

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-02-2420

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SC Court of Appeals

William and Mary Frances Walde, as assignees of Johnson Construction Company of
Aiken,.....Respondents,

v.

Association Insurance Company,.....Appellant.

RETURN TO PETITION FOR REHEARING

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Attorneys for Appellant

The Appellant files this Return to the Petition for Rehearing pursuant to South Carolina Appellate Court Rule 240. For the reasons stated below and based on the findings of this Court, Respondents' Petition for Rehearing should be denied in its entirety.

This Court's decision to reverse the lower court's grant of partial summary judgment in favor of Appellant was correct and should remain. This Court correctly found that Association Insurance Company ("AIC") had no duty to defend Johnson Construction Company of Aiken, Inc. ("Johnson").

I. The Court did not err in failing to apply the "law of the case" doctrine to footnote 4 of the Trial Court's Order.

The Court properly determined that the trial court's reference to breach of fiduciary duty was "attached to the court's finding that an 'occurrence' existed by virtue of Johnson's negligent statements to the Waldes pursuant to the Permitting Contract that the plans complied with the variance and special exception." (Op., footnote 6, p. 87.) Therefore, the Court correctly concluded that the footnote did not "constitute an alternative finding to support a blanket grant of summary judgment on the duty to defend." (Op., footnote 6, p. 87.)

Furthermore, Appellant believes it is disingenuous of Respondents to argue that Appellant failed to appeal the trial court's footnote discussing duty to defend relative to breach of fiduciary duty. Appellant's Final Brief stated that "it is clear that none of the Respondents' claims fell within the ambit of coverage. Therefore, no duty to defend on the part of Association was triggered." (Final Brief of Appellant, p. 18.) Furthermore, the issues related to footnote 4 and the breach of fiduciary duty were fully briefed in the

Final Reply Brief of Appellant. (Final Reply Brief of Appellant, p. 5-6.) The Court properly concluded that the “law of the case” doctrine does not apply to footnote 4.

II. The Court properly determined that Johnson’s remedial measures relative to the second story of the barn did not constitute physical injury.

Respondents claim that the Court improperly considered the definition of “physical injury” in its analysis of property damage, because Respondents claim this issue was never raised. However, Appellant’s Final Brief argues that “nothing in the Demand sets forth any allegations that the building at issue was physically injured . . .” (Final Brief of Appellant, p. 23.)

Furthermore, the South Carolina Supreme Court recently addressed the definition of physical injury relative to property damage in a CGL policy and specifically stated, “We emphasize the difference between a claim for the costs of repair 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.” Crossmann Communities of North Carolina, Inc. v. Harleystown Mutual Ins. Co., 395 S.C. 40, 49, 717 S.E.2d 589, 593 (Aug. 22, 2011). The Court properly determined that Johnson’s remedial measures did not constitute physical injury.

II. The Court properly applied Exclusion A.2(j)(6) and properly found that Appellant has no duty to defend under the policy.

Pursuant to the plain language of the insurance policy, coverage is precluded; therefore, the Court properly concluded that Appellant has no duty to defend under the policy. The following relevant policy language applies to preclude coverage:

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.

...

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

...

16. "Products-completed operations hazard":

- a) Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

1. Products that are still in your physical possession; or
2. Work that has not yet been completed or abandoned. However "your work" will be deemed completed at the earlier of the following times:

a) When all of the work called for in your contract has been completed.

b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

...

22. "Your work":

- a. Means:

- 1) Works 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.

...

The Court properly applied Exclusion A.2(j)(6), because the Respondents alleged property damage that would not be included in the Products Completed Operations Hazard pursuant to the facts and the plain language of the policy. Furthermore, the Respondents alleged property damage to “[t]hat particular part of property that must be . . . replaced because ‘your work’ was incorrectly performed on it.” “Your work” is defined in the policy as “[w]orks or operations performed by you or on your behalf” and includes “[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of ‘your work.’” The Court properly concluded that the Respondents “claim loss of use of the property arising out of Johnson’s incorrectly performed obligations to advise them and obtain the necessary approval from the BZA to build the desired barn on the property under the Permitting Contract.” (Op, p. 93). All of the work performed by Johnson meets the policy definition of “your work.” Appellant presented this argument in its Final Brief of Appellant. Specifically, in the Final Brief, the Appellant argued that the following actions by Johnson fall within the definition of “your work” in the policy:

The Demand for Arbitration alleges that “Respondents represented Claimants before Aiken Board of Zoning Appeals [and] [r]espondents then built the building.” (Compl. Ex. B; R. p. 106). The Pre-Trial Brief alleges in its introduction that Johnson “promised that he could and would build a stable in compliance with the zoning ordinance then that the builder had violated the

zoning ordinance by building the stable in the wrong location and by building a different structure than what had been allowed...” (Compl. Ex. D, p. 1; R. p. 117). Finally, in their Complaint, Respondents allege that their damages arise from “the demolition of this accessory apartment and partial rebuilding of the stable as the BZA approved the location of the stable where it had been built so that the entire stable did not need to be torn down.” (Compl. ¶ 32; R. pp. 33-34). To the extent that the Waldes’ damages involve the repair or replacement of Johnson’s faulty workmanship, those damages would clearly not be covered.

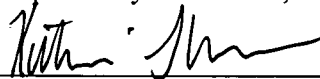
(Final Brief of Appellant, p. 26.) Appellant argued that all of Johnson’s actions, including the permitting work and the construction work, met the policy definition of “your work.”

The Court found that the Policy deemed all loss of use to have occurred at the time of the occurrence. If Johnson’s advising the Waldes regarding zoning approval constitutes an occurrence, then the loss of use would have occurred at the time such advice was rendered, and as such would not have been within the Products Completed Operations Hazard. The Court properly concluded that the alleged loss of use occurred before Johnson’s work was completed. (Op. p. 93 and footnote 9). Because Exclusion A.2(j)(6) operates to preclude coverage under the policy for property that must be repaired because Johnson’s work was performed incorrectly, the Court properly concluded that Appellant had no duty to defend Johnson.

CONCLUSION

In summary, Respondents’ Petition for Rehearing should be denied in its entirety. The Court properly concluded that Exclusion A.2(j)(6) operates to preclude coverage under the policy, and, therefore, Appellant had no duty to defend Johnson.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Return to Petition for Rehearing upon counsel for Respondents to this matter via email and First Class Mail, a true copy of same to all parties of record as follows:

Benjamin E. Nicholson, V, Esq.
McNair Law Firm, PA
1221 Main Street, Suite 1800
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This 28th day of January, 2013.



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January 28, 2013

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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JAN 30 2013

SC Court of Appeals

Re: Walde v. Association Insurance Company
C/A No.: 2009-CP-02-02420
Case Tracking No.: 2010172706
CCS No.: 2560-40525

Dear Ms. Kitchings:

Enclosed for filing, please find an original and seven (7) copies of Return to Petition for Rehearing. Please file the original and return a file-stamped copy to our office in the enclosed self-addressed, stamped envelope.

Should you have any questions or concerns, please do not hesitate to call me. With kind regards, I am

Sincerely yours,



KATHERINE W. SULLIVAN

KWS/kjg
Enclosures

cc: Benjamin E. Nicholson, V, Esquire (via email and U.S. mail)