THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

Precision Walls, Inc: ..... Appellant,

v.

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

FINAL BRIEF OF APPELLANT

Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

Attorneys for Appellant

November 26, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

DICTIONARY

STATEMENT OF ISSUES ON APPEAL

I. **Whether the Trial Court erred by narrowly construing the insuring agreement against coverage and broadly construing a policy exclusion to defeat coverage?**

II. **Whether the Trial Court erred in finding that tearing down a brick veneer wall was not "physical injury to tangible property" so as to constitute "property damage" as that term is defined in the insurance policy?**

III. **Whether the Trial Court erred in finding that in the absence of any evidence of negligent or faulty workmanship by the insured, the loss of adhesion of the insulation joint tape was not an "accident" so as to constitute an "occurrence" as that term is defined in the insurance policy?**

IV. **Whether the Trial Court erred in finding that the insurance policy's "Damage to Property" Exclusion, which requires that the insured's work have been incorrectly performed on the damaged property, applied despite the fact that the insured in this case performed no work on the damaged property?**

STATEMENT OF THE CASE

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

The parties presented this matter to the trial court based upon a stipulated record setting forth the undisputed facts. The Honorable Letitia H. Verdin conducted a summary bench trial based on the stipulated record on February 6, 2013. The Court filed a Form 4 Order on February 19, 2013, granting judgment in favor of Liberty Mutual which counsel for Precision Walls received on February 22, 2013. On March 4, 2013, Precision Walls filed its Motion for Reconsideration under Rule 59(a), SCRCP, and, alternatively, under Rule 59(e), SCRCP. On April 10, 2013, the Court entered its Form 4

Order denying Precision Walls' Motion for Reconsideration and entering its final order of judgment in favor of Liberty Mutual. Precision Walls received notice of this order on April 12, 2013, and filed its Notice of Appeal on April 16, 2013. On appeal, Precision Walls seeks a reversal of the trial court's order and remand to the lower court for further proceedings consistent with this Court's opinion.

STATEMENT OF FACTS

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

Precision Walls made submittals for review by SYS Constructors and the project architect relative to certain materials to be used by Precision Walls in the performance of its work. One of the submittals by Precision Walls related to the proposed use of a "Seam & Seal" Tape manufactured by Berry Plastics for use in taping and sealing the joints of the blue board insulation. This submittal was reviewed by the architect for the Project and SYS Constructors without objection and Precision Walls proceeded with taping the insulation joints with the "Seam & Seal" tape. (Doherty Aff. ¶ 6, Ex. 2; R. p. 334; pp. 351-361)

The exterior wall for the Project was brick veneer. SYS Constructors subcontracted with Pride Masonry to provide the labor and materials needed to construct the brick veneer wall. (Doherty Aff. ¶ 7; R. p. 334) Before the brick veneer wall could be constructed, Precision Walls had to install the blue board insulation and tape and seal

each of the joints of the insulation boards. Each insulation board is approximately 4 feet by 8 feet in size which required significant taping and sealing of joints. Precision Walls had nothing to do with the construction of the brick veneer wall, which could only be constructed after Precision Walls had finished its work of installing, taping and sealing the insulation boards. (Doherty Aff. ¶ 8; R. p. 334)

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

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

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

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

STANDARD OF REVIEW

Because declaratory judgment actions are neither legal nor equitable, the standard of review depends on the nature of the underlying issues. *Auto-Owners Ins. Co. v. Hamin,* 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006), *petition for cert. filed,* (S.C. June 16, 2006). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. *Id.* When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the

trial court properly applied the law to those facts. *WDW Props. v. City of Sumter,* 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court owes no particular deference to the trial court's legal conclusions. *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth.,* 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999); *see also Duke Power Co. v. Laurens Elec. Coop., Inc.,* 344 S.C. 101, 104, 543 S.E.2d 560, 561-62 (Ct. App. 2001).

ARGUMENT

I. The Trial Court erred by narrowly construing the insuring agreement against coverage and broadly construing a policy exclusion to defeat coverage.

This matter involves the construction and interpretation of a CGL policy under which Precision Walls is the insured and Liberty Mutual is the insurer. Insurance policies are subject to general rules of contract construction. *Fritz-Pontiac-Cadillac-Buick v. Goforth,* 312 S.C. 315, 318, 440 S.E.2d 367, 370 (1994). The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *Id.* An insurer's obligation under a policy of insurance is defined by the terms of the policy itself and cannot be enlarged by judicial construction. *South Carolina Ins. Co. v. White,* 301 S.C. 133, 137, 390 S.E.2d 471, 474 (Ct. App. 1990). Terms of an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. *Standard Fire Co. v. Marine Contracting & Towing Co.,* 301 S.C. 418, 421, 392 S.E.2d 460, 461-62 (1990) (citations omitted). "Moreover, if the intention of the parties is clear, courts have no authority to change insurance contracts in any particular or to interpolate a condition or stipulation not contemplated either by the law or by the contract between the parties." *Id.*

The burden of proof is on the insured to show that a claim falls within the coverage of an insurance contract while the insurer bears the burden of establishing exclusions to coverage. *Sunex Int'l, Inc. v. Travelers Indem. Co. of Ill.*, 185 F. Supp. 2d 614, 617 (D.S.C. 2001)(citations omitted). Exclusions in an insurance policy are always construed most strongly against the insurer. *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 464, 252 S.E.2d 565, 568 (1979). Additionally, "where there are doubts about the existence or extent of coverage the language of the policy is to be understood in its most inclusive sense." *Auto Owners Ins. Co. v. Langford,* 330 S.C. 578, 584, 500 S.E.2d 496, 499 (Ct. App. 1998).

In this case, the trial court erred by straying from these fundamental principles of construction for insurance contracts. Instead of construing the policy liberally in favor of coverage, the trial court narrowly construed the policy terms in the insuring agreement against coverage. In addition, instead of construing the policy exclusions against the insurer, the trial court broadly construed a policy exclusion beyond its intended application so as to preclude coverage.

II. The Trial Court erred in finding that the facts of this case did not establish the existence of "property damage."

The CGL policy at issue in this case defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property. . . ." (Liberty Mutual Ex. 1 at Section V.-Definitions, part 17.a[1]; R. p. 235) Applying the plain meaning of the policy definition to the facts in this instance, there is "property damage."

---

[1] The definitions and exclusions set forth in the CGL policy in this case are the same definitions and exclusions contained in standard CGL policies which South Carolina appellate courts have addressed in prior opinions. *See e.g. Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011); *Auto Owners Ins. Co. v. Newman,* 385 S.C. 187, 192, 684 S.E.2d 541, 543 (2009); *Walde v. Association Ins. Co.,* 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012).

A brick wall (tangible property) was torn down (physical injury). Moreover, the contractor, SYS Constructors, and the Project owner lost the use of an otherwise functioning brick veneer wall. Therefore, the policy definition is satisfied by the undisputed facts of this case.

Rather than engage in an application of the unique facts of this case to the actual policy terms, the trial court regrettably misapplied several prior South Carolina opinions in finding that "property damage" does not exist in this instance.

A. *Crossman* supports a finding of "property damage" on the facts on this case.

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

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

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

Moreover, in *L-J II*, the South Carolina Supreme Court stated that "[t]he CGL policy may, however, provide coverage in cases where faulty workmanship causes a third

party bodily injury or damage to other property, *not in cases where faulty workmanship damages the work product alone."* *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 123, 621 S.E.2d 33, 36, n.4 (2005)(emphasis in original); *see also Auto Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 100-101, 682 S.E.2d 857, 866-67 (Ct. App. 2009). Therefore, it is clear that under South Carolina law, CGL policies may provide coverage when defective or faulty workmanship causes third-party property damage.

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

B. The trial court misapplied *Walde* to the materially different facts of this case.

In *Walde v. Association Ins. Co.*, 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012), the South Carolina Court of Appeals addressed a situation somewhat similar to this case. The primary issue in *Walde* was whether the insurer had a duty to defend its insured against the claims asserted against the insured by the Waldes. *Id.* In order to determine whether the duty to defend existed, the court had to engage in a coverage analysis

focusing on whether the Waldes had made allegations which, if true, would constitute "property damage" under the terms of the applicable CGL policy. *Id.*

In analyzing whether the allegations asserted against the insured raised the possibility of "physical injury to tangible property," the *Walde* court focused on the fact that the necessary remedial measures required that the insured tear down its own work product in order to fix the problem. *See Walde*, 401 S.C. at 442-443, 737 S.E.2d at 637. In other words, once the insured in *Walde* tore down its own work product, the problem was remediated. However, unlike the situation in *Walde*, the removal of the brick wall in this instance was not a remedial measure. There was nothing wrong with the brick veneer wall. It required no remediation. Its destruction did not cure the problem with the defective joint tape. (Affidavit of D.J. Doherty at ¶¶ 9-12; Howell Dep., p. 65, l. 9-16; R. pp. 334-336; R. p. 88, lines 9-16) In this case, the necessary remedial measures were re-taping the insulation joints which was the work of Precision Walls and which forms no part of Precision Walls' claim under the CGL policy. The trial court erred by expanding the reach of remedial measures to the tearing down of the brick veneer wall which was the non-defective work of another subcontractor. This is an overbroad application of the holding in *Walde* and contrary to the fundamental tenet that insurance contracts should be construed broadly in favor of coverage. *See Walde,* 401 S.C. at 439, 737 S.E.2d at 635, *quoting M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010).

Another key difference from the facts of *Walde* is that the tearing down of the brick veneer wall in this instance was third-party property damage involving the violation of another's legal right which the *Walde* court found was determinative of the existence

of "physical injury." *See Walde*, 401 S.C. at 442-43, 737 S.E.2d at 637. Precision Walls had nothing to do with the construction of the brick veneer wall. (Doherty Aff. at ¶¶ 7-8; R. p. 334) The brick veneer wall was the property of others and SYS Constructors clearly had the right under its subcontract with Precision Walls to recover the costs of tearing down and rebuilding the brick veneer wall. (Doherty Aff. ¶ 10; R. p. 335) Therefore, in this case, we have third party property damage for which the insured is legally responsible. Conversely, in *Walde*, the contractor partially tore down its own work product as a direct part of the remedial measures. The only damage was to the contractor's own work product done by the contractor himself. *See Walde*, 401 S.C. at 442-43, 737 S.E.2d at 637.

C. *Walde*'s definition of "physical injury" within the broader policy definition of "property damage" is contrary to established principles of insurance contract construction and should be reversed.

In its opinion in *Walde,* the Court engaged in an analysis of whether the allegations in the underlying pleadings could be construed to allege "property damage" as defined by the CGL policy at issue. Specifically, the Court focused on defining "physical injury" within the context of the policy definition of "property damage" which is "'physical injury' to tangible property . . . ." *Walde v. Association Ins. Co.*, 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012). In so doing, the *Walde* court erroneously adopted an overly restrictive, legalistic definition of the term "physical injury." [2]

The South Carolina Supreme Court has consistently recognized that the words used in an insurance policy cannot be strained either to defeat coverage that was intended or to extend coverage that was never intended. *E.g.*, *Diamond State Ins. Co. v.*

[2] Currently, the Waldes' Petition for Writ of Certiorari is pending before the South Carolina Supreme Court. One of the grounds on which the Waldes seek review is that this Court erred by ignoring precedent and issuing an improper and overly restrictive definition of the term "physical injury."

Homestead Ind., Inc., 318 S.C. 231, 456 S.E.2d 912 (1995); *Torrington Co. v. Aetna Cas. and Sur. Co.*, 264 S.C. 636, 216 S.E.2d 547 (1975). Instead, words in the policy must be given their plain, ordinary, and popular meanings. *E.g., Diamond State*, 318 S.C. at 236, 456 S.E.2d at 915. Even more specific to the circumstances of *Walde* and this case, it is the ordinary meaning as understood **by an ordinary person** that controls the court's analysis: "terms appearing in insurance policies should be defined according to the ordinary and usual understanding of their significance to the ordinary or common man." *Green v. United Ins. Co. of Am.*, 254 S.C. 202, 174 S.E.2d 400 (1970); *USAA Prop. and Cas. Ins. Co. v. Rowland*, 312 S.C. 536, 435 S.E.2d 879 (Ct. App. 1993) (citing *Green v. United Ins. Co.* for proposition that: "In the absence of a prescribed definition, the term should be defined according to the ordinary and usual understanding of the term's significance to the ordinary person."); *Sunex Intl. Inc. v. Travelers Indem. Co. of Ill.*, 185 F.Supp.2d 614 (D.S.C. 2001) (applying South Carolina law and rejecting plaintiff's interpretation of "infringement of title" to refer to a formal property right where an ordinary person would understand it to mean the title of a work or a name).

In keeping with these rules, the South Carolina Supreme Court has consistently rejected analyses based on technical or industry usage that would vary the plain and ordinary meaning of words as understood by laypersons. A directly applicable example is found in *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004), in which the South Carolina Supreme Court considered the scope of a policy providing coverage for "damages" the insured is "legally obligated to a pay." Relying upon two Fourth Circuit opinions decided under Maryland and South Carolina law, the lower courts held that "damages" did not include sums expended by the insured in

response to a "potentially responsible party" letter issued by the Environmental Protection Agency because such sums were not legal damages resulting from a lawsuit. In reversing the lower courts, the Supreme Court agreed with the opinion in *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021 (Md. 1993), in which Maryland's highest appellate court "flatly rejected" the proposition that the term "damages" is "to be construed in consonance with its 'accepted **technical** meaning in law.'" *Helena Chem.*, 357 S.C. at 636-637, 594 S.E.2d at 457-458. In rejecting this argument, the South Carolina Supreme Court reaffirmed its adherence to the rule of construing policies using plain and ordinary meanings:

> We agree with the reasoning of the *Bausch & Lomb* court. As that court pointed out, the Fourth Circuit's logic contains an inherent paradox: although insurance policy terms are to be construed in their ordinary and usual way, the *Armco* and *Milliken* courts both accorded the term "damages" a narrow, technical meaning. This goes against South Carolina precedent which holds that this Court must give policy language its plain, ordinary, and popular meaning. *E.g., Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002).
>
> The plain, ordinary meaning of "damages" is monies paid on an insured's loss, in this case, from property damage. An "ordinary" meaning of the term is not a legalistic one dependent on whether the damages are classified as legal versus equitable.

Helena Chem., 357 S.C. at 638, 594 S.E.2d at 458 (quoting *Bausch & Lomb* holding that "we accord to words their usual and accepted signification. 'Damages' in common usage means the reparation in money for a detriment or injury sustained. The reasonably prudent layperson does not cut nice distinctions between the remedies offered at law and in equity.")

These opinions of the South Carolina Supreme Court stand for a clear rule: if the insurance contract uses common words with plain and ordinary meanings understood by

laypersons, the function of the court is to construe the contract according to those plain and ordinary meanings. Therefore, the *Walde* court erred by adopting a narrow, technical definition of the undefined policy term "physical injury." There can be no question that an ordinary layperson would consider the tearing down of a brick wall to constitute physical injury to the wall. Moreover, a layperson is unlikely to resort to Black's Law Dictionary to understand undefined policy terms such as "physical injury" or "injury."[3] By contrast, one of the definitions of "injury" found in the Oxford English Dictionary is "[h]urt or loss caused to or sustained by a person or thing; harm, detriment, damage." Oxford English Dictionary (2013). It is beyond dispute that any ordinary layperson would consider tearing down a break wall to constitute "physical harm" or "physical damage." Therefore, the *Walde* court erred by adopting a narrow and restrictive definition of the undefined policy term "physical injury" in contravention of the long standing policy of construing policy terms broadly in favor of coverage. This Court should take the opportunity now to correct this error and overrule that part of the *Walde* opinion.

III. The Trial Court erred in finding that the facts of this case did not establish an "occurrence" as that term is defined in the insurance policy.

The CGL policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Liberty Mutual Ex. 1 at Section V.-Definitions, part 13; R. 234) The policy does not define the term "accident." Within the context of a CGL policy, the South Carolina Supreme Court has

---

[3] The *Walde* court inexplicably referred to Black's Law Dictionary for the definition of "injury" when the term "physical injury" is also defined in this dictionary. *See Black's Law Dictionary* 1032 (6th Ed. 1990)(defining "physical injury" as "Bodily harm or hurt, excluding mental distress, fright or emotional disturbance. *See also* Physical Harm.") Black's defines "physical harm" as follows: "[t]he words 'physical harm' are used throughout the Restatement of Torts to denote the physical impairment of the human body, or of land or chattels." *Id.* Therefore, tearing down a brick wall would certainly constitute physical impairment of land or chattels.

defined "accident" as "an unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." *E.g. Auto Owners Ins. Co. v. Newman,* 385 S.C. 187, 192, 684 S.E.2d 541, 543 (2009); *Auto Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 100, 682 S.E.2d 857, 867 (Ct. App. 2009). Under the undisputed facts of this case, it is clear that the loss of adhesion of the joint tape was an accident. The Berry Plastics Seam & Seal tape was approved for use in taping the insulation board joints and there is no evidence that the tape was applied improperly. Neither SYS Constructors nor Precision Walls knows why the tape lost its adhesion and came loose. These events fall squarely within any accepted definition of the word "accident" and establish that an "occurrence" has taken place for purposes of satisfying this element of the insuring agreement of the CGL policy. Moreover, after the South Carolina Supreme Court's recent pronouncement in *Crossman* that the standard CGL policy definition of "occurrence" is ambiguous and must be construed in favor of the insured, the error in the trial court's finding that no "occurrence" existed in this instance is even further magnified. *See Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011).

Regrettably, as it did in the case of analyzing "property damage," the trial court again mischaracterizes Precision Walls' claim as seeking coverage for repairing Precision Walls' own "non-conforming work." (Order at p. 5.; R. p. 11) As set forth above, the claim is for a loss arising from third-party property damage that Precision Walls was legally obligated to pay to SYS Constructors. It does not include Precision Walls' own costs for removing and replacing the joint tape which constituted non-conforming or defective work on the part of Precision Walls. No part of the deductive change order

which is the basis for Precision Walls' claim is for removing and replacing the defective or non-conforming joint tape.

The trial court also errs in relying on the out-dated analysis of what constitutes an "occurrence" set forth in *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005). After *Crossman* and *Newman*, the validity of the "occurrence" analysis in *L-J* is highly questionable. For example, the *L-J* court held that negligent acts constituting faulty workmanship did not constitute an occurrence. *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 123, 621 S.E.2d 33, 36 (2005). However, in its later opinion in *Auto Owners Ins. Co. v. Newman,* 385 S.C. 187, 196, 684 S.E.2d 541, 545-46 (2009), the South Carolina Supreme Court held that "the negligent application of stucco resulted in an 'occurrence' . . . ." Moreover, as set forth above, the *Crossman* court found the term "occurrence" to be ambiguous and one that had to be construed in favor of the insured. *See Crossman supra.* Regardless, this case does not involve allegations of negligent construction or faulty workmanship which were fundamental to the *L-J* Court's determination that no "occurrence" existed. Here, there are no allegations, and certainly no evidence, that Precision Walls' was negligent or that its workmanship was faulty. To the contrary, the evidence leads to only one logical conclusion: the joint tape's loss of adhesion was purely an "unexpected happening or event" which constitutes an "accident" for purposes of the "occurrence" analysis.

IV. The Trial Court erred in finding that the insurance policy's "Damage to Property" Exclusion applied.

The exclusion referred to by the trial court as the "Damage to Property" exclusion, state as follows:

2. Exclusions

This insurance does not apply to:

j. Damage to Property

"Property Damage" to:

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

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

In its analysis relating to the applicability of the "Damage to Property" exclusion, the trial court does not even attempt to apply the facts of this case to the exclusion. This is a glaring omission because to do so readily demonstrates that this exclusion has no applicability to Precision Walls' claim. In order for policy exclusion "(j)(6)" to bar coverage, the insured's work must have been incorrectly performed **on** the property that has to be replaced. In this case, the property that suffered damage and required restoration was the brick veneer wall. Because the brick veneer wall was constructed **after** Precision Walls installed the exterior insulation board and applied Seam and Seal tape to the joints, Precision Walls performed no work **on** the brick veneer wall itself. (Doherty Aff.; R. pp. 333-336) Therefore, because Precision Walls performed no work on that particular part of the property that was damaged, the "Damage to Property" exclusion cannot apply by its express terms. Under the facts of this case, to construe this exclusion otherwise would require ignoring its plain and obvious meaning and would further require a broad, expansive interpretation of the policy exclusion in favor of the insurer. Neither interpretation is a proper construction of an insurance policy exclusion. *See Walde,* 401 S.C. at 439, 737 S.E.2d at 635, *quoting M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010)("[p]olicies are construed in

favor of coverage, and exclusions in an insurance policy are construed against the insurer.")

The trial court relies upon *Century Indemnity Company v. Golden Hills Builders*, 348 S.C. 559, 561 S.E.2d 355 (2002), as being dispositive on the issue of whether policy exclusion "(j)(6)" bars coverage. As a threshold matter, the continuing validity of *Century Indemnity* is questionable. In *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), the South Carolina Supreme Court overruled *Century Indemnity* without limitation. Second, even if *Crossman* did not overrule *Century Indemnity* in its entirety, the opinion in *Century Indemnity* cannot be reconciled with the South Carolina Supreme Court's later opinion in *Auto Owners Ins. Co. v. Newman,* 385 S.C. 187, 196, 684 S.E.2d 541, 545-46 (2009). In *Newman*, the South Carolina Supreme Court held that property damage to the framing and exterior sheathing behind an improperly installed synthetic stucco exterior was a covered loss under the CGL policy. *Id.* In stark contrast, under an almost identical factual scenario, the South Carolina Supreme Court held in *Century Indemnity* that the GCL policy did not cover damage to the home's substrate and framing caused by an improperly installed synthetic stucco exterior. Notably, while the *Crossman* court overruled *Century Indemnity,* it specifically stated that it "elected to adhere to our precedent in *Newman.*" *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594, n.6 (2011). Therefore, it would appear that *Century Indemnity* has little to no precedential value after *Newman* and *Crossman.*

Regardless, even if there is any continuing validity to the analysis in *Century Indemnity,* the facts in this case are very different than those in that case. *Century Indemnity* involved a synthetic stucco exterior **incorrectly** installed **on** exterior framing and substrate. *See Century Indemnity Company v. Golden Hills Builders*, 348 S.C. 559, 561 S.E.2d 355 (2002). Therefore, the facts of *Century Indemnity* supported the conclusion of the court that the property that had to be repaired or replaced (i.e. the exterior substrate and framing) was excluded from coverage by the "faulty workmanship" exclusion because the insured's work was incorrectly performed on it. *See id.* Here, the exact opposite situation is presented. The brick veneer wall had to be torn down, not because Precision Walls' work had been performed on it, but because it had to be removed in order for Precision Walls to have access to repair its own defective work. Moreover, there is no evidence in this case that Precision Walls' incorrectly or improperly performed its work with respect to applying the joint tape to the exterior insulation boards. Instead, the record in this case strongly supports the conclusion that the joint tape's loss of adhesion was caused by a defect with the tape itself rather than the workmanship of Precision Walls in installing the tape. Lastly, another important distinction is that in this case, the claim involves physical damage to the property of others rather than damage to the insured's own work.

The trial court also cited this Court's recent opinion in *Walde* as support for its finding that Precision Walls' claim is barred by policy exclusion "(j)(6)". While the trial court's order simply cited *Walde's* reference to *Century Indemnity*[4], *Walde's* analysis of policy exclusion "(j)(6)" is instructive in this instance. Unlike the trial court in this instance and the South Carolina Supreme Court in *Century Indemnity*, the *Walde* court actually engaged in an application of the underlying facts to the plain language of the policy exclusion. In so doing, the *Walde* court held that the "(j)(6)" policy exclusion applied to bar coverage because the property damage was to that particular part of the property on which the insured incorrectly performed its work. *Walde,* 401 S.C. at 447, 737 S.E.2d at 639. In *Walde*, the property damage that had to be replaced (i.e. the walls and roof of the offending upstairs apartment) was the insured's own work. Therefore, the *Walde* court correctly found that the property damage was excluded by policy exclusion "(j)(6)" because it constituted "that particular part of property that must be replaced because [the insured's] permitting work was incorrectly performed on it." *Id.* However, in this instance, because Precision Walls performed no work **on** the brick veneer wall (i.e. the property damage) which was installed **after** Precision Walls had already performed its relevant work, the "(j)(6)" exclusion cannot apply.

CONCLUSION

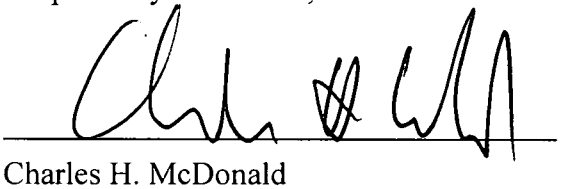
Applying a straightforward analysis of the undisputed facts to the plain policy terms establishes coverage under the CGL policy. Moreover, using the same analysis, it is clear that no policy exclusions apply to remove coverage. Therefore, the trial court

---

[4] *Walde* contains a parenthetical summary of the purported holding in *Century Indemnity* with respect to the application of the "faulty workmanship" exclusion in the standard CGL policy. *Walde,* 401 S.C. at 447, 737 S.E.2d at 639. However, this parenthetical is an overbroad summary of the actual holding in *Century Indemnity* and the trial court's reliance on same is, therefore, misplaced. *See Century Indemnity,* 348 S.C. at 566-67, 561 S.E.2d at 358-59.

erred in finding that the facts of this case did not establish "property damage" or an "occurrence." The trial court further erred by finding that the CGL policy's "Damage to Property" exclusion otherwise applied to bar coverage. For these reasons, the ruling of the trial court should be reversed and this case remanded to the trial court for a determination of whether the "occurrence" caused the "property damage" and the amount of Precision Walls' covered loss under the CGL policy.

Respectfully Submitted,



Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

Counsel for Appellant Precision Walls, Inc.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

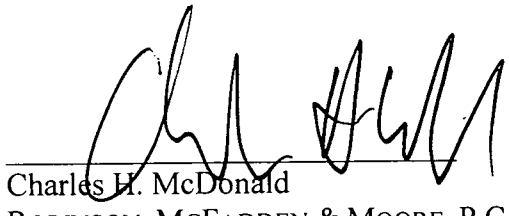
Precision Walls, Inc. ..... Appellant,

v.

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

CERTIFICATE OF COUNSEL

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



Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorneys for Appellant

November 26, 2013

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

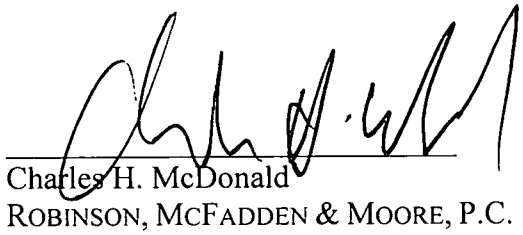
Precision Walls, Inc. ..... Appellant,

v.

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

PROOF OF SERVICE

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



Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorneys for Appellant

November 26, 2013