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 Company .....Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court correctly apply the proper standards of contract construction to ascertain and give legal effect to the intentions of the parties as determined by the clear and unambiguous language of the insurance policy?**

II. **Did the trial court correctly find that deductions charged by the general contractor against Appellant's subcontract price for the costs of removal and replacement of brick veneer in order to remedy a deficiency in the Appellant's work underneath are not "property damage" as defined in the insurance policy?**

III. **Did the trial court correctly find that even if subcontract deductions made by the general contractor for the costs of removal and replacement of brick veneer in order to remedy a deficiency in Appellant's work underneath were "property damage," such damage did not result from an "occurrence" as defined in the insurance policy?**

IV. **Did the trial court correctly find that even if subcontract deductions made by the general contractor for the costs of removal and replacement of brick veneer in order to remedy a deficiency in Appellant's work underneath were "property damage" resulting from an "occurrence," such damage was excluded from coverage by Exclusion "j(6)"?**

V. **Should the judgment of the trial court be affirmed under Rules 208(b)(2) and 220(c) SCACR because it appears from the Record on Appeal that even if subcontract deductions made by the general contractor for the costs of removal and replacement of brick veneer in order to remedy a deficiency in Appellant's work underneath were "property damage" resulting from an "occurrence," such damage was excluded from coverage by Exclusion "m"?**

STATEMENT OF THE CASE

Precision Walls, Inc. ("Precision Walls") commenced this action on March 23, 2011 by the filing of a Summons and Complaint, which was later amended on December 1, 2011. The Amended Complaint alleged claims for declaratory judgment, breach of contract, and unreasonable refusal to pay insurance benefits in violation of S.C. Code Ann. § 38-59-40. The claims arose out of the denial of coverage by Liberty Mutual Fire Insurance Company ("Liberty Mutual") for certain losses claimed by Precision Walls under commercial general liability policy number TB2-651-287492-029 (the "Policy") issued by Liberty Mutual to Precision Walls for the period from September 30, 2009 to September 30, 2010. Specifically, Precision Walls contends it is entitled to coverage for a loss of $97,500.00 incurred because of a deduction charged against Precision Walls' subcontract by the general contractor for costs incurred for the correction of Precision Walls' deficient insulation work on a construction project in Easley, South Carolina known as Tri-County Tech Occupational Building (the "Project").[1]

Liberty Mutual answered the Complaint and Amended Complaint, asserting that the losses claimed by Precision Walls are not covered under the insuring agreement and, alternatively, are excluded from coverage. After a period of discovery, Liberty Mutual filed a motion for summary judgment and incorporated memorandum of law on February 20, 2012 based upon the pleadings, the deposition of Kevin Howell, Precision Walls' answers to interrogatories, and numerous exhibits filed with the trial court. Thereafter,

[1] Precision Walls also alleged it was entitled to interest at the prevailing legal rate from the date of the claim, but it made no argument or showing in the trial court to support such a claim. Liberty Mutual denied the allegations. *See, Vaughn Development, Inc. v. Westvaco Development Corp.*, 372 S.C. 576, 642 S.E.2d 757 (Ct. App. 2007)(trial court erred in awarding pre-judgment interest when scope and extent of work under construction contract were uncertain).

on or about April 10, 2012, Precision Walls filed a motion for partial summary judgment, with a memorandum of law, based upon an affidavit of D.J. Doherty, III, the deposition of Jonathan Williams, the deposition of Kevin Howell, and related exhibits. Liberty Mutual filed a memorandum in opposition to Precision Walls' motion.

Both motions came before the Greenville County Court of Common Pleas for a hearing on May 7, 2012. At the hearing, Precision Walls agreed to a dismissal, with prejudice, of the Third Cause of Action of its Amended Complaint, which alleged a statutory claim for attorney fees and costs under S.C. Code Ann. § 38-59-40, leaving only its claims for declaratory relief and breach of insurance contract. With respect to Precision Walls' claims for declaratory judgment and breach of contract, both parties agreed the material facts were undisputed, but disagreed as to the proper interpretation and effect of the applicable law. Nonetheless, in a written Form 4 order filed May 14, 2012, the trial court denied both motions for summary judgment on the grounds there were material questions of fact.

Before the next non-jury term of court, Liberty Mutual and Precision Walls reached an agreement to submit the case for decision based upon the same factual record and legal memoranda previously submitted with their summary judgment motions, except for Precision Walls' claim under S.C. Code Ann. § 38-59-40, which had been voluntarily dismissed with prejudice. The parties also agreed that any issues of fact regarding the remaining claims would be determined by the court, as trier of fact, based upon the same evidence submitted on summary judgment.

In light of this procedural background and stipulated record, Liberty Mutual filed a motion and supplemental memorandum on January 29, 2013 requesting involuntary

dismissal of the action under SCRCP 41(b) and entry of judgment in favor of Liberty Mutual under SCRCP 52. Precision Walls filed a motion for judgment as a matter of law and supplemental memorandum on January 30, 2013. The supplemental memoranda were filed by agreement of counsel specifically to address two cases that were decided after the filing of the parties' respective summary judgment motions: *Walde v. Association Ins. Co.*, Op. No. 5061, Shearouse Advance Sheets (filed December 12, 2012) and *Harleysville Mut. Ins. Co. v. State of South Carolina*, Op. No. 27189, Shearouse Advance Sheets (filed November 21, 2012). Otherwise, previously filed memoranda were incorporated by reference.

Thus the matter came before the Honorable Letitia H. Verdin on February 6, 2013. On February 19, 2013, the trial court filed a Form 4 order granting judgment in favor of Liberty Mutual. Precision Walls filed a motion for reconsideration under Rule 59(a) and, alternatively, Rule 59(e), SCRCP on March 4, 2013. On April 10, 2013, the trial court denied Precision Walls' motion for reconsideration in a Form 4 order and entered a separate order granting final judgment in favor of Liberty Mutual. Precision Walls filed its notice of appeal on April 16, 2013.

STATEMENT OF FACTS

Precision Walls was a subcontractor to SYS Constructors, Inc. ("SYS") on the Project. (Subcontract, R. pp. 338-350). For a one-year period during the Project, from September 30, 2009 to September 30, 2010, Precision Walls was insured under the Policy. (Policy, R. pp. 158-237)

The scope of work to be performed by Precision Walls was described as follows in the subcontract:

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

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

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

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

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

D.J. Doherty, III, Project Manager for SYS, referred to Section 6 as the basis for directing Precision Walls to correct a deficiency in insulation joint tape supplied and installed by Precision Walls. On February 12, 2010, Mr. Doherty wrote Kevin Howell,

Project Manager for Precision Walls, a letter concerning the issue, stating in pertinent part as follows:

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

(Letter from D.J. Doherty, III to Kevin Howell (2/12/2010), R. p. 363). The letter instructed Precision Walls to provide a method of correcting the deficiency and to begin corrective measures by the end of business Tuesday, February 16, 2010, failing which, "SYS will begin correction of the deficiency and will look to Precision for any losses incurred as a result thereof." (Letter, R. p. 363).

The deductive change order for which Precision Walls seeks reimbursement under the Policy was for costs incurred by SYS and back-charged to Precision Walls for the removal of brick veneer in some sections of the wall in order to gain access to the insulation joints underneath in order to correct the tape deficiency. The change order was first issued by SYS on September 27, 2010, after completion of the remedial work, (Unexecuted Change Order, R. p. 155), but not accepted by Precision Walls until

November 2011, after significant modifications. (Executed Change Order, R. p. 371). The change-order work is described in the Doherty Affidavit.[2]

Paragraph 5 of Mr. Doherty's Affidavit sets forth the scope of work of Precision Walls' subcontract, which, in part, required Precision Walls to provide "taped & sealed blue board insulation" on exterior wall framing. Paragraph 9 describes how it was determined prior to completion of the brick veneer over the insulation that "some of the tape sealing the joints at the insulation board was losing adhesion and coming loose" and "that tape was also coming loose in areas which were covered up by the brick veneer wall." In paragraph 10, Mr. Doherty explains that "[b]oth the Owner of the Project and SYS Constructors were unwilling to allow unsealed joints to remain behind the brick veneer wall," and "[a]ccordingly, SYS Constructors directed Precision Walls, Inc. to comply with its subcontract requirements and provide taped and sealed joints at all locations." Paragraph 11 explains that "[t]he only feasible way to access the areas where tape was coming loose behind the brick veneer wall was to remove the brick," and "SYS Constructors engaged its masonry contractor to remove the brick veneer wall in place and then build a new brick veneer wall once Precision Walls had removed the tape in place and sealed the insulation joints with new tape." Finally, as explained in paragraph 12, the deductive change order that is the basis for Precision Walls' claim is for the cost of the demolition and rebuilding of the brick veneer by the masonry subcontractor, including additional project management and supervision time associated with the masonry work, dumpster bills, and attorney fees, totaling $97,500.00 after a cost reduction negotiated between SYS Constructors and Precision Walls.

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[2] *See also,* Precision Walls' Answers to Liberty Mutual's Interrogatories 8 and 9. (R. pp. 241-42).

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

Precision Walls admits that the costs it incurred in removing and replacing the deficient joint tape "are not covered losses under the CGL policy" and it makes no claim for those losses. (Amended Initial Brief of Appellant, p. 5). It also admits that the removal and replacement of the brick veneer was necessary only as a means to correct its deficient work, i.e. the insulation tape, but it seeks to carve out the costs of the masonry work to pursue a claim under the Policy.

Liberty Mutual conducted an investigation of Precision Walls' claim under a full reservation of all rights under the Policy, including the right to deny coverage if warranted by the facts. (Letter from J.J. Williams to Gerry Golt (4/5/2010), R. pp. 243-46). After confirming there was no physical injury to the brick veneer, Liberty Mutual denied coverage and so notified Precision Walls by letters of J.J. Williams dated November 19, 2010 and January 12, 2011. (Letters, R. pp. 247-50 and pp. 252-54).

STANDARD OF REVIEW

In a declaratory judgment action, the standard of review is determined by the nature of the underlying issue. *Crossman Communities of North Carolina, Inc. v. Beazer Homes Investment Corp.*. 395 S.C. 40, 46-47, 717 S.E.2d 589, 593 (2011). When the purpose is to determine whether coverage exists under an insurance policy, the action is

one at law. *Id.* "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.* (internal quotations and citation omitted). In cases where the facts are stipulated or undisputed, the standard of review on appeal is plenary and without deference to the trial court. *Id.*

This is an action at law tried without a jury based upon an agreed factual record. It appears the facts are undisputed, but to the extent the trial court made findings of facts, such findings should not be disturbed on appeal unless there is no evidence reasonably to support them. Otherwise, the standard of review of questions of law is plenary.

ARGUMENT

I. The trial court correctly applied the proper standards of contract construction to ascertain and give legal effect to the intentions of the parties as determined by the clear and unambiguous language of the insurance policy.

The general rules of contract construction apply to insurance policies. *M&M Corp. of South Carolina v. Auto-Owners Ins. Co.,* 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). The cardinal rule is to ascertain and give legal effect to the parties' intentions as determined by the contract language. *McGill v. Moore,* 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). When the language of the contract is clear and unambiguous, the language alone determines its force and effect. *Id.* It is the responsibility of the courts to enforce, not write, contracts of insurance, and the language must be given its plain, ordinary and popular meaning, except with technical language or where the context requires another meaning. *M&M Corp.*, 390 S.C. at 259, 701 S.E.2d at 259. The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and

subject matter of the insurance contract. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

It is evident from the order granting judgment for Liberty Mutual that the trial court adhered to these general principles of contract construction. Moreover, the order and judgment are supported by authoritative South Carolina precedent construing the same or similar policy language in the same way, giving effect to the intention of the contracting parties according to clear and unambiguous language of the Policy.

II. The trial court correctly found that deductions charged by the general contractor against Appellant's subcontract price for the costs of removal and replacement of brick veneer in order to remedy a deficiency in the Appellant's work underneath are not "property damage" as defined in the insurance policy.

The Policy's insuring agreement states, in pertinent part, as follows:

> "1. Insuring Agreement
>
> > a. We 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. . . .
> >
> > b. This insurance applies to 'bodily injury' and 'property damage' only if:
> >
> > > (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory';
> > > . . . .

(Policy, Section I – Coverages, part 1 - Insuring Agreement, a. and b., R. p. 221).

A threshold issue in a case like this one is whether or not the insured's claim meets the Policy definition of "property damage". *See, Crossman,* 395 S.C. at 49, 717 S.E.2d at 594 ("[I]t is only after 'property damage' has been alleged that the question of 'occurrence' is reached."). Precision Walls seeks coverage based upon subpart "a" of the

definition, according to which the term "property damage" is defined as "[p]hysical injury to tangible property, including all resulting loss of use of that property." (Policy, Section V.- Definitions, part 17. a., R. p. 235). Precision Walls conceded at trial that subpart b. of the Definition does not apply. (Transcript, p. 12, (February 6, 2013), R. p. 117, lines 2-10).

In *Walde v. Association Ins. Co.* this Court gave an unequivocal answer to the question of whether or not losses such as those claimed by Precision Walls are "physical injury to tangible property". *Walde v. Association Ins. Co.*, 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012), *rehearing denied (February 26, 2013), petition for certiorari pending.* *Walde* held that the costs of a contractor's partial demolition of a new barn and apartment building then under construction in order to bring the building into compliance with county zoning ordinances did not constitute "physical injury to tangible property" under a commercial general liability ("CGL") insurance policy. The word "injury," the court said, generally means the violation of another's right. *Walde,* 401 S.C. at 443, 737 S.E.2d at 637. The court reasoned that the partial demolition of the barn done under the direction of the owner for remedial purposes was not an "injury" as commonly understood. *Id.* Consequently, the court held, "the Waldes' allegation that the barn had to be partially torn down to make it comply with Aiken's regulations does not raise the possibility of 'physical injury to tangible property.'" *Id.*

Similarly, in this case, it is undisputed that the only loss claimed by Precision Walls is the contractual liability it incurred because of the tear-down and reconstruction of an otherwise intact brick veneer at the direction of the Project owner and general contractor for the remedial purpose of bringing the work of Precision Walls into

compliance with subcontract specifications. One need only read the Doherty Affidavit for substantiation of that fact.

Precision Walls argues that *Walde* was wrongly decided and quibbles with the *Walde* court's construction of the word "injury." According to the Oxford English Dictionary, however, the primary definition of the word injury is "[w]rongful action or treatment; violation or infringement of another's rights; suffering or mischief willfully and unjustly inflicted. . . . A wrongful act; a wrong inflicted or suffered." 7 J.A. Simpson & E.S.C. Weiner, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) at 981.

Precision Walls also fails in its fruitless attempt to undermine *Walde* by analogy with *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004). In that case, the court was concerned about an interpretation of the word "damages" that would have presumed a person of ordinary understanding to possess legal knowledge sufficient to make technical distinctions between legal and equitable remedies. *See, Helena Chem. Co.*, 357 S.C. at 638, 594 S.E.2d at 458 (ordinary meaning is not dependent upon whether "damages" are classified as legal versus equitable). Unlike *Helena Chem. Co.*, in this case the plain, ordinary, and popular meaning of the word "injury" as a "wrong" or "violation of a right" is undoubtedly within the ken of common understanding. No legalistic distinctions are involved.

Moreover, *Walde* does not stand in isolation. Other authorities in South Carolina and elsewhere have consistently held that the cost of removal and replacement of defective material installed in a building simply to bring the building into compliance with contractual specifications is not "physical injury to tangible property."

For example, in *Crossman, supra*, the court drew a critical distinction between the costs of repairing or removing defective work, which the court said was not "property damage" and, therefore, not covered under a commercial general liability policy, and the cost of repairing consequential damage caused by the defective work, which may be. The "property damage" for which the court found coverage in *Crossman* was progressive physical damage to interior elements of the building caused by water intrusion through improperly installed exterior siding. On the other hand, the costs to repair the defective construction were not covered "property damage." Among the cases cited by *Crossman* as illustrative of the proper application of the definition of "property damage" is *L-J., Inc. v. Bituminous Fire and Marine Ins. Co.,* 366 S.C. 117, 621 S.E.2d 33 (2005) ("In the present case, the complaint did not allege property damage beyond the improper performance of the task itself."). *Crossman*, 395 S.C. at 49, 717 S.E.2d at 593.

As expressed in *L-J,* "a CGL policy is not intended to cover economic loss resulting from faulty workmanship." 366 S.C. at 122, 621 S.E.2d 33 at 36, *citing, Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 563-64, 561 S.E.2d 355, 357 (2002). The *L-J* court reasoned that "any liability that is incurred because of faulty workmanship is part of the insured's contractual liability, not an insurable event under a CGL policy." *Id.* (citations omitted). Therefore, the court held that a commercial general liability insurance policy "will not stand to cover liability for the Contractor's contract liability for a claim that was for money damages to compensate for the defective work." 348 S.C. at 124, 561 S.E.2d at 36-37. To hold otherwise, said the court, would transform the CGL policy into a performance bond, which guarantees the work, rather than an insurance policy, which is intended to insure against accidents. *Id.* "Consequently," the

court said, "our holding today ensures that ultimate liability falls to the one who performed the negligent work – the subcontractor – instead of the insurance carrier." *Id.*

C.D. Walters Construction Co. v. Fireman's Insurance Company of Newark, 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984) provides a cogent explanation of the difference between "business risks" assumed by a contractor in the ordinary, normal course of business and "insurable risks" assumed by the contractor's insurance company under a commercial general liability insurance policy:

> "The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained."

281 S.C. at 596, 316 .S.E.2d at 712, *quoting with approval, Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 791 (1979).

The distinction recognized in *Crossman, L-J,* and *C.D. Walters* is reflected in the Policy definition of "property damage," as construed by *Walde* and other courts that have applied the same or similar definition of "property damage" to claims like that of Precision Walls. The cases discussed below are illustrative.

New Hampshire Ins. Co. v. Vieira, 930 F.2d 696, 699 (9th Cir. 1991) is a good example. In *Vieira*, a drywall subcontractor sought coverage under a CGL policy for the costs of retro-fitting three buildings with drywall in the attic, which had been specified by the general contractor for the original construction, but omitted by the subcontractor. The

subcontractor argued, in part, that the costs of correcting the defect constituted "property damage" because the remedial work required holes to be cut in the roofs of the buildings in order to install the drywall. Rejecting this contention, the court held "the nature of repairs cannot create coverage where none exists." *Id.* Having already found that loss measured by diminution in value of the buildings because of the defect was not "property damage," the court observed that, "[d]iminution in value and cost of repair are not two separate harms – they are two different ways of measuring the same harm." *Id.* "If the harm - Vieira's defective work is not covered as measured by diminished value, it is not covered as measured by the cost of repair," the court said. *Id.* at 701-02.

South Carolina follows the same logic and reasoning as *Vieira*. *See, Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003)("Most courts hold the diminished value of tangible property does not constitute property damage within the meaning of CGL policies which define property damage as physical injury"). Further, in South Carolina, as in *Vieira*, diminution in value and cost of repair are simply different ways of measuring the same harm. *See, Scott v. Fort Roofing and Sheet Metal Works, Inc.*, 299 S.C. 449, 385 S.E.2d 826 (1989) (recognizing cost of repair as an alternative to diminution in value as a measure of damage to property).

Similarly, in *Traveler's Ins. Co. v. Eljer Manufacturing, Inc.*, 197 Ill.2d 278, 757 N.E.2d 481 (2001), the Illinois Supreme Court held that economic loss resulting from a building owner's deliberate decision to remove and replace a defective polybutylene plumbing system was not "property damage" and, therefore, not covered under a commercial general liability policy that defined "property damage" as "physical injury to

tangible property." 757 N.E.2d at 494-504. The court rejected the building owners' arguments that damage to the walls, or floors, or ceilings caused by the removal of the plumbing system were covered "property damage." *Id.* at 504. The court said "[t]he 'injury' caused *by the Qest system* under these facts flows from the claimant's disappointed commercial expectations in the performance of the Qest system and is not an injury which is 'physical' in nature." *Id.* (emphasis in original). Furthermore, "[c]onsistent with the policy language agreed upon by the parties to the insurance contract, the insurers did not consent to become guarantors of the product quality or the performance of the Qest systems," the court said. *Id.* It declined to interpret the liability policy to find coverage for the cost of repairing or replacing defective work, which would have the effect of transforming the liability policy into something like a performance bond. *Id.* at 503.

Other courts around the country have followed the same principles to preclude coverage under commercial general liability policies for economic losses resulting from the repair or replacement of defective work or products that have not caused "physical injury to tangible property" aside from the repair work itself. *E.g., Jacob v. Russo Builders,* 224 Wis.2d 436, 450, 592 N.W.2d 271, 277 (1999) (Damages to driveway, sidewalk, patio, and landscaping resulting from the need to get access for repair and replacement of defective masonry were not "property damage" that resulted from insured's defective work, but were the result of repair efforts by others, and, therefore, not covered by subcontractor's commercial general liability policy); *Fireman's Ins. Co. of Newark v. National Union Fire Ins. Co.*, 387 N.J. Super. 434, 904 A.2d 754 (A.D.

2006) (Damages caused by removal and replacement of substandard firewalls were not covered "property damage" under commercial general liability policy).

According to *Crossman* and *Walde*, the losses claimed by Precision Walls are not covered "property damage," because they do not constitute an "injury." Furthermore, like *Eljer*, *supra*, if there was an injury, it was not "physical in nature" but the result of disappointed commercial expectations stemming from the inadequate performance of the insulation tape. The demolition of the brick veneer was purely incidental to the repair of a non-covered economic loss (i.e. the joint tape) and as such is not within the coverage of the Policy. The trial court correctly construed the Policy language according to the plain, ordinary, and popular meaning, and in doing so, was true to the fundamental principles of South Carolina law governing coverage under CGL policies.

III. The trial court correctly found that even if subcontract deductions made by the general contractor for the costs of removal and replacement of brick veneer in order to remedy a deficiency in Appellant's work underneath were "property damage," such damage did not result from an "occurrence" as defined in the insurance policy.

The insuring agreement covers "property damage" only if it is caused by an "occurrence." According to the Policy Definitions, the term "occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Policy, Section V – Definitions, part 13, R. p. 234). The term "accident" is not defined in the Policy. In the context of a CGL policy, the South Carolina Supreme Court defines "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).

In *L-J, supra*, the South Carolina Supreme Court, following the majority rule, held that faulty work is not an "occurrence" where the claim is for money damages to compensate for repairing the defective work. 366 S.C. at 124, 621 S.E.2d at 36. As explained above, Precision Walls' claim for the costs incurred for the removal and replacement of the otherwise intact brick veneer was for the correction of its own defective work, and, therefore, not an "occurrence." The brick veneer was not damaged by the loss of adhesion of the seal tape on the insulation board. It was torn down deliberately at the direction of the owner and general contractor as part of the plan to remove and replace the faulty insulation tape. The removal of the veneer was neither unexpected nor by chance. It was intentional, by the design of the building owner and general contractor.

The recent decision of the South Carolina Supreme Court in *Crossman, supra* does not change the conclusion drawn from *L-J.* Unlike the present case, the claim at issue in *Crossman* was for progressive damages to other property caused by water intrusion through the improperly installed exterior siding. The court was construing the part of the definition of "occurrence" concerning "continuous or repeated exposure to substantially the same general harmful conditions." By contrast, here there is no allegation of progressive property damage. The question is simply whether the deliberate decision to remove the brick veneer was an "accident," which it plainly was not. *See, Bright Wood Corp. v. Bankers Standard Ins. Co.*, 665 N.W.2d 544 (Minn. Ct. App. 2003)(damage to other property resulting from deliberate actions undertaken in the course of repairing deficient product is not an "occurrence").

This court need not reach the issue of whether or not the losses claimed by Precision Walls resulted from an "occurrence" because it has already been shown that the losses were not "property damage." Even so, the undisputed facts show the losses also were not accidental and, therefore, were not the result of an "occurrence" as defined in the Policy.

IV. The trial court correctly found that even if subcontract deductions made by the general contractor for the costs of removal and replacement of brick veneer in order to remedy a deficiency in Appellant's work underneath were "property damage" resulting from an "occurrence," such damage is excluded from coverage by Exclusion "j(6)".

As an alternative basis for denial of coverage, Liberty Mutual established in the trial court that even if the losses claimed by Precision Walls were found to be within the coverage of the insuring agreement, the losses would be excluded by Exclusion "j(6)". (Policy, Section 1 – Coverages – part 2. Exclusions. – subpart j(6), R. p. 224-25). In pertinent part, it excludes coverage for "property damage" to "[t]hat particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it." (*Id.*)

The term "your work" is defined as follows:

> 22. "Your Work":
>
> a. Means:
>
> (1) Work or operations performed by you or on your behalf; and
> (2) Materials, parts or equipment furnished in connection with such work or operations.
>
> b. Includes:
>
> (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

(Policy, Section V – Definitions, part 22, R. p. 236).

An exclusion virtually identical to this one was applied by the South Carolina Supreme Court in *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002), *overruled on other grounds, Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (2011)(trigger of coverage). In *Century Indemnity*, a homeowner sought coverage under a contractor's commercial general liability policy for property damage to the wall sheathing and substrate of their home caused by water intrusion through an exterior stucco cladding that was improperly installed. Rejecting the homeowners' argument that the exclusion applied only to the defective work (i.e., the stucco cladding) and not the damage to the underlying substrate, the court held: "Based 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." (citations omitted). 348 S.C. at 566, 561 S.E.2d at 359. As supporting precedent, the court referenced a number of cases from South Carolina and other states that had applied a similar exclusion in analogous factual circumstances, including *Engineered Prods, Inc. v. Aetna Cas. & Sur. Co.*, 295 S.C. 375, 368 S.E.2d 674 (Ct. App. 1988)(coverage excluded for damages resulting from restoration, repair, or replacement of rack system where losses were the result of subcontractor's failure to properly install anchor system); and *C.D. Walters Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, New Jersey,* 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984) (coverage excluded for property damages resulting from faulty workmanship).

Walde, supra, also held that an exclusion virtually identical to (j)(6) "excluded coverage not only for (1) 'property damage' to defective work caused by that defective work but also (2) 'property damage' to non-defective work caused by the defective work." *Walde,* 401 S.C. at 447, 737 S.E.2d at 639, *quoting, Century Indemnity,* 348 S.C. at 565-67, 561 S.E.2d at 358-59. Furthermore, the continuing vitality of *Century Indemnity* on this point was recently re-affirmed by the South Carolina Supreme Court in *Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 2013 S.C. Lexis 170 (July 17, 2013), *rehearing denied,* 2013 S.C. Lexis 234 (September 6, 2013), *quoting with approval, Century Indemnity Co. v. Golden Hills Builders, Inc.,* 348 S.C. 559, 566, 561 S.E.2d 355, 358 (2002), *overruled in part on other grounds by Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co., supra.*

All of these cases follow the consistent theme that commercial general liability policies do not cover contractual liabilities for economic losses resulting from deficient work of the insured, which, according to the Policy definition of "Your Work," includes "[m]aterials, parts or equipment furnished in connection with such work or operations" and "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work'." The losses for which Precision Walls seeks reimbursement from Liberty Mutual are a classic example of the type of business risk that is the contractual responsibility of Precision Walls, not its liability insurer.

V. The judgment of the trial court should be affirmed under Rules 208(b)(2) and 220(c) SCACR because the Record on Appeal shows that even if subcontract deductions made by the general contractor for the costs of removal and replacement of brick veneer in order to remedy a deficiency in Appellant's work underneath were "property damage" resulting from an "occurrence," such damage is excluded from coverage by Exclusion "m".

As an alternative basis for judgment, Liberty Mutual presented evidence and argument in the trial court to show that even if the losses claimed by Precision Walls for the removal and replacement of brick veneer were determined to be "property damage" within the Policy definition, coverage for such losses would be excluded by Exclusion "m." Although the trial court did not reach the issue, the Record on Appeal shows that Liberty Mutual is entitled to judgment on those grounds as well, and this Court should affirm the judgment pursuant to Rules 208(b)(2) and 220(c), SCACR. *See, I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 419, 526 S.E.2d 716, 23 (2000)(under present rules, appellate court may affirm lower court's ruling on any ground appearing in the record on appeal regardless of whether the issue was ruled upon by trial court).

According to Exclusion "m," coverage is excluded for:

> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency or dangerous condition in "your product" or "your work"; or
>
> (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or your work after it has been put to its intended use."

(Policy, Section I – Coverages, part 2 – Exclusions - subpart "m", R. p. 225)

The term "impaired property" is defined as follows:

> "8. Impaired property" means tangible property, other than "your product" or "your work" that cannot be used or is less useful because:

> a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
>
> b. You have failed to fulfill the terms of a contract or agreement;
>
> if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement."

(Policy, Section V – Definitions – part 8, R. p. 233).

Even if the losses claimed by Precision Walls were determined to be within the coverage of the insuring agreement, they would nonetheless be excluded by Exclusion m. Precision Walls contends that the usefulness of the wall clad with the brick veneer was "impaired" because it incorporated defective work not in compliance with the terms of Precision Walls' subcontract. Furthermore, Precision Walls contends the "impaired property" was restored by the repair and replacement of the defective work or product of Precision Walls, which could only be effected by removal of the brick veneer siding. The "impaired property" exclusion would apply to the costs of repair and replacement of the defective work and any loss of use. *See, St. Paul Fire and Marine Ins. Co. v. Futura Coatings, Inc.*, 993 F.Supp. 1258 (D. Minn. 1998)("impaired property" and "business risk" exclusions applied to preclude coverage for loses caused by the failure of sealant manufacturer's products to perform as promised).

CONCLUSION

The trial court was correct in its determination that the costs of removal and replacement of brick veneer as part of remedial work directed by the property owner and general contractor to correct a deficiency in insulation joint tape supplied and installed by

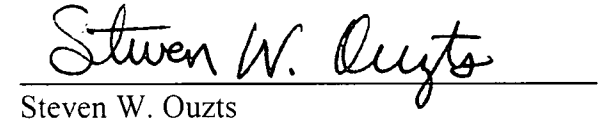
Precision Walls were not "physical injury to tangible property," and, therefore, were not covered by the Policy. Further, the trial court was correct in finding that the losses claimed by Precision Walls were not the result of an "occurrence" as defined by the Policy. On those grounds, the order of the trial court should be affirmed.

In addition, the trial court correctly determined that even if the losses claimed by Precision Walls were found to meet the definition of "property damage" resulting from an "occurrence," coverage would be excluded by Exclusion "j(6)". The order should be affirmed on that ground as well. Finally, the Record on Appeal shows that Exclusion "m" would exclude coverage, and the order should be affirmed on that additional ground pursuant to Rules 208(b)(2) and 220(c), SCACR.

Respectfully submitted,

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

November 20, 2013



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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

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v.

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CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

The undersigned certifies that he has served a copy of the Final Brief of Respondent by hand-delivery to the Appellant's attorney of record, Charles H. McDonald, Robinson, McFadden & Moore, P.C., 1901 Main Street, Suite 1200, Columbia, South Carolina 29201.

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