play the role of a "friend of the court," justifying grant of its motion for leave to appear as amicus curiae.

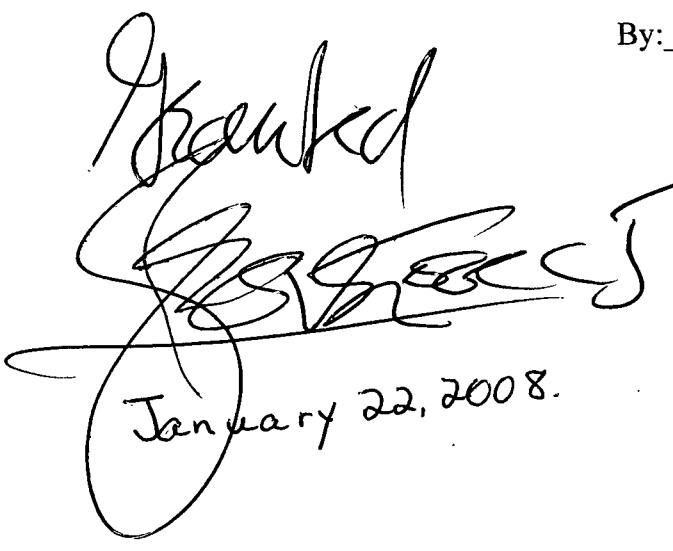
CONCLUSION

For the foregoing reasons, Complex Insurance Claims Litigation Association respectfully requests that this Court grant its motion for leave to appear as amicus curiae in support of appellant Auto-Owners Insurance Company and file the accompanying proposed brief.

Respectfully Submitted,

By:


Laura A. Foggan
Parker-Lavin
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006
Telephone: (202) 719-7000


David E. Dukes
William C. Wood, Jr.
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29201
Telephone: (803) 799-2000

*Counsel for Amicus Curiae Complex Insurance
Claims Litigation Association*

January 22, 2008.

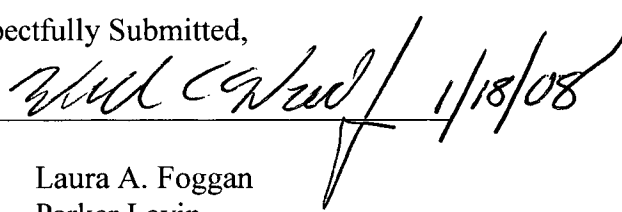
Ennis, Effective Amicus Briefs, 33 Cath. U. L. Rev. 603, 608 (1984), quoted in Robert L. Stern et al., Supreme Court Practice §13.13 (7th ed. 1993). Numerous courts have recognized that “the classic role of amicus curiae” is fulfilled by “assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court’s attention to law that escaped consideration.” Miller-Wohl Co. v Comm’r of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982). Accordingly, CICLA is qualified to play the role of a “friend of the court,” justifying grant of its motion for leave to appear as amicus curiae.

CONCLUSION

For the foregoing reasons, Complex Insurance Claims Litigation Association respectfully requests that this Court grant its motion for leave to appear as amicus curiae in support of appellant Auto-Owners Insurance Company and file the accompanying proposed brief.

Respectfully Submitted,

By:

 1/18/08
Laura A. Foggan
Parker Lavin
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006
Telephone: (202) 719-7000

David E. Dukes
William C. Wood, Jr.
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29201
Telephone: (803) 799-2000

*Counsel for Amicus Curiae Complex Insurance
Claims Litigation Association*

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc.,

Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc.,

Respondents.

CERTIFICATE OF SERVICE

I, Jennifer Lee, an employee of the law firm of Nelson Mullins, do hereby certify that I served one copy of Amicus Curiae Complex Insurance Claims Litigation Association's Motion for Leave to Appear this the 18th day of January, 2008, upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

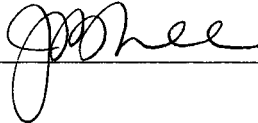
Joseph K. Qualey, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, South Carolina 29401

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mount Pleasant, south Carolina 29464

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton head Island, South Carolina 29938

Michael S. Seekings, Esquire
Leath, Bouch & Crawford, LLP
Post Office Box 59
Charleston, South Carolina 29402

John L. McCants, Esquire
Eliis Lawhorne & Sims, PA
1501 Main Street, Fifth Floor
Post Office Box 8825
Columbia, South Carolina 29201



Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law

1320 Main Street / 17th Floor / Columbia, SC 29201

Tel: 803.799.2000 Fax: 803.256.7500

www.nelsonmullins.com

William C. Wood, Jr.

Tel: 803.255.9534

bill.wood@nelsonmullins.com

January 18, 2008

RECEIVED

JAN 18 2008

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
1231 Gervais Street
Columbia, SC 29201

RE: Auto-Owners Insurance Co., Inc. v. Newman, et al.
Trial Court Case No. 2002-CP-10-4390
Our file no. 31717/01500

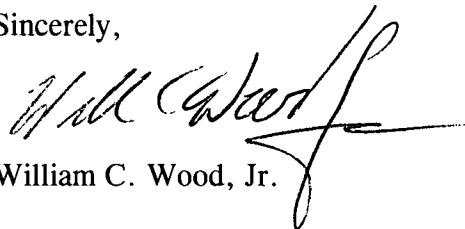
Dear Mr. Shearouse:

Enclosed please find originals and the required copies of the below listed documents. Please file the originals and return a clocked-in copy to me via our courier. By copy of this letter via electronic mail and U.S. mail, we are serving all parties of record.

1. Motion of Amicus Curiae Complex Insurance Claims Litigation Association for Leave to Appear in Support of Appellant
2. Brief of Amicus Curiae Complex Insurance Claims Litigation Association in Support of Appellant
3. Motion for Admission Pro Hac Vice of Laura A. Foggan, Esq.
4. Motion for Admission Pro Hac Vice of Parker J. Lavin, Esq.

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

Sincerely,



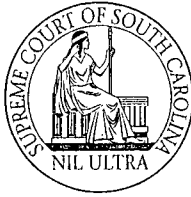
William C. Wood, Jr.

WCWJR:jbl
Enclosures

cc: Joseph K. Qualey, Esq.
Frank M. Cisa, Esq.

The Honorable Daniel E. Shearouse
January 18, 2008
Page 2

George E. Mullen, Esq.
Daniel F. Oberklein, Esq.
Michael S. Seekings, Esq.
John L. McCants, Esq.
Parker J. Lavin, Esq.
Laura A. Foggan, Esq.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 16, 2008

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

Frank M. Cisa, Esquire
Cisa & Dodds, L.L.P.
622 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29465

Joseph K. Qualey, Esquire
Qualey & Beck. P.A.
23 Broad Street
Charleston, SC 29401

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath, Bouch & Crawford, LLP
P O Box 59
Charleston, SC 29402

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

John L. McCants, Esquire
Re: Auto Owners v. Newiman, Virginia
January 16, 2008
Page two

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows:

Appellant	10 minutes
Respondents	10 minutes
Appellant in Reply	5 minutes

Reminder:

This case is scheduled for hearing at 10:00 a.m. on Wednesday, January 23, 2008.

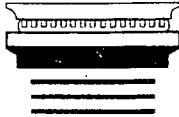
Very truly yours,

Daniel E. Shearouse, Clerk

By Jean J. Peebles
Administrative Assistant

DES/jjp

cc: George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire



LEATH, BOUCH & CRAWFORD LLP
PRACTICE LIMITED TO COMMERCIAL LITIGATION & CREDITORS RIGHTS
WITH EMPHASIS ON CONSTRUCTION & ENVIRONMENTAL LAW

January 4, 2008

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RE: Auto Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 2002-CP-10-4390

Dear Mr. Shearouse:

Pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules, enclosed please find a copy of *United States Fire and Insurance Company, etc., vs. J.S.U.B., Inc., etc., et al.*, Case No. SC05-1295, Supreme Court of Florida, December 20, 2007. This case is significant and pertinent to the issue of whether there is coverage under a general contractor's CGL policy in circumstances similar to those in the case pending before this Court.

By copy of this correspondence, I am informing all parties of this supplemental citation. If you have any questions or concerns, please do not hesitate to call my office.

JAN 09 2008

SC SUPREME COURT

Yours truly,

LEATH, BOUCH & CRAWFORD, LLP

Michael S. Seekings

MSS/am

Enclosures

cc (w/o enc.): John L. McCants, Esq.
Frank M. Cisa, Esq.
George Mullen, Esq.
Daniel Soberklein, Esq.
Joseph Qualey, Esq.
Kenneth E. Ormand, Jr., Esq.
David S. Jaffe, Esq.

Supreme Court of Florida

No. SC05-1295

UNITED STATES FIRE INSURANCE COMPANY, etc.,
Petitioner,

RECEIVED

JAN 09 2008

vs.

J.S.U.B., INC., etc., et al.,
Respondents.

FLA. SUPREME COURT

[December 20, 2007]

PARIENTE, J.

J.S.U.B., Inc. seeks review of the decision of the Second District Court of Appeal in J.S.U.B., Inc. v. United States Fire Insurance Co., 906 So. 2d 303 (Fla. 2d DCA 2005), which is in express and direct conflict with the decision of the Fourth District Court of Appeal in Lassiter Construction Co. v. American States Insurance Co., 699 So. 2d 768 (Fla. 4th DCA 1997).¹ The conflict issue is whether a post-1986 standard form commercial general liability (CGL) policy with products-completed operations hazard coverage, issued to a general contractor,

1. We have jurisdiction. See art. V, § 3(b)(3), Fla. Const.

provides coverage when a claim is made against the contractor for damage to the completed project caused by a subcontractor's defective work.

We answer this question in the affirmative. We conclude that defective work performed by a subcontractor that causes damage to the contractor's completed project and is neither expected nor intended from the standpoint of the contractor can constitute "property damage" caused by an "occurrence" as those terms are defined in a standard form commercial general liability policy.

Accordingly, a claim made against the contractor for damage to the completed project caused by a subcontractor's defective work is covered under a post-1986 CGL policy unless a specific exclusion applies to bar coverage. In this case, the terms of the policy included an exception to the "Your Work" exclusion for faulty workmanship by a subcontractor and did not include a breach of contract exclusion. We therefore approve the Second District's decision in J.S.U.B. and disapprove the Fourth District's decision in Lassiter.

FACTS AND PROCEDURAL HISTORY

J.S.U.B., Inc., and Logue Enterprises, Inc., as partners of First Home Builders of Florida ("J.S.U.B."), contracted to build several homes in the Lehigh Acres area of Lee County, Florida. After completion and delivery of the homes to the homeowners, damage to the foundations, drywall, and other interior portions of the homes appeared. It is undisputed that the damage to the homes was caused by

subcontractors' use of poor soil and improper soil compaction and testing. The homeowners demanded that J.S.U.B. repair or remedy the damages, asserting breach of contract, breach of warranty, negligence, strict liability, and violation of the Florida Building Code.

During the period in which the homes were built, J.S.U.B. was insured under a commercial general liability policy and renewal policy issued by United States Fire Insurance Company ("U.S. Fire"). The policies provide coverage for the "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage'" caused by an "occurrence" within the "coverage territory" during the policy period. As defined in the policies, an "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," and "property damage" includes "[p]hysical injury to tangible property, including all resulting loss of use of that property." The policies also contain "products-completed operations hazard" coverage that

[i]ncludes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

....
(2) Work that has not yet been completed or abandoned.[²]

2. Under the policies, J.S.U.B. had a per occurrence limit of \$1 million, a general aggregate limit of \$2 million, and a separate products-completed operations hazard aggregate limit of \$2 million for which additional premiums were charged.

The coverage provisions are limited by numerous exclusions. Of particular relevance are those exclusions, with their exceptions, that exclude coverage for damage to the insured's property and work:

j. Damage To Property
"Property damage" to:

-
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
 - (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

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

.....
l. Damage To Your Work

"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 damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

(Emphases supplied.)³

3. The policies define "your work" as follows:

"Your work" means:

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

"Your work" includes:

J.S.U.B. sought coverage under the policies for the structural damage to the homes and the damage to the homeowners' personal property. U.S. Fire agreed that the policies provided coverage for damage to the homeowners' personal property, such as the homeowners' wallpaper. However, U.S. Fire asserted that there was no insurance coverage for the costs of repairing the structural damage to the homes, such as the damage to the foundations and drywall.

J.S.U.B. made the necessary repairs to the homes and filed a declaratory judgment action to determine whether coverage existed for the cost of repairing the structural damage. The circuit court entered judgment in favor of U.S. Fire. Citing to LaMarche v. Shelby Mutual Insurance Co., 390 So. 2d 325 (Fla. 1980), the circuit court found that the CGL policies did not provide

coverage for faulty workmanship and that the damages alleged by [J.S.U.B.] and caused by [J.S.U.B.'s] subcontractors' use of poor soil, improper soil compaction and testing are the faulty workmanship for which no coverage exists under the subject policies.

J.S.U.B. appealed and the Second District Court of Appeal reversed. The Second District held that LaMarche did not control. The Second District further concluded that the policies contained "broad policy language" that provided coverage to J.S.U.B. in light of this Court's subsequent decision in State Farm Fire & Casualty

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

Co. v. CTC Development Corp., 720 So. 2d 1072 (Fla. 1998), and that none of the exclusions in the policies applied. See J.S.U.B., 906 So. 2d at 309, 311.

Construing a CGL policy similar to those at issue in this case, the Fourth District Court of Appeal came to a contrary conclusion in Lassiter. In that case, the contractor argued that because exclusions (j)(6) and (l) “do not exclude work performed by subcontractors, there is coverage for the defective work performed by subcontractors.” Lassiter, 699 So. 2d at 770. The Fourth District disagreed, summarily concluding that “[t]he insured has failed to demonstrate that there are any provisions in the coverage section of the policy which would provide coverage for this defective work.” Id. We accepted jurisdiction to resolve the conflict between J.S.U.B. and Lassiter.

ANALYSIS

The issue we decide is whether a post-1986 standard form commercial general liability policy with products-completed operations hazard coverage, issued to a general contractor, provides coverage when a claim is made against the contractor for damage to the completed project caused by a subcontractor’s defective work.⁴ This is an issue of insurance policy construction, which is a question of law subject to de novo review. See Fayad v. Clarendon Nat’l Ins. Co., 899 So. 2d 1082, 1085 (Fla. 2005).

4. U.S. Fire does not argue that any of the policy exclusions apply to bar coverage.

In resolving this issue, we first set forth the standards for construing insurance contracts and outline the origin and evolution of CGL policies, highlighting the changes that have been made to the relevant language of the insuring provisions and exclusions over the years. We then review our decision in LaMarche, which has been relied on by courts to deny coverage for damage to a completed project caused by a subcontractor's defective work. We then analyze whether under CGL policies issued after 1986, a subcontractor's faulty workmanship can constitute an "occurrence" as that term is defined in the policy and as interpreted in CTC Development. Finally, we analyze the definition of "property damage" to determine whether the damage to the completed homes comes within the policy definition.

A. Standards for Construing Insurance Contracts

Our interpretation of insurance contracts, such as the CGL policies in this case, is governed by generally accepted rules of construction. Insurance contracts are construed according to their plain meaning, with any ambiguities construed against the insurer and in favor of coverage. See Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co., 913 So. 2d 528, 532 (Fla. 2005). Further, "in construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000). Accordingly, "[a]lthough exclusionary

clauses cannot be relied upon to create coverage, principles governing the construction of insurance contracts dictate that when construing an insurance policy to determine coverage the pertinent provisions should be read in pari materia.” CTC Development, 720 So. 2d at 1074-75 (citations, alteration, and internal quotation marks omitted).

B. The Origin and Evolution of CGL Policies

Commercial General Liability policies are designed to protect an insured against certain losses arising out of business operations. See Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 305 (Tenn. 2007). The first standard form comprehensive general liability insurance policy was drafted by the insurance industry in 1940. See 21 Eric Mills Holmes, Holmes’ Appleman on Insurance 2d, §129.1, at 7 (2002).⁵ The standard policy was the result of a voluntary effort in the insurance industry to address the misunderstanding, coverage disputes, and litigation that resulted from the unique language used by each liability insurer. See id.; see also Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp., 636 So. 2d 700, 702 (Fla. 1993) (explaining that CGL policies “are standard insurance policies developed by insurance industry trade associations, and these policies are the primary form of commercial insurance coverage obtained by

5. In 1986, the “Comprehensive General Liability” policy was renamed the “Commercial General Liability” policy. However, the acronym “CGL” is commonly used to refer to both. See id.

businesses throughout the country”).

Since 1940, the standard policy has been revised several times. See 21 Holmes, supra, §129.1, at 7-8. We review these changes because the insuring agreement has been expanded over the years and the exclusions narrowed. With regard to the insuring agreement, the language was expanded from providing coverage only for damages “caused by an accident” to include coverage for damages caused by an “occurrence,” which is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Compare 16 id. § 117.1, at 215, with 20 id. § 129.2, at 104. In CTC Development, we explained that an “occurrence,” which is defined as an “accident,” encompasses damage that is “neither expected nor intended from the standpoint of the insured.” 720 So. 2d at 1076.

Like the insuring language, the exclusions in standard CGL policies have been modified over the years. See generally 21 Holmes, supra, §132.1-132.9, at 5-158. The exclusions that are of significance to our analysis in this case are the “business risk” exclusions, including the “your work” and “your product” exclusions. The 1973 standard CGL policy interpreted in LaMarche contained broad exclusions for damage to “your work” and “your product” stating that the insurance did not apply

(n) to property damage to the named insured’s products arising out of such products or any part of such products;

(o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

390 So. 2d at 326; 21 Holmes, supra, §132.1, at 11 (emphasis supplied).

Beginning in 1976, the insured could purchase a Broad Form Property Endorsement. See Am. Family Mut. Ins. Co. v. Am. Girl, Inc., 673 N.W.2d 65, 83 (Wis. 2004). This endorsement replaced exclusion (o), set forth above, and exclusion (k), which excluded damage to property owned by or within the control of the insured. As to exclusion (o), the endorsement replaced it with more specific exclusions and also differentiated between property damage that occurred before and after operations were completed. The endorsement provided that the insurance did not apply:

(d) to that particular part of any property . . .

(i) upon which operations are being performed by or on behalf of the insured at the time of the property damage arising out of such operations, or

(ii) out of which any property damage arises, or

(iii) the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the insured; . . .

(3) with respect to the completed operations hazard and with respect to any classification stated in the policy or the company's manual as "including completed operations," to property damage to work performed by the named insured arising out of such work or any portion thereof, or out of such materials, parts or equipment furnished in connection therewith.

21 Holmes, supra, §132.9, at 149 (emphasis supplied). Thus, with regard to completed operations, the endorsement eliminated the exclusion for “work performed on behalf of the named insured.”

When the CGL policy was revised again in 1986, it contained new provisions that incorporated and clarified the Broad Form Property Endorsement. See id. at 149, 153. New exclusion (j)(6) and the exception to this exclusion clearly stated that the exclusion for faulty workmanship did not apply to work within the products-completed operation hazard:

This insurance does not apply to:

j. Damage to Property
“Property damage” to:

.....
(6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

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

Id. at 145, 153 (emphasis supplied). The 1986 policy also added new exclusion (l), the “your work exclusion,” with an express exception for subcontractor work as follows:

This insurance does not apply to:

.....
l. Damage To Your Work
“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 damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Id. at 145, 152 (emphasis supplied). The reason for this 1986 revision that added the subcontractor exception has been explained as follows:

[T]he insurance and policyholder communities agreed that the CGL policy should provide coverage for defective construction claims so long as the allegedly defective work had been performed by a subcontractor rather than the policyholder itself. This resulted both because of the demands of the policyholder community (which wanted this sort of coverage) and the view of insurers that the CGL was a more attractive product that could be better sold if it contained this coverage.

See 2 Jeffrey W. Stempel, Stempel on Insurance Contracts §14.13[D] at 14-224.8 (3d ed. Supp. 2007). Moreover, the Insurance Services Office promulgated a circular on July 15, 1986, confirming that the 1986 revisions to the standard CGL policy not only incorporated the “Broad Form” property endorsement but also specifically “cover[ed] damage caused by faulty workmanship to other parts of work in progress; and damage to, or caused by, a subcontractor’s work after the insured’s operations are completed.” Insurance Services Office Circular, Commercial General Liability Program Instructions Pamphlet, No. GL-86-204 (July 15, 1986).⁶ Of course, the subcontractor’s exception to the general exclusion

6. The Insurance Services Office, Inc., also known as ISO, is an industry organization that promulgates various standard insurance policies that are utilized by insurers throughout the country, including the standard CGL policy at issue in this case. See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 772 (1993)

for a contractor's defective work becomes important only if there is coverage under the initial insuring provision.

C. LaMarche

The threshold issue in this case, whether a subcontractor's defective work can constitute an "occurrence," requires us to examine our decision in LaMarche because it is the Florida case that is generally cited to support the proposition that CGL policies do not provide coverage for damage to the contractor's work caused by faulty workmanship. The issue in LaMarche involved a claim for a contractor's faulty workmanship, which the homeowners argued caused structural defects and consequent secondary damage. See Shelby Mut. Ins. Co. v. LaMarche, 371 So. 2d 198, 200 (Fla. 2d DCA 1979). The contractor entered into an agreement for the construction of a home, under which all workmanship with regard to the structure was guaranteed for five years from the date of delivery. See LaMarche, 390 So. 2d at 326. The CGL policy issued to the contractor provided that the insurer "would pay for bodily injury or property damage for which the contractor became liable."

Id. However, the policy also included the following relevant exclusionary provisions, which were standard in 1973 CGL policies:

("Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers . . . , is the almost exclusive source of support services in this country for CGL insurance. ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms.") (citations omitted).

(a) to liability assumed by the insured under any contract or agreement except an incidental contract; but this exclusion does not apply to a warrant[y] of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner;
(n) to property damage to the named insured's products arising out of such products or any part of such products;
(o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith[.]

Id.

The work performed by the contractor was defective, and the homeowners, as beneficiaries under the insurance contract, sought coverage for replacing the defective materials and workmanship. The homeowners argued that

the average person would interpret subparagraph (a) as granting coverage for damages arising from a breach of warranty of fitness or a failure to perform work in a workmanlike manner. Petitioners further argue that the homeowner, as beneficiary of the insured, should be granted coverage because the policy is ambiguous.

Id. The Court rejected both contentions, ruling that "[t]he district court was correct in concluding that an exclusion does not provide coverage but limits coverage."

Id.

The Court noted that the district court's decision was consistent with the majority of other jurisdictions, which had concluded that "the purpose of this comprehensive liability insurance coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product." Id. The Court reasoned that this interpretation was consistent with the intent of the parties as evidenced by the

language of the exclusions:

We find this interpretation was not the intent of the contractor and the insurance company when they entered into the subject contract of insurance, and the language of the policy clearly excludes this type of coverage.

Id.

Thus, although LaMarche used broad language regarding the purpose of CGL policies, LaMarche's ultimate determination that there was no coverage for repair and replacement of the contractor's own defective work was based on the policy exclusions, not the insuring provisions. This is evident for several reasons.

First, the issue before the district court in LaMarche was whether the "three exclusions [at issue in the CGL policy] are clear and unambiguous" and the court's decision, which this Court fully approved, stated:

In resolving the issue raised on appeal we make no decision as to whether the policy expressly provides coverage for the damage which resulted to appellees' residence. That question is not before us. We hold only that the exclusions at issue here do not create an ambiguity.

371 So. 2d at 200-01. Accordingly, the issue on appeal to this Court was whether the district court correctly concluded that the exclusions were clear and unambiguous, which is apparent by this Court solely discussing the issue of coverage in terms of the exclusions. Indeed, the Court found that "the language of the policy clearly excludes this type of coverage," which is further evidence that

the Court's decision was based on the exclusions. LaMarche, 390 So. 2d at 326.

We agree with the Second District in J.S.U.B., which recognized this distinction:

Our decision [in LaMarche] specified that we were not deciding whether the CGL policy expressly provided coverage for the damage that had been incurred, but rather, we determined that the policy exclusions that were at issue did not create an ambiguity. Id. at 201. In its review of our decision, the supreme court also focused on the exclusionary language and concluded that the policy excluded coverage for building flaws or deficiencies and "instead covers damage caused by these flaws." LaMarche, 390 So. 2d at 326.

906 So. 2d at 307-08.

Second, the Court in LaMarche adopted in full the reasoning and analysis of the New Jersey Supreme Court's decision in Weedo v. Stone-E-Brick, Inc., 405 A.2d 788, 792 (N.J. 1979), which was based on the same exclusions at issue in LaMarche; specifically, the "insured products" (exclusion "(n)") and "work performed" (exclusion "(o)") exclusions. The Weedo court explained that the insuring provisions "set forth, in fundamental terms, the general outlines of coverage," while "[t]he limitations on coverage are set forth in the exclusion clauses of the policy, whose function it is to restrict and shape the coverage otherwise afforded." Id. at 790. The court then noted that the insurer conceded that

but for the exclusions in the policy, coverage would obtain. Hence we need not address the validity of one of the carrier's initially-offered grounds of non-coverage, namely, that the policy did not extend coverage for the claims made even absent the exclusions.

Id. at 790 n.2.

The New Jersey Supreme Court concluded that coverage was lacking, not due to the insuring provisions, but because faulty workmanship by a contractor was specifically excluded based on the clear and unambiguous “business risk” exclusionary clauses. Id. at 792-95 (concluding that the language of these “business risk” exclusions was clear and rejecting the argument that these exclusions were rendered ambiguous when read in conjunction with exclusion (a)). Additionally, the Court reinforced that it was looking to the exclusions to determine if coverage existed by stating the principle that “[t]he limitations on coverage are set forth in the exclusion clauses of the policy, whose function it is to restrict and shape the coverage otherwise afforded.” Id. at 790. Thus, it is clear that LaMarche relied on the exclusions to determine that no coverage existed in that case.

U.S. Fire and the amici curiae that support its position argue that LaMarche and the district court decisions that reiterate LaMarche’s broad language regarding the purpose of CGL policies stand for the proposition that faulty workmanship that damages the contractor’s own work can never constitute a covered “occurrence.” See, e.g., Sekura v. Granada Ins. Co., 896 So. 2d 861, 862 (Fla. 3d DCA 2005); Lassiter, 699 So. 2d at 769; Home Owners Warranty Corp. v. Hanover Ins. Co., 683 So. 2d 527, 529 (Fla. 3d DCA 1996); Tucker Constr. Co. v. Michigan Mut.

Ins. Co., 423 So. 2d 525, 527-28 (Fla. 5th DCA 1982). We disagree. Although some of these district court decisions may have reached the correct result under their particular facts, none of them expressly considered whether it is appropriate to apply LaMarche's rationale to cases involving different policy provisions.⁷

We conclude that the holding in LaMarche, which relied on Weedo and involved the issue of whether there was coverage for the contractor's own defective work, was dependent on the policy language of pre-1986 CGL policies, including the relevant insuring provisions and applicable exclusions. The Minnesota Supreme Court, the Tennessee Supreme Court, and the Wisconsin Supreme Court reached the same conclusion regarding prior state court decisions that relied on Weedo and interpreted pre-1986 CGL policies. See Wanzek Constr., Inc. v. Employers Ins. of Wausau, 679 N.W.2d 322, 327 (Minn. 2004); Moore & Assocs., Inc., 216 S.W.3d at 307; Am. Girl, 673 N.W.2d at 77.

Because LaMarche involved a claim of faulty workmanship by the contractor, rather than a claim of faulty workmanship by the subcontractor, and because the policy being interpreted involved distinct exclusions and exceptions,

7. For example, in Home Owners, the Third District relied on LaMarche and Weedo in concluding that a post-1986 CGL policy did not provide coverage for the cost of both repair and maintenance as a result of construction defects. See 683 So. 2d at 529. However, the court also noted that the complaint did not identify any damages caused by the alleged defects. See id. at 528 n.2. As explained below, it is unlikely that based on these allegations, there was coverage under the policy because there was no allegation that the faulty workmanship caused "property damage."

we do not regard LaMarche as binding precedent in this case. The role of precedent in insurance policy interpretation cases depends largely on whether the underlying facts and the policies at issue in the two decisions are similar. Indeed, precedent has been defined as “A decided case that furnishes a basis for determining later cases involving similar facts or issues.” Black’s Law Dictionary 1214 (8th ed. 2004) (emphasis supplied). Thus, whether a decision is binding on another is dependent upon there being similar facts and legal issues. As Justice Overton observed in his concurrence in Perez v. State, 620 So. 2d 1256, 1259 (Fla. 1993),

[t]he doctrine of precedent is basic to our system of justice. In simple terms, it ensures that similarly situated individuals are treated alike rather than in accordance with the personal view of any particular judge. In other words, precedent requires that, when the facts are the same, the law should be applied the same.

However, where the policies and underlying facts are different, then a previous decision should not be binding. We recognized this principle in Travelers Indemnity Co. v. PCR, Inc., 889 So. 2d 779, 791 n.13 (Fla. 2004) (questioning the applicability of a previous decision’s definition of a policy term in a subsequent case where the exclusionary clauses were materially different).

Accordingly, our decision in LaMarche does not control the resolution of the issue in this case, namely, whether a subcontractor’s faulty workmanship is covered in a post-1986 CGL policy. Instead, we first analyze the specific insuring

provisions of the current policy to determine whether a subcontractor's faulty workmanship that results in damage to the contractor's work can constitute an "occurrence" as that term has been defined under Florida case law. In doing so, we apply well-established principles of insurance contract interpretation, reading the policy both in accord with its plain language, construing any ambiguities in favor of the insured, see Taurus Holdings, 913 So. 2d at 532, and "as a whole, endeavoring to give every provision its full meaning and operative effect." Anderson, 756 So. 2d at 34.

D. Whether Faulty Workmanship Can Constitute an "Occurrence"

The question of whether faulty workmanship can constitute an "occurrence" is a matter governed by the actual terms of the policy and Florida law interpreting insurance contracts. The policy and renewal policy in this case define an "occurrence" as an "accident" but leave "accident" undefined. Thus, under our decision in CTC Development, these policies provide coverage not only for "'accidental events,' but also injuries or damage neither expected nor intended from the standpoint of the insured." 720 So. 2d at 1076.

U.S. Fire nevertheless argues that a subcontractor's faulty workmanship that damages the contractor's own work can never be an "accident" because it results in reasonably foreseeable damages. We expressly rejected the use of the concept of "natural and probable consequences" or "foreseeability" in insurance contract

interpretation in CTC Development when we receded from prior case law. See id. at 1074-77.

Further, we fail to see how defective work that results in a claim against the contractor because of injury to a third party or damage to a third party's property is "unforeseeable," while the same defective work that results in a claim against the contractor because of damage to the completed project is "foreseeable." This distinction would make the definition of "occurrence" dependent on which property was damaged. For example, applying U.S. Fire's interpretation in this case would make the subcontractor's improper soil compaction and testing an "occurrence" when it damages the homeowners' personal property, such as the wallpaper, but not an "occurrence" when it damages the homeowners' foundations and drywall. As the Tennessee Supreme Court explained, in rejecting this distinction:

A shingle falling and injuring a person is a natural consequence of an improperly installed shingle just as water damage is a natural consequence of an improperly installed window. If we assume that either the shingle or the window installation will be completed negligently, it is foreseeable that damages will result. If, however, we assume that the installation of both the shingle and the window will be completed properly, then neither the falling shingle nor the water penetration is foreseeable and both events are "accidents." Assuming that the windows would be installed properly, Moore could not have foreseen the water penetration. Because we conclude the water penetration was an event that was unforeseeable to Moore, the alleged water penetration is both an "accident" and an "occurrence" for which there is coverage under the "insuring agreement."

Moore & Assocs., 216 S.W.3d at 309.

We also conclude that U.S. Fire's argument that a breach of contract can never result in an "accident" is not supported by the plain language of the policies.

The Wisconsin Supreme Court came to the same conclusion in American Girl:

[T]here is nothing in the basic coverage language of the current CGL policy to support any definitive tort/contract line of demarcation for purposes of determining whether a loss is covered by the CGL's initial grant of coverage. "Occurrence" is not defined by reference to the legal category of the claim. The term "tort" does not appear in the CGL policy.

673 N.W.2d at 77. The Kansas Supreme Court followed American Girl's reasoning in holding that a subcontractor's defective work can constitute an "occurrence" under Kansas law. See Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486, 491 (Kan. 2006).⁸

If U.S. Fire intended to preclude coverage based on the cause of action asserted, it was incumbent on U.S. Fire to include clear language to accomplish this result. See Container Corp. of Am. v. Maryland Cas. Co., 707 So. 2d 733, 736 (Fla. 1998) ("Had Maryland wished to limit Container's coverage to vicarious liability, it could have done so by clear policy language."). In fact, there is a

8. American Girl most closely resembles the factual scenario in J.S.U.B. and the reasoning of the Second District. The Wisconsin Supreme Court held that damage to a warehouse caused by soil settlement, which was the result of a subcontractor's inadequate site preparation, was an "occurrence" because "[n]either the cause nor the harm was intended, anticipated, or expected." Am. Girl, 673 N.W.2d at 76.

breach of contract endorsement exclusion, not present in the CGL policies at issue in this case, that excludes coverage for breach of contract claims. See B. Hall Contracting Inc. v. Evanston Ins. Co., 447 F. Supp. 2d 634, 639 (N.D. Tex. 2006).

The endorsement provides:

This insurance does not apply to claims for breach of contract, whether express or oral, nor claims for breach of an implied in law or implied in fact contract, whether "bodily injury," "property damage," "advertising injury," "personal injury" or an "occurrence" or damages of any type is alleged; this exclusion also applies to any additional insureds under this policy.

Id.

Furthermore, ISO has begun to issue an endorsement that may be included in a CGL policy, which entirely eliminates the subcontractor exception to the "your work" exclusion. See ISO Properties, Inc., Endorsement CG 22 94 10 01, <http://www.lexis.com>; see also Lamar Homes, Inc. v. Mid-Continent Cas. Co., 50 Tex. Sup. Ct. J. 1162, 1168 (Tex. 2007) ("More recently, the Insurance Services Office has issued an endorsement that may be included in the CGL to eliminate the subcontractor exception to the 'your work' exclusion."). The fact that these additional endorsements may be included in CGL policies highlights that the ultimate analysis is governed by the actual language contained in the applicable insurance contract.

U.S. Fire's assertion that damage resulting from a breach of contract must be presumed to be expected is also unpersuasive. As with U.S. Fire's foreseeability

argument, this position makes the definition of “occurrence” dependent on whether the property damaged is part of the construction contract or the homeowner’s separate property. Under CTC Development, the appropriate consideration is whether the damage was expected or intended from the standpoint of the insured, not whose property was damaged. 720 So. 2d at 1076; see also Lamar Homes, 50 Tex. Sup. Ct. J. at 1166 (“The CGL policy, however, does not define an ‘occurrence’ in terms of the ownership or character of the property damaged by the act or event. Rather, the policy asks whether the injury was intended or fortuitous, that is, whether the injury was an accident.”). As the amici Florida Home Builders Association and National Association of Home Builders assert in arguing that CGL policies issued to their members do not distinguish between the property damaged for purposes of defining “occurrence”:

If a defective masonry wall falls outward and damages a parked car, no one disputes the “occurrence” of “property damage,” but if it falls inward and damages the floor, the insurers label that a non-occurrence or not property damage. Likewise, if the wall falls the day before the home buyer resells to a new owner, they contend it is not covered as a contract claim, but if it falls the day after resale, it is covered as a tort claim.

(Citation omitted.)

In sum, we reject a definition of “occurrence” that renders damage to the insured’s own work as a result of a subcontractor’s faulty workmanship expected, but renders damage to property of a third party caused by the same faulty

workmanship unexpected. There is simply nothing in the definition of the term “occurrence” that limits coverage in the manner advanced by U.S. Fire, and we decline to read the broad “business risk” exclusions at issue in LaMarche into the definition of “occurrence” used in the coverage provisions of the post-1986 standard CGL policies at issue in this case. We agree with the Wisconsin Supreme Court’s observation that

CGL policies generally do not cover contract claims arising out of the insured’s defective work or product, but this is by operation of the CGL’s business risk exclusions, not because a loss actionable only in contract can never be the result of an “occurrence” within the meaning of the CGL’s initial grant of coverage. This distinction is sometimes overlooked, and has resulted in some regrettably overbroad generalizations about CGL policies in our case law.

Am. Girl, 673 N.W.2d at 76; accord Moore & Assocs., 216 S.W.2d at 307

(agreeing with American Girl that “[r]eliance upon a CGL’s ‘exclusions’ to determine the meaning of ‘occurrence’ has resulted in ‘regrettably overbroad generalizations’ concerning CGLs”).

Although the Supreme Courts of Kansas, Minnesota, Tennessee, Texas and Wisconsin have adopted a similar interpretation of the term “occurrence” as we do in this case, we recognize that there is an opposing view that defective construction that damages the work product itself can never constitute an accident. See, e.g., Auto-Owners Ins. Co. v. Home Pride Cos., 684 N.W.2d 571, 577 (Neb. 2004); Oak Crest Constr. Co. v. Austin Mut. Ins. Co., 998 P.2d 1254, 1257 (Ore. 2000);

Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 899 (Pa. 2006); L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 621 S.E.2d 33, 35-36 (S.C. 2005).⁹ However, contrary to our interpretation of the term “accident” in CTC Development, these courts construe “accident” narrowly. See Home Pride Cos., 684 N.W.2d at 577 (concluding that faulty workmanship is not an “accident” because it is not a fortuitous event); Kvaerner Metals, 908 A.2d at 899 (same); Oak Crest, 998 P.2d at 1257 (concluding that faulty workmanship is not an “occurrence” because it is a failure to perform under the contract, which cannot be characterized as unexpected); L-J, Inc., 621 S.E.2d at 35 (same). Moreover, a number of these courts support their decisions by reciting broad

9. The Kansas Supreme Court explained that there are two different views reflected in the nationwide case law regarding whether defective construction can constitute an accident:

[O]ne line of cases has held that faulty or improper construction does not constitute an accident; rather, the damage is the natural and ordinary consequence of the insured’s act. The other line of cases has held that improper or faulty construction does constitute an accident as long as the resulting damage is an event that occurs without the insured’s expectation or foresight.

Lee Builders, 137 P.3d at 491. These two opposing views of the term “accident” are repeated by U.S. Fire and J.S.U.B. as well as the numerous amicus briefs filed in support of the parties. There are also law review articles that advocate both sides of the issue. Compare Clifford J. Shapiro, Point/Counterpoint: Inadvertent Construction Defects Are an “Occurrence” under CGL Policies, Construction Law, Spring 2002, at 13, with Linda B. Foster, Point/Counterpoint: No Coverage Under the CGL Policy for Standard Construction Defect Claims, Construction Law, Spring 2002, at 22.

principles that categorically dismiss claims for damages caused by defective work as being outside the scope of CGL policies. See, e.g., Oak Crest, 998 P.2d at 1257 n.7; Kvaerner Metals, 908 A.2d at 899 n.10; L-J, Inc., 621 S.E.2d at 35. Because these courts allow recovery when the faulty workmanship injures a third party or results in damage to property other than the work product itself, the implication from these cases is that damage to the insured's own work from failure to perform a construction contract is presumed to be expected while damage to the person or property of a third party is presumed to be unexpected. As explained above, we find this reasoning unconvincing and contrary to policy language defining "occurrence."

Even if there was any ambiguity in the policies as to whether a subcontractor's faulty workmanship can constitute an "occurrence," we would interpret the ambiguity against the insurer and in favor of coverage. See Taurus Holdings, 913 So. 2d at 532. In addition, our interpretation of the term "occurrence" is guided by a view of the policy as a whole. See Anderson, 756 So. 2d at 34. As we explained in CTC Development, "[a]lthough exclusionary clauses cannot be relied upon to create coverage, principles governing the construction of insurance contracts dictate that when construing an insurance policy to determine coverage the pertinent provisions should be read in pari materia." 720 So. 2d at 1074-75 (citations, alteration, and internal quotation marks omitted).

In this case, if the insuring provisions do not confer an initial grant of coverage for faulty workmanship, there would be no reason for U.S. Fire to exclude damage to “your work”:

If . . . losses actionable in contract are never CGL “occurrences” for purposes of the initial coverage grant, then the business risk exclusions are entirely unnecessary. The business risk exclusions eliminate coverage for liability for property damage to the insured’s own work or product-liability that is typically actionable between the parties pursuant to the terms of their contract, not in tort. If the insuring agreement never confers coverage for this type of liability as an original definitional matter, then there is no need to specifically exclude it. Why would the insurance industry exclude damage to the insured’s own work or product if the damage could never be considered to have arisen from a covered “occurrence” in the first place?

Am. Girl, 673 N.W.2d at 78; accord Lamar Homes, Inc., 50 Tex. Sup. Ct. J. at 1168 (“By incorporating the subcontractor exception into the ‘your-work’ exclusion, the insurance industry specifically contemplated coverage for property damage caused by a subcontractor’s defective performance.”)

In addition, a construction of the insuring agreement that precludes recovery for damage caused to the completed project by the subcontractor’s defective work renders the “products-completed operations hazard” exception to exclusion (j)(6) and the subcontractor exception to exclusion (l) meaningless. See Lee Builders, 137 P.3d at 494 (stating that “the ‘Damage to Your Work’ business risk exclusion in the CGL policy in the instant case supports the determination of an occurrence” because “[i]f there can be no occurrence, the exclusion—and its exception—appear

to be superfluous”); Lennar Corp. v. Great Am. Ins. Co., 200 S.W.3d 651, 673 (Tex. App. 2006) (“[F]inding no occurrence for defective construction resulting in damage to the insured’s work would render the subcontractor exception superfluous and meaningless.”), petition for review filed, No. 06-287 (Tex. May 11, 2006).¹⁰ Paragraph (j)(6) specifically excludes from coverage that “particular part of any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it.” However, the policy goes on to provide an exception by stating that “[p]aragraph (6) of this exclusion does not apply to ‘property damage’ included in the ‘products-completed operations hazard.’” Exclusion (l) excludes damage to “‘your work’ arising out of it or any part of it and included in the ‘products-completed operations-hazard’” but then provides an exception that states that this “exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.” (Emphasis supplied.) We simply cannot ignore the exception that has now been incorporated into exclusion (l), an exception that clearly applies to damages to the insured’s own work arising out of the work of a subcontractor. Reading these provisions in pari materia with the insuring agreement supports the

10. Although the petition for review in Lennar Corp. is still pending in the Texas Supreme Court and a final disposition has not been released, the Court’s decision in Lamar Homes, Inc. appears to resolve the pending issue. However, we note that the Court did not specifically approve of the decision in Lamar Homes, Inc.

conclusion that a subcontractor's defective work that results in damage to the completed project can constitute an "occurrence."

Finally, we reject U.S. Fire's contention that construing the term "occurrence" to include a subcontractor's defective work converts the policies into performance bonds. "The purpose of a performance bond is to guarantee the completion of the contract upon default by the contractor." Am. Home Assur. Co. v. Larkin Gen. Hosp., Ltd., 593 So. 2d 195, 198 (Fla. 1992). Thus, unlike an insurance policy, a performance bond benefits the owner of a project rather than the contractor. Cf. School Bd. of Palm Beach County v. Vincent J. Fasano, Inc., 417 So. 2d 1063, 1065 n.3 (Fla. 4th DCA 1982) ("On private construction projects performance bonds are usually secured for the benefit of the owner . . ."). Further, a surety, unlike a liability insurer, is entitled to indemnification from the contractor. See Western World Ins. Co. v. Travelers Indem. Co., 358 So. 2d 602, 604 (Fla. 1st DCA 1978); see also Fidelity & Deposit Co. of Md. v. Hartford Cas. Ins. Co., 189 F. Supp. 2d 1212, 1218 (D. Kan. 2002) (rejecting the argument that "if the structural damage caused by faulty workmanship constitutes an 'occurrence,' then the CGL and umbrella policies will be transformed into a performance bond" because the bond "in no way" protected the contractor or subcontractor from liability).

The Texas Court of Appeals explained the salient differences between a

liability policy and a performance bond:

[A]lthough defective construction may constitute an “occurrence,” the insurer indemnifies the insured only for resulting “property damage” arising after the project is completed. In contrast, a performance bond is broader than a CGL policy in that it guarantees “the completion of a construction contract upon the default of the general contractor.” Therefore, a “variety of deficiencies that do not constitute ‘property damage’ may be covered by a performance bond, and not all deficiencies cause additional property damage.” Consequently, allowing coverage for some “property damage” resulting from defective construction does not transform a CGL policy into a performance bond and require a CGL carrier to pay anytime an insured fails to complete, or otherwise comply with, its contract.

Lennar Corp., 200 S.W.3d at 673-74 (footnote and citations omitted) (quoting Black’s Law Dictionary 1158 (7th ed. 1999) and O’Shaughnessy v. Smuckler Corp., 543 N.W.2d 99, 105 (Minn. Ct. App. 1996)); accord Lamar Homes, Inc., 50 Tex. Sup. Ct. J. at 1167 & n.7 (“[T]he protection afforded by a performance bond is, in fact, different from that provided by [a] CGL insurance policy [A]n insurance policy spreads the contractor’s risk while a bond guarantees its performance. An insurance policy is issued based on an evaluation of risks and losses that is actuarially linked to premiums; that is, losses are expected. In contrast, a surety bond is underwritten based on what amounts to a credit evaluation of the particular contractor and its capabilities to perform its contracts, with the expectation that no losses will occur. Unlike insurance, the performance bond offers no indemnity for the contractor; it protects only the owner.”). The Supreme Court of Tennessee also rejected this argument, recognizing that the fact

that damages may result from an “occurrence” under a CGL policy is only the first step in determining whether the damages are covered. Moore & Assocs., 216 S.W. 2d at 309. The “occurrence” may not have caused “property damage” or coverage provided by the insuring agreement may be precluded by an exclusion.

We hold that faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an “accident” and, thus, an “occurrence” under a post-1986 CGL policy. In this case, we conclude that the subcontractors’ defective soil preparation, which J.S.U.B. did not intend or expect, was an “occurrence.” However, in order to determine whether the policies provide coverage for J.S.U.B.’s losses, we must next address whether the “occurrence” caused “property damage” within the meaning of the policies.

E. Whether the Subcontractors’ Improper Soil Preparation Caused “Property Damage”

The CGL policies define “property damage” as “[p]hysical injury to tangible property, including all resulting loss of use of that property.” U.S. Fire and the amici that argue in favor of its position assert that faulty workmanship that injures only the work product itself does not result in “property damage.” However, just like the definition of the term “occurrence,” the definition of “property damage” in the CGL policies does not differentiate between damage to the contractor’s work

and damage to other property.¹¹

We further reject U.S. Fire's contention that there can never be "property damage" in cases of faulty construction because the defective work rendered the entire project damaged from its inception. To the contrary, faulty workmanship or defective work that has damaged the otherwise nondefective completed project has caused "physical injury to tangible property" within the plain meaning of the definition in the policy. If there is no damage beyond the faulty workmanship or defective work, then there may be no resulting "property damage."

Both the Third and Fifth District Courts of Appeal have recognized this distinction. See West Orange Lumber Co. v. Indiana Lumbermens Mut. Ins. Co., 898 So. 2d 1147, 1148 (Fla. 5th DCA 2005); Auto Owners Ins. Co. v. Tripp Constr., Inc., 737 So. 2d 600, 601 (Fla. 3d DCA 1999). In Tripp, although the Third District cited LaMarche, the court differentiated between a claim for the costs of repairing and replacing the actual defects in the construction, which it held was not covered, and a claim for the costs of repairing the damage caused by

11. U.S. Fire's reliance on the economic loss doctrine to support its position is unconvincing. "The economic loss rule is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses." Indemnity Ins. Co. of N.Am. v. Am. Aviation, Inc., 891 So. 2d 532, 536 (Fla. 2004). Thus, the economic loss doctrine determines what cause of action is available to recover economic losses—tort or contract—but not whether an insurance policy covers a claim, which depends on the policy language. As explained above, we find no language in the CGL policies that limits coverage to tort claims.

construction defects “to other elements of the subject homes,” which it held was covered. 737 So. 2d at 601-02. In West Orange, the Fifth District held that there was no allegation of “property damage” when the only damage alleged was the cost of removing and replacing the wrong grade cedar siding that had been installed. 898 So. 2d at 1148.

Other courts have also recognized that there is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for “property damage,” and a claim for the costs of repairing damage caused by the defective work, which is a claim for “property damage.” See, e.g., Cincinnati Ins. Co. v. Venetian Terrazzo, Inc., 198 F. Supp. 2d 1074, 1079 n.1 (E.D. Mo. 2001) (concluding that costs of repair and replacement of an improperly installed floor was not covered “property damage”); Lennar Corp., 200 S.W.3d at 679-80 (distinguishing between costs to remove and replace defective stucco as a preventative measure, which were not “damages because of . . . property damage,” and the costs to repair water damage that resulted from the application of the defective stucco, which were “damages because of . . . property damage”). As the Supreme Court of Tennessee explained:

[A] “claim limited to faulty workmanship or materials” is one in which the sole damages are for replacement of a defective component or correction of faulty installation.

We conclude that Hilcom’s claim is not limited to faulty workmanship and does in fact allege “property damage.” Moore’s subcontractor allegedly installed the windows defectively. Without

more, this alleged defect is the equivalent of the "mere inclusion of a defective component" such as the installation of a defective tire, and no "property damage" has occurred. The alleged water penetration is analogous to the automobile accident that is caused by the faulty tire. Because the alleged defective installation resulted in water penetration causing further damage, Hilcom has alleged "property damage." Therefore, we conclude that Hilcom has alleged damages that constitute "property damage" for purposes of the CGL.

Moore & Assocs., 216 S.W.3d at 310; see also Am. Girl, 673 N.W.2d at 74-75

("The sinking, buckling, and cracking of the [warehouse] as a result of soil settlement qualifies as 'physical injury to tangible property.'").

Like the Tennessee case, Moore & Assocs., and the Wisconsin case, American Girl, this case does not involve a claim for the cost of repairing the subcontractor's defective work, but rather a claim for repairing the structural damage to the completed homes caused by the subcontractor's defective work. Specifically, it was the subsequent soil settlement due to the subcontractor's faulty workmanship that caused the structural damage to the homes. Because there was "physical injury to tangible property," we conclude that the structural damage to the homes is "property damage" within the meaning of the policies.

In reaching this conclusion, we discern no public policy reason for precluding coverage. A subcontractor's defective work that is neither intended nor expected from the standpoint of the insured is not the type of intentional wrongful act that we have held was uninsurable as a matter of public policy. See Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So. 2d 1005, 1009 (Fla. 1989) (holding that

public policy prohibits the insured from being indemnified for a loss resulting from intentional employment discrimination). Even if a “moral hazard” argument could be made regarding the contractor’s own work, the argument is not applicable for the subcontractors’ work:

Providing coverage for claims arising out of the subcontractor work also made sense in terms of meeting the moral hazard and adverse selection problems associated with faulty workmanship claims. Although it may be unwise to provide liability coverage for a builder directing its own crews, who may be tempted to cut corners if insured, the same rationale did not as readily apply to modern construction that depends heavily on subcontractors on whom general contractors depend. . . . Particularly if the subcontractor does soil, concrete, or framing work, it is as a practical matter very difficult for the general contractor to control the quality of the subcontractor work. Only if the contractor has a supervisor at the elbow of each subcontractor at all times can quality control be relatively assured—but this would be prohibitively expensive. Because the general contractor depends on the subcontractor to a large degree, the general contractor is not tempted by moral hazard to the degree that makes the consequences of faulty subcontractor work more expensive to insure.

Stempel, supra, § 14.13[D], at 14-224.8. Further, the argument that indemnity will create a windfall for the contractor is speculative. As the amici point out, the contractor gains nothing if insurance reimburses the costs of repairing the damage caused by the defective work. Moreover, if the insurer decides that this is a risk it does not want to insure, it can clearly amend the policy to exclude coverage, as can be done simply by either eliminating the subcontractor exception or adding a breach of contract exclusion.

CONCLUSION

We conclude that faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an "accident" and thus an "occurrence" under a post-1986 standard form CGL policy. We further conclude that physical injury to the completed project that occurs as a result of the defective work can constitute "property damage" as defined in a CGL policy. Accordingly, we hold that a post-1986 standard form commercial general liability policy with products completed-operations hazard coverage, issued to a general contractor, provides coverage for a claim made against the contractor for damage to the completed project caused by a subcontractor's defective work provided that there is no specific exclusion that otherwise excludes coverage. In so holding, we distinguish but do not recede from LaMarche because that case concluded, based on the policy exclusions, that there was no coverage under a pre-1986 CGL policy for the repair and replacement of the contractor's own defective work.

In this case, because there are no exclusions that bar coverage, we agree with the Second District's conclusion that the CGL policies issued by U.S. Fire to J.S.U.B. provide coverage for the costs to replace the homeowner's personal property, such as their wallpaper, as well as the costs to repair the structural damage to the homes, such as the walls, both of which were caused by the subcontractors' improper soil preparation. Accordingly, we approve the Second

District's decision in J.S.U.B. and disapprove the Fourth District's decision in Lassiter to the extent that it held that CGL policies can never provide coverage for a claim made against the contractor for damage to the completed project caused by a subcontractor's faulty workmanship.

It is so ordered.

ANSTEAD, QUINCE, and BELL, JJ., concur.
LEWIS, C.J., concurs in result only with an opinion.
WELLS, J., concurs in result only.
CANTERO, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND
IF FILED, DETERMINED.

LEWIS, C.J., concurring in result only.

While I agree with the result reached by the majority, I cannot fully subscribe to the reasoning. Sufficient ambiguity exists in these post-1986 commercial general liability ("CGL") policies to afford coverage for insured contractors whose work is damaged by subcontractor negligence. See, e.g., State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1076 (Fla. 1998) ("[W]here policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer."). However, we must not overlook three major areas of concern with regard to emerging CGL jurisprudence. First, when one is attempting to determine and define the coverage afforded by any given insurance policy, the type of policy at

issue must remain a central and critical concern. Second, courts, commentators, and parties to insurance contracts must remain wary of basing coverage determinations primarily upon the exclusions and exceptions within a contract, rather than upon the initial grant of coverage. Third and finally, the original function and scope of CGL policies has been significantly altered, not by courts, commentators, or insureds, but by the insurance industry itself through drafting and marketing practices.

THE TYPE OF POLICY AT ISSUE.

It remains true that when an insurer fails to define a term in a policy, the insurer simply cannot validly assert that there should be a narrow and restrictive interpretation of the coverage provided under the contract. See, e.g., State Comprehensive Health Ass'n v. Carmichael, 706 So. 2d 319, 320 (Fla. 4th DCA 1997). The coverage provided, however, must be gleaned in part from reference to the type of policy involved. Here, it should be remembered that “a commercial general liability insurance policy is generally designed to provide coverage for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or work is not that for which the damaged person bargained.” 9A Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 129:1 (3d ed. 2005) (emphasis supplied).

I do not suggest that I agree with the decisions from other jurisdictions which hold that the defective work of subcontractors can never result in an “occurrence” under a CGL policy. See, e.g., Auto-Owners Ins. Co. v. Home Pride Companies, Inc., 684 N.W.2d 571, 575-80 (Neb. 2004); L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 621 S.E.2d 33, 35-36 (S.C. 2005). Rather, I caution that CGL coverage claims for those things other than the originally intended tort liability to third parties should be viewed with a cautious and suspect eye. See, e.g., 2 Jeffrey W. Stempel, Stempel on Insurance Contracts, § 14.01[B], at 14-17 (3d ed. 2007) (“The CGL, like most insurance policies, has a relatively targeted objective for insuring risks. It is designed to protect commercial operators from litigation and liability arising out of their business operations. . . . [T]he CGL is not designed to guarantee the quality of the policyholder’s work or the successful completion of its business activities.” (emphasis supplied)). Thus, in the interpretation of insurance policy language, as with the interpretation of any contract, one should remain cognizant of the type of policy or contract at issue and the type of coverage that is generally and naturally associated with such a policy. However, courts should only use interpretive tools to further the intent of the parties, not to usurp or contradict the language of the policy as written. See, e.g., Discover Prop. & Cas. Ins. Co. v. Beach Cars of W. Palm, Inc., 929 So. 2d 729, 732 (Fla. 4th DCA 2006).

COVERAGE DETERMINATIONS SHOULD NOT BE MADE BASED UPON POLICY EXCLUSIONS.

The policy-interpretation linguistic gymnastics that tend to occur in some jurisdictions across the country in CGL cases, which involve the so-called subcontractor exception to the your-work exclusion, walk a very thin line of falling into violations of the rule that “exclusionary clauses cannot be relied upon to create coverage.” See, e.g., CTC, 720 So. 2d at 1074. However, the insurance industry itself created the language which has necessitated much of this at times thin and often thought-provoking interpretation by drafting CGL forms in a fashion that has pushed insureds and courts to rely on language in the exclusions to give meaning to all the words in the policy and to decipher the coverage grants. See, e.g., Am. Family Mut. Ins. Co. v. Am. Girl, Inc., 673 N.W.2d 65, 73 (Wis. 2004) (adopting a three-part approach to interpreting a CGL policy: (1) examine the initial coverage grant to determine if “property damage” or “bodily injury” has resulted from an “occurrence”; (2) if “property damage” or “bodily injury” has occurred, examine the policy exclusions to see if the CGL policy’s otherwise broad coverage is thereby narrowed to exclude the claim; and finally (3) determine if any exceptions to applicable exclusions restore otherwise excluded coverage); Elmer W. Sawyer, Comprehensive Liability Insurance 11 (1943) (“[I]nstead of insuring against only enumerated hazards, we now insure against all hazards not excluded.” (emphasis supplied)). Furthermore, the “Business-Risk Doctrine” or the “Historical Model”

concept—the weapons upon which the insurance industry has generally relied to deny claims for faulty subcontractor work—simply do not appear anywhere in these post-1986 standard-form CGL policies, as demonstrated by the policy involved in J.S.U.B. See, e.g., ISO Policy Form Number CG 00 01 07 98, <http://www.lexis.com>; see also James Duffy O'Connor, What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction, Constr. Law., Winter 2001, at 15, 15-16 (explaining that the Business-Risk Doctrine or Historical Model cannot be used to rewrite the actual language of the policy); 4 Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner & O'Connor on Construction Law § 11:28 (2002 & Supp. 2007) (substantially similar). These concepts should not be used to preclude coverage that the drafters of the policy intended and that insureds relied upon to justify paying additional premiums. Courts should not use the “concepts” of the Business-Risk Doctrine and Historic Model to simply bar coverage, in lieu of examining the policies as written. See Wanzek Constr., Inc. v. Employers Ins. of Wausau, 679 N.W.2d 322, 325-27 (Minn. 2004) (avoiding this interpretive problem by modifying Minnesota’s view of the Business-Risk Doctrine in light of the changed policy language present in post-1986 standard-form CGL policies).

It has become clear that if the insurance industry seeks to avoid further and expansive interpretations of its CGL policies, it must do a better job of more

narrowly describing coverage and defining the type of “property damage,” “bodily injury,” and “occurrences” that it may intend these types of policies to cover, rather than adopting linguistic forms that tend to force courts to swim against the interpretive current by looking into the policy exclusions for answers to coverage questions to give meaning and life to all words utilized. Thus, while I am hesitant to place as much emphasis on the policies’ exclusions and exceptions as does the majority, I certainly recognize that courts should not rely on ephemeral policy justifications when the actual language of the policy at issue and the parties’ admitted intent do not include or reflect these justifications.

In these cases, this analysis leads me to the conclusion that we cannot simply rely on the Business-Risk Doctrine or Historical Model to deny the coverage claims of the insureds if neither the coverage grant nor the exclusions explain, reference, or use words to evidence these concepts in a manner that causes them to become controlling. The situation this Court faces, while facially complex, is actually fairly straightforward. The relevant CGL policy anticipates the “occurrence” of inadvertent (i.e., “neither expected nor intended”) events, which result in “property damage” or “bodily injury.”¹² The policies then fail to outline

12. Opinions which assert that these CGL policies’ definition of “occurrence” somehow excludes coverage for fortuitous damage caused by faulty subcontractor work fail to support that position with reference to the actual language of the policies. See, e.g., L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 621 S.E.2d 33, 34, 35-36 (S.C. 2005) (without specifying which portions of a road

the protections allegedly afforded as limited by the Business-Risk Doctrine or Historical Model, and the exclusions are ambiguous to the extent that we must find that they certainly do not exclude coverage for fortuitous damage that faulty subcontractor work causes to other portions of the completed project. If insurers wish to exclude this type of “occurrence” in this context, the onus is on them—not the courts—to clearly express that intent through the CGL policies they issue.

THE INSURANCE INDUSTRY HAS STRAYED FROM THE SCOPE OF COVERAGE ORIGINALLY PROVIDED BY CGL POLICIES.

Prior to the 1970s, there was minimal debate with regard to an expansive scope of coverage provided by CGL policies. Before that time, the wide-ranging consensus was that “[t]he coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss.” Roger C.

Henderson, Insurance Protection for Products Liability and Completed Operations—

project were completed by the subcontractors—who “perform[ed] most of the work”—court held that damage to the completed project did “not constitute an occurrence under a CGL policy”). Focusing on the definition of “occurrence” does not explain how that definition excludes coverage ab initio for fortuitous damage caused by faulty subcontractor work. Clearly, general contractors intend for subcontractors to complete their work, but they do not generally intend or anticipate that subcontractors will complete their work in a faulty manner, which later results in damage to the completed project. Moreover, any damage caused by subcontractor work that the insured “intended” or “expected” is already excluded under the standard CGL policy, which undermines the position that finding coverage in these types of cases provides general contractors with an incentive to render shoddy construction work. See, e.g., ISO Policy Form Number CG 00 01 07 98, exclusion a. (“This insurance does not apply to ‘[b]odily injury’ or ‘property damage’ expected or intended from the standpoint of the insured.” (emphasis supplied; internal division omitted)).

-What Every Lawyer Should Know, 50 Neb. L. Rev. 415, 441 (1971). As I began my analysis of this case, that guiding principle directed my attention; however, it has become apparent that the insurance industry itself began to undermine that consensus, and maybe intentionally, in 1976 when it introduced the Broad Form Property Damage Endorsement ("BFPDE"), which altered the then-existing "your-work" exclusions. Specifically, the BFPDE extended coverage to general-contractor insureds for property damage caused by the work of their subcontractors, and decisions report that the industry has specifically acknowledged as much in its own publications. See, e.g., Md. Cas. Co. v. Reeder, 270 Cal. Rptr. 719, 725 (Cal. Ct. App. 1990) ("[T]he ISO explains the broad form endorsement is intended to 'exclud[e] only damages caused by the named insured to his own work. Thus, . . . [t]he insured would have coverage for damage to his work arising out of a subcontractor's work [and] [t]he insured would have coverage for damage to a subcontractor's work arising out of the subcontractor's work.' " (emphasis supplied)); see also James T. Hendrick & James P. Wiesel, The New Commercial General Liability Forms – An Introduction and Critique, 36 Fed'n Ins. & Corp. Couns. Q. 319, 360 (1986); National Underwriter Co., Fire, Casualty & Surety Bulletins, Public Liability Aa 16-17 (1993) ("FC&S Bulletin").

It appears that in 1986, the Insurance Services Office ("ISO") issued the fifth major revision of the standard CGL policy form. 9A Russ & Segalla, supra §

129:1. As part of that revision, the ISO lifted the extended coverage provided by the BFPDE and directly incorporated it into the standard CGL policy in the form of the so-called subcontractor exception to the your-work exclusion. See 21 Eric Mills Holmes, Holmes' Appleman on Insurance § 132.9, 152-53 (2d ed. 2002). As a direct result, the insurance industry continued to expand coverage for unintentional, contractual damages caused by subcontractors to the contractor-insured's completed project. See, e.g., FC&S Bulletin Aa 16-17 (explaining that the ISO intended this exception to the your-work exclusion to provide coverage for damages caused to the insured-contractor's completed work by the defective work of its subcontractors).¹³

Therefore, the scope of CGL policies has apparently been expanded to the extent that a CGL policy, which includes the subcontractor exception to the your-

13. I represent a prime exponent that CGL policies were originally intended solely to cover damages that the insured's operations caused to third parties' persons or property. However, there is substantial evidence, which I and the majority have noted, that the insurance industry itself altered this original intent by extending coverage—albeit in a convoluted fashion—to insureds for fortuitous damage caused to their completed projects by faulty subcontractor work. Opinions that hold otherwise regarding standard-form post-1986 CGL policies do not address the evidence in this and other more recent CGL cases, which indicates that this extension of coverage, while inartfully executed, is exactly what the parties have accomplished—and intended to accomplish—by altering the your-work exclusions to no longer exclude the type of coverage disputed in these cases. The law requires that we rely on the plain language of the policy's coverage provision, the ambiguity of the exclusions, and the ample evidence of the parties' intent to support the proposition that the policy does not clearly exclude otherwise-present coverage for fortuitous damage caused by faulty subcontractor work.

work exclusion, is in operation actually now the equivalent of a warranty or product coverage that affords protection for the contractors' product and work.¹⁴ Cf. Stempel, supra § 14.13[B], at 14-216 ("Performance bonds and CGL policies serve different purposes. The performance bond ensures against claims for defective workmanship while the CGL insures for personal injury claims based on acts or omissions of the policyholder. Courts are wary of permitting claimants or policyholders to receive CGL policy proceeds for what functionally are claims of defective construction" (emphasis supplied)). It bears repeating, however, that traditional CGL policies were initially designed and intended to cover only tort liability for injuries sustained by third parties or their property, not contractual liability for products that fail to live up to the buyer's expectations.¹⁵ Moreover,

14. With the increasing probability that current construction practices will result in construction projects entirely completed by subcontractors, many distinctions between work and product protection and CGL policies that include the subcontractor exception may have disappeared. The majority is correct that the owner-obligee is the direct beneficiary under a performance-bond type protection, but the same functional situation obtains when a disappointed owner sues a general contractor, who then requests coverage from its CGL insurer; the owner becomes the beneficiary of the CGL policy. This too is counter to CGL policies' original function, which was to provide tort-liability coverage for injuries caused to third parties' persons and property. However, this result appears to have been the intent of the parties due to the words of the contract and other supporting evidence.

15. Insurers attempt to draft coverage language with a degree of precision. Liability insurance is intended to insure the policyholder against the consequences of third-party claims, while other types of insurance have traditionally insured against different types of risks. "To maintain this division of labor or compartmentalization, insurers draft liability policies with an eye toward

ostensibly expanding the scope of coverage by altering the exclusions and exceptions present in a CGL policy, instead of amending the coverage grant, is counterintuitive from a policy or contract interpretation standpoint, but again, these changes were the result of the deliberate efforts of the insurance industry.

I find this tortuous, indirect melding of the characteristics of different types of insurance coverages, performance bonds, and warranty-type protection to be somewhat inconsistent and inappropriate. However, if the insurance industry now seeks to place blame or fault for the current conditions, it need only look in the mirror: the industry has been a force in producing this apparent confusion, not the insureds and not the courts. The ISO appears to have begun the clean-up process by providing an endorsement to the standard post-1986 CGL policy, which eliminates the subcontractor exception to the your-work exclusion. See, e.g., Lamar Homes, Inc. v. Mid-Continent Cas. Co., No. 05-0832, 50 Tex. Sup. Ct. J. 1162, 1168, 2007 WL 2459193, at *7 (Tex. Aug. 31, 2007). The true resolution to a continuing saga of litigation “of words,” however, is clarity of terms in all aspects of contract and policy preparation. The stacking of endorsements upon endorsements upon endorsements may or may not be the answer. Unfortunately, I suspect the latter.

preventing policyholders from obtaining first-party type protections from their liability insurance or converting their liability insurance into protection from nonfortuitous losses such as claims based on poor business operations.” Stempel, supra § 14.13, at 14-211.

Application for Review of the Decision of the District Court of Appeal - Direct
Conflict of Decisions

Second District - Case No. 2D03-134

(Lee County)

Ronald L. Kammer and Sina Bahadoran of Hinshaw and Culbertson, LLP, Miami, Florida; June Galkoski Hoffman of Fowler, White, and Burnett, P.A., Miami, Florida; Joseph R. Miele, Jr. of Marshall, Dennehey, Warner, Coleman, and Goggin, Fort Lauderdale, Florida; and Donna M. Greenspan of Edwards, Angell, Palmer and Dodge, LLP, West Palm Beach, Florida,

for Petitioners

Mark A. Boyle, Sr., Michael G. Fink and Geoffrey H. Gentile, Sr. of Fink and Boyle, P.A., Fort Myers, Florida,

for Respondents

Denise V. Powers, Coral Gables, Florida, on behalf of National Association of Mutual Insurance Companies; William D. Horgan of Fuller, Johnson, and Farrell, P.A., Tallahassee, Florida, on behalf of Complex Insurance Claims Litigation Association; Pamela A. Chamberlin of Mitrani, Rynor, and Adamsky, P.A., Miami, Florida, on behalf of Mid-Continent Casualty Company; John Bond Atkinson, Rebecca A. Brownell, and Ellie A. Levy of Atkinson and Brownell, P.A., Miami, Florida, and Shaun McParland Baldwin and Donald E. Elder of Tressler, Soderstrom, Maloney and Priess, Chicago, Illinois, on behalf of Amerisure Mutual Insurance Company; Perry N. Bass, Houston, Texas, and Christopher W. Martin and Levon G. Hovnatanian of Martin, Disiere, Jefferson and Wisdom, LLP, Houston, Texas, on behalf of Hartford Fire Insurance Company; and David K. Miller and Ginger L. Barry of Broad and Cassel, Tallahassee, Florida, and Keith Hetrick, Florida Home Builders Association, Tallahassee, Florida, and R. Hugh Lumpkin and Michael F. Huber of Ver Ploeg and Lumpkin, P.A., Miami, Florida, on behalf of Florida Home Builders Association, National Association of Home Builders, Arvida/JMB Partners, L.P., Arvida Managers, Inc., Arvida/JMB Management, L.P. and Mercedes Home Corporation; Warren H. Husband of Metz, Husband, and Daughton, P.A., Tallahassee, Florida, and Patrick J. Wielinski of Cokinos, Bosien, and Young,

P.C., Arlington, Texas, on behalf of Associated General Contractors of America, Florida Associate General Contractors Council, Inc., the Associated General Contractors of Greater Florida, Inc., South Florida Chapter of the Associated General Contractors, Florida East Coast Chapter of the Associated General Contractors of America, Inc., American Subcontractors Association, Inc., and American Subcontractors of Florida, Inc.; Stephen A. Marino, Jr. of Ver Ploeg and Lumpkin, P.A., Miami, Florida, on behalf of the Academy of Florida Trial Lawyers; Duane A. Daiker and Steven G. Schember of Shumaker, Loop, and Kendrick, LLP, Tampa, Florida, on behalf of Amwest Surety Insurance Company; Daniel J. Santaniello and Paul Stephen Jones of Luks, Santaniello, Perez, Petrillo, and Gold, Orlando, Florida, James P. Waczewski of Luks, Santaniello, Perez, Petrillo and Gold, Tallahassee, Florida, and Joseph L. Oliva of Oliva and Associates, ALC, San Diego, California, on behalf of Poole and Kent Company,

As Amici Curiae



NAHB
NATIONAL ASSOCIATION
OF HOME BUILDERS



ADVOCACY GROUP
Construction Liability & Legal Research Department

November 14, 2007

Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Auto owners v. Newman, Virginia

Dear Mr. Shearouse:

This letter is in response to your letter dated September 17, 2007 advising that as counsel of record for amicus curiae National Association of Home Builders and Home Builders Association of South Carolina in the above entitled matter I must make a motion to be admitted pro hac vice if I wish to make an appearance in this case since I am not admitted to practice law in South Carolina.

Please consider this letter notice to the Supreme Court of South Carolina that I will not be making an appearance in this matter and therefore respectfully decline the invitation to be admitted pro hac vice. Kenneth E. Ormand, Jr. will remain counsel of record for the National Association of Home Builders and the Home Builders Association of South Carolina in this matter.

I certify that on this 14th day of November, 2007, a copy of this letter was mailed to all counsel of record by depositing same in the U.S. mail, certified receipt and addressed as follows:

John L. McCants, Esq.
Ellis, Lawhorne & Sims, P.A.
1501 Main Street, 5th Floor
Post Office Box 2285
Columbia, SC 29202

Michael S. Seekings
Amy E. Melvin
Leath, Bouch, & Crawford, LLP
92 Broad Street
P.O. Box 59
Charleston, SC 29402

RECEIVED
NOV 14 2007

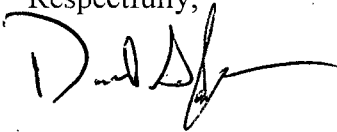
S.C. Supreme Court
Clerk of Court

Joseph K. Qualey
Qualey Law Firm, P.A.
23 Broad Street
Charleston, SC 29401

Frank M. Cisa
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, South Carolina 29464

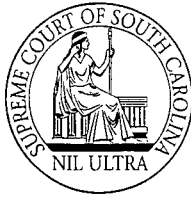
George E. Mullen
Daniel F. Oberklein
Mullen Wylie, LLC
70 Arrow Road, Suite 1
Post Office Box 5969
Hilton Head Island, South Carolina 29938

Respectfully,

A handwritten signature in dark ink, appearing to read "David S. Jaffe", with a long horizontal flourish extending to the right.

David S. Jaffe
Staff Vice President, Legal Affairs
National Association of Home Builders

cc: Kenneth E. Ormand, Jr.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 16, 2007

David S. Jaffe, Esquire
National Association of Home
Builders
1201 15th Street, N.W.
Washington, DC 20005

Re: Auto Owners v. Newman, Virginia

Dear Mr. Jaffe:

On September 19, 2007, you were advised that it would be necessary for you to be admitted pro hac vice before you could make an appearance in this matter.

We have not received a motion to be admitted pro hac vice from you, therefore, you will not be listed as counsel for the Amicus Curiae National Association of Home Builders and Home Builders Association of South Carolina.

Very truly yours,

Daniel E. Shearouse
CLERK

DES/jjp

cc: John L. McCants, Esquire

Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire

ORMAND, ASHLEY & GIBBONS, P.A.
ATTORNEYS AND COUNSELORS AT LAW
625 Taylor Street, 2nd Floor
Columbia, South Carolina 29201

Kenneth E. Ormand Jr.
Robert C. Ashley
Carlos W. Gibbons, Jr.

Mailing Address: Post Office Box 8657
Columbia, South Carolina 29202
Telephone: (803) 254-4220
General Facsimile: (803) 254-0348
Sender's Facsimile: (803) 736-7334

November 13, 2007

HAND-DELIVERED

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

RECEIVED

NOV 13 2007

S.C. SUPREME COURT

Re: Auto-Owners Insurance Co., Inc. v.
Virginia T. Newman and Trinity Construction, Inc.;
Trial Court Case No: 2002-CP-10-4390

Dear Mr. Shearouse:

In connection with the above-referenced matter, enclosed please find the Original and fourteen bound copies of Amended Amicus Curiae Brief of National Association of Home Builders and Home Builders Association of South Carolina for filing in the above-referenced matter. This revised brief reflects the changes requested by you in your letter of September 26, 2007, deleting the attachments to the brief.

We would appreciate your filing the original and returning a file-stamped copy to us with the courier who delivers this package.

By copy of this letter each counsel of record is being provided with three copies of the revised brief. If you have any questions, please do not hesitate to contact me at the above number.

Sincerely,

ORMAND, ASHLEY & GIBBONS

By: Kenneth E. Ormand, Jr.

KEOjr/tm
Encl.

cc: Frank M. Cisa, Esquire
David S. Jaffe, Esquire
John L. McCants, Esquire
George E. Mullen, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: John L. McCants, Esquire
From: Daniel E. Shearouse
Date: November 14, 2007
RE: January Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the January 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of January 8, 9, 10, 22 and 23, 2008. Please notify this office in writing prior to November 21, 2007 as to any scheduling conflicts for the January term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Joseph K. Qualey, Esquire
From: Daniel E. Shearouse
Date: November 14, 2007
RE: January Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the January 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of January 8, 9, 10, 22 and 23, 2008. Please notify this office in writing prior to November 21, 2007 as to any scheduling conflicts for the January term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
From: Daniel E. Shearouse
Date: November 14, 2007
RE: January Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the January 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of January 8, 9, 10, 22 and 23, 2008. Please notify this office in writing prior to November 21, 2007 as to any scheduling conflicts for the January term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Frank M. Cisa, Esquire
From: Daniel E. Shearouse
Date: November 14, 2007
RE: January Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the January 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of January 8, 9, 10, 22 and 23, 2008. Please notify this office in writing prior to November 21, 2007 as to any scheduling conflicts for the January term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
From: Daniel E. Shearouse
Date: November 14, 2007
RE: January Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the January 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of January 8, 9, 10, 22 and 23, 2008. Please notify this office in writing prior to November 21, 2007 as to any scheduling conflicts for the January term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

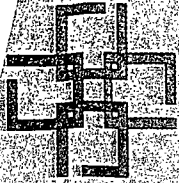
P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Kenneth E. Ormand, Jr., Esquire
From: Daniel E. Shearouse
Date: November 14, 2007
RE: January Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the January 2008 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of January 8, 9, 10, 22 and 23, 2008. Please notify this office in writing prior to November 21, 2007 as to any scheduling conflicts for the January term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



MULLEN WYLIE

A T T O R N E Y S

RECEIVED

NOV 07 2007

S.C. SUPREME COURT

November 6, 2007

70 Arrow Road

P.O. Box 5969

Hilton Head Island, SC 29938

Phone: (843) 785-6969

Fax: (843) 785-6711

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: *Auto Owners Ins. Co. v. Newman et al.*
Civil Action No. 2002-CP-10-4390

Dear Mr. Shearouse:

I am writing pursuant to Rule 208(b)(7), SCACR, to provide the Court with a citation of supplemental authority in support of the Amicus Curiae Brief filed by South Carolina Community Associations Institute in the above-referenced matter. The recent decision of the Supreme Court of Texas in *Lamar Homes, Inc. v. Mid-Continent Casualty Company*, No. 05-0832, 2007 Tex. LEXIS 797, 50 Tex. Sup. J. 1162 (August 31, 2007), supports the argument, contained on pages 21 through 24 of the Amicus Brief, that the greater weight of authority, particularly among recent decisions, recognizes that continuous and repeated exposure to harmful conditions caused by faulty workmanship constitutes an "occurrence" even when the only damage is to the contractor's work product itself.

George E. Mullen

Robert L. Wylie IV

Francis E. Grimball

James E. Lady

Glynn L. Capell

Paige Fowler Bellamy

Arthur T. Meeder

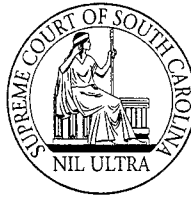
Daniel F. Oberklein

Sincerely yours,

MULLEN WYLIE LLC

Daniel F. Oberklein

cc: John L. McCants, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Frank M. Cisa, Esquire
Kenneth E. Ormand, Jr., Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 2, 2007

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

Frank M. Cisa, Esquire
Cisa & Dodds, L.L.P.
622 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29465

Joseph K. Qualey, Esquire
Qualey & Beck, P.A.
23 Broad Street
Charleston, SC 29401

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath, Bouch & Crawford, LLP'
P O Box 59
Charleston, SC 29402

Re: Auto Owners v. Newman, Virginia

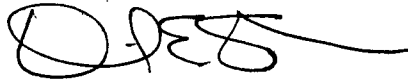
Dear Counsel:

When the roster for the December 2007 term of Court was prepared, the above referenced case was not scheduled. Our records indicate that you are counsel of record in this case.

John L. McCants, Esquire
Re: Auto Owners v. Newman, Virginia
November 2, 2007
Page two

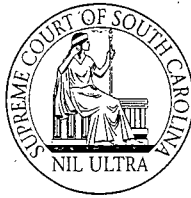
This case will be placed on the January 2008 Preliminary List of Cases. Court will meet the days of January 8, 9, 10, 22 and 23, 2008.

Very truly yours,


CLERK

DES/jjp

cc: George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 25, 2007

Kenneth E. Ormand, Jr., Esquire
Ormand, Ashley & Gibbons, P.A.
P.O. Box 8657
Columbia, SC 29202

Re: Auto Owners v. Newman, Virginia

Dear Mr. Ormand:

On September 26, 2007, you were advised that the Amicus Curiae Brief of National Association of Home Builders and Home Builders Association of South Carolina filed by you contained attachments in the back of the brief that needed to be removed by October 10, 2007. The brief still has not been corrected.

This case is ready to be heard by the Court and we are sending the records to the Members of the Court next week. Your brief will not be given to the Court unless it is corrected.

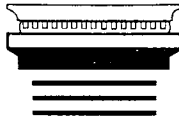
You are also advised that David S. Jaffe, Esquire is not listed as counsel in this matter as he has not been admitted pro hac vice.

Very truly yours,

CLERK

DES/jjp

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
David S. Jaffe, Esquire



LEATH, BOUCH & CRAWFORD LLP
PRACTICE LIMITED TO COMMERCIAL LITIGATION & CREDITORS RIGHTS
WITH EMPHASIS ON CONSTRUCTION & ENVIRONMENTAL LAW

RECEIVED

October 22, 2007

OCT 24 2007

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

S.C. SUPREME COURT

RE: Auto Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 2002-CP-10-4390

Dear Mr. Shearouse:

I will be arguing the above-referenced case on behalf of the Respondent. I am in receipt of your letter regarding the December Preliminary List and hearing dates. Unfortunately, I have a scheduling conflict during those dates. I am running in a Marathon in Nevada, for which I have been training for six months. I made my travel reservations in March of this year, and have enclosed a copy for your file. Accordingly, I respectfully request that the hearing be continued until the next term of court.

By copy of this correspondence, I am informing all parties of interest of the conflict. If you have any questions or concerns, please do not hesitate to call my office.

Yours truly,

LEATH, BOUCH & CRAWFORD, LLP

Michael S. Seekings

MSS/am

Enclosures

cc (w/o enc.): John L. McCants, Esq.

Frank M. Cisa, Esq.

George Mullen, Esq.

Daniel Soberklein, Esq.

Joseph Qualey, Esq.

Kenneth E. Ormand, Jr., Esq.

David S. Jaffe, Esq.



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

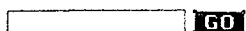
P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
From: Daniel E. Shearouse
Date: October 19, 2007
RE: December Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the December 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of December 4, 5 and 6, 2007. Please notify this office in writing prior to October 26, 2007 as to any scheduling conflicts for the December term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



Welcome MICHAEL SEEKINGS : 99,661 | Log Out


[Book travel](#) | [Dividend Miles](#) | [Specials](#) | [Travel tools](#) | [About US](#)
**Travel tools**

[Web Check-in](#)
[Manage reservations](#)
[Flight status & schedules](#)
[At the airport](#)
[In the air](#)
[Baggage](#)
[Mobile US Airways](#)
[Policies & special needs](#)
[Products & services](#)
[Cargo](#)
[US Airways Club](#)

Need Help?

[Live Help! Chat With an Agent](#)
[Email us](#)
[Call us 800-428-4322](#)

Home > Travel tools > Manage reservations > **managespecificres**

View a printer friendly version

Manage My Reservation

Please note: Our 24-hour Reservations Desk is always available to assist you over the phone. If you have any questions regarding your reservation, please call our 24-hour Reservations Desk at 1-800-428-4322.

We're sorry, but we are unable to modify the itinerary for this reservation online. To modify this reservation, please call our 24-hour Internet Help Desk at 1-800-327-7810.

Confirmation EJHR5T**Date Issued** 3/4/2007**Form of Payment** Visa ****-****-****-2092**Grand Total** \$2,003.18**Unflown Value** \$2,003.18

- ▶ [Make a Hotel Reservation](#)
- ▶ [Make a Car Reservation](#)
- ▶ [View Online Reservations](#)
- ▶ [Email Reservation](#)
- ▶ [Download Reservation to Outlook](#)

Passenger Information [change](#)

Party of (2)	Dividend Miles #	Ticket #	Seats change
MICHAEL SEEKINGS	1781610	03721300507293	4A, 2A, 2A, 2A
MICHELEH SEEKINGS	6C897M0	03721300507326	4C, 2C, 2C, 2C

Contact Information

Contact Name	Day Phone	Destination Phone
MICHAEL SEEKINGS	(843) 853-5353	

Passenger Itinerary

Depart	Arrive	Flight # and Details		
11:20 AM 01 Dec 2007 Charleston, SC	12:23 PM 01 Dec 2007 Charlotte, NC	Flight: 2617 Class: Coach	M Canadair Regional Jet 900 On-Time: 90-100%	Meal: None Travel Time: 1 h 3 m
1:15 PM 01 Dec 2007 Charlotte, NC	3:08 PM 01 Dec 2007 Las Vegas, NV	Flight: 780 Class: First	Boeing 757-200 On-Time: 70-80%	Meal: Lunch Travel Time: 4 h 53 m
7:45 AM 05 Dec 2007 Las Vegas, NV	2:48 PM 05 Dec 2007 Charlotte, NC	Flight: 1504 Class: First	Boeing 757-200 On-Time: 70-80%	Meal: Breakfast Travel Time: 4 h 3 m
4:30 PM 05 Dec 2007 Charlotte, NC	5:33 PM 05 Dec 2007 Charleston, SC	Flight: 1254 Class: First	Boeing 737-300 On-Time: 80-90%	Meal: None Travel Time: 1 h 3 m
M Flight operated by Mesa Airlines doing business as US Airways Express				
Summary (2 Passengers)				
Base Fare				\$1,800.92
Taxes and Fees				\$202.26
Grand Total				\$2,003.18

Terms and Conditions

- We're sorry, the Terms and Conditions for this reservation cannot be displayed at this time. Please contact the Internet Support team at 800-327-7810 with questions regarding your reservation.

Travel Tips

January 23, 2007: All U.S. citizens (including infants and children) must have a valid passport to travel to and from Bermuda, Canada, Mexico, Central and South America, and the Caribbean (excluding Puerto Rico and the U.S. Virgin Islands). You need a valid passport to re-enter the U.S. This information applies to Canadian...

LEATH BOUCH & CRAWFORD, LLP
92 BROAD STREET
CHARLESTON, SC 29401
PHONE (843) 937-8811
FAX (843) 937-0606

FACSIMILE TRANSMITTAL SHEET

TO: The Honorable Daniel E. Shearhouse
South Carolina Supreme Court
803-734-1499

FROM: Michael S. Seekings, Esq.

RE: Auto Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 2002-CP-10-4390

TOTAL NUMBER OF PAGES (INCLUDING THIS SHEET): 4

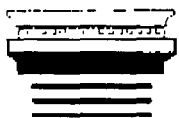
DATE TRANSMITTED October 22, 2007

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

THIS FACSIMILE MESSAGE IS CONFIDENTIAL. IT IS INTENDED SOLELY FOR THE USE OF THE INDIVIDUAL NAMED BELOW. IF YOU ARE NOT THE INTENDED RECIPIENT, OR THE PERSON RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY ADVISED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS PROHIBITED. IF YOU HAVE RECEIVED THIS FACSIMILE MESSAGE IN ERROR, PLEASE IMMEDIATELY NOTIFY THE SENDER BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO THE SENDER BY U.S. MAIL.

NOTES/COMMENTS:

RECEIVED
OCT 22 2007
S.C. SUPREME COURT

**LEATH, BOUCH & CRAWFORD LLP**PRACTICE LIMITED TO COMMERCIAL LITIGATION & CREDITORS RIGHTS
WITH EMPHASIS ON CONSTRUCTION & ENVIRONMENTAL LAW

October 22, 2007

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RE: Auto Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 2002-CP-10-4390

Dear Mr. Shearouse:

I will be arguing the above-referenced case on behalf of the Respondent. I am in receipt of your letter regarding the December Preliminary List and hearing dates. Unfortunately, I have a scheduling conflict during those dates. I am running in a Marathon in Nevada, for which I have been training for six months. I made my travel reservations in March of this year, and have enclosed a copy for your file. Accordingly, I respectfully request that the hearing be continued until the next term of court.

By copy of this correspondence, I am informing all parties of interest of the conflict. If you have any questions or concerns, please do not hesitate to call my office.

Yours truly,

LEATH, BOUCH & CRAWFORD, LLP

Michael S. Seekings

MSS/am

Enclosures

cc (w/o enc.): John L. McCants, Esq.
Frank M. Cisa, Esq.
George Mullen, Esq.
Daniel Soberklein, Esq.
Joseph Qualey, Esq.
Kenneth E. Ormand, Jr., Esq.
David S. Jaffe, Esq.

RECEIVED
OCT 22 2007
S.C. SUPREME COURT



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
From: Daniel E. Shearouse
Date: October 19, 2007
RE: December Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the December 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of December 4, 5 and 6, 2007. Please notify this office in writing prior to October 26, 2007 as to any scheduling conflicts for the December term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia

ELLIS:LAWHORNE

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

RECEIVED

OCT 22 2007

October 19, 2007

S.C. SUPREME COURT

Via Runner

The Honorable Daniel E. Shearouse
Clerk of Court, Supreme Court
John C. Calhoun Building
1015 Sumter Street
Columbia, South Carolina

RECEIVED

OCT 19 2007

SC Court of Appeals

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

Dear Mr. Shearouse:

Enclosed are an original and fourteen copies of Appellant's Statement in Response to Amicus Curiae Brief of the National Association of Home Builders and Home Builders Association of South Carolina for filing in the referenced matter. Please return a clocked copy of the same to us via our runner.

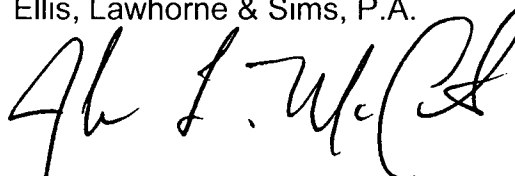
By copy of this letter, counsel of record are each being provided with three copies of the Statement.

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

With warm personal regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.



John L. McCants

JLM/ssh

cc: Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
George E. Mullen, Esquire
Michael S. Seekings, Esquire
Kenneth E. Ormand, Jr., Esquire
David S. Jaffe, Esquire

Enclosures

Ellis, Lawhorne & Sims, P.A., Attorneys at Law

1501 Main Street, 5th Floor ■ PO Box 2285 ■ Columbia, South Carolina 29202 ■ 803 254 4190 ■ 803 779 4749 Fax ■ ellislawhorne.com



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

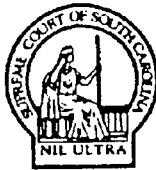
P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO 734-1080

To: George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
From: Daniel E. Shearouse
Date: October 19, 2007
RE: December Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the December 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of December 4, 5 and 6, 2007. Please notify this office in writing prior to October 26, 2007 as to any scheduling conflicts for the December term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
From: Daniel E. Shearouse
Date: October 19, 2007
RE: December Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the December 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of December 4, 5 and 6, 2007. Please notify this office in writing prior to October 26, 2007 as to any scheduling conflicts for the December term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: John L. McCants, Esquire
From: Daniel E. Shearouse
Date: October 19, 2007
RE: December Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the December 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of December 4, 5 and 6, 2007. Please notify this office in writing prior to October 26, 2007 as to any scheduling conflicts for the December term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Frank M. Cisa, Esquire
From: Daniel E. Shearouse
Date: October 19, 2007
RE: December Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the December 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of December 4, 5 and 6, 2007. Please notify this office in writing prior to October 26, 2007 as to any scheduling conflicts for the December term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Joseph K. Qualey, Esquire
From: Daniel E. Shearouse
Date: October 19, 2007
RE: December Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the December 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of December 4, 5 and 6, 2007. Please notify this office in writing prior to October 26, 2007 as to any scheduling conflicts for the December term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

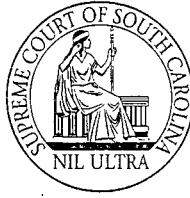
P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Kenneth E. Ormand, Jr., Esquire
From: Daniel E. Shearouse
Date: October 19, 2007
RE: December Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the December 2007 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of December 4, 5 and 6, 2007. Please notify this office in writing prior to October 26, 2007 as to any scheduling conflicts for the December term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Auto Owners v. Newman, Virginia



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 26, 2007

Kenneth E. Ormand, Jr., Esquire
Ormand, Ashley & Gibbons, P.A.
P.O. Box 8657
Columbia, SC 29202

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

We have noticed that the Amicus Curiae Brief of National Association of Home Builders and Home Builders Association of South Carolina filed by you in the above matter contains Attachment A and Attachment B in the back of the brief. Please be advised that there it will be necessary for you to remove this material as there is no authority to include an attachment in a brief.

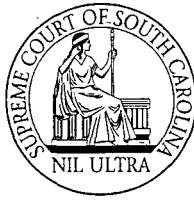
Please correct the brief by October 10, 2007.

Very truly yours,

Brenda F. Shealy
CHIEF DEPUTY CLERK

DES/jjp

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 19, 2007

David S. Jaffe, Esquire
National Association of Home
Builders
1201 15th Street, N.W.
Washington, DC 20005

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

This office has received the Amicus Curiae Brief of National Association of Home Builders and Home Builders Association of South Carolina in the above entitled matter. It reflects that you are counsel of record for the amicus curiae in this matter. Since you are not admitted to practice law in South Carolina, you must be admitted pro hac vice by this Court before you may make an appearance in this matter, Rule 404, SCACR.

If you desire to appear as counsel in this matter, the South Carolina counsel with whom you will be associated must make a motion to have you admitted pro hac vice. The motion should comply with the requirements of Rule 224, SCACR, to include a filing fee of \$25.00. Additionally, the motion should be accompanied by an original and a copy of the completed application form required by Rule 404, to include the \$250.00 filing fee and any required attachments. This office will insure that a copy of the application form and the filing fee are provided to the Office of Bar Admissions.

David S. Jaffe, Esquire
Re: Auto Owners v. Newman, Virginia
September 19, 2007
Page two

The motion should be filed in this office and served on opposing counsel within thirty days of the date of this letter. I have enclosed a copy of Rule 404 and the application form.

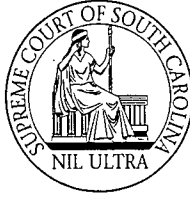
Very truly yours,

Daniel E. Shevouse
CLERK

DES/jjp

Enclosures (2)

cc: Kenneth E. Ormand, Jr., Esquire
John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 19, 2007

Kenneth E. Ormand, Jr., Esquire
Ormand, Ashley & Gibbons, P.A.
P.O. Box 8657
Columbia, SC 29202

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

The following Order has been endorsed on your Motion for Leave to File Amicus Curiae Brief on behalf of National Association of Home Builders and Home Builders Association of South Carolina in the above entitled case on appeal.

"Motion for leave to file
amicus curiae is granted.

s/ Jean H. Toal C.J.
For the Court

September 19, 2007."

We have received your amicus curiae brief and it has been filed as of this date. By copy of this letter, other counsel in this matter are advised that any response to the amicus brief should be served and filed no later than October 19, 2007.

Very truly yours,

Daniel E. Shearouse
CLERK _{LS}

DES/jjp

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire

ORMAND, ASHLEY & GIBBONS, P.A.
ATTORNEYS AND COUNSELORS AT LAW
625 Taylor Street, 2nd Floor
Columbia, South Carolina 29201

Kenneth E. Ormand Jr.
Robert C. Ashley
Carlos W. Gibbons, Jr.

Mailing Address: Post Office Box 8657
Columbia, South Carolina 29202
Telephone: (803) 254-4220
General Facsimile: (803) 254-0348
Sender's Facsimile: (803) 736-7334

August 30, 2007

HAND-DELIVERED

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

RECEIVED

AUG 31 2007

Re: Auto-Owners Insurance Co., Inc. v.
Virginia T. Newman and Trinity Construction, Inc.;
Trial Court Case No: 2002-CP-10-4390

S.C. SUPREME COURT

Dear Mr. Shearouse:

In connection with the above-referenced matter, enclosed please find the Original and seven copies of Motion of National Association of Home Builders and Home Builders Association of South Carolina for Leave to File Amicus Curiae Brief, with brief attached, with an original and one copy of a Proof of Service for each.

We would appreciate your filing the originals and returning a file-stamped copy of each to us with the courier who delivers this package. Thank you.

Also find our check for \$25.00 to cover the filing fee.

Sincerely,

ORMAND, ASHLEY & GIBBONS

By: Kenneth E. Ormand, Jr.

KEOJr/tm
Encl.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
B. Hicks Harwell, Jr., Circuit Court Judge

RECEIVED

AUG 31 2007

Trial Court Case No. 2002-CP-10-4390

S.C. SUPREME COURT

Auto-Owners Insurance Co., Inc., ...Appellant,

v.

Virginia T. Newman and
Trinity Construction, Inc., ...Respondents.

**MOTION OF NATIONAL ASSOCIATION OF
HOME BUILDERS AND HOME BUILDERS
ASSOCIATION OF SOUTH CAROLINA
FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

Kenneth E. Ormand, Jr.
Ormand, Ashley & Gibbons, P.A.
625 Taylor Street, 2nd Floor
Columbia, South Carolina 29202
Tel: (803) 254-4220
Fax: (803) 254-0348

David S. Jaffe
National Association of Home Builders
1201 15th Street, N.W.
Washington, DC 20005
Tel: (202) 266-8317
Fax: (202) 266-8161

*Counsel for Amicus Curiae National Association of Home Builders
and Home Builders Association of South Carolina*

The National Association of Home Builders ("NAHB") and the Home Builders Association of South Carolina ("HBASC") respectfully move this Court for leave to file the enclosed "Brief of Amicus Curiae National Association of Home Builders and Home Builders Association of South Carolina.

The "occurrence" issue presented in this appeal is extremely important to homebuilders and other policyholders. As amicus curiae, NAHB and HBASC would inform this Court of the importance of liability insurance in the home building industry, of the significance of the "occurrence" issue to insurance coverage for home builders, of relevant precedent decided by this Court, and of recent developments in the case law of various other states that have concluded that a general liability insurance policy's "occurrence" requirement is met by facts similar to those in this case. NAHB and HBASC were permitted to file an amicus brief by this Court in L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 621 S.E.2d 33 (S.C. 2005), which presented an "occurrence" issue similar to the one at issue in the instant appeal.

NAHB and HBASC respectfully request that the Court accept their brief for filing in light of:

- The lack of prejudice to the parties, since oral argument has not yet been scheduled.
- The fact that under this Court's rules the appellant insurer will be permitted to answer the amicus brief within a time specified by the Court.
- The importance of the insurance coverage issue in this case to builders in South Carolina.

- The varying holdings of the federal and state courts in South Carolina applying the L-J decision on the “occurrence” issue. These decisions include the federal district court’s recent decision in Builders Mut. Ins. Co. v. The Burton Company, Inc., 2007 WL 2284576 (D.S.C. Aug. 7, 2007), in which the federal district court certified to this Court the same occurrence issue as is presented in the instant case.

NAHB represents the nation's home builders. NAHB is a nonprofit trade association that has 235,000 builder and associate members organized into approximately 800 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. These affiliated associations include 20 state and local associations in South Carolina. NAHB's goals are to promote home ownership; to foster a healthy and efficient housing industry; and to promote policies that will keep safe, decent, and affordable housing a national priority. Its members construct over 80% of the housing in the United States. NAHB's website address is "www.nahb.org."

HBASC is the largest association of residential construction entities in South Carolina affected by the Court’s decision in this matter. Its website is at www.hbaofsc.com. HBASC has approximately 6,000 members consisting primarily of contractors, subcontractors, developers and other related occupations that build and develop houses, apartments, and condominiums for residential use in South Carolina. HBASC believes that the vast majority of construction for residential use in South Carolina is performed in whole or in part by its members. HBASC speaks for the homebuilders in South Carolina. HBASC is at the forefront in monitoring legislation

and legal developments that affect the home building industry in South Carolina. For example, HBASC works with state and local communities in the implementation of building codes to ensure that the codes provide for safe, affordable housing for the residents of South Carolina.

NAHB and HBASC can offer this Court a broad view of (i) the role that liability insurance plays within the home building industry, (ii) the evolution of the standard general liability policy to include damage to the builder's work caused by subcontractors, (iii) the lack of justification for the retrenchment of coverage that the insurer is seeking in this case, and (iv) the disruptive effect that the insurer's position would have on South Carolina home builders and South Carolina homeowners alike.

In particular, in their amicus curiae brief NAHB and HBASC urge this Court to affirm the ruling of the trial court that the property damage at issue resulted from an "occurrence" within the meaning of the builder's general liability insurance policy. The insurer's position would rewrite the liability insurance policies of builders throughout South Carolina, and it would erroneously deprive builders of insurance coverage for inadvertent construction defects resulting in property damage that was caused by the work of subcontractors and that was neither expected nor intended by the builder.

Builders have been insured for such property damage since at least 1986, when an exclusion in the standard liability insurance policy for property damage to "your work" was amended to except from the exclusion property damage to the house itself (the builder's "work") caused by the work of a subcontractor. The insurer's position on the "occurrence" issue seeks effectively to eliminate such insurance for property damage to

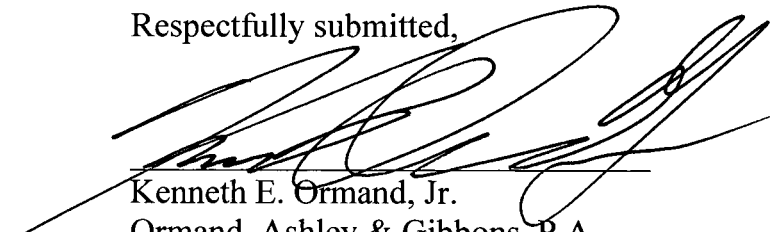
the house or other structure caused by subcontractors by arguing that property damage to the structure itself can never be covered because such damage can never satisfy the insurance policy's "occurrence" requirement. The insurer's position would render meaningless the subcontractor exception to the "your work" exclusion -- in violation of bedrock principles of insurance policy interpretation. Numerous courts around the country have rejected the arguments that the insurer is making in this case.

Conclusion

For these reasons, NAHB and HBASC respectfully request that (i) their motion for leave to file the enclosed amicus curiae brief be granted, (ii) the Court set a date pursuant to Rule 213, SCACR, by which appellant insurer may file a responsive brief, and (iii) the enclosed 15 copies of the amicus brief of NAHB and HBASC be accepted for filing.

Date: August 30, 2007

Respectfully submitted,



Kenneth E. Ormand, Jr.
Ormand, Ashley & Gibbons, P.A.
625 Taylor Street, 2nd Floor
Columbia, South Carolina 29202
Tel: (803) 254-4220
Fax: (803) 254-0348

David S. Jaffe
National Association of Home Builders
1201 15th Street, N.W.
Washington, DC 20005
Tel: (202)266-8317
Fax: (202)266-8161

*Counsel for Amicus Curiae National
Association of Home Builders and Home
Builders Association of South Carolina*

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2007, a copy of the Motion of National Association of Home Builders and Home Builders Association of South Carolina for Leave to File Amicus Curiae Brief was mailed first class, postage prepaid, to:

John L. McCants, Esq.
Ellis, Lawhorne & Sims, P.A.
1501 Main Street, 5th Floor
Post Office Box 2285
Columbia, SC 29202

Counsel for Appellant

Michael S. Seekings
Amy E. Melvin
Leath, Bouch, & Crawford, LLP
92 Broad Street
P.O. Box 59
Charleston, SC 29402

Joseph K. Qualey
Qualey Law Firm, P.A.
23 Broad Street
Charleston, SC 29401

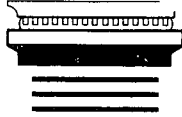
Motion for leave to file

Amicus Curiae is granted *Counsel for Respondents*

For the Court

September 19, 2007

Kenneth E. Ormand, Jr.



LEATH, BOUCH & CRAWFORD LLP
PRACTICE LIMITED TO COMMERCIAL LITIGATION & CREDITORS RIGHTS
WITH EMPHASIS ON CONSTRUCTION & ENVIRONMENTAL LAW

July 31, 2007

VIA FEDERAL EXPRESS

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RECEIVED

AUG 01 2007

S.C. SUPREME COURT

RE: Auto Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 2002-CP-10-4390

Dear Mr. Shearouse:

Enclosed for filing please an original and fourteen (14) copies of Respondents' Brief in Support of Amicus Curiae Brief in regards to the above-referenced matter. Also included is the Proof of Service on all counsel of record.

By copy of this correspondence, I am forwarding three (3) copies of the same to all parties of interest. If you have any questions or concerns, please do not hesitate to call our office.

Yours truly,

LEATH, BOUCH & CRAWFORD, LLP

Amy E. Melvin

Enclosures

cc (w/ enc.): John L. McCants, Esq.
Frank M. Cisa, Esq.
George Mullen, Esq.
Daniel Soberklein, Esq.
Joseph Qualey, Esq.

ELLIS:LAWHORNE

JOHN L. McCANTS

803 212 4959

jmccants@ellislawhorne.com

RECEIVED

JUL 31 2007

July 31, 2007

S.C. SUPREME COURT

VIA HAND DELIVERY

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

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

Dear Mr. Shearouse:

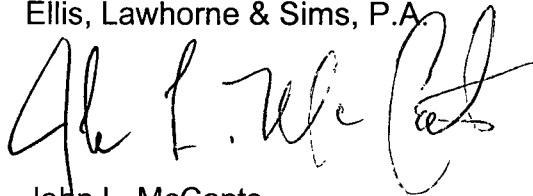
Enclosed are an original and copy of Appellant Auto-Owners Insurance Co., Inc.'s **Reply Brief to the Amicus Curiae Brief** for filing in the referenced matter. Please return a clocked copy of the same to us via our runner. By copy of this letter, we are serving opposing counsel with a copy of said Reply Brief.

Your assistance is appreciated.

With warm personal regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.



John L. McCants

ssh

cc: George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Frank M. Cisa, Esquire
Michael S. Seekings, Esquire
Joseph K. Qualey, Esquire

Enclosures

The Supreme Court of South Carolina

Auto Owners Insurance
Company, Inc.,

Appellant,

v.

Virginia T. Newman and
Trinity Construction, Inc.,

Respondents.

The Honorable B. Hicks Harwell, Jr.
Charleston County
Trial Court Case No. 2002-CP-10-04390

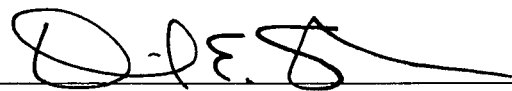
ORDER

For good cause having been shown, the time for serving and filing a Response to the Amicus Curiae Brief filed on behalf of South Carolina Community Association in the above entitled matter is hereby extended until August 1, 2007.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

June 28, 2007

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable B. Hicks Harwell, Jr.

Case No. 2001-CP-10-060

Auto-Owners Insurance Co., Inc. Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc. Respondents.

MOTION FOR EXTENSION OF TIME

Appellant Auto-Owners Insurance Company, Inc. moves the Court for an extension of time to file a reply to the Amicus Curiae Brief filed on behalf of S.C. Community Associations Institute in the above-captioned matter. The legal issues being presented to the Court with regard to this Appeal necessitate this extension.

Counsel for the Appellant Auto-Owners Insurance Company hereby requests a thirty (30) day extension of time to file its Reply to the Amicus Curiae Brief. With the extension, Appellant Auto-Owners' Reply Brief will be due on August 1, 2007.

RECEIVED

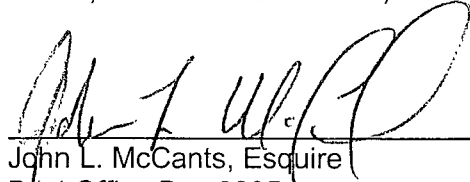
JUN 28 2007

S.C. SUPREME COURT

Counsel for the Appellant Auto-Owners Insurance Company, Inc. certifies that he has consulted with counsel and they have consented to this Motion for Extension of time.

Respectfully Submitted,

ELLIS, LAWHORNE & SIMS, P.A.



John L. McCants, Esquire

Post Office Box 2285

Columbia, South Carolina 29202

Phone: (803) 254-4190

Fax: (803) 779-4749

E-mail: jmccants@ellislawhorne.com

ATTORNEYS FOR APPELLANT AUTO-OWNERS
INSURANCE CO., INC.

Columbia, South Carolina

27th day of June, 2007

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc. Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc. Respondents.

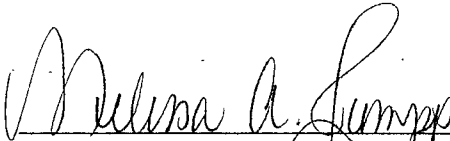
CERTIFICATE OF SERVICE

I, Melissa A. Jumpp, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I served a copy of our Motion for Extension of time this the 27th day of June 2007 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

Joseph K. Qualey, Esquire
W. Peter Beck, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, SC 29401

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29464

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, SC 29938



Melissa A. Jumpp, Paralegal

Columbia, South Carolina.

ELLIS: LAWHORNE

JOHN L. MCCANTS

803 212 4959

jmccants@ellislawhorne.com

June 27, 2007

Via Runner

The Honorable Daniel E. Shearouse
Clerk of Court, Supreme Court
John C. Calhoun Building
1015 Sumter Street
Columbia, South Carolina

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

Dear Mr. Shearouse:

Enclosed are an original and seven copies of our Motion for Extension of Time in the referenced matter. Please return a clocked copy of the same to us via our runner. Our check in the amount of \$25 is enclosed to cover the filing fee.

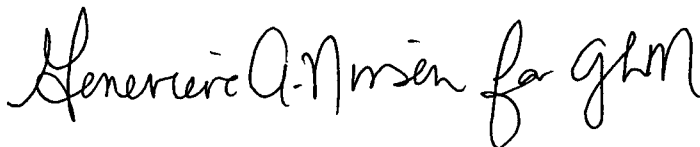
By copy of this letter, opposing counsel are being provided with a copy of the Motion.

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

With warm personal regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.



John L. McCants

JLM/GAN/ssb

cc: George E. Mullen, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire

Enclosures

RECEIVED

JUN 28 2007

S.C. SUPREME COURT

RECEIVED

JUN 27 2007

SC Court of Appeals

ELLIS:LAWHORNE

JOHN L. McCANTS

803 212 4959

jmcants@ellislawhorne.com

June 22, 2007

RECEIVED

JUN 22 2007

Via Facsimile: (803) 734-1499**S.C. SUPREME COURT**

The Honorable Daniel E. Shearouse
Clerk of Court, Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

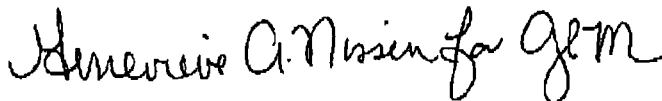
Dear Mr. Shearouse:

I am requesting a thirty (30) day extension to file Appellant's Response to the Amicus Curiae Brief. Opposing counsel has consented to this request in writing, and copies of those consents are attached.

With warm personal regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.



John L. McCants

JLM/GAN/ssb

Attachments

cc: George E. Mullen, Esquire - Via Facsimile: (843) 785-6969
Frank M. Cisa, Esquire - Via Facsimile: (843) 881-2511
Joseph K. Qualey, Esquire - Via Facsimile: (843) 577-2241

ELLIS:LAWHORNE

JOHN L. MCCANTS

Direct Dial (803) 212-4959

jmcants@ellislawhorne.com

June 18, 2007

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, SC 29938

Re: Auto-Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
EL&S File No.: 118-5-6507

Dear George and Daniel:

My deadline to respond to your Brief is July 2, 2007. I wish to seek a 30-day extension with the Court. I would appreciate your executing the signature blank below to evidence your consent to an extension. I am requesting the same of Respondents' counsel.

Your cooperation is appreciated.

With kindest regards, I am

Yours very truly,

Ellis, Lawhorne & Sims, P.A.



John L. McCants

JLM/ssh

cc: Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire


George E. Mullen or Daniel F. Oberklein
As Attorneys for South Carolina Community Associations Institute

Joseph K. Qualey
As Attorney for Virginia T. Newman

Frank M. Cisa
As Attorney for Trinity Construction

Ellis, Lawhorne & Sims, P.A., Attorneys at Law

1501 Main Street, 5th Floor - PO Box 2285 - Columbia, South Carolina 29202 - 803 254 4190 - 803 779 4749 Fax - ellislawhorne.com

JUN-22-2007 FRI 02:59 PM

JUN 20 07 09:06a

JUN-18-2007 MON 04:20 PM

Ellis Law Firm

FAX NO.

84: 72241

FAX NO.

P. 03/04

P. 2
P. 02/02

ELLIS:LAWHORNE

JOHN L. McCANTS

Direct Dial (803) 212-4959

jmcants@ellislawhorne.com

June 18, 2007

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, SC 29938

Re: Auto-Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
EL&S File No.: 118-S-8507

Dear George and Daniel:

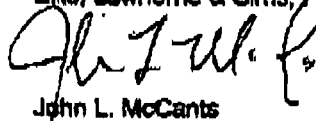
My deadline to respond to your Brief is July 2, 2007. I wish to seek a 30-day extension with the Court. I would appreciate your executing the signature blank below to evidence your consent to an extension. I am requesting the same of Respondents' counsel.

Your cooperation is appreciated.

With kindest regards, I am

Yours very truly,

Ellis, Lawhorne & Sims, P.A.



John L. McCants

JLM/ssh

cc: Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire

George E. Mullen or Daniel F. Oberklein
As Attorneys for South Carolina Community Associations Institute


Joseph K. Qualey
As Attorney for Virginia T. Newman

Frank M. Cisa
As Attorney for Trinity Construction

Ellis, Lawhorne & Sims, P.A., Attorneys at Law

1501 Main Street, 5th Floor • PO Box 2285 • Columbia, South Carolina 29202 • 803 254 4190 • 803 779 4749 Fax • ellislawhorne.com

JUN-22-2007 FRI 02:59 PM

Jun 20 2007 4:55PM

ISA & DODDS LAW FIRM

FAX NO.

848 891 5433

P. 04/04

P. 2

JUN-18-2007 MON 04:19 PM

FAX NO.

P. 02/02

ELLIS:LAWHORNE

JOHN L. McCANTS

Direct Dial (803) 212-4959

jmcants@ellislawhome.com

June 18, 2007

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5869
Hilton Head Island, SC 29938

Re: Auto-Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
EL&S File No.: 118-5-8507

Dear George and Daniel:

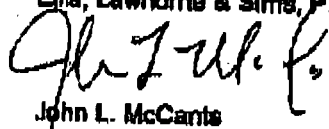
My deadline to respond to your Brief is July 2, 2007. I wish to seek a 30-day extension with the Court. I would appreciate your executing the signature blank below to evidence your consent to an extension. I am requesting the same of Respondents' counsel.

Your cooperation is appreciated.

With kindest regards, I am

Yours very truly,

Ellis, Lawhorne & Sims, P.A.



John L. McCants

JLM/sch

cc: Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire

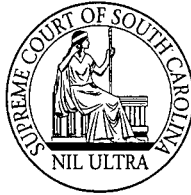
George E. Mullen or Daniel F. Oberklein
As Attorneys for South Carolina Community Associations Institute

Joseph K. Qualey
As Attorney for Virginia T. Newman

 6/21/07
Frank M. Cisa
As Attorney for Trinity Construction

Ellis, Lawhorne & Sims, P.A., Attorneys at Law

1501 Main Street, 5th Floor - PO Box 2285 - Columbia, South Carolina 29202 - 803 254 4180 - 803 779 4749 Fax - ellislawhome.com



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 4, 2007

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen, Wylie & Seekings
P O Box 5969
Hilton Head Island, SC 29938

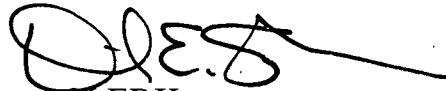
Re: Auto-Owners v. Newman, Virginia

Dear Counsel:

This will acknowledge receipt of your Amicus Curiae Brief on behalf of South Carolina Community Associations Institute in the above entitled matter.

By copy of this letter, all other counsel in this matter are advised that any response to the amicus brief should be served and filed no later than July 2, 2007.

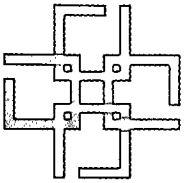
Very truly yours,



CLERK

DES/jjp

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire



MULLEN WYLIE
ATTORNEYS

RECEIVED

JUN - 4 2007

S.C. SUPREME COURT

June 1, 2007

70 Arrow Road

P.O. Box 5969

Hilton Head Island, SC 29938

Phone: (843) 785-6969

Fax: (843) 785-6711

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: *Auto Owners Ins. Co. v. Newman et al.*
Civil Action No. 2002-CP-10-4390

Dear Mr. Shearouse:

Enclosed for filing please find the original plus fourteen copies of the Amicus Curiae Brief of South Carolina Community Associations Institute, along with the Certificate of Counsel and Proof of Service, in the above-referenced case. I have also enclosed an extra copy of each document to be file-stamped and returned to me in the stamped, self-addressed envelope provided. Thank you for your assistance.

George E. Mullen

Robert L. Wylie, IV

Francis E. Grimball

James E. Lady

Glynn L. Capell

Arthur T. Meeder

Daniel F. Oberklein

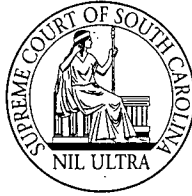
Sincerely yours,

MULLEN WYLIE, LLC

Daniel F. Oberklein

Enclosures

cc: John L. McCants, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Frank M. Cisa, Esquire
(all w/ enclosures)



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 3, 2007

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen, Wylie, LLC
P O Box 5969
Hilton Head Island, SC 29938

Re: Auto-Owners v. Newman, Virginia

Dear Counsel:

The following Order has been endorsed on your Motion for Leave to File an Amicus Curiae Brief on behalf of the South Carolina Chapter of Community Associations Institute in the above entitled case on appeal.

“Motion for Leave to file
amicus curiae brief is granted.

s/ Jean H. Toal C.J.
For the Court

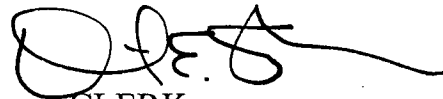
Justice John H. Waller, Jr.,
not participating.

May 3, 2007.”

George E. Mullen, Esquire
Re: Auto-Owners v. Newman, Virginia
May 3, 2007
Page two

Please be advised that the original and fourteen (14) copies of the Amicus Curiae Brief should be served and filed by June 4, 2007. Any response briefs should be served and filed within thirty (30) days after service of the Amicus Curiae Brief.

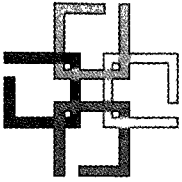
Very truly yours,



CLERK

DES/jjp

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire



MULLEN WYLIE
A T T O R N E Y S

April 9, 2007

70 Arrow Road

P.O. Box 5969

Hilton Head Island, SC 29938

Phone: (843) 785-6969

Fax: (843) 785-6711

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: *Auto Owners Ins. Co. v. Newman et al.*
Civil Action No. 2002-CP-10-4390

Dear Mr. Shearouse:

Enclosed for filing please find the original plus six copies of a Motion For Leave to File an Amicus Curiae Brief, with Proof of Service attached, on behalf of the South Carolina Chapter of Community Associations Institute in the above-referenced case. I have also enclosed an extra copy to be stamped and returned to me in the stamped, self-addressed envelope provided. Thank you for your assistance. With kind regards, I am

George E. Mullen

Robert L. Wylie, IV

Francis E. Grimball

James E. Lady

Glynn L. Capell

Arthur T. Meeder

Daniel F. Oberklein

Very truly yours,

MULLEN WYLIE, LLC

Daniel F. Oberklein

Enclosure

cc: John L. McCants, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Frank M. Cisa, Esquire
(all w/ enclosure)

RECEIVED

APR 13 2007

SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
B. Hicks Harwell, Jr., Circuit Court Judge

RECEIVED

APR 13 2007

Trial Court Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., ... Appellant,
S.C. SUPREME COURT

v.

Virginia T. Newman and
Trinity Construction, Inc., ... Respondents.

MOTION FOR LEAVE TO FILE
AN AMICUS CURIAE BRIEF

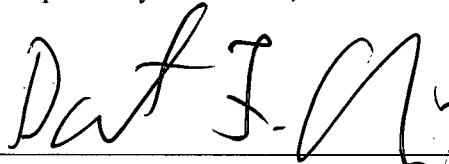
The South Carolina Chapter of Community Associations Institute (hereinafter referred to as "CAI") respectfully submits this Motion for Leave to File an Amicus Curiae Brief pursuant to Rule 213 of the South Carolina Appellate Court Rules. CAI is an organization of property owners associations, condominium regimes, and property managers who represent the interests of thousands of property owners in this state, many of whom are involved in litigation with construction companies who are insured by commercial general liability (CGL) policies identical to the Auto-Owners policy involved in this case.

Since the issuance of this Court's opinion in *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), there has been tremendous confusion in the insurance industry as to this decision's application to coverage in construction defect litigation. A number of carriers interpret *L-J* as a complete bar to coverage of construction disputes, while a number of other carriers read *L-J* as extending the coverage for contractors. Additionally, several decisions of the U.S. District Court for the District of South Carolina have reached different and irreconcilable results when applying *L-J*, further compounding the uncertainty.

Members of CAI, particularly those involved in ongoing litigation, have become snarled in the dispute and uncertainty among CGL carriers and their insured contractors, resulting in inability to resolve construction disputes with carriers who are denying coverage. CAI encourages this Court to clarify the issues of coverage and allow CAI to file an Amicus Curiae brief in support thereof.

April 9, 2007

Respectfully submitted,



George E. Mullen (S.C. Bar #4130)
Daniel F. Oberklein (S.C. Bar #75295)
MULLEN WYLIE, LLC
70 Arrow Road, Suite 1
Post Office Box 5969
Hilton Head Island, South Carolina 29938
(843) 785-6969
Fax #: (843) 785-6711
Attorneys for the Amicus Petitioner

Motion for Leave to file
Amicus Curiae Brief is granted.

For the Court

Justice John H. Waller, Jr.
Not Participating

May 3, 2007.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
B. Hicks Harwell, Jr., Circuit Court Judge

Trial Court Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., ... Appellant,

v.

Virginia T. Newman and
Trinity Construction, Inc., ... Respondents.

PROOF OF SERVICE

I hereby certify that a true and correct copy of the Motion For Leave to File an Amicus Curiae Brief was served on this 9th day of April 2007 via First Class U.S. Mail, postage prepaid, upon the following counsel of record:

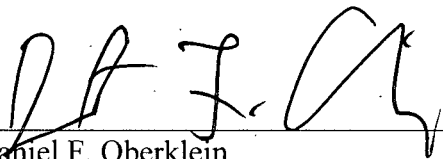
[ADDRESSES AND SIGNATURE ON FOLLOWING PAGE]

John L. McCants, Esquire
Ellis, Lawhorne & Sims, PA
P.O. Box 2285
Columbia, SC 29202
Attorney for Appellant, Auto-Owners Insurance Co., Inc.

Joseph K. Qualey, Esquire
Qualey & Beck, LLC
23 Broad Street
Charleston, SC 29401
Attorney for Respondent Virginia T. Newman

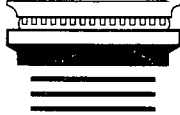
Michael S. Seekings, Esquire
Leath, Bouch & Crawford, LLP
P.O. Box 59
Charleston, SC 29402
Attorney for Respondent Virginia T. Newman

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29464
Attorney for Respondent Trinity Construction, Inc.



Daniel F. Oberklein

April 9, 2007



LEATH, BOUCH & CRAWFORD LLP
PRACTICE LIMITED TO COMMERCIAL LITIGATION & CREDITORS RIGHTS
WITH EMPHASIS ON CONSTRUCTION & ENVIRONMENTAL LAW

March 14, 2007

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RE: Auto Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 2002-CP-10-4390

Dear Mr. Shearouse:

Enclosed for filing please the original copy of the Notice of Appearance for Michael S. Seekings in regards to the above-referenced matter. Also included is the Proof of Service on all counsel of record.

By copy of this correspondence, I am forwarding the same to all parties of interest. If you have any questions or concerns, please do not hesitate to call our office.

Yours truly,

RECEIVED

MAR 16 2007

S.C. SUPREME COURT

LEATH, BOUCH & CRAWFORD, LLP

Stephanie A. Saporita

Stephanie A. Saporita, ALS
Paralegal to Michael S. Seekings

Enclosures

cc (w/ enc.): John L. McCants, Esq.
Frank M. Cisa, Esq.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CHARLESTON COUNTY
Court of Common Pleas

The Honorable B. Hicks Harwell, Jr.

Case No.: 2002-CP-10-04390

RECEIVED

MAR 16 2007

S.C. SUPREME COURT

Auto Owners Insurance Company, ... Appellant,

v.

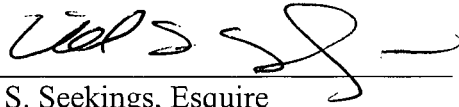
Virginia T. Newman and Trinity Construction, Inc., ... Respondents.

NOTICE OF APPEARANCE

The undersigned counsel, Michael S. Seekings, hereby notices his appearance as co-counsel for the Respondent, Virginia T. Newman in the above-entitled action.

Any and all matters directed to said Respondent should be addressed to and/or served upon the undersigned at Leath Bouch & Crawford, LLP, Post Office Box 59 Charleston, SC 29402.

This 14th day of March, 2007
Charleston, South Carolina


Michael S. Seekings, Esquire
Leath, Bouch & Crawford, LLP
Post Office Box 59
Charleston, SC 29402

Joseph K. Qualey, Esquire
Qualey & Beck, LLC
23 Broad Street
Charleston, SC 29401

Attorneys for Respondent
Virginia T. Newman

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CHARLESTON COUNTY
Court of Common Pleas

The Honorable B. Hicks Harwell, Jr.

Case No.: 2002-CP-10-04390

Auto Owners Insurance Company, ...Appellant,

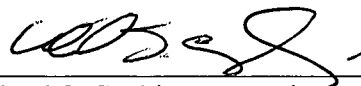
v.

Virginia T. Newman and Trinity Construction, Inc., ...Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appearance on Auto Owners Insurance Company by depositing a copy of it in the United States Mail; postage prepaid on March 14, 2007, addressed to its attorney of record, John L. McCants, at his office at, P.O. Box 2285, Columbia, South Carolina 29202.

This 14th day of March, 2007
Charleston, South Carolina



Michael S. Seekings, Esquire
Leath, Bouch & Crawford, LLP
Post Office Box 59
Charleston, SC 29402

Attorney for Respondent
Virginia T. Newman

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CHARLESTON COUNTY
Court of Common Pleas

The Honorable B. Hicks Harwell, Jr.

Case No.: 2002-CP-10-04390

Auto Owners Insurance Company, ...Appellant,

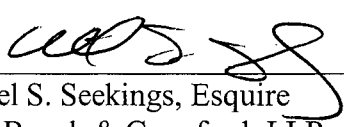
v.

Virginia T. Newman and Trinity Construction, Inc., ... Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appearance on Trinity Construction, Inc. by depositing a copy of it in the United States Mail; postage prepaid on March 14, 2007, addressed to its attorney of record, Frank M. Cisa, at his office at, 622 Johnnie Dodds Boulevard, Mt. Pleasant, South Carolina 29464.

This 14th day of March, 2007
Charleston, South Carolina



Michael S. Seekings, Esquire
Leath, Bouch & Crawford, LLP
Post Office Box 59
Charleston, SC 29402

Attorney for Respondent
Virginia T. Newman

The Supreme Court of South Carolina

Auto Owners Insurance
Company, Inc.,

Appellant,

v.

Virginia T. Newman and
Trinity Construction, Inc.,

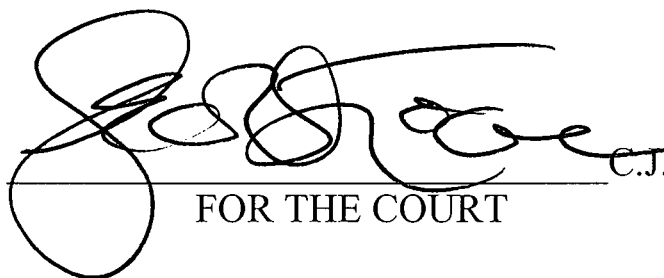
Respondents.

The Honorable B. Hicks Harwell, Jr.
Charleston County
Trial Court Case No. 2002-CP-10-04390

ORDER

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

IT IS SO ORDERED.



C.J.
FOR THE COURT

Columbia, South Carolina

January 31, 2007

cc: John L. McCants, Esq.
Frank M. Cisa, Esq.
Joseph K. Qualey, Esq.
The Honorable Kenneth A. Richstad

QUALEY & BECK

ATTORNEYS AT LAW
23 BROAD STREET
CHARLESTON, SC 29401

JOSEPH K. QUALEY
JOEQUALEY@QLAWFIRM.COM

PHONE: (843) 577-3434
FACSIMILE: (843) 577-2241

December 11, 2006

**VIA FACSIMILE 803-734-1839
AND US MAIL**

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

Re: Auto Owners Insurance Company, Inc. v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 02-CP-10-4390

Dear Mr. Richstad:

At the time the Appeal was filed, W. Brian Cornwell, Esquire was an associate of this firm. He will not need to be a recipient of any copies.

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

Best regards,

Joe
Joseph K. Qualey

JKQ/aab

cc: John L. McCants, Esquire
Frank M. Cisa, Esquire

RECEIVED

DEC 12 2006

SC Court of Appeals



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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

December 4, 2006

Joseph K. Qualey, Esq.
W. Brian Cornwell, Esq.
Qualey & Beck, P.A.
23 Broad Street
Charleston, SC 29401

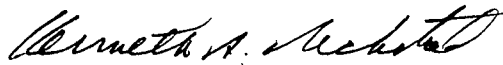
Re: Auto Owners v. Newman, V.

Dear Counsel:

We have received your Final Brief of Respondent in the above entitled case on appeal. The filing of a final brief does not require a filing fee. Therefore, we are herewith returning your firm check, #6969, in the amount of \$25.00 to you.

Our records indicate that W. Brian Cornwell is co-counsel in this appeal. Please provide the Court with fifteen (15) self-adhesive, properly sized labels to add Mr. Cornwell as co-counsel within ten (10) days of the date of this letter.

Very truly yours,


CLERK

KAR/ma

cc: John L. McCants, Esq.
Frank M. Cisa, Esq.

QUALEY & BECK

ATTORNEYS AT LAW
23 BROAD STREET
CHARLESTON, SC 29401

JOSEPH K. QUALEY
JOEQUALEY@QLAWFIRM.COM

RECEIVED

NOV 30 2006

PHONE: (843) 577-3434

SC Court of Appeals

November 29, 2006

VIA FED EX OVERNIGHT DELIVERY

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

Re: Auto Owners Insurance Company, Inc. v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 02-CP-10-4390

Dear Mr. Richstad:

Enclosed please find the original and fifteen (15) copies of the Respondents Final Brief in the above-referenced matter. I would appreciate your returning a clocked-in copy to me in the enclosed envelope.

I have also enclosed my firm's check number 6969 in the amount of \$25.00 for your filing fee.

By copy of this letter I am serving all counsel of Record with three (3) copies of the same via U. S. Mail.

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

Best regards,

J. K. Qualey
Joseph K. Qualey

JKQ/aab
Enclosures – stated

cc: Frank M. Cisa, Esquire
John L. McCants, Esquire
Virginia T. Newman (w/o enclosures)

The South Carolina Court of Appeals

Auto Owners Insurance Company, Inc., Appellant,

v.

Virginia T. Newman and Trinity
Construction, Inc., Respondents.

The Honorable B. Hicks Harwell, Jr.
Charleston County
Trial Court Case No. 2002-CP-10-04390

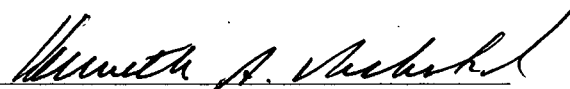
ORDER

For good cause having been shown, the time for serving and filing the Respondent's Final Brief in the above entitled matter is hereby extended until November 30, 2006.

IT IS SO ORDERED.

KAYE G. HEARN, CHIEF JUDGE
For the Court

BY


CLERK

Columbia, South Carolina
11/21/2006

cc: John L. McCants, Esq.
Frank M. Cisa, Esq.
Joseph K. Qualey, Esq.
W. Peter Beck, Esq.
W. Brian Cornwell, Esq.

06-11-6215

QUALEY & BECK

ATTORNEYS AT LAW
23 BROAD STREET
CHARLESTON, SC 29401

JOSEPH K. QUALEY
JOEQUALEY@QLAWFIRM.COM

PHONE: (843) 577-3434
FACSIMILE: (843) 577-2241

November 17, 2006

RECEIVED

NOV 20 2006

SC Court of Appeals

**VIA FACSIMILE 803-734-1839
AND US MAIL**

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

Re: Auto Owners Insurance Company, Inc. v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 02-CP-10-4390

Dear Mr. Richstad:

I respectfully request a 10-day extension by which to file our Final Brief, thereby making it due by November 30, 2006. Opposing counsel, John L. McCants has no objection to this extension. I have enclosed a check in the amount of \$25.00, which represents the filing fee for this request.

This request is being made via facsimile and the original of this letter together with the filing fee will be mailed from this office today.

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

Best regards,


Joseph K. Qualey

JKQ/aab

cc: John L. McCants, Esquire

11-20-06
11-20-06

ELLIS:LAWHORNE

JOHN L. MCCANTS

Direct Dial (803) 212-4959

jmccants@ellislawhorne.com

RECEIVED

NOV 16 2006

SC Court of Appeals

November 16, 2006

VIA HAND DELIVERY

The Honorable Kenneth A. Richstad
Clerk of Court, Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

Dear Mr. Richstad:

Enclosed herein for filing please find sixteen (16) copies of the following documents in connection with the above-referenced civil action:

1. Record on Appeal;
2. Final Reply Brief of Appellant; and
3. Final Brief of Appellant.

I would appreciate your returning a clocked-in copy of each to me via my firm's courier.

Pursuant to Rule 210 and the previously filed Certificate of Service, counsel of record was previously served with three (3) copies of the Record on Appeal. By copy of this letter to counsel of record and pursuant to the Certificates of Service contained within each brief, I am hereby serving three (3) copies of the Final Brief of Appellant and Final Reply Brief of Appellant upon counsel of record via U.S. Mail.

I sincerely appreciate your assistance with this matter and should you otherwise have any questions or comments, please do not hesitate to contact me.

With warm personal regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.

Susan Bennett

Susan Bennett

Paralegal to John L. McCants

SB/ssh

cc: Joseph K. Qualey, Esquire

Ellis, Lawhorne & Sims, P.A., Attorneys at Law

1501 Main Street, 5th Floor ■ PO Box 2285 ■ Columbia, South Carolina 29202 ■ 803 254 4190 ■ 803 779 4749 Fax ■ ellislawhorne.com

W. Brian Cornwell, Esquire
Frank M. Cisa, Esquire
Enclosures

ELLIS:LAWHORNE

JOHN L. McCANTS

803 212 4959

jmcants@ellislawhorne.com

October 30, 2006

The Honorable Kenneth A. Richstad
Clerk of Court, Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, South Carolina 29211

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

Dear Mr. Richstad:

Enclosed herein for filing please find an original and one copy of a **Certificate of Service** in connection with the above-referenced matter. Please file the original and return a clocked-in copy of same to my office via my firm's courier.

By copy of this letter, I am hereby serving a copy of same upon all parties to the appeal.

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

With warm personal regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.



Susan Bennett
Paralegal to John L. McCants

/sb

Enclosures
cc: (w/ encl.)

Joseph K. Qualey, Esquire

W. Brian Cornwell, Esquire

Qualey Law Firm, P.A.

23 Broad Street
Charleston, South Carolina 29401

RECEIVED

OCT 31 2006

SC Court of Appeals

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, South Carolina 29464

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc. Appellant,

v.

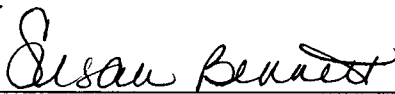
Virginia T. Newman and Trinity Construction, Inc. Respondents.

CERTIFICATE OF SERVICE

I, Susan Bennett, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I served one copy of Appellant Auto-Owners Insurance Co., Inc.'s Reply Brief this the 29th day of September 2006 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

Joseph K. Qualey, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, South Carolina 29401

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, South Carolina 29464



Susan Bennett, Paralegal

Columbia, South Carolina.

ELLIS:LAWHORNE

JOHN L. MCCANTS

803 212 4959

jmccants@ellislawhorne.com

September 29, 2006

RECEIVED

SEP 29 2006

SC Court of Appeals

Via Hand Delivery

The Honorable Kenneth A. Richstad
Clerk of Court, Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

Mr. Richstad:

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

By copy of this letter and attached Certificate of Service, I am hereby serving a copy of same upon all parties to the appeal.

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

With warm personal regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.

John L. McCants
John L. McCants

JLM/sb
Enclosures
cc: (w/ encl.)

Joseph K. Qualey, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, South Carolina 29401

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, South Carolina 29464

The South Carolina Court of Appeals

Auto Owners Insurance Company, Inc., Appellant,

v.

Virginia T. Newman and Trinity
Construction, Inc., Respondents.

The Honorable B. Hicks Harwell, Jr.
Charleston County
Trial Court Case No. 2002-CP-10-04390

ORDER

For good cause having been shown, the time for serving and filing the Appellant's Initial Reply Brief and Designation of Matter in the above entitled matter is hereby extended until September 29, 2006.

IT IS SO ORDERED.

KAYE G. HEARN, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
9/15/2006

cc: John L. McCants, Esq.
Frank M. Cisa, Esq.
Joseph K. Qualey, Esq.
W. Peter Beck, Esq.
W. Brian Cornwell, Esq.

06-CI-4993

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
SEP 14 2006
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable B. Hicks Harwell, Jr.

Case No. 2001-CP-10-060

Auto-Owners Insurance Co., Inc. Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc. Respondents.

MOTION FOR EXTENSION OF TIME

Appellant Auto-Owners Insurance Company, Inc. moves the Court for an extension of time to serve Respondents Virginia T. Newman and Trinity Construction, Inc. with a Reply Brief to Respondents' Initial Brief in the above-captioned matter. The complex legal issues being presented to the Court with regard to this Appeal necessitate this extension.

Counsel for the Appellant Auto-Owners Insurance Company hereby requests a fourteen (14) day extension of time to file its Reply to Respondents' Initial Brief. With the extension, Appellant Auto-Owners' Reply Brief will be due on September 29, 2006.

9-15-06
9-29-06

Counsel for the Appellant Auto-Owners Insurance Company, Inc. certifies that he has consulted with counsel for Respondents and they have consented to this Motion for Extension of time.

Respectfully Submitted,

ELLIS, LAWHORNE & SIMS, P.A.



John L. McCants, Esquire
Benjamin A. Traywick, Esquire
Post Office Box 2285
Columbia, South Carolina 29202
Phone: (803) 254-4190
Fax: (803) 779-4749
E-mail: jmccants@ellislawhorne.com
ATTORNEYS FOR APPELLANT AUTO-OWNERS
INSURANCE CO., INC.

Columbia, South Carolina

14 day of September, 2006

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc. Appellant,

v.

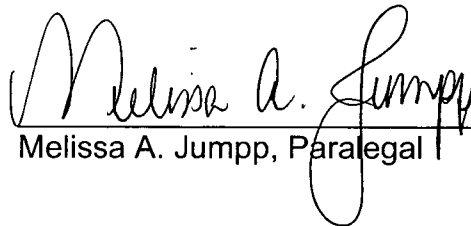
Virginia T. Newman and Trinity Construction, Inc. Respondents.

CERTIFICATE OF SERVICE

I, Melissa A. Jumpp, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I served one copy of Appellant Auto-Owners Insurance Co., Inc.'s Motion for Extension of Time on this the 14th day of September, 2006 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

Joseph K. Qualey, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, South Carolina 29401

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Blvd.
Mt. Pleasant, South Carolina 29464



Melissa A. Jumpp, Paralegal

ELLIS:LAWHORNE

JOHN L. McCANTS
803 212 4959
jmccants@ellislawhorne.com

September 14, 2006

RECEIVED
SEP 14 2006
SC Court of Appeals

Via Hand Delivery

The Honorable Kenneth A. Richstad
Clerk of the S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Auto-Owners Insurance Company, Inc. v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 02-CP-10-4390
Our File No: 118-5-6507

Dear Mr. Richstad:

Enclosed herein for filing please find the original and seven (7) copies of Appellant Auto-Owners Insurance Co., Inc.'s Motion for Extension of Time and Proof of Service in connection with the above-referenced matter. Additionally, I have included my firm's check in the amount of \$25.00 for the required filing fees. I would appreciate your filing and returning a clocked copy of the Motion to my office via my firm's courier.

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

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

With warm personal regards, I am

Sincerely,

Ellis, Lawhorne & Sims, P.A.


Benjamin A. Traywick

/maj

Enclosures

cc: Frank M. Cisa, Esquire (Via Facsimile: (843) 881-2511)
Joseph K. Qualey, Esquire (Via Facsimile: (843) 577-2241)

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No.: 2002-CP-10-4390

Auto-Owners Insurance Co., Inc..... Appellant,

v.

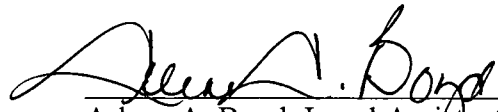
Virginia T. Newman and Trinity Construction, Inc..... Respondents.

CERTIFICATE OF SERVICE

I, Arlene A. Boyd, an employee of the law firm of Qualey & Beck, LLC, do hereby certify that I served one copy of Respondent Virginia T. Newman's Initial Brief on this 5th day of September 2006 upon all counsel of record by depositing same in the U. S. Mail, postage prepaid and addressed as follows:

John L. McCants, Esquire
Ellis, Lawhorne & Sims, P. A.
Post Office Box 2285
Columbia, South Carolina 29202

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, South Carolina 29464


Arlene A. Boyd, Legal Assistant

Charleston, South Carolina

QUALEY & BECK

ATTORNEYS AT LAW
23 BROAD STREET
CHARLESTON, SC 29401

FedEx
RECEIVED

SEP 06 2006

SC Court of Appeals
FACSIMILE: (843) 577-2241

September 5, 2006

VIA FEDERAL EXPRESS (7915 4261 9101)

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

Re: Auto Owners Insurance Company, Inc. v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 02-CP-10-4390

Dear Mr. Richstad:

Enclosed please find for filing the original and one copy of the Respondent's Virginia T. Newman Initial Brief and Certificate of Service in the above-referenced matter. Please file the original and return a clocked-in copy of the same to me in the envelope provided.

By copy of this letter to Appellant's counsel I am provided them with a copy of the same.

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

Best regards,



W. Brian Cornwell

Enclosures – stated

cc: Frank M. Cisa, Esquire
John L. McCants, Esquire
Virginia T. Newman (w/o enclosures)

The South Carolina Court of Appeals

Auto Owners Insurance Company, Inc., Appellant,

v.

Virginia T. Newman and Trinity
Construction, Inc., Respondents.

The Honorable B. Hicks Harwell, Jr.
Charleston County
Trial Court Case No. 2002-CP-10-04390

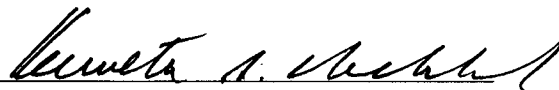
ORDER

For good cause having been shown, the time for serving and filing the Respondents' Initial Brief and Designation of Matter in the above entitled matter is hereby extended until September 6, 2006.

IT IS SO ORDERED.

KAYE G. HEARN, CHIEF JUDGE
For the Court

BY



CLERK

Columbia, South Carolina
August 2, 2006

cc: John L. McCants, Esq.
Frank M. Cisa, Esq.
Joseph K. Qualey, Esq.
W. Peter Beck, Esq.
W. Brian Cornwell, Esq.

QUALEY & BECK

ATTORNEYS AT LAW
23 BROAD STREET
CHARLESTON, SC 29401

W. BRIAN CORNWELL
WBCORNWELL@QLAWFIRM.COM

PHONE: (843) 577-3434
FACSIMILE: (843) 577-2241

July 27, 2006

The Honorable Kenneth A. Richstad
Clerk of Court
South Carolina Court of Appeals
Attn: Monica Amick-Cassidy
P.O. Box 11629
Columbia, SC 29211

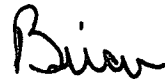
*Re: Auto Owners Insurance Company, Inc. v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 02-CP-10-4390*

Dear Ms. Amick-Cassidy:

Pursuant to your correspondence of July 25, 2006 I have enclosed our firm's trust account check in the amount of \$25.00 for the filing fee.

If you have any questions please do not hesitate to contact me.

Best regards,



W. Brian Cornwell

RECEIVED

JUL 31 2006

SC Court of Appeals



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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

July 25, 2006

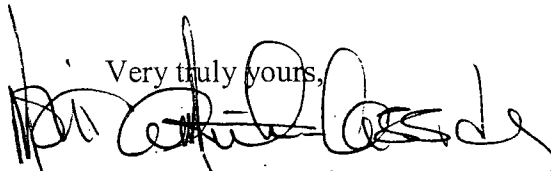
Joseph K. Qualey, Esq.
W. Peter Beck, Esq.
W. Brian Cornwell, Esq.
Qualey & Beck, P.A.
23 Broad Street
Charleston, SC 29401

Re: Auto Owners v. Newman, V.

Dear Counsel:

We have received your letter of July 19, 2006 requesting an extension of time to serve and file the Respondents' Initial Brief and Designation of Matter. However, according to Rule 224 of the South Carolina Appellate Court Rules, all motions and requests for extensions must be accompanied by a \$25.00 filing fee. Please provide the required filing fee within ten (10) days of the date of this letter.

Very truly yours,


Monica Amick-Cassidy
Docketing Specialist


/ma

cc: John L. McCants, Esq.
Frank M. Cisa, Esq.

06-01-4165

QUALEY & BECK

ATTORNEYS AT LAW
23 BROAD STREET
CHARLESTON, SC 29401

W. BRIAN CORNWELL
WBCORNWELL@QLAWFIRM.COM

PHONE: (843) 577-3434
FACSIMILE: (843) 577-2241

July 19, 2006

Via Facsimile and U.S. Mail
The Honorable Kenneth A. Richstad
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Auto Owners Insurance Company, Inc. v. Virginia T. Newman and Trinity
Construction, Inc.*
Case No.: 02-CP-10-4390

Dear Mr. Richstad:

I am writing on behalf of Frank M. Cisa, Esq. and myself pursuant to Rule 234(b) SCRAP to request an extension of time of thirty (30) days to file the Respondents' Initial Briefs.

The Appellant's Initial brief was filed on July 6, 2006. Therefore, the Respondents' Initial Briefs are now due on August 6, 2006. With the requested extension the Respondents' Initial Briefs would be due on September 6, 2006. The Respondents have several matters pending over the next thirty (30) days along with long standing vacation plans, and would not be able to provide the time necessary for the appeal.

By copy of this letter, I am providing Appellant's Counsel with the same.

Thank you for your consideration in this matter.

Best regards,



W. Brian Cornwell

cc: Frank M. Cisa, Esq. (via facsimile only)
John L. McCants, Esq. (via facsimile only)

RECEIVED

JUL 20 2006

SC Court of Appeals
8-7-06
a-6-06

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc. Appellant,

v.

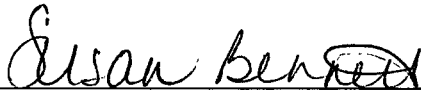
Virginia T. Newman and Trinity Construction, Inc..... Respondents.

CERTIFICATE OF SERVICE

I, Susan Bennett, an employee of the law firm of Ellis, Lawhorne & Sims, P.A., do hereby certify that I served one copy of Appellant Auto-Owners Insurance Co., Inc.'s Initial Brief and Designation of Matter to be Included in the Record on Appeal this the 6th day of July 2006 upon all counsel of record by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

Joseph K. Qualey, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, South Carolina 29401

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, South Carolina 29464


Susan Bennett, Paralegal

Columbia, South Carolina.

ELLIS:LAWHORNE

JOHN L. MCCANTS

803 212 4959

jmccants@ellislawhorne.com

July 6, 2006

Via Hand Delivery

The Honorable Kenneth A. Richstad
Clerk of Court, Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
JUL 06 2006 AS/NB
SC Court of Appeals

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

Mr. Richstad:

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

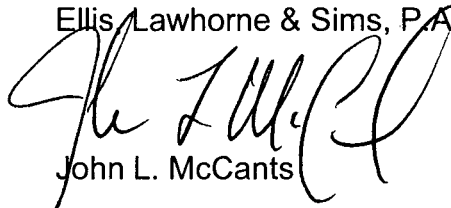
By copy of this letter and attached Certificate of Service, I am hereby serving a copy of same upon all parties to the appeal.

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

With warm personal regards, I am

Sincerely yours,

Ellis Lawhorne & Sims, P.A.



John L. McCants

JLM/sb
Enclosures
cc: (w/ encl.)

Joseph K. Qualey, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, South Carolina 29401

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Boulevard
Mt. Pleasant, South Carolina 29464

The South Carolina Court of Appeals

Auto Owners Insurance Company, Inc., Appellant,

v.

Virginia T. Newman and Trinity
Construction, Inc.,

Respondents.

The Honorable B. Hicks Harwell, Jr.
Charleston County
Trial Court Case No. 2002-CP-10-04390

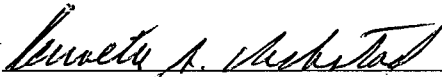
ORDER

For good cause having been shown, the time for serving and filing the Appellant's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until July 6, 2006.

IT IS SO ORDERED.

KAYE G. HEARN, CHIEF JUDGE
For the Court

BY



CLERK

Columbia, South Carolina
5/19/2006

cc: John L. McCants, Esq.
Frank M. Cisa, Esq.
Joseph K. Qualey, Esq.
W. Peter Beck, Esq.

e6-CI-2604

ELLIS:LAWHORNE

JOHN L. MCCANTS

803 212 4959

jmccants@ellislawhorne.com

May 16, 2006

RECEIVED

MAY 16 2006

SC Court of Appeals

Via Facsimile: (803) 734-1839

Claire Allen, Deputy Clerk of Court

Court of Appeals

Post Office Box 11629

Columbia, South Carolina 29211

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

Ms. Allen:

Pursuant to Rule 234(b) of the South Carolina Rules of Appellate Practice, I am writing to request an extension of time of forty-five (45) days to file Appellant's Initial Brief. I received the transcript on April 20, 2006. Therefore, the Initial Brief is now due on May 20, 2006. With the requested extension, the Initial Brief would be due July 4, 2006. I have several large matters scheduled for trial over the next month and, therefore, would not be able to provide adequate time to the appeal.

I am also enclosing the original request letter and a copy of the transaction report dated May 10, 2006.

By copy of this letter, I am notifying opposing counsel of my request for an extension.

With warm personal regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.

Genevieve A. Nissen for

John L. McCants

JLM/sb

cc:

Frank M. Cisa, Esquire (Via Facsimile: (843) 881-2511)

Joseph K. Qualey, Esquire (Via Facsimile: (843) 577-2241)

GRANTED

KAYE G. HEARN, C.J.
FOR THE COURTBy: V. Claire Allen
(Clerk) (Deputy Clerk)

5/16/06

5-22-06
2-6800

ELLIS:LAWHORNE

JOHN L. MCCANTS

803 212 4959

jmccants@ellislawhorne.com

May 10, 2006

Via Facsimile: (803) 734-1839

The Honorable Kenneth A. Richstad

Clerk of Court, Court of Appeals

Post Office Box 11629

Columbia, South Carolina 29211

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
(Declaratory Judgment Action)
Civil Action No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

Mr. Richstad:

Pursuant to Rule 234(b) of the South Carolina Rules of Appellate Practice, I am writing to request an extension of time of forty-five (45) days to file Appellant's Initial Brief. I received the transcript on April 20, 2006. Therefore, the Initial Brief is now due on May 20, 2006. With the requested extension, the Initial Brief would be due July 4, 2006. I have several large matters scheduled for trial over the next month and, therefore, would not be able to provide adequate time to the appeal.

By copy of this letter, I am notifying opposing counsel of my request for an extension.

With warm personal regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.



John L. McCants

JLM/sb

cc:

Frank M. Cisa, Esquire (Via Facsimile: (843) 881-2511)

Joseph K. Qualey, Esquire (Via Facsimile: (843) 577-2241)

TRANSACTION REPORT

P. 01

MAY-10-2006 WED 05:13 PM

FOR:

BROADCAST

DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
MAY-10	05:10 PM	7341839	25"	1	FAX TX	OK	262	
	05:11 PM	18438812511	16"	1	FAX TX	OK	262	
	05:12 PM	18435772241	20"	1	FAX TX	OK	262	
TOTAL :						1M 1S	PAGES:	3

ELLIS: LAWHORNE

JOHN L. McCANTS

803 212 4859

jmcants@ellislawhorne.com

May 10, 2006

Via Facsimile: (803) 734-1839

The Honorable Kenneth A. Richstad
 Clerk of Court, Court of Appeals
 Post Office Box 11629
 Columbia, South Carolina 29211

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
 (Declaratory Judgment Action)
 Civil Action No.: 02-CP-10-4390
 Claim No: 36-07099-99
 EL&S File No.: 118-5-6507

Mr. Richstad:

Pursuant to Rule 234(b) of the South Carolina Rules of Appellate Practice, I am writing to request an extension of time of forty-five (45) days to file Appellant's Initial Brief. I received the transcript on April 20, 2006. Therefore, the Initial Brief is now due on May 21, 2006. With the requested extension, the Initial Brief would be due July 4, 2006. I have several large matters scheduled for trial over the next month and, therefore, would not be able to provide adequate time to the appeal.

ELLIS LAWHORNE

JOHN L. MCCANTS

803 212 4959

jmccants@ellislawhorne.com

March 27, 2006

RECEIVED

MAR 28 2006

SC Court of Appeals

The Honorable Rosalyn W. Frierson
Director
South Carolina Court Administration
1015 Sumter St., Ste. 200
Columbia, SC 29201

RE: Auto-Owners Insurance Co., Inc, Appellant v. Virginia T. Newman and
Trinity Construction, Inc., Respondents
C/A No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

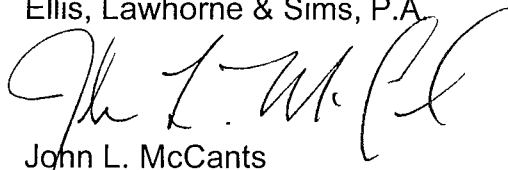
Dear Ms. Frierson:

By correspondence dated January 18, 2006, I ordered the transcript of the proceedings in this case. Counsel is unaware of an extension requested by or granted to the court reporter.

As of this day, Appellant has not received the transcript from the court reporter.

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.



John L. McCants

JLM/acb

Enclosures

cc/enc:

H. Gayle Burns

The Honorable Kenneth A. Richstad

Frank M. Cisa, Esquire

Joseph K. Qualey, Esquire



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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

January 20, 2006

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

Re: Auto Owners v. Newman, V.

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 238(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(e), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as

amended June 1, 1999, by the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,
Kenneth A. Richstad
CLERK

KAR/ma

cc: Frank M. Cisa, Esq.
Joseph K. Qualey, Esq.
W. Peter Beck, Esq.

ELLIS:LAWHORNE

JOHN L. MCCANTS

803 212 4959

jmccants@ellislawhorne.com

January 18, 2006

H. Gayle Burns
161 Barnhill Dr.
Ladson, SC 29456-4114

RE: Auto-Owners Insurance Co., Inc, Appellant v. Virginia T. Newman and
Trinity Construction, Inc., Respondents
C/A No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

Dear Ms. Burns:

On October 31, 2005, the above-referenced matter was tried before the Honorable B. Hicks Harwell, Jr., Circuit Court Judge, in Charleston County, South Carolina. My records indicate that you were the court reporter for this matter.

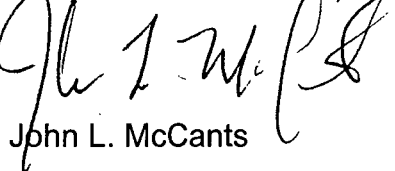
I hereby request that you provide me with a transcript of the proceedings. Please transcribe the entire record and forward it to me at your earliest convenience.

Pursuant to Rule 607, SCACR, I agree to pay the per page charge for this transcript.

With warm personal regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.



John L. McCants

JLM/acb

cc: S.C. Court Administration
The Honorable Kenneth A. Richstad
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
W. Peter Beck, Esquire

RECEIVED

JAN 19 2006

SC Court of Appeals

POS 1/16/06
PM 1/16/06

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc. Appellant,

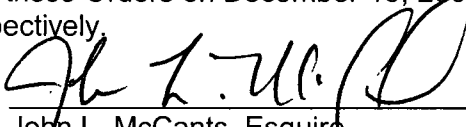
v.

Virginia T. Newman and Trinity Construction, Inc. Respondents.

NOTICE OF APPEAL

Auto-Owners Insurance Co., Inc., appeals the Orders of the Honorable B. Hicks Harwell, Jr. dated December 7, 2005, December 15, 2005 and December 29, 2005. Appellant received written notice of entry of these Orders on December 15, 2005, January 3, 2006 and January 16, 2006 respectively.

January 16, 2006


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

Other Counsel of Record:

Frank M. Cisa, Esquire
Cisa & Dodds, LLP
622 Johnnie Dodds Blvd.
Mt. Pleasant, SC 29464
Attorney for Trinity Construction, Inc.

Joseph K. Qualey, Esquire
W. Peter Beck, Esquire
Qualey & Beck, P.A.
23 Broad St.
Charleston, SC 29401
Attorneys for Virginia T. Newman

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc. Appellant,

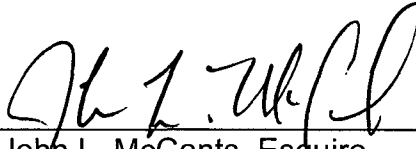
v.

Virginia T. Newman and Trinity Construction, Inc. Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal upon Virginia T. Newman and Trinity Construction, Inc. by depositing a copy of it in the United States Mail, post prepared on January 16, 2006, addressed to counsel for Respondents, Frank M. Cisa, Esquire, 622 Johnnie Dodds Blvd., Mt. Pleasant, SC 29464 and Joseph K. Qualey, Esquire and W. Peter Beck, Esquire 23 Broad St., Charleston, SC 29401.

January 16, 2006



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

ELLIS:LAWHORNE

JOHN L. MCCANTS

803 212 4959

jmccants@ellislawhorne.com

January 16, 2006

The Honorable Kenneth A. Richstad
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Auto-Owners Insurance Co., Inc, Appellant v. Virginia T. Newman and
Trinity Construction, Inc., Respondents
C/A No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

Dear Mr. Richstad:

Enclosed for filing please find the original and two (2) copies of a Notice of Appeal in the above-referenced matter. Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondents;
2. A copy of the Orders which are to be challenged on appeal; and,
3. A filing fee of \$100.

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

With warm personal regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.

John L. McCants

RECEIVED

JAN 19 2006

SC Court of Appeals

JLM/acb
Enclosures
cc/enc:

The Honorable Julie J. Armstrong, Charleston County Clerk of Court
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
W. Peter Beck, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AUTO OWNERS INSURANCE
COMPANY, INC.

Plaintiff,

vs.

VIRGINIA T. NEWMAN and
TRINITY CONSTRUCTION, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 02-CP-10-4390

ORDER

2005 DEC 14 04:11:08
JULIA L. COLEMAN
CLERK OF COURT

The Non-Jury Trial of this Matter came before me on October 31, 2005. Plaintiff Auto-Owners Insurance Co., Inc. ("Auto-Owners") filed a lawsuit on October 28, 2002 seeking declaratory relief to determine its rights and obligations under an insurance policy that it issued to Defendant Trinity Construction, Inc. ("Trinity") for the period July 7, 1993 to July 27, 2000 ("Policy").

FACTUAL BACKGROUND

This action stems from a prior lawsuit initiated by Defendant Virginia T. Newman ("Newman") in which the underlying factual issues remain largely undisputed. Trinity and Newman entered into a contract for Trinity to construct a house for Newman in Mount Pleasant, South Carolina. The certificate of occupancy for the home was issued on May 28, 1999. Newman filed a civil action against Trinity in Charleston County on March 3, 2000 (hereinafter referred to as "Newman v. Trinity") in which Newman alleged breach of contract, negligence and breach of warranty based on the findings of a construction deficiencies investigation performed by Robert G. Sisroy, P.E. It should be noted that in her Complaint, Newman also alleged that the construction deficiencies caused severe damage to the structure and substructure of the house.

BH

Trinity and Newman agreed to refer their dispute to binding Arbitration. M. Dawes Cook, Jr., Esquire, an attorney highly experienced in the area of construction disputes, arbitrated the matter and issued an Award in favor of Newman in the amount of \$55,898.00. Said Award is attached as Exhibit "A."

At the Trial of the immediate matter the parties stipulated that Sisnroy was an expert in the field of structural engineering. (Sisnroy testified that he has examined literally thousands of homes in the Charleston area which have deficiencies similar to those exhibited in this instance.) The parties further stipulated that all work on Newman's home was performed by sub-contractors.

FINDINGS AND CONCLUSIONS

Based on the parties' arguments and the testimony given at Trial, after review of the relevant provisions of the Policy and after consideration of the Arbitration Award issued in Newman v. Trinity, I now make the following findings and conclusions:

The Policy issued by Auto-Owners states that it "will pay those sums that the insured becomes legally obligated to pay as damages because of... 'property damage' to which this insurance applies." See, Section I (A)(1)(a). The Policy states that "this insurance applies to... 'property damage' only if: (1) The... 'property damage' is caused by an 'occurrence' that takes place during the policy period" See, Section I (A)(1)(b).

"Property damage" is defined as "Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it," See, Section V (12)(a); or "Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the 'occurrence' that caused it." See, Section V (12)(b). An "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." See, Section V (9).

BH

The South Carolina Supreme Court addressed the issue of whether property damage constitutes an "occurrence" as defined in a commercial general liability ("CGL") policy in L-J, Inc. v. Bituminous Fire and Marine Ins., Co., Op. No. 25854 (S.C. Sup. Ct. filed September 26, 2005). In the L-J, Inc. v. Bituminous decision the Supreme Court sought the guidance of the High Country Associates v. New Hampshire, 648 A.2d. 474 (N.H. 1994) decision, which I find to be helpful in determining whether Auto-Owner's Policy should provide coverage for the damages in the immediate matter.

In High Country Assocs., the Court held that a CGL provided coverage for property damage caused by continuous exposure to moisture when the Complaint alleged negligent construction that resulted in property damage and not merely negligent construction damaging only the work product itself. *See*, L-J, Inc. v. Bituminous (quoting High Country Assocs.). The Complaint in High Country Assocs. alleged:

[a]ctual damage to the buildings caused by exposure to water seeping into the walls that resulted from the negligent construction methods of High Country Associates. The damages claimed are for the water-damaged walls, not the diminution in value or cost of repairing work of inferior quality. Therefore, the property damage described in the amended writ, caused by continuous exposure to moisture through leaky walls, is not simply a claim for the contractor's defective work.

Id. "As a result, the Court held that the Plaintiffs' alleged negligent construction was the result of an occurrence, rather than an allegation of faulty or defective work." *Id.* The facts in High Country Assocs. essentially mimic those presented in this case.

At the Trial of the immediate matter, Sisroy testified that Trinity negligently applied the stucco to the exterior of the home and failed to properly flash the windows and doors, both deficiencies being Code violations and deviations from industry standards which allowed a "continuous" intrusion of water into the home. Sisroy also testified that to a reasonable degree of

BH

engineering certainty that the moisture intrusion was causing damage to the wooden structure and sub-structure of the house and to the sheathing beneath the stucco exterior.

Next comes the issue of where an applicable exclusion existed which would preclude coverage by the Policy. "The insurer bears the burden of establishing exclusions to coverage." Sunex Intern., Inc. v. Travelers Indem. Co., 185 F.Supp. 2d 614, 617 (D.S.C. 2001). In response to a question from the Court, Sisroy stated that he had never seen a home with installation deficiencies [such as those present in the Newman home] that did not have underlying damage. In response to questions on cross examination regarding a contractor's expectations of such water intrusion, Sisroy opined that a "contractor could not expect or contemplate water intrusion of this magnitude" [referring to the water intrusion present in Newman's home], and that a contractor would not contemplate expected damages if he has no knowledge of negligence [upon the completion of construction].

Upon review of the Arbitration Award made by Mr. Cook in Newman v. Trinity, it appears that the Arbitrator recognized the existence of underlying water damage to Newman's home. Evidence of such includes the specific awards for "Rough carpentry," "Windows and doors," "Thermal and moisture protection" and "Interior and exterior finishes." It is also reasonable to assume that Mr. Cook contemplated the fact that the full extent of the home's underlying water damage could not be assessed or remediated without first removing the entire stucco exterior. Accordingly, I find that Mr. Cook intended to award Newman for underlying damages caused by water intrusion in addition to the cost of replacing the stucco on the exterior of the home.

BH

I am convinced that the facts of the underlying Newman v. Trinity case give rise to a finding by this Court that is consistent to the reasoning used by the Supreme Court in L-J. Inc. v. Bituminous. In Newman v. Trinity, like High Country Assocs., the Plaintiff alleged property damage beyond the proper performance of the task itself, to wit: underlying water damage to the home caused by the improper installation of the stucco and improper flashing and sealing of the home.

My decision in the immediate matter is supported by the arguments and evidence presented at Trial, including the testimony of Robert G. Sisnroy, P.E. and the Arbitration Award issued by M. Dawes Cook, Jr., Esquire, as well a review of the insurance Policy issued by Auto-Owners.

Accordingly, I specifically find the following:

1. The Arbitrator correctly recognized and affirmed the property damage alleged in the Newman's Complaint.
2. The property damage occurred during the Policy period.
3. The property damage to Newman's home constitutes an "occurrence" consistent with the definition provided by the Policy issued by Auto-Owners, with the exception of the damages to the master bath (\$1,640.00); the front bath (\$988.00); the landing (\$305.00) and the miscellaneous punch list items (\$4,275.00).
4. The insurer has failed to meet its burden of showing that any exclusions provided by the Policy apply.
5. That there is no other way to address the underlying damage caused to the sub-structure and the sheathing than to strip and replace the exterior stucco in its entirety.

BH

6. That Trinity is entitled to recover its reasonable attorney's fees and costs, pursuant to the Supreme Court's decision in Hegler v. Gulf Insurance Co., 243 S.E. 2d 443, 270 S.C. 548 (S.C. 1978). Trinity's attorney shall submit an Affidavit of attorney's fees and costs to this Court with a proposed Order within fifteen (15) days from the date of Trinity's receipt of this Order.

NOW THEREFORE, I find that the Policy issued by Auto-Owners shall stand to cover Trinity's liability for the assessment of damages provided for in the Arbitration Award issued on August 9, 2002, with the exception of items #8, 10, 12 and 13 on the attached Exhibit "A."

IT IS SO ORDERED.

Dated: December 7, 2005

B. Hicks Harwell
The Honorable B. Hicks Harwell

# 8	1,640.00+
# 10	305.00+
# 12	4,275.00+
# 13	988.00+
	7,208.00T

0.00T

0.00T

Total Award	55,898.00+
	7,208.00-
	48,690.00T

0.00T

BARNWELL WHALEY PATTERSON & HELMS, LLC

William C. Helms, III
M. Dawes Cooke, Jr.
B. C. Killough*

Special Counsel:
J. Gail Rahn**
Mark C. Brandenburg
Thomas B. Pritchard
Todd Musheff***
P. Gunnar Nistad

*Registered Patent Attorney
**Also licensed in MD
***Also licensed in OH

Attorneys and Counselors at Law
134 Meeting Street, Suite 300
PO Drawer H
Charleston, SC 29402-0197
Telephone: (843) 577-7700
Facsimile: (843) 577-7708

August 9, 2002

Writer's Direct E-Mail:
mdc@barnwell-whaley.com

Lucinda Gardner Wichmann
James H. Elliott, Jr.
Phillip S. Ferderigos
Andrea H. Brisbin
G. Troy Thames
K. Michael Barfield
Gerald E. DeLoss

Of Counsel:
James E. Reeves

Robert A. Patterson
Nathaniel B. Barnwell (1877-1950)
Ben Scott Whaley (1909-1987)
Samuel J. Corbin (1907-1975)

Joseph K. Qualey, Esquire
Qualey Law Firm
23 Broad Street
Charleston, SC 29401

L. Dean Best, Esquire
Haynsworth Sinkler Boyd, PA
160 East Bay Street
Charleston, SC 29401

RE: Virginia T. Newman v. Trinity Construction, Inc., et al.
Our File No.: 605.459

Dear Joe and Dean:

I appreciate your offering me the opportunity to serve as arbitrator in this matter. I have reviewed the testimony and documentary evidence, and I have come to the following conclusions. At your request, I will omit a lengthy explanation of my rulings. I will, however, itemize the award by categories, following generally the categories set out in Mr. Hedgepath's estimates. I have concluded that Mrs. Newman is entitled to have the stucco replaced, but I have concluded that the stucco can be replaced somewhere between what it was done for in 1999 and what Mr. Hedgepath estimated it would cost to do it now. I believe that the stucco system is defective because it is most probably Portland stucco and was not applied in conformity to the Code. The system may be functional now, but I have to assume that there is a good reason why the Code requires additional thickness. I also feel that there are sufficient other problems with the installation—lack of weep holes, flashing, etc.—that allowance needs to be made for replacement of the system.

I have not made any award for regrading the property. I believe that the building code is directed to maintaining the integrity of the building, and there is insufficient evidence to conclude that excessive moisture is being directed towards the structure except at the front porch, where allowance is being made to revise the guttering system. Finally, I have discounted a number of the other items, primarily because they constitute

H.O. LEGAL

August 7, 2002

Page 2

punch list items which, had Trinity been given full opportunity to perform them, could have been done at less expense than is now required. With these points in mind, I award the following:

1)	Site work:	\$ 1,500.00
2)	Demolition:	\$ 5,250.00
3)	Rough carpentry:	\$ 1,000.00
4)	Windows and doors:	\$ 6,070.00
5)	Thermal and moisture protection:	\$ 4,850.00
6)	Interior and exterior finishes:	\$14,000.00
7)	Miscellaneous:	\$ 3,650.00
8)	Master bath:	\$ 1,640.00
9)	Screen porch:	\$ 970.00
10)	Landing:	\$ 305.00
11)	Grading of lot:	\$ 0.00
12)	Miscellaneous punch list:	\$ 4,275.00
13)	Front bathroom:	\$ 988.00
	Subtotal:	\$44,498.00
14)	Overhead and profit (20%):	\$ 8,900.00
	Construction Total:	\$53,398.00
15)	Relocation Allowance:	\$ 2,500.00
	GRAND TOTAL:	\$55,898.00

As you requested, I will entertain requests for reconsideration for a period of five working days after the date of this award. Thank you once again for allowing me to participate in this process. Best wishes to you and to your clients.

Sincerely,



M. Dawes Cooke, Jr.

MDCjr/klj

H.O. LEGAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
AUTO-OWNERS INSURANCE CO., INC.)
)
Plaintiff,)
)
vs.)
)
VIRGINIA T. NEWMAN and TRINITY)
CONSTRUCTION, INC.,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 02-CP-10-4390

SUPPLEMENTAL ORDER
AWARDING ATTORNEY'S FEES

2005 DEC 30 AM 10:06
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Following the Courts ruling in the above case the Defendant, Trinity Construction, Inc.' s attorney, Frank M. Cisa, submitted an Affidavit in support of Trinity Construction, Inc., attorney's fees. After careful consideration of the affidavit submitted by Trinity's attorney I find that Trinity's attorney shall be awarded the sum of \$ 2,461.25 in attorney's fees.

In granting the attorney's fees and cost I have considered the nature, extent and difficulty of the case; the time necessarily devoted to the case; the professional standing of counsel; the contingency of compensation; the beneficial result obtained; and the customary legal fees for similar services. Gordon v. Drews 595 S.E. 2d 864, 358 S.C. 598 (S.C. App. 2004).

Based upon foregoing, Trinity Construction, Inc., is entitled to judgement against the Plaintiff, Auto Owners Insurance Co, Inc., in the amount of \$ 2, 461.25 as reasonable attorney's fees relative to the above case.

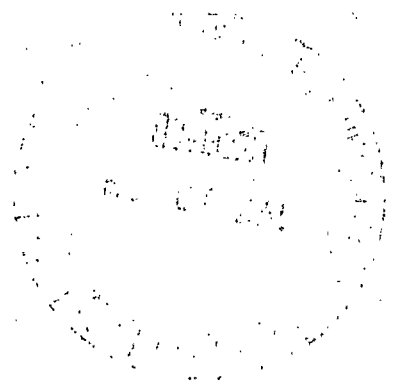
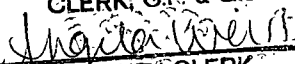
[Handwritten signature]

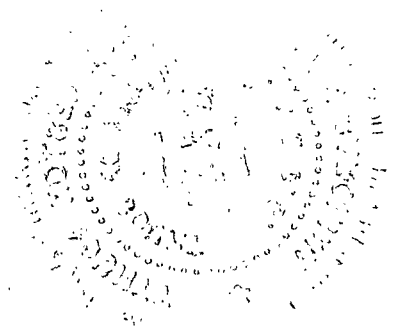
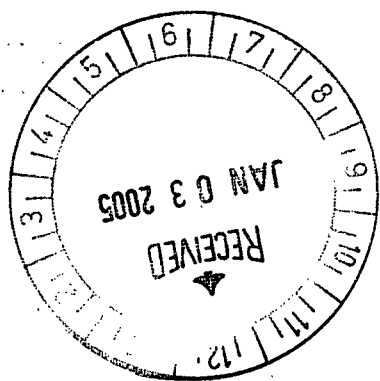
AND IT IS SO ORDERED!


B. Hicks Harwell, Circuit Court Judge

This 15th day of December, 2005

Florence, South Carolina


ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P. & G.S.
By 
DEPUTY CLERK



STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

AUTO OWNERS INSURANCE)
COMPANY, INC.)

Plaintiff,)

vs.)

VIRGINIA T. NEWMAN and)
TRINITY CONSTRUCTION, INC.,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 02-CP-10-4390

ORDER

FILED
2005 JAN -9 PM 2:09
JULIE J. ARNOLD
CLERK OF COURT

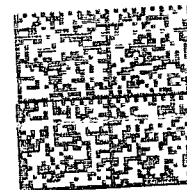
THIS MATTER comes before me on a Motion by Plaintiff Auto-Owners Insurance Co. for a New Trial/Amendment of Judgment pursuant to S.C.R.C.P. 59. The Non-Jury Trial of this Matter came before me on October 31, 2005 and an Order was issued on December 14, 2005.

Based upon review of my notes and the arguments, testimony and evidence presented by the Parties at the Trial of this matter, I find my Order to be consistent with the facts presented and that there was no oversight or misconstruction of facts, errors of law or any other reason(s) whatsoever upon which Plaintiff's Motion should be granted.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Plaintiff's Motion for New Trial/Amendment of Judgment is **DENIED**.

Dated: 12/29/2005


The Honorable B. Hicks Harwell



012H16208183

\$02.15₀

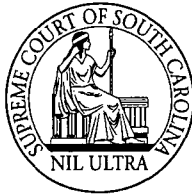
01/16/2006

Mailed From 29201
US POSTAGE

ELLIS:LAWHORNE

Ellis, Lawhorne & Sims, P.A., Attorneys at Law
PO Box 2285 ■ Columbia, SC 29202

The Honorable Kenneth A. Richstad
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
(118-5-6507)



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 6, 2010

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath, Bouch & Crawford, LLP'
P O Box 59
Charleston, SC 29402

Re: Auto Owners v. Newman, Virginia
2002-CP-10-04390

Dear Counsel:

The following Order has been endorsed on your Motion for Costs in the above entitled case on appeal.

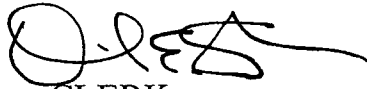
"Costs in the amount of
\$1,325.59 are approved.

s/ Jean H. Toal C.J.
For the Court
Justice John H. Waller, not participating.

January 6, 2010."

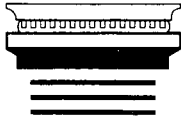
By copy of this letter, the Court of the Circuit Court is requested to add these costs to the remittitur in this matter. Rule 222, SCACR.

Very truly yours,


CLERK

DES/jjp

cc: C. Mitchell Brown, Esquire
John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Matthew D. Patterson, Esquire
A. Mattison Bogan, Esquire
David E. Dukes, Esquire
William C. Wood, Jr., Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggon, Esquire
Parker J. Lavin, Esquire
Lawrence M. Hunter, Jr., Esquire
Stephen Peterson Groves, Sr., Esquire
The Honorable Julie J. Armstrong



LEATH, BOUCH, CRAWFORD & VON KELLER, LLP

PRACTICE LIMITED TO COMMERCIAL LITIGATION & CREDITORS RIGHTS
WITH EMPHASIS ON CONSTRUCTION & ENVIRONMENTAL LAW

October 30, 2009

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RE: Auto Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 2002-CP-10-4390

Dear Mr. Shearouse:

Enclosed for filing please the original and six (6) copy of the Motion of Respondents for an Assessment of Costs and an Itemized Statement of Costs in regards to the above-referenced matter. Also enclosed is the Proof of Service on all counsel of record and a firm check in the amount of \$25.00.

By copy of this correspondence, I am forwarding one (1) copy of the same to all counsel of record. Should you have any questions or concerns, please do not hesitate to call our office.

Yours truly,

LEATH, BOUCH, CRAWFORD & von KELLER, LLP

Stephanie A. Saporita

Stephanie A. Saporita, PLS
Paralegal to Michael S. Seekings

Enclosures

cc (w/ enc.): Joseph K. Qualey, Esq.
John L. McCants, Esq.
Frank M. Cisa, Esq.
George E. Mullen, Esq.
Daniel F. Oberklein, Esq.
Kenneth E. Ormand, Jr., Esq.

RECEIVED

NOV - 2 2009

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CHARLESTON COUNTY
Court of Common Pleas

The Honorable B. Hicks Harwell, Jr.

RECEIVED

NOV - 2 2009

Case No.: 2002-CP-10-04390

S.C. SUPREME COURT

Auto-Owners Insurance Company, Inc.,.....Appellant,

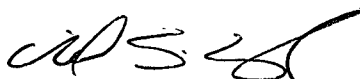
v.

Virginia T. Newman and Trinity Construction, Inc.,..... Respondents.

MOTION OF RESPONDENTS FOR AN ASSESSMENT OF COSTS

Pursuant to Rules 224 and 226(j), SCACR, Respondents Virginia T. Newman and Trinity Construction hereby move this court for an assessment of costs against Appellant. In support of this motion, Respondents submit a sworn, itemized statement of costs incurred as a result of this appeal.

Respectfully submitted,



Michael S. Seekings, Esquire
Leath Bouch Crawford & von Keller, LLP
Post Office Box 59
Charleston, SC 29402
(843) 937-8811

This 30th day of October 2009
Charleston, South Carolina

Joseph K. Qualey, Esquire
Qualey & Beck, LLC
23 Broad Street
Charleston, SC 29401
(843) 577-3434

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CHARLESTON COUNTY
Court of Common Pleas

The Honorable B. Hicks Harwell, Jr.

Case No.: 2002-CP-10-04390

Auto-Owners Insurance Company, Inc., ... Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc., ... Respondents.

ITEMIZED STATEMENT OF COSTS

The Supreme Court is requested to tax the following costs against Auto-Owners Insurance Company, Inc.

COSTS TAXABLE UNDER RULE 226(j), SCACR	NO. OF PAGES	RATE	REQUESTED	ALLOWED (For Court Use Only)
Cost of Printing or Copying Brief			\$165.30	
Cost of Printing or Copying Reply Brief			\$160.29	
Cost of Printing or Copying Appendix				
Filing fee paid under Rule 226(c), SCACR				

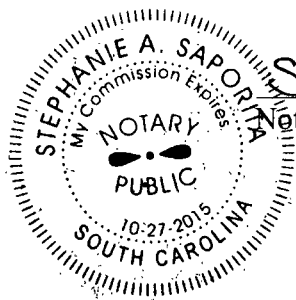
Attorney=s fee provided by Rule 226(j)(2), SCACR			\$1,000.00	
Other (specify and explain):				
		TOTAL	\$1325.59	

I, Michael S. Seekings, do swear or affirm that the foregoing costs are correct and were necessarily incurred in this action. A copy of this statement was mailed to opposing counsel.

Michael S. Seekings
(Signature)
Attorney for Respondents

Subscribed and sworn to before me this 30th day of October, 20 09.

(Seal)



Stephanie A. Saporta
Notary Public for State of South Carolina

My Commission Expires: 10/27/2015

*Costs in the amount of
\$1,325.59 are approved.*

John H. Waller
For the Court *CJ*

*Justice John H. Waller, not participating
January 6, 2010*

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CHARLESTON COUNTY
Court of Common Pleas

The Honorable B. Hicks Harwell, Jr.

Case No.: 2002-CP-10-04390

Auto Owners Insurance Company, ...Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc., ... Respondents.

PROOF OF SERVICE

I certify that I have served the MOTION OF RESPONDENTS FOR AN ASSESSMENT OF COSTS and ITEMIZED STATEMENT OF COSTS by depositing a copy of it in the United States Mail; postage prepaid on October 30, 2009, addressed to all counsel of record:

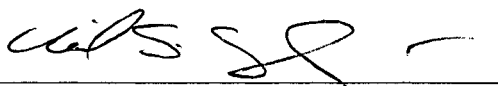
John L. McCants, Esq.
Ellis, Lawhorne & Sims
P.O. Box 2285
Columbia, SC 29202

Frank M. Cisa, Esq.
Cisa & Dodds
858 Lowcountry Blvd.
Mt. Pleasant, SC 29464

George E. Mullen, Esq.
Daniel F. Oberklein, Esq.
Mullen Wylie
P.O. Box 5969
Hilton Head Island, SC 29938

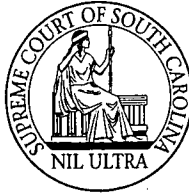
Kenneth E. Ormand, Jr., Esq.
Ormand, Ashley & Gibbons
P.O. Box 8657
Columbia, SC 29202

This 30th day of October, 2009
Charleston, South Carolina



Michael S. Seekings, Esquire
Leath, Bouch & Crawford, LLP
Post Office Box 59
Charleston, SC 29402

Attorney for Respondents



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 21, 2009

REMITTITUR

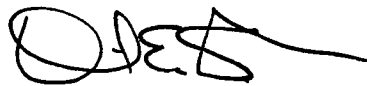
The Honorable Julie J. Armstrong
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: Auto Owners v. Newman, Virginia – 2002-CP-10-04390

Dear Ms. Armstrong:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,



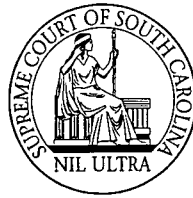
CLERK

DES/jjp

Enclosure

cc: (without enclosure)
C. Mitchell Brown, Esquire
John L. McCants, Esquire

Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Matthew D. Patterson, Esquire
A. Mattison Bogan, Esquire
David E. Dukes, Esquire
William C. Wood, Jr., Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggon, Esquire
Parker J. Lavin, Esquire
Lawrence M. Hunter, Jr., Esquire
Stephen Peterson Groves, Sr., Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 21, 2009

C. Mitchell Brown, Esquire
Nelson Mullins Riley
& Scarborough
P O Box 11070
Columbia, SC 29211

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

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing or Reconsideration:

"Petition for rehearing or reconsideration is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

C. Mitchell Brown, Esquire
Auto Owners v. Newman
October 21, 2009
Page two

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

October 21, 2009.”

The remittitur is today being forwarded to the lower court.

Very truly yours,


CLERK

DES/jjp

cc: Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Matthew D. Patterson, Esquire
A. Mattison Bogan, Esquire
David E. Dukes, Esquire
William C. Wood, Jr., Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggon, Esquire
Parker J. Lavin, Esquire
Lawrence M. Hunter, Jr., Esquire
Stephen Peterson Groves, Sr., Esquire

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law

1320 Main Street / 17th Floor / Columbia, SC 29201

Tel: 803.799.2000 Fax: 803.255.9025

www.nelsonmullins.com

C. Mitchell Brown

Tel: 803.255.9595

Fax: 803.255.9025

mitch.brown@nelsonmullins.com

RECEIVED

September 23, 2009

SEP 23 2009

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

S.C. SUPREME COURT

RE: Virginia Newman v. Auto Owners Insurance Company
Our File No. 01226/01602

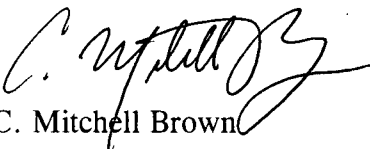
Dear Mr. Shearouse:

Enclosed please find the original and seven copies of Petition for Clarification or Rehearing in the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed is our Firm check in the amount of \$25.00 as the required filing fee.

By copy of this letter to counsel of record, we are serving them with a copy of this pleading.

With kind regards, I remain

Sincerely yours,



C. Mitchell Brown

CMB:lpw

Enclosure

cc: Joseph K. Qualey, Esquire
Frank M. Cisa, Esquire
George E. Mullen, Esquire
Michael S. Seekings, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggan, Esquire
Lawrence M. Hunter, Jr., Esquire
Stephen P. Groves, Sr., Esquire
John L. McCants, Esquire

RECEIVED

THE STATE OF SOUTH CAROLINA
In The Supreme Court

SEP 23 2009

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-04390

Auto-Owners Insurance Company, Inc., ... Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc., ... Respondents.

PETITION FOR CLARIFICATION OR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, the Appellant, Auto-Owners Insurance Company, Inc. ("Auto-Owners"), hereby petitions this Court for clarification, or in the alternative, rehearing, in the above referenced matter. Because this Court has visited the primary issues in this matter twice, this rehearing petition does not go to the seminal issues involved in the Court's September 8, 2009 opinion. Rather, the petition is focused on a specific statement in this Court's opinion regarding an insurer's duty to take certain steps in proceedings between the insured and the third party. In this regard, the opinion in *Auto Owners Insurance Company, Inc. v. Newman and Trinity Construction*, Op. No. 26450 (S.C. Sup. Ct. filed September 8, 2009) (Shearouse Adv. Sh. No. 39 at 12) (hereinafter also as "Opinion") misapprehends matters of fact and law and conflicts with other opinions of this Court and with courts from across the country.

Introduction

This Court's September 8, 2009 Opinion contains the following statement :

[I]t is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto-Owners had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits.

Opinion at 22).

This statement is incorrect because of its context. The projection the Court seems to be making with this statement is that the insurer Auto-Owners had the opportunity, but failed to avail itself of that opportunity, to require an ascertainment of the type or character of damages suffered, and whether such damages were of a nature or type to fall within an exclusion, *in the arbitration between the owner and builder/insured*. In fact, whether it be via an arbitration or trial between the third party and the insured, the insurer has no such ability¹, as will be explained below. Rather, the insurer in a *declaratory judgment action* would have the opportunity to put in evidence showing the type or character of the damages suffered in order to prove the applicability of an exclusion, other condition or coverage defense. The *total amount of damages suffered by the third party* may not be re-litigated, of course, in the declaratory judgment action.

If this Court's true holding is that Auto-Owners failed, *in the declaratory judgment action*², to prove that certain damages suffered were of a type that were excluded from the policy, then such would be consistent with prior South Carolina law and with the law of other jurisdictions. As it stands however, the statement quoted

¹ In some instances the underlying action will be of such a nature that there will be no need for a declaratory judgment action to determine the applicability of insurance coverage.

² Auto-Owners admittedly made reference to the same evidence put forth in the arbitration proceeding in arguing its declaratory judgment arguments, so this Court's opinion could easily be clarified to remove the problems created by the quoted language above.

above by the Court is incorrect and respectfully should be corrected now, rather than in a future matter. Thus, this Court should clarify its Opinion by clarifying the statement or in the alternative grant rehearing in this matter on this issue.

Argument

I. Counsel for Trinity Construction at arbitration had a duty to defend and represent only Trinity, and not Auto-Owners.

Counsel for Trinity had no duty to present evidence as to categories of damages that may fall within our outside of policy exclusions, and Auto-Owners was not present at the arbitration to do so itself. In recognition of potentially divergent interests among insurers and insureds, the Rules of Professional Conduct, located in Rule 407, SCACR, mandate that counsel for Trinity owes a duty of loyalty only to Trinity, not Auto-Owners, if their interests diverge. Specifically, Comment 11 of Rule 1.8, RPC, Rule 407, SCACR states:

Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. . . . Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.

Further, Rule 5.4(c), RPC, Rule 407, SCACR states, "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Accordingly, when Auto-Owners retained counsel to defend Trinity under a reservation of rights against Ms. Newman in the underlying arbitration proceeding, that

counsel—Mr. Dean Best, Esquire, of Haynsworth Sinkler Boyd, P.A.—represented *only* Trinity's interests, and *not* Auto-Owner's interests³, with respect to any duty to present evidence as to categories of damages which may fall within a policy exclusion.

II. The existence of insurance is not to be injected into the proceeding between the insured and the third party.

This Court has a long history of not allowing the existence of insurance to be introduced in litigation between a third party plaintiff and an insured. Hence, Auto-Owners should not be made to intervene or otherwise inject itself into the underlying arbitration proceeding between Ms. Newman and Trinity for the purpose of showing that certain damages may fall within insurance policy exclusions. In *Crocker v. Weathers*, 240 S.C. 412, 126 S.E.2d 335 (1962) the Court set forth the following rule:

The long-established rule of our decisions is that the fact that a Defendant is protected from liability in an action for damages by insurance shall not be made known to the jury. The reason of the rule is to avoid prejudice in the verdict, which might result from the jury's knowledge that the defendant will not have to pay it.

See also, Dobson v. American Indemnity Co., 227 S.C. 307, 87 S.E.2d 869, 870 (1955).

As stated in *Crocker*, this bar exists to prevent a jury's liability determination from being improperly influenced or prejudiced. *See also Cox v. Employers Liability Assur. Corp.*, 191 S.C. 233, 236, 196 S.E. 549, 550 (1938) ("The writer of this opinion, after twelve years' experience upon the trial bench, knows of no more effective method of embalming a defense than that of informing a jury in a negligence case that the defendant in the suit is protected against their verdict by liability

³ *See St. Paul Travelers v. Payne*, 444 F. Supp. 2d 519, 523 (D.S.C. 2006) (demonstrating that an insured's and insurer's interests can diverge and recognizing that an insurer is entitled to a trial on the issues even when the underlying suit settles favorably to the insured).

insurance.”); *Horsford v. Carolina Glass Co.*, 92 S.C. 236, 258-59, 75 S.E. 533, 541 (1912) (“There can be no doubt on the bench or at the bar that, in an action by an employee against his employer to recover damages for personal injury, both reason and authority forbid bringing into the evidence or argument the fact that defendant is protected by employer’s liability insurance. Such evidence or argument has a manifest and strong tendency to carry the jury away from the real issue and to lead them to regard carelessly the legal rights of the defendant on the ground that some one else will have to pay the verdict.”). Thus, not only was Attorney Best—hired by Auto-Owners to represent Trinity in its arbitration with Ms. Newman—representing only the interests of Trinity, Auto-Owners should not otherwise have been required to intervene or inject itself in those proceedings since such would have injected the issue of insurance into those proceedings.⁴

III. The insurer is entitled, in a declaratory judgment action, to prove all or part of the damages awarded against the insured are excluded under the policy, and may put in evidence to show this in the declaratory judgment action.

This Court's Opinion can be read in this regard to misconstrue the purpose of declaratory judgment actions and some may attempt to use the Opinion to prevent an insurer from offering proof as to categories of damages or otherwise proving that damages are excluded under an insurance policy. As a result, this Court should clarify its Opinion on this point as outlined herein.

The purpose of a declaratory judgment action is to assess the legal relationship and responsibilities of the parties. S.C. Code Ann. § 15-53-20 (Supp. 2009) (“Courts

⁴ Rule 411, SCRE (2008) does not mandate a different result, as there would be no reason, such as an issue regarding proof of ownership, agency, control, bias, or prejudice that would apply to make injecting insurance appropriate in this matter in the underlying arbitration action.

of record within their respective jurisdictions shall have power to declare rights, status and other legal relations.”); 26 C.J.S. *Declaratory Judgments* § 3 (2001) (“The object of a declaratory judgment is to enable a party whose rights, privileges, and powers are endangered, or uncertain, and to invoke the aid of the court to obtain a declaration of rights or legal relations.”); 26 CJS *Declaratory Judgments* § 66 (2001) (“A declaratory judgment may be invoked to adjudicate the construction and operation of liability or indemnity insurance policies regarding the rights and liabilities of the parties. Accordingly, a suit for a declaratory judgment may determine the extent of coverage, the insurer’s liability and duties, such as the duty to defend or to indemnify the insured against a claim on which the suit is brought.”). Declaratory judgments allow a court to determine the extent of an insurer’s liability due to the type or categorization of damages, but declaratory judgments do not establish the amount of damages, that is for the trier of fact. 22A *Declaratory Judgments* § 133 (2003) (“Declaratory suits to determine the scope of insurance coverage have often been brought independently of the underlying claims, even though the exact amount to which the insurer may be liable depends on the outcome of the underlying suits against the insured who seeks the declaratory judgment.”).

This Court has previously recognized the purpose of a declaratory judgment action in an insurance coverage matter. In *Sims v. Nationwide*, 247 S.C. 82, 84, 145 S.E.2d 523, 523 (1965) evidence indicated the insured intentionally caused a vehicle collision, and intentional acts were excluded from the insurance policy involved there. Nationwide refused to defend Sims in the underlying tort action. *Id.* In the subsequent indemnity case, Nationwide attempted to offer evidence Sims’ action was intentional

and therefore excluded from the policy. *Id.* at 84, 145 S.E.2d at 524. The trial court held Nationwide was precluded from entering this evidence since it did not do so in the underlying litigation between its insured and the third party. *Id.*

On appeal, this Court reversed the trial court's decision to preclude the insurer's ability to offer evidence as to the exclusion stating that the general rule—"where an insurance company has notice and opportunity to defend an action against its insured, the company is bound by pertinent material facts established against its insured, whether it appears in the defense of the action or not"—is inapplicable where the interests of the insured and insurer *diverge* in the underlying trial. *Id.* at 84-85, 145 S.E.2d at 524 (emphasis added). In recognizing that the interests of the insured and insurer can diverge, the *Sims* court stated:

It is, however, obvious that the binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract, and that the Insurance Company is neither obligated to defend nor bound by the findings of the court if the claim against the insured is not covered by the policy. To hold otherwise would be to estop the Insurance Company by the acts of parties in a transaction in which it has no concern and over which it has no control, and to deprive it of its day in court to show that the transaction is foreign to the contract of insurance.

Id. at 86-87, 145 S.E.2d at 525 (quoting *Farm Bureau Mutual Auto Ins. Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949).

In so holding, the *Sims* Court additionally relied on the Restatement of the Law of Judgment, section 107(a), Comment (g), which states, "it is stated that this rule is binding only as to issues relevant to the proceeding; and that the judgment against the indemnitee does not decide issues as to the existence and extent of the duty to indemnify, and that in a subsequent action the indemnitor may show that the

circumstances under which he was required to give indemnity do not exist.” *Sims*, 247 S.C. at 87, 145 S.E.2d at 525. Accordingly, under *Sims*, when an insurer and an insured’s interests diverge in the underlying case, an insurer may introduce evidence supporting its interest in the declaratory judgment indemnity case. To hold otherwise would deprive the insurer of its day in court.

The rationale underlying *Sims* is supported by opinions from courts across the country. These cases, like *Sims*, show what proof can be offered in a declaratory judgment action. In *Bulger v. Indiana Insurance Co.*, 901, N.E.2d 1110 (Ind. Ct. App. 2009), a case with a nearly identical procedural history to the one at bar, the Indiana Court of Appeals reversed the trial court’s decision to grant summary judgment because the issue of which categories of damages were covered under the policy could not be discerned from the lump sum judgment awarded by the arbitrator. *Id.* at 1116. The underlying case between the insured and the third-party homeowner was submitted to arbitration. At the arbitration, the homeowner received an award for \$2,325,000 and the insured received an award of \$140,000. *Id.* The insured had a commercial general liability policy (CGL) with Indiana Insurance Company, and the insured and the insurer Indiana sought a declaration of whether the insured’s losses fell within the CGL policy. *Id.* at 1113. The trial court granted summary judgment to the insurer, holding the insured’s faulty workmanship and the design of the unit predominately caused the damages, and such causes were outside the coverage umbrella of the CGL policy. *Id.* at 1114.

However, on appeal the Indiana Court of Appeals observed:

The Mussmans and Bulger submitted their claims to arbitration. Presumably, the Mussmans submitted some documentary evidence of

their damages to the arbitrator, which may have included damage to property not belonging to Bulger; however, no such documentary evidence is included in the record on appeal. The arbitrator awarded a lump sum award to the Mussmans without breaking down the individual damage categories. Therefore, Bulger did not present any documentary evidence of a claim for property damages that might be covered under the policy.

Id. at 1116. The court then reversed the grant of summary judgment, finding a genuine issue of material fact regarding coverage for property damages existed due to affidavits submitted by the insured regarding the type of damages awarded, which type was not discernable from the lump sum award alone in the underlying action with the third-party homeowner. *Id.* Accordingly, the Indiana court held that evidence would be allowed in the declaratory judgment action to determine whether the type of damages awarded in the arbitration between insured and the third-party were covered under the CGL policy.

Similarly, in *Cincinnati Insurance Co. v. Tennessee Log Homes*, 2008 WL 2944914 (E.D. Tenn. 2008), an insurer brought a declaratory judgment action to determine coverage following an arbitration award. In the underlying action, the arbitrator awarded the third party home owners \$95,000 due to the “under-design” of the home. *Id.* at *5. During the declaratory judgment action, the insured attempted to revisit the design of the log home. *Id.* As the insured was a party to the underlying action, the federal court barred the insured from relitigating the design argument. *Id.* at 6. However, the court held this ban on re-litigating the design argument in no way prevented the insured from arguing whether the awarded damages are covered under the insurance policies. *Id.* at *7.

The same was true in *Acuity v. Burd & Smith Construction, Inc.*, 721 N.W.2d 33, 35 (N.D. 2006), where the court determined a damage award in an underlying case was only partially covered by a CGL policy. The court held, “the CGL policy does not provide coverage to repair or replace a defective roof . . . but does provide coverage for other property damage to the apartment building. *Id.* Thus, the North Dakota court, like the others cited herein and our Court in *Sims*, recognize that in a declaratory judgment action it is proper to examine the type of the damages awarded in the underlying action and to determine availability of coverage or whether an exclusion applies.

Also, in a declaratory judgment action to determine whether categories of damages awarded in an underlying action were insured, the District Court for the Southern District of Indiana stated:

In a case in which there has been no previous finding of liability, a declaratory judgment does not assign specific dollar values to damages that the insurer must cover; *the judgment may simply clarify which categories of damages the insurer may be responsible for indemnifying if the third party victim can prove in the underlying suit that the insured is liable for those damages.*

Selective Ins. Co. v. Cagnoni Dev., LLC, 2008 WL 126950, *5 (S.D. Ind. 2008)

(emphasis added).⁵ This statement of the law is correct and demonstrates that the

⁵ Commentators have also addressed the tension between relitigation and allowing an insurer to be heard on coverage issues, and conclude that if the interests of the insured and insurer diverge on a particular matter, then an insurer should be permitted to present the evidence⁵ against the insured's interest at the subsequent indemnity action.

When the policyholder's liability arises out of a judgment entered against it in an underlying proceeding, courts evaluate the insurer's obligation to indemnify by comparing the policy language with the facts found by the court (or jury) in that proceeding. If the facts as determined by the trier of fact fall within the coverage of the policy, the insurer must indemnify the policyholder.

. . . .

purpose of the declaratory judgment action in this context is to ascertain whether categories of damages will be covered under the insurance policy—not to relitigate the amount of total damages owed by the insured to the third party.

Auto-Owners does not attempt to change the law, it only requests that this Court correct the above-quoted statement and clarify that proof as to coverage and the issue of whether certain categories of damages are covered can in fact, and should, be offered in a declaratory judgment action.⁶ *Sims* correctly states the law on this issue and the opinions from the other jurisdiction support the holding in *Sims*. Auto-Owners respectfully submits that this Court should address this error in its opinion now to prevent further and prolonged litigation in this area of the law.

Where the conflict between insurer and policyholder centers on the basis of the policyholder's liability to the underlying claimant, the insurer may not be collaterally estopped from challenging those facts determined in the underlying action with respect to which the interests of policyholder and insurer diverge.

JOHN H. MATHIAS, JR., JOHN D. SHUGRUE, AND THOMAS A. MARRINSON, INSURANCE COVERAGE DISPUTES § 9.01[1] (2009). This statement is consistent with this Court's ruling in *Sims*.

⁶ The Court also stated, "There is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco." Accordingly, the Court held that the entire award was payable by Auto Owners. The Arbitrator issued an itemized award (R. pg. 11). As one can see in the award, the arbitrator included fifteen (15) headings, e.g., SITE WORK. The arbitrator did not create the headings on his own, but adopted the headings used by Newman's arbitration expert in the expert's proposal for a cost to repair the house. To prove damages, Newman retained a general contractor, Robert Hedgepath, to prepare a proposal for a cost to repair the house. Hedgepath's proposal appears on pages 327 and 328 of the record. It contains the same headings as the award, e.g., SITE WORK; and the proposal has itemized, estimated amounts for each portion of the work. Further, the headings in Hedgepath's proposal contain more description of the work than does the award.

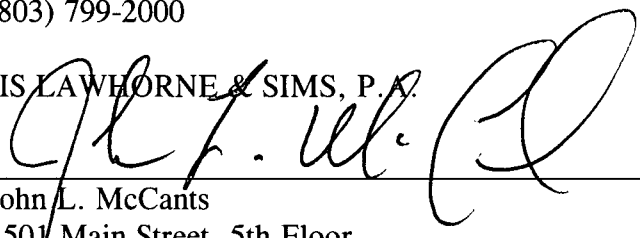
When one reads the award and proposal together, it is submitted that there is an adequate description of the direct and incidental costs to remove and replace the defective stucco. By way of example, Hedgepath estimated the direct cost to remove the stucco under the DEMOLITION heading and he estimated the direct cost to install a new stucco wall system under the INTERIOR & EXTERIOR FINISHES heading. To the extent the Court determines there is uncertainty, Auto Owners respectfully submits that the appropriate course of action is to reverse and remand the case to the lower court to have a judge make findings of fact consistent with the law determined by the Court herein.

Conclusion

Petitioner therefore respectfully requests that this Court grant its petition consistent with its arguments stated herein.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
C. Mitchell Brown
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

ELLIS LAWHORNE & SIMS, P.A.
By: 
John L. McCants
1501 Main Street, 5th Floor
Columbia, SC 29201

Attorneys for Auto-Owners Insurance Company, Inc.

Columbia, South Carolina

September 23rd, 2009

Petition for rehearing ~~or~~ reconsideration is denied.

Robert D. Evans C.J.
John H. Walker Jr. J.
John M. Stevens J.
Donald A. Batty J.
John K. Keith Jr. J.

October 21, 2009

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Auto-Owners Insurance Co., Inc., ... Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc., ... Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Petition for Clarification of Rehearing

Counsel Served:

Joseph K. Qualey, Esquire
Qualey Law Firm, P.A.
23 Broad Street
Charleston, SC 29401

Frank M. Cisa, Esquire
The Law Firm of Cisa & Dodds, LLP
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, SC 29938

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath Bouch & Crawford, LLP
Post Office Box 59
Charleston, SC 29402

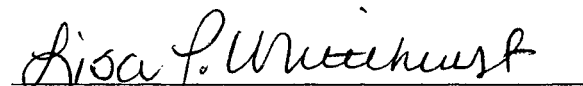
Kenneth E. Ormand, Jr., Esquire
Post Office Box 8657
Columbia, SC 29202

Laura A. Foggan, Esquire
Parker J. Lavin, Esquire
Wiley Rein, LLP
1776 K Street NW
Washington, DC 20006

Lawrence M. Hunter, Jr., Esquire
Hunter & Foster
Post Office Drawer 10309
Greenville, SC 29603

Stephen P. Groves, Sr., Esquire
Nexsen Pruet, LLC
Post Office Box 486
Charleston, SC 29402

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



Lisa P. Whitehurst
Administrative Assistant

September 23, 2009

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Auto Owners Insurance
Company, Inc.,

Appellant,

v.

Virginia T. Newman and
Trinity Construction, Inc.,

.Respondents.

Appeal From Charleston County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 26450
Heard January 23, 2008 – Re-filed September 8, 2009

AFFIRMED IN PART; REVERSED IN PART

C. Mitchell Brown, of Nelson Mullins Riley & Scarborough,
and John L. McCants, of Ellis Lawhorne & Sims, both of
Columbia, for Appellant.

Frank M. Cisa, of Cisa & Dodds, of Mt. Pleasant, Joseph K.
Qualey, of Qualey & Beck, of Charleston, and Michael S.
Seekings and Amy E. Melvin, both of Leath Bouch &
Crawford, of Charleston, for Respondents.

George E. Mullen and Daniel F. Oberklein, both of Mullen
Wylie & Seekings, of Hilton Head Island, for Amicus Curiae
South Carolina Community Associations Institute.

Kenneth E. Ormand, Jr., of Ormand Ashley & Gibbons, of Columbia, for Amicus Curiae National Association of Home Builders and Home Builders Association of South Carolina.

David E. Dukes and William C. Wood, Jr., both of Nelson Mullins Riley & Scarborough, of Columbia, and Laura A. Foggon and Parker J. Lavin, both of Wiley Rein, of Washington, D.C., for Amicus Curiae Complex Insurance Claims Litigation Association.

Lawrence M. Hunter, Jr., of Hunter & Foster, of Greenville, for Amicus Curiae Bituminous Casualty Corporation.

Stephen P. Groves, Sr., of Nexsen Pruet, of Charleston, for Amicus Curiae Builders Mutual Insurance Company.

C. Mitchell Brown, William C. Wood, Jr., Matthew D. Patterson, and A. Mattison Bogan, of Nelson Mullins Riley & Scarborough, of Columbia, for Amicus Curiae Harleysville Mutual Insurance Company.

CHIEF JUSTICE TOAL: The issuer of a homebuilder's commercial general liability policy sought a declaratory judgment to determine whether the policy covered a homeowner's claim for damages caused by the negligence of a construction subcontractor. The trial court determined that the homeowner's claim fell within the policy's coverage and this appeal followed. We certified the case pursuant to Rule 204(b), SCACR, and affirmed the trial court's decision. We now withdraw our prior opinion and substitute it with this opinion. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

Respondent Trinity Construction, Inc. ("Trinity") completed the construction of a home for Respondent Virginia Newman ("Homeowner") in May 1999. Shortly thereafter, the Homeowner filed a claim against Trinity for breach of contract, negligence, and breach of warranty, alleging defective

construction primarily related to the installation of the stucco siding. Based on the report of an engineer hired by the Homeowner to inspect the home's construction, the Homeowner alleged that the application of the stucco did not conform to industry standards and that these nonconforming aspects of the stucco installation allowed water to seep into the home causing severe damage to the home's framing and exterior sheathing. The Homeowner and Trinity referred the action to binding arbitration in which an arbitrator issued the Homeowner an award of itemized damages due to the defective construction totaling \$55,898.

At the time of construction, Trinity held a commercial general liability (CGL) policy issued by Appellant Auto-Owners Insurance Company ("Auto-Owners"). Following arbitration, Auto-Owners sought a declaratory judgment to determine its rights and obligations under the CGL policy, contending that the damages awarded by the arbitrator were not covered under the policy. The trial court determined that the policy covered the damages because they resulted from an "occurrence" and because Auto-Owners failed to show that any policy exclusions applied. Accordingly, the trial court determined that the CGL policy covered all but four items of the damages provided for in the arbitration award. Auto-Owners appealed. After certifying the case, we affirmed the trial court's ruling. *Auto-Owners Ins. Co., Inc. v. Newman*, Op. No. 1383 (S.C. Sup. Ct. filed March 10, 2008) (Shearouse Adv. Sh. No. 9 at 63).

On rehearing, we now consider the following issue for review:

Did the trial court err in holding that the damages awarded by the arbitrator for negligent construction were covered under a CGL policy?

STANDARD OF REVIEW

A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue. *Colleton County Taxpayers Ass'n v. Sch. 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. Haman*, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006). In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them. *Id.*

LAW/ANALYSIS

A. Negligent construction as an "occurrence" under the policy

Auto-Owners argues that the arbitrator's award for the Homeowner's property damage is not covered by the policy. Specifically, Auto-Owners argues that pursuant to this Court's opinion in *L-J v. Bituminous Fire & Marine Insurance Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), the subcontractor's defective installation of stucco did not cause an "accident" constituting an "occurrence" subject to coverage under the policy. We disagree.

The CGL policy issued by Auto-Owners in this case is the standard Insurance Services Office (ISO) CGL policy used since 1986 and is identical to that reviewed by this Court in *L-J*. The relevant policy provisions state that Auto Owners will "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The policy further explains that the insurance applies to such "bodily injury" or "property damage" only if it is caused by an "occurrence."

The CGL policy defines many of the particular terms used to outline the scope of its coverage. The policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property," and defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." The policy does not define the term "accident," however, and this Court has found that in the absence of a prescribed definition in the policy, the definition of "accident" is "[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." *Green v. U. Ins. Co. of America*, 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970).

We begin our analysis in this case with a review of *L-J*, which all parties, as well as the trial court, assert in support of their respective resolutions of the issue. In *L-J*, a developer hired L-J, Inc. ("L-J") as contractor for the site development and road construction in a subdivision development. 366 S.C. at 119, 621 S.E.2d at 34. L-J hired subcontractors to perform most of the work, and four years after construction was completed, the roads began to deteriorate due to negligent road design, preparation, and construction. *Id.* The developer sued L-J and the parties settled. L-J subsequently sought indemnification from Bituminous Fire and Marine Insurance Company ("Bituminous") and three other insurance companies who insured L-J under various CGL policies. *Id.* Bituminous refused to indemnify L-J and brought a declaratory judgment action to determine whether its CGL policy issued to L-J covered the damage to the roads caused by the negligent construction. *Id.* at 120, 621 S.E.2d at 34.

This Court found that although the deterioration to the roadways may have constituted property damage, the various negligent acts of the subcontractors upon which the developer based its claim did not constitute an "occurrence" for which the CGL policy provided coverage. *Id.* at 123, 621 S.E.2d at 36. Specifically, the Court found that the developer's claim alleged negligent construction causing damage only to the defective work product itself (i.e. the roadway), and that such a claim was merely one for faulty workmanship. *Id.* 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 policy's scope of coverage. *Id.* See also *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 16, 459 S.E.2d 318, 320 (Ct. App. 1994) (explaining that a claim solely for economic losses resulting from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover).

The *L-J* court went on to explain, however, that a CGL policy may provide coverage where faulty workmanship causes third party bodily injury or damage to other property besides the defective work product. *Id.* n.4. To illustrate this theory, the Court examined the case of *High Country Associates v. New Hampshire Insurance Co.*, in which a condominium homeowners'

association sued the condominium builder seeking damages allegedly due to negligent construction of the condominium buildings. 648 A.2d 474, 476 (N.H. 1994). The complaint alleged that the continuous moisture intrusion resulting from a subcontractor's defective installation of siding resulted in moisture seeping into the buildings, which caused widespread decay of the interior and exterior walls and loss of structural integrity over a nine-year period. *Id.* The *High Country* court found that the complaint was not simply a claim for faulty workmanship seeking damages to repair the defective siding itself, but rather, was a claim for negligent construction resulting in damage to other property. *Id.* at 477. The court determined that the continuous exposure to moisture due to the defective installation of siding constituted an "occurrence" under the policy and that, in this way, the homeowners' association had properly "alleged negligent construction that resulted in an occurrence, rather than an occurrence of alleged negligent construction." *Id.* at 478. Accordingly, *High Country* held that the CGL policy would cover the homeowners' association's claim against the builder, if successful. *Id.*

We find *High Country* equally instructive in determining whether a CGL policy provides coverage in the instant case where an arbitrator determined that the Homeowner incurred damages as a result of the negligent application of stucco by Trinity's subcontractor. Specifically, the arbitrator found that the defective stucco allowed for continuous moisture intrusion resulting in substantial water damage to the home's exterior sheathing and wooden framing.¹ In our view, these findings establish that there was "property damage" beyond that of the defective work product itself, and that therefore, the Homeowner's claim is not merely a claim for faulty workmanship typically excluded under a CGL policy.

¹ According to expert testimony from the consulting engineer hired by the Homeowner, the subcontractor's application of stucco did not meet applicable building code requirements and deviated from industry standards. The expert testified that the subcontractor did not apply the stucco to the required thickness; failed to install a weep system or flashing around doors and windows; and used improper caulking and banding methods.

Furthermore, although the subcontractor's negligent application of the stucco does not on its own constitute an "occurrence," we find that the continuous moisture intrusion resulting from the subcontractor's negligence is an "occurrence" as defined by the CGL policy. In our view, the continuous moisture intrusion into the home was "an unexpected happening or event" not intended by Trinity – in other words, an "accident" – involving "continuous or repeated exposure to substantially the same harmful conditions." See *Travelers Indem. Co. of Am. v. Moore & Assocs.*, 16 S.W.3d 302, 309 (Tenn. 2007) (holding that whether an "accident" has occurred under the terms of a CGL policy requires a court to determine whether damages would have been foreseeable if the insured had completed the work properly). Accordingly, we hold that the subcontractor's negligence resulted in an "occurrence" falling within the CGL policy's initial grant of coverage for the resulting "property damage" to the home's framing and exterior sheathing. See also *Penn. Mfrs. Assoc. Ins. Co. v. Dargan Constr. Co.*, 2006 U.S. Dist. LEXIS 53366 (D.S.C. July 13, 2006).

We note that interpreting "occurrence" as we do in this case gives effect to the subcontractor exception to the "your work" exclusion in the standard CGL policy. On this matter, a brief history of CGL policies is instructive. A CGL policy in the home construction industry is designed to cover the risks faced by homebuilders when a homeowner asserts a post-construction claim against the builder for damage to the home caused by alleged construction defects. See Rowland H. Long, *The Law of Liability Insurance*, § 3.06(1) (2007). Several construction-specific exclusions in the standard CGL policy exclude from coverage certain types of property damage attributable to risks outside the scope of CGL recovery. See *id.* The primary exclusion is the "your work" exclusion which provides that the policy will not cover "property damage to 'your work.'" In 1986, the insurance industry amended the "your work" exclusion to provide that even if the property damage is to the builder's own work, the "your work" exclusion does not apply "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." See *French v. Assurance Co. of America*, 448 F.3d 693, 701 (4th Cir. 2006) (discussing the evolution of the standard CGL policy). In doing so, the insurance industry

extended liability coverage for property damage to the contractor's completed work arising out of work performed by the subcontractor.² *Id.*

The facts of this case establish exactly the type of property damage the CGL policy was intended to cover after the 1986 amendment to the "your work" exclusion. In construing the provisions of an insurance policy, the Court must consider the policy as a whole and adopt a construction that gives effect to the whole instrument and to each of its various parts and provisions. *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976). To interpret "occurrence" as narrowly as Auto-Owners suggests would mean that any time a subcontractor's negligence led to the damage of any part of the contractor's overall project, a CGL insurer could deny recovery on the basis that it is excluded from the policy's initial grant of coverage. This interpretation would render both the "your work" exclusion and the subcontractor's exception to the "your work" exclusion in the policy meaningless.³ See *French*, 448 F.3d at 705-06.

² *C.D. Walters Construction Co., Inc. v. Fireman's Insurance Co.*, cited by Auto-Owners in support of its argument, is distinguishable from the instant case because it denied coverage under a CGL policy based on the "your work" policy exclusion before the 1986 modification to cover damage resulting from subcontractor negligence. 281 S.C. 593, 597-98, 316 S.E.2d 709, 712 (Ct. App. 1984).

We would also distinguish this Court's decision in *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002), because the coverage period for the policy at issue expired while the contractor was still in possession of the home.

³ In adopting this interpretation, the dissent asserts that we need not "look at the terms of a policy's exclusion in order to determine coverage." Nevertheless, in order to determine the proper meaning of the term "occurrence," we must read the policy as a whole and consider "the context and subject matter of the insurance contract." *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). We decline to adopt any construction of the CGL policy that renders a significant exclusion meaningless, notwithstanding the objections voiced by the dissent.

For these reasons, we hold that the trial court correctly found that the negligent application of stucco resulted in an “occurrence” of water intrusion, causing “property damage” that is covered under Trinity’s CGL policy.

B. Operation of policy exclusion to exclude damages awarded for replacing the substrate

Auto-Owners argues that even if the subcontractor’s negligent application of stucco resulted in an “occurrence” under the CGL policy, coverage for the resulting property damage is nevertheless barred by a policy exclusion. We disagree.

An exclusion found in the standard CGL policy prohibits coverage for “‘property damage’ expected or intended from the standpoint of the insured.”⁴ Auto-Owners claims that pursuant to this exclusion, damages awarded by the arbitrator related to the framing and exterior sheathing of the home are not covered under the CGL policy because a construction professional would expect substantial moisture intrusion from defective stucco to result in these types of damages. In our opinion, and in the absence of any evidence otherwise, it is unreasonable to believe that Trinity expected or intended its subcontractor to perform negligently. Therefore, Trinity could not have expected or intended the resulting property damage. *Cf. Lamar Homes v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007) (“But a deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly.”). Accordingly, we hold that the property damage to the home’s framing and exterior sheathing was not

⁴ We note that instead of containing an exclusion to this effect, the pre-1986 CGL policy included this language in its initial grant of coverage as part of the definition of “occurrence.” *See French*, 448 F.3d at 701. Although, in our view, an analysis under our modern jurisprudence as to whether or not there was an “occurrence” essentially subsumes this particular 1986 amendment to the policy, we set forth an analysis of the exclusion’s applicability in this case for the sake of completeness.

expected or intended by Trinity, and therefore, coverage of the Homeowner's property damage is not barred by this exclusion contained in the CGL policy.

C. Damages awarded for replacement of the defective stucco

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

The standard CGL policy grants the insured broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions. Each exclusion in the policy must be read and applied independently of every other exclusion. *Engineered Products, Inc. v. Aetna Cas. & Sur. Co.*, 295 S.C. 375, 378-79, 368 S.E.2d 674, 675-76 (Ct. App. 1988) (quoting *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 795 (N.J. 1979)).

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

Nevertheless, it is not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto-Owners had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits.⁵ See *Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.").

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision finding that the CGL policy issued by Auto-Owners to Trinity covers the damage awarded by the arbitrator to the Homeowner. Although we reverse the trial court's decision to the extent that it orders recovery under the policy for the removal and replacement of the defective stucco, there is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco.

WALLER, BEATTY and KITTREDGE, JJ., concur.
PLEICONES, J., dissenting in a separate opinion.

⁵ Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award.

JUSTICE PLEICONES: I respectfully dissent. We have held that faulty workmanship by a subcontractor which results in property damage only to the work product itself is not an occurrence within the meaning of that term in a comprehensive general liability (CGL) policy. L-J, Inc. v. Bituminous Fire and Marine Ins. Co., 366 S.C. 117, 621 S.E.2d 33 (2005). Here, the general contractor's "work product" is the entire home, including the stucco, the framing, and the exterior sheathing. In my view, there is no coverage under the CGL policy because there is no occurrence, rather only faulty workmanship. L-J, Inc., *supra*.

As we explained in Century Indemnity Co. v. Golden Hills Bldrs., Inc., 348 S.C. 559, 561 S.E.2d 355 (2002):

A comprehensive general liability policy, such as the one at issue, provides coverage "for all the risks of legal liability encountered by a business entity," with coverage excluded for certain specific risks. Rowland H. Long, L.L.M., *The Law of Liability Insurance*, § 3.06[1] (2001). This type of insurance "is not intended to insure business risks, *i.e.*, risks that are normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage." *Id.* § 10.01 [1]. Specifically, "[t]he policies do not insure [an insured's] work itself, but rather, they generally insure consequential risks that stem from that work." *Id.* See also *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) (general liability policy is intended to provide coverage for tort liability for physical damage to property of others; it is not intended to provide coverage for insured's contractual liability which causes economic losses); *Sapp v. State Farm Fire & Cas. Co.*, 226 Ga.App. 200, 486 S.E.2d 71, 75 (1997) (noting risk intended to be insured is possibility that work of insured, once completed, will cause bodily injury or damage to property other than to completed work itself, and for which insured may be found liable; coverage applicable under CGL policy is for tort liability for injury

to persons and damage to *other* property and not for contractual liability of insured for economic loss because completed work is not that for which the damaged person bargained).

Id. at 565-66, 561 S.E.2d at 358 (emphasis in original).

Under the relevant provisions of this CGL policy, Auto Owners is responsible for “property damage” that is caused by an “occurrence.” “Occurrence” as used in the policy “means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Faulty workmanship by subcontractors which leads to deterioration or damages the work product itself is not an accident within the meaning of a CGL policy. L-J, Inc., supra.⁶ In L-J, as the majority notes, we also explained that there may be coverage where faulty workmanship causes third party bodily injury or damage to property other than the contractor’s work product. Here, we have neither bodily injury nor damage to anything other than the contractor’s work product.

The majority relies on High Country Assocs. v. New Hamp. Ins. Co., 139 N.H. 39, 648 A.2d 474 (1994), and finds that damage caused to other parts of the house by the stucco subcontractor’s faulty workmanship is a claim of property damage beyond that of the defective work itself, and thus covered under the policy. I disagree.

⁶ In my opinion, the definition of “accident” in Travelers Indem. Co. of Am. v. Moore & Assoc., 216 S.W.3d 302 (Tenn. 2007), relied upon by the majority, is fundamentally inconsistent with the definition we adopted in L-J, Inc., supra. See Gen. Sec. Indem. Co. of Az. v. Mtn. States Mut. Cas. Co., 205 P.3d 529 (Colo. App. 2009) (identifying L-J, Inc. as following majority rule that construction defect claims are not accidents under a CGL policy and Moore as a minority rule decision).

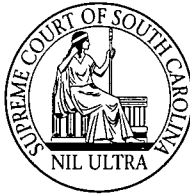
As noted above, the “work product”⁷ is the entire home constructed by Trinity for the Homeowners. See L-J, Inc., supra. While I agree that High Country appears to distinguish between the construction of the condominium units themselves (the work product) and the damage done to the structure of these units, a later New Hampshire case which cites High Country makes it clear that coverage under a CGL policy exists only where there is actual damage to property other than the insured’s work product. Webster v. Acadia Ins. Co., 156 N.H. 317, 934 A.2d 567 (2007) (CGL coverage where negligent installation of new roof caused damage to preexisting rafters). As I understand High Country in light of Webster, there would be no coverage here as only Trinity’s “work product” has been damaged as a result of the stucco subcontractor’s faulty workmanship.

Finally, I do not believe we need look at the terms of a policy’s exclusion in order to determine coverage. Under existing South Carolina law, there is no occurrence here, thus no property damage, and therefore no coverage. The “your work” exclusion applies only where there is, in fact, “property damage” to “your work.” Absent that threshold showing of coverage, there is no reason to reach the exclusion, much less the subcontractor exception to the exclusion. Compare Laidlaw Enviro. Serv. (TOC) v. Aetna Cas. & Assur. Co. of Ill., 338 S.C. 43, 524 S.E.2d 847 (Ct. App. 1999) (exclusion does not create coverage but limits it).

I would reverse.

⁷ The CGL does not use this term: it is a combination of “your product” and “your work,” both terms defined under the contract. Here, we are actually talking about “your work” which means:

- a. work or operations performed by you or on your behalf; and
- b. materials, parts or equipment furnished in connection with such work or operations.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

August 14, 2009

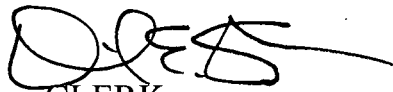
John L. McCants, Esquire
Ellis Lawhorne & Sims PA
P O Box 2285
Columbia, SC 29202

Re: Auto Owners v. Newman, Virginia

Dear Mr. McCants:

We are hereby returning your Check No. 115382 in the amount of \$20.00.
As you were advised by telephone, we are unable at this time to make a copy of the
tape for you.

Very truly yours,


CLERK

DES/jjp

Enclosure

ELLIS:LAWHORNE

JOHN L. MCCANTS

803 212 4959

jmccants@ellislawhorne.com

August 11, 2009

Honorable Daniel E. Shearouse
S.C. Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211

Re: Auto-Owners Insurance Company v. Trinity Construction, Inc.
Civil Action No.: 02-CP-10-4390
Claim No: 36-07099-99
EL&S File No.: 118-5-6507

Dear Mr. Shearouse:

We would like to obtain a copy of the cassette tape for the oral arguments heard before the Supreme Court on November 6, 2008 concerning the above-referenced matter. I understand the fee associated with this request is \$20.00 and I have enclosed our firm's check made payable to your office.

Thank you for your assistance. If you have any questions in this regard, please give my office a call.

With warm regards, I am

Sincerely yours,

Ellis, Lawhorne & Sims, P.A.

John L. McCants

RECEIVED

AUG 13 2009

/maj S.C. SUPREME COURT
Enclosure

~~Westlaw~~.CourtExpress™

South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201
Attention: Clerks Office

March 11, 2009

Dear Sir or Madam:

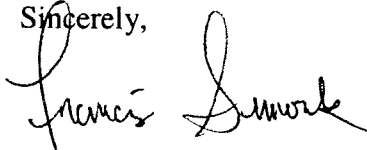
I respectfully request one copy of the oral argument cd for the following case:

Case # 26450 Auto Owners Insurance vs Newman

I ask that you allow my researcher to hand deliver this request and pay the necessary fee.
If for some reason this can not be done, I ask that you call me at 800-916-8493.

Thank you for all of your assistance.

Sincerely,


Francis Smoak

POC Janice Parks 803-356-9934 or 803 960 7923

The Supreme Court of South Carolina

Auto Owners Insurance
Company, Inc.,

Appellant,

v.

Virginia T. Newman and
Trinity Construction, Inc.,

Respondents.

ORDER

The motion to file a supplemental brief and the motion to supplement the record are denied. While not accepted as a supplement to the record, a copy of the unofficial transcript of the prior oral argument submitted by respondent is accepted solely as an aid to this Court. If it becomes necessary to consider the prior arguments to resolve this matter, this Court will rely on the official tapes of those arguments.

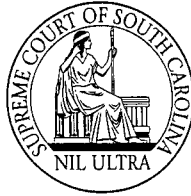
IT IS SO ORDERED.



FOR THE COURT C. J.

Columbia, South Carolina
October 29, 2008

cc: C. Mitchell Brown, Esquire
John L. McCants, Esquire
Frank M. Cisa, Esquire
Joseph K. Qualey, Esquire
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Matthew D. Patterson, Esquire
A. Mattison Bogan, Esquire
David E. Dukes, Esquire
William C. Wood, Jr., Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggon, Esquire
Parker J. Lavin, Esquire
Lawrence M. Hunter, Jr., Esquire
Stephen Peterson Groves, Sr., Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 28, 2008

C. Mitchell Brown, Esquire
Nelson Mullins Riley
& Scarborough
P O Box 11070
Columbia, SC 29211

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

Frank M. Cisa, Esquire
Cisa & Dodds
858 Lowcountry Boulevard,
Suite 101
Mt. Pleasant, SC 29464

Joseph K. Qualey, Esquire
Qualey & Beck. P.A.
23 Broad Street
Charleston, SC 29401

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath, Bouch & Crawford, LLP'
P O Box 59
Charleston, SC 29402

Re: Auto Owners v. Newman, Virginia

Dear Counsel:

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows:

Appellant	15 minutes
Respondents	15 minutes
Appellant in Reply	5 minutes

Reminder:

This case is scheduled for hearing at 11:00 a.m. on Thursday, November 6, 2008.

Very truly yours,

Daniel E. Shearouse, Clerk

By Jean J. Peebles
Administrative Assistant

DES/jjp

cc: William C. Wood, Jr., Esquire
Matthew D. Patterson, Esquire
A. Mattison Bogan, Esquire
David E. Dukes, Esquire
William C. Wood, Jr., Esquire
George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Kenneth E. Ormand, Jr., Esquire
Laura A. Foggon, Esquire
Parker J. Lavin, Esquire
Lawrence M. Hunter, Jr., Esquire
Stephen Peterson Groves, Sr., Esquire

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law

1320 Main Street / 17th Floor / Columbia, SC 29201

Tel: 803.799.2000 Fax: 803.255.5916

www.nelsonmullins.com

A. Mattison Bogan

Tel: 803.255.9589

Fax: 803.255.5916

matt.bogan@nelsonmullins.com

October 28, 2008

RECEIVED

OCT 28 2008

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Virginia T. Newman and Trinity Construction, Inc. v. Auto-Owners Insurance
Company, Inc.
Our File No. 01226/01602

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Return of Appellant Auto-Owners Insurance Company, Inc. to Respondents' Motion to Supplement the Record and the Return of Appellant Auto-Owners Insurance Company, Inc. to Respondents' Motion to File Supplemental Brief. Please file the originals and return clocked-in copies to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of these pleadings.

Very truly yours,



A. Mattison Bogan

AMB:lpw

Enclosures

cc: Michael S. Seekings, Esquire
Frank M. Cisa, Esquire
George E. Mullen, Esquire
Kenneth E. Ormand, Jr., Esquire
John L. McCants, Esquire

RECEIVED

OCT 28 2008

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-04390

Virginia T. Newman and Trinity Construction, Inc.,..... Respondents,

v.

Auto-Owners Insurance Company, Inc.,..... Appellant.

**RETURN OF APPELLANT
AUTO-OWNERS INSURANCE COMPANY, INC.
TO RESPONDENTS' MOTION TO FILE SUPPLEMENTAL BRIEF**

Pursuant to Rule 224(e), SCACR and at the request of this Court, Auto-Owners Insurance Company, Inc. ("Auto-Owners") files this Return to Respondents' Motion to File a Supplemental Brief. Based on the authority set forth below, this Court should deny Respondents' Motion.

ARGUMENT

Respondents petitioned this Court requesting an opportunity to file a supplemental brief prior to oral argument responding to issues raised in Appellant's petition for rehearing and the briefs of *amici curiae* supporting the petition for rehearing. Auto-Owners filed the petition for rehearing on April 21, 2008. Respondents chose not to respond as permitted by Rule 224(e), SCACR. *Amici* also filed their motions and briefs on April 21, 2008. Again, Respondents chose not to

respond as permitted by Rule 213, SCACR (setting forth the time period in which a response to an *amicus curiae* brief should be filed).

The petition for rehearing was granted on August 22, 2008, over two months ago. The order specifically noted that the matter would be scheduled for argument in November 2008.

Now, two weeks before oral argument, Respondents seek to file a supplemental brief addressing briefs filed over six months ago and more than two months after Respondents knew that rehearing was granted and that the case would be argued. With oral argument currently scheduled for November 6, 2008, granting Respondents' Motion would allow Respondents to present written arguments to this Court to which Auto-Owners would be unable to reply prior to oral argument. Granting the motion would also disrupt preparation for oral argument and would effectively reward Respondents for their prior inactivity. Respondents should not be allowed to benefit from their failure to avail themselves of their right to respond as provided for in the appellate court rules.

The motion should be denied. If the Court grants Respondents' Motion, Auto-Owners requests that the Court postpone the scheduled oral argument and allow Auto-Owners time to file a reply brief.

Signatures Attached

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: C. Mitchell Brown by AAB

C. Mitchell Brown
SC Bar No. 012872
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

John L. McCants
ELLIS LAWHORNE & SIMS, P.A.
1501 Main Street, 5th Floor
Columbia, SC 29201

Attorneys for Auto-Owners Insurance Company, Inc.

Columbia, South Carolina

October 28, 2008

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Virginia T. Newman and Trinity Construction, Inc., ... Respondents.

v.

Auto-Owners Insurance Co., Inc., ... Appellant,

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Return of Appellant Auto-Owners Insurance Company, Inc.
to Respondents' Motion to File Supplemental Brief

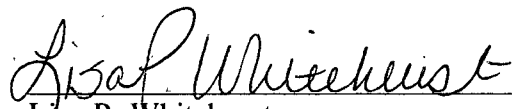
Counsel Served:

Frank M. Cisa, Esquire
The Law Firm of Cisa & Dodds, LLP
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, SC 29938

Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath Bouch & Crawford, LLP
Post Office Box 59
Charleston, South Carolina 29402

Kenneth E. Ormand, Jr., Esquire
Ormand Ashley & Gibbons
117 Alpine Cir. #700
Columbia, South Carolina 29223



Lisa P. Whitehurst
Administrative Assistant

October 28, 2008

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 28 2008

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-04390

Virginia T. Newman and Trinity Construction, Inc.,..... Respondents,

v.

Auto-Owners Insurance Company, Inc.,..... Appellant.

**RETURN OF APPELLANT
AUTO-OWNERS INSURANCE COMPANY, INC.
TO RESPONDENTS' MOTION TO SUPPLEMENT THE RECORD**

Pursuant to Rule 224(e), SCACR and at the request of this Court, Auto-Owners Insurance Company Inc. ("Auto-Owners") files this Return to Respondents' Motion to Supplement the Record. Based on the authority set forth below, this Court should deny Respondents' Motion.

LEGAL AUTHORITY AND ARGUMENT

I. The appellate court rules forbid the inclusion of the policy endorsement in the Record on Appeal.

Respondents seek to supplement the record with a copy of an endorsement form titled "Exclusion - Damage to Work Performed by Subcontractors on Your Behalf" copyrighted by ISO, Inc. (Insurance Services Office, Inc.) in 2000. This document is not part of the policy at issue in this case. Based on a review of the transcripts and

motions, this document was never presented to the lower court as an exhibit, as evidence, or for any other purpose. The motion to supplement is devoid of any statement as to the source or relevance of the document to the CGL policy at issue in this appeal.

The appellate court rules also forbid the inclusion of matters in the Record on Appeal that were neither raised to nor ruled upon by the lower court. Rule 210(c), SCACR expressly provides that “[t]he Record shall not . . . include matter which was not presented to the lower court or tribunal.” Id. (emphasis added). Further, the Court’s rules limit consideration of any facts not appearing in the Record on Appeal. Rule 210(h), SCACR (“the appellate court will not consider any fact which did not appear in the Record on Appeal”).

By their motion, Respondents effectively seek to introduce new exhibits or evidence on appeal. The Court should deny the attempt.

II. The original oral argument transcript cannot be included in the Record on Appeal.

Respondents seek to supplement the record with a purported transcript of the first oral argument in this matter. This material should also not be included in the record on appeal.

The document attached to the motion is unofficial. It is unauthenticated. There is no statement or certification regarding how or when this “transcript” was generated. There is no certification that it is a true and accurate record of what occurred in the Court at the first hearing. Cf. Rule 30(f)(1), SCRCP (requiring certification of the court reporter for deposition transcripts).

The Court is in possession of the official recording of the prior oral argument. To the extent the Court needs to reference the prior argument as part of its deliberations, the official tape is already part of the Court's record of those proceedings. The motion should thus be denied.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: C. Mitchell Brown by JMB
C. Mitchell Brown
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

John L. McCants
ELLIS LAWHORNE & SIMS, P.A.
1501 Main Street, 5th Floor
Columbia, SC 29201

Attorneys for Auto-Owners Insurance Company, Inc.

Columbia, South Carolina

October 28, 2008

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

B. Hicks Harwell, Jr., Circuit Court Judge

Case No. 2002-CP-10-4390

Virginia T. Newman and Trinity Construction, Inc.,..... Respondents.

v.

Auto-Owners Insurance Co., Inc., ... Appellant,

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Return of Appellant Auto-Owners Insurance Company, Inc.
to Respondents' Motion to Supplement the Record

Counsel Served:

Frank M. Cisa, Esquire
The Law Firm of Cisa & Dodds, LLP
858 Lowcountry Blvd., Suite 101
Mt. Pleasant, SC 29464

George E. Mullen, Esquire
Daniel F. Oberklein, Esquire
Mullen Wylie, LLC
Post Office Box 5969
Hilton Head Island, SC 29938

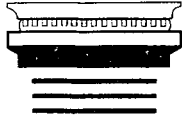
Michael S. Seekings, Esquire
Amy E. Melvin, Esquire
Leath Bouch & Crawford, LLP
Post Office Box 59
Charleston, South Carolina 29402

Kenneth E. Ormand, Jr., Esquire
Ormand Ashley & Gibbons
117 Alpine Cir. #700
Columbia, South Carolina 29223



Lisa P. Whitehurst
Administrative Assistant

October 28, 2008



LEATH, BOUCH & CRAWFORD LLP

PRACTICE LIMITED TO COMMERCIAL LITIGATION & CREDITORS RIGHTS
WITH EMPHASIS ON CONSTRUCTION & ENVIRONMENTAL LAW

October 22, 2008

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RE: Auto Owners Insurance Company v. Virginia T. Newman and Trinity
Construction, Inc.
Case No.: 2002-CP-10-4390

Dear Mr. Shearouse:

Enclosed for filing please the original and six (6) copy of the Motion of Respondents to File Supplemental Brief and Motion of Respondents Supplement the Record. Also included is the Proof of Service on all counsel of record with a firm check in the amount of \$50.00.

By copy of this correspondence, I am forwarding the same to all parties of interest. If you have any questions or concerns, please do not hesitate to call our office.

RECEIVED

OCT 24 2008

S.C. SUPREME COURT

Yours truly,

LEATH, BOUCH & CRAWFORD, LLP

Stephanie A. Saporita

Stephanie A. Saporita, ALS
Paralegal to Michael S. Seekings

Enclosures

cc (w/ enc.): Joseph K. Qualey, Esq.
John L. McCants, Esq.
Frank M. Cisa, Esq.
George E. Mullen, Esq.
Daniel F. Oberklein, Esq.
Kenneth E. Ormand, Jr., Esq.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CHARLESTON COUNTY
Court of Common Pleas

The Honorable B. Hicks Harwell, Jr.

Case No.: 2002-CP-10-04390

Auto-Owners Insurance Company, Inc.,.....Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc.,.....Respondents.

MOTION OF RESPONDENTS TO FILE SUPPLEMENTAL BRIEF

Pursuant to Rules 212 and 224, SCAP Respondents Virginia T. Newman and Trinity Construction hereby move this court for an order allowing them to file a supplemental brief in advance of Oral Arguments on Appellant's Petition for Rehearing. In support of this motion, Respondents would show that this case was heard on January 23, 2008, following an extensive pre-argument briefing period. A decision was rendered on March 10, 2008. Following a Petition by Appellant and several briefs in support, rehearing was granted by the court by order dated August 22, 2008. A hearing is scheduled for November 6, 2008.

By their filing, Respondents simply want to respond, briefly, to matters raised by Appellant and Amici and update their position. Granting of this motion would be in the best interest of justice and allow for a complete record of all positions in advance of this Court's hearing.

RECEIVED

OCT 24 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read "MS Seekings", written over a horizontal line.

Michael S. Seekings, Esquire
Leath Bouch Crawford & von Keller, LLP
Post Office Box 59
Charleston, SC 29402

This 22nd day of October 2008
Charleston, South Carolina

Joseph K. Qualey, Esquire
Qualey & Beck, LLC
23 Broad Street
Charleston, SC 29401

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CHARLESTON COUNTY
Court of Common Pleas

The Honorable B. Hicks Harwell, Jr.

Case No.: 2002-CP-10-04390

Auto-Owners Insurance Company, Inc.,.....Appellant,

v.

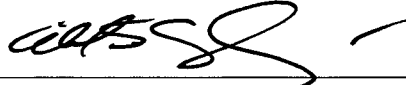
Virginia T. Newman and Trinity Construction, Inc.,..... Respondents.

MOTION OF RESPONDENTS TO SUPPLEMENT THE RECORD

Pursuant to Rules 212 and 224, SCACR, Respondents Virginia T. Newman and Trinity Construction hereby move this Court for an order allowing them to Supplement the original Record on Appeal to include a Transcript of the Oral Arguments held in this matter on January 23, 2008, and ISO Form "Exclusion – Damage to Work Performed by Subcontractors on Your Behalf", copies of which are attached hereto.

Respondents respectfully request this Court grant their leave to supplement the Record on Appeal prior to the rehearing scheduled for November 6, 2008.

Respectfully submitted,



This 22nd day of October 2008
Charleston, South Carolina

Michael S. Seekings, Esquire
Leath Bouch Crawford & von Keller, LLP
Post Office Box 59
Charleston, SC 29402

Joseph K. Qualey, Esquire
Qualey & Beck, LLC
23 Broad Street
Charleston, SC 29401

Attorneys for Respondents

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**EXCLUSION - DAMAGE TO WORK PERFORMED BY
SUBCONTRACTORS ON YOUR BEHALF**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion I. of Section I - Coverage A - Bodily Injury And Property Damage Liability is replaced by the following:

2. Exclusions

This insurance does not apply to:

I. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

THE COURT: The next case for oral argument is Auto Owners against Newman. Mr. McCants, you may proceed.

MR. MCCANTS: Chief Justice Toll, in the minutes that I have, I will ask that I be able to dispense with the facts and proceed with the argument.

THE COURT: Very well.

MR. MCCANTS: Thank you. The Appellant requests the Court to reverse the decision of the lower court. I will argue the lower court erred on the following bases. The bases of the Appellant's position is that the Court erred in regard to going beyond the four corners of the arbitration award to define coverage, and the Court erred in defining the words "an occurrence."

Reading from the record, page 291, the expert engineer for Respondent Newman makes at the arbitration, quote, "Since a polymer-based finish was installed and a Portland cement stucco application, the only remediation option is to remove the entire Portland cement stucco cladding and reinstall to the proper three-fourths inch thickness required by the

1 code.
 2 On page 11 of the record is the
 3 arbitrator's award. The arbitrator found,
 4 quote, "I believe the stucco system is defective
 5 because it is most probably Portland stucco and
 6 is not applied in conformance to the code. The
 7 system may be functional now, but I have to
 8 assume there's a good reason why the code
 9 requires additional thickness. I also feel
 10 there's sufficient other problems with the
 11 installation, like weep holes, flashing, et
 12 cetera, that an allowance needs to be made for
 13 the replacement of the system.
 14 Reading from the record on page 113, Judge
 15 Harwell, quote, "All of this is a moot issue;
 16 the award is the award. Under the doctrine of
 17 Offensive non-mutual collateral estoppel, the
 18 plaintiff may be prevented from relitigating
 19 issues to determine the prior action so long as
 20 the parties had a full and fair opportunity to
 21 litigate the issues. The reason why you need to
 22 remove the stucco, according to the arbitrator's
 23 actions is determined by the arbitrator for
 24 liability. In sum, the allowance for the
 25 removal and replacement is the award to correct

1 damage other than complete replacement.
 2 THE COURT: Well, Mr. McCants, there may
 3 be. But that's the award the arbitrator made
 4 and that's the basis upon which he made it.
 5 Now, how am I gonna get in here and restore it
 6 back? What authority have I got as a judge to
 7 pick apart the rationale there? He made an
 8 award and he explains why he made the award, and
 9 he indicates very clearly the award is made for
 10 what he considers an occurrence, and that
 11 occurrence is ancillary damage brought about by
 12 faulty workmanship, not a claim for the faulty
 13 workmanship itself. Now, how can I pick that
 14 apart? What authority have I got to do that?
 15 MR. MCCANTS: Your Honor, I agree that to
 16 some extent this court is bound by factual
 17 findings. I specifically disagree that Dawes
 18 Cooke made that finding. He very clearly said
 19 that the system is wrongly applied, and then he
 20 gave an allowance should there be rot damage.
 21 THE COURT: Well, if we decide that he did
 22 make those conclusions, then your only way to
 23 win this case is to have occurrence defined as
 24 you would like defined.
 25 MR. MCCANTS: There's a much bigger issue

1 faulty workmanship alone, which is not an
 2 incurable event."
 3 Moving on with regard to the discussion of
 4 the occurrence. With regard to the CGL policy --
 5 THE COURT: Dawes Cooke certainly didn't
 6 say that in the arbitration award, and the
 7 implication is quite to the contrary. The
 8 implication is that you can't effectuate the
 9 repair of the ancillary damage that was caused
 10 by the faulty workmanship in installing the
 11 stucco without taking the stucco off, and that
 12 is the award he made and that was the rationale
 13 he used. I understand that y'all don't agree
 14 with that. But how else are you going to repair
 15 the ancillary damage he says was done unless you
 16 do take off the stucco? That's a factual
 17 finding on his part as an arbitrator. How am I
 18 gonna get up here and dissect that?
 19 MR. MCCANTS: A, I disagree. He found it
 20 was necessary to --
 21 THE COURT: Well, assume for a moment he
 22 did.
 23 MR. MCCANTS: Let's assume there is an
 24 allowance for wood rot damage. There's
 25 certainly other methods to getting to that

1 to be decided, yes, your Honor, with regard to
 2 that. The issues centered on are the faulty
 3 construction to be an occurrence. The word
 4 "occurrence" is part of the insuring agreement.
 5 According to the policy, the word is defined,
 6 quote, "An accident including continuous or
 7 repeated exposure to substantially the same
 8 general harmful condition. The latter phrase is
 9 a temporal addition to the word "accident."
 10 The definition of the word "accident" says,
 11 quote, "usually suddenly." The addition of this
 12 phrase means that you did not need a sudden
 13 event. The term "accident" is not defined by
 14 the policy, so the Court reverts to state law.
 15 The South Carolina State Law defines the word
 16 "accident" to be an unexpected happening or
 17 event which occurs by chance." What is chance?
 18 Well, the dictionary defines it as "an
 19 unexpected, unpredicted event."
 20 The majority and the minority courts really
 21 agree with regard to the definition of the word
 22 "accident" as usually an unexpected event.
 23 Where the courts part ways is with the
 24 application of the word "unexpected" in a
 25 construction defect accident. The dispute among

1 the courts is whether the construction defect is
 2 an unexpected event in a construction project.
 3 The recent decision of the Florida Supreme
 4 Court in U.S. Fire I use as a template for the
 5 Respondent's position. The Florida Supreme
 6 Court's conclusion that a construction defect is
 7 an unexpected event is problematic. The Court
 8 reasons that a contractor does not expect
 9 physical damage to result from the contractor's
 10 work. Physical damages are not expected. It is
 11 an accident; it is an occurrence.

12 The illustration that the Court gives is
 13 the window illustration borrowed from the
 14 Tennessee court. That illustration is this: If
 15 the builder installs the window, you can
 16 substitute the word "stucco," if the builder
 17 installs the window correctly, the builder does
 18 not expect it to leak. The Florida court --

19 THE COURT: But that's not the -- whose
 20 perspective are we looking at "unexpected" from?

21 MR. MCCANTS: The policy says from the
 22 standpoint of the builder.

23 THE COURT: All right, sir. In this
 24 particular instance, what is the accident that
 25 is being talked about here?

1 they claim?

2 MR. MCCANTS: That's what they claim, and
 3 you said a lot there, Your Honor. You said the
 4 words "accident," you said "property damage,"
 5 and you said "subcontractor." The word
 6 "accident" with regard to the water may be the
 7 temporal addition, which is the continuous or
 8 repeated. That is simply --

9 THE COURT: Accident is something that
 10 doesn't have to occur all at one time. It can
 11 occur with continuous or repeated exposure;
 12 right?

13 MR. MCCANTS: That's what the policy
 14 attempts to say. The policy doesn't want to
 15 limit you to a car wreck in an intersection. It
 16 says it can be over time. However, you've gotta
 17 go to the next step, which the majority and the
 18 minority courts did. Is that continuous or
 19 repeated exposure an unexpected event? And
 20 that's where we submit the --

21 THE COURT: Are you saying you think that's
 22 an expected event from the standpoint of the
 23 builder, the policy holder?

24 MR. MCCANTS: The builder is gonna be just
 25 as surprised and unexpecting when the builder

1 MR. MCCANTS: The accident being talked
 2 about does not exist.

3 THE COURT: What they contend is that
 4 continuous water intrusion occurred as a result
 5 of the subcontractor's negligence in installing
 6 this stucco, and that that continuous water
 7 intrusion led to extensive damage in the home.
 8 What Dawes Cooke did was to say, yes, that did
 9 occur. The sub negligently installed this EIFS,
 10 and the result was that there was continuous
 11 water intrusion and it resulted in damage to the
 12 rest of the house, and he parsed out what damage
 13 that water intrusion caused. He called that an
 14 accident involving continuous or repeated
 15 exposure to substantially the same harmful
 16 conditions; which is what your policy covers,
 17 doesn't it?

18 MR. MCCANTS: Again, I would disagree with
 19 Dawes, Your Honor.

20 THE COURT: But is that the accident these
 21 folks claim? They say, we didn't make a claim
 22 for subcontractor negligence; we made a claim
 23 for the property damage that occurred in the
 24 rest of the building as a result of the
 25 subcontractor's negligence. Isn't that what

1 goes out there to see that the window is
 2 installed wrong. For instance, let me go back
 3 to the window installation. The premise of the
 4 Tennessee illustration is this; the builder is
 5 told that there is water damage. The builder
 6 goes out there and expects a surprise and
 7 doesn't expect the water damage. That's
 8 supposedly an occurrence. Take the leaking
 9 away, take the water damage away. Let's just
 10 talk about whether the unexpectedness of the
 11 faulty window installation is an occurrence.
 12 It's the same reasoning.

13 If you take a builder out to the house and
 14 you say -

15 THE COURT: But these are your words, your
 16 policy language, Mr. McCants. If we follow your
 17 reasoning, then this policy doesn't cover
 18 anything. In 1986, these CGL policies were
 19 amended all over the country to cover precisely
 20 what we're talking about here, which is
 21 ancillary property damage that occurs from bad
 22 sub work. It wasn't intended, and we've said
 23 that in L.J., it wasn't intended to cover the
 24 sub's work itself. It was intended to cover bad
 25 effects from property damage to the rest of the

1 construction from bad sub work.
 2 In L.J. we had a situation where all that
 3 was being claimed was the very work of the sub,
 4 the bad work. You said, no, it's not covered.
 5 But you certainly said, and you used High
 6 Country and other cases to illustrate the
 7 position of this Court, that the 1986 amendment
 8 to these commercial general liability policies
 9 meant something. What they meant is that
 10 ancillary property damage, even if it's with
 11 continuous exposure type damage, would be
 12 recoverable and would be considered an accident.
 13 Now, you're arguing suppositions that's
 14 going to render that coverage meaningless.
 15 MR. MCCANTS: I disagree, Your Honor.
 16 THE COURT: What kind of subcontractor --
 17 what kind of damage from the negligence of the
 18 subcontractor, what kind of damage to the work
 19 of a general contractor by these CGL policies
 20 would be covered under your interpretation for
 21 accident in this policy?
 22 MR. MCCANTS: That position creates
 23 coverage vis-a-vis an exclusion. It would cover
 24 an accident caused by a subcontractor. The fact
 25 that the subcontractor --

1 injury, the bike is the property damage. That's
 2 an accident caused by those subcontractors --
 3 THE COURT: That's the third party that
 4 comes on the property. But this CGL insurance
 5 per our analysis in L.J. and per many other
 6 states that have looked at this, also covered
 7 property damage to the rest of the work.
 8 MR. MCCANTS: That's where the disagreement
 9 is, Your Honor.
 10 THE COURT: Well, we've already decided
 11 that, and now you're coming back and talking
 12 about what the definition of accident is. But
 13 in L.J. we decided that, did we not?
 14 MR. MCCANTS: In L.J. you had the exact
 15 same thought pattern that's here, essentially.
 16 You had property, a road; you have property, a
 17 house. You had subcontractors who built the
 18 road; you have subcontractors who built the
 19 house.
 20 THE COURT: In L.J. you had a contract that
 21 involved a whole lot more than just a building
 22 of the road. The insurance is not bought by the
 23 sub who built the road, it's bought by the
 24 contractor that built the whole project. One of
 25 the parts of the project was that road. What we

1 THE COURT: But that's what they're saying
 2 is occurring here, the accident is the water's
 3 intrusion into other parts of the construction
 4 and the property damage caused thereby.
 5 MR. MCCANTS: It's only an accident if it
 6 is unexpected.
 7 THE COURT: Well, give me an example of
 8 something that would be covered under your
 9 formulation of what constitutes an accident.
 10 MR. MCCANTS: A subcontractor installs
 11 shingles on a roof, the shingles are not nailed
 12 correctly and injuring a third party.
 13 THE COURT: We're not talking about
 14 personal; we're talking about property damage.
 15 MR. MCCANTS: Okay. The subcontractor --
 16 THE COURT: If the shingles were
 17 negligently installed and they resulted in some
 18 damage by water intrusion to other parts of the
 19 building than the roof, would that be covered or
 20 not covered?
 21 MR. MCCANTS: I disagree. Let me change
 22 the example. You asked about personal injury
 23 versus property damage. A boy on a bicycle is
 24 in an accident because of the cracked road in
 25 L.J. The boy on the bicycle suffers personal

1 said was that this CGL policy couldn't stand
 2 good simply for the failure of the sub's work.
 3 But we also pointed out, and used High Country
 4 as an example, that if other parts of the work
 5 had been impacted, then recovery could be had.
 6 What you're saying is it is only third
 7 parties that get to recover, and that no other
 8 part of the general contractor's work that gets
 9 damaged by faulty sub installation, no other
 10 part of his work can be covered. That's what
 11 you really want us to uphold, isn't it?
 12 MR. MCCANTS: I think that's because there
 13 is no accident to the work itself. You have to
 14 equate accident to negligence. Let me try to go
 15 back to the example. In L.J., it was a general
 16 contractor's policy. It was a road, like the
 17 house. It was subcontractors who built the
 18 road. It was only the road that was damaged.
 19 Same thing here. Subcontractors built the house
 20 and it's only the house that's damaged.
 21 Basically the same accident.
 22 Now, the Court did flip over, if you will,
 23 to High Country. And it's our position that
 24 there's a window illustration that most recently
 25 U.S. Fire is nothing unexpected about the water

1 damage that comes from the subcontractor's work.
 2 THE COURT: That's not what the New
 3 Hampshire Court held in High Country, is it?
 4 MR. MCCANTS: The New Hampshire Court
 5 simply, with a summary judgement letter, simply
 6 said there was an occurrence. I disagree with
 7 that finding, essentially because you had the
 8 position that the Respondents want to take in
 9 the case, that the arbitration -- they want to
 10 argue that the arbitrator should fix liability
 11 on Trinity because he's charged with properly
 12 supervising and knowing the subcontractor's
 13 work. On the other hand, the Respondent even
 14 asked the lower court herein to find an
 15 unexpected event because Trinity had had no
 16 knowledge of the subcontractor's work. Well,
 17 it's going both ways. If you want to argue one
 18 way, argue that. Unexpected or expected,
 19 depending on the liability --
 20 THE COURT: If we fix on that, then the
 21 1986 amendments the insurance industry made to
 22 the "your work" exclusion so as to provide that
 23 even property damage from the builder's own work
 24 would be covered if it arose out of damage by
 25 negligence of a subcontractor. (inaudible)

1 that they are charged with knowing what the
 2 subcontractor knows. There is no scenario under
 3 which -- I don't want to mince words. What
 4 we're really going to be asked to do, in your
 5 argument, is to simply say the general
 6 contractors can never recover because they're
 7 charged with the sub's knowledge, and they will
 8 never be able to recover from negligent
 9 construction by a sub if it effects other parts
 10 of the work, and I need to know that that's what
 11 you're asking us to do.
 12 MR. MCCANTS: The general contractor's
 13 policy in this case is covered with sub
 14 accidents, such as third-party personal property
 15 damage.
 16 THE COURT: It wouldn't bother with
 17 anything to the builder's work because he's
 18 charged with the sub's knowledge that if he puts
 19 in something negligently, it may affect other
 20 parts of the work; is that right?
 21 MR. MCCANTS: I disagree with that coverage
 22 right there. It's conceivable that the property
 23 damage as the work itself may be covered, that's
 24 what you're saying. But I think that the policy
 25 is supposed to pick up the accident caused by

1 insurance, the 4th Circuit Court recognizes
 2 that. But your very restrictive interpretation
 3 of accident would really render that
 4 meaningless, wouldn't it?
 5 MR. MCCANTS: With all due respect, Your
 6 Honor, I think you have to back up to is there
 7 an accident.
 8 THE COURT: But is there any scenario under
 9 which there could be an accident that involves
 10 the general contractor's work as opposed to an
 11 accident which involves some complete third
 12 party, in your opinion?
 13 MR. MCCANTS: I think that if you're gonna
 14 reach the general contractor's work, you must
 15 first have an unexpected event. And that is
 16 whether --
 17 THE COURT: Unexpected from whose
 18 perspective?
 19 MR. MCCANTS: From the standpoint of the
 20 builder. The law charges the builder to know
 21 and to do and should know, et cetera. But the
 22 law says that you have to know what the
 23 subcontractor's doing, and that's what they want
 24 to argue at the liability stage.
 25 THE COURT: What you're saying, again, is

1 the sub. Now, faulty construction causing
 2 property damage is not covered. Faulty
 3 construction which triggers the liability which
 4 causes an accident, i.e., to a third party,
 5 which results in property damage, that may be
 6 covered.
 7 THE COURT: I understand your position.
 8 MR. MCCANTS: Thank you very much.
 9 THE COURT: Thank you, Mr. McCants.
 10 MR. SEEKINGS: If it please the Court,
 11 along with Joe Qualey, we represent before this
 12 Court today, Ms. Newman and Trinity
 13 Construction. In 1999, Ms. Newman walked into
 14 Mr. Qualey's office, having a problem with a
 15 home that was built by Trinity Construction.
 16 That home had water intrusion. They had a
 17 dispute; a dispute that involved the general
 18 contractor during 1999, when no one had heard of
 19 L.J. or a lot of the cases in jurisprudence
 20 around this country, had insurance that covered
 21 him with something. He paid money for that
 22 insurance. And what he paid for was insurance
 23 that covered the exact case that I stand here
 24 before you eleven years later to this day.
 25 Because what did Trinity Construction and

1 its owner purchase from Auto Owners? They
 2 purchased a commercial general liability policy
 3 which had Completed Operations Hazard Coverage,
 4 and that is very important. And if you look in
 5 the record before this Court, I think one of the
 6 most important pages is the sheet that shows how
 7 much was paid for that policy. The biggest
 8 single line item is for Completed Operation
 9 Hazard Coverage. \$711.00 of the \$1,600.00 that
 10 was paid for this policy was for Completed
 11 Operation Hazard Coverage.

12 What does that mean? That means when Mr.
 13 Causey, the owner of Trinity, completed this
 14 project and left, a project he completed through
 15 the use exclusively, and it's stipulated in this
 16 record, subcontractors, he was protected to
 17 certain claims arised.

18 Now, go to the policy, and that's what this
 19 case is about. There is lots of jurisprudence.
 20 I did something I rarely do at Christmas, your
 21 Honor, as you know, I wrote a letter. I wrote a
 22 letter to this Court which included the Florida
 23 case and J.S.U.B., which we think is very
 24 instructive. But, it's not as instructive as
 25 the policy itself. And the policy itself, which

1 there something that excludes it? The question
 2 here is, is there damage to your work? No, it
 3 was done by a subcontractor. Here you have J6&L
 4 which clearly states in a Completed Operations
 5 Policy, which we've got here, when the work is
 6 completed by a subcontractor, there is an
 7 exception to any exclusion that might exist.

8 Again, go back to the money that was paid
 9 for this policy and what was purchased,
 10 completed operations. Completed operations done
 11 by a subcontractor that goes all the way back to
 12 1986, and they included all the broad form
 13 exclusions and exceptions, Your Honor. This
 14 here is exactly what the industry itself
 15 contemplated would be covered.

16 THE COURT: Would you agree that post 1986
 17 these policies are amended to allow coverage for
 18 ancillary damage that occurs to the rest of the
 19 work by negligent performance of a sub on his
 20 part of the work?

21 MR. SEEKINGS: Yes.

22 THE COURT: So the coverage does not
 23 include claims simply from damage to the sub's
 24 work because of his negligence in performing his
 25 work; am I right?

1 I believe and I believe the industry believes,
 2 even Mr. McCants will tell you, is something
 3 that this Court needs to look to in deciding
 4 this case in arriving at its opinion. A
 5 Completed Operations Policy that covers property
 6 damage in the case of an occurrence. That's the
 7 first question.

8 The first question you have to ask is what
 9 is the initial coverage? How do we determine if
 10 property damage has resulted from an occurrence?
 11 Well, the industry itself has defined it in this
 12 policy post 1986, as the Court pointed out, as
 13 an accident including, not exclusively,
 14 including repeated exposure to the same or
 15 similar harmful condition. The accident here is
 16 just that, water is getting behind the exterior
 17 envelope in Ms. Newman's home and creating
 18 damage below that the arbitrator, and
 19 importantly Judge Harwell in a proceeding that
 20 Auto Owners brought, found to be there. That
 21 triggers coverage.

22 Then the question becomes, is there
 23 anything in the policy that was purchased by
 24 this general contractor that would exclude
 25 coverage? Is that trigger no longer loaded? Is

1 MR. SEEKINGS: I think you've got to go
 2 back to the policy. And clearly, that's not the
 3 situation here. But if you go back to the
 4 policy and you look at the exclusion and the
 5 exception to the exclusion, I'm not sure that's
 6 completely right.

7 THE COURT: Well, that's what we said in
 8 L.J. versus Bituminous, isn't it?

9 MR. SEEKINGS: It is, under a very
 10 different set of circumstances, Your Honor.
 11 Because if you go back --

12 THE COURT: It's the same language, isn't
 13 it?

14 MR. SEEKINGS: It is the same language.
 15 There's no question it's the same policy, it's
 16 the same language, with completed operations and
 17 in fact you've got the same --

18 THE COURT: There we said if it's damage to
 19 the sub's work alone by negligence of the sub in
 20 doing his work, it's not covered by the CGL
 21 policy; right?

22 MR. SEEKINGS: It's interesting, when you
 23 asked that question to Mr. McCants, I pulled out
 24 L.J. because I thought I remembered reading it
 25 this morning, and actually we're talking there

1 about the contractor and not the subcontractor.
 2 Here we've gone one step further, and it's
 3 the subcontractor very clearly under the scheme
 4 that's been set up. Here, Trinity had a
 5 subcontractor, so I don't think L.J. speaks
 6 directly to that situation, but the policy does.
 7 The policy very clearly does speak very directly
 8 to it, and it says, look, this work was done on
 9 your behalf by a subcontractor, and if there's a
 10 claim later for resulting damage, which is
 11 exactly the fact pattern here stipulated to,
 12 you've got coverage.

13 THE COURT: If there's damage to other
 14 parts of the work, not the work the subs
 15 performed; right?

16 MR. SEEKINGS: Not the work performed by
 17 the general contractor, and I think it's silent
 18 as to the subcontractor because your work is
 19 defined as the work of the contractor. There's
 20 an exclusion for work done on your behalf which
 21 is subcontracted.

22 THE COURT: What does High Country say
 23 about that?

24 MR. SEEKINGS: High Country, again, as you
 25 know, is a pleading case.

1 want to tell this Court, and anyone else who
 2 would listen that's become an industry around
 3 the country, to go to the highest courts in the
 4 land and the states and say, look, there can
 5 never be an occurrence under this situation,
 6 ever, ever, ever, that there is never an
 7 occurrence when it's a general contractor who is
 8 being sued for subsequent damage to property in
 9 a construction situation.

10 And, more importantly, if a subcontractor
 11 does the work, it's intended. The general
 12 contractor knows somehow that they have hired a
 13 subcontractor that's gonna go out and do
 14 something incorrectly, do it wrong, that will
 15 lead to subsequent damage, and they put
 16 themselves in a position where they know they're
 17 gonna be in an altercation somewhere later with
 18 the homeowner. Under the scenario that's set up
 19 by the industry, that would be crazy because the
 20 whole industry would say, look, they're going in
 21 knowing there is no coverage, knowing their
 22 subcontractor is not gonna do it right, knowing
 23 they have complete exposure. That's not, when
 24 you focus back on what the policy says is
 25 covered, what we've got here.

1 THE COURT: Y'all can't hide behind
 2 pleading. There is plenty of recitation of the
 3 law of what this contract means. What does High
 4 Country say about this particular situation?

5 MR. SEEKINGS: I believe that High Country
 6 says that in this particular situation -- are
 7 you talking about the facts here? The facts
 8 here is there's coverage. There's clearly
 9 coverage.

10 THE COURT: What does it say about the
 11 issue of whether or not you can recover under
 12 these kind of policies for damage to the sub's
 13 work caused by the sub's negligence?

14 MR. SEEKINGS: I believe under that -- that
 15 the language is silent. But I think you can
 16 read that it says if it's damage to the
 17 contractor's work itself it's not covered, and
 18 that's why the completed operations endorsement
 19 is the key to this analysis, Your Honor. If you
 20 go and look, that then clearly speaks -- that's
 21 where subcontractors come into the analysis
 22 under the policy that was sold and bought by
 23 Trinity. If not, what did they buy? What was
 24 purchased under the whole notion that the
 25 industry -- Auto Owners and the industry, they

1 THE COURT: What's excluded from coverage
 2 under your scenario?

3 MR. SEEKINGS: What's excluded from
 4 coverage is there is no Completed Operations
 5 Policy as to work of the general contractor.
 6 What also is --

7 THE COURT: The Completed Operations Hazard
 8 Coverage is also a part of all these policies,
 9 so that doesn't add anything to your situation
 10 that's not present in all these other cases that
 11 I've cited that you've been talking about. What
 12 is excluded?

13 MR. SEEKINGS: Well, in this case not
 14 anything that is before the Court. But what may
 15 be excluded is damage to the work itself.
 16 Damage to the work itself may be excluded. But
 17 here, that's not what we've got. We've got
 18 damage that's a result of the work of the
 19 subcontractor, resulting damage in this case.
 20 The record is very clear what happened. Water
 21 got behind the stucco that's at issue. It has
 22 created problems behind that stucco. They have
 23 to go in to go get it.

24 THE COURT: The award really comes to the
 25 work itself. Cooke said that to get to the

1 damage underneath, you're gonna have to remove
 2 the EIFS, and he then allowed recovery for that
 3 as well.
 4 MR. SEEKINGS: Absolutely. And
 5 importantly, within this record there's more
 6 than that. Because the industry thereafter
 7 through Auto Owners brought a declaratory
 8 judgment action. There is a record of exactly
 9 what happened. There's testimony in this case.
 10 This is not just simply an arbitration award.
 11 There's testimony of the very people who
 12 appeared before the arbitrator, appearing before
 13 the Court on the industry's declaratory judgment
 14 action where all those questions were asked.
 15 "Is there resulting damage to a reasonable
 16 degree of certainty?" Mr. Sisnroy said, "Yes."
 17 "Was it intended or expected?" "No." Those are
 18 facts that this Court takes before them in
 19 making the decision in this case. Again, a case
 20 in which you've got all of the elements of all
 21 of the parts from vertical construction under
 22 the CGL policy with completed operations. We
 23 certainly ask this Court to affirm the decision
 24 below, and in arriving at its decision, look at
 25 what that policy says and render an opinion in

1 Judge Harwell, "To meet those
 2 specifications?"
 3 Engineer, "Yes, Your Honor."
 4 The Court, "You can predict you're gonna
 5 have problems if you don't?"
 6 Engineer, "Absolutely, Your Honor." What
 7 is the definition of accident, unexpected; what
 8 is chance, unpredictable. The engineer also
 9 said, talking about the builder, page 158, "I
 10 would expect water intrusion to rot the system
 11 that's been installed properly."
 12 The arbitrator said, "I have to assume
 13 there is a good reason why the code requires
 14 additional thickness." Why is it that the
 15 arbitrator admits it and understands why the
 16 stucco must be installed correctly, but Trinity
 17 gets it by? Why is it unexpected when Trinity
 18 is told that the stucco is installed wrong, and
 19 that is somehow an accident? Again, these are
 20 not unexpected, unpredicted events at all. You
 21 have to back up under these policies. In the
 22 1986 version and before, the consistent word
 23 that is there is "accident."
 24 Accident by the majority and minority
 25 courts is defined as the unexpected. There is

1 favor of Ms. Newman and Trinity. Thank you,
 2 Your Honor.
 3 THE COURT: Thank you, Mr. Seekings. Mr.
 4 McCants?
 5 MR. MCCANTS: May it please the Court, the
 6 1986 policy did not strike the word "accident."
 7 The Court is still required to find an accident,
 8 and the majority and minority decisions conclude
 9 that an accident is an unexpected event, an
 10 unpredicted event. It is just as predictable
 11 that if the stucco is installed correct or
 12 wrong, that you're gonna need to replace it.
 13 That's not an accident.
 14 THE COURT: Well, there's testimony to the
 15 contrary in this record, as Mr. Seekings has
 16 referred to, Mr. McCants. What do we do with
 17 that, that there is expert testimony that this
 18 was unexpected?
 19 MR. MCCANTS: Well, that's the opinion of
 20 that particular expert, and I do not believe
 21 that that particular position is consistent with
 22 the law. Here's the testimony from the
 23 engineer: "You have to follow the rules and
 24 install the materials and make sure all the
 25 items that have to be there are there."

1 nothing unexpected here. What is unexpected is
 2 the shingle that falls off the roof and hurts
 3 the person. C.D. Walter, "It may be true that
 4 the same neglect for workmanship is, under the
 5 policy, both a business expensible repair,
 6 property damage, or a loss represented by damage
 7 to persons and property. The two consequences
 8 are vastly different in relationship to sharing
 9 the cost of such risks as a matter of insurance
 10 underwriting."
 11 Century Indemnity, "Coverage applicable
 12 under the CGL policy for court liability for
 13 injury to persons and damage to other property."
 14 Your Honor, risk is the possibility that an
 15 undesirable event will occur. Actuaries are
 16 experts in determining risk in assessing.
 17 Mathematical theory shows that the greatest
 18 relief from risk is eliminating the consequences
 19 of events that are very likely to result in very
 20 big lawsuits.
 21 THE COURT: Mr. McCants?
 22 MR. MCCANTS: Yes, Your Honor.
 23 THE COURT: Just one question, and I know
 24 Chief asked you this time and time again, but I
 25 don't think I ever got an answer, or maybe I

1 missed it. Give me an example of when property
 2 damage would be covered under your policy.
 3 MR. MCCANTS: Property damage is covered if
 4 --
 5 THE COURT: An example.
 6 MR. MCCANTS: A shingle falls off and
 7 injures a person, personal injury, which is
 8 covered.
 9 THE COURT: I'm not talking about personal
 10 injury. Property damage?
 11 MR. MCCANTS: The bicycle is an example.
 12 THE COURT: No. Home construction, give me
 13 one.
 14 MR. MCCANTS: Property damage to the house
 15 itself?
 16 THE COURT: Yes, sir.
 17 MR. MCCANTS: Not covered.
 18 THE COURT: So this policy is no good.
 19 MR. MCCANTS: No, this policy covers an
 20 accident to a third person. Personal injury to
 21 a person that's hit by the shingle, a bicycle
 22 that is broken because of it, the cracked grade.
 23 Those are accidental injuries and those are
 24 covered losses.
 25 THE COURT: Why would you have amended that

1 citizen? How much do they get hurt, minor or
 2 serious injury? What is the likelihood that a
 3 shingle falls off and hurts someone? Ask the
 4 insurance industry, What is the likelihood a
 5 shingle falls off and damages the rest of the
 6 house? That's a controlled risk. In allocating
 7 risk and assigning responsibilities under this
 8 policy, the party best able to control them,
 9 Trinity. The party best able to cut the
 10 unexpected cost, the insurance industry or Auto
 11 Owners. I see that my time is up. We would ask
 12 this Court to reverse the lower Court.
 13 THE COURT: Thank you, Mr. McCants. The
 14 Court will be in recess.

1 "your work" exclusion if you're right that no
 2 part of the construction is covered? To say the
 3 exclusion does not apply to damaged work or work
 4 out of which the damage arises is performed on
 5 your behalf by the subcontractor?
 6 MR. MCCANTS: The policy now picks up under
 7 the general contractor's policy, the accident
 8 caused by subcontractors. Faulty construction
 9 causing property damage is not an insurable
 10 loss. Faulty workmanship by the subcontractor
 11 that causes an accident that results in property
 12 damage, the loss, and those are the two examples
 13 I gave you.
 14 THE COURT: So the 4th Circuit was wrong in
 15 French versus Insurance Company of America, in
 16 your opinion?
 17 MR. MCCANTS: Right off the top of my head,
 18 I think the 4th Circuit would need to back up to
 19 the definition of accident and find it as
 20 unexpected. I would disagree with their -- I
 21 can't cite it at first. There are multiple
 22 exclusions.
 23 One other point, the unworkmanlike
 24 performance exposes the contractor to limitless
 25 liabilities. Who gets hurt, a child or senior

A able 1:5 16:8 32:8,9 Absolutely 26:4 28:6 accident 5:6,9,10,13 5:16,22,25 6:11,24 7:1,14,20 8:4,6,9 10:12,21,24 11:2,5 11:9,24 12:2,12 13:13,14,21 15:3,7 15:9,11 16:25 17:4 19:13,15 27:6,7,9 27:13 28:7,19,23 28:24 30:20 31:7 31:11,19 accidental 30:23 accidents 16:14 action 2:19 26:8,14 actions 2:23 Actuaries 29:15 add 25:9 addition 5:9,11 8:7 additional 2:9 28:14 admits 28:15 affect 16:19 affirm 26:23 agree 3:13 4:15 5:21 20:16 agreement 5:4 allocating 32:6 allow 20:17 allowance 2:12,24 3:24 4:20 allowed 26:2 altercation 24:17 amended 9:19 20:17 30:25 amendment 10:7 amendments 14:21 America 31:15 analysis 12:5 23:19 23:21 ancillary 3:9,15 4:11 9:21 10:10 20:18 answer 29:25 apart 4:7,14 appeared 26:12 appearing 26:12 Appellant 1:9 Appellant's 1:13 applicable 29:11 application 1:22 5:24 applied 2:6 4:19 apply 31:3 arbitration 1:15,20 3:6 14:9 26:10 arbitrator 2:3,23 3:17 4:3 14:10	19:18 26:12 28:12 28:15 arbitrator's 2:3,22 argue 1:11 14:10,17 14:18 15:24 arguing 10:13 argument 1:1,7 16:5 arised 18:17 arises 31:4 arose 14:24 arriving 19:4 26:24 asked 11:22 14:14 16:4 21:23 26:14 29:24 asking 16:11 assessing 29:16 assigning 32:7 assume 2:8 3:21,23 28:12 attempts 8:14 authority 4:6,14 Auto 1:2 18:1 19:20 23:25 26:7 32:10 award 1:15 2:3,16 2:16,25 3:6,12 4:3 4:8,8,9 25:24 26:10 B back 4:6 9:2 12:11 13:15 15:6 20:8,11 21:2,3,11 24:24 28:21 31:18 bad 9:21,24 10:1,4 bases 1:12,12 Basically 13:21 basis 4:4 behalf 22:9,20 31:5 believe 2:4 19:1,1 23:5,14 27:20 believes 19:1 best 32:8,9 beyond 1:14 bicycle 11:23,25 30:11,21 big 29:20 bigger 4:25 biggest 18:7 bike 12:1 Bituminous 21:8 borrowed 6:13 bother 16:16 bought 12:22,23 23:22 bound 4:16 boy 11:23,25 broad 20:12 broken 30:22	brought 4:11 19:20 26:7 builder 6:15,16,17 6:22 8:23,24,25 9:4,5,13 15:20,20 28:9 builder's 14:23 16:17 building 7:24 11:19 12:21 built 12:17,18,23,24 13:17,19 17:15 business 29:5 buy 23:23 C called 7:13 car 8:15 Carolina 5:15 case 1:1 4:23 14:9 16:13 17:23 18:19 18:23 19:4,6 22:25 25:13,19 26:9,19 26:19 cases 10:6 17:19 25:10 caused 3:9 7:13 10:24 11:4 12:2 16:25 23:13 31:8 causes 17:4 31:11 Causey 18:13 causing 17:1 31:9 cement 1:21,23 centered 5:2 Century 29:11 certain 18:17 certainly 3:5,25 10:5 26:23 certainty 26:16 cetera 2:12 15:21 CGL 3:4 9:18 10:19 12:4 13:1 21:20 26:22 29:12 chance 5:17,17 28:8 change 11:21 charged 14:11 16:1 16:7,18 charges 15:20 Chief 1:4 29:24 child 31:25 Christmas 18:20 Circuit 15:1 31:14 31:18 circumstances 21:10 cite 31:21 cited 25:11 citizen 32:1 cladding 1:24	claim 4:12 7:21,21 7:22 8:1,2 22:10 claimed 10:3 claims 18:17 20:23 clear 25:20 clearly 4:9,18 20:4 21:2 22:3,7 23:8 23:20 code 2:1,6,8 28:13 collateral 2:17 come 23:21 comes 12:4 14:1 25:24 coming 12:11 commercial 10:8 18:2 Company 31:15 complete 4:1 15:11 24:23 completed 18:3,8,10 18:13,14 19:5 20:4 20:6,10,10 21:16 23:18 25:4,7 26:22 completely 21:6 conceivable 16:22 conclude 27:8 conclusion 6:6 conclusions 4:22 condition 5:8 19:15 conditions 7:16 conformance 2:6 consequences 29:7 29:18 considered 10:12 considers 4:10 consistent 27:21 28:22 constitutes 11:9 construction 5:3,25 6:1,2,6 10:1 11:3 16:9 17:1,3,13,15 17:25 24:9 26:21 30:12 31:2,8 contemplated 20:15 contend 7:3 continuous 5:6 7:4,6 7:10,14 8:7,11,18 10:11 contract 12:20 23:3 contractor 6:8 10:19 12:24 17:18 19:24 22:1,17,19 24:7,12 25:5 31:24 contractors 16:6 contractor's 6:9 13:8,16 15:10,14 16:12 23:17 31:7 contrary 3:7 27:15	control 32:8 controlled 32:6 Cooke 3:5 4:18 7:8 25:25 corners 1:14 correct 2:25 27:11 correctly 6:17 11:12 28:16 cost 29:9 32:10 country 9:19 10:6 13:3,23 14:3 17:20 22:22,24 23:4,5 24:3 court 1:1,8,10,11,11 1:13,16 3:5,21 4:2 4:16,21 5:14 6:4,7 6:12,14,18,19,23 7:3,20 8:9,21 9:15 10:7,16 11:1,7,13 11:16 12:3,10,20 13:22 14:2,3,4,14 14:20 15:1,8,17,25 16:16 17:7,9,10,12 18:5,22 19:3,12 20:16,22 21:7,12 21:18 22:13,22 23:1,10 24:1 25:1 25:7,14,24 26:13 26:18,23 27:3,5,7 27:14 28:4 29:12 29:21,23 30:5,9,12 30:16,18,25 31:14 32:12,12,13,14 courts 5:20,23 6:1 8:18 24:3 28:25 Court's 6:6 cover 9:17,19,23,24 10:23 coverage 1:15 10:14 10:23 16:21 18:3,9 18:11 19:9,21,25 20:17,22 22:12 23:8,9 24:21 25:1 25:4,8 29:11 covered 10:4,20 11:8 11:19,20 12:6 13:10 14:24 16:13 16:23 17:2,6,20,23 20:15 21:20 23:17 24:25 30:2,3,8,17 30:24 31:2 covers 7:16 19:5 30:19 cracked 11:24 30:22 crazy 24:19 created 25:22 creates 10:22 creating 19:17

cut 32:9 C.D 29:3	dissect 3:18 doctrine 2:16 doing 15:23 21:20 due 15:5	exposure 5:7 7:15 8:11,19 10:11 19:14 24:23 extensive 7:7 extent 4:16 exterior 19:16	18:18 20:8 21:1,3 21:11 23:20 24:3 24:13 25:23,23 goes 9:1,6 20:11 going 1:14 3:14 10:14 14:17 16:4 24:20 gonna 3:18 4:5 8:24 15:13 24:13,17,22 26:1 27:12 28:4 good 2:8 13:2 28:13 30:18 gotta 8:16 grade 30:22 greatest 29:17	impacted 13:5 implication 3:7,8 important 18:4,6 importantly 19:19 24:10 26:5 inaudible 14:25 inch 1:25 include 20:23 included 18:22 20:12 including 5:6 19:13 19:14 incorrectly 24:14 incurable 3:2 Indemnity 29:11 indicates 4:9 industry 14:21 19:1 19:11 20:14 23:25 23:25 24:2,19,20 26:6 32:4,10 industry's 26:13 initial 19:9 injures 30:7 injuries 30:23 injuring 11:12 injury 11:22 12:1 29:13 30:7,10,20 32:2 install 27:24 installation 2:11 9:3 9:11 13:9 installed 1:21 7:9 9:2 11:17 27:11 28:11,16,18 installing 3:10 7:5 installs 6:15,17 11:10 instance 6:24 9:2 instructive 18:24,24 insurable 31:9 insurance 12:4,22 14:21 15:1 17:20 17:22,22 29:9 31:15 32:4,10 insuring 5:4 intended 9:22,23,24 24:11 26:17 interesting 21:22 interpretation 10:20 15:2 intersection 8:15 intrusion 7:4,7,11,13 11:3,18 17:16 28:10 involved 12:21 17:17 involves 15:9,11 involving 7:14
D damage 3:9,15,24 4:1,11,20 6:9 7:7 7:11,12,23 8:4 9:5 9:7,9,21,25 10:10 10:11,17,18 11:4 11:14,18,23 12:1,7 14:1,23,24 16:15 16:23 17:2,5 19:6 19:10,18 20:2,18 20:23 21:18 22:10 22:13 23:12,16 24:8,15 25:15,16 25:18,19 26:1,15 29:6,6,13 30:2,3 30:10,14 31:4,9,12 damaged 13:9,18,20 31:3 damages 6:10 32:5 Dawes 3:5 4:17 7:8 7:19 day 17:24 decide 4:21 decided 5:1 12:10,13 deciding 19:3 decision 1:10 6:3 26:19,23,24 decisions 27:8 declaratory 26:7,13 defect 5:25 6:1,6 defective 2:4 define 1:15 defined 4:23,24 5:5 5:13 19:11 22:19 28:25 defines 5:15,18 defining 1:16 definition 5:10,21 12:12 28:7 31:19 degree 26:16 depending 14:19 determine 2:19 19:9 determined 2:23 determining 29:16 dictionary 5:18 different 21:10 29:8 directly 22:6,7 disagree 3:19 4:17 7:18 10:15 11:21 14:6 16:21 31:20 disagreement 12:8 discussion 3:3 dispense 1:6 dispute 5:25 17:17 17:17	E effects 9:25 16:9 effectuate 3:8 EIFS 7:9 26:2 elements 26:20 eleven 17:24 eliminating 29:18 endorsement 23:18 engineer 1:19 27:23 28:3,6,8 entire 1:23 envelope 19:17 equate 13:14 erred 1:12,13,16 essentially 12:15 14:7 estoppel 2:17 et 2:11 15:21 event 3:2 5:13,17,19 5:22 6:2,7 8:19,22 14:15 15:15 27:9 27:10 29:15 events 28:20 29:19 exact 12:14 17:23 exactly 20:14 22:11 26:8 example 11:7,22 13:4,15 30:1,5,11 examples 31:12 exception 20:7 21:5 exceptions 20:13 exclude 19:24 excluded 25:1,3,12 25:15,16 excludes 20:1 exclusion 10:23 14:22 20:7 21:4,5 22:20 31:1,3 exclusions 20:13 31:22 exclusively 18:15 19:13 exist 7:2 20:7 expect 6:8,18 9:7 28:10 expected 6:10 8:22 14:18 26:17 expects 9:6 expensible 29:5 expert 1:19 27:17,20 experts 29:16 explains 4:8 exposes 31:24	F fact 10:24 21:17 22:11 facts 1:6 23:7,7 26:18 factual 3:16 4:16 failure 13:2 fair 2:20 falls 29:2 30:6 32:3,5 faulty 3:1,10 4:12,12 5:2 9:11 13:9 17:1 17:2 31:8,10 favor 27:1 feel 2:9 find 14:14 27:7 31:19 finding 3:17 4:18 14:7 findings 4:17 finish 1:21 Fire 6:4 13:25 first 15:15 19:7,8 31:21 fix 14:10,20 flashing 2:11 flip 13:22 Florida 6:3,5,18 18:22 focus 24:24 folks 7:21 follow 9:16 27:23 following 1:12 form 20:12 formulation 11:9 found 2:3 3:19 19:20 four 1:14 French 31:15 full 2:20 functional 2:7 further 22:2	H Hampshire 14:3,4 hand 14:13 happened 25:20 26:9 happening 5:16 harmful 5:8 7:15 19:15 Harwell 2:15 19:19 28:1 Hazard 18:3,9,11 25:7 head 31:17 heard 17:18 held 14:3 hide 23:1 High 10:5 13:3,23 14:3 22:22,24 23:3 23:5 highest 24:3 hired 24:12 hit 30:21 holder 8:23 holes 2:11 home 7:7 17:15,16 19:17 30:12 homeowner 24:18 Honor 4:15 5:1 7:19 8:3 10:15 12:9 15:6 18:21 20:13 21:10 23:19 27:2 28:3,6 29:14,22 house 7:12 9:13 12:17,19 13:17,19 13:20 30:14 32:6 hurt 31:25 32:1 hurts 29:2 32:3	
		G general 5:8 10:8,19 13:8,15 15:10,14 16:5,12 17:17 18:2 19:24 22:17 24:7 24:11 25:5 31:7 getting 3:25 19:16 give 11:7 30:1,12 gives 6:12 go 8:17 9:2 13:14	I illustrate 10:6 illustration 6:12,13 6:14 9:4 13:24	

issue 2:15 4:25 23:11 25:21 issues 2:19,21 5:2 item 18:8 items 27:25 i.e 17:4 J Joe 17:11 judge 2:14 4:6 19:19 28:1 judgement 14:5 judgment 26:8,13 jurisprudence 17:19 18:19 Justice 1:4 J.S.U.B 18:23 J6&L 20:3 K key 23:19 kind 10:16,17,18 23:12 know 15:20,21,22 16:10 18:21 22:25 24:16 29:23 knowing 14:12 16:1 24:21,21,22 knowledge 14:16 16:7,18 knows 16:2 24:12 L land 24:4 language 9:16 21:12 21:14,16 23:15 law 5:14,15 15:20,22 23:3 27:22 lawsuits 29:20 lead 24:15 leak 6:18 leaking 9:8 led 7:7 left 18:14 letter 14:5 18:21,22 Let's 3:23 9:9 liabilities 31:25 liability 2:24 10:8 14:10,19 15:24 17:3 18:2 29:12 likelihood 32:2,4 limit 8:15 limitless 31:24 line 18:8 listen 24:2 litigate 2:21 loaded 19:25 long 2:19	longer 19:25 look 18:4 19:3 21:4 22:8 23:20 24:4,20 26:24 looked 12:6 looking 6:20 loss 29:6 31:10,12 losses 30:24 lot 8:3 12:21 17:19 lots 18:19 lower 1:11,11 14:14 32:12 L.J 9:23 10:2 11:25 12:5,13,14,20 13:15 17:19 21:8 21:24 22:5 M majority 5:20 8:17 27:8 28:24 making 26:19 materials 27:24 Mathematical 29:17 matter 29:9 McCants 1:2,4,9 3:19,23 4:2,15,25 6:21 7:1,18 8:2,13 8:24 9:16 10:15,22 11:5,10,15,21 12:8 12:14 13:12 14:4 15:5,13,19 16:12 16:21 17:8,9 19:2 21:23 27:4,5,16,19 29:21,22 30:3,6,11 30:14,17,19 31:6 31:17 32:13 mean 18:12 meaningless 10:14 15:4 means 5:12 18:12 23:3 meant 10:9,9 meet 28:1 methods 3:25 mince 16:3 minor 32:1 minority 5:20 8:18 27:8 28:24 minutes 1:5 missed 30:1 moment 3:21 money 17:21 20:8 moot 2:15 morning 21:25 Moving 3:3 multiple 31:21 N	nailed 11:11 necessary 3:20 need 2:21 5:12 16:10 27:12 31:18 needs 2:12 19:3 neglect 29:4 negligence 7:5,22,25 10:17 13:14 14:25 20:24 21:19 23:13 negligent 16:8 20:19 negligently 7:9 11:17 16:19 never 16:6,8 24:5,6 New 14:2,4 Newman 1:2,19 17:12,13 27:1 Newman's 19:17 non-mutual 2:17 notion 23:24 O occur 7:9 8:10,11 29:15 occurred 7:4,23 occurrence 1:17 3:4 4:10,11,23 5:3,4 6:11 9:8,11 14:6 19:6,10 24:5,7 occurring 11:2 occurs 5:17 9:21 20:18 Offensive 2:17 office 17:14 Okay 11:15 Operation 18:8,11 operations 18:3 19:5 20:4,10,10 21:16 23:18 25:4,7 26:22 opinion 15:12 19:4 26:25 27:19 31:16 opportunity 2:20 opposed 15:10 option 1:22 oral 1:1 owner 18:1,13 Owners 1:2 18:1 19:20 23:25 26:7 32:11 P page 1:18 2:2,14 28:9 pages 18:6 paid 17:21,22 18:7 18:10 20:8 parsed 7:12 part 3:17 5:4,23 13:8,10 20:20 25:8	31:2 particular 6:24 23:4 23:6 27:20,21 parties 2:20 13:7 parts 11:3,18 12:25 13:4 16:9,20 22:14 26:21 party 11:12 12:3 15:12 17:4 32:8,9 pattern 12:15 22:11 people 26:11 performance 20:19 31:24 performed 22:15,16 31:4 performing 20:24 person 29:3 30:7,20 30:21 personal 11:14,22 11:25 16:14 30:7,9 30:20 persons 29:7,13 perspective 6:20 15:18 phrase 5:8,12 physical 6:9,10 pick 4:7,13 16:25 picks 31:6 plaintiff 2:18 pleading 22:25 23:2 please 17:10 27:5 plenty 23:2 point 31:23 pointed 13:3 19:12 policies 9:18 10:8,19 20:17 23:12 25:8 28:21 policy 3:4 5:5,14 6:21 7:16 8:13,14 8:23 9:16,17 10:21 13:1,16 16:13,24 18:2,7,10,18,25,25 19:5,12,23 20:5,9 21:2,4,15,21 22:6 22:7 23:22 24:24 25:5 26:22,25 27:6 29:5,12 30:2,18,19 31:6,7 32:8 polymer-based 1:20 Portland 1:21,23 2:5 position 1:13 6:5 10:7,22 13:23 14:8 17:7 24:16 27:21 possibility 29:14 post 19:12 20:16 precisely 9:19 predict 28:4 predictable 27:10	premise 9:3 present 25:10 prevented 2:18 prior 2:19 probably 2:5 problem 17:14 problematic 6:7 problems 2:10 25:22 28:5 proceed 1:3,6 proceeding 19:19 project 6:2 12:24,25 18:14,14 proper 1:24 properly 14:11 28:11 property 7:23 8:4 9:21,25 10:10 11:4 11:14,23 12:1,4,7 12:16,16 14:23 16:14,22 17:2,5 19:5,10 24:8 29:6 29:7,13 30:1,3,10 30:14 31:9,11 protected 18:16 provide 14:22 pulled 21:23 purchase 18:1 purchased 18:2 19:23 20:9 23:24 put 24:15 puts 16:18 Q Qualey 17:11 Qualey's 17:14 question 19:7,8,22 20:1 21:15,23 29:23 questions 26:14 quite 3:7 quote 1:20 2:4,15 5:6,11 R rarely 18:20 rationale 3:12 4:7 reach 15:14 read 23:16 reading 1:18 2:14 21:24 really 5:20 13:11 15:3 16:4 25:24 reason 2:8,21 28:13 reasonable 26:15 reasoning 9:12,17 reasons 6:8 recess 32:14

recitation 23:2 recognizes 15:1 record 1:18 2:2,14 18:5,16 25:20 26:5 26:8 27:15 recover 13:7 16:6,8 23:11 recoverable 10:12 recovery 13:5 26:2 referred 27:16 regard 1:14 3:3,4 5:1,21 8:6 reinstall 1:24 relationship 29:8 relief 29:18 relitigating 2:18 remediation 1:22 remembered 21:24 removal 2:25 remove 1:23 2:22 26:1 render 10:14 15:3 26:25 repair 3:9,14 29:5 repeated 5:7 7:14 8:8,11,19 19:14 replace 27:12 replacement 2:13,25 4:1 represent 17:11 represented 29:6 requests 1:10 required 1:25 27:7 requires 2:9 28:13 respect 15:5 Respondent 1:19 14:13 Respondents 14:8 Respondent's 6:5 responsibilities 32:7 rest 7:12,24 9:25 12:7 20:18 32:5 restore 4:5 restrictive 15:2 result 6:9 7:4,10,24 25:18 29:19 resulted 7:11 11:17 19:10 resulting 22:10 25:19 26:15 results 17:5 31:11 reverse 1:10 32:12 reverts 5:14 right 6:23 8:12 16:20,22 20:25 21:6,21 22:15 24:22 31:1,17 risk 29:14,16,18	32:6,7 risks 29:9 road 11:24 12:16,18 12:22,23,25 13:16 13:18,18 roof 11:11,19 29:2 rot 3:24 4:20 28:10 rules 27:23 S saying 8:21 11:1 13:6 15:25 16:24 says 3:15 5:10 6:21 8:16 15:22 22:8 23:6,16 24:24 26:25 scenario 15:8 16:2 24:18 25:2 scheme 22:3 see 9:1 32:11 Seekings 17:10 20:21 21:1,9,14,22 22:16,24 23:5,14 25:3,13 26:4 27:3 27:15 senior 31:25 serious 32:2 set 21:10 22:4 24:18 sharing 29:8 sheet 18:6 shingle 29:2 30:6,21 32:3,5 shingles 11:11,11,16 shows 18:6 29:17 silent 22:17 23:15 similar 19:15 simply 8:8 13:2 14:5 14:5 16:5 20:23 26:10 single 18:8 sir 6:23 30:16 Sisnroy 26:16 situation 10:2 21:3 22:6 23:4,6 24:5,9 25:9 sold 23:22 South 5:15 speak 22:7 speaks 22:5 23:20 specifically 4:17 specifications 28:2 stage 15:24 stand 13:1 17:23 standpoint 6:22 8:22 15:19 state 5:14,15 states 12:6 20:4 24:4 step 8:17 22:2	stipulated 18:15 22:11 strike 27:6 stucco 1:22,23 2:4,5 2:22 3:11,11,16 6:16 7:6 25:21,22 27:11 28:16,18 sub 7:9 9:22 10:1,3 12:23 13:9 16:9,13 17:1 20:19 21:19 subcontracted 22:21 subcontractor 7:22 8:5 10:16,18,24,25 11:10,15 14:25 16:2 20:3,6,11 22:1,3,5,9,18 24:10,13,22 25:19 31:5,10 subcontractors 12:2 12:17,18 13:17,19 18:16 23:21 31:8 subcontractor's 7:5 7:25 14:1,12,16 15:23 submit 8:20 subs 22:14 subsequent 24:8,15 substantially 5:7 7:15 substitute 6:16 sub's 9:24 13:2 16:7 16:18 20:23 21:19 23:12,13 sudden 5:12 suddenly 5:11 sued 24:8 suffers 11:25 sufficient 2:10 sum 2:24 summary 14:5 supervising 14:12 supposed 16:25 supposedly 9:8 suppositions 10:13 Supreme 6:3,5 sure 21:5 27:24 surprise 9:6 surprised 8:25 system 2:4,7,13 4:19 28:10 T take 3:16 9:8,9,13 14:8 takes 26:18 talk 9:10 talked 6:25 7:1 talking 9:20 11:13	11:14 12:11 21:25 23:7 25:11 28:9 30:9 tell 19:2 24:1 template 6:4 temporal 5:9 8:7 Tennessee 6:14 9:4 term 5:13 testimony 26:9,11 27:14,17,22 Thank 1:9 17:8,9 27:1,3 32:13 theory 29:17 thickness 1:25 2:9 28:14 thing 13:19 think 8:21 13:12 15:6,13 16:24 18:5 18:23 21:1 22:5,17 23:15 29:25 31:18 third 11:12 12:3 13:6 15:11 17:4 30:20 third-party 16:14 thought 12:15 21:24 three-fourths 1:25 time 8:10,16 29:24 29:24 32:11 today 17:12 told 9:5 28:18 Toll 1:4 top 31:17 trigger 19:25 triggers 17:3 19:21 Trinity 14:11,15 17:12,15,25 18:13 22:4 23:23 27:1 28:16,17 32:9 true 29:3 try 13:14 two 29:7 31:12 type 10:11 U underneath 26:1 understand 3:13 17:7 understands 28:15 underwriting 29:10 undesirable 29:15 unexpected 5:16,19 5:22,24 6:2,7,20 8:19 11:6 13:25 14:15,18 15:15,17 27:9,18 28:7,17,20 28:25 29:1,1 31:20 32:10 unexpectedness 9:10	unexpected 8:25 unpredictable 28:8 unpredicted 5:19 27:10 28:20 unworkmanlike 31:23 uphold 13:11 use 6:4 18:15 usually 5:11,22 U.S 6:4 13:25 V vastly 29:8 version 28:22 versus 11:23 21:8 31:15 vertical 26:21 vis-a-vis 10:23 W walked 17:13 Walter 29:3 want 8:14 13:11 14:8,9,17 15:23 16:3 24:1 wasn't 9:22,23 water 7:4,6,11,13 8:6 9:5,7,9 11:18 13:25 17:16 19:16 25:20 28:10 water's 11:2 way 4:22 14:18 20:11 ways 5:23 14:17 weep 2:11 we're 9:20 11:13,14 16:4 21:25 we've 9:22 12:10 20:5 22:2 24:25 25:17,17 win 4:23 window 6:13,15,17 9:1,3,11 13:24 wood 3:24 word 5:3,5,9,10,15 5:21,24 6:16 8:5 27:6 28:22 words 1:16 8:4 9:15 16:3 work 6:10 9:22,24 10:1,3,4,18 12:7 13:2,4,8,10,13 14:1,13,16,22,23 15:10,14 16:10,17 16:20,23 20:2,5,19 20:20,24,25 21:19 21:20 22:8,14,14 22:16,18,19,20

23:13,17 24:11
 25:5,15,16,18,25
 31:1,3,3
workmanship 3:1,10
 4:12,13 29:4 31:10
wouldn't 15:4 16:16
wreck 8:15
wrong 9:2 24:14
 27:12 28:18 31:14
wrongly 4:19
wrote 18:21,21

Y

years 17:24
y'all 3:13 23:1

\$

\$1,600.00 18:9
\$711.00 18:9

1

11 2:2
113 2:14
158 28:9
1986 9:18 10:7 14:21
 19:12 20:12,16
 27:6 28:22
1999 17:13,18

2

291 1:18

4

4th 15:1 31:14,18

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE STATE OF SOUTH CAROLINA
In The Court of Appeals

CHARLESTON COUNTY
Court of Common Pleas

The Honorable B. Hicks Harwell, Jr.

Case No.: 2002-CP-10-04390

Auto Owners Insurance Company, ...Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc., ... Respondents.

PROOF OF SERVICE

I certify that I have served the MOTION OF RESPONDENTS TO FILE SUPPLEMENTAL BRIEF and MOTION OF RESPONDENTS SUPPLEMENT THE RECORD by depositing a copy of it in the United States Mail; postage prepaid on October 22, 2008, addressed to all counsel of record:

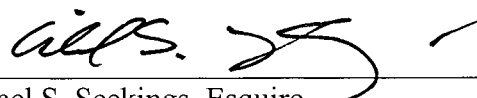
John L. McCants, Esq.
Ellis, Lawhorne & Sims
P.O. Box 2285
Columbia, SC 29202

Frank M. Cisa, Esq.
Cisa & Dodds
858 Lowcountry Blvd.
Mt. Pleasant, SC 29464

George E. Mullen, Esq.
Daniel F. Oberklein, Esq.
Mullen Wylie
P.O. Box 5969
Hilton Head Island, SC 29938

Kenneth E. Ormand, Jr., Esq.
Ormand, Ashley & Gibbons
P.O. Box 8657
Columbia, SC 29202

This 22nd day of October, 2008
Charleston, South Carolina



Michael S. Seekings, Esquire
Leath, Bouch & Crawford, LLP
Post Office Box 59
Charleston, SC 29402

Attorney for Respondents