

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

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

v.

Association Insurance Company,.....Appellant.

RECORD ON APPEAL

R. MICHAEL ETHRIDGE
JENNIFER B. MCCOY
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307
Attorneys for Appellant

BENJAMIN E. NICHOLSON, V
McNair Law Firm
P.O. Box 11390
1221 Main Street, Suite 1800
Columbia, SC 29201
(803) 799-9800
Attorney for Respondent

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STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

William & Mary Frances Walde,
as assignees of Johnson Construction
Company of Aiken, Inc.,)

Plaintiff,)

vs.)

Association Insurance Company,)

Defendant.)

IN THE COURT OF COMMON PLEAS

Docket No.: 2009-CP-02-02420

**ORDER GRANTING PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY**

JUDGMENT

**DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

SEP 13 2010

CCCP & O. S., Aiken County, SC

Deputy Clerk

This matter came before me on cross-motions by the Plaintiffs, William and Mary Frances Walde ("the Waldes"), and the Defendant, Association Insurance Company ("AIC"), for partial summary judgment and summary judgment at the Aiken County Court of Common Pleas, Aiken, South Carolina on January 20, 2010.

For the reasons stated herein, I GRANT the Waldes' Motion for Partial Summary Judgment and DENY AIC's Motion for Summary Judgment.

L UNDISPUTED FACTS

For purposes of the Plaintiff's Motion for Partial Summary Judgment, the operative facts are plead in the Complaint (¶¶6-42), which contains as Exhibits all the relevant documents, including the insurance policy at issue, the denials of coverage, and the Arbitration Demands which are the subject of Plaintiff's Motion. The facts supporting the Waldes' Motion are undisputed.

This matter arises out of a settlement of an arbitration claim by the Waldes against Johnson Construction Company of Aiken, Inc. ("Johnson"), which was insured through a Comprehensive General Liability insurance policy by the defendant in this action, Association Insurance Company

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("AIC"). AIC refused to offer a defense to Johnson when the Waldes filed an Arbitration Demand against Johnson for negligently representing them before the Aiken County Board of Zoning Appeals ("the BZA"), which resulted in an Order from that BZA that a barn built by Johnson under a separate agreement for the Waldes had to be removed.¹ The Waldes were ultimately able to persuade the BZA to allow the barn to stay in the same place but with modifications. The Waldes in their Arbitration Demand against Johnson claimed damages for the cost to rebuild the barn to comply with the BZA Orders.

Johnson made demand on AIC to defend and indemnify Johnson for the claims made in the Arbitration Demand. AIC refused. (See Exhibit C attached to the Complaint.) The Waldes subsequently filed an extensive Pre-Trial Brief which in more detail outlined the subject matter of the Arbitration Demand. (The Arbitration Demand and the Pre-Trial Brief are hereinafter collectively referred to as "the Arbitration Demands.") Johnson tendered that to AIC and AIC still refused coverage. (See Exhibit E attached to the Complaint.)

The first set of operative allegations against Johnson by the Waldes upon which this Court must base its decision are first the Arbitration Demand (attached to the Complaint as Exhibit B) filed with the American Arbitration Association:

Respondents represented Claimants before Aiken Board of Zoning Appeals to obtain variance to build paddock and stable for Claimants. Respondents then built the building. Respondents obtained variance but then built building in wrong location and wrongly told Claimants that an addition to original plans was permissible. BZA has now ordered building removed. Claimants claim breach of contract, negligent misrepresentation, and breach of fiduciary duty seeking actual damages for money already paid to Respondents, and cost to demolish or move the building to the correct location.

¹ The Waldes paid Johnson \$500 to represent them before the BZA before they executed and went forward with a construction contract with Johnson for the barn. Thus, Johnson was paid separately for its work before the BZA. This is important because it demonstrates that Johnson's BZA representation was a different type of work for the Waldes than its construction of the barn.

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Thereafter, in its Pre-Trial Brief (attached to the Complaint as Exhibit D), the Waldes further stated their claim against Johnson which acted as a further allegation of facts as if an Amended Complaint:

This case is about a contractor who promised absentee owners that he could and would build a stable in compliance with the zoning ordinance in the City of Aiken, South Carolina, told the absentee owners that he had obtained the necessary variances from the City to build the stable with a second story, and then built the stable, only to discover when it was near completion 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 by the City.

(Pre-Trial Brief, p. 1)

Because the Waldes did not live full time in Aiken, and because Johnson assured them that he was an experienced contractor in Aiken familiar with the City's Ordinance and the personnel enforcing the Ordinance, the Waldes agreed for Johnson to handle for them the process of obtaining a Special Exception and Variance to allow them to have Johnson build the stable and paddock.

(Pre-Trial Brief, pp. 3-4.)

On or around March 17, 2008, Johnson submitted two Applications on behalf of the Waldes (as their 'agent') to the City's BZA, an Application for a Variance for the project and an Application for a Special Exception. Johnson's Applications attached a sketch plan of the stable and the location of the stable he proposed. Mary Frances Walde emailed Johnson her written authorization to appear for her at the BZA meeting to apply for the Variance and Special Exception. Prior to the BZA meeting, Johnson advised the Waldes of issues regarding the Ordinances requirements, including what sort of variance was needed.

(Pre-Trial Brief, pp. 4-5)(citations omitted.)

At no time did Johnson advise the Waldes that the Ordinance did not allow for an accessory apartment on the stable or that the accessory apartment he designed would make the height of the stable higher than permitted by the Ordinance.

(Pre-Trial Brief, p. 6)

Johnson's representations that he could build the stable with an accessory apartment were negligent misrepresentations. In order to state a claim for negligent misrepresentation, Claimants must show:

- 1) the defendant made a false representation to the plaintiff;
- 2) the defendant had a pecuniary interest in making the statement;

- 3) the defendant owed a duty of care to communicate truthful information to the plaintiff;
- 4) the defendant breached that duty by failing to exercise due care;
- 5) the plaintiff justifiably relied on the representation;
- 6) the plaintiff suffered a pecuniary loss as the proximate result of reliance on the representation.

Koontz v. Thomas, 511 S.E.2d 407, 413 (S.C. Ct. App. 1999). A claim for negligent misrepresentation is proper where the misrepresentation "induced the plaintiff to enter a contract or business transaction." *Redwend Limited Partnership v. Edwards*, 581 S.E.2d 496, 504 (S.C. Ct. App. 2003). This is precisely what Johnson did.

The damages in a negligent misrepresentation action are the actual pecuniary loss suffered. *Koontz*, 511 S.E.2d at 513.

(Pre-Trial Brief, p. 17).

Johnson and the Waldes settled the Arbitration Demand the night before trial and as part of the settlement, Johnson assigned to the Waldes certain rights Johnson may have against AIC, including AIC's liability for Johnson's attorney's fees incurred when it defended itself against AIC.

The Waldes' pending Motion for Partial Summary Judgment before this Court is limited to the narrow issue of whether or not AIC owed a duty of defense to Johnson pursuant to the Arbitration Demand and the Pre-Trial Brief. AIC's Motion for Summary Judgment seeks a dismissal of the Waldes' Complaint for several reasons, including that it had no duty to defend Johnson in the Arbitration.

Based on a review of the undisputed facts and the law, the Court holds that AIC was obligated to defend Johnson in the Arbitration, and because it failed to do so, as matter of law AIC must pay to the Waldes (as assignees of Johnson), Johnson's reasonable attorneys fees and cost that it incurred defending the Arbitration Demands, as well as the Waldes' reasonable attorneys fees and costs for the portion of this lawsuit seeking this relief.

II. APPLICABLE LAW

A. The Scope of An Insurer's Duty to Defend is Based on the Arbitration Demand.

A liability insurance policy contains two insuring provisions of major significance: one, providing for the payment by the insurer of sums the insured shall become obligated to pay, the other providing, in substance, for the defense of any suit alleging bodily injury or property damage and seeking damages payable under the terms of the policy. The latter clause also provides, as a rule, that such a defense will be furnished even if any of the allegations of the suit are groundless, false or fraudulent.

Sloan Const. Co., Inc. v. Central Nat. Ins. Co., 236 S.E.2d 818, 820 (S.C. 1977). "[T]he duty to defend in South Carolina is broader than the duty to indemnify," *Liberty Life Ins. Co. v. Comm. Union Ins. Co.*, 857 F.2d 945, 950 (4th Cir. 1988). See *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 459 S.E.2d 318, 319 (S.C. App. 1995) ("If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend.") (Emphasis added.)

In other words, "the insurance company's duty to defend its assured is usually said to be broader than its duty to pay a judgment against him." *Donnelly v. Transportation Ins. Co.*, 589 F.2d 761, 765, 765 (4th Cir. 1979). Courts in South Carolina historically have been expansive in their reading of an insurer's duty to defend under an insurance policy. "If a complaint, however ambiguous, may be read as premising liability on alternative grounds, and either ground states liability potentially or arguably covered by the policy, the insured is entitled to a defense." *Id.* at 767 (emphasis added.)

In support of this proposition, the Fourth Circuit in *Donnelly* explained its rationale:

A number of reasons are specified in the just cited cases as to why a liability insurer's duty to defend may be broader than its duty to pay a judgment against its assured or to indemnify him. First, whether or not there is a duty to defend is usually determined from the pleadings in a case, but whether there is a duty to pay a judgment or to indemnify an assured who has paid usually cannot be determined until the evidence has been heard. Second, with the great latitude with which pleadings are construed today, and the great latitude of amendment, an

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insured's right to a defense should not be foreclosed unless such a result is inescapably necessary. Third, if part of a plaintiff's claims against an insured fall within the coverage of a policy and part do not, the company should defend all, although it might eventually be required to pay only some, claims. Fourth, while there may be some policy considerations which preclude protecting a wrongdoer from having to pay for an intentional injury he has caused, those same policy considerations do not foreclose the defense of an accused party who has not yet been found to be guilty. There may be additional reasons but these are especially applicable to the case now before us.

589 F.2d at 765.

"An insurer's duty to defend extends beyond the policy's term for indemnity, arising both where the suit is frivolous and where it exceeds the policy limits. The duty to defend is unconditional." *Hodges v. State Farm Mutual Auto. Ins. Co.*, 488 F. Supp. 1057, 1065 (D. S. C. 1980). The insurer must defend an entire lawsuit even though some of the claims are not covered by the policy so long as one of the claims is covered. *Town of Duncan v. State Budget and Control Board*, 482 S.E.2d 768, 774 (S.C. 1997).

"Accordingly, an insurer is excused from its duty to defend the insured only where the complaint against the insured clearly demonstrates no basis upon which the insured could be required to indemnify the insured under the policy." *Fuisz v. Selective Ins. Co. of America*, 61 F.3d 238, 242 (4th Cir. 1995). "If the complaint 'creates a possibility of coverage ... the insurer is obligated to defend.'" *Spartan Petroleum Co., Inc. v. Federated Mut. Ins. Co.*, 162 F.3d 805, 808 fn.2 (4th Cir. 1998). Any doubts regarding the obligation of the insurer to defend must be resolved in favor of the insured, and the decision of the insurer not to defend must be free from doubt. *Employers Mut. Liability Ins. Co. v. Hendrix*, 199 F.2d 53, 56-7 (4th Cir. 1952).

The decision of whether or not an insurer is required to defend an insured based on the complaint in the subject action is a matter of law for the Court. *Baker v. American Ins. Co. of Newark*, 324 F.2d at 750.

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B. If an Insurer Breaches its Duty to Defend, the Cost of Defense are the Damages.

"Where an insurer refuses to undertake the defense of an action against the insured based upon a claim within the coverage of the insurance policy, it thereby breaches the contract of insurance and is liable to the insured for all damages resulting to such insured as a direct result of such refusal and breach." *Fuller v. Eastern Fire & Cas. Ins. Co.*, 124 S.E.2d 602, 610 (S.C. 1962). Further, "[w]here an insurer wrongfully refuses to defend an action against the insured on the ground that the claim upon which the action was based, was not within the coverage of the policy, it is liable for the court costs taxed or incurred in such suit." *Id.* Thus, it is well settled that the damages recoverable for a breach of duty to defend include the attorney's fees and costs incurred in the lawsuit that the insured is forced to defend. *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443, 444 (1978).

C. The Insured May Also Recover its Attorneys Fees in the Lawsuit Against the Insurer For Breach of Duty to Defend.

1. Attorneys Fees and Costs.

Because the insured suing an insurer in a breach of duty to defend case has to file a lawsuit to determine its rights under the policy, it is entitled to an award of its attorney's fees and costs for this action as well. See e.g., *BP Oil Company v. Federated Mutual Ins. Co.*, 329 S.C. 631, 496 S.E.2d 35, 41 (1998); *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 38 (1980); and *Sloan Const. Co., Inc. v. Central Nat. Ins. Co.*, 236 S.E.2d 818, 820 (S.C. 1977). Thus, the Waldes as the assignees of Johnson may recover their attorneys fees and costs in this action related to AIC's breach of its duty to defend.

2. Prejudgment Interest.

South Carolina courts have not directly addressed whether or not prejudgment interest is recoverable on attorneys fees. However, other courts have expressly held that when an insurer

breaches its duty to defend in an insurance policy, the insured may recover prejudgment interest on the attorneys fees and costs it had to pay to defend itself.² Also, it is universally accepted that the prejudgment interest should be calculated from the date that the insured paid the bills.³ This is consistent with South Carolina law. Thus, AIC is required to pay prejudgment interest at the South Carolina statutory rate on the reasonable attorneys fees and costs billed by Johnson's attorney to Johnson from the date Johnson paid those invoices.

D. The Allegation of Johnson's Negligent Conduct is Covered By the Policy.

1. General Law: The Policy is Construed in Favor of Insured.

"It is well settled in South Carolina that provisions of an insurance policy are to be liberally construed in favor of the insured." *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132, 135 (Ct. App. 2000); *Cummings v. Horace Mann Ins. Co.*, 996 F.2d 720, 722 (4th Cir. 1993); and *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 392 S.E.2d 460, 461 (S.C. 1990). Thus, "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*, 500 S.E.2d 496, 499 (S.C. App. 1998).

² See e.g., *Liberty Mutual Fire Ins. Co. v. Canal Ins. Co.*, 177 F.3d 326, 339 (5th Cir. 1999) (Applying Miss. law); *Coastal-Iron Works, Inc. v. Petty Ray Geophysical*, 783 F. 2d 577, 586 (5th Cir. 1986) (Applying Texas law); *American Simmental Association v. Coregis Ins. Co.*, 234 F. Supp. 2d 1028, 1031-33 (D. Neb. 2002); *Ultra Coachbuilders, Inc. v. General Security Ins. Co.*, 229 F. Supp. 2d 284, 288-89 (S.D.N.Y. 2002); *Fidelity & Dep. Co. of Maryland v. Hartford Cas. Ins. Co.*, 216 F. Supp. 2d 1240, 1243-44 (D. Kan. 2002); *Federal Ins. Co. v. Stroh Brewery Co.*, 35 F. Supp. 2d 650, 663 (N.D. Ind. 1988); *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's of London*, 813 F. Supp. 576, 590 (N.D. Ohio 1993); *City of Burlington v. Ass'n. of Gas & Elec. Insurance Services, Ltd.*, 751 A.2d 284, 293 (Vt. 2000); *City of Willoughby Hills v. Cincinnati Ins. Co.*, 26 Ohio App. 3d 146, 499 N.E. 2d 31, 34 (Ohio App. 1986); and *Ervin v. Sears, Roebuck & Co.*, 127 Ill. App. 3d 982, 82 Ill. Dec. 709, 469 N.E. 2d 243, 250 (Ill. App. 1984).

³ *Liberty Mutual Fire Ins. Co. v. Canal Ins. Co.*, 177 F.3d at 339; *American Simmental Association v. Coregis Ins. Co.*, 234 F. Supp. 2d at 1031-33; *Fidelity & Dep. Co. of Maryland v. Hartford Cas. Ins. Co.*, 216 F. Supp. 2d at 1243-44; *Federal Ins. Co. v. Stroh Brewery Co.*, 35 F. Supp. 2d at 663; And see, *Ultra Coachbuilders, Inc. v. General Security Ins. Co.*, 229 F. Supp. 2d at 288-89 (interest ran from date of each invoice.); *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's of London*, 813 F. Supp. at 590 (interest ran from date fees incurred.); and *Ervin v. Sears, Roebuck & Co.*, 469 N.E. 2d at 250 (Same.)

"Rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed." *McPherson v. Michigan Mut. Ins. Co.*, 426 S.E.2d 770, 771 (S.C. 1995). "However, we subject insurance contracts to the same rules of interpretation governing other types of contracts." *Laidlaw Environ. Services (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 524 S.E.2d 874, 880 (Ct. App. 1999). Thus, the intent of the parties controls. *Id.*

As one court explained, "the purpose of an insurance policy is to insure. Insurance policies are written by insurance companies. Like Humpty Dumpty, they should say what they mean in advance, not after the fact." *Brooklyn Bridge, Inc. v. South Carolina Insurance Company*, 420 S.E.2d 511, 512 (S.C. App. 1993). Where an internal inconsistency in an insurance policy renders it ambiguous and the policy is susceptible of more than one reasonable interpretation, one which would provide coverage, coverage must be found as a matter of law. *Id.*, citing *Insurance Reserve Fund v. Prince*, 403 S.E.2d 643 (1991). Further, "[w]here the words of an insurance policy are capable of two reasonable interpretations, we will adopt the construction most favorable to the insured." *Laidlaw Environ. Services (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 524 S.E.2d 874, 879 (Ct. App. 1999).

2. There Was an "Occurrence" under the Policy.

As this Motion is limited to AIC's duty to defend, the Court only need find that one claim in the Arbitration Demand or Pre-Trial Brief alleges a covered event under the Policy. The Court finds that the claim for negligence/negligent misrepresentation was covered for purposes of the duty to defend.

The alleged negligence was (a) Johnson's failure to properly obtain BZA approval; (b) the failure to properly advise the Waldes as the zoning ordinance requirements after undertaking that duty; and (c) the failure to locate the barn in the proper location. The South Carolina Supreme

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Court has specifically held on a very similar issue that "the allegedly negligent location of the house on a lot which created the exposure to a condition which resulted in property damage constituted an 'occurrence.'" *Boggs v. Aetna Cas. & Sur. Co.*, 252 S.E.2d 565, 567 (S.C. 1979). Thus, Johnson's bad advice, its failure to obtain the correct variances from the BZA which resulted in the misplacement of the barn, and its improper height were 'occurrences' which primed the duty to defend.⁴ As such, it is indistinguishable from cases like *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 459 S.E.2d 318 (S.C. App. 1995), where the Court held that an negligently issued termite certificate resulted in continued termite damage to a building bought by a third party in reliance on the termite report. In the underlying case, the improper advice of Johnson caused the accident, i.e., the barn being built in the wrong location and being built with an apartment not allowed by the Aiken Ordinance and the subsequent order by the City of Aiken that the barn be torn down and/or remediated.

AIC characterizes the underlying arbitration as a construction defect type case. However, it is not. The Waldes did not allege, nor have they ever alleged, that the construction itself was defective. The essence of the Arbitration Demands was the negligent conduct of Johnson surrounding his undertaking of a duty to advise the Waldes with the BZA and his improper advice.⁵

Likewise, a claim for negligent misrepresentation is an "occurrence" under a general liability insurance policy. See *Sheets v. Brethren Mut. Ins. Co.*, 679 A.2d 540, 545-51 (Md. 1996);

⁴ Additionally, and as an alternative basis for finding a duty to defend, the Court finds that the allegation of harm caused by Johnson's breach of fiduciary duty is covered. *Unified Western Grocers, Inc. v. Twin City Fire Ins. Co.*, 457 F.3d 1106 (9th Cir. 2006).

⁵ By undertaking this action, as alleged in the Pre-Trial Brief sections cited above, Johnson assumed a duty of care, rendering it liable for negligent execution of this duty. "[O]ne who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care." *Crowley v. Spivey*, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct.App. 1985). See *Lawlor v. Scheper*, 232 S.C. 94, 99, 101 S.E.2d 269, 271 (1957) ("It may be true, as counsel argue, that appellants owed no duty to furnish any information as to the amounts owing on the two mortgages but when they undertook to do so, they owed a duty not to mislead respondent."); *Winburn v. Insurance Company of North America*, 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct.App. 1985) ("A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction."); *Folkens v. Hunt*,

Wood v Safeco Ins. Co. of America, 980 S.W.2d 43 (Mo. App. 1998); *SL Indus., Inc. v. American Motorists Ins. Co.*, 607 A.2d 1266, 1276-77 (N.J. 1992); *Universal Underwriters v. Youngblood*, 549 So.2d 76, 78-79 (Ala. 1989); *Reinsurance Ass'n of Minnesota v. Timmer*, 641 N.W.2d 302 (Minn. App. 2002). See also *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 265 S.E.2d 38, 40 (S.C. 1980) (Insurer breached duty to defend; policy covered negligence and so negligent misrepresentation claim covered.).

3. The Insured Acts were not subject to limitation as an "insured contract."

AIC states that one of the claims the Waldes made against Johnson was not an "insured contract" under Paragraph 9 of the Policy, and thus there was no coverage. However, the "insured contract" defense is irrelevant in a duty to defend analysis unless it is the only claim made, as the duty to defend is triggered by any claim possibly covered under the policy. *Town of Duncan, supra*. Obviously, the Waldes made claims of negligence/negligent misrepresentation in their Arbitration Demands. Thus, this defense is irrelevant to the subject matter of the Waldes' motion.

4. The Loss Was an "Accident" or "Fortuitous" Occurrence.

AIC argues that the claims made by the Waldes in the Arbitration Demands were not accidental or 'fortuitous.' However, as stated recently by the South Carolina Supreme Court, "this Court has found that in the absence of a prescribed definition in the policy, the definition of 'accident' is '[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt.'" *Auto Owners Inc. Co. v. Newman*, 684 S.E.2d 541, 543 (S.C. 2009), quoting *Green v. United Ins. Co. of America*, 174 S.E.2d 400, 402 (S.C. 1970). The key definitional point here is that the actions

290 S.C. 194, 348 S.E.2d 839 (Cl.App.1986) (once a public accountant undertakes to act on behalf of a client, he owes a duty to make a reasonable inquiry to ascertain facts).

complained of, Johnson's improper advice, were neither contemplated nor expected by either Johnson or the Waldes, and cannot be so construed by any reading of the Arbitration Demand.

AIC argues that the use of the word "wrongly" as used in the first Arbitration Demand means non-fortuitous conduct. This is a self-serving definition of the word 'wrongly.' The use of the word "wrongly" in the Arbitration Demand does not equate to "fraudulent", as argued by AIC. For example, definitions of the word "wrong" include, among others, to mean "not in conformity with fact or truth; incorrect," "not fitting or suitable," "not in accordance with an established usage, method, or procedure," or when used as an adverb, "in a wrong manner; mistakenly or erroneously." *American Heritage Dictionary* (2nd Ed. 1982); *www.Dictionary.com*. In fact, most definitions of the word "wrong" concern mistaken or negligent conduct, rather than intentional conduct. See *www.Dictionary.com*. Thus, the term 'wrongly' suggests negligence, not fraud.

"In examining the complaint, a court must look beyond the labels describing the acts to the acts themselves which form the basis of the claim against the insured." *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 666 S.E.2d 897, 899 (S.C. 2008). The Arbitration Demand alleged that Johnson acted "wrongly." Included in the adverb definition of "wrong" is "in a wrong manner; mistakenly or erroneously." This clearly suggests accidental wrongfulness.⁶

5. Property Damage was a Covered Loss.

AIC argues that the damage alleged was not 'property loss' as defined in the Policy. However, the damage alleged qualifies as "property damage" in several ways. First, there was "physical damage" to the barn: it had to be partially torn down. See *Auto Owners Ins. Co. v. Rhodes*, 682 S.E.2d 857, 868-69 (S.C. App. 2009) (Diminution in value of property due to loss of

⁶ Also, as an alternative basis for the Court's holding, the Pre-Trial Brief specifically alleged that Johnson undertook a duty to advise the Waldes with regard to the BZA and the Aiken County Ordinance. Breach of such a duty was negligence (whether labeled negligence or not). *Crowley v. Spivey*, 329 S.E.2d 774, 780 (S.C. App. 1985). Thus,

permits to put up signs was "property damage.") Second, there was also a 'loss of use' of the barn as it could not be used due to the negligent representations of Johnson that it could be built with an accessory apartment and his negligence in failing to tell the Waldes that it could not be built without a Special Exception and Variance to the Aiken County Building Ordinance.

In a similar case, the United States District Court in Colorado held allegations that the failure of a contractor to have a house designed to meet a county's height restrictions that would result in the partially-completed house that was built having to be torn down sufficiently alleged "property damage" to activate the insurer's duty to defend. *American Family Mutual Ins. Co. v. Teamcorp, Inc.*, 2009 WL 3077836 * 13 (D. Colo. September 22, 2009). Thus, the Arbitration Demand and Pre-Trial Brief clearly allege "property damage" covered by the Policy.

E. None of the Exclusions Cited by the Insurer Apply.

AIC raised in its Denial Letters (and raises in its cross motion for Summary Judgment) three exclusions. It says first that the "your work" exclusion precludes coverage. It then says that the "products-completed operations hazard" exclusion bars coverage. Finally it says the "intentional acts" exclusion bar coverage.

An exclusion in an insurance policy "is a limitation of liability or a carving out of certain types of loss to which the coverage or protection of the policy does not apply." 17 *Williston on Contracts* § 49:111 (4th Ed.) The insurer has the burden of proof that its exclusion and policy conditions should apply. *Owner's Insurance Co. v. Clayton*, 614 S.E. 2d 611, 614 (S.C. 2005) ("Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability.")

when the allegations of the Pre-Trial brief are examined, there clearly was stated a claim not only for negligent

1. The 'Your Work' Exclusion Does Not Apply.

AIC claims the "Your Work" Exclusion in the Policy bars coverage. The Exclusion at Section I, A.2.1 says "'Property damage' to 'your work' arising out of it or any part of it and included in the 'product-completed operations hazard.'" For purposes of this matter, the "Your Work" exclusion and the "Products-Completed Hazard" (*see infra*) exclusions are closely related.

It is clear from the Arbitration Demand and then the Pre-Trial Brief that the negligent misrepresentations by Johnson and its breach of duty were related to what variances and special exceptions were needed from the BZA and were related to its misrepresentations that the Waldes could build an accessory apartment as part of a barn without BZA approval. The resulting and ensuing damage that occurred was the partial demolition of the barn Johnson built. Thus, the actions complained of in the Arbitration Demands were separate and apart from the actual construction of the barn itself. The two events (Johnson's representation of the Waldes vs. Johnson's building of the barn) are separate. They could have been performed by different companies; for example, an attorney could have represented the Waldes before the BZA. Further, as alleged in the Arbitration Demands, they were separately paid for. Thus, Johnson's work before the BZA was different from its work of building the barn. The Waldes had no complaint about the quality of the barn; their complaint was over Johnson's negligence in procuring the special exceptions or variances.

For example, had Johnson not built the barn, but had he only breached a duty of care in representing the Waldes before the BZA, there is little doubt but that the insurer would have

misrepresentation, but one for negligence as well.

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[Signature]

covered the property damage to a barn built by another contractor at the wrong location and wrong height due to Johnson's negligence.

Also, by way of another example, if Johnson had improperly built a house, and after completion that house had caught on fire because Johnson negligently installed a light fixture, and then the fire spread to burn down a second house that Johnson was building, the insurer unquestionably would pay for the damage to the second house being built by Johnson. This is because Johnson's negligent conduct arose not with respect to the structure, the second house that he was building, but rather arose out of the first house it built that damaged the second house. Thus, the "your work" referred to in the Policy is the not the "your work" that was damaged.

Finally, the "Your Work" exclusion is ambiguous as applied to these facts since nowhere does the exclusion appear to contemplate the facts that occurred here: a service provided by an insured that later damaged a structure provided separately by the insured. In other words, the exclusion is inherently contradictory when the "work" of an insured damages distinct and separate "work" of same insured. In such a case, the Court must adopt the interpretation favoring the insured, which in this case would be that the two "your work" situations are separate. *See Brooklyn Bridge, supra*.

2. The "Products-Completed Operations Hazard" Exclusion Does Not Apply.

AIC attempts to apply the Products-Completed Operations Hazard Exclusion ("PCOH") to the claims in the Complaint. However, as noted by the South Carolina Court of Appeals, the products-completed operations hazard exclusion "cannot serve as a broadly written catch-all exclusion that would prohibit recovery no matter what consequences 'arise out of' the product of the insured." *Auto Owners Ins. Co. v. Rhodes*, 682 S.E.2d 857, 870 (S.C. App. 2009). The

policy actually covers products-completed operations hazards if not expressly excluded, as that was a separate coverage purchased by Johnson as reflected in the Policy Declarations. However, through the definition of certain "property damage" at Exclusion j, much of the products-completed operations hazard coverage is likewise excluded. The PCOH, however, is really not an exclusion; rather, it is an exception to an exclusion. The PCOH has been described as follows:

Before proceeding to our analysis of whether there was coverage, we think it would be helpful to explain how the PCOH provision fits into a CGL policy. A CGL policy, like every other insurance policy, has an insuring clause under which the insurer agrees to pay sums that the insured becomes legally obligated to pay because of property damages caused by an occurrence. The CGL policy also has exclusions that take away some of this coverage. The PCOH provision is an exception to these exclusions. Or, stated another way, the PCOH provision is simply a category of losses that are covered even though these losses might otherwise be excluded. Viewed in this light, the PCOH provision does not create a separate category of coverage. Rather, any loss falling within the PCOH provision must still meet all the requirements of the policy, like any other loss, except the exclusion from which the losses are excepted.

Pursell Const. Inc. v. Hawkeye-Security Ins. Co., 596 N.W.2d 67, 69 (Iowa 1999). The PCOH exception is to the Exclusion j which excludes certain types of defined "property damage" from coverage. (See pages 5-6 of Policy.) As an initial matter, Exclusion j does not apply to this situation as the negligence advice/negligent misrepresentation by Johnson does not fit into any of the exclusion's categories of excluded property damage. Thus, AIC cannot show (as is its burden) that the exclusions would apply.

Second, AIC confuses the claims in the Arbitration Demands as one for defective design or construction. The Arbitration Demands arose out of *defective advice* before a BZA, not for defective design or construction. There was no negligence in the design or construction of the building; the loss that occurred to the building was due to the negligent misrepresentations by Johnson involving the BZA. As long as the damages sought are not for the "work" itself, but are

for damage to other property, the PCOH does not apply. *Gaylord Chemical Corp. v. ProPump, Inc.*, 753 So.2d 349, 354-55 (La. App. 2000)(Interpreting identical policy provision and holding there was coverage for negligent misrepresentation claim.)

Finally, the Products-Completed Hazard Exclusion by its terms states that it does not apply to *uncompleted work*. Section V, 16. a. (2). AIC states that because the barn was not completed, then the exclusion applies. See Complaint, Exhibit C, page 7. However, Johnson's work before the BZA was completed before the construction contract was signed or work began on the barn. Thus, this exclusion does not apply.⁷

3. The Intentional Acts Exclusion Does Not Apply.

AIC's position that the intentional acts exclusion could apply is not persuasive as there is no allegation of fraudulent conduct by the Waldes. AIC in its second letter denying coverage stated that Johnson's conduct that was alleged in the Complaint as negligent conduct was rather intentional conduct. (See Complaint, Exhibit E, page 10.) The Court rejects this interpretation as the law of South Carolina nowhere states that the insurer for purposes of a duty to defend can so drastically recast the claims of a complaint. Indeed, the policy itself says the intentional actions exclusion is for damage "expected or intended from the standpoint of the insured." See Policy, page 2, section 2 a, attached at Exhibit A to Complaint. There is no allegation, or even a possible reasonable reading of the Arbitration Demand, that could lead AIC to a conclusion that the acts complained of were intentional.

⁷ The exclusion as applied to these facts is also ambiguous as it does not contemplate the work of the insured damaging other product of the insured. The Supreme Court of Florida held that a "Products-Completed Operations" exclusion was ambiguous as it referred to a contractor as opposed to a manufacturer, and thus an a duty to defend existed. *Nixon v. USF&G*, 290 So.2d 26 (Fla. 1973). The PCOH provision here at best is similarly ambiguous when applied to these facts.

AIC confuses **intentional conduct** with **intended results** of intentional conduct. The former is covered if there is negligence. The latter is not. "The South Carolina Supreme Court has held that, for an act to be an intentional act excluded by the intentional act exclusion of a policy, 1) the act which produces the loss must be intentional, and 2) the results of the act must be intended." *Manufacturers and Merchants Mutual Ins. Co. v. Harvey*, 498 S.E.2d 222, (S.C. App. 1998) citing *Miller v. Fidelity-Phoenix Ins. Co.*, 231 S.E.2d 701 (S.C. 1977). There is no allegation that Johnson intended that his negligent representation of the Waldes before the BZA cause the barn to be built in the wrong place or caused it to be built too high. Indeed, it is nonsensical to construe the Arbitration Demands as alleging that Johnson intentionally misled the Waldes; there is not a shred of any allegation to that effect.

Further, it has been held that a claim for "negligent misrepresentation" does not meet the threshold "intent" criteria for an intentional act for this exclusion to apply. *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 265 S.E.2d 38, 40 (S.C. 1980)(Insurer breached duty to defend; policy covered negligence and so negligent misrepresentation claim covered.); *Wood v. Safeco Ins. Co. of America*, 980 S.W.2d 43 (Mo. App. 1998). As noted by the Iowa Supreme Court in *Newton Nat'l Bank v. General Casualty Co.*, 426 N.W.2d 618, 625-626 (Iowa 1988), "the very definition of 'negligent misrepresentation' connotes negligent rather than intentional conduct."

III. DENIAL OF AIC'S MOTION FOR SUMMARY JUDGMENT

AIC has moved for Summary Judgment on the claims of the Complaint as a whole, relying on the same defenses it asserts in response to the Waldes' Motion for Partial Summary Judgment. The deficiency in nearly every one of AIC's arguments is that it fails to consider the significant difference between the activation of its "duty to defend" under the Policy and its "duty to

#18 of 20


indemnify" under the Policy and that its' duty to defend is triggered by a much lower standard than a duty to indemnify.

As its arguments fail for the duty to defend, as described in the Plaintiff's prior Memorandum and this Reply, AIC's arguments must fail. Further, the matter of AIC's duty to indemnify is not ripe for adjudication as there are questions of fact that preclude summary judgment on AIC's claims of no coverage.⁸ Therefore, AIC's Motion for Summary Judgment is DENIED. Matters related to whether or not AIC owes a duty of indemnification to Johnson (and therefore the Waldes as Johnson's assignees) are not decided by this Motion.

IV. RELIEF ORDERED

Since the determination of whether or not there was a duty to defend is a question of law for the Court based on its review of the Arbitration Demand, Pre-Trial Brief, and Policy, and because the facts necessary to make a determination on the Waldes' Motion for Partial Summary Judgment as to whether or not AIC owed a duty to defend are undisputed, the Court finds that based on the facts and law, AIC owed Johnson a duty to defend the Waldes' claims in the Arbitration.

Further, the Court finds that AIC breached its duty to defend Johnson by refusing to defend Johnson in the Arbitration.

Further, because AIC breached its duty to defend, South Carolina law provides that AIC must pay to Johnson its reasonable attorneys fees and costs incurred in the defense of the Arbitration.

Finally, because the Waldes (as assignees of Johnson's claim against AIC) had to bring this lawsuit and Motion for Partial Summary Judgment because AIC breached its duty to defend, South

⁸AIC has the burden of proof to show that any exclusion applies to the damages or conduct claimed. *Owner's Insurance Co. v. Clayton*, 614 S.E. 2d 611, 614 (S.C. 2005). As AIC has submitted no evidence (only arguments) that any of its exclusions apply to the facts of this case, its Motion for Summary Judgment must fail as to those grounds for Summary Judgment.

#19.2.20


Carolina law also provides that AIC must pay to the Waldes their reasonable costs and attorneys fees related to this portion of this lawsuit related to AIC's breach of its duty to defend.

However, as the Waldes have not sought a determination of damages they should be awarded in their Motion for Partial Summary Judgment, this Court does not determine what the reasonable amount of attorney's fees and costs to be awarded which can be done upon the Waldes' petition for further relief.

AND IT IS SO ORDERED, THIS 2nd DAY OF ~~AUGUST~~^{SEPTEMBER}, 2010.

Orangery, South Carolina

Edgar W. Dickson
Honorable Edgar W. Dickson
Presiding Judge

* 20 9 20
Edgar W. Dickson

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

William & Mary Frances Walde,
as assignees of Johnson Construction
Company of Aiken, Inc.,

Plaintiff,

vs.

Association Insurance Company,

Defendant.

IN THE COURT OF COMMON PLEAS

Docket No.: 2009-CP-02-02420

CERTIFICATE OF SERVICE

I, Margaret S. Kirkland, an employee of McNair Law Firm, P.A., do hereby certify that I have served the foregoing *Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendant's Motion for Summary Judgment* by mailing same via U.S. Mail, first class postage affixed thereto, on the 8th day of September, 2010 to the following address:

Jennifer L. Blanchard
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Attorneys for the Defendant


Margaret S. Kirkland

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

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

Plaintiff(s)

vs.

Association Insurance Company

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2009-CP - 02- 02420

(Please Print)

Submitted By: Benjamin E. Nicholson V
Address: McNAIR LAW FIRM, P.A.
P.O. Box 11390 Columbia, SC 29211

SC Bar #: 10137

Telephone #: 803.799.9800

Fax #: 803.753.3278

Other:

E-mail: nnicholson@mcnair.net

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|---|--|
| Contracts | Torts - Professional Malpractice | Torts - Personal Injury | Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Assault/Slander/Libel (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☐ Motor Vehicle Accident (320) | ☐ Foreclosure (420) |
| ☐ General (130) | ☐ Notice/ File Med Mal (230) | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☒ Breach of Contract (140) | ☐ Other (299) | ☐ Products Liability (340) | ☐ Partition (440) |
| ☐ Other (199) | | ☐ Personal Injury (350) | ☐ Possession (450) |
| | | ☐ Wrongful Death (360) | ☐ Building Code Violation (460) |
| | | ☐ Other (399) | ☐ Other (499) |
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- | | | | |
|--|--|---|--|
| Inmate Petitions | Judgments/Settlements | Administrative Law/Relief | Appeals |
| ☐ PCR (500) | ☐ Death Settlement (700) | ☐ Reinstate Driver's License (800) | ☐ Arbitration (900) |
| ☐ Mandamus (520) | ☐ Foreign Judgment (710) | ☐ Judicial Review (810) | ☐ Magistrate-Civil (910) |
| ☐ Habeas Corpus (530) | ☐ Magistrate's Judgment (720) | ☐ Relief (820) | ☐ Magistrate-Criminal (920) |
| ☐ Other (599) | ☐ Minor Settlement (730) | ☐ Permanent Injunction (830) | ☐ Municipal (930) |
| | ☐ Transcript Judgment (740) | ☐ Forfeiture-Petition (840) | ☐ Probate Court (940) |
| | ☐ Lis Pendens (750) | ☐ Forfeiture-Consent Order (850) | ☐ SCDOT (950) |
| | ☐ Other (799) | ☐ Other (899) | ☐ Worker's Comp (960) |
-
- | | |
|--|---|
| Special/Complex /Other | |
| ☐ Environmental (600) | ☐ Pharmaceuticals (630) |
| ☐ Automobile Arb. (610) | ☐ Unfair Trade Practices (640) |
| ☐ Medical (620) | ☐ Out-of State Depositions (650) |
| ☐ Other (699) | ☐ Sexual Predator (510) |

Submitting Party Signature: [Signature]

Date: October 12, 2009

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN)

Docket No.: 2009-CP-02-02420

William & Mary Frances Walde,
as assignees of Johnson Construction
Company of Aiken, Inc.,)

Plaintiff,)

vs.)

Association Insurance Company,)

Defendant.)

SUMMONS

C O P Y
ORIGINAL FILED

OCT 14 2009

AIKEN COUNTY
CLERK OF COURT

TO THE DEFENDANT NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to said Complaint upon the subscribers at their office, 1301 Gervais Street, Post Office Box 11390, Columbia, South Carolina 29211, within thirty (30) days after service hereof, exclusive of the day of service. If you fail to answer the Complaint within the time aforesaid, the plaintiffs will apply to the Court for the relief demanded therein, and judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,

Benjamin E. Nicholson, V
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, SC 29211
803.799.9800
nnicholson@mcnair.net

Columbia, SC
October 12, 2009

By: 
Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

William & Mary Frances Walde,
as assignees of Johnson Construction
Company of Aiken, Inc.,

Plaintiffs,

vs.

Association Insurance Company,

Defendant.

IN THE COURT OF COMMON PLEAS

Docket No.: 2009-CP-02- 02420

COMPLAINT

(Insurance Coverage)

COPY
ORIGINAL FILED

OCT 14 2009

AIKEN COUNTY
CLERK OF COURT

The Plaintiffs, William & Mary Frances Walde, as assignees of Johnson Construction Company of Aiken, Inc., Michael Johnson, and Annette Johnson hereby complain of the Defendant, Association Insurance Company as follows:

I. THE PARTIES AND JURISDICTION

1. The Plaintiffs, William & Mary Frances Walde, are citizens of the state of Florida who own a house in Aiken South Carolina.

2. The Defendant, Association Insurance Company ("the Insurer") is, upon information and belief, a corporation organized under the laws of the State of Georgia and with its principal place of business in a state other than South Carolina. The Insurer is authorized to do business in South Carolina and has done business in South Carolina at the times alleged herein. The Insurer issued a Comprehensive General Liability insurance policy, policy number GLP 0003940 03 to Johnson Construction Company of Aiken, Inc. with a policy period of 7/11/2008 to 7/11/209 (hereinafter, "the Policy"). A true and correct copy of the Policy is attached hereto as Exhibit A. Upon information and belief, the Insurer had issued a Comprehensive General Liability Insurance policy

identical in coverages relevant to the allegations herein to Johnson Construction Company of Aiken, Inc. for the period of 7/11/2007 to 7/11/2008. Any such policy applicable to that time period is also referred to hereinafter as "the Policy."

3. This Court has jurisdiction and venue over this action as the defendant is licensed and does business generally in South Carolina and South Carolina is the location of where the claims arose and the damages alleged herein. This Court has exclusive jurisdiction of this matter as the Plaintiffs seek less than \$74,999.00 in damages of any type in the aggregate.

4. Venue is proper in this Court as the events complained of occurred in Aiken County, South Carolina and the Insurer entered into a contract of insurance with the Insured in Aiken, South Carolina. Jurisdiction is exclusively in this Court as the Plaintiffs seek in total damages of all kinds stated herein no more than Seventy-Four Thousand, Nine Hundred and Ninety-Nine (\$74,999.00) Dollars and no/cents.

5. The Plaintiffs are the real parties in interest as the assignees of all rights, interests, and claims that Johnson Construction Company of Aiken, Inc., Michael Johnson, and Annette Johnson may have against the Insurer with regard to those matters alleged in this Complaint. This Assignment arose from a Settlement Agreement between the Plaintiffs and Johnson Construction Company of Aiken, Inc., Mike Johnson and Annette Johnson that settled the Dispute as more clearly stated below.

II. THE UNDERLYING DISPUTE

6. The Plaintiffs own a house at 903 Two Notch Road in Aiken, South Carolina ("the Property.") As Mary Frances Walde had an interest in horses and riding, the Plaintiffs intended to construct a stable and paddock at the Property to accommodate her horses. The Plaintiffs hoped to build one in their back yard to stable

one or two horses. This is not an uncommon feature for lots in that area of Aiken. However, the City of Aiken has a strict zoning ordinance that required both a Special Exception to the Zoning Ordinance and a Variance to the Zoning Ordinance to allow the stable and paddock to be built. (The Zoning Ordinance is hereinafter referred to as "the Ordinance.")

7. The Plaintiffs while in the process of exploring their ability to put in stable and paddock on the Property were informed that a Special Exception was needed to Section 3.15 of the Ordinance to allow the stable, referred to as a "pleasure stable" because it was not for commercial use. A Variance was needed to allow the stable to be built in the backyard as it would be nearer to neighbors' houses than permitted by the Ordinance. The Plaintiffs understood that while special permission was needed from the City of Aiken's Board of Zoning Appeals ("the BZA") to go forward with this project, they believed that the BZA would allow them to build their project. They hoped that there would not be substantial neighbor opposition.

8. To that end, the Plaintiffs in 2008 found Mike Johnson and his company, Johnson Construction of Aiken, Inc., (collectively hereinafter "Johnson") to build their stable and paddock. However, proper zoning was always the initial hurdle the Plaintiffs knew needed to be cleared.

9. On February 12, 2008, Johnson notified Mary Frances Walde that he would "proceed with some sketches and filling [out] an application as well" with regard to the zoning variance and special exception. Because the Plaintiffs did not live full time in Aiken, and because Johnson assured them that he was an experienced contractor in Aiken familiar with the City's Ordinance and the personnel enforcing the Ordinance, the

Plaintiffs agreed for Johnson to handle for them the process of obtaining a Special Exception and Variance to allow them to have Johnson build the stable and paddock.

10. On or around March 17, 2008, Johnson submitted two Applications on behalf of the Waldes (as their 'agent') to the City's BZA, an Application for a Variance for the project and an Application for a Special Exception. Johnson's Applications attached a sketch plan of the stable and the location of the stable he proposed.

11. Johnson then appeared at the BZA meeting of March 25, 2008 representing Mary Frances Walde and submitted the request for the Variance and Special Exception. Despite resistance from some neighbors, the BZA approved the Variance and Special Exception. However, the approval was only after three amendments to the motion to approve the Variance and only after certain conditions were inserted in the approval, such as the requirement that the approval was "to allow the pleasure stable and one paddock as conceptually shown in Exhibit E."

12. Johnson was paid \$500 by the Plaintiffs to represent their interests at the BZA meeting.

13. Thereafter, Johnson and the Plaintiffs entered into a construction contract dated April 22, 2008 for construction of the stable and paddock ("the Contract.") The Contract contemplated an accessory apartment being built above the stable. Johnson begun construction of the stable with accessory apartment and was roughly 80% complete by late June of 2008. The accessory apartment was not specifically mentioned in either the Variance or the Special Exception obtained by Johnson.

14. However, on June 27, 2008, Johnson was notified by the City of Aiken's Building Inspector that the stable did not comply with the Variance or the Special Exception. In particular, it was ultimately determined by City of Aiken officials that the

stable was not built in the location allowed by the Special Exception and that the accessory apartment resulted in the stable not meeting the height and size standards of the Ordinance. Further, the Ordinance did not permit the accessory apartment to be built without a Variance.

15. To attempt to rectify the situation, Johnson appeared before the BZA again at its July 29, 2008 hearing seeking another Special Exception and Variance to allow the stable to stay where it was built and to allow the accessory apartment to remain. The BZA denied the requests and directed that the stable be torn down.

16. The Plaintiffs terminated the Contract with Johnson because of the failure to obtain proper approvals for the construction from the BZA.

17. The Plaintiffs had no complaint as to the quality of the work performed by Johnson and did not have any claim of defective workmanship as to the stable.

18. The Plaintiffs requested another Special Exception from the BZA, this time without Johnson, in December of 2008. The Plaintiffs requested that the stable be allowed to stay in its location if the accessory apartment was removed. Otherwise, the entire structure would have had to have been torn down. The BZA at its January 8, 2009 meeting granted the Plaintiff's request.

19. On September 17, 2008, the Plaintiffs filed with the American Arbitration Association ("AAA") a Demand for Arbitration as provided for in the Contract. A true and correct copy of the Demand is attached at Exhibit B. (The Arbitration Demand and all acts in furtherance and part of the arbitration dispute resolution process are hereafter called at times collectively "the Arbitration.") In the Section of the AAA Demand called "Nature of the Dispute," the Plaintiffs stated:

Respondents represented Claimants before Aiken Board of Zoning Appeals to obtain variance to build paddock and stable for Claimants. Respondents then built the building. Respondents obtained variance but then built building in wrong location and wrongly told Claimants that an addition to original plans was permissible. BZA has now ordered building removed. Claimants claim breach of contract, negligent misrepresentation, and breach of fiduciary duty seeking actual damages for money already paid to Respondents, and cost to demolish or move the building to the correct location.

20. Johnson tendered the defense of the AAA Demand to the Insurer. By letter of September 25, 2008, the Insurer denied coverage, including any duty to defend. A true and correct copy of the letter is attached as Exhibit C.

21. Johnson thereafter hired its own legal counsel to defend against the Plaintiff's allegations in the Arbitration Demand. Johnson thereafter incurred attorney's fees and costs in the defense of Plaintiff's claims in the Arbitration. Johnson incurred approximately \$8,800.00 in attorney's fees and costs in defending the Arbitration.

22. Also, because the Insurer had refused to defend or indemnify Johnson in the Arbitration, Johnson agreed to mitigate damages by at its cost tearing off the accessory apartment and rebuilding the stable in conformity with the Ordinance. Johnson incurred approximately \$19,000 in costs doing so.

23. On August 17, 2009, the Plaintiffs submitted their Pre-Trial Brief to the Arbitrator in the Arbitration. Johnson again tendered the defense of the Arbitration to the Insurer by forwarding to it this Pre-Trial Brief. A true and correct copy of the Pre-Trial Brief is attached hereto at Exhibit D.

24. The Insurer again denied a defense and denied coverage by letter of August 27, 2009, a true and correct copy of which is attached at Exhibit E.

25. The Arbitration was scheduled to go forward on August 20th and 21st, 2009. However, the Plaintiffs and Johnson reached a settlement the evening of August 19th, 2009. Among other things, including the assignment by which the Plaintiffs are the real parties in interest in this action, the settlement agreement provided that Johnson pay to the Plaintiffs via a promissory note secured by a Confession of Judgment, Mortgage and Security Agreement the sum of Forty-Two Thousand, Five Hundred (\$42,500.00) Dollars and no/cents.

26. Although Johnson performed much of the remediation work at its cost after its claim for coverage was denied by the Insurer, the Plaintiffs still suffered damages. Among the damages the amount of the settlement represented were additional costs required to put the stable into a condition it would have been had Johnson not made the negligent misrepresentations to the Plaintiffs and built a non-conforming structure.

27. The settlement between Johnson and the Plaintiffs was reasonable.

III. THE OPERATIVE POLICY PROVISIONS

28. The Policy provides in Section I, Coverage A, Subsection 1. a. that the Insurer "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."

29. The Insurer claimed at page 10 of its August 27th, 2009 letter at Exhibit E denying coverage that there was no "occurrence" resulting in "property damage" and therefore the Policy did not cover the claims made in the Arbitration Demand or outlined in the Pre-Trial Brief. However, the Plaintiffs in the Demand for Arbitration at Exhibit B clearly stated a claim for "negligent misrepresentation" among other claims with regard to the representations made to the Plaintiffs by Johnson. The negligent

misrepresentations were, as stated initially in the Arbitration Demand, for wrongly telling the Plaintiffs that the accessory apartment was permissible.

30. Further, the Pre-Trial Brief at Exhibit D forwarded to the Insurer further amplified the negligent misrepresentation allegations. For example, the Pre-Trial Brief states at page 5:

Before the BZA meeting, and then again afterwards, the Waldes asked Johnson about the feasibility to using the space over the stable for making an accessory apartment. Johnson advised them that this would be no problem. Johnson in that time period began working on an accessory apartment plan and estimating it as well.

Thereafter, at page 6, the Pre-Trial Brief states: "At no time did Johnson advise the Waldes that the Ordinance did not allow for an accessory apartment on the stable or that the accessory apartment he designed would make the height of the stable higher than permitted by the Ordinance."

31. The Pre-Trial Brief also stated at page 17 that: "Johnson's representations that he could build the stable with an accessory apartment were negligent misrepresentations." Page 19 of the Pre-Trial Brief stated "

Mary Frances and Bill Walde trusted Mike Johnson to guide them through the process of obtaining appropriate zoning approvals and then building them a stable and paddock. Johnson knew that the Waldes were absentee owners and that he was their representative before the BZA and to the City of Aiken. However, as he admitted before the BZA, he was ignorant of basic requirements of the zoning Ordinance, and he failed to advise the Waldes that he had not obtained the proper approvals for the structure he was building. He then refused to refund to the Waldes the money they overpaid him for a stable that was a non-conforming use only because of his advice.

32. The Plaintiffs' Demand for Arbitration and subsequent Pre-Trial Brief alleges that the negligent acts were (1) Johnson obtaining insufficient special exceptions

and variances to build the stable where it was located and to build it with an accessory apartment and (2) the misrepresentation by Johnson that the accessory apartment could be built. The resulting and ensuing damage that occurred arose out of 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.

33. As alleged in the Demand for Arbitration and the Pre-Trial Brief, the negligent acts occurred prior to and separately from the actual stable construction project. Therefore, the ensuing damage was not to "your product" or "your work" as the ensuing damage (the removal of the accessory apartment and rebuilding of the stable) was not because of faulty workmanship but rather was because of negligent misrepresentations as to what could be built.

34. For the same reasons, the "Products - Completed Operations Hazard" Exclusion does not apply as the negligent acts—the misrepresentations—had been completed before the stable was built.

35. Johnson did not claim that any contract was an "insured contract" and therefore the Insurer's reference to such in its August 27th, 2009 letter is superfluous.

36. The Insurer claims the intentional acts exclusion bars its liability. However, as to negligent misrepresentation, there was no intentional act allegation. Indeed, the Pre-Trial brief quotes Mike Johnson from the BZA meeting:

Johnson represented to the BZA that "[he] had no idea there was a height issue" with the stable he built. (See Exhibit 67, p. 367; Exhibit 68, p. 19-20: "[a]nd I had no inkling, no intent or anything that there was an issue with size, because I had thought and understood that it was the footprint and whatever was enclosed. As far as height, I had no idea that there was a height issue....You know, I guess, you know, what you approved back

wherever you approved it, yes we, I thought that we were within those guidelines based on me getting building permit.")

Thereafter as recited at pages 8-9 of the Pre-Trial Brief:

Johnson stated "had he known all of these regulations, he would not have made any modifications on the building permit application." *Also see Exhibit 68, p. 21.* ("If I had known this when I applied for this permit, I mean, I wouldn't have done it.") He stated that "he relies on the city departments to determine if the plans meet all city requirements." Johnson admitted that he submitted a different site plan with the building permit than the one that was approved by the BZA. (*See Exhibit 67, p. 369.*) Johnson admitted to the BZA that he had been "enlightened."

37. Thus, the intentional acts exclusion would not on its face deny the obligation of the Insurer to offer a defense or indemnify Johnson for the claim.

38. The Insurer in its August 27th, 2009 Denial Letter also cited the "Faulty, Defective or Poor Workmanship Exclusion" in the Policy. However, there is no allegation in either the Demand for Arbitration or the Pre-Trial Brief of faulty, defective, or poor workmanship. There are allegations of incomplete workmanship, but the negligence claims have nothing to do with the quality of the work performed or of the workmanship.

39. The Insurer at pages 12-13 in its August 27th, 2009 Denial Letter also cited the "Exclusions - Contractor - Professional Liability" Exclusion. However, nothing alleged to have been done by Johnson falls into any type of "professional service" as defined by this Exclusion as nothing references the appearance of Johnson before a BZA or that type body on behalf of its customer as a "professional service."

40. The Insurer at pages 13 in its August 27th, 2009 Denial Letter also cited the "Exclusions - Construction Management Errors and Omissions" Exclusion. However, nothing alleged to have been done by Johnson falls into any type of

"construction management" as defined by this Exclusion as nothing references the appearance of Johnson before a BZA or that type body on behalf of its customer as a "construction management service."

41. The Insurer at pages 13-14 in its August 27th, 2009 Denial Letter also cited the "Exclusions - Engineers, Architects or Surveyors Professional Liability" Exclusion. However, nothing alleged to have been done by Johnson falls into any type of "professional service" as defined by this Exclusion as nothing references the appearance of Johnson before a BZA or that type body on behalf of its customer as a "professional service."

42. The Insurer at pages 14-15 in its August 27th, 2009 Denial Letter also cited the "Exclusions - Designated Professional Services" Exclusion. However, nothing alleged to have been done by Johnson falls into any type of "professional service" as defined by this Exclusion as nothing references the appearance of Johnson before a BZA or that type body on behalf of its customer as a "professional service."

IV. THE CLAIM

For A First Cause of Action (Breach of Contract)

43. The Plaintiffs re-allege herein the allegations of the above stated paragraphs.

44. The Policy provided the Insurer to provide a defense for Johnson to the claims made in the Arbitration.

45. The Policy provided for the Insurer to indemnify Johnson for any judgment or settlement for damages covered by the Policy.

46. The Insurer wrongfully refused to defend or indemnify Johnson.

47. The Insurer has therefore breached the terms and conditions of the Policy by refusing to defend Johnson and to indemnify Johnson for sums it has so expended.

48. The Insurer has therefore breached its contract by refusing to defend Johnson and indemnify it as stated in the Complaint.

49. The Plaintiffs, as assignees of Johnson, are entitled to recover ad damages from the Insurer Johnson's attorneys fees and costs in defending the Arbitration, Johnson's cost to partially demolish and rebuild the stable in accordance with the Ordinance, and the amount of the Promissory Note which represented a fair and reasonable compromise of Johnson's potential liability for actual and punitive damages for negligent misrepresentation, among other claims, and the Plaintiffs' costs and attorneys fees in prosecuting this action against the Insurer.

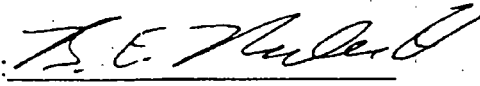
50. The Plaintiffs, as assignees of Johnson, are entitled to a recovery from the Insurer of Johnson's actual, consequential and incidental damages as above alleged from the Insurer due to the Insurer's breach of contract of no more than Seventy-Four Thousand, Nine Hundred and Ninety-Nine (\$74,999.00) Dollars and no/cents, exclusive of interest and costs.

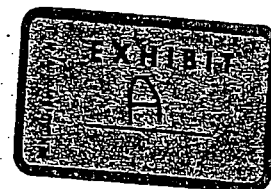
WHEREFORE, the Plaintiffs request that the Court order that the relief it requests be granted, including all actual, consequential, and incidental damages, its attorney's fees and costs, prejudgment interest, and any other such relief as the Court may order, up to the amount of and not to exceed the amount of Seventy Four Thousand, Nine Hundred and Nine-Nine (\$74,999.00) Dollars and no/cents, exclusive of interest and costs.

Respectfully submitted,

Benjamin E. Nicholson, V
Burl F. Williams
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, SC 29211
803.799.9800
nnicholson@mcnair.net

October 12th, 2009
Columbia, South Carolina

By: 
Attorneys for the Plaintiffs



INSURED
MAILER PAGE

Reference: GLP 0003940 04

|||||

JOHNSON CONSTRUCTION CO OF AIK
808 MARKET PLACE
AIKEN, SC 29803



Association Insurance Company

P.O. Box 723099
Atlanta, GA 31139 0099

INSURED COPY
Date Issued: 05/19/2009

GENERAL LIABILITY INSTALLMENT SCHEDULE

Policy Number
GLP 0003940 04

Policy Period
07/11/2009 07/11/2010

JOHNSON CONSTRUCTION CO OF AIC
808 MARKET PLACE
AIKEN, SC 29803

Frank B. Norris & Co.
P.O. Box 5836
Columbia, SC 29250-0000

TELEPHONE: 8032567555

0001357

WRITTEN PREMIUM \$12,250.00
PAYMENT PLAN 25% Down, 9 Installments

INSTALLMENT #	INSTALLMENT AMOUNT	DUE DATE
01	3,062.50	07/11/2009
02	1,020.83	08/11/2009
03	1,020.83	09/11/2009
04	1,020.83	10/11/2009
05	1,020.83	11/11/2009
06	1,020.83	12/11/2009
07	1,020.83	01/11/2010
08	1,020.83	02/11/2010
09	1,020.83	03/11/2010
10	1,020.86	04/11/2010

The Installment Schedule is calculated at the point of policy inception and is subject to change with endorsements or without notice.

For additional information please contact Builders Insurance Group at 1-800-883-9305.
Thank you.



The following information is provided in accordance with applicable state and federal laws and regulations. No action on your part is necessary.

PRIVACY NOTICE OF THE BUILDERS INSURANCE GROUP COMPANIES

Builders Insurance Group, Inc., Association Services, Inc., Association Insurance Company, Vinings Insurance Company and Builders Insurance (A Mutual Captive Company) referred to as "Builders Insurance Group."

This privacy policy does not apply to your relationship with other financial service providers, such as your insurance agent or broker, that are not part of the Builders Insurance Group. Their privacy policies govern how they collect, use and disclose personal information that you allow them to access.

What categories of information about you do we collect?

We may collect the following categories of nonpublic personal information about you from the following sources:

- Information about you that you provide to us on applications for our products or services or other forms, such as your address, telephone number, income, assets, insurance policies, social security numbers, payroll information, and accounts with others;
- Information about your transactions and experiences with us, our affiliates and nonaffiliated third parties, such as your insurance coverages, claims, loss or other transaction history, premium payments; and
- Information we obtain about you from consumer reporting agencies.

What categories of information about you do we disclose?

We may disclose all of the personal information that we collect, as described above, to our affiliates and nonaffiliated third parties as required or permitted by law. In some cases, this means that we can disclose information about you to certain third parties without your authorization.

How do we protect the confidentiality and security of your information?

We restrict access to your nonpublic personal information in our records to our employees who need to know that information to provide our products or services to you, and for other reasons required or permitted by law. We maintain physical, electronic and procedural safeguards to guard the confidentiality and security of your nonpublic personal information in our records. Our employees who violate our privacy policy are subject to disciplinary action.

Builders Insurance Group follows these privacy practices even when a customer relationship no longer exists.

You have the right to obtain access to certain types of information about you in our records and to request correction of such information if you feel it is inaccurate. We would be pleased to tell you about our policies and procedures regarding the privacy of your nonpublic personal information. Please contact us in writing at Builders Insurance Group, P.O. Box 723099, Atlanta Georgia 31139-0099 regarding our privacy notice.

BIG PRVN 01 08 06



To: Our Valued Policyholder
From: Builders Insurance Group
Re: Notification of Change in Policy Terms

Dear Policyholder:

The Department of Insurance requires all insurance carriers to provide advance notice to policyholders when there is a change in the policy terms or a reduction in coverage. No coverage is provided by this summary nor can it be construed to replace any provisions of your policy or endorsements. You should read your policy and review your declaration page for complete information on the coverages you are provided. If there is any conflict between the policy and this summary, **THE PROVISIONS OF THE POLICY SHALL CONTROL**. Your general liability policy is scheduled to renew soon. Your renewal will be conditioned on a change(s) in the policy terms as described below:

Form Number	Title of Form	Explanation of coverage change
GL RFWE 02 08	Residential Faulty, Defective or Poor Workmanship Exclusion	This endorsement, when attached to your policy, changes exclusion I. Faulty, Defective or Poor Workmanship in Your Work.



To: Our Valued Policyholder
From: Builders Insurance Group
Re: Notification of Change in Policy Terms

Dear Policyholder:

The Department of Insurance requires all insurance carriers to provide advance notice to policyholders when there is a change in the policy terms or a reduction in coverage. No coverage is provided by this summary nor can it be construed to replace any provisions of your policy or endorsements. You should read your policy and review your declaration page for complete information on the coverages you are provided. If there is any conflict between the policy and this summary, **THE PROVISIONS OF THE POLICY SHALL CONTROL**. Your general liability policy is scheduled to renew soon. Your renewal will be conditioned on a change(s) in the policy terms as described below:

Form Number	Title of Form	Explanation of coverage change
GL CONDO R 01 08	AMENDMENT OF GL CONDO FOR REMODELING	This form amends your policy by not excluding "your work" for "remodeling" operations performed to a unit within a residential "condominium" and/or "community apartment project/co-operative project".

Please read your policy and the endorsements attached to your policy carefully. Not all forms shown above will appear on all policies. If you have any questions regarding this notice, please contact your agent who is familiar with the changes in your policy.

Thank you and we appreciate your business.

Builders Insurance Group

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RECORDING AND DISTRIBUTION OF MATERIAL OR INFORMATION IN VIOLATION OF LAW EXCLUSION ENDORSEMENT ADVISORY NOTICE TO POLICYHOLDERS

This Notice does not form a part of your insurance contract. No coverage is provided by this Notice, nor can it be construed to replace any provisions of your policy (including its endorsements). If there is any conflict between this Notice and the policy (including its endorsements), the provisions of the policy (including its endorsements) shall prevail.

Carefully read your policy, including the endorsements attached to your policy.

This Notice provides information concerning the following new endorsement, which applies to your renewal policy being issued by us:

Recording And Distribution Of Material Or Information In Violation Of Law Exclusion Endorsement CG 00 68 05 09

This endorsement replaces the current Distribution Of Material In Violation Of Statutes Exclusion in your policy with a revised exclusion, newly titled Recording And Distribution Of Material Or Information In Violation Of Law Exclusion. The revised exclusion contains language that elaborates on the intent of the Distribution Of Material In Violation Of Statutes Exclusion to reflect that, in addition to the TCPA and CAN-SPAM Act of 2003, the exclusion will more explicitly exclude liability coverage for bodily injury, property damage or personal and advertising injury arising out of any action or omission that violates, or is alleged to violate, the Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA) and any other similar federal, state or local statute, ordinance or regulation concerning disposal and dissemination of personal information.



BUILDERS INSURANCE GROUP
GENERAL LIABILITY SUPPLEMENTAL APPLICATION

All information on this application and the accompanying ACORD application must be completed. Both applications must be signed by the applicant and the producer.

Proposed Effective Date 07/11/2009		Today's Date 05/19/09	
DBA Name (This is the name by which we will refer to this account)			
Legal Name (If different) JOHNSON CONSTRUCTION CO OF AIK			
Has any owner or officer of this company ever declared bankruptcy? Yes ☐ No ☐ If "yes" please provide the following details:			
Date Filed	Amount Filed	Chapter? 7 11 13	Attach documents verifying court's final disposition.
PROPERTY DAMAGE DEDUCTIBLE	\$1,000 (Std) x	\$2,000	\$5,000 \$10,000
Signature _____			

MOLD ELECTION (YOU MUST ELECT "A" OR "B" BELOW AND SIGN WHERE INDICATED)

A. On behalf of the named insured above, the undersigned hereby acknowledges that this policy provides limited (\$2,500) coverage for property damage losses only (not bodily injury), from mold, mildew, fungi, or bacteria or any similar or related cause of loss.

Owner Name Printed _____ Signature _____

-OR-

B. We hereby elect the option selected below for mold, mildew, fungi, bacteria and understand and acknowledge coverage is limited by an annual aggregate and coverage is inclusive of defense costs and is for property damage losses only. A deductible of two times the policy deductible applies to each occurrence. Choose one only if you elect this additional coverage:

_____ \$5,000 (Premium of \$500.00) _____ \$10,000 (Premium of \$1,000.00)

Owner Name Printed _____ Signature _____

TERRORISM
Selection or Rejection of Terrorism Insurance Coverage

_____ I hereby elect to purchase Terrorism coverage for a prospective additional premium charge. Final premium to be determined at audit.

_____ I hereby reject Terrorism coverage. I understand that I will not be covered for losses arising from acts of terrorism that were previously excluded.

Policyholder/Applicant Signature _____

JOHNSON CONSTRUCTION CO OF AIK
Print Name _____ GLP 0003940 04
Policy Number _____ Date _____

AFFIDAVIT: I, the undersigned, hereby certify that I have read, understand, and certify the validity of the statements and information included in and made a part of this application. I also agree to maintain and make available to the Company applicable payroll records, and to comply with all applicable laws, orders, rules, and regulations relating to the welfare, health, and safety of employees. I further agree to comply with all reasonable recommendations made by the Company with regard to same.

Owner/Officer's Signature _____ Producer's signature _____

Owner/Officer's Name (Printed) _____ Agency Name (Printed) Frank B. Norris & Co.

To request a quotation, fax a complete submission to your underwriter. Do not send a check until you have received our written quotation. Mail to: Builders Insurance Group, PO Box 723099, Atlanta, GA 31139-0099.

GL SU AP SC 09/08

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SOUTH CAROLINA INSURANCE FEE DISCLOSURE NOTICE

Insured: JOHNSON CONSTRUCTION CO OF AIK

PLEASE BE ADVISED THAT THE FOLLOWING FEES MAY APPLY:

Maximum Fee Schedule:

LATE CHARGES	\$10.00
REINSTATEMENT CHARGES	\$10.00
CONVENIENCE CHARGES	\$ 3.00
INSTALLMENT PAYMENT FEE	\$10.00
NOT SUFFICIENT FUNDS FEE	\$30.00

GLSCFDN002

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P.O.Box 723099 • Atlanta, GA 31139-0099 • 678-309-4000 • 800-883-9305 • Fax 678-309-4077 • www.bldrs.com

POLICY NUMBER: GLP 0003940 04

INSURED: JOHNSON CONSTRUCTION CO OF AIK

Association Insurance Company

A Stock Company
Post Office Box 723099
Atlanta, Georgia 31139-0099
1-800-883-9305

General Liability Policy

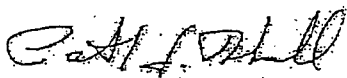
For:

JOHNSON CONSTRUCTION CO OF AIK
808 MARKET PLACE
AIKEN, SC 29803

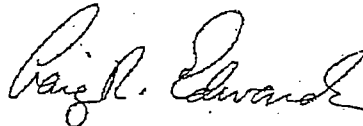
By:

Frank B. Norris & Co.
P.O. Box 5836
Columbia, SC 29250-0000

IN WITNESS WHEREOF, we have caused this policy to be executed and attested, and, if required by state law, this policy shall not be valid unless countersigned by our authorized representative.



President



Secretary

GL PJA001



**Builders
Insurance
Group**

**Association Insurance Company
A Stock Company**
P.O. Box 723099
Atlanta, GA 31139-0099

GENERAL LIABILITY DECLARATION

Policy Number	Policy Period
GLP 0003940 04	From: 07/11/2009 To: 07/11/2010 12:01 A.M. Standard Time at the described location

Transaction	
RENEWAL DECLARATION	
Named Insured and Address	Agent
JOHNSON CONSTRUCTION CO OF AIX 808 MARKET PLACE AIKEN, SC 29803	Frank B. Norris & Co. P.O. Box 5836 Columbia, SC 29250-0000 Telephone: 8032567555
Business Description Residential General Contractor	Type of Business Corporation
	Audit Period Annual

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE

Each Occurrence Limit	\$	500,000
Personal and Advertising Injury Limit	\$	500,000
Products - Completed Operations Aggregate Limit	\$	1,000,000
General Aggregate Limit (Other than Products-Completed Operations)	\$	1,000,000
Medical Expense Limit, any one person	\$	5,000
Fire Damage Limit, any one fire	\$	100,000

AMENDED LIMITS OF LIABILITY

Refer to attached schedule, if any.

LOCATIONS OF ALL PREMISES YOU OWN, RENT OR OCCUPY

Refer to attached schedule.

CLASSIFICATIONS

Refer to attached schedule

POLICY PREMIUM	\$	12,250.00
DEPOSIT PREMIUM	\$	
TAXES AND SURCHARGES	\$	0.00
TOTAL POLICY PREMIUM	\$	12,250.00

Forms and Endorsements Applicable to this Policy See Attached Forms Inventory Schedule

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These Declarations together with the common policy conditions, coverage declarations, coverage form(s) and form(s) and endorsements, if any, issued, complete the above numbered policy.

Issued Date: 05/19/09

GL DECA001

INSURED COPY

Association Insurance Company
A Stock Company
P.O. Box 723099
Atlanta, GA 31139 0099

GENERAL LIABILITY DECLARATION

Policy Number: GLP 0003940 04
Named Insured: JOHNSON CONSTRUCTION CO OF ALK
Agent: Frank B. Norris & Co. 0001357

COMMERCIAL GENERAL LIABILITY CLASSIFICATION SCHEDULE

Loc	St	Terr	Code	Rate	Effective	Expiration	Premium Basis	Per	Cov**	Premium
00001	SC	001	91583	1.053	07/11/2009	07/11/2010	1,497,000	Total Cost	O	\$1,576.00
INSURED SUB-CONTRACTORS - 1 & 2 FAMILY DWELLINGS										
00001	SC	001	91580	28.377	07/11/2009	07/11/2010	24,100	Payroll	O	\$684.00
CONTRACTORS-EXECUTIVE SUPERVISORS/EXECUTIVE SUPERINTENDENTS										
00001	SC	001	94444	3.321	07/11/2009	07/11/2010	6,000	Payroll	O	\$20.00
UNINSURED SUB-CONTRACTORS										
00001	SC	001	91340	17.847	07/11/2009	07/11/2010	110,300	Payroll	O	\$1,969.00
DIRECT EMPLOYEES										
00001	SC	999	91583	2.649	07/11/2009	07/11/2010	1,497,000	Total Cost	P	\$3,966.00
INSURED SUB-CONTRACTORS - 1 & 2 FAMILY DWELLINGS										
00001	SC	999	94444	20.228	07/11/2009	07/11/2010	6,000	Payroll	P	\$121.00
UNINSURED SUB-CONTRACTORS										
00001	SC	999	91340	35.485	07/11/2009	07/11/2010	110,300	Payroll	P	\$3,914.00
DIRECT EMPLOYEES										

** - P is for Products-Completed Operations, O is for All Other Hazards

TOTAL POLICY PREMIUM \$12,250.00

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Issued Date: 05/19/2009
GL CSA001

INSURED COPY

R 49

Association Insurance Company
A Stock Company
P.O. Box 723099
Atlanta, GA 31139 0099

GENERAL LIABILITY DECLARATION

Policy Number:	GLP 0003940 04
Named Insured:	JOHNSON CONSTRUCTION CO OF AIK
Agent:	Frank B. Norris & Co. 0001357

LOCATIONS OF ALL PREMISES YOU OWN, RENT OR OCCUPY

Loc# 1
115 Implement Road
Aiken, SC 29803

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Issued Date: 05/19/2009
GL LOCA001

INSURED COPY

R 50

Association Insurance Company
A Stock Company
P.O. Box 723099
Atlanta, GA 31139 0099

FORM INVENTORY SCHEDULE

Policy Number:	GLP 0003946 04
Named Insured:	JOHNSON CONSTRUCTION CO OF AIK
Agent:	Frank B. Norris & Co. 0001357

FORMS INVENTORY

Policy Level Forms

BIGPRVN01	(8/06)	Privacy Notice
GL AIC	(1/05)	Association Insurance Company
IL0003	(9/08)	Calculation Of Premium
IL0017	(11/98)	Common Policy Conditions
IL0021	(9/08)	Broad Form Nuclear Energy Excl
IL0249	(9/08)	SC Changes-Canc & Nonrnwl
IL0985	(1/08)	Terrorism Disclosure
GLPHNRFWE1	(1/08)	GL RFWE Notice to Policyholder
GLPHNCR01	(6/09)	GLCONDO Notice To Policyholder
CGP011	(5/09)	Advisory PHN for CG0068

General Liability Forms

GL DEC	(6/96)	General Liability Declarations
CG0001	(12/07)	Comm1 Gen Liab Coverage Form
CG0068	(5/09)	Excl-Recording & Distribution
CG2101	(11/85)	Exclusion-Athletic/Sports Part
CG2116	(7/98)	Excl-Designated Profes.Service
CG2117	(7/98)	Excl-Movement of Bldgs/Struct
CG2134	(1/87)	Excl-Designated Work
CG2146	(7/98)	Abuse or Molestation Exclusion
CG2147	(12/07)	Excl-Employ.-Related Practices
CG2152	(7/98)	Exclusion-Financial Services
CG2165	(12/04)	Total Pollution Exclusion
CG2166	(12/04)	Excl-Volunteer Workers
CG2167	(12/04)	Fungi or Bacteria Exclusion
CG2186	(12/04)	Excl-Exterior Insulation
CG2243	(7/98)	Excl-Engineers, Arch. Surv. Prof
CG2279	(7/98)	Excl-Contractors Prof Liab
CG2301	(12/04)	Excl-Real Est Agents & Brokers
CG2426	(7/04)	Amend Insd Contract Definition
GLALSE	(1/07)	Excl-Asbestos, Lead, Silica
GLCONDO	(1/07)	Excl-Condos
GLCONDOC	(1/07)	Excl-Residential Condos
GLCONDOR	(1/08)	Amendment of GL CONDO
GLEICD	(1/07)	Expansion of Insured Contract
GLFB	(4/04)	Fungi & Bacteria
GLRFWE	(2/08)	Residential Faulty Work Excl
CG2234	(7/98)	Excl-Constr.Mgmt E & O
CG0300	(1/96)	Deductible Liability Insurance
GLPCO	(1/07)	Excl-Prior Completed Operation
CG2173	(1/08)	Exclusion-Cert Acts of Terrori

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Issued Date: 05/19/2009
GL FIA001

INSURED COPY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CALCULATION OF PREMIUM

This endorsement modifies insurance provided under the following:

- CAPITAL ASSETS PROGRAM (OUTPUT POLICY) COVERAGE PART
- COMMERCIAL AUTOMOBILE COVERAGE PART
- COMMERCIAL GENERAL LIABILITY COVERAGE PART
- COMMERCIAL INLAND MARINE COVERAGE PART
- COMMERCIAL PROPERTY COVERAGE PART
- CRIME AND FIDELITY COVERAGE PART
- EMPLOYMENT-RELATED PRACTICES LIABILITY COVERAGE PART
- EQUIPMENT BREAKDOWN COVERAGE PART
- FARM COVERAGE PART
- LIQUOR LIABILITY COVERAGE PART
- MEDICAL PROFESSIONAL LIABILITY COVERAGE PART
- OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
- POLLUTION LIABILITY COVERAGE PART
- PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
- RAILROAD PROTECTIVE LIABILITY COVERAGE PART

The following is added:

The premium shown in the Declarations was computed based on rates in effect at the time the policy was issued. On each renewal, continuation, or anniversary of the effective date of this policy, we will compute the premium in accordance with our rates and rules then in effect.

COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

A. Cancellation

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. Examination Of Your Books And Records

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

D. Inspections And Surveys

1. We have the right to:
 - a. Make inspections and surveys at any time;

- b. Give you reports on the conditions we find; and

- c. Recommend changes.

2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
 - a. Are safe or healthful; or
 - b. Comply with laws, regulations, codes or standards.

3. Paragraphs 1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

4. Paragraph 2. of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

E. Premiums

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and
2. Will be the payee for any return premiums we pay.

F. Transfer Of Your Rights And Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT

(Broad Form)

This endorsement modifies insurance provided under the following:

COMMERCIAL AUTOMOBILE COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
MEDICAL PROFESSIONAL LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
PROFESSIONAL LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART

1. The insurance does not apply:

A. Under any Liability Coverage, to "bodily injury" or "property damage":

(1) With respect to which an "insured" under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

(2) Resulting from the "hazardous properties" of "nuclear material" and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the "insured" is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

B. Under any Medical Payments coverage, to expenses incurred with respect to "bodily injury" resulting from the "hazardous properties" of "nuclear material" and arising out of the operation of a "nuclear facility" by any person or organization.

C. Under any Liability Coverage, to "bodily injury" or "property damage" resulting from "hazardous properties" of "nuclear material", if:

(1) The "nuclear material" (a) is at any "nuclear facility" owned by, or operated by or

on behalf of, an "insured" or (b) has been discharged or dispersed therefrom;

(2) The "nuclear material" is contained in "spent fuel" or "waste" at any time possessed, handled, used, processed, stored, transported or disposed of, by or on behalf of an "insured"; or

(3) The "bodily injury" or "property damage" arises out of the furnishing by an "insured" of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any "nuclear facility", but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to "property damage" to such "nuclear facility" and any property thereat.

2. As used in this endorsement:

"Hazardous properties" includes radioactive, toxic or explosive properties;

"Nuclear material" means "source material", "Special nuclear material" or "by-product material";

"Source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"Spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a "nuclear reactor";

"Waste" means any waste material (a) containing "by-product material" other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore pro-

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cessed primarily for its "source material" content, and (b) resulting from the operation by any person or organization of any "nuclear facility" included under the first two paragraphs of the definition of "nuclear facility".

"Nuclear facility" means:

- (a) Any "nuclear reactor";
- (b) Any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing "spent fuel", or (3) handling, processing or packaging "waste";
- (c) Any equipment or device used for the processing, fabricating or alloying of "special nuclear material" if at any time the total amount of such material in the custody of the "insured" at the premises where such

equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;

- (d) Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of "waste";

and includes the site on which any of the foregoing is located; all operations conducted on such site and all premises used for such operations.

"Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

"Property damage" includes all forms of radioactive contamination of property.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SOUTH CAROLINA CHANGES - CANCELLATION AND NONRENEWAL

This endorsement modifies insurance provided under the following:

CAPITAL ASSETS PROGRAM (OUTPUT POLICY) COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL INLAND MARINE COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART
CRIME AND FIDELITY COVERAGE PART
EMPLOYMENT-RELATED PRACTICES LIABILITY COVERAGE PART
EQUIPMENT BREAKDOWN COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
MEDICAL PROFESSIONAL LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

- A. Paragraphs 2. and 3. of Cancellation Common Policy Condition are replaced by the following:
2. We may cancel this policy by mailing or delivering to the first Named Insured and the agent, if any, written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
 3. We will mail or deliver our notice to the first Named Insured's and agent's last known addresses.
- B. The following is added to the Cancellation Common Policy Condition:
7. Cancellation Of Policies In Effect For 120 Days Or More
If this policy has been in effect for 120 days or more, or is a renewal or continuation of a policy we issued, we may cancel this policy only for one or more of the following reasons:
 - a. Nonpayment of premium;
 - b. Material misrepresentation of fact which, if known to us, would have caused us not to issue the policy;
 - c. Substantial change in the risk assumed, except to the extent that we should reasonably have foreseen the change or contemplated the risk in writing the policy;
 - d. Substantial breaches of contractual duties, conditions or warranties; or
 - e. Loss of our reinsurance covering all or a significant portion of the particular policy insured, or where continuation of the policy would imperil our solvency or place us in violation of the insurance laws of South Carolina.
- Prior to cancellation for reasons permitted in this item e., we will notify the Commissioner, in writing, at least 60 days prior to such cancellation and the Commissioner will, within 30 days of such notification, approve or disapprove such action.
- Any notice of cancellation will state the precise reason for cancellation.

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C. The following is added and supersedes any provisions to the contrary:

Nonrenewal

1. We will not refuse to renew a policy issued for a term of more than one year, until expiration of its full term, if anniversary renewal has been guaranteed by additional premium consideration.
2. If we decide not to renew this policy, we will:
 - a. Mail or deliver written notice of nonrenewal to the first Named Insured and agent, if any, before:
 - (1) The expiration date of this policy, if the policy is written for a term of one year or less; or
 - (2) An anniversary date of this policy, if the policy is written for a term of more than one year or for an indefinite term; and

b. Provide at least

- (1) 60 days' notice of nonrenewal, when nonrenewal is to become effective between November 1 and May 31; or
 - (2) 90 days' notice of nonrenewal, when nonrenewal is to become effective between June 1 and October 31.
3. Any notice of nonrenewal will be mailed or delivered to the first Named Insured's and agent's last known addresses. If notice is mailed, proof of mailing will be sufficient proof of notice.
 4. Any notice of nonrenewal will state the precise reason for nonrenewal.

POLICY NUMBER: GLP 0003940 04

IL 09 85 01 08

THIS ENDORSEMENT IS ATTACHED TO AND MADE PART OF YOUR POLICY IN RESPONSE TO THE DISCLOSURE REQUIREMENTS OF THE TERRORISM RISK INSURANCE ACT. THIS ENDORSEMENT DOES NOT GRANT ANY COVERAGE OR CHANGE THE TERMS AND CONDITIONS OF ANY COVERAGE UNDER THE POLICY.

DISCLOSURE PURSUANT TO TERRORISM RISK INSURANCE ACT

SCHEDULE

Terrorism Premium (Certified Acts) \$ Coverage Not Included

This premium is the total Certified Acts premium attributable to the following Coverage Part(s), Coverage Form(s) and/or Policy(s):

Additional information, if any, concerning the terrorism premium:

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Disclosure Of Premium

In accordance with the federal Terrorism Risk Insurance Act, we are required to provide you with a notice disclosing the portion of your premium, if any, attributable to coverage for terrorist acts certified under the Terrorism Risk Insurance Act. The portion of your premium attributable to such coverage is shown in the Schedule of this endorsement or in the policy Declarations.

B. Disclosure Of Federal Participation In Payment Of Terrorism Losses

The United States Government, Department of the Treasury, will pay a share of terrorism losses insured under the federal program. The federal share equals 85% of that portion of the amount of such insured losses that exceeds the applicable insurer retention. However, if aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31), the Treasury shall not make any payment for any portion of the amount of such losses that exceeds \$100 billion.

C. Cap On Insurer Participation In Payment Of Terrorism Losses

If aggregate insured losses attributable to terrorist acts certified under the Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31) and we have met our insurer deductible under the Terrorism Risk Insurance Act, we shall not be liable for the payment of any portion of the amount of such losses that exceeds \$100 billion, and in such case insured losses up to that amount are subject to pro rata allocation in accordance with procedures established by the Secretary of the Treasury.

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COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II - Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V - Definitions.

SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

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. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

- 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";

- (2) The "bodily injury" or "property damage" occurs during the policy period; and

- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II - Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

- d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution

(1) "Bodily Injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
- (b) Claims or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
 - (a) Less than 26 feet long; and
 - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4) Liability assumed under any "insured contract" for the ownership, maintenance or use

of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of the operation of:

- (a) The operations of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or
- (b) the operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

- (1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or
- (2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

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

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III - Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a side-track agreement.

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

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Insured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy 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.

n. Recall Of Products, Work Or Impaired Property

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

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

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

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Distribution Of Material In Violation Of Statutes

"Bodily Injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or

(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III - Limits Of Insurance.

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlement under Coverage A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

- b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. Material Published With Knowledge Of Falsity

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

d. Criminal Acts

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. Quality Or Performance Of Goods - Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. Wrong Description Of Prices

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. Insureds In Media And Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

- (1) Advertising, broadcasting, publishing or telecasting;
- (2) Designing or determining content of websites for others; or

- (3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs 14.a., b. and c. of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-Related

Any loss, cost or expense arising out of any:

- (1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
- (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. Distribution Of Material In Violation Of Statutes

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

COVERAGE C MEDICAL PAYMENTS

1. Insuring Agreement

- a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations;

provided that:

- (a) The accident takes place in the "coverage territory" and during the policy period;
- (b) The expenses are incurred and reported to us within one year of the date of the accident; and
- (c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

- b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid administered at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

a. Any Insured

To any insured, except "volunteer workers".

b. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. Injury On Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

d. Workers Compensation And Similar Laws

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. Products-Completed Operations Hazard

Included within the "products-completed operations hazard".

g. Coverage A Exclusions

Excluded under Coverage A.

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

a. All expenses we incur.

b. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability coverage applies. We do not have to furnish these bonds.

c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$250 a day because of time off from work.

e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit";

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit"; and

- (b) Conduct and control the defense of the indemnitee in such "suit".

so long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph 2.b.(2) of Section I - Coverage A - Bodily Injury and Property Damage Liability, such payment will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
- e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

- a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

- (1) "Bodily injury" or "personal and advertising injury":

- (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

- (b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1)(a) above;

- (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or

- (d) Arising out of his or her providing or failing to provide professional health care services.

- (2) "Property damage" to property:

- (a) Owned, occupied or used by,

- (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

- b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.
 - c. Any person or organization having proper temporary custody of your property if you die, but only:
 - (1) With respect to liability arising out of the maintenance or use of that property; and
 - (2) Until your legal representative has been appointed.
 - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
- a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
 - b. Coverage A does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
 - c. Coverage B does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III - LIMITS OF INSURANCE

1. The limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Claims made or "suits" brought; or
 - c. Persons or organizations making claims or bringing "suits".
2. The General Aggregate Limit is the most we will pay for the sum of:
 - a. Medical expenses under Coverage C;
 - b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard", and
 - c. Damages under Coverage B.

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".
4. Subject to 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
5. Subject to 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
 - a. Damages under Coverage A; and
 - b. Medical expenses under Coverage C
 because of all "bodily injury" and "property damage" arising out of any one "occurrence".
6. Subject to 5. above, the Damage To Premises Rented to You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
7. Subject to Paragraph 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.
2. Duties In The Event Of Occurrence, Offense, Claim Or Suit
 - a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and

- (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

- b. If a claim is made or "suit" is brought against any insured, you must:

- (1) Immediately record the specifics of the claim or "suit" and the date received; and
(2) Notify us as soon as possible.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

- c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
(2) Authorize us to obtain records and other information;
(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.

b. Excess Insurance

- (1) This insurance is excess over:

- (a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

- (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

- (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

- (iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

- (iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I - Coverage A - Bodily Injury And Property Damage Liability.

- (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

- (2) When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V - DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web-sites, only that part of a website that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Autos" means:

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

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3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

- a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
- b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above; or
- c. All other parts of the world if the injury or damage arises out of:
 - (1) Goods or products made or sold by you in the territory described in Paragraph a. above;
 - (2) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or
 - (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

provided the insured's responsibility to pay damages is determined in a "Suit" on the merits, in the territory described in Paragraph a. above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

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.

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
- b. While it is in or on an aircraft, watercraft or "auto"; or
- c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
- b. Vehicles maintained for use solely on or next to premises you own or rent;
- c. Vehicles that travel on crawler treads;
- d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - (1) Power cranes, shovels, loaders, diggers or drills; or
 - (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
- e. Vehicles not described in Paragraph a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
 - (2) Cherry pickers and similar devices used to raise or lower workers;
- f. Vehicles not described in Paragraph a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

- (a) Snow removal;
- (b) Road maintenance, but not construction or resurfacing; or
- (c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

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 earliest 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.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such

loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

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b. Includes

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
 - (2) The providing of or failure to provide warnings or instructions.
- c. Does not include vending machines or other property rented to or located for the use of others but not sold.

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.

RECORDING AND DISTRIBUTION OF MATERIAL OR INFORMATION IN VIOLATION OF LAW EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. Exclusion of q. of Paragraph 2. Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability is replaced by the following:

2. Exclusions

This insurance does not apply to:

- q. Recording And Distribution Of Material Or Information In Violation Of Law

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or
- (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

- B. Exclusion p. of Paragraph 2. Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability is replaced by the following:

2. Exclusions

This insurance does not apply to:

- p. Recording And Distribution Of Material Or Information In Violation Of Law

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or
- (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

POLICY NUMBER: GLP 0003940 04

COMMERCIAL GENERAL LIABILITY
CG 03 00 01 96

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DEDUCTIBLE LIABILITY INSURANCE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

Coverage	SCHEDULE	
	Amount and Basis of Deductible PER CLAIM or PER OCCURRENCE	
Bodily Injury Liability OR	\$	\$
Property Damage Liability OR	\$	\$ 1,000.00
Bodily Injury Liability and/or Property Damage Liability Combined	\$	\$

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

APPLICATION OF ENDORSEMENT (Enter below any limitations on the application of this endorsement. If no limitation is entered, the deductibles apply to damages for all "bodily injury" and "property damage", however caused):

- A. Our obligation under the Bodily Injury Liability and Property Damage Liability Coverages to pay damages on your behalf applies only to the amount of damages in excess of any deductible amounts stated in the Schedule above as applicable to such coverages.
- B. You may select a deductible amount on either a per-claim or a per "occurrence" basis. Your selected deductible applies to the coverage option and to the basis of the deductible indicated by the placement of the deductible amount in the Schedule above. The deductible amount stated in the Schedule above applies as follows:
1. **PER CLAIM BASIS.** If the deductible amount indicated in the Schedule above is on a per claim basis, that deductible applies as follows:
 - a. Under Bodily Injury Liability Coverage, to all damages sustained by any one person because of "bodily injury";
 - b. Under Property Damage Liability Coverage, to all damages sustained by any one person because of "property damage"; or
 - c. Under Bodily Injury Liability and/or Property Damage Liability Coverage Combined, to all damages sustained by any one person because of:
 - (1) "Bodily injury";
 - (2) "Property damage"; or
 - (3) "Bodily injury" and "property damage" combinedas the result of any one "occurrence".If damages are claimed for care, loss of services or death resulting at any time from "bodily injury", a separate deductible amount will be applied to each person making a claim for such damages.
With respect to "property damage", person includes an organization.

2. **PER OCCURRENCE BASIS.** If the deductible amount indicated in the Schedule above is on a "per occurrence" basis, that deductible amount applies as follows:

- a. Under Bodily Injury Liability Coverage, to all damages because of "bodily injury";
- b. Under Property Damage Liability Coverage, to all damages because of "property damage"; or
- c. Under Bodily Injury Liability and/or Property Damage Liability Coverage Combined, to all damages because of:
 - (1) "Bodily injury";
 - (2) "Property damage"; or
 - (3) "Bodily injury" and "property damage" combined

as the result of any one "occurrence", regardless of the number of persons or organizations who sustain damages because of that "occurrence."

C. The terms of this insurance shall be the same as the terms of this insurance with respect to:

- 1. Our right and duty to defend you in any "suits" against any "suits" see and
- 2. Your duties in the "suit" or "claim", claim, or "suit" apply irrespective of the deductible amount.
- D. We may pay any part or amount to effect settlement of "suit" and, upon notification taken, you shall promptly pay the deductible amount of the deductible amount by us.

POLICY NUMBER: GLP 0003940 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
EXCLUSION - ATHLETIC OR SPORTS PARTICIPATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description of Operations:

Any operations of the named insured or any persons or organizations that are insured by this policy.

(If no entry appears above, information required to complete this endorsement will be shown in the Schedule applicable to this endorsement.)

With respect to any operations shown in the Schedule, this insurance does not apply to "bodily injury or property damage sustained by or to any person while practicing for or participating in any sports or athletic contest or exhibition that you sponsor, manage, own, control, or are financially interested in."

CG 21 01 11 85

NUMBER: GLP 0003940 04

COMMERCIAL GENERAL LIABILITY
CG 21 16 07 98

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – DESIGNATED PROFESSIONAL SERVICES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designation Of Professional Services:

Insurance Agents and/or Brokers

Architects, Engineers or Surveyors

Declarations as

"bodily injury" to any
person or property.

If any information appears above, information required to complete this endorsement will be shown in the Declaration applicable to this endorsement.)

In addition to any professional services shown in the schedule, the following exclusion is added to Part A – Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability and Part B – Exclusions of Section I – Coverage B – Personal Advertising Injury Liability:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" due to the rendering of or failure to render any professional service.

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POLICY NUMBER: GLP 0003940 04

CG 21 01 11 85

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - ATHLETIC OR SPORTS PARTICIPANTS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description of Operations:

Any operations of the named insured or any persons or organizations that are insured by this policy.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

With respect to any operations shown in the Schedule, this insurance does not apply to "bodily injury" to any person while practicing for or participating in any sports or athletic contest or exhibition that you sponsor.

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POLICY NUMBER: GLP 0003940 04

COMMERCIAL GENERAL LIABILITY
CG 21 16 07 98

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – DESIGNATED PROFESSIONAL SERVICES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description Of Professional Services:
1. Real Estate Agents and/or Brokers
2. Architects, Engineers or Surveyors
3.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

With respect to any professional services shown in the Schedule, the following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability and Paragraph 2., Exclusions Of Section I – Coverage B – Personal And Advertising Injury Liability:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" due to the rendering of or failure to render any professional service.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – MOVEMENT OF BUILDINGS OR STRUCTURES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability and Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising in-

jury" arising out of and occurring during the course of the movement of any building or structure by an "auto" or "mobile equipment". The period of movement:

1. Begins when the building or structure is removed from its old foundation; and
2. Ends when the unloading of the vehicle begins for the purpose of placing the building or structure on its new foundation.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – MOVEMENT OF BUILDINGS OR STRUCTURES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability and Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising in-

jury" arising out of and occurring during the course of the movement of any building or structure by an "auto" or "mobile equipment". The period of movement:

1. Begins when the building or structure is removed from its old foundation; and
2. Ends when the unloading of the vehicle begins for the purpose of placing the building or structure on its new foundation.

POLICY NUMBER: GLP 0003940 04

COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - DESIGNATED WORK

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Description of your work:

1. The design, manufacture, construction, fabrication, maintenance, repair, remodeling, service, correction, or replacement, of any structure which exceeds (3) stories. This does not apply to interior on going or completed operations.
2. Any work or operations with respect to any exterior component, fixture or feature of any structure if a spray on siding product is used on any part of that structure.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

This insurance does not apply to "bodily injury" or "property damage" included in the "products-completed operations hazard" and arising out of "your work" shown in the Schedule.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ABUSE OR MOLESTATION EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART . .

The following exclusion is added to Paragraph 2., Exclusions Of Section I - Coverage A - Bodily Injury and Property Damage Liability and Paragraph 2., Exclusions Of Section I - Coverage B - Personal And Advertising Injury Liability:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of:

1. The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured, or

2. The negligent:

- a. Employment;
- b. Investigation;
- c. Supervision;

- d. Reporting to the proper authorities, or failure to so report; or
- e. Retention;

of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1. above.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYMENT-RELATED PRACTICES EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:

This insurance does not apply to:

"Bodily injury" to:

- (1) A person arising out of any:
 - (a) Refusal to employ that person;
 - (b) Termination of that person's employment; or
 - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the injury-causing event described in Paragraphs (a), (b) or (c) above occurs before employment, during employment or after employment of that person;
- (2) Whether the insured may be liable as an employer or in any other capacity; and
- (3) To any obligation to share damages with or repay someone else who must pay damages

because of the injury.

B. The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

This insurance does not apply to:

"Personal and advertising injury" to:

- (1) A person arising out of any:
 - (a) Refusal to employ that person;
 - (b) Termination of that person's employment; or
 - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "personal and advertising injury" to that person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury
- (3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - FINANCIAL SERVICES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions Of Section I - Coverage A - Bodily Injury And Property Damage Liability and Section I - Coverage B - Personal And Advertising Injury Liability:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" resulting from the rendering of or the failure to render financial services by any insured to others. For the purpose of this exclusion, financial services include but are not limited to:

1. Planning, administering or advising on:
 - a. Any:
 - (1) Investment;
 - (2) Pension;
 - (3) Annuity;
 - (4) Savings;
 - (5) Checking; or
 - (6) Individual retirement plan, fund or account;
 - b. The issuance or withdrawal of any bond, debenture, stock or other securities;
 - c. The trading of securities, commodities or currencies; or
 - d. Any acquisitions or mergers;
2. Acting as a dividend disbursing agent, exchange agent, redemption or subscription agent, warrant or scrip agent, fiscal or paying agent, tax withholding agent, escrow agent, clearing agent, or electronic funds transfer agent;
3. Lending, or arranging for the lending of, money, including credit card, debit card, leasing or mortgage operations or activities or interbank transfers;
4. Repossessing of real or personal property from a borrower or acting as an assignee for the benefit of creditors;
5. Checking or reporting of credit;
6. Maintaining of financial accounts or records;
7. Tax planning, tax advising or the preparation of tax returns; or
8. Selling or issuing travelers checks, letter of credit, certified checks, bank checks or money orders.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**TOTAL POLLUTION EXCLUSION WITH A BUILDING
HEATING, COOLING AND DEHUMIDIFYING EQUIPMENT
EXCEPTION AND A HOSTILE FIRE EXCEPTION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion f. under Paragraph 2., Exclusions Of Section I - Coverage A - Bodily Injury And Property Damage Liability is replaced by the following:

This insurance does not apply to:

f. Pollution

- (1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

This exclusion does not apply to:

- (a) "Bodily injury" if sustained within a building which is or was at any time owned or occupied by, or rented or loaned to, any insured and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests: or
- (b) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire" unless that "hostile fire" occurred or originated:
- (i) At any premises, site or location which is or was at any time used by

or for any insured or others for the handling store, disposal, processing or treatment of waste; or

- (ii) At any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations to test for, monitor, clean up, remove, contain, treat, detoxify, neutralize or in any way respond to, or assess the effects of, "pollutants"; or

- (2) Any loss, cost or expense arising out of any:

- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or
- (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - VOLUNTEER WORKERS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Paragraph 2.a. Exclusions of Section I - Coverage C - Medical Payments is replaced by the following:

We will not pay expenses for "bodily injury":

a. To any insured.

B. Paragraph 2. Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability is amended as follows:

1. Paragraph g. is replaced by the following:

This insurance does not apply to:

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft:

- (1) Owned or operated by or rented or loaned to any insured; or
- (2) Operated by any "volunteer worker" in the course of his or her employment by the insured or while performing duties related to the conduct of the insured's business.

Use includes operation and "loading or unloading".

This exclusion applies even if the claims against the insured allege negligence or other wrongdoing in the supervision, hiring, employment, training, or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
 - (a) Less than 26 feet long; and
 - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you, the insured, any of your "volunteer workers" or any "volunteer workers" of the insured;
- (4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or
- (5) "Bodily injury" or "property damage" arising out of:
 - (a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or
 - (b) The operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of "mobile equipment".

C. Paragraphs 2.a. and 2.b. of Section II - Who Is An Insured is replaced by the following:

2. Each of the following is also an insured:

- a. Your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" is an insured for:

(1) "Bodily injury" or "personal and advertising injury":

- (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), or to a co-"employee" or while that co-"employee" is either in the course of his or her employment or performing duties related to the conduct of your business;

- (b) To the spouse, child, parent, brother or sister of that co-"employee" as a consequence of Paragraph (1)(a) above;

- (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or

- (d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

- (a) Owned, occupied or used by,

- (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by

- b. Any person (other than your "employee"), or any organization while acting as your real estate manager.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FUNGI OR BACTERIA EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. The following exclusion is added to Paragraph 2. Exclusions Of Section I - Coverage A - Bodily Injury And Property Damage Liability:
- B. The following exclusion is added to Paragraph 2. Exclusions Of Section I - Coverage B - Personal And Advertising Injury Liability:

2. Exclusions

This insurance does not apply to:

Fungi or Bacteria

- a. "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
- b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.

2. Exclusions

This insurance does not apply to:

Fungi or Bacteria

- a. "Personal and advertising injury" which would not have taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury.
- b. Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

- C. The following definition is added to the Definitions Section:

"Fungi" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF CERTIFIED ACTS OF TERRORISM

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

A. The following exclusion is added:

This insurance does not apply to:

TERRORISM

"Any injury or damage" arising, directly or indirectly, out of "a certified act of terrorism".

B. The following definitions are added:

1. For the purposes of this endorsement, "any injury or damage" means any injury or damage covered under any Coverage Part to which this endorsement is applicable, and includes but is not limited to "bodily injury", "property damage", "personal and advertising injury", "injury" or "environmental damage" as may be defined in any applicable Coverage Part.

2. "Certified act of terrorism" means an act that is certified by the Secretary of the Treasury, in concurrence with the Secre-

tary of State and the Attorney General of the United States, to be an act of terrorism pursuant to the federal Terrorism Risk Insurance Act. The criteria contained in the Terrorism Risk Insurance Act for a "certified act of terrorism" include the following:

- a. The act resulted in insured losses in excess of \$5 million in the aggregate, attributable to all types of insurance subject to the Terrorism Risk Insurance Act; and
- b. The act is a violent act or an act that is dangerous to human life, property or infrastructure and is committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion..

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - EXTERIOR INSULATION AND FINISH SYSTEMS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of, caused by, or attributable to, whether in whole or in part, the following:
1. The design, manufacture, construction, fabrication, preparation, distribution and sale, installation, application, maintenance or repair, including remodeling, service, correction or replacement, of any "exterior insulation and finish system" or any part thereof, or any substantially similar system or any part thereof, including the application or use of conditioners, primers, accessories, flashings, coatings, caulking or sealants in connection with such a system; or
 2. "Your product" or "your work" with respect to any exterior component, fixture or feature of any structure, if an "exterior insulation and finish system", or any substantially similar system, is used on the part of the structure containing that component, fixture or feature.
- B. The following definition is added to the Definitions Section:
- "Exterior insulation and finish system" means a non-load bearing exterior cladding or finish system, and all component parts therein, used on any part of any structure, and consisting of:
1. A rigid or semi-rigid insulation board made of expanded polystyrene and other materials;
 2. The adhesive and/or mechanical fasteners used to attach the insulation board to the substrate;
 3. A reinforced or unreinforced base coat;
 4. A finish coat providing surface texture to which color

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – CONSTRUCTION MANAGEMENT ERRORS AND OMISSIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability and Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of:

1. The preparing, approving, or failure to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings

and specifications by any architect, engineer or surveyor performing services on a project on which you serve as construction manager; or

2. Inspection, supervision, quality control, architectural or engineering activities done by or for you on a project on which you serve as construction manager.

This exclusion does not apply to "bodily injury" or "property damage" due to construction or demolition work done by you, your "employees" or your subcontractors.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – ENGINEERS, ARCHITECTS OR SURVEYORS PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability and Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or any engineer,

architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

Professional services include:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
2. Supervisory, inspection, architectural or engineering activities.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**EXCLUSION - REAL ESTATE AGENTS OR BROKERS
ERRORS OR OMISSIONS**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2.
Exclusions of Section I - Coverage A - Bodily Injury
And Property Damage Liability, and Paragraph 2.
Exclusions of Section I - Coverage B - Personal And
Advertising Injury Liability:

This insurance does not apply to "bodily injury",
"property damage" or "personal and advertising
injury" arising out of any misrepresentation, error or
omission by you or any real estate agent or broker
who is either employed by you or performing work on
your behalf in such capacity.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF INSURED CONTRACT DEFINITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Paragraph 9. of the Definitions Section is replaced by the following:

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ASBESTOS, LEAD OR SILICA EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury arising out of or related to any form of asbestos or lead or "silica" or substances from same. This exclusion applies whether or not the asbestos or lead or "silica" is contained in or mixed with or made a part of any other goods or materials or products or structures. This exclusion includes:

1. Actual or alleged or threatened exposure
2. Sale of transport of handling or storage or disposal or removal or existence
3. Supervision or warnings given or which should have been given
4. Loss or cost or expense arising out of abatement or mitigation or removal or testing or disposal
5. An obligation to share damages with or to repay another who must pay damages arising out of or related to asbestos or lead or "silica"

The following is added to the DEFINITIONS section of the policy:

1. "Silica" means any form of silicon dioxide or other silicon compound and a siliceous or silicic mineral (such as sand or quartz or slate or granite or flint) and any gas or vapor or scent or other byproduct of silica.

GL ALSE 01 07

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - CONDOMINIUM, CO-OPERATIVE PROJECT and COMMUNITY APARTMENT PROJECT

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Description of "your work":

The design, manufacture, construction, fabrication, maintenance, repair, remodeling, service, correction, or replacement of any part of a "condominium project" and/or "community apartment project/co-operative project".

a. For the purpose of this endorsement, "condominium project" means:

1. A development consisting of condominiums.
2. A condominium consists of an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit.

b. For the purpose of this endorsement "community apartment project/co-operative project" means:

A development in which an undivided interest in land is coupled with the right of exclusive occupancy of any apartment located thereon.

This insurance does not apply to "bodily injury", "property damage", "personal injury", or "advertising injury" included in the "products-completed operations hazard" and "your work" shown in the Schedule.

CONDO 01 07

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**EXCLUSION - RESIDENTIAL CONDOMINIUM,
CO-OPERATIVE PROJECT and COMMUNITY
APARTMENT PROJECT**

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

This insurance does not apply to "bodily injury", "property damage", "personal injury", or "advertising injury" arising out of "your work" in the design, manufacture, construction, fabrication, maintenance, repair, remodeling, service, correction, or replacement of any part of a "condominium project" and/or "community apartment project/co-operative project".

a. For the purpose of this endorsement, "condominium project" means:

A development consisting of condominiums. A condominium consists of an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit.

b. For the purpose of this endorsement "community apartment project/co-operative project" means:

A development in which an undivided interest in land is coupled with the right of exclusive occupancy of any apartment located thereon.

This exclusion does not apply unless the "condominium project" and/or "community apartment project/co-operative project" either in whole or in part, is permitted, designed, remodeled, constructed, fabricated or manufactured for residential use.

GL CONDO C 01 07

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POLICY NUMBER GLP 0003940 04

COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF GL CONDO FOR REMODELING

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

This amends GL CONDO 01 07. This exclusion does not apply to "your work" for "remodeling" operations performed to a unit within a residential "condominium project" and/or "community apartment project/co-operative project". All other terms and conditions remain same.

c. For the purpose of this endorsement "remodeling" means:

Work being performed on behalf of a unit owner or apartment occupant to change the appearance or functional utility of parts of the unit or apartment for which the unit owner or apartment occupant controls exclusively for their use by any deed restrictions, b-laws or Association covenants, codes or restrictions.

CONDO R 01 08

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXPANSION OF INSURED CONTRACT DEFINITION

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

Endorsement CG 24 26 07 04 AMENDMENT OF INSURED CONTRACT DEFINITION is hereby expanded by the addition of the following:

- g. A contract or agreement for a lease of office equipment including but not limited to items such as printers, copiers, telephone systems, and computer systems.

GL EICD 01 07

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITED FUNGI OR BACTERIA LIABILITY

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Fungi and Bacteria Each Occurrence Limit and Aggregate Limit	Fungi and Bacteria Per Occurrence Deductible For This Coverage Part
\$ 2,500.00	\$2,000

The insurance provided under Section I - Coverage A - Bodily Injury and Property Damage Liability as modified by the Fungi Or Bacteria Exclusion is hereby extended to provide insurance for (a) "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage; and (b) any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of "fungi" or bacteria, by any insured or by any other person or entity.

- A. For purposes of this Limited Fungi or Bacteria Liability insurance only, Paragraph 1.a., 1.b., 1.c., 1.d., and 1.e of Section I - Supplementary Payments - Coverages A and B, are deleted: DEFENSE EXPENSES AND OTHER COSTS PROVIDED UNDER THE DELETED PARAGRAPHS ARE INCLUDED WITHIN THE LIMIT OF LIABILITY SHOWN IN THE SCHEDULE ABOVE.
- B. For purposes of this Limited Fungi or Bacteria Liability insurance only, Section III - Limits of Insurance is deleted and replaced by the following:
1. The Limits of Insurance shown in the Limited Fungi or Bacteria Liability Schedule above and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Claims made or "suits" brought; or
 - c. Persons or organizations making claims or bringing "suits".
 2. The Aggregate Limit shown in the Limited Fungi or Bacteria Liability Schedule above is the most we will pay for the sum of:
 - a. Damages under Coverage A for "property damage" insured under this endorsement; and
 - b. Any amounts that, but for Paragraph A. above, would have been payable under Paragraph 1.a., 1.c., 1.d., and 1.e of Section I-Supplementary Payments-Coverages A and B.

3. The Products-Completed Operations Aggregate Limit for "property damage" insured under this extension of Coverage A for Limited Fungi or Bacteria Liability is the same as and included within the Aggregate Limit shown in the Schedule above and, subject to the terms of this endorsement, is the most we will pay for such "property damage".
4. Subject to 2. and 3. above, whichever applies, the Each Occurrence Limit shown in the Schedule above is the most we will pay for the sum of:
 - a. Damages under Coverage A;
 - b. Any amounts that, but for Paragraph A. above, would have been payable under Paragraph 1.a., 1.c., 1.d., and 1.e of Section I - Supplementary Payments - Coverages A and B. because of "property damage" insured under this extension of Coverage A for Limited Fungi or Bacteria Liability arising out of any one "occurrence".
5. Subject to 4. above, The Damage To Premises Rented To You Limit for "property damage" insured under this extension of Coverage A for Limited Fungi or Bacteria Liability is the same as the Aggregate Limit shown in the Schedule above and, subject to the terms of this endorsement, is the most we will pay for such "property damage".

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the limits of Insurance.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PRIOR COMPLETED OPERATIONS EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

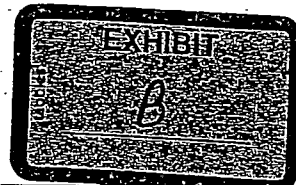
This insurance does not apply to "property damage" arising out of "your work" if "your work" was completed or abandoned prior to the first date of coverage, or renewal thereof without lapse, with Builders Insurance (A Mutual Captive Company), Association Insurance Company or Vinings Insurance Company. This exclusion does not apply to "property damage" to personal property that is not part of "your work".

For purposes of this endorsement only, this exclusion does not apply to "property damage" arising out of service, maintenance, correction, repair or replacement of any part of any structure performed during the policy period.

All other terms and conditions of this Policy remain unchanged.

GL PCO 01 07

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CONSTRUCTION INDUSTRY ARBITRATION RULES

Demand for Arbitration

MEDIATION: If you would like the AAA to contact the other parties and attempt to arrange a mediation, please check this box. ☐
There is no additional administrative fee for this service.

Name of Respondent Johnson Construction of Aiken, Inc.; Michael E. Johnson; Anne Johnson			Name of Representative (if known) M. Anderson Griffith, Esq.		
Address: 115 Implement Road			Name of Firm (if applicable) Busbee, Hunter & Griffith		
			Representative's Address: Post Office Drawer 2009		
City Aiken	State SC	Zip Code 29803	City Aiken	State SC	Zip Code 29802-2009
Phone No. 803-648-0568		Fax No. 803-648-3150	Phone No. 800-850-6932		Fax No. 803-648-3278
Email Address: johnson7991@bellsouth.net			Email Address:		

The named claimant, a party to an arbitration agreement dated April 22, 2008, which provides for arbitration under the Construction Industry Rules of the American Arbitration Association, hereby demands arbitration.

ARBITRATION CLAUSE CONTAINED IN THE FOLLOWING CONTRACT DOCUMENT: (Please check one)

☐ AIA-American Institute of Architects ☐ AGC-Associated General Contractors of America ☐ DBIA-Design Build Institute of America
☐ EJCDC-Engineers Joint Contract Documents Committee ☐ ASA-American Subcontractors Association ☐ CMAA-Construction Management Association of America ☒ Other (specify) Article 12.1 of Respondent's Contract Form

THE NATURE OF THE DISPUTE

Respondents represented Claimants before Aiken Board of Zoning Appeals to obtain variance to build paddock and stable for Claimants. Respondents then built the building. Respondents obtained variance but then built building in wrong location and wrongly told Claimants that an addition to original plans was permissible. BZA has now ordered building removed. Claimants claim breach of contract, negligent misrepresentation, and breach of fiduciary duty seeking actual damages for money already paid to Respondents, and cost to demolish or move the building to the correct location.

Dollar Amount of Claim \$ 150,000.00

Other Relief Sought: ☒ Attorneys Fees ☒ Interest
☒ Arbitration Costs ☒ Punitive/ Exemplary ☐ Other

AMOUNT OF FILING FEE ENCLOSED WITH THIS DEMAND (please refer to the fee schedule in the rules for the appropriate fee) \$

PLEASE DESCRIBE APPROPRIATE QUALIFICATIONS FOR ARBITRATOR(S) TO BE APPOINTED TO HEAR THIS DISPUTE:
Construction and zoning/land use planning experience preferable.

Hearing locale Aiken or Columbia, SC (check one) ☒ Requested by Claimant ☐ Locale provision included in the contract

Estimated time needed for hearings overall:
_____ hours or 1-2 days

Specify type of business: Claimant Home owner
Respondent General Contractor

You are hereby notified that copies of our arbitration agreement and this demand are being filed with the American Arbitration Association's Case Management Center, located in (check one) ☒ Atlanta, GA ☐ Dallas, TX ☐ East Providence, RI ☐ Fresno, CA ☐ International Centre, NY, with a request that it commence administration of the arbitration. Under the rules, you may file an answering statement within fifteen days after notice from the AAA.

Signature (may be signed by a representative) Date:			Name of Representative Benjamin Edward Nicholson, V		
Name of Claimant William and Mary Frances Walde			Name of Firm (if applicable) McNair Law Firm, P.A.		
Address (to be used in connection with this case) 6501 Goldleaf Drive			Representative's Address 1301 Gervais Street/P.O. Box 11390		
City Bethesda	State MD	Zip Code 20817	City Columbia	State SC	Zip Code 29211
Phone No. 302-227-6684		Fax No.	Phone No. 803-799-9800		Fax No. 803-933-1540
Email Address: maryfwalde@gmail.com			Email Address: nnicholson@mcnair.net		

To begin proceedings, please send two copies of this Demand and the Arbitration Agreement, along with the filing fee as provided for in the Rules, to the AAA. Send the original Demand to the Respondent.

Please visit our website at www.adr.org if you would like to file this case online. AAA Customer Service can be reached at 800-778-7879

Builders
Insurance
Group

September 25, 2008

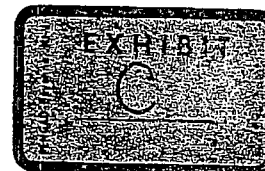
RECEIVED

SEP 29 2008

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Mr. Michael Johnson
Johnson Construction of Aiken
808 Market Place
Aiken, SC 29803

Re: Insured: Johnson Construction of Aiken
Claimant: Bill and Mary Frances Walde
Policy #: GLP 0003940-03
Effective Dates: 7/11/2008 to 7/11/2009
BIG Claim #: GLP 108 61193



Dear Mr. Johnson:

This letter is in response to your request that Association Insurance Company provide coverage for Johnson Construction of Aiken as it relates to the Demand for Arbitration filed by the attorney for Bill and Mary Frances Walde for alleged alterations to the original paddock and stable without having a valid permit.

We have reviewed the allegations set forth in the subject Complaint, in conjunction with the coverage afforded and it has been determined that no coverage exists.

As a result, Association Insurance Company will not assume or participate in the defense of Johnson Construction of Aiken, nor pay any damage award for which any insured may be held liable should an adverse judgment be rendered.

The issues of coverage pertaining to this matter will be discussed in detail below.

The case is the result of a Demand for Arbitration via the American Arbitration Association filed by the attorney for Bill and Mary Frances Walde, 903 Two Notch Rd., Aiken, SC 29801.

The Demand for Arbitration states as follows:

Mr. Michael Johnson
Case No: GLP 108 61193
September 15, 2008
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"Respondents represented Claimants before Aiken Board of Zoning Appeals to obtain variance to build paddock and stable for Claimants. Respondents then built the building. Respondents obtained Variance but then built building in wrong location and wrongly told Claimants that an addition to the original plans was permissible. BZA has now ordered building removed. Claimants claim breach of contract, negligent misrepresentation, and breach of fiduciary duty seeking actual damage for money already paid to Respondents and cost to demolish or move the building to the correct location."

Association Insurance Company issued a general liability policy of insurance to Johnson Construction of Aiken via policy number GLP 0003940-03. This coverage was afforded on an "Occurrence" basis for a period of 7/11/2008 through 7/11/2009.

Limits of liability are afforded in the amount of \$500,000 per occurrence, \$1,000,000 Products-Completed Operations aggregate limit with a \$1,000,000 General Aggregate with a \$1,000 per "Occurrence" deductible.

We would now like to direct your attention to policy number GLP 0003940-03. Contained within this policy is form number CG 00 01 (10-01), which states as follows:

**"SECTION I - COVERAGES
COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

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. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

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September 25, 2008
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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";
- (2) The "bodily injury" or "property damage" occurs during the policy period; and
- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II - Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur."

2. Exclusions

This insurance does not apply to:

j. Damage To Property

"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

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

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III - Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

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

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy 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.

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n. Recall Of Products, Work Or Impaired Property

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

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

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

SECTION V - DEFINITIONS

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

.....

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:
 - a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
 - b. Your fulfilling the terms of the contract or agreement.

.....

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

.....

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 earliest 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.

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September 25, 2008
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(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.

b. Does not include "bodily injury" or "property damage" arising out of:

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

21. "Your product":

a. Means:

- (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

Mr. Michael Johnson
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- (c) A person or organization whose business or assets you have acquired; and
- (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.
- b. Includes
 - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
 - (2) The providing of or failure to provide warnings or instructions.
- c. Does not include vending machines or other property rented to or located for the use of others but not sold.

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."

The Claimants allege in the Demand for Arbitration that Respondents represented Claimants before Alken Board of Zoning Appeals to obtain variance to build paddock and stable for Claimants. Respondents then built the building. Respondents obtained Variance but then built building in wrong location and wrongly told Claimants that an addition to the original plans was permissible. BZA has now ordered building removed.

As it appears that there was no "occurrence" resulting in "property damage", as defined in the policy terms and conditions above, no coverage can be afforded for the claim for the improper placement of the building or any deviation from the approved building plans and/or zoning.

In addition it is alleged that the insured wrongly told the Claimants that the addition to the original plans was permissible.

Also, the policy above precludes coverage for damage to or defects in "your work" or "your product".

Finally, it appears that to date, the building in question has not been completed. As such, there is no potential that coverage would attach under the "Products-Completed Operations Hazard".

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The General Liability Coverage form number CG 00 01 10 01 contained within policy number GLP0003940-03 is modified by form number GLFWE 01/07. The endorsement states as follows:

"FAULTY, DEFECTIVE OR POOR WORKMANSHIP EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Exclusion I. Damage to Your Work of Section I - Coverage A, Bodily Injury and Property Damage Liability, is deleted and replaced with:

I. Faulty, Defective or Poor Workmanship Exclusion

This insurance does not apply to any claim or "suit" for the cost of repair, replacement, adjustment, removal, loss of use, inspection, disposal, or otherwise making good any faulty, defective or poor workmanship in "your work" for which any insured or any insured's employees, contractors, or subcontractors may be liable.

This exclusion does not include "property damage" included in the "products-completed operations hazard." To property other than the poor workmanship in "your work" "

The above endorsement modifies the basic coverage form and precludes coverage for "your work" and/or your subcontractor's faulty or defective work on the subject property.

Further, your general liability policy of insurance is not a warranty policy, nor does it provide a guarantee of the fitness and/or the quality of "your work" or the work of your subcontractors. As such, we will be unable to provide coverage for the allegations related to the claimed defective or deficient construction by you or your subcontractors.

The General Liability Coverage form number CG 00 01 10 01 contained within policy number GLP0000774-06 is further modified by form number CG 24 26 07 04. This endorsement states as follows:

"AMENDMENT OF INSURED CONTRACT DEFINITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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Paragraph 9. of the Definitions Section is replaced by the following:

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities."

A review of the endorsement above reveals that there is no coverage for a contract that is not an "insured contract". The subject contract is a contract for the construction of a paddock and stable. A review of the terms above reveals that a contract of this type would not fit within the definition of an "insured contract". As such, there is no coverage for the allegations derived from an alleged breach of contract.

It has been determined that no coverage exists under the subject policy for the allegations set forth in the Demand for Arbitration.

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As a result, Association Insurance Company will not assume or participate in the defense of Johnson Construction of Alken, nor pay any damage award for which any insured may be held liable should an adverse judgment be rendered in the Demand for Arbitration.

It should be understood that Association Insurance Company, by quoting specific portions of policy number GLP 0003940-03 does not hereby waive any other defenses it may have under the subject policy or the law.

The specific reservations set forth in this letter are not meant to be exclusive but are the only ones of which Association Insurance Company is presently aware. Association Insurance Company intends to reserve its rights on all possible coverage bases, not simply those set forth in this letter.

Should further facts be presented or be uncovered, Association Insurance Company reserves the right to modify, amend or supplement the position set forth in this letter.

Nothing in this letter should be construed as an admission of liability for any portion of the claims or occurrences noticed, or as a waiver, modification or estoppel with respect to Association Insurance Company policy terms, conditions, limitations or exclusions. All of Association Insurance Company rights, remedies or defenses, both legal and equitable, remain expressly reserved.

If you have any additional information or facts which might cause us to reconsider our decision, or should the lawsuit be amended in any way, please forward that information to our attention as soon as possible.

If you have any additional questions, please do not hesitate to contact the undersigned.

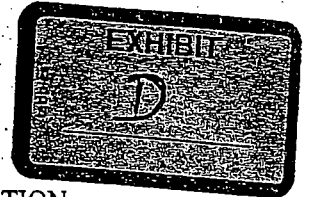
Sincerely,


Kevin H. Eroakey
Builders Insurance Group

Cc: Frank B. Norris Insurance
Post Office Box 5836
Columbia, SC 29205

Mr. Mike Murzowski
Builders Insurance Group
P.O. Box 723099
Atlanta, GA 31139-4054

**Walde v. Johnson Construction, et al
Claimants' Pre-Trial Brief**



STATE OF SOUTH CAROLINA) IN ARBITRATION BEFORE THE
COUNTY OF AIKEN) AMERICAN ARBITRATION ASSOCIATION
Case No. 31 110 00302 08

William and Mary Frances Walde,)

Claimants,)

v.)

Johnson Construction of Aiken, Inc.,)
Michael Johnson, and Anne Johnson,)

Respondents.)

**CLAIMANTS'
PRE-TRIAL BRIEF**

The Claimants, William Walde and Mary Frances Walde, hereby submit their
Pre-Trial Brief for the Arbitration of this matter as follows:

I. INTRODUCTION

This case is about a contractor who promised absentee owners that he could and would build a stable in compliance with the zoning ordinance in the City of Aiken, South Carolina, told the absentee owners that he had obtained the necessary variances from the City to build the stable with a second story, and then built the stable, only to discover when it was near completion 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 by the City.

As a result of the contractor's actions, the owners had to hire legal counsel to prevent the City from citing the owners criminally for the offending structure, reapply to the City to allow the structure to remain where it was located with certain modifications, and hire an architect, construction manager, and surveyor, to oversee the modifications to the stable to bring it into compliance with the City zoning ordinance.

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The absentee owners, Bill and Mary Frances Walde, paid Johnson Construction of Aiken, Inc. and its owner, Mike Johnson, \$110,500 of a \$160,000 contract for a two story stable with an accessory apartment under the belief that Johnson had obtained the proper permits to do so. What the Waldes ended up with is a stable as permitted by the City, but one that is not completed and is unusable. Notably, Johnson was originally going to charge the Waldes for a stable without the accessory apartment, \$85,000. (Johnson agreed to perform the modifications to the stable to bring it within the Special Exception authorized by the City. He did so, although he failed to complete the stable work once it was brought into conformity with the zoning ordinance.)

By this claim, the Waldes make claims directly against Johnson Construction, Mike Johnson and his wife Annette seeking a return of the money they overpaid Johnson, their costs and attorneys fees per their contract, and the expenses that they incurred for additional construction personnel to both appease the City and insure that the stable was modified correctly.

II. FACTUAL BACKGROUND TO THE WALDES' CLAIMS

Mary Frances Smoak Walde, an Aiken native, and her husband Bill, currently reside in Florida. Mrs. Walde has an interest in horses, as many do from Aiken, and in 2004 Mary Frances Walde purchased a house at 903 Two Notch Road in Aiken ("the Property") for the purpose of having a second home in Aiken where she could return and ride and care for horses. As the Property was large enough for a stable and paddock, Mary Frances and Bill hoped to build one in their back yard to stable one or two horses. This is not an uncommon feature for lots in that area of Aiken. However, the City of Aiken has a strict zoning ordinance that required both a Special Exception to the Zoning

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Ordinance and a Variance to the Zoning Ordinance to allow the stable and paddock to be built. (The Zoning Ordinance is hereinafter referred to as "the Ordinance.")

The Waldes while in the process of exploring their ability to put in stable and paddock on the Property were informed that a Special Exception was needed to Section 3.15 of the Ordinance to allow the stable, referred to as a "pleasure stable" because it was not for commercial use. A Variance was needed to allow the stable to be built in the backyard as it would be nearer to neighbors' houses than permitted by the Ordinance. The Waldes understood that while special permission was needed from the City of Aiken's Board of Zoning Appeals to go forward with this project, they believed that the BZA would allow them to build their project. They hoped that there would not be substantial neighbor opposition.

To that end, the Waldes in 2008 found Mike Johnson and his company, Johnson Construction of Aiken, Inc., to build their stable and paddock. However, proper zoning was always the initial hurdle the Waldes knew needed to be cleared. (See Exhibit 1: Email from Mary Frances Walde to Mike Johnson, 2/11/08: "I would very much like to move ahead with resolving the zoning issue and start planning for the barn--- what do I need to get to you for this and do we need to set up any sort of an agreement?")

A. The Pre-Contract Negotiations and Johnson's Representation.

On February 12, 2008, Mike Johnson (hereinafter, Mike Johnson and Johnson are collectively referred to as "Johnson.") notified Mary Frances Walde that he would "proceed with some sketches and filling [out] an application as well." (See Exhibit 2: Email from MJ to MFW, 2/12/08.) Because the Waldes did not live full time in Aiken, and because Johnson assured them that he was an experienced contractor in Aiken

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familiar with the City's Ordinance and the personnel enforcing the Ordinance, the Waldes agreed for Johnson to handle for them the process of obtaining a Special Exception and Variance to allow them to have Johnson build the stable and paddock. (See **Exhibit 3**, MJ's 2/13/08 fax to MFW with sketch plan and Ordinance excerpts.) Johnson in this time frame also sent proposed options for the location of the stable and paddock as well. (See **Exhibit 5**, MJ Email of 2/16/08 with attachments.)

On February 20, 2008, Johnson emailed Mary Frances Walde that "I'm going to apply for the variance meeting." See **Exhibit 8**. He thereafter sent to the Waldes drafts of his Variance and Special Exception requests. See **Exhibit 9**. The Waldes expressed their concern to Johnson as he was pushing them for money to begin building. As stated in an email of 2/26/08, Mary Frances Walde wrote Johnson:

am looking forward to working with you on the barn at 903 Two Notch and am happy to get you the deposit etc. *I'd like to focus on getting the approval first* as I'm a little concerned about the neighbors and their reaction. (I'm hopeful that we will be able to build the barn and that we won't get blocked.) I'll call the individuals on the list you forwarded to me and *I'm pleased to pay you for your time and effort to get the variance....*

Exhibit 11. (Emphasis added.) As noted, *infra*, the Waldes did indeed compensate Johnson for the task of obtaining the Variance and Special Exception.

On February 29, 2008, the Waldes received from Johnson a Construction Proposal for building the stable and paddock for \$85,000. See **Exhibits 13 & 14**. This Proposal was for a one-story stable and paddock.

On or around March 17, 2008, Johnson submitted two Applications on behalf of the Waldes (as their 'agent') to the City's BZA, an Application for a Variance for the project (see **Exhibit 17**) and an Application for a Special Exception (see **Exhibit 18**).

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Johnson's Applications attached a sketch plan of the stable and the location of the stable he proposed. Mary Frances Walde emailed Johnson her written authorization to appear for her at the BZA meeting to apply for the Variance and Special Exception. (See Exhibit 19.) Prior to the BZA meeting, Johnson advised the Waldes of issues regarding the Ordinances requirements, including what sort of variance was needed. (See Exhibit 20: 3/19/08 emails between MJ and MFW.)

Before the BZA meeting, and then again afterwards, the Waldes asked Johnson about the feasibility to using the space over the stable for making an accessory apartment. Johnson advised them that this would be no problem. Johnson in that time period began working on an accessory apartment plan and estimating it as well.

Johnson then appeared at the BZA meeting of March 25, 2008 representing Mary Frances Walde and submitted the request for the Variance and Special Exception. Despite resistance from some neighbors, the BZA approved the Variance and Special Exception. (See Exhibit 23: "Minutes of 3/25/08 BZA Meeting".) However, the approval was only after three amendments to the motion to approve the Variance and only after certain conditions were inserted in the approval, such as the requirement that the approval was "to allow the pleasure stable and one paddock as conceptually shown in Exhibit E." (See Exhibit 23: p. 7)

B. The Contract for Construction.

On April 1, 2008, Johnson emailed the Waldes asking if he should include an estimate for having "the upper level finished", meaning putting in an accessory apartment in the stable. (See Exhibit 25) On the same day he faxed to them a sketch plan for an upper story on the stable. . (See Exhibit 26) The next day he asked the City's Zoning

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Administrator for a copy of the approval documents for the project. . . (See Exhibit 28)

Johnson received the formal ruling of the BZA by letter of April 24, 2008. (See Exhibit 32).

Having received BZA approval, the Waldes forwarded a check for \$500 to Johnson and a signed contract and asked Johnson to send them a final set of plans and the location of the stable. (See Exhibit 29) On April 22, 2008, Johnson signed the contract (see Exhibit 30) and signed construction proposal with the scope of work back to the Waldes. (See Exhibit 31). (Collectively, these documents and plans are called "the Contract.") The Contract as finalized by the parties was a Cost Plus-Fixed Fee Contract on a form supplied by Johnson for a total price of \$160,000. The price rose considerably because of the accessory apartment.

At no time did Johnson advise the Waldes that the Ordinance did not allow for an accessory apartment on the stable or that the accessory apartment he designed would make the height of the stable higher than permitted by the Ordinance.

The Waldes were not concerned as they had hired Johnson specifically to handle any variance or special exception needs with the City. Indeed, the very beginning of the Contract states at Article 1:

**1.1 CONTRACT BASED ON FINAL APPROVAL BY VARIANCE
AND SPECIAL EXCEPTION COMMITTEES APPROVAL.**

The capitalized language emphasized the Waldes' reliance on Johnson for obtaining all necessary approvals by the local zoning authorities for what he was constructing. Further, Section 6.2 of the Contract provided "[a]ll work shall be completed in a workmanlike manner, and shall comply with all applicable national, state and local building codes and laws."

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Johnson soon received funds from the Waldes and applied for a building permit with the City of Aiken on May 2, 2008. (See Exhibit 34) The Application contained the sketch for the two story stable with accessory apartment. It also contained a survey with Johnson's notation of the location of what he planned to build. At page 3 of the Application, Sandra Korbelik, the City's Zoning Administrator, noted under the "Planning and Zoning" remarks that "Approved with Conditions per BZA Approval Special Exception 08-92004 and Variance 08-93035." Johnson was issued a building permit by the City under these conditions. (See Exhibit 37).

With that, Johnson began construction. Construction of the two-story stable was approximately 80% complete by late June. (See photographs at Exhibit 85).

C. The Notification by the City of Non-Compliance.

On or around June 27, 2008, Tommy Paradise, City's Building Inspector, determined that the stable did not comply with the Variance or the Special Exception. The City had inspected the construction progress before, but not objected. Nonetheless, Paradise determined that the stable had not been built in the location allowed by the Special Exception and it did not meet the height and size standards or the Ordinance. Johnson subsequently notified the Waldes. (See Exhibit 40).

Clearly the stable as built by Johnson had two major problems. First, the stable contained an accessory apartment, and with that apartment violated the height and size requirements of the City Ordinance for such structures. (See Exhibit 65). Thus, a Variance was required to put the structure into compliance with the Ordinance. Also, the stable required an additional Special Exception because it was not built in the location required by the prior Special Exception and because of the accessory apartment and its

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size and height requirements. (See Exhibit 66). Johnston initially claimed that the apartment was allowed and insinuated that the space issue was not a big deal. (See Exhibit 58, MJ 7/22/08 Email to MFW).

D. Johnson's Efforts to Obtain a Variance From the City.

After reviewing the City's position and various possible construction and legal alternatives, the parties determined that it was necessary for the Waldes to obtain another Special Exception and Variance to allow the stable to remain. (See Exhibits 41-64). Ultimately, Johnson, again on behalf of the Waldes, applied for the Variance and Special Exception to allow the stable to remain. (See Exhibits 65 & 66). A hearing on the applications was held by the BZA on July 29, 2008. The reaction from the BZA and the neighbors, who felt they had been hoodwinked by the Waldes, was not pleasant.

Johnson represented to the BZA that "[he] had no idea there was a height issue" with the stable he built. (See Exhibit 67, p. 367; Exhibit 68, p. 19-20: "[a]nd I had no inkling, no intent or anything that there was an issue with size, because I had thought and understood that it was the footprint and whatever was enclosed. As far as height, I had no idea that there was a height issue.... You know, I guess, you know, what you approved back wherever you approved it, yes we, I thought that we were within those guidelines based on me getting building permit.")

Johnson admitted that he had removed vegetation when he had told the BZA previously that it would be good to leave it in. Johnson stated "had he known all of these regulations, he would not have made any modifications on the building permit application." Also see Exhibit 68, p. 21. ("If I had known this when I applied for this permit, I mean, I wouldn't have done it.") He stated that "he relies on the city

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departments to determine if the plans meet all city requirements." Johnson admitted that he submitted a different site plan with the building permit than the one that was approved by the BZA. (See Exhibit 67, p. 369.) Johnson admitted to the BZA that he had been "enlightened."

After one BZA member said that "they have never seen anything as ridiculous in 20 years", the BZA unanimously denied the request for the Special Exception and Variance. (See Exhibit 67, p. 372 and Exhibit 71.)

Inexplicably, after screwing up the job to the extent that the BZA has ruled it a non-conforming use and exposing the Waldes to criminal prosecution, Johnson on August 1, 2008 sent a demand letter to the Waldes for payment of \$29,537.49 and threatening to file a mechanics lien on the Property. (See Exhibit 68A). The Waldes responded as any reasonable person would. On August 6, 2008, the Waldes terminated the Contract due to Johnson's default. (See Exhibit 69A.) By this point, the Waldes had paid Johnson \$110,500 for the construction of the useless stable and accessory apartment.

E. The Waldes Obtain a Reprieve from the City

The Waldes by August of 2008 had hired legal counsel, had terminated Johnson's Contract, and had began the process of trying to salvage the situation as best they could. To that end, they hired an Aiken construction manager specializing in stables, Warren Scherer, to assist them in the process of fixing the stable. The immediate problem, however, was that the stable was a non-conforming structure to the City's Ordinance, which made the Waldes subject to fines and prosecution by the City.

The Waldes were working fervently with Mr. Scherer to obtain a solution to the stable problem. However, (partially) in order to prevent the City from beginning

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enforcement proceedings, the Waldes filed an Appeal of the BZA's Order denying Johnson's Applications with the Circuit Court on September 25, 2008. (See Exhibits 82 & 83) The Waldes hired an architect, construction manager, surveyor, talked to neighbors, and planted a screen of trees at the back of the property.

With new plans in hand, the Waldes, this time without Johnson, submitted yet another Special Exception Application in December of 2008. (See Exhibit 76.) The Waldes proposed that the stable stay in its current location, that the accessory apartment be removed and the roof lowered, and that the structure be approved with the additional 90 feet in its footprint. At the BZA's January 8, 2009 meeting, the BZA approved the Waldes' Special Exception Application by a 4-3 vote and its other two other applications 7-0 and 5-2 respectively. (See Exhibit 79)

The BZA's approval saved all parties here considerable expense and trouble as if the BZA had not approved the request, the stable would have had to been torn down. Upon receipt of the BZA's decision, the Waldes dismissed the Appeal of the prior BZA Order. (See Exhibit 84.)

F. Johnson Agrees to Modify the Barn per the City's Directions.

The Waldes gave Johnson the opportunity to cure his default to a degree and thus mitigate the Waldes' damages. To that end, in late March and early April, 2009, through counsel, the Waldes and Johnson agreed for Johnson to perform certain of the remedial work on the stable at no charge to the Waldes.¹ (See Exhibit 81) The work is pursuant to the plans prepared by the Waldes' architect as represented to the BZA. (See Exhibit 89.) The work has been partially performed and for the most part approved by Mr.

¹ Apparently Johnson has given up his claim for \$29,537.49 per Exhibit 68A since there was no counterclaim made in this action and since Johnson did not charge for the remedial work, such that it was.

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Scherer. (See Exhibits 86 & 87 showing work progress.) However, as stated *infra*, there are still some issues regarding Johnson's failure to complete the project that remain for the Arbitrator to determine.

In fact, the stable is *not even now finished*. Johnson refused to complete the stable per the original intended agreement, so the Waldes have not received an \$85,000 stable yet. What they have is a one story barn with no paddock, no electricity, no driveway, no sink and plumbing fixtures in the tackroom, no hook up for the washer/dryer, no counters, no fencing, no irrigation, and no cleanup of construction debris. The Waldes will submit testimony that the cost to perform the rest of the work is \$17,799.90 as follows:

1. Painting has been completed at an expense of \$2,127.45 paid to Park Avenue paints. Estimates for additional work to complete stable are as below:

2. Unfinished Electrical- \$2,000 (The Waldes will use a different electrician and a new permit will have to be pulled - there is an allowance just for the fixtures of \$800 in Johnson's original \$85,000 proposal).

3. Unfinished Plumbing - \$600 (washer/dryer hookups, sink and fixtures -- there is a plumbing fixture allowance in Johnson's \$85,000 proposal for \$600).

4. Unfinished Landscaping and Irrigation for paddock - \$1,500 allowance for grading paddock area and to install irrigation system for paddock.

5. Counters in tack room - there is a \$3,800 allowance for cabinetry and countertops in \$85,000 proposal; cabinetry is in but no countertops - estimate is \$500 for counter top and installation.

6. Unfinished Tack Room floor- \$1,600 allowance in proposal- for tile floor.

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7. To be built: paddock-(In \$85,000 proposal- Section 1.19 "Install 400 feet of 3 board, painted fencing.") Fencing is \$4.50 per foot for cost of \$1,800 plus estimate of \$500 to paint it.

8. To be built- extension of drive way to back of barn- (Section 1.21 of proposal- "Add to existing gravel driveway and continue to barn area") - Estimate to grade drive, make clay base, add stone - \$3,000.

Total out of pocket estimate to finish structure: \$13,627.45 plus 15% management fee to pay Mr. Scherer to oversee work - (\$2,045) = \$15,672.45, + \$2,127.45 for paint per above = Grant total to make stable an \$85,000 stable: \$17,799.90.

This \$17,799.90 should be added to the \$25,500 owed to the Waldes as an overpayment on the work Johnson performed on the stable for a total overpayment of \$43,299.90.

III. DAMAGES CLAIMED BY THE WALDES

Although the BZA's decision that the Waldes did not have to tear down the stable saved them, and thus Johnson, a substantial amount of money, the Waldes are still out of pocket sums because of Johnson's actions. (See a partial compilation of damages at Exhibit 80.) These damages are as follows:

A. What the Waldes Overpaid and their Out of Pocket Loss.

1. The Principal Amount.

As stated, the Waldes paid Johnson \$110,500. He delivered a stable that ultimately is worth much less than that and is unfinished. Assuming the Waldes were entitled to an \$85,000 stable, they grossly overpaid what was delivered as stated above.

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Thus, the Waldes seek damages of \$43,299.90 for the overpayment/unjust enrichment of Johnson.

2. Prejudgment Interest on Amount Unjustly Retained.

The Waldes paid their last check of \$32,000 to Johnson dated June 28, 2008 before the construction was halted by the City. They also paid Johnson \$10,000 by check dated June 10, 2008. They will therefore also seek prejudgment interest pursuant to S.C. Code §34-31-20(A) on the \$32,000 from June 29, 2008 to August 20, 2009 and the \$10,000 from June 10, 2008 to August 20, 2008 in an amount to be submitted at trial. It is proper to assess prejudgment interest from the date of payment. *Cf. St. Paul Mercury Indemnity Co. v. Donaldson*, 83 S.E. 2d 159, 163 (S.C. 1954)(Surety entitled to interest from principal from date surety paid claim.)

B. Attorneys Fees and Costs

The Contract provides at Section 15.1:

[I]n the event of any arbitration or litigation relating to the project, project performance or this contract, the prevailing party shall be entitled to reasonable attorneys fees, costs and expenses.

The Waldes seek from Johnson their costs and attorneys fees in this action arising from Johnson's breach of the Contract, the Waldes' dealings with the City of Aiken and its BZA, and this litigation.

Alternatively, the Waldes seek their attorneys fees and costs related to their dealings with the City of Aiken because Johnson's acts and omissions made it necessary to hire legal counsel to work their way through the BZA appeal process and appeal the original ruling of the BZA to hold off enforcement of the BZA's original order that the

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stable be removed. Such attorney's fees and costs are the direct and proximate result of Johnson's failure to obtain proper approval of the project, and so are recoverable.²

The Waldes will submit an attorneys fee affidavit to the arbitrator should the arbitrator award them attorneys fees and costs in the Initial Award.

C. Costs of Architect, Construction Manager, and Surveyor

1. The Walde paid Warren Scherer the following amounts: Check No. 2003 9/23/08 \$5,000; Check No. 2627: 4/15/09 \$3,500; Check No. 2522: 3/16/09 \$3,500; Check No. 2395: 2/9/09 \$3,500 for a total of \$15,500.

2. The Waldes paid Ben Christenson, a local surveyor, \$1,125 for his survey of the location of the stable and property as part of their appeal to the BZA.

3/ The Waldes paid the architect, Martin Buckley, \$480.

4. They paid a landscape planner, J. Michael Miller \$513.55 for landscape plans submitted to the BZA.

Thus, the Waldes had to pay additional construction professionals \$17,618.55 for supervision, plans and surveying services as a result of Johnson's acts and omissions. They will also submit prejudgment interest on this amount at trial.

D. Miscellaneous Damages

For travel costs for the January 2009, BZA meeting, the Mary Frances Walde spent \$320.01 for a flight and \$84.82 for a rental car. The Waldes will also seek the costs of the arbitration, \$1,750 so far to AAA, as well as the full arbitrator's fee

² It is well settled that consequential damages arising from a breach of contract include those "which stem from losses incurred by the nonbreaching party in its dealings with third parties..." *437 Madison Avenue Associates v. A.T. Kearney, Inc.*, 127 Misc.2d 37, 488 N.Y.S.2d 950, 951 (S. Ct. 1985).

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E. Total Damages Claimed

Thus, the Waldes claim \$62,988.45 in total actual damages from the Respondents (\$43,299.90+\$17,618.55+\$3320+\$1750), not including prejudgment interest and reasonable attorneys fees and costs, which are to be submitted by a post-award petition. The Waldes also request an award of punitive damages in an amount the Arbitrator feels to be appropriate.

IV. LEGAL BASIS FOR THE WALDES' CLAIMS

A. Breach of Contract Against Johnson Construction

South Carolina damages jurisprudence's primary aim is to compensate injured parties. *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E. 2d 67, 70 (S.C. App. 1996) (stating that the general policy objective of awarding damages is to place the plaintiff in the position they would have been in had the contract been fulfilled). Additionally, a damages award should be a "natural consequence and proximate result of his [defendant's] conduct" or reasonably within the contemplation of the parties at the time the contract was formed. 11 S.C. Jur. Damages § 58 (2007); *Kline Iron & Steel Co. v. Superior Trucking Co.*, 261 S.C. 542, 547, 201 S.E. 2d 388, 390 (S.C. 1973).

Stated generally, the purpose of a damages award for a contract breach is to place the plaintiff in as good a position he would have been in had the contract in question been adequately performed. *Drews Co., Inc. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 209, 371 S.E. 2d 532, 533-34 (S.C. 1988), *Minter* at 528. The proper measure of damages, therefore, should reflect the "loss actually suffered by the contractee as a result of the breach." *South Carolina Finance Corp. of Anderson v. West Side Finance Co.*, 113 S.E. 2d 329, 335 (S.C. 1960).

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Breach of contract damages in a construction case should serve to put the non-breaching party in the same position it would have been had the contract not been properly performed. *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 1990 S.C. Lexis 155 (S.C. App. 1990), *aff'd*, 423 S.E.2d 114 (S.C. 1992). Normally, the breach of contract damages include two elements: (1) out of pocket costs actually incurred as a result of the breach and (2) the gain above cost that would have been realized had the contract been performed. *Id.* The owner may recover lost profits from the contractor due to the breach as well. *Id.*

If the breach of contract by the contractor renders the building completely useless for its intended purpose, the owner can recover back all amounts paid to the contractor. *Ivester v. Family Pools, Inc.*, 202 S.E.2d 362 (S.C. 1974).

The Waldes seek the costs of the construction professionals paid to make sure the stable as re-built complied with the Ordinance. Damages awards including the cost of reconstruction have been consistently upheld in a number of jurisdictions. *Marchesseault v. Jackson*, 611 A.2d 95, 98 (Me. 1992) (holding in part that the contractee was entitled to both the cost of reconstruction and the diminution in value of the defectively constructed home); *Northern Petrochem Co. v. Thorsen & Thorshov, Inc.*, 297 Minn. 118, 124, 211 N.W. 2d 159, 165 (Minn. 1973) (finding in relevant part that "the preferred measure of damages in a case such as this [breach of an industrial construction contract] is to take either the cost of reconstruction in accordance with the contract" or diminution in value if reconstruction costs constituted economic waste); *Johnson* at 85, *supra*; *Mathis v. Glover*, 714 S.W. 2d 222, 228 (Mo. Ct. App. 1986) (finding that contractee could recover the cost of construction if it did not involve "unreasonable economic

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waste"); *Ohio Valley v. Copley*, 121 Ohio App. 3d 197, 210, 699 N.E. 2d 540, 548 (Ohio Ct. App. 4 Dist., 1997) (concluding that the trial court did not error in calculating damages to include the cost of reconstruction); *Ferris-Prabhu v. Dave & Son, Inc.*, 142 Vt. 479, 481, 457 A.2d 631, 632 (Vt. 1983) (stating that "the measure of damages, in cases where the contractor breaches the contract by defective construction, is the reasonable cost of reconstruction and completion in accordance with the contract").

B. Negligent Misrepresentation Against All Respondents

Johnson's representations that he could build the stable with an accessory apartment were negligent misrepresentations. In order to state a claim for negligent misrepresentation, Claimants must show:

- 1) the defendant made a false representation to the plaintiff;
- 2) the defendant had a pecuniary interest in making the statement;
- 3) the defendant owed a duty of care to communicate truthful information to the plaintiff;
- 4) the defendant breached that duty by failing to exercise due care;
- 5) the plaintiff justifiably relied on the representation;
- 6) the plaintiff suffered a pecuniary loss as the proximate result of reliance on the representation.

Koontz v. Thomas, 511 S.E.2d 407, 413 (S.C. Ct. App. 1999).³ A claim for negligent misrepresentation is proper where the misrepresentation "induced the plaintiff to enter a contract or business transaction." *Redwend Limited Partnership v. Edwards*, 581 S.E.2d 496, 504 (S.C. Ct. App. 2003). This is precisely what Johnson did.

The damages in a negligent misrepresentation action are the actual pecuniary loss suffered. *Koontz*, 511 S.E.2d at 513.

³ Since the relationship Johnson and the Waldes is that of a fiduciary, this automatically meets the standard for element 3), duty, and element 5), justifiable reliance, above. *Brown v. Felkel*, 465 S.E.2d 93, 94 (S.C. Ct. App. 1995); *Kemmerlin v. Wingate*, 261 S.E.2d 50, 51 (S.C. 1979).

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C. Breach of Fiduciary Duty Against Mike Johnson.

A fiduciary relationship exists when a person places special trust or confidence in another, so that the latter in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence. *Moore v. Moore*, 599 S.E.2d 467, 472 (S.C. Ct. App. 2004). Clearly, Johnson owed a fiduciary duty to the Waldes when he undertook to represent them before the BZA and then advised them as to the sufficiency of the variances and special exceptions obtained for the stable to be built. The "damages in an action for breach of fiduciary duty are those proximately resulting from the wrongful conduct of the defendant." *Moore*, 599 S.E.2d at 473. Further, since, a fiduciary is not permitted to use the fiduciary relationship for his own personal gain. *Island Car Wash, Inc. v. Norris*, 358 S.E.2d 150, 152 (S.C. Ct. App. 1987), Johnson should disgorge the money he made from the Waldes.

D. Unjust Enrichment

Should Johnson retain the money overpaid to him by the Waldes, he would be unjustly enriched and as a matter of equity he and his company should be compelled to return the money overpaid to the Waldes as restitution. "Restitution is a remedy designed to prevent unjust enrichment." *Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 435 n. 1, 322 S.E.2d 474, 478 n. 1 (S.C. App. 1984). To recover on a theory of restitution, the plaintiff must show that: (1) he conferred a non-gratuitous benefit on the defendant, (2) the defendant realized some value from the benefit, and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 581 S.E.2d 161 (2003).

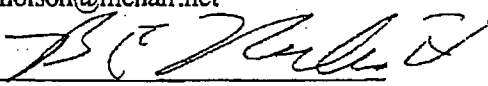
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VI. CONCLUSION

Mary Frances and Bill Walde trusted Mike Johnson to guide them through the process of obtaining appropriate zoning approvals and then building them a stable and paddock. Johnson knew that the Waldes were absentee owners and that he was their representative before the BZA and to the City of Aiken. However, as he admitted before the BZA, he was ignorant of basic requirements of the zoning Ordinance, and he failed to advise the Waldes that he had not obtained the proper approvals for the structure he was building. He then refused to refund to the Waldes the money they overpaid him for a stable that was a non-conforming use only because of his advice.

The Waldes request that the Arbitrator award to them the amount of money they overpaid Johnson, plus all their consequential and incidental expenses and costs, plus their reasonable costs and attorneys fees. Finally, an award of punitive damages is warranted in this case as a deterrent for the Respondents from misleading consumers about their knowledge of zoning laws in the future.

Benjamin Edward Nicholson V
McNAIR LAW FIRM, P. A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800
nnicholson@mcnair.net

By: 
Attorneys for the Claimants,
William and Mary Frances Walde

Columbia, South Carolina
August 17, 2009



August 27, 2009

CERTIFIED MAIL RETURN RECEIPT REQUESTED

M. Anderson Griffith, Esq.
Busbee, Hunter and Griffith
Post Office Drawer 2009
Aiken, SC 29802-2009

Re: Insured: Johnson Construction of Aiken
Claimant: Bill and Mary Frances Walde
Policy #: GLP 0003940-03
Effective Dates: 7/11/2008 to 7/11/2009
BIG Claim #: GLP 108 61193

Dear Mr. Johnson:

Thank you for your letter dated August 18, 2009 that you advise serves as a response to our letter of September 25, 2008. In your letter you state in part;

"It is our position that this response does not relieve Builders Insurance Group from providing coverage based on the allegations in this case.

.....

There are claims such as the negligent misrepresentation and portions of the damages that would appear to be covered by the carrier..... Certainly, Builders Insurance Group should provide a defense even if it is with a reservation of rights.

I would prefer that Builders Insurance Group re-evaluate its decision before our clients consider whether the denial was exercised in bad faith..."

As you have not provided Builders Insurance Group with your analysis as to what portion of the allegations creates a duty to defend under the terms and conditions set forth in the subject policy we will nonetheless provide you with a response that will serve to supplement but not replace our original letter enumerating our coverage analysis.

In reviewing Plaintiff's Pre-Trial Brief in conjunction with the coverage afforded within the policy, we respectfully disagree with your assertion that the contents of Plaintiff's Pre-Trial Brief triggers or creates a duty to defend under the subject policy.

The plaintiff's Pre-Trial Brief mirrors the allegations set forth in the original Demand for Arbitration. The original Demand for Arbitration states in part, as follows:

"Respondents represented Claimants before Aiken Board of Zoning Appeals to obtain variance to build paddock and stable for Claimants. Respondents then built the building. Respondents obtained Variance but then built building in wrong location and wrongly told Claimants that an addition to the original plans was permissible. BZA has now ordered building removed. Claimants claim breach of contract, negligent misrepresentation, and breach of fiduciary duty seeking actual damage for money already paid to Respondents and cost to demolish or move the building to the correct location."

We would now like to draw your attention to Claimants' Pre-Trial Brief which states in part as follows:

"INTRODUCTION

This case is about a contractor who promised absentee owners that he could and would build a stable in compliance with the zoning ordinance in the City of Aiken, South Carolina, told the absentee owners that he had obtained the necessary variances from the City to build the stable with a second story, and then built the stable, only to discover when it was near completion 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 by the City.

As a result of the contractor's actions, the owners had to hire legal counsel to prevent the City from citing the owners criminally for the offending structure, reapply to the City to allow the structure to remain where it was located with certain modifications, hire an architect, construction manager, and surveyor, to oversee the modifications to the stable to bring it into compliance with the City zoning ordinance.

The absentee owners, Bill and Mary Frances Walde, paid Johnson Construction of Aiken, Inc. and its owner Mike Johnson, \$110,500 of a \$160,000 contract for a two story stable with an accessory apartment under the belief that Johnson had obtained the proper permits to do so. What the Waldes ended up with is a stable as permitted by the City, but one that is not completed and is unusable...

By this claim, the Waldes make claims directly against Johnson Construction, Mike Johnson and his wife Annette seeking a return of the money they overpaid Johnson, their costs and attorneys fees per their contract, and the expenses that they incurred for additional construction personnel to both appease the City and insure that the stable was modified correctly.

The Waldes gave Johnson the opportunity to cure his default to a degree and thus mitigate the Waldes' damages. To that end, in late March and early April 2009, through counsel, the Waldes and Johnson agreed for Johnson to perform certain of the remedial work on the stable at no charge to Waldes... The work has been partially performed and for the most part approved by Mr. Scherer. However, as stated *infra*, there are still some issues regarding Johnson's failure to complete the project that remain for the Arbitrator to determine.

In fact, the stable is *not even now finished*. Johnson refused to complete the stable per the original intended agreement, so the Waldes have not received an \$85,000 stable yet. What they have is a one story barn with no paddock, no electricity, no driveway, no sink and plumbing fixtures in the tackroom, no hook up for the washer/dryer, no counters, no fencing, no irrigation, and no cleanup of construction debris. The Waldes will submit testimony that the cost to perform the rest of the work is \$17,799.90

.....

III. DAMAGES CLAIMED BY THE WALDES

A. What the Waldes Overpaid and their Out of Pocket Loss.

1. The Principal Amount
2. Prejudgment Interest on Amount Unjustly Retained

B. Attorneys Fees and Costs.

C. Costs of Architect, Construction Manager, and Surveyor.

D. Miscellaneous Damages.

IV. LEGAL BASIS FOR THE WALDES'S CLAIMS

A. Breach of Contract Against Johnson Construction.

B. Negligent Misrepresentation Against All Respondents.

Johnson's representations that he could build the stable with an accessory apartment were negligent misrepresentations.

C. Breach of Fiduciary Duty Against Mike Johnson.

D. Unjust Enrichment."

Association Insurance Company issued a general liability policy of insurance to Johnson Construction of Aiken via policy number GLP 0003940-03. This coverage was afforded on an "Occurrence" basis for a period of 7/11/2008 through 7/11/2009.

Limits of liability are afforded in the amount of \$500,000 per occurrence, \$1,000,000 Products-Completed Operations aggregate limit with a \$1,000,000 General Aggregate with a \$1,000 per "Occurrence" deductible.

We would now like to direct your attention to policy number GLP 0003940-03. Contained within this policy is form number CG 00 01 (12 04), which states as follows:

SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

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. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

- 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";
- (2) The "bodily injury" or "property damage" occurs during the policy period; and
- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II - Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

- d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.
- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

j. Damage To Property

"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III - Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

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

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy 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.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

SECTION V – DEFINITIONS

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Coverage territory" means:
 - a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
 - b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in a. above; or
 - c. All other parts of the world if the injury or damage arises out of:
 - (1) Goods or products made or sold by you in the territory described in a. above;
 - (2) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; or

- (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.
5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
-
8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
- It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
 - 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.
9. "Insured contract" means:
- A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
 - A sidetrack agreement;
 - Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
 - An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - An elevator maintenance agreement;
 - That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
- Paragraph f. does not include that part of any contract or agreement:
- That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
 - That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.
-

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

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 earliest 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.

b. Does not include "bodily injury" or "property damage" arising out of:

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

- (a) You;
- (b) Others trading under your name; or
- (c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

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

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

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."

The Claimants allege in the Demand for Arbitration and the Claimants' Pre-Trial Brief that Respondents represented Claimants before Aiken Board of Zoning Appeals to obtain variance to build paddock and stable for Claimants. Respondents then began the construction of the building. Respondents obtained Variance but then built building in wrong location and wrongly told Claimants that an addition to the original plans was permissible.

The claimants allege that that the building that is the subject of the Arbitration was never completed, overpaid for the work that was completed, incurred expenses in getting the building approved by the county, incurred legal expenses and are faced with additional costs to complete the project which were left short of completion by Johnson Construction of Aiken, Inc., allegedly in breach of the construction contract.

As it appears that there was no "occurrence" resulting in "property damage", as defined in the policy terms and conditions above, no coverage can be afforded for the claims for the improper placement of the building or any deviation from the approved building plans and/or zoning.

In addition it is alleged that the insured wrongly told the Claimants that the addition to the original plans was permissible. You will note that intentional acts are excluded as stated in the policy language above. As such, there would be no coverage for any acts that would be deemed intentional in nature. Also, the Claimants allege that Johnson represented that he could build the stable with an accessory apartment. These statements would not appear to fall within the definition of "occurrence" set forth above. As a result, there would be no coverage for the alleged misrepresentations.

Also, the policy above precludes coverage for damage to or defects in "your work" or "your product".

Finally, it appears that to date, the building in question has not been completed. As such, there is no potential that coverage would attach under the "Products-Completed Operations Hazard".

The General Liability Coverage form number CG 00 01 12 04 contained within policy number GLP0003940-03 is modified by form number GLFWE 01/07. The endorsement states as follows:

"FAULTY, DEFECTIVE OR POOR WORKMANSHIP EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Exclusion I. Damage to Your Work of Section I -- Coverage A. Bodily Injury and Property Damage Liability, is deleted and replaced with:

I. Faulty, Defective or Poor Workmanship Exclusion

This insurance does not apply to any claim or "suit" for the cost of repair, replacement, adjustment, removal, loss of use, inspection, disposal, or otherwise making good any faulty, defective or poor workmanship in "your work" for which any insured or any insured's employees, contractors, or subcontractors may be liable.

This exclusion does not include "property damage" included in the "products-completed operations hazard." To property other than the poor workmanship in "your work" "

The above endorsement modifies the basic coverage form and precludes coverage for "your work" and/or your subcontractor's faulty, defective or poor work on the subject property.

Further, your general liability policy of insurance is not a warranty policy, nor does it provide a guarantee of the fitness and/or the quality of "your work" or the work of your subcontractors. As such, we will be unable to provide coverage for the allegations related to the claimed defective or deficient construction by the insured or their subcontractors.

The General Liability Coverage form number CG 00 01 12 04 contained within policy number GLP0003940-03 is further modified by form number CG 24 26 07 04. This endorsement states as follows:

"AMENDMENT OF INSURED CONTRACT DEFINITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Paragraph 9. of the Definitions Section is replaced by the following:

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities."

A review of the endorsement above reveals that there is no coverage for a contract that is not an "insured contract". The subject contract is a contract for the construction of a paddock and stable. A review of the terms above reveals that a contract of this type would not fit within the definition of an "insured contract". As such, there is no coverage for the allegations derived from an alleged breach of the subject construction contract.

The General Liability Coverage form number CG 00 01 12 04 contained within policy number GLP0003940-03 is further modified by form number CG 22 79 07 98. This endorsement states as follows:

"EXCLUSION - CONTRACTORS - PROFESSIONAL LIABILITY"

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of Section I - Coverage A - Bodily Injury An Property Damage Liability and Paragraph 2., Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability:

1. This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or on your behalf, but only with respect to either or both of the following operations:
 - a. Providing engineering, architectural or surveying services to others in your capacity as an engineer, architect or surveyor; and
 - b. Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with construction work you perform.
2. Subject to Paragraph 3. below, professional services include:
 - a. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and
 - b. Supervisory or inspection activities performed as apart of any related architectural or engineering activities.

Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor."

A review of the endorsement above reveals that coverage is excluded for any "property damage" arising out of the rendering or failure to render any professional services related to the providing or hiring independent professions to provide engineering, architectural or surveying services in connection with construction work.

The General Liability Coverage form number CG 00 01 12 04 contained within policy number GLP0003940-03 is modified by form number CG 22 34 07 98. The endorsement states as follows:

"EXCLUSION - CONSTRUCTION MANAGEMENT ERRORS AND OMISSIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability and Paragraph 2., Exclusions of Section I - Coverage B - Personal and Advertising Injury Liability:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of:

1. the preparing, approving, or failure to prepare or approve, maps, shop drawings, opinions reports, surveys, field orders, change orders or drawings and specifications by any architect, engineer or surveyor performing services on a project on which you serve as construction manager; or
2. Inspection, supervision, quality control, architectural or engineering activities done by or for you on a project on which you serve as a construction manager.

This exclusion does not apply to "bodily injury" or "property damage" due to construction or demolition work done by you, your "employees or your subcontractors."

The endorsement above precludes coverage for any errors and omissions as it relates to your role as a construction manager on the subject project.

The General Liability Coverage form number CG 00 01 12 04 contained within policy number GLP0003940-03 is modified by form number CG 22 43 07 98. The endorsement states as follows:

EXCLUSION- ENGINEERS, ARCHITECTS OR SURVEYORS PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability and Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of the rendering of or failure to render any professional services by your or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

Professional services include:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
2. Supervisory, inspection, architectural or engineering activities.”

The endorsement above precludes coverage for any “property damage” arising out of the rendering of or failure to render any professional services by your or any engineer, architect or surveyor who is either employed by you or performing work on your behalf.

Finally, the General Liability Coverage form number CG 00 01 12 04 contained within policy number GLP0003940-03 is modified by form number CG 22 43 07 98. The endorsement states as follows:

“EXCLUSION – DESIGNATED PROFESSIONAL SERVICES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description Of Professional Services:

1. Real Estate Agents and/or Brokers
2. Architects, Engineers or Surveyors
- 3.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

With respect to any professional services shown in the Schedule, the following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability and Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” due to the rendering of or failure to render any professional service.”

The endorsement above precludes coverage for any "bodily injury" or "property damage" related to the rendering or failure to render services as an Architect, Engineer or Surveyor.

It has been determined that no coverage exists under the subject policy for the allegations set forth in the Demand for Arbitration and the Claimant's Pre-Trial Brief. A thorough review of both of the documents reveals that the offenses alleged in both of the documents do not fall within the definition of "occurrence" that results in "property damage" as defined above.

In addition, both documents allege a breach of the construction contract. There is no coverage for the offenses enumerated related to a breach of contract as the subject contract does not fit within the definition of an "insured contract".

Finally, defects in "your work" or "your product" built either by the insured or their subcontractors are excluded as stated above.

As a result, Association Insurance Company will not assume or participate in the defense of Johnson Construction of Aiken, Inc., Michael Johnson or Anne Johnson, nor pay any damage award for which any insured may be held liable should an adverse judgment be rendered in the Demand for Arbitration.

It should be understood that Association Insurance Company, by quoting specific portions of policy number GLP 0003940-03 does not hereby waive any other defenses it may have under the subject policy or the law.

The specific reservations set forth in this letter are not meant to be exclusive but are the only ones of which Association Insurance Company is presently aware. Association Insurance Company intends to reserve its rights on all possible coverage bases, not simply those set forth in this letter.

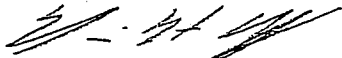
Should further facts be presented or be uncovered, Association Insurance Company reserves the right to modify, amend or supplement the position set forth in this letter.

Nothing in this letter should be construed as an admission of liability for any portion of the claims or occurrences noticed, or as a waiver, modification or estoppel with respect to Association Insurance Company policy terms, conditions, limitations or exclusions. All of Association Insurance Company rights, remedies or defenses, both legal and equitable, remain expressly reserved.

If you have any additional information or facts which might cause us to reconsider our decision, or should the lawsuit be amended in any way, please forward that information to our attention as soon as possible.

If you have any additional questions, please do not hesitate to contact the undersigned.

Sincerely,



Kevin H. Eroskey
Builders Insurance Group

Cc: Frank B. Norris Insurance
Post Office Box 5836
Columbia, SC 29205

Mr. Michael Johnson
Johnson Construction of Aiken
808 Market Place
Aiken, SC 29803

Mr. Mike Murawski
Builders Insurance Group
P.O. Box 723099
Atlanta, GA 31139-4054

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

) IN THE COURT OF COMMON PLEAS
) THE SECOND JUDICIAL CIRCUIT
) CASE NO.: 2009-CP-02-02420

WILLIAM & MARY FRANCES WALDE, AS)
ASSIGNEES OF JOHNSON CONSTRUCTION)
COMPANY OF AIKEN, INC.,)

) DEFENDANT ASSOCIATION INSURANCE
) COMPANY'S ANSWER TO PLAINTIFFS'
) COMPLAINT

Plaintiffs,

vs.

ASSOCIATION INSURANCE COMPANY,

Defendant.

COMES NOW Defendant Association Insurance Company (hereinafter referred to as "Association"), by and through its undersigned counsel, and replies to and answers Plaintiffs' Complaint (hereinafter "Complaint") as follows. Except as specifically admitted herein or otherwise addressed below, each and every allegation in Plaintiffs' Complaint is expressly denied.

1. Defendant Association is without information sufficient to form a belief as to the allegations contained in Paragraph 1 of the Complaint and, therefore, denies the same and demands strict proof thereof.
2. Defendant Association admits so much of Paragraph 2 of the Complaint as provides that Association is a corporation organized under the laws of the State of Georgia and with its principal place of business in a state other than South Carolina. Association further admits that it is authorized to do business in South Carolina. Furthermore, Association admits that it issued a Comprehensive General Liability insurance policy, policy number GLP 003940-03, to Johnson Construction of Aiken with a policy period of 7/11/08 - 7/11/09. At this time, Association neither admits nor denies the remaining allegations contained within Paragraph 2 of Plaintiffs' Complaint.

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AIKEN COUNTY
CLERK OF COURT

3. Upon information and belief, Association admits the allegations contained within Paragraph 3 of Plaintiffs' Complaint. Association reserves the right to amend this response upon further investigation of the facts.
4. At this time, Association neither admits nor denies the allegations contained in Paragraph 4 of Plaintiffs' Complaint.
5. At this time, Association neither admits nor denies the allegations contained in Paragraph 5 of Plaintiffs' Complaint.
6. At this time, Association neither admits nor denies the allegations contained in Paragraph 6 of Plaintiffs' Complaint.
7. At this time, Association neither admits nor denies the allegations contained in Paragraph 7 of Plaintiffs' Complaint.
8. At this time, Association neither admits nor denies the allegations contained in Paragraph 8 of Plaintiffs' Complaint.
9. At this time, Association neither admits nor denies the allegations contained in Paragraph 9 of Plaintiffs' Complaint.
10. At this time, Association neither admits nor denies the allegations contained in Paragraph 10 of Plaintiffs' Complaint.
11. At this time, Association neither admits nor denies the allegations contained in Paragraph 11 of Plaintiffs' Complaint.
12. At this time, Association neither admits nor denies the allegations contained in Paragraph 12 of Plaintiffs' Complaint.

13. At this time, Association neither admits nor denies the allegations contained in Paragraph 13 of Plaintiffs' Complaint.
14. At this time, Association neither admits nor denies the allegations contained in Paragraph 14 of Plaintiffs' Complaint.
15. At this time, Association neither admits nor denies the allegations contained in Paragraph 15 of Plaintiffs' Complaint.
16. At this time, Association neither admits nor denies the allegations contained in Paragraph 16 of Plaintiffs' Complaint.
17. At this time, Association neither admits nor denies the allegations contained in Paragraph 17 of Plaintiffs' Complaint.
18. At this time, Association neither admits nor denies the allegations contained in Paragraph 18 of Plaintiffs' Complaint.
19. At this time, Association neither admits nor denies the allegations contained in Paragraph 19 of Plaintiffs' Complaint.
20. Defendant Association admits the allegations contained in Paragraph 20 of Plaintiffs' Complaint inasmuch as coverage for the underlying dispute was denied. Responding further, to the extent the allegations may be construed as against Defendant Association, such allegations are expressly denied.
21. At this time, Association neither admits nor denies the allegations contained in Paragraph 21 of Plaintiffs' Complaint.
22. At this time, Association neither admits nor denies the allegations contained in Paragraph 22 of Plaintiffs' Complaint.

23. Upon information and belief, Association admits the allegations contained in Paragraph 23 of Plaintiffs' Complaint.
24. Defendant Association admits the allegations contained in Paragraph 24 of Plaintiffs' Complaint inasmuch as coverage for the underlying dispute was denied. Responding further, to the extent the allegations may be construed as against Defendant Association, such allegations are expressly denied.
25. At this time, Association neither admits nor denies the allegations contained in Paragraph 25 of Plaintiffs' Complaint.
26. At this time, Association neither admits nor denies the allegations contained in Paragraph 26 of Plaintiffs' Complaint.
27. At this time, Defendant Association neither admits nor denies the allegations contained within Paragraph 27 of Plaintiffs' Complaint.
28. Paragraph 28 of Plaintiffs' Complaint refers to the policy, which speaks for itself. To the extent the allegations contained in Paragraph 28 may be construed to imply coverage, those allegations are expressly denied.
29. Association denies the allegations contained in Paragraph 29, as stated.
30. Association denies the allegations contained in Paragraph 30, as stated.
31. Paragraph 31 of Plaintiffs' Complaint refers to the Pre-Trial brief, which speaks for itself. Responding further, Defendant Association denies the allegations contained in Paragraph 31 of the Plaintiffs' Complaint to the extent it supports or implies that coverage was applicable.

32. Paragraph 32 of Plaintiffs' Complaint refers to the Pre-Trial brief, which speaks for itself. Responding further, Defendant Association denies the allegations contained in Paragraph 32 of the Plaintiffs' Complaint to the extent it supports or implies that coverage was applicable.
33. Defendant Association denies the allegations contained in Paragraph 33 of the Plaintiffs' Complaint.
34. Defendant Association denies the allegations contained in Paragraph 34 of the Plaintiffs' Complaint.
35. Defendant Association denies the allegations contained in Paragraph 35 of the Plaintiffs' Complaint.
36. Defendant Association denies the allegations contained in Paragraph 36 of the Plaintiffs' Complaint.
37. Defendant Association denies the allegations contained in Paragraph 37 of the Plaintiffs' Complaint.
38. Defendant Association denies the allegations contained in Paragraph 38 of the Plaintiffs' Complaint.
39. Defendant Association denies the allegations contained in Paragraph 39 of the Plaintiffs' Complaint.
40. Defendant Association denies the allegations contained in Paragraph 40 of the Plaintiffs' Complaint.
41. Defendant Association denies the allegations contained in Paragraph 41 of the Plaintiffs' Complaint.

42. Defendant Association denies the allegations contained in Paragraph 42 of the Plaintiffs' Complaint.
43. Responding to Paragraph 43 of Plaintiffs' Complaint, Defendant Association reasserts and realleges its responses to Paragraphs 1 through 42 of Plaintiffs' Complaint as if restated verbatim herein.
44. Defendant Association denies the allegations contained in Paragraph 44 of the Plaintiffs' Complaint.
45. Defendant Association denies the allegations contained in Paragraph 45 of the Plaintiffs' Complaint.
46. Defendant Association denies the allegations contained in Paragraph 46 of the Plaintiffs' Complaint.
47. Defendant Association denies the allegations contained in Paragraph 47 of the Plaintiffs' Complaint.
48. Defendant Association denies the allegations contained in Paragraph 48 of the Plaintiffs' Complaint.
49. Defendant Association denies the allegations contained in Paragraph 49 of the Plaintiffs' Complaint.
50. Defendant Association denies the allegations contained in Paragraph 50 of the Plaintiffs' Complaint.

**FURTHER RESPONDING TO THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
DEFENDANT ALLEGES AND SAYS:**

51. That venue in the Aiken County Court of Common Pleas may be improper and the Complaint should be dismissed pursuant to Rule 12(b)(3), SCRCP.

**FURTHER RESPONDING TO THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
DEFENDANT ALLEGES AND SAYS:**

52. Plaintiffs may not have effected service upon Defendant Association and the Complaint should be dismissed for lack of personal jurisdiction pursuant to Rule 12(b)(2), SCRCP.

**FURTHER RESPONDING TO THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
DEFENDANT ALLEGES AND SAYS:**

53. Plaintiffs may not have effected service upon Defendant Association in a manner required by law and the Complaint should be dismissed for insufficient process or insufficient service of process pursuant to Rules 12(b)(4)-(5), SCRCP.

**FURTHER RESPONDING TO THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
DEFENDANT ALLEGES AND SAYS:**

54. Defendant Association has at all relevant times acted fairly and reasonably, in good faith, and in accordance with its contractual and legal obligations.

**FURTHER RESPONDING TO THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
DEFENDANT ALLEGES AND SAYS:**

55. The terms, conditions and limitations contained in the policy preclude Plaintiffs' claim for coverage. Accordingly, reasonable grounds exist to deny Plaintiffs' claim.

**FURTHER RESPONDING TO THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
DEFENDANT ALLEGES AND SAYS:**

56. Coverage is precluded to the extent Plaintiffs as assignees of Johnson Construction

Company of Aiken, Inc. may have failed to perform any obligations under the policy and comply with the terms and conditions contained therein.

**FURTHER RESPONDING TO THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
DEFENDANT ALLEGES AND SAYS:**

57. Plaintiffs' Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), SCRPC.

**FURTHER RESPONDING TO THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
DEFENDANT ALLEGES AND SAYS:**

58. Plaintiffs' Complaint fails to state a claim upon which attorneys' fees can be awarded or allege facts which, if proven, would entitle Plaintiffs to an award of attorneys' fees.

**FURTHER RESPONDING TO THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
DEFENDANT ALLEGES AND SAYS:**

59. Plaintiffs' Complaint fails to state a claim upon which punitive damages can be awarded or allege facts which, if proven, would entitle Plaintiffs to an award of punitive damages.

**FURTHER RESPONDING TO THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
DEFENDANT ALLEGES AND SAYS:**

60. Any award of punitive or exemplary damages in this action would be in violation of Defendant's constitutional rights.

**FURTHER RESPONDING TO THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
DEFENDANT ALLEGES AND SAYS:**

61. There has been a failure of condition precedent or subsequent, with the result that the result that the Plaintiff cannot recover from this Defendant.

**FURTHER RESPONDING TO THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO,
DEFENDANT ALLEGES AND SAYS:**

62. Defendant Association reserves any additional and further defenses as may become available or apparent during the course of investigation and discovery as consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, Defendant respectfully requests that Plaintiffs' request for relief be denied and that judgment be entered against Plaintiffs in favor of Defendant declaring that pursuant to the terms, conditions and limitations contained in the policy, Defendant is not obligated to provide either defense or indemnity obligations to Plaintiffs related to the underlying Arbitration, that Defendant at all times acted reasonably and in good faith in denying the underlying claim, and further dismissing Plaintiffs' Complaint in its entirety with prejudice, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

CARLOCK COPELAND & STAIR, LLP

40 Calhoun Street, Suite 400
Charleston, SC 29401-3531
843-727-0307

By: Jennifer Blanchard
R. MICHAEL ETHRIDGE
State Bar No.: 016892
JENNIFER L. BLANCHARD
State Bar No.: 74841

Attorneys for Defendant Association Insurance Co.

Defendant.

CERTIFICATE OF SERVICE

R 161

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

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

☒ Plaintiff

v.

Association Insurance Company

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2009-CP-02-02420

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Benjamin E. Nicholson V, Bar No. 10137
Address:
P.O. Box 11390
Columbia, SC 29211
phone: 803.799.9800 fax: 803.753.3278
e-mail: nnicholson@mcnair.net other:

Defendant's Attorney:
Jennifer L. Blanchard, Bar No.
Address:
40 Calhoun Street, Suite 400
Charleston, SC 29401
phone: (843) 266.8232 fax: (843) 727.2995
e-mail: jblanchard@carlockcopeland.com other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

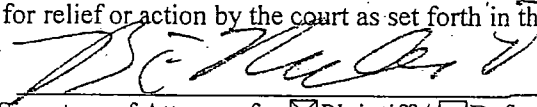
Nature of Motion: Motion for Partial Summary Judgment

Estimated Time Needed: 45 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

November 17, 2009

Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: 25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

William & Mary Frances Walde,
as assignees of Johnson Construction
Company of Aiken, Inc.,

Plaintiff,

vs.

Association Insurance Company,

Defendant.

IN THE COURT OF COMMON PLEAS

Docket No.: 2009-CP-02-02420

PLAINTIFFS'

NOTICE OF MOTION AND MOTION
FOR PARTIAL SUMMARY JUDGMENT

(Liability-Duty to Defend)

TO THE DEFENDANT NAMED ABOVE and ITS ATTORNEYS:

YOU ARE HEREBY NOTIFIED that the Plaintiffs, by and through the undersigned counsel, will on the tenth (10th) day after service hereof, or as soon thereafter as noticed by the Court, move for an Order pursuant to Rule 56, South Carolina Rules of Civil Procedure, seeking partial summary judgment that there is no genuine issue of material fact but that:

1. For the reasons stated in the Complaint, the Defendant owed to Johnson a contractual duty to provide a defense to the claims made in the Arbitration by the Plaintiffs against Johnson; and that the Defendant breached that duty by refusing to do so;
2. Because of the breach of its duty to defend Johnson as alleged in the Complaint, the Defendant is liable to Plaintiffs (as the Assignees of Johnson) for Johnson's reasonable costs and attorney's fees incurred in the defense of the Arbitration; and

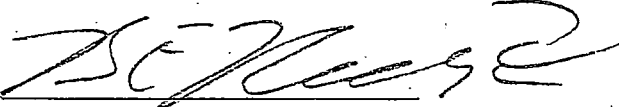
3. The Plaintiffs (as assignees of Johnson) are entitled to their costs and attorney fees from Defendant for the prosecution of this action to the extent it seeks damages for Defendant's breach of its duty to defend Johnson in the Arbitration. Plaintiffs do not seek to establish monetary damages by this Motion, but only seek to establish liability for the Defendant's breaches of duty as requested.

WHEREFORE, the Plaintiffs request that the Court grant the relief requested based on the pleadings filed and any affidavit(s) and memorandum of law submitted in support.

Respectfully submitted,

Benjamin E. Nicholson, V
Burl F. Williams
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, SC 29211
803.799.9800
nnicholson@mcnair.net

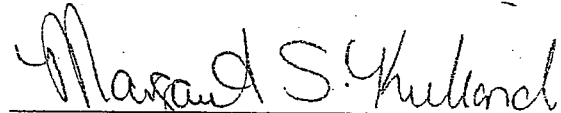
Columbia, SC
November 16, 2009

By: 
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I, Margaret S. Kirkland, an employee of McNair Law Firm, P.A., do hereby certify that I have served the foregoing *Plaintiffs' Notice of Motion and Motion for Partial Summary Judgment* by mailing same via U.S. Mail, first class postage affixed thereto, on the 17th day of November, 2009 to the following address:

Jennifer L. Blanchard
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Attorneys for the Defendant


Margaret S. Kirkland

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

WILLIAM & MARY FRANCES WALDE, AS
ASSIGNEES OF JOHNSON CONSTRUCTION
COMPANY OF AIKEN, INC.,

☐

Plaintiffs,

vs.

ASSOCIATION INSURANCE COMPANY,

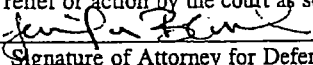
☒

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT
CASE NO.: 2009-CP-02-02420

MOTION INFORMATION & COVER SHEET

(check box above indicating submitting party)

Name, S.C. bar no. and address of Plaintiff's attorney Benjamin E. Nicholson, V, Esquire McNair Law Firm PO Box 11390 Columbia, SC 29211		Name, S.C. bar no. and address of Defendants' attorney R. Michael Ethridge, Esq. (16892) Jennifer L. Blanchard, Esq. (74841) Carlock Copeland & Stair, LLP 40 Calhoun Street, Suite 400 Charleston, SC 29401	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Cross Motion for Partial Summary Judgment Estimated Time Needed : 45 Minutes Court Reporter Needed: Yes			
SECTION II: Motion Type ☒ Written motion attached ☐ Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for Defendant  Date submitted 12/16/09			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other:			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE: _____ DATE: _____ FILED: _____ 2009 Aiken County Clerk of Court	
CLERK'S VERIFICATION Collected by: _____ (print name) ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

SCCA/233 (1/2003)

) IN THE COURT OF COMMON PLEAS
) THE SECOND JUDICIAL CIRCUIT
) CASE NO.: 2009-CP-02-02420

) CASE NO.: 2009-CP-02-02420

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COMES NOW, the Defendant sued as Association Insurance Company, (hereinafter referred to as "Association"), by and through its undersigned attorneys, and hereby moves for Partial Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure on the grounds that (1) there was no "occurrence" giving rise to "property damage" for the claims made in the underlying Arbitration, (2) the "your work" exclusion located within the policy operates to preclude coverage, (3) the contract at issue was not an "insured contract," (4) the "products-completed operations hazard" exclusion operates to bar coverage, and (5) the "intentional acts" exclusion bars some or all claims made. Therefore, Summary Judgment is appropriate as a matter of law. As a result, Association is not liable to Plaintiffs (as Assignees of Johnson) for Johnson's costs and fees associated with the underlying Arbitration nor is Defendant Association liable to Plaintiffs for their costs and fees associated with bringing the present action.

This Motion is based upon pleadings, discovery, the South Carolina Rules of Civil Procedure, evidence of record, applicable case law, deposition testimony, supporting affidavits

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and the Memorandum in Support of Summary Judgment as submitted to the Court under separate filing.

Respectfully submitted,

CARLOCK COPELAND & STAIR, LLP

By:


R. MICHAEL ETHRIDGE
State Bar No.: 16892

JENNIFER L. BLANCHARD
State Bar No.: 74841

40 Calhoun Street, Suite 400
Charleston, SC 29401-3531
843-727-0307

Attorneys for Defendant Association Insurance
Company

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

WILLIAM & MARY FRANCES WALDE, AS
ASSIGNEES OF JOHNSON CONSTRUCTION
COMPANY OF AIKEN, INC.,

Plaintiff,

vs.

ASSOCIATION INSURANCE COMPANY,

Defendant.

) IN THE COURT OF COMMON PLEAS
) THE SECOND JUDICIAL CIRCUIT
) CASE NO.: 2009-CP-02-02420

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Benjamin E. Nicholson, V, Esq.
McNair Law Firm, PA
P.O. Box 11390
Columbia, SC 29211

This 11th day of December, 2009.

Theresa Escobedo

Theresa Escobedo

Legal Assistant to Jennifer L. Blanchard

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AIKEN COUNTY
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
William & Mary Frances Walde,)
as assignees of Johnson Construction)
Company of Aiken, Inc.,)
Plaintiff,)
vs.)
Association Insurance Company,)
Defendant.)

IN THE COURT OF COMMON PLEAS

Docket No.: 2009-CP-02-02420

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS'
NOTICE OF MOTION AND MOTION
FOR PARTIAL SUMMARY
JUDGMENT
(Liability-Duty to Defend)**

The Plaintiffs, William and Mary Frances Walde ("the Waldes"), submit their Memorandum in Support of their Motion seeking partial summary judgment that there is no genuine issue of material fact but that:

1. For the reasons stated in the Complaint, the Defendant owed to Johnson a contractual duty to provide a defense to the claims made in the Arbitration by the Plaintiffs against Johnson; and that the Defendant breached that duty by refusing to do so;
2. Because of the breach of its duty to defend Johnson as alleged in the Complaint, the Defendant is liable to Plaintiffs (as the Assignees of Johnson) for Johnson's reasonable costs and attorney's fees incurred in the defense of the Arbitration; and
3. The Plaintiffs (as assignees of Johnson) are entitled to their costs and attorney fees from Defendant for the prosecution of this action to the extent it seeks damages for Defendant's breach of its duty to defend Johnson in the Arbitration.

Plaintiffs do not seek to establish monetary damages by this Motion, but only seek to establish liability for the Defendant's breaches of duty as requested.

I. INTRODUCTION

The facts in this case have been carefully pleaded in the Complaint (¶¶6-42), which contains as Exhibits all the relevant documents, including the insurance policy at issue, the denials of coverage, and the Arbitration Demands which are the subject of this Motion.

This matter arises out of a settlement of an arbitration claim by the Waldes against Johnson Construction Company of Aiken, Inc. ("Johnson"), which was insured through a Comprehensive General Liability insurance policy by the defendant in this action, Association Insurance Company ("AIC"). AIC refused to offer a defense to Johnson when the Waldes filed an Arbitration Demand against Johnson for negligently representing them before the Aiken County Board of Zoning Appeals ("the BZA"), which resulted in an Order from that BZA that a barn built by Johnson under a separate agreement for the Waldes had to be removed.¹ The Waldes were ultimately able to persuade the BZA to allow the barn to stay in the same place but with modifications. The Waldes in their Arbitration Demand against Johnson claimed damages for the cost to rebuild the barn to comply with the BZA Orders.

Johnson made demand on AIC to defend and indemnify Johnson for the claims made in the Arbitration Demand. AIC refused. (See Exhibit C attached to the Complaint.) The Waldes subsequently filed an extensive Pre-Trial Brief which in more detail outlined the subject matter of the Arbitration Demand. (The Arbitration Demand and the Pre-Trial Brief are hereinafter collectively referred to as "the Arbitration Demands.") Johnson tendered that to AIC and AIC still refused coverage. (See Exhibit E attached to the Complaint.)

¹ The Waldes paid Johnson \$500 to represent them before the BZA before they executed and went forward with a construction contract with Johnson for the barn. Thus, Johnson was paid separately for its work before the BZA. This is important because it demonstrates that Johnson's BZA representation was a different type of work for the Waldes than its construction of the barn.

The operative allegations against Johnson by the Waldes upon which this Court must base its decision are first the Arbitration Demand (attached to the Complaint as Exhibit B) filed with the American Arbitration Association:

Respondents represented Claimants before Aiken Board of Zoning Appeals to obtain variance to build paddock and stable for Claimants. Respondents then built the building. Respondents obtained variance but then built building in wrong location and wrongly told Claimants that an addition to original plans was permissible. BZA has now ordered building removed. Claimants claim breach of contract, negligent misrepresentation, and breach of fiduciary duty seeking actual damages for money already paid to Respondents, and cost to demolish or move the building to the correct location.

Thereafter, in its Pre-Trial Brief (attached to the Complaint as Exhibit D), the Waldes further stated their claim against Johnson:

This case is about a contractor who promised absentee owners that he could and would build a stable in compliance with the zoning ordinance in the City of Aiken, South Carolina, told the absentee owners that he had obtained the necessary variances from the City to build the stable with a second story, and then built the stable, only to discover when it was near completion 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 by the City.

(Pre-Trial Brief, p. 1)

Because the Waldes did not live full time in Aiken, and because Johnson assured them that he was an experienced contractor in Aiken familiar with the City's Ordinance and the personnel enforcing the Ordinance, the Waldes agreed for Johnson to handle for them the process of obtaining a Special Exception and Variance to allow them to have Johnson build the stable and paddock.

(Pre-Trial Brief, pp. 3-4.)

On or around March 17, 2008, Johnson submitted two Applications on behalf of the Waldes (as their 'agent') to the City's BZA, an Application for a Variance for the project and an Application for a Special Exception. Johnson's Applications attached a sketch plan of the stable and the location of the stable he proposed. Mary Frances Walde emailed Johnson her written authorization to appear for her at the BZA meeting to apply for the Variance and Special Exception. Prior to the BZA meeting, Johnson advised the Waldes of issues regarding the Ordinance's requirements, including what sort of variance was needed.

(Pre-Trial Brief, pp. 4-5)(citations omitted.)

At no time did Johnson advise the Waldes that the Ordinance did not allow for an accessory apartment on the stable or that the accessory apartment he designed would make the height of the stable higher than permitted by the Ordinance.

(Pre-Trial Brief, p. 6)

Johnson's representations that he could build the stable with an accessory apartment were negligent misrepresentations. In order to state a claim for negligent misrepresentation, Claimants must show:

- 1) the defendant made a false representation to the plaintiff;
- 2) the defendant had a pecuniary interest in making the statement;
- 3) the defendant owed a duty of care to communicate truthful information to the plaintiff;
- 4) the defendant breached that duty by failing to exercise due care;
- 5) the plaintiff justifiably relied on the representation;
- 6) the plaintiff suffered a pecuniary loss as the proximate result of reliance on the representation.

Koontz v. Thomas, 511 S.E.2d 407, 413 (S.C. Ct. App. 1999). A claim for negligent misrepresentation is proper where the misrepresentation "induced the plaintiff to enter a contract or business transaction." *Redwend Limited Partnership v. Edwards*, 581 S.E.2d 496, 504 (S.C. Ct. App. 2003). This is precisely what Johnson did.

The damages in a negligent misrepresentation action are the actual pecuniary loss suffered. *Koontz*, 511 S.E.2d at 513.

(Pre-Trial Brief, p. 17).

Johnson and the Waldes settled the Arbitration Demand the night before trial and as part of the settlement, Johnson assigned to the Waldes certain rights Johnson may have against AIC, including AIC's liability for Johnson's attorney's fees incurred when it defended itself against AIC. This motion is limited to the narrow issue of whether or not AIC owed a duty of defense to Johnson pursuant to the Arbitration Demand and the Pre-Trial Brief. If the Court so holds, then under South Carolina law, AIC is obligated to pay to the Waldes (as assignees of Johnson), Johnson's attorneys fees and cost that it incurred defending the Arbitration Demands, as well as their costs and attorneys fees in seeking this relief.

II. LEGAL ARGUMENTS

A. The Scope of An Insurer's Duty to Defend is Based on the Arbitration Demand.

A liability insurance policy contains two insuring provisions of major significance: one, providing for the payment by the insurer of sums the insured shall become obligated to pay, the other providing, in substance, for the defense of any suit alleging bodily injury or property damage and seeking damages payable under the terms of the policy. The latter clause also provides, as a rule, that such a defense will be furnished even if any of the allegations of the suit are groundless, false or fraudulent.

Sloan Const. Co., Inc. v. Central Nat. Ins. Co., 236 S.E.2d 818, 820 (S.C. 1977). "[T]he duty to defend in South Carolina is broader than the duty to indemnify," *Liberty Life Ins. Co. v. Comm. Union Ins. Co.*, 857 F.2d 945, 950 (4th Cir. 1988).

In other words, "the insurance company's duty to defend its assured is usually said to be broader than its duty to pay a judgment against him." *Donnelly v. Transportation Ins. Co.*, 589 F.2d 761, 765, 765 (4th Cir. 1979). Courts in South Carolina historically have been expansive in their reading of an insurer's duty to defend under an insurance policy. **"If a complaint, however ambiguous, may be read as premising liability on alternative grounds, and either ground states liability potentially or arguably covered by the policy, the insured is entitled to a defense."** *Id.* at 767 (emphasis added.)

In support of this proposition, the Fourth Circuit in *Donnelly* explained its rationale:

A number of reasons are specified in the just cited cases as to why a liability insurer's duty to defend may be broader than its duty to pay a judgment against its assured or to indemnify him. First, whether or not there is a duty to defend is usually determined from the pleadings in a case, but whether there is a duty to pay a judgment or to indemnify an assured who has paid usually cannot be determined until the evidence has been heard. Second, with the great latitude with which pleadings are construed today, and the great latitude of amendment, an insured's right to a defense should not be foreclosed unless such a result is inescapably necessary. Third, if part of a plaintiff's claims against an insured fall within the coverage of a policy and part do not, the company should defend all, although it might eventually be required to pay only some, claims. Fourth, while there may be some policy considerations which preclude protecting a wrongdoer from having to pay for an intentional injury he has caused, those same policy

considerations do not foreclose the defense of an accused party who has not yet been found to be guilty. There may be additional reasons but these are especially applicable to the case now before us.

589 F.2d at 765.

"An insurer's duty to defend extends beyond the policy's term for indemnity, arising both where the suit is frivolous and where it exceeds the policy limits. The duty to defend is unconditional." *Hodges v. State Farm Mutual Auto. Ins. Co.*, 488 F. Supp. 1057, 1065 (D. S. C. 1980). The insurer must defend an entire lawsuit even though some of the claims are not covered by the policy so long as one of the claims is covered. *Town of Duncan v. State Budget and Control Board*, 482 S.E.2d 768, 774 (S.C. 1997).

"Accordingly, an insurer is excused from its duty to defend the insured only where the complaint against the insured clearly demonstrates no basis upon which the insured could be required to indemnify the insured under the policy." *Fuisz v. Selective Ins. Co. of America*, 61 F.3d 238, 242 (4th Cir. 1995). "If the complaint 'creates a possibility of coverage ... the insurer is obligated to defend.'" *Spartan Petroleum Co., Inc. v. Federated Mut. Ins. Co.*, 162 F.3d 805, 808 fn.2 (4th Cir. 1998). Any doubts regarding the obligation of the insurer to defend must be resolved in favor of the insured, and the decision of the insurer not to defend must be free from doubt. *Employers Mut. Liability Ins. Co. v. Hendrix*, 199 F.2d 53, 56-7 (4th Cir. 1952).

The decision of whether or not an insurer is required to defend an insured based on the complaint in the subject action is a matter of law for the court. *Baker v. American Ins. Co. of Newark*, 324 F.2d at 750.

B. If an Insurer Breaches its Duty to Defend, the Cost of Defense are the Damages.

“Where an insurer refuses to undertake the defense of an action against the insured based upon a claim within the coverage of the insurance policy, it thereby breaches the contract of insurance and is liable to the insured for all damages resulting to such insured as a direct result of such refusal and breach.” *Fuller v. Eastern Fire & Cas. Ins. Co.*, 124 S.E.2d 602, 610 (S.C. 1962). Further, “[w]here an insurer wrongfully refuses to defend an action against the insured on the ground that the claim upon which the action was based, was not within the coverage of the policy, it is liable for the court costs taxed or incurred in such suit.” *Id.* Thus, it is well settled that the damages recoverable for a breach of duty to defend include the attorney’s fees and costs incurred in the lawsuit that the insured is forced to defend. *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443, 444 (1978).

C. The Insured May Also Recover its Attorneys Fees in the Lawsuit Against the Insurer For Breach of Duty to Defend.

1. Attorneys Fees and Costs.

Because the insured suing an insurer in a breach of duty to defend case has to file a lawsuit to determine its rights under the policy, it is entitled to an award of its attorney’s fees and costs for this action as well. See e.g., *BP Oil Company v. Federated Mutual Ins. Co.*, 329 S.C. 631, 496 S.E.2d 35, 41 (1998); *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 38 (1980); and *Sloan Const. Co., Inc. v. Central Nat. Ins. Co.*, 236 S.E.2d 818, 820 (S.C. 1977). Thus, the Waldes as the assignees of Johnson may recover their attorneys fees and costs in this action related to AIC’s breach of its duty to defend.

2. Prejudgment Interest.

South Carolina courts have not directly addressed whether or not prejudgment interest is recoverable on attorneys fees. However, other courts have expressly held that when an insurer

breaches its duty to defend in an insurance policy, the insured may recover prejudgment interest on the attorneys fees and costs it had to pay to defend itself.² Also, it is universally accepted that the prejudgment interest should be calculated from the date that the insured paid the bills.³ This is consistent with South Carolina law. Thus, the Court should Order that AIC is required to pay prejudgment interest at the South Carolina statutory rate on the amounts billed by Johnson's attorney to Johnson from the date Johnson paid those invoices.

D. The Allegation of Johnson's Negligent Conduct is Covered By the Policy.

1. General Law: The Policy is Construed in Favor of Insured.

"It is well settled in South Carolina that provisions of an insurance policy are to be liberally construed in favor of the insured." *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132, 135 (Ct. App. 2000); *Cummings v. Horace Mann Ins. Co.*, 996 F.2d 720, 722 (4th Cir. 1993); and *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 392 S.E.2d 460, 461 (S.C. 1990). Thus, "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*, 500 S.E.2d 496, 499 (S.C. App. 1998).

² See e.g., *Liberty Mutual Fire Ins. Co. v. Canal Ins. Co.*, 177 F.3d 326, 339 (5th Cir. 1999) (Applying Miss. law); *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F. 2d 577, 586 (5th Cir. 1986) (Applying Texas law); *American Simmental Association v. Coregis Ins. Co.*, 234 F. Supp. 2d 1028, 1031-33 (D. Neb. 2002); *Ultra Coachbuilders, Inc. v. General Security Ins. Co.*, 229 F. Supp. 2d 284, 288-89 (S.D.N.Y. 2002); *Fidelity & Dep. Co. of Maryland v. Hartford Cas. Ins. Co.*, 216 F. Supp. 2d 1240, 1243-44 (D. Kan. 2002); *Federal Ins. Co. v. Stroh Brewery Co.*, 35 F. Supp. 2d 650, 663 (N.D. Ind. 1988); *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's of London*, 813 F. Supp. 576, 590 (N.D. Ohio 1993); *City of Burlington v. Ass'n. of Gas & Elec. Insurance Services, Ltd.*, 751 A.2d 284, 293 (Vt. 2000); *City of Willoughby Hills v. Cincinnati Ins. Co.*, 26 Ohio App. 3d 146, 499 N.E. 2d 31, 34 (Ohio App. 1986); and *Ervin v. Sears, Roebuck & Co.*, 127 Ill. App. 3d 982, 82 Ill. Dec. 709, 469 N.E. 2d 243, 250 (Ill. App. 1984).

³ *Liberty Mutual Fire Ins. Co. v. Canal Ins. Co.*, 177 F.3d at 339; *American Simmental Association v. Coregis Ins. Co.*, 234 F. Supp. 2d at 1031-33; *Fidelity & Dep. Co. of Maryland v. Hartford Cas. Ins. Co.*, 216 F. Supp. 2d at 1243-44; *Federal Ins. Co. v. Stroh Brewery Co.*, 35 F. Supp. 2d at 663; And see, *Ultra Coachbuilders, Inc. v. General Security Ins. Co.*, 229 F. Supp. 2d at 288-89 (interest ran from date of each invoice.); *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's of London*, 813 F. Supp. at 590 (interest ran from date fees incurred.); and *Ervin v. Sears, Roebuck & Co.*, 469 N.E. 2d at 250. (Same.)

"Rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed." *McPherson v. Michigan Mut. Ins. Co.*, 426 S.E.2d 770, 771 (S.C. 1995). "However, we subject insurance contracts to the same rules of interpretation governing other types of contracts." *Laidlaw Environ. Services (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 524 S.E.2d 874, 880 (Ct. App. 1999). Thus, the intent of the parties controls. *Id.*

As one court explained, "the purpose of an insurance policy is to insure. Insurance policies are written by insurance companies. Like Humpty Dumpty, they should say what they mean in advance, not after the fact." *Brooklyn Bridge, Inc. v. South Carolina Insurance Company*, 420 S.E.2d 511, 512 (S.C. App. 1993). Where an internal inconsistency in an insurance policy renders it ambiguous and the policy is susceptible of more than one reasonable interpretation, one which would provide coverage, coverage must be found as a matter of law. *Id.*, citing *Insurance Reserve Fund v. Prince*, 403 S.E.2d 643 (1991). Further, "[w]here the words of an insurance policy are capable of two reasonable interpretations, we will adopt the construction most favorable to the insured." *Laidlaw Environ. Services (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 524 S.E.2d 874, 879 (Ct. App. 1999).

2. There Was an "Occurrence" under the Policy.

As this Motion is limited to AIC's duty to defend, the Court only need find that one claim in the Arbitration Demand or Pre-Trial Brief alleges a covered event under the Policy. Clearly, the claim for negligence/negligent misrepresentation is covered.

The alleged negligence was (a) Johnson's failure to properly obtain BZA approval; (b) the failure to properly advise the Waldes as the zoning ordinance requirements after undertaking that duty; and (c) the failure to locate the barn in the proper location. The South Carolina Supreme Court has specifically held on a very similar issue that "the allegedly negligent location of the house

on a lot which created the exposure to a condition which resulted in property damage constituted an 'occurrence.'" *Boggs v. Aetna Cas. & Sur. Co.*, 252 S.E.2d 565, 567 (S.C. 1979). Thus, Johnson's bad advice, its failure to obtain the correct variances from the BZA which resulted in the misplacement of the barn, and its improper height were 'occurrences' which primed the duty to defend.⁴

AIC has consistently failed to consider the real basis of the Waldes' complaint, as it continuously characterizes the underlying arbitration as a construction defect type case. However, it is not. **The Waldes did not allege, nor have they ever alleged, that the construction itself was defective.** The essence of the Arbitration Demands was the negligent conduct of Johnson surrounding his undertaking of a duty to advise the Waldes with the BZA and his improper advice.⁵

Likewise, a claim for negligent misrepresentation is an "occurrence" under a general liability insurance policy. *See Sheets v. Brethren Mut. Ins. Co.*, 679 A.2d 540, 545-51 (Md. 1996); *Wood v Safeco Ins. Co. of America*, 980 S.W.2d 43 (Mo. App. 1998); *SL Indus., Inc. v. American Motorists Ins. Co.*, 607 A.2d 1266, 1276-77 (N.J. 1992); *Universal Underwriters v. Youngblood*, 549 So.2d 76, 78-79 (Ala. 1989); *Reinsurance Ass'n of Minnesota v. Timmer*, 641 N.W.2d 302 (Minn. App. 2002). *See also Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 265 S.E.2d 38, 40 (S.C. 1980)(Insurer breached duty to defend; policy covered negligence and so negligent misrepresentation claim covered.).

⁴ Additionally, the allegation of harm caused by Johnson's breach of fiduciary duty is covered. *Unified Western Grocers, Inc. v. Twin City Fire Ins. Co.*, 457 F.3d 1106 (9th Cir. 2006).

⁵ By undertaking this action, as alleged in the Pre-Trial Brief sections cited above, Johnson assumed a duty of care, rendering it liable for negligent execution of this duty. "[O]ne who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care." *Crowley v. Spivey*, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct.App. 1985). *See Lawlor v. Scheper*, 232 S.C. 94, 99, 101 S.E.2d 269, 271 (1957) ("It may be true, as counsel argue, that appellants owed no duty to furnish any information as to the amounts owing on the two mortgages but when they undertook to do so, they owed a duty not to mislead respondent."); *Winburn v. Insurance Company of North America*, 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct.App.1985) ("A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction."); *Folkens v. Hunt*,

3. The Insured Acts were not subject to limitation as an "insured contract."

AIC states that one of the claims the Waldes made against Johnson was not an "insured contract" under Paragraph 9 of the Policy, and thus there was no coverage. However, the "insured contract" defense is irrelevant in a duty to defend analysis unless it is the only claim made, as the duty to defend is triggered by any claim possibly covered under the policy. *Town of Duncan, supra*. Obviously, the Waldes made claims of negligence/negligent misrepresentation in their Arbitration Demands. Thus, this defense is irrelevant to the subject matter of the Waldes' motion.

E. None of the Exclusions Cited by the Insurer Apply.

AIC raised in its Denial Letters (and raises in its cross motion for summary judgment) three exclusions. It says first that the "your work" exclusion precludes coverage. It then says that the "products-completed operations hazard" exclusion bars coverage. Finally it says the "intentional acts" exclusion bar coverage.

An exclusion in an insurance policy "is a limitation of liability or a carving out of certain types of loss to which the coverage or protection of the policy does not apply." 17 *Williston on Contracts* § 49:111 (4th Ed.) The insurer has the burden of proof that its exclusion and policy conditions should apply. *Owner's Insurance Co. v. Clayton*, 614 S.E. 2d 611, 614 (S.C. 2005) ("Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability.")

1. The 'Your Work' Exclusion Does Not Apply.

AIC claims the "Your Work" Exclusion in the Policy bars coverage. The Exclusion at Section I, A.2.1 says "'Property damage' to 'your work' arising out of it or any part of it and

290 S.C. 194, 348 S.E.2d 839 (Ct.App.1986) (once a public accountant undertakes to act on behalf of a client, he owes a duty to make a reasonable inquiry to ascertain facts).

included in the 'product-completed operations hazard.'" For purposes of this matter, the "Your Work" exclusion and the "Products-Completed Hazard" (*see infra*) exclusion are closely related.

It is clear from the Arbitration Demand and then the Pre-Trial Brief that the negligent misrepresentations by Johnson its breach of duty were related to what variances and special exceptions were needed from the BZA and its misrepresentations that the Waldes could build an accessory apartment as part of a barn without BZA approval. The resulting and ensuing damage that occurred was the partial demolition of the barn Johnson built. Thus, the actions complained of in the Arbitration Demands were separate and apart from the actual construction of the barn itself. The two events (Johnson's representation of the Waldes vs. Johnson's building of the barn) are separate. They could have been performed by different companies; for example, an attorney could have represented the Waldes before the BZA. Further, as alleged in the Arbitration Demands, they were separately paid for. Thus, Johnson's work before the BZA was different from its work of building the barn. The Waldes had no complaint about the quality of the barn; their complaint was over Johnson's negligence in procuring the special exceptions or variances.

For example, had Johnson not built the barn, but had he only breached a duty of care in representing the Waldes before the BZA, there is little doubt but that the insurer would have covered the property damage to a barn built by another contractor at the wrong location and wrong height due to Johnson's negligence.

Also, by way of another example, if Johnson had improperly built a house, and after completion that house had caught on fire because Johnson negligently installed a light fixture, and then the fire spread to burn down a second house that Johnson was building, the insurer unquestionably would pay for the damage to the second house being built by Johnson. This is

because Johnson's negligent conduct arose not with respect to the structure, the second house that he was building, but rather arose out of the first house it built that damaged the second house. Thus, the "your work" referred to in the Policy is the not the "your work" that was damaged.

Finally, the "Your Work" exclusion is ambiguous as applied to these facts since nowhere does the exclusion appear to contemplate the facts that occurred here: a service provided by an insured that later damaged a structure provided separately by the insured. In other words, the exclusion is inherently contradictory when the "work" of an insured damages distinct and separate "work" of same insured. In such a case, the Court must adopt the interpretation favoring the insured, which in this case would be that the two "your work" situations are separate. *See Brooklyn Bridge, supra*.

2. The "Products-Completed Operations Hazard" Exclusion Does Not Apply.

AIC attempts to apply the Products-Completed Operations Hazard Exclusion ("PCOH") to the claims in the Complaint. The policy actually covers products-completed operations hazards if not expressly excluded, as that was a separate coverage purchased by Johnson as reflected in the Policy Declarations. However, through the definition of certain "property damage" at Exclusion j, much of the products-completed operations hazard coverage is likewise excluded. The PCOH, however, is really not an exclusion; rather, it is an exception to an exclusion. The PCOH has been described as follows:

Before proceeding to our analysis of whether there was coverage, we think it would be helpful to explain how the PCOH provision fits into a CGL policy. A CGL policy, like every other insurance policy, has an insuring clause under which the insurer agrees to pay sums that the insured becomes legally obligated to pay because of property damages caused by an occurrence. The CGL policy also has exclusions that take away some of this coverage. The PCOH provision is an exception to these exclusions. Or, stated another way, the PCOH provision is

simply a category of losses that are covered even though these losses might otherwise be excluded. Viewed in this light, the PCOH provision does not create a separate category of coverage. Rather, any loss falling within the PCOH provision must still meet all the requirements of the policy, like any other loss, except the exclusion from which the losses are excepted.

Pursell Const. Inc. v. Hawkeye-Security Ins. Co., 596 N.W.2d 67, 69 (Iowa 1999). The PCOH exception is to the Exclusion j which excludes certain types of defined "property damage" from coverage. (See pages 5-6 of Policy.) As an initial matter, Exclusion j does not apply to this situation as the negligence advice/negligent misrepresentation by Johnson does not fit into any of the exclusion's categories of excluded property damage. Thus, AIC cannot show (as is its burden) that the exclusions would apply.

Second, AIC again confuses the claims in the Arbitration Demands as one for defective design or construction. The Arbitration Demands arose out of defective advice before a BZA, not for defective design or construction. There was no negligence in the design or construction of the building; the loss that occurred to the building was due to the negligent misrepresentations by Johnson involving the BZA. As long as the damages sought are not for the "work" itself, but are for damage to other property, the PCOH does not apply. *Gaylord Chemical Corp. v. ProPump, Inc.*, 753 So.2d 349, 354-55 (La. App. 2000)(Interpreting identical policy provision and holding there was coverage for negligent misrepresentation claim.)

Finally, the Products-Completed Hazard Exclusion by its terms states that it does not apply to *uncompleted work*. Section V, 16. a. (2). AIC states that because the barn was not completed, then the exclusion applies. See Complaint, Exhibit C, page 7. However, Johnson's

work before the BZA was completed before the construction contract was signed or work began on the barn. Thus, this exclusion does not apply.⁶

3. The Intentional Acts Exclusion Does Not Apply.

AIC's position that the intentional acts exclusion could apply, apparently to the negligence claims, is mystifying in this matter as there is no allegation of fraudulent conduct. AIC in its second letter denying coverage stated that Johnson's conduct that was alleged in the Complaint as negligent conduct was rather intentional conduct. (See Complaint, Exhibit E, page 10.) This is a nonsensical position; the law does not allow an insurance company to what is pled as negligence something else just to avoid coverage. Otherwise, every auto insurer would deny a defense where a complaint alleges that someone negligently ran a stop sign. Indeed, the policy itself says the intentional actions exclusion is for damage "expected or intended from the standpoint of the insured." See Policy, page 2, section 2 a, attached at Exhibit A to Complaint. There is no allegation, or even a possible reasonable reading of the Arbitration Demand, that could lead AIC to a conclusion that the acts complained of were intentional.

A claim for "negligent misrepresentation" does not meet the threshold "intent" criteria for an intentional act for this exclusion to apply. *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 265 S.E.2d 38, 40 (S.C. 1980)(Insurer breached duty to defend; policy covered negligence and so negligent misrepresentation claim covered.); *Wood v Safeco Ins. Co. of America*, 980 S.W.2d 43 (Mo. App. 1998). As noted by the Iowa Supreme Court in *Newton Nat'l Bank v.*

⁶ The exclusion as applied to these facts is also ambiguous as it does not contemplate the work of the insured damaging other product of the insured. The Supreme Court of Florida held that a "Products-Completed Operations" exclusion was ambiguous as it referred to a contractor as opposed to a manufacturer, and thus an a duty to defend existed. *Nixon v. USF&G*, 290 So.2d 26 (Fla. 1973). The PCOH provision here at best is similarly ambiguous when applied to these facts.

General Casualty Co., 426 N.W.2d 618, 625-626 (Iowa 1988), "the very definition of 'negligent misrepresentation' connotes negligent rather than intentional conduct."

III. CONCLUSION

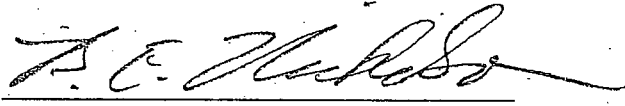
AIC attempts to pound the square peg of the Arbitration Demands into the round holes of its Policy exclusions. However, it cannot do so.

WHEREFORE, the Plaintiffs request that the Court grant the relief requested based on the pleadings filed and any affidavit(s) and memorandum of law submitted in support.

Respectfully submitted,

Benjamin E. Nicholson, V
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, SC 29211
803.799.9800
nnicholson@mcnair.net

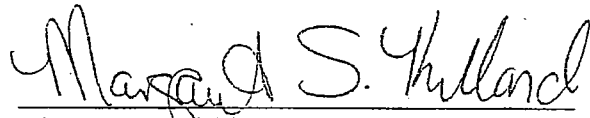
Columbia, SC
January 15, 2010

By: 
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I, Margaret S. Kirkland, an employee of McNair Law Firm, P.A., do hereby certify that I have served the foregoing *Plaintiffs' Memorandum In Support of Plaintiffs' Notice of Motion and Motion for Partial Summary Judgment* by mailing same via U.S. Mail, first class postage affixed thereto, on the 15th day of January, 2010 to the following address:

Jennifer L. Blanchard
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Attorneys for the Defendant


Margaret S. Kirkland

COLUMBIA 984200v1

Association Insurance Company. (See Policy, attached as Exhibit A to Plaintiffs' Complaint.)

The policy contained the following language pertinent to the present action:

SECTION I - COVERAGES
COVERAGE A BODILY INJURY AND PROPERTY DAMAGE
LIABILITY

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. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

- ...
- 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";
- (2) The "bodily injury" or "property damage" occurs during the policy period;
- ...

2. Exclusions

This insurance does not apply to:

j. Damage to Property

"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;

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

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III - Limits of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

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

k. Damage to Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage to Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

m. Damage to Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically insured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay of 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 injury to "your product" or "your work" after it has been put to its intended use.

SECTION V - DEFINITIONS

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
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.

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

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.

- b) Does not include "bodily injury" or "property damage" arising out of:

1. The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of a vehicle by any insured;
 2. The existence of tools, uninstalled equipment or abandoned or unused materials; or
 3. Products or operations for which the classification listed, in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.
17. "Property damage" means:
- a) Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
 - b) Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.
18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
- a) An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
 - b) Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with out consent.
21. "Your product":
- a. Means:
 - 1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - a) You;
 - b) Others trading under your name; or
 - c) A person or organization whose business or assets you have acquired; and
 - 2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.
 - b. Includes:

- 1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
 - 2) The providing of or failure to provide warnings or instructions.
- c. Does not include vending machines or other property rented to or located for the use of others but not sold.

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.

(See Policy, attached as Exhibit A to Plaintiff's Complaint.)

Upon information and belief, the Plaintiffs filed with the American Arbitration Association ("AAA") a Demand for Arbitration stating the following under "The Nature of the Dispute":

Respondents represented Claimants before Aiken Board of Zoning Appeals to obtain variance to build a paddock and stable for Claimants. Respondents then build the building. Respondents obtained variance but then built building in wrong location and wrongly told Claimants that an addition to original plans was permissible. BZA has now ordered building removed. Claimants claim breach of contract, negligent misrepresentation, and breach of fiduciary duty seeking actual damages for money already paid to Respondents, and cost to demolish or move the building to the correct location.

(See Demand for Arbitration, attached as Exhibit "C" to Plaintiff's Complaint.) On September 25, 2008, Association sent Johnson a detailed letter outlining the reasons that the acts complained of in the Demand did not trigger coverage under the policy. (See letter dated 9/25/08, Exhibit C to Complaint; a copy of which is attached hereto as Exhibit A.) In that letter,

Association cited several specific grounds for denying coverage. Upon receiving another letter from Johnson's counsel eleven months later enclosing Plaintiffs' Pre-Trial Brief, Association again responded to Johnson via his counsel regarding its decision to deny coverage of the claims by letter dated August 27, 2009. (See letter dated 8/27/09, Exhibit E to Complaint, a copy of which is attached hereto as Exhibit B; see also Pre-Trial Brief, Exhibit D to Plaintiff's Complaint.) Upon information and belief, on August 19, 2009, a settlement was reached between Plaintiffs and Johnson prior to the arbitration. (See Complaint at 7.) The terms of the settlement included the assignment of the current claim against Association to Plaintiffs. (Id.)

On October 14, 2009, Plaintiffs filed the current breach of contract action, alleging, in pertinent part, as follows:

44. The Policy provided the Insurer to provide a defense for Johnson to the claims made in the Arbitration.
45. The Policy provided for the Insurer to indemnify Johnson for any judgment or settlement for damages covered by the Policy.
46. The Insurer wrongfully refused to defend or indemnify Johnson.
47. The Insurer has therefore breached the terms and conditions of the Policy by refusing to defend Johnson and to indemnify Johnson for sums it has so expended.
48. The Insurer has therefore breached its contract by refusing to defend Johnson and indemnify it as stated in the Complaint.

(See Complaint at pp. 11-12.) Plaintiffs now seek damages in an amount not to exceed \$74,999.00. For the reasons that follow, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, this Defendant respectfully requests that this Court grant Defendant's Motion for Partial Summary Judgment previously filed with this Court.

ARGUMENT

Standard of Review

A Motion for Summary Judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. For summary judgment purposes, a Court must view the facts in the light most favorable to the non-moving party. E.g., George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When a properly supported motion for summary judgment is presented, the nonmoving party must establish specific facts showing that there is a genuine issue of material fact for trial, or the court must grant summary judgment. Matsushita Electric Industries Company v. Zenith Radio Corporation, 475 U.S. 574, 106 S. Ct. 1348, 89, L.E.D.2d 538 (1986). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." Guinan v. Tenet Healthsystems of Hilton Head, 383 S.C. 48, 53, 677 S.E.2d 32, 35 (Ct. App. 2009). A court may not properly deny a defendant's motion for summary judgment unless a genuine issue of material fact exists for each essential element of the plaintiff's claim. Id. at 358, 650 S.E.2d at 71 (citation omitted). "[T]he non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Legal Analysis

I. ASSOCIATION DID NOT OWE A DUTY TO DEFEND

A. The insurance policy which is the subject matter of this lawsuit does not provide coverage for the claims set forth in the demand for arbitration and/or the pre-trial brief

i. No Occurrence – No Duty to Defend

As set forth above, the subject policy covers "bodily injury" or "property damage" that is caused by an "occurrence." (See Policy, Exhibit A to Complaint.) An "occurrence" policy covers negligent acts and omissions occurring within the policy period. "Occurrence" as defined within the subject insurance policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Id.)

In the underlying Demand for Arbitration, the Plaintiffs' claims as set forth in "The Nature of the Dispute" were as follows:

Respondents represented Claimants before Aiken Board of Zoning Appeals to obtain variance to build a paddock and stable for Claimants. Respondents then build the building. Respondents obtained variance but then built building in wrong location and wrongly told Claimants that an addition to original plans was permissible. BZA has now ordered building removed. Claimants claim breach of contract, negligent misrepresentation, and breach of fiduciary duty seeking actual damages for money already paid to Respondents, and cost to demolish or move the building to the correct location.

(See Demand for Arbitration, Exhibit B to Complaint.) Nothing in the above language indicates "accidental" or fortuitous loss that would give rise to an "occurrence" within the meaning set forth in the policy. Furthermore, nothing in the Demand sets forth what could be construed as "property damage," defined in the policy as follows:

"Property damage" means:

- a) Physical injury to tangible property, including all resulting loss of use of that property. All such loss of

- use shall be deemed to occur at the time of the physical injury that caused it; or
- b) Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(See Policy, Exhibit A to Complaint.) Building a structure in the "wrong location" does not fall within the meaning of "property damage," above. Nothing in the Demand sets forth any allegations that the building at issue was physically injured or that any "loss of use" resulted. Therefore, as no "occurrence" giving rise to "property damage" could be inferred from the Demand for Arbitration, no coverage was triggered under the subject policy, and Association owed no duty to defend Johnson in the claim.

Plaintiffs' Complaint also alleges in part that the language contained within Plaintiffs' underlying Pre-Trial Brief (which was forwarded to Association on the eve of Arbitration eleven (11) months later) sets forth facts that "further amplified" negligent misrepresentation allegations. (See Complaint p. 8.) Based on its review of the Pre-Trial Brief in conjunction with the policy, Association found that the contents of the Pre-Trial brief did not trigger coverage. (See letter dated 8/27/09, attached hereto as Exhibit C.) Indeed, no language in the Pre-Trial Brief alleges facts which would fall within the meaning of "occurrence" and/or "property damage" which would trigger coverage. The specific quotations in the Complaint from the Plaintiffs' Pre-Trial Brief do not provide facts that give rise to an "occurrence" resulting in "property damage." (See Complaint at pp.7-10.) Therefore, there is no duty to defend based on the facts alleged, and summary judgment should be granted to Defendant Association as no issue of fact exists showing otherwise.

ii. "Negligent Misrepresentation" is Not a Covered "Occurrence"

The policy at issue covers "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies....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'." (See

Policy, attached as Exhibit A to Complaint.) "Occurrence" as defined in the Policy means "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Id.)

It is a fundamental requirement that an insurer will not pay for a loss unless it is fortuitous, so even if the insurance policy does not expressly limit coverage to accidental damage, the court will imply the requirement. S.C Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 20, 382 S.E.2d 11, 14 (Ct. App. 1989). "The principle that one should not be permitted to insure against his own intentional wrongdoing applies to voluntary insurance." Id. Plaintiffs' Complaint alleges that the claim for negligent misrepresentation located in the Demand for Arbitration and "amplified" in the Pre-Trial Brief resulted in damage, and therefore gives rise to coverage. (See Demand for Arbitration, attached as Exhibit B to Complaint; see also Complaint at pp. 8-9.) The Demand for Arbitration states that Johnson "wrongly told Claimants that an addition to original plans was permissible." (See Demand for Arbitration, attached as Exhibit B to Complaint.) Plaintiffs also cite portions of their own Pre-Trial Brief in the underlying action in an apparent attempt to force a more "coverable" claim. The Complaint includes a quote from Johnson at the BZA meeting stating that he "had no ... intent or anything that there was an issue with size, because [he] had thought and understood that it was the footprint and whatever was enclosed. As far as height, I had no idea that there was a height issue.... You know, I guess, you know, what you approved back wherever you approved it, yes we, I thought that we were within those guidelines based on me getting building permit." (See Pre-Trial Brief at p.8, attached as Exhibit D to Complaint.) Any implication that this language in the Plaintiffs' Pre-Trial Brief should have triggered coverage, however, is misplaced.

In South Carolina, a claim for negligent misrepresentation does not automatically trigger coverage.¹ In Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 578, 666 S.E.2d 897, 900 (2008), our Supreme Court recently held that the trial court erred in finding the possibility of coverage for a the negligent misrepresentation cause of action, when it granted partial summary judgment for the plaintiff. Id. citing Manufacturers and Merchants Mutual Insurance Company v. Harvey, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998). To support their negligent misrepresentation claim, the Plaintiffs in Collins incorporated facts such as fraudulent inducement and acts and alleged Collins sold, leased, and distributed machines that were equipped in a manner as to permit manipulation and that were configured to be used in a manner that violated laws expressly designed to protect the public from the lure of excessive gambling. The Collins court found that such allegations do not support a claim for negligent conduct. Therefore, because the negligent misrepresentation claim incorporated the same facts and did not allege an "occurrence," the Court held that the negligent misrepresentation cause of action did not trigger the insurance company's duty to defend. Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 579, 666 S.E.2d 897, 900 (2008).

While neither the Demand for Arbitration nor the Pre-Trial Brief cite fraudulent activity on the part of the insured, the Demand does state that Johnson "wrongly told" claimants that he could obtain the variance required to build their structure. South Carolina case law clearly holds that an "occurrence" sufficient to invoke a duty to defend under a standard policy must be accidental in nature. Wrongful conduct resulting in injury does not constitute an occurrence - insurance policies are intended to insure only against accidents. See L-J, Inc. v. Bituminous Fire and Marine Insurance Co., 366 S.C. 117, 621 S.E.2d 33 (2005). Therefore, there is no duty to defend the insured for wrongful acts. See State Farm Fire and Cas. Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132 (Ct. App. 2000). Even though passages of Johnson's testimony while pleading

¹ Many courts have held that negligent misrepresentation is not an "occurrence" because the tortfeasor's intent to induce reliance on the representation or the foreseeability of the injury resulting from the misrepresentation remove the act from the realm of accidental happenings. See, e.g., Holz-Her U.S., Inc. v. U.S. Fidelity and Guar. Co., 539 S.E.2d 348 (N.C. Ct. App. 2000); Nationwide Property & Cas. v. Comer, 559 F. Supp. 2d 685 (S.D. W. Va. 2008);

for a variance at a BZA hearing indicate that he made a mistake in hindsight, he nevertheless wrongfully and willfully told the claimants that he could obtain a variance in order to induce them into hiring him for the project. To hold that an insurance policy must cover all unkept promises made by its insureds would create a windfall effect, giving rise to a different meaning of "accident" than intended by public policy and South Carolina courts. Accordingly, labeling a cause of action as "negligent misrepresentation" is not sufficient to establish an accidental "occurrence" under the policy in issue and not does trigger a duty to defend. Therefore, summary judgment should be granted to Defendant.

B. Exclusions and Definitions Within the Policy Operate to Bar Coverage of the Claims

Insurers have the right to limit their liability and to impose whatever conditions they desire upon an insured, provided they are not in contravention of some statutory inhibition or public policy. Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Parker, 282 S.C. 546, 550-51, 320 S.E.2d 458, 461 (Ct. App. 1984)(citations omitted). Exclusions in an insurance policy must be read independently of each other rather than cumulatively. Engineered Prods., Inc. v. Aetna Cas. & Sur. Co., 295 S.C. 375, 378, 368 S.E.2d 674, 675 (Ct. App. 1988). Specifically, "[i]f any one exclusion applies there should be no coverage, regardless of inferences that might be argued on the basis of exceptions or qualifications contained in other exclusions. There is no instance in which an exclusion can properly be regarded as inconsistent with another exclusion, since they bear no relationship with one another." Id. (quoting Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (1979)).

i. The "Your Work" Exclusion Bars Coverage of the Claims

Association also denied coverage based on the following exclusion, commonly known as the "your work" exclusion:

FAULTY, DEFECTIVE OR POOR WORKMANSHIP EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Exclusion I. Damage to Your Work of Section I – Coverage A. Bodily Injury and Property Damage Liability, is deleted and replaced with:

I. Faulty, Defective or Poor Workmanship Exclusion

This insurance does not apply to any claim or "suit" for the cost of repair, replacement, adjustment, removal, loss of use, inspection, disposal, or otherwise making good any faulty, defective or poor workmanship in "your work" for which any insured or any insured's employees, contractors, or subcontractors may be liable.

This exclusion does not include "property damage" included in the "products-completed operations hazard." To property other than the poor workmanship in "your work"

(See Policy, attached as Exhibit A to Complaint.) Typical CGL policies include this exclusion which excludes coverage for faulty workmanship by the insured, and this exclusion has been upheld by South Carolina courts. See e.g. Century Indemnity Co. v. Golden Hills Builders, Inc., et al., 348 S.C. 559, 561 S.E.2d 355 (2002). (No duty to defend in a declaratory judgment action when the policy had a "faulty workmanship provision" and excluded coverage for property damage to "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it" and the damage was caused to substrate and framing of a house because of the improper installation of stucco exterior.) Id. The Golden Hills Court discussed the difference between insuring "business risks" (which are not covered by a CGL policy) and "consequential risks that stem from work" (which insurance is intended to cover). Id.

The Demand for Arbitration alleges that "Respondents represented Claimants before Aiken Board of Zoning Appeals [r]espondents then built the building." (See Demand for Arbitration, attached as Exhibit B to Complaint.) 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..." (See Pre-Trial Brief p. 1, attached as Exhibit D to Complaint.) Clearly, it appears that at least a portion of the damages alleged by the Plaintiffs resulted from faulty workmanship. Finally, in their Complaint, Plaintiffs 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." (See Complaint, pp 8-9, ¶32.) To the extent that the Plaintiffs' damages involve the repair or replacement of Johnson's faulty workmanship, those damages are not covered. Therefore, this exclusion would operate to bar coverage for any such claims for damage.

ii. The Contract at Issue Was Not an "Insured Contract"

Paragraph 9 of the Policy at issue defines "Insured contract." (See Policy, attached as Exhibit A to Complaint.) The contract at issue was for the construction of a paddock and stable. Endorsement CG 24 26 07 04 contained within the policy modifies the meaning of "Insured contract" such that the contract at issue between Johnson and Plaintiffs was not covered under the Policy. Therefore, no coverage for any claim arising out of the contract between Johnson and Plaintiffs is covered under the plain meaning of the Policy, and Association owes no duty to defend any such claims.

iii. The "Products-Completed Operations Hazard" Exclusion Operates to Bar Coverage

As referenced above, the Policy at issue contains the following definition:

"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 earliest 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.

b. Does not include "bodily injury" or "property damage" arising out of:

- 1) The transportation of property, unless The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of a vehicle by any insured;
- 2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- 3) Products or operations for which the classification listed, in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

(See Policy at p. 15 of 16, attached as Exhibit A to Complaint.) Based on Association's review of the Pre-Trial Brief, coverage was denied under the Products-Completed Operations Hazard ("PCOH") because Plaintiffs alleged that the stable was "not even now finished." (See Pre-Trial Brief at p. 11, attached as Exhibit D to Complaint.)

By its plain meaning, products-completed operations coverage applies when the insured contractor completes work on a project. Accordingly, "[w]ork that has not yet been completed" is still in progress and not covered under the products-completed operations coverage. Similarly, work that has not been abandoned is still in progress and not covered under products-completed operations coverage. Conversely, when an insured abandons work on a project the insured has effectively "completed" its work for that project, even if the project remains unfinished, thus invoking products-completed operations coverage. Consequently, this exclusion applies when work has been completed or abandoned. Laidlaw Environmental Services (TOC), Inc. v. Aetna Cas. & Sur. Co. of Illinois, 338 S.C. 43, 48-49, 524 S.E.2d 847, 850 (Ct. App. 1999). The Pre-Trial Brief alleges that Johnson "refused to complete the stable per the original intended agreement" even after the Plaintiffs gave him an opportunity to mitigate his damages. (See Pre-Trial Brief pp. 9-10, attached as Exhibit D to Complaint.) Therefore, Johnson's abandonment invoked the Products-Completed Operations exclusion and precludes Plaintiffs' claims.

iv. Intentional Acts Are Not Covered Under the Policy

The underlying Demand for Arbitration alleges Johnson "wrongfully told claimants that an addition to the original plans was permissible." (See Demand for Arbitration, attached as Exhibit B to Complaint)(emphasis added.) This language is clearly indicative of intentional activity. Despite the label of a cause of action for "negligent misrepresentation," to the asserted allegations, it is clear that this cause of action is based upon the intentional conduct on the part of Johnson. Johnson intended for the Waldes to rely on his representation in order to induce them into paying him additional money for a larger project. The nature of this alleged "wrongful" conduct is intentional and not negligent or accidental.

In the Complaint, Plaintiffs attempt to remedy this problem by citing statements from the Pre-Trial Brief that were made by Johnson in the BZA hearing. (See Complaint, pp. 9-10, ¶36). The Pre-Trial Brief alleges Johnson "had no inkling, no intent or anything that there was a height issue" and "had he known all of these regulations, he would not have made any modifications on the building permit application." (See Pre-Trial Brief attached to Complaint as Exhibit D, pp. 8-9; see also Complaint, pp. 9-10, ¶36.) However, the Pre-Trial Brief also states that "[a] claim for negligent misrepresentation is proper where the misrepresentation "induced the plaintiff to enter a contract or business transaction." Redwend Limited Partnership v. Edwards, 581 S.E.2d 496, 504 (Ct. App. 2003). This type of inducement does not give rise to a duty to defend in South Carolina. See Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573 (2008), supra. Accordingly, labeling a cause of action as "negligent misrepresentation" is not sufficient to establish an accidental occurrence under the policy in issue. Therefore, summary judgment is proper, as Defendant Association had no duty to defend Johnson for his allegedly "wrongful" conduct.

II. ASSOCIATION DID NOT BREACH ITS CONTRACT BY REFUSING TO DEFEND OR INDEMNIFY JOHNSON BECAUSE NO DUTY EXISTED

If the facts fail to bring a claim within policy coverage, an insurer has no duty to defend. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). As outlined above, none of the facts alleged in the Demand for Arbitration or in Plaintiffs' Pre-Trial Brief give rise to coverage under the subject policy. Association has, at all times, maintained its position that coverage was precluded under the Policy as discussed herein. Plaintiffs have not produced any evidence to present a question of fact otherwise. Therefore, Association continues to maintain its position that it owed no duty to defend, and requests this court grant summary judgment that no duty to defend existed on the part of Association.

III. COSTS AND FEES

Plaintiffs in their Motion for Partial Summary Judgment seek Johnson's costs and attorney's fees incurred in the defense of the Arbitration as well as costs and attorney's fees associated with the present action. The mere fact that an insured prevails on his breach of contract action does not, in and of itself, justify an award of attorneys' fees and costs pursuant to Section 38-59-40. Rather, an award of attorneys' fees and costs pursuant to Section 38-59-40 is only permitted where the insurer's failure to pay the claim was "without reasonable cause or in bad faith." Shiftlet v. Allstate Ins. Co., 451 F.Supp.2d 763, 773 (D.S.C. 2006) (finding that because Allstate's refusal to pay the claim was not without reasonable cause or in bad faith, the plaintiff was not entitled to attorneys' fees). A number of courts have denied attorneys' fees when an insurer's refusal to pay is based on a sufficiently debatable area of law. See Esler v. United Services Automobile Association, 273 S.C. 259, 255 S.E.2d 676 (S.C. 1979) (interpretation earlier underinsured statute was sufficiently questionable to justify insurer's refusal to pay). Even if this court finds an issue of fact exists as to Association's grounds for denial of coverage, Plaintiffs have not presented any evidence that Association's refusal to defend was not without reasonable cause. Therefore, Plaintiffs are not entitled to costs or fees association with either the underlying Arbitration or the instant lawsuit.

Conclusion

Plaintiffs have alleged breach of contract against Association Insurance Company. There is no evidence to support Plaintiffs' claim that Association owed a duty to defend Johnson in the underlying Arbitration, and thus no questions of material fact; therefore, Defendant's Motion for Summary Judgment should be granted.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: Jennifer Blanchard

R. MICHAEL ETHRIDGE

State Bar No.: 16892

JENNIFER L. BLANCHARD

State Bar No.: 74841

Attorneys for Defendant
Association Insurance Company

40 Calhoun Street, Suite 400
Charleston, SC 29401-3531

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

WILLIAM AND MARY FRANCES
WALDE, as assignees of Johnson
Construction Company of Aiken, Inc.

Plaintiffs,

vs.

ASSOCIATION INSURANCE
COMPANY

Defendant.

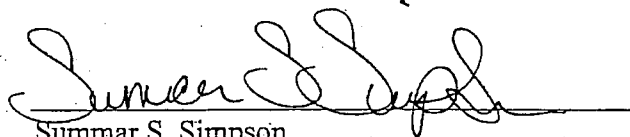
) IN THE COURT OF COMMON PLEAS
) THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2009-CP-02-02420

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing Defendant's Memorandum In Support Of Its Cross Motion For Summary Judgment upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Benjamin E. Nicholson, V
McNair Law Firm, P.A.
P. O. Box 11390
Columbia, SC 29211

This 19TH day of January, 2010.


Summar S. Simpson
Paralegal to R. Michael Ethridge

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN)

Docket No.: 2009-CP-02-02420

William & Mary Frances Walde,
as assignees of Johnson Construction
Company of Aiken, Inc.,)

Plaintiff,)

vs.)

Association Insurance Company,)

Defendant.)

**REPLY
IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT
AND IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

The Plaintiffs, William and Mary Frances Walde ("the Waldes"), submit their Reply in Support of their Motion seeking partial summary judgment and in Opposition to the Motion for Summary Judgment of the defendant, Association Insurance Company ("AIC") as follows:

I. REPLY ARGUMENTS

The deficiency in nearly every one of AIC's arguments is that it fails to consider the significant difference between the activation of its "duty to defend" under the Policy and its "duty to indemnify" under the Policy.

As its arguments fail for the duty to defend, as described in the Plaintiff's prior Memorandum and this Reply, AIC's arguments must fail. Further, the matter of AIC's duty to indemnify is not ripe for adjudication as there are questions of fact that preclude summary judgment on AIC's claims of no coverage.¹

¹ As noted in Plaintiff's prior Memorandum, AIC has the burden of proof to show that any exclusion applies to the damages or conduct claimed. *Owner's Insurance Co. v. Clayton*, 614 S.E. 2d 611, 614 (S.C. 2005). As AIC has submitted no evidence that any of its exclusions apply to the facts of this case, its Motion for Summary Judgment must fail as to those grounds for Summary Judgment.

A. The Loss Was an "Accident" or "Fortuitous" Occurrence.

AIC argues that the claims made by the Waldes in the Arbitration Demands were not accidental or 'fortuitous.' However, as stated recently by the South Carolina Supreme Court, "this Court has found that in the absence of a prescribed definition in the policy, the definition of 'accident' is '[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt.'" *Auto Owners Inc. Co. v. Newman*, 684 S.E.2d 541, 543(S.C. 2009), quoting *Green v. United Ins. Co. of America*, 174 S.E.2d 400, 402 (S.C. 1970). The key definitional point here is that the actions complained of, Johnson's improper advice, were neither contemplated nor expected by either Johnson or the Waldes.

The "occurrence" alleged in this case was the improper advice by Johnson which caused damage to a structure. As such, it is indistinguishable from cases like *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 459 S.E.2d 318 (S.C. App. 1995), where the Court held that an negligently issued termite certificate resulted in continued termite damage to a building bought by a third party in reliance on the termite report. In the underlying case, the improper advice of Johnson caused the accident, i.e, the barn being built in the wrong location and being built with an apartment not allowed by the Aiken Ordinance and the subsequent order by the City of Aiken that the barn be torn down and/or remediated.

B. The Arbitration Demand and Pre-Trial Brief State Claims for Negligence.

As stated by the Supreme Court in *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, "we must look beyond the label of negligence to determine if [the insurer] had a duty to defend..." 666 S.E.2d 897 (S.C. 2008). However, all of the allegations of "negligence" in *Collins* were based on "intentional, deliberate, and illegal acts executed with the purpose of addicting patrons to

gambling machines, and in our view, such alleged conduct cannot be construed as accidental in nature.” *Id.* at 899. As noted by the Supreme Court on the facts of *Collins*, there was no “possibility” of coverage based on those allegations, and thus no duty to defend. *Id.* However, unlike in *Collins*, the allegation of the Arbitration Demand and Pre-Trial Brief create a definite “possibility” of negligent conduct. See *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 459 S.E.2d 318, 319 (S.C. App. 1995)(“If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend.”)(Emphasis added.)

AIC argues that the use of the word “wrongly” as used in the first Arbitration Demand means non-fortuitous conduct. This is a self-serving definition of the word ‘wrongly.’ The use of the word “wrongly” in the Arbitration Demand does not equate to “fraudulent”, as argued by AIC. For example, definitions of the word “wrong” include, among others, to mean “not in conformity with fact or truth; incorrect,” “not fitting or suitable,” “not in accordance with an established usage, method, or procedure,” or when used as an adverb, “in a wrong manner; mistakenly or erroneously.” *American Heritage Dictionary* (2nd Ed. 1982); *www.Dictionary.com*. In fact, most definitions of the word “wrong” concern mistaken or negligent conduct, rather than intentional conduct. See *www.Dictionary.com*. Thus, the term ‘wrongly’ suggests negligence, not fraud.

“In examining the complaint, a court must look beyond the labels describing the acts to the acts themselves which form the basis of the claim against the insured.” *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 666 S.E.2d 897, 899 (S.C. 2008). The Arbitration Demand alleged that Johnson acted “wrongly.” Included in the adverb definition of “wrong” is “in a wrong manner; mistakenly or erroneously.” This clearly suggests accidental wrongfulness. Also, as stated in the Memorandum, the Pre-Trial Brief specifically alleged that Johnson undertook a duty to advise the Waldes with regard to the BZA and the Aiken County Ordinance. Breach of such a duty was

negligence (whether labeled negligence or not). *Crowley v. Spivey*, 329 S.E.2d 774, 780 (S.C. App. 1985). Thus, when the allegations of the Pre-Trial brief are examined, there clearly was stated a claim not only for negligent misrepresentation, but one for negligence as well.

C. Property Damage was a Covered Loss.

The damage alleged qualifies as "property damage" in several ways. First, there was "physical damage" to the barn: it had to be partially torn down. *See Auto Owners Ins. Co. v. Rhodes*, 682 S.E.2d 857, 868-69 (S.C. App. 2009)(Diminution in value of property due to loss of permits to put up signs was "property damage.") Second, there was also a 'loss of use' of the barn as it could not be used due to the negligent representations of Johnson that it could be built with an accessory apartment and his negligence in failing to tell the Waldes that it could not be built without a Special Exception and Variance to the Aiken County Building Ordinance.

In a similar case, the United States District Court in Colorado held allegations that the failure of a contractor to have a house designed to meet a county's height restrictions that would result in the partially-completed house that was built having to be torn down sufficiently alleged "property damage" to activate the insurer's duty to defend. *American Family Mutual Ins. Co. v. Teamcorp, Inc.*, 2009 WL 3077836 * 13 (D. Colo. September 22, 2009). Thus, the Arbitration Demand and Pre-Trial Brief clearly allege "property damage" covered by the Policy.

D. The Intentional Act Exclusion Does Not Apply.

AIC confuses **intentional conduct** with **intended results** of intentional conduct. The former is covered if there is negligence. The latter is not. "The South Carolina Supreme Court has held that, for an act to be an intentional act excluded by the intentional act exclusion of a policy, 1) the act which produces the loss must be intentional, and 2) the results of the act must be intended." *Manufacturers and Merchants Mutual Ins. Co. v. Harvey*, 498 S.E.2d 222, (S.C. App. 1998) *citing*

Miller v. Fidelity-Phoenix Ins. Co., 231 S.E.2d 701 (S.C. 1977). There is no allegation that Johnson intended that his negligent representation of the Waldes before the BZA cause the barn to be built in the wrong place or caused it to be built too high. Indeed, it is nonsensical to construe the Arbitration Demands as alleging that Johnson intentionally misled the Waldes; there is not a shred of any allegation to that effect.

E. The “Your Work” and “Products-Completed Operations Hazard” Exclusions Do Not Apply.

As stated in Plaintiff’s Memorandum, AIC’s interpretation of the “your work” and “products-completed operations hazard” coverage limitations do not apply to the present set of facts as its interpretation does not separate different projects performed by an insured from one general category of ‘your work.’ In such a case, the exclusion would destroy all coverage as to any structure an insured built where it was damaged by some independent work by an insured. As noted by the South Carolina Court of Appeals, the products-completed operations hazard exclusion “cannot serve as a broadly written catch-all exclusion that would prohibit recovery no matter what consequences ‘arise out of’ the product of the insured.” *Auto Owners Ins. Co. v. Rhodes*, 682 S.E.2d 857, 870 (S.C. App. 2009). Thus, the exclusions cannot apply.

II. CONCLUSION

The arguments of AIC must fail because they contemplate a case that was not alleged. AIC’s arguments depend on the Court finding that there was an allegation that Johnson’s actions before the BZA and its representations to the Waldes were absolutely and necessarily part of the construction of the barn. This was not the case, as the former acts preceded and were independent of the latter. Further, AIC fails to recognize that the mere possibility of a claim under its policy triggers the duty to defend, which is the subject matter of the Waldes’ Motion. Finally, AIC fails to

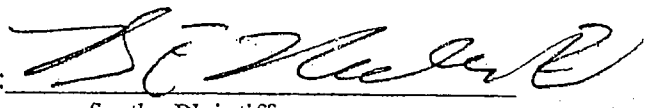
submit evidence in support of its Motion that the facts fall within any of the exclusions it argues;
thus, its Motion for Summary Judgment must be denied.

WHEREFORE, the Plaintiffs request that the Court grant the relief requested.

Respectfully submitted,

Benjamin E. Nicholson, V
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, SC 29211
803.799.9800
nnicholson@mcnair.net

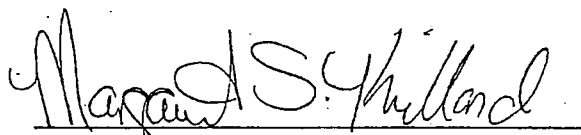
Columbia, SC
January 19, 2010

By: 
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I, Margaret S. Kirkland, an employee of McNair Law Firm, P.A., do hereby certify that I have served the foregoing *Plaintiffs' Reply In Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment* by mailing same via U.S. Mail, first class postage affixed thereto, on the 19th day of January, 2010 to the following address:

Jennifer L. Blanchard
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Attorneys for the Defendant


Margaret S. Kirkland

1 STATE OF SOUTH CAROLINA

2 COUNTY OF AIKEN

CIRCUIT COURT
2009-CP-02-02420

3
4 WILLIAM AND MARY FRANCES

5 WALDE, et al,
Plaintiff,

6 -vs-

TRANSCRIPT OF RECORD

7 ASSOCIATION INSURANCE COMPANY,
8 Defendant.

9
10 Heard on Wednesday, January 20, 2010

11 Aiken, South Carolina

12 BEFORE:

13 THE HONORABLE EDGAR W. DICKSON
14
15

16 APPEARANCES:

17 Counsel on Behalf of the Plaintiff:
Benjamin Nicholson, Esq.

18
19 Counsel on Behalf of the Defendant:
Jennifer Blanchard McCoy, Esq.

20
21
22 Cheri L. Young, RPR
Circuit Court Reporter
23 P O Box 1154
Aiken, SC 29802-1154
24
25

1 ON WEDNESDAY, JANUARY 20, 2010 AT 11:36 A.M.:

2 THE COURT: This is Walde versus Association.

3 MR. NICHOLSON: Walde versus Association
4 Insurance Company.

5 THE COURT: Okay. And Mr. Nicholson?

6 MR. NICHOLSON: Yes, sir. Ben Nicholson here for
7 the Plaintiff.

8 THE COURT: And Ms. Blanchard?

9 MS. BLANCHARD: Yes, sir.. That's me.

10 THE COURT: And let's see. This is --
11 Mr. Nicholson, this is your motion.

12 MR. NICHOLSON: Your Honor, there are two
13 motions.

14 THE COURT: Oh. There are two motions..

15 MR. NICHOLSON: I have a motion for partial
16 summary judgment on behalf of the Plaintiff and the
17 Defendant insurance company has a motion for summary
18 judgment that we agreed to be heard.

19 THE COURT: So you won't have to come back and
20 wait another day, is that correct?

21 MR. NICHOLSON: As much as we enjoy it.

22 THE COURT: Yes, sir. I know, I know.

23 MR. NICHOLSON: We didn't want to subject you to
24 hearing insurance coverage matters twice.

25 MS. BLANCHARD: Twice, a bit much.

1 THE COURT: I appreciate that. So, who wants to
2 go first?

3 MR. NICHOLSON: Your Honor, I think that we filed
4 first and since we're the Plaintiff seeking partial
5 summary judgment, I might be able to give a little more
6 factual background in terms of where we're coming from in
7 this whole thing.

8 THE COURT: All right.

9 MR. NICHOLSON: May it please the Court.

10 THE COURT: Yes, sir.

11 MR. NICHOLSON: Your Honor, I represent Bill and
12 Mary Frances Walde, who are the assignees of the right to
13 sue an insurance company.

14 So really what we're talking about today will be
15 the rights between Johnson Construction Company and its
16 comprehensive general liability carrier which I will call
17 AIC which is the Defendant in this matter.

18 The Waldes are Plaintiffs by virtue of a
19 settlement with Johnson Construction. Johnson
20 Construction was originally represented by Andy Griffith
21 who is back here in the room. He and I butted heads for a
22 while before we finally reached a resolution.

23 But part of what we're talking about here today
24 involves Mr. Griffith's attempts to get AIC to insure
25 Johnson Construction in the lawsuit my clients brought.

1 So, our motion is for partial summary judgment
2 only and on a very limited part of the case. The motion
3 is on the basis that AIC owed a duty to defend Johnson
4 Construction in an arbitration demand filed by the Waldes
5 against Johnson Construction. This is not a motion
6 seeking summary judgment on indemnification for the
7 settlement or anything like that. This is purely an issue
8 of law for the Court.

9 That is, did the arbitration demand and the
10 subsequent amplification of the arbitration demand in the
11 pretrial brief contain sufficient facts such that the
12 insurer owed a duty to defend Johnson.

13 Again, Your Honor, that is an issue of law for
14 the Court.

15 And to give -- before I get into the facts, if I
16 could briefly cover a little bit the law of the duty to
17 defend versus duty to indemnify an insurance company has
18 for its insured because that's very important because the
19 duty to defend here is much, much broader than the duty to
20 indemnify.

21 Essentially, if the complaint or in this case the
22 arbitration demand, states the claimant has any
23 possibility for coverage, whether it's ambiguous or not
24 fully stated, but if there's any possibility for coverage
25 under any claim, not all the claims but any claim, the

1 insurer owes the duty of defense.

2 The reason for that is defined by South Carolina
3 Courts is that otherwise insurers would opt out of
4 defending companies and persons left and right if they
5 could find some excuse in the complaint. So what the
6 courts have decided is that if the complaint can be
7 construed in any way for coverage, then there's a duty to
8 defend.

9 And it is the Court's responsibility to look at
10 the arbitration matter in the complaint and determine if
11 those facts, the coverage falls within those facts or
12 could possibly fall within those facts.

13 So, again, with those statements in mind, let me
14 give you a little bit of factual background in this
15 matter. What happened here were two discreet projects, we
16 believe, that Johnson Construction had for Waldes. The
17 Waldes before they filed their arbitration demand --
18 they're out of state. They live out of state. They had
19 some property here in Aiken and wanted to build a barn and
20 paddock behind a house in the city limits of Aiken.
21 Because they were out of state, they didn't really know
22 anything about handling matters involving the zoning
23 ordinance and that sort of thing.

24 So they hired Mr. Johnson and Johnson
25 Construction and paid him \$500 to advise them what they

1 needed to do and what variances or special exceptions they
2 needed for the Aiken Board of Zoning Appeals. In fact,
3 Mr. Johnson agreed to do that and he did.

4 He appeared before the Aiken Board of Zoning
5 Appeals and obtained a variance and special exception to
6 allow a barn and a paddock for horses to be built behind
7 the Waldes' house in the City of Aiken.

8 After they received the notification from the
9 Board of Zoning Appeals that this was approved, the Waldes
10 then entered into a construction contract with Johnson
11 Construction. Now it's our position that those are two
12 discreet projects. And that the harm that occurred in
13 this case that is at issue in this motion was what Johnson
14 did with regard to his representations to the Waldes and
15 his representation of them before the Board of Zoning
16 Appeals.

17 And what those representations were were that the
18 Waldes could build the barn and paddock in a certain
19 location. The representations were that the barn could be
20 built with an apartment on top of it. It could be built
21 to a certain height. And there was also a representation
22 that it would be -- generally that Mr. Johnson was capable
23 of doing all of this competently and adequately.

24 Now, what happened is, is that the Waldes were
25 relying on this. They entered into a construction

1 contract with Johnson to actually construct the barn and
2 paddock.

3 And lo and behold, it's about 90 percent complete
4 when the City issues a stop-work order and says, wait a
5 minute, you're in violation of the zoning ordinance
6 because, A., you built it in the wrong place. You built
7 it not where we said you could build it, but it's in a
8 different location. B., you built it too high. C., you
9 built it with an apartment that's not allowed.

10 All of these things were things that Mr. Johnson
11 had told the Waldes that were permissible prior to them
12 entering into a construction contract with Johnson
13 Construction Company.

14 So, the Board of Zoning Appeals then issues an
15 order: Tear it down. Now remember, this thing's 90
16 percent complete.

17 So, what happens is that we have damage in that
18 the barn, and there's some mitigation occurs, and I'll get
19 to that in a minute on the time line; but we have damage
20 because the barn literally, at least part of the barn
21 ended up having to be torn off and rebuilt.

22 So the Waldes filed an arbitration demand. They
23 terminate the contract with Mr. Johnson for construction
24 and filed an arbitration demand against him. And that
25 arbitration demand is quoted in the complaint that we

1 filed and also of course attached the complaint.

2 But, the arbitration demand said basically that,
3 the operative things are, it's also in our memorandum at
4 page three, said respondents, meaning Johnson individually
5 and his company, represented claimants, the Waldes, before
6 the Aiken Board of Zoning Appeals to obtain a variance to
7 build a paddock and stable for claimants. The respondents
8 then built the building. Respondents obtained the
9 variance but then built the building in the wrong location
10 and wrongly told claimants that an addition to original
11 plans was permissible.

12 The BZA has now ordered the building removed.
13 Claimant's claim breach of contract, negligent
14 misrepresentation and breach of fiduciary duty seeking
15 actual damages for money already paid to respondents and
16 costs to demolish and move the building to the correct
17 location.

18 So, Your Honor, we have an arbitration demand
19 that initially primes the insurers duty to defend.
20 Mr. Griffith being the good lawyer that he was immediately
21 sent that in to the insurer who sent a denial of coverage
22 letter back saying that we not only don't have coverage,
23 we don't have a duty to defend, at which point
24 Mr. Griffith proceeded to represent Mr. Johnson
25 Construction directly.

1 Later the Waldes appeared before the Board of
2 Zoning Appeals and got them to back off a little bit in
3 that they allowed the building to stay in the same
4 location. The Waldes and Johnson agreed that Johnson
5 could actually do the tear-down so he could mitigate the
6 damages. Nevertheless, he still had damage to the
7 original structure.

8 We filed a pretrial brief which as the Court
9 knows arbitration demands are even scantier than
10 complaints and notice pleadings in terms of the number of
11 facts that have to be pled. So we provided a pretrial
12 brief that amplified the claims and Mr. Griffith, again,
13 being the good lawyer that he is, sent the pretrial brief
14 to the insurance company. They looked it over and again
15 denied coverage on essentially the same grounds that they
16 denied coverage before.

17 The case settled before trial. Amongst the
18 relief that the Waldes got from Johnson Construction was
19 also an assignment for Johnson Construction's rights
20 against its insurance company, AIC, including the duty to
21 defend.

22 And so what we're here today on is simply the
23 fact that AIC wrongfully refused to defend Johnson
24 Construction in that case.

25 And the Court can so hold as a matter of law

1 because it is an issue of law for the Court. And should
2 the Court so hold, then we would also ask that the Court
3 hold that AIC is responsible to pay the reasonable
4 attorney's fees and costs of Johnson Construction that
5 they paid to Mr. Griffith. And I know Mr. Griffith's fees
6 are reasonable because he's a reasonable man, but -- and
7 as well as pay our reasonable fees and costs in this
8 action that South Carolina expressly provides. We're not
9 asking for a damages award at this point, just for
10 liability.

11 Now, Your Honor, in terms of the actual policy,
12 there has to be an occurrence that causes property
13 damage. That's pretty standard in comprehensive general
14 liability policies.

15 In this case the occurrence that's alleged was
16 the breach of duty of care by Johnson with regard to the
17 first undertaking that he had for the Waldes. That is,
18 his representation of them before the Board of Zoning
19 Appeals and his advice to them regarding what he could get
20 and what he did get before the Board of Zoning Appeals.

21 Also, as alleged in the arbitration demand, there
22 was a wrongful location of the building. Now ultimately
23 the location wasn't an issue that resulted in damages
24 because we got to keep the location. The Waldes went back
25 before the Board of Zoning Appeals. They let them keep it

1 there. They just said, tear down the apartment and lower
2 it.

3 But, again, the Court at this stage only looks at
4 the complaint and what's stated in the complaint. And
5 what's stated in the arbitration demand is that he
6 wrongfully located the building.

7 And there's South Carolina precedent on point,
8 Boggs versus Aetna, our South Carolina Supreme Court said
9 that a negligent location of a house on a lot by a
10 contractor was an occurrence under the policy. So we
11 actually have, we think, case law on point. Negligent
12 location of a house is an occurrence under a comprehensive
13 general liability policy.

14 We also cited a case that I've handled up to your
15 clerk that came out in September in Colorado, District
16 Court in Colorado, American Family Mutual Insurance
17 Company versus Teamcorp where the failure to contract and
18 to get the proper height restrictions with regard to a
19 house that it constructed was an occurrence under a
20 policy.

21 There are several other cases in South Carolina
22 that are similar. Isle of Palms Pest Control, the
23 negligent issue of termites letter that resulted in damage
24 to a house. Gordon-Gallop Realtors was a case where the
25 court -- our courts held that -- Supreme Court held there

1 was, that negligent misrepresentation was an occurrence.

2 And then, Your Honor, although the pretrial brief
3 that -- said that and the arbitration demand said
4 negligent misrepresentation, there are also from the facts
5 as stated in the arbitration demand and in the pretrial
6 brief clearly within a straight negligence claim because
7 there was an undertaking. Look at Crowley versus Spivey.
8 It was an undertaking of the duty by Mr. Johnson to advise
9 my clients. He advised them. He advised them
10 improperly. He breached his duty of care.

11 So if you read -- a fair reading of the
12 arbitration demand and the pretrial brief shows claims for
13 negligent misrepresentation and negligence. There's some
14 argument by the insurer that the word -- use of the word
15 wrongful in the arbitration demand means intentional.

16 But to the contrary, if the Court would notice in
17 our reply brief, that if you look up the definition of
18 wrong or wrongful in places like the American Heritage
19 Dictionary or Dictionary dot com, which is what everybody
20 looks at these days, the word is defined in most places as
21 mistaken, erroneous.

22 So, the term wrongful means negligence as far as
23 this demand is construed. And, again, if there's any
24 ambiguity, if there's any doubt to be resolved as to what
25 it means, those doubts are resolved in favor of the

1 insured and in favor of the duty to defend.

2 I've talked about the occurrence. Now I'm going
3 to talk about property damage.

4 And there are two discussions here of property
5 damage. One is property damage in the sense of what is
6 covered. And, two, in the sense of what is not excluded.
7 And so, talking about the property damage in terms of what
8 is covered, again, we get back to the concepts of two
9 separate jobs.

10 The projects were separate. The advice as to the
11 BZA and the zoning ordinance was one set, one project.
12 The building of the barn was a second and separate
13 project. It was conditioned on the first project being
14 successful but, you know, the Waldes very well could have
15 paid Mr. Johnson \$500 to get their advice and then hired
16 another contractor to build this barn here.

17 And I suspect that if that had happened, we
18 wouldn't be here in this position. The insurance company
19 would have defended and paid up. But I think the problem
20 the insurance company has is that they're trying to make
21 this all one big project and not two projects.

22 And clearly, comprehensive general liability
23 insurance doesn't cover a contractor's own defective work,
24 meaning that if the contractor hammers the nail in
25 improperly, his comprehensive general liability carrier's

1 insurance is not going to cover him putting the nail in
2 the right way. We got no beef with that.

3 But in this situation, you've got a barn under a
4 separate contract that was affected by conduct under a
5 previous deal, and previous work that the contractor had.
6 So it's sort of akin to if the contractor had built a
7 house on Lot A. and completed it and then built a house
8 right next to it on Lot B., and in the first house he put
9 in a defective lighting fixture and it caught on fire and
10 burned the first house down but the fire spread and burned
11 the second house down that he was working on.

12 I don't think there's any question that his
13 insurance carrier under what's called a completed-products
14 operation hazard coverage would pay for the second house
15 being burned down because he negligently constructed the
16 first house.

17 So that essentially is, we think, the principle
18 that's applicable here. Again, there was physical
19 damage. The house -- the barn had to be partially torn
20 down. There was obviously a loss of use, loss of value.
21 We think if you look at the Auto Owners Insurance versus
22 Rhodes case by our South Carolina Court of Appeals case in
23 2009, that shows that the loss of use and diminution of
24 value by the barn having to be torn down is property
25 damage under the comprehensive general liability policy.

1 Also, again, I refer to that District of Colorado
2 case, the Teamcorp Case, where they held that tearing down
3 of the building was physical damage under the CGL policy.

4 So to summarize quickly why we think there's
5 coverage. We got a negligent representation which equals
6 an occurrence. You got damage to that project that
7 occurred by virtue of what he did in a prior project. And
8 the damage, the physical damage was the building had to be
9 partially attorney down.

10 Now that doesn't end the analysis as much as I
11 wish it did.

12 THE COURT: All right, sir.

13 MR. NICHOLSON: We have the exclusions in the
14 policy that the insurer has raised. But I think it's very
15 important at this point to note that it's clear that the
16 law in South Carolina is that the insurer has the burden
17 of demonstrating that the exclusion applies in the
18 particular case and the particular facts that it's being
19 applied to.

20 And in duty to defend situations, it goes even
21 further because in a duty to defend case they've got to
22 show that the exclusion absent -- that there's no
23 possibility that the exclusion does not apply.

24 In other words, it's almost like beyond a
25 reasonable doubt argument that the exclusion applies. I

1 mean, that's not the proper standard, but I'm just trying
2 to convey the fact that they have a tough burden, with
3 this kind of motion that we have, to overcome.

4 And they've cited a few exclusions. And I will
5 go through those quickly. First of all, they cite the
6 intentional act exclusion which essentially says, of
7 course, that the insurance company does not insure for the
8 insured's intentional acts.

9 They try to say that apparently because -- they
10 try to say that because Mr. Johnson intentionally
11 represented to the Waldes' incorrect information that's an
12 intentional act. But, under the Manufacturers and
13 Merchants Insurance Company versus Harvey case from our
14 Supreme Court, that's not the definition of intentional.

15 You've got to -- the act itself being intentional
16 isn't what you concentrate on. It's do you intend the
17 consequences. And there's no allegation anywhere, in
18 either the pretrial brief or the arbitration demand that
19 Mr. Johnson intentionally gave bad advice to the Waldes.

20 Frankly, I can't see -- there's no allegation of
21 fraudulent conduct. There's nothing like that. And the
22 Collins Holding's case from our Supreme Court that the
23 insurance company relies on where the Collins Holding's
24 case says, hey, we're going to look at the whole
25 complaint. You pled negligent misrepresentation. It's

1 really an intentional act.

2 Well in that case every fact pled involved a
3 scheme to defraud people, involved racketeering, involved
4 illegal gambling. So, yeah sure, the Court held that
5 there wasn't a single fact in the complaint in Collins
6 Holding's that supported negligence.

7 So they were right. I understand that Collins
8 Holding's but that's not case here. We don't have any
9 intentional acts alleged in our situation. So the
10 intentional act exclusion absolutely doesn't apply.

11 There's the your-work and products-completed
12 operation hazard exception to the exclusion. And it's
13 kind of confusing, if you saw my brief, people confuse
14 products-completed operations hazard insurance sometimes
15 they call it an exclusion. It's actually an additional
16 coverage that then has exclusions to it and exceptions to
17 the exclusions. So it's kind of typical insurance company
18 two-step but the bottom line is that under either of those
19 exclusions, the fact that you have one set of work being
20 advice regarding the BZA, a second project involving a
21 construction contract, the fact that we have two different
22 projects completely throws out into the work exclusion and
23 on the products-completed operation hazard coverage it
24 falls right into that because the products-completed
25 operation hazard says that the work has to be completed.

1 Well Johnson's work for the Waldes before the
2 Board of Zoning Appeals was completed before the
3 construction contract was signed and before he started
4 constructing the building.

5 So the building -- the insurer in their denial
6 letters kept saying the barn wasn't finished. Well,
7 that's true but that's irrelevant because the negligent
8 conduct at issue was the prior conduct before the BZA
9 which was finished well before construction was started.

10 So, again, Your Honor, to summarize with regard
11 to the exclusions, all we have to show is any possibility
12 that there's coverage. The insurer has to show that the,
13 on the face of the arbitration demand in the pretrial
14 brief that there was absolutely 100 percent certainty that
15 the conduct was excluded. It can't do that.

16 Your Honor, to be -- and to sort of -- to sort of
17 cover quickly my response to what will be the motion to
18 dismiss filed by the insurer because it really operates on
19 the same, a lot of the same issues, it's our position that
20 once you've established the duty to defend, that there's
21 an occurrence properly alleged and the only thing that's
22 left under the insurer's motion for summary judgment that
23 they have filed are issues of fact regarding the
24 exclusions.

25 Their motion is different from our motion. Their

1 motion is a traditional summary judgment motion when
2 there's no issue of fact. Ours is essentially an issue of
3 law that our courts have said that you analyze the
4 pleadings to determine whether or not the four corners of
5 the pleadings show that there is a possibility of
6 coverage.

7 However, the insurance company's submitted no
8 affidavits. Essentially they are relying on exclusions.
9 They have the burden of proof. And they've submitted no
10 evidence in support of their motion for summary judgment.

11 So it's simply our position, Your Honor, that
12 from our standpoint, from our partial motion for summary
13 judgment, that the arbitration demand in the pretrial
14 brief clearly shows there's a possibility of coverage
15 under this policy, that they clearly showed that the
16 exclusions could not apply, and that with regard to any
17 kind of motions on the merits that there's no evidence by
18 the insurance company to support them.

19 So thank you, Your Honor. And appreciate your
20 time.

21 THE COURT: Yes, sir. And thank you for
22 providing me with this reading material. I appreciate
23 that.

24 I think Ms. Blanchard's probably going to have a
25 different take on that.

1 MS. BLANCHARD: I'm going to have a slightly
2 different take on it, Your Honor.

3 THE COURT: Yes, ma'am.

4 MS. BLANCHARD: Mr. Nicholson did a good job.
5 Again, my name is Jennifer Blanchard. I'm here on behalf
6 of Association Insurance Company today.

7 Your Honor, this is our cross motion for summary
8 judgment as to Association's duty to defend the underlying
9 arbitration or lack thereof.

10 Association, as Mr. Nicholson told you, issued
11 Mr. Johnson a CGL or commercial general liability policy.
12 The policy -- Association's obligation under that policy
13 applies to bodily injury or in this case alleged property
14 damage caused by an occurrence.

15 Association did deny coverage to the insured
16 based on the fact that there was no occurrence based on
17 the underlying arbitration demand, our pretrial brief, no
18 property damage took place based on the underlying demand
19 or pretrial brief and the other exclusions in the policy
20 would preclude coverage.

21 And I'll move forward with my argument as to
22 those main points.

23 THE COURT: All right.

24 MS. BLANCHARD: First of all, there was no
25 occurrence, Your Honor. The policy defines occurrence

1 within its definitions as an accident including continuous
2 or repeated exposure to substantially the same general
3 harmful conditions. An occurrence is an accident, an
4 accidental happening.

5 In a West Virginia District Court case within our
6 Fourth Circuit that I've handed up, I believe, to your law
7 clerk earlier before the hearing, the Court held that an
8 alleged intentional and negligent failure to disclose
9 known defects in a house in selling a home was not an
10 occurrence --

11 THE COURT: Before you go there, which one of
12 these cases Krieger or --

13 MS. BLANCHARD: I handed you Krieger and Cooley.
14 And this one, I think I actually didn't hand up this one.
15 I do have the cite for your law clerk and I'll go ahead
16 and give you that. It's 559 Fed Sup Second 685. That's a
17 2008 case.

18 And the next case, and I know I did hand that one
19 up, Cooley versus State Farm, which is an Eastern District
20 of Arkansas case, 2009. In that case the Court ruled that
21 any alleged non disclosure or misrepresentation is not an
22 accident that resulted in property damage but was rather
23 an event that allegedly caused economic damages.

24 And that's essentially what the Plaintiffs in
25 this case alleged in their demand and the pretrial brief.

1 In our case the Plaintiffs allegedly relied upon Johnson's
2 negligent misrepresentations. However, it was apparent
3 based on a review of the demand and pretrial brief by
4 Association that it was not an accident resulting in
5 property damage but an event causing damages purely
6 economic in nature to the Plaintiffs.

7 And then the other case that I handed up was the
8 Krieger versus General Steel case, it's an Eastern
9 District of Louisiana case from 2009. In that case the
10 Court reviewed, many other courts have looked at this
11 negligent misrepresentation issue within the -- whether or
12 not it resulted in an occurrence.

13 And that Court stated that the generally-accepted
14 rule is that alleged misrepresentations do not constitute
15 an occurrence. Johnson's actions that were alleged in the
16 demand for arbitration and the pretrial brief clearly
17 don't constitute an occurrence to include property damage
18 resulting from any sort of accidental or gratuitous event.

19 Secondly, Your Honor, as to the property damage
20 aspect of the claim, Association found that no property
21 damage took place within the meaning of property damage in
22 the policy that was issued to Mr. Johnson. Property
23 damage in that policy is defined as physical injury to
24 tangible property or loss of use.

25 Plaintiff's demand in pretrial brief indicated

1 that the resulting and ensuing damage that occurred was
2 the partial demolition of the barn that Johnson built for
3 the Waldes. However, there's nothing accidental in the
4 nature of having to purposely tear down a portion of a
5 structure.

6 Plaintiff's reply brief does cite a Colorado case
7 and I believe he also handed it up to your clerk but that
8 case, I would submit to you, I reviewed it yesterday
9 afternoon, and, you know, it applies Colorado law and
10 relies on Colorado standards.

11 But I'll leave that one for you to read.

12 THE COURT: I'm glad y'all are giving me all of
13 these out-of-state cases.

14 MS. BLANCHARD: If that's any indication, Your
15 Honor.

16 But, regardless, as there was no occurrence the
17 alleged property damage doesn't rise to a duty to defend
18 on the part of the Association.

19 And there were, as Mr. Nicholson's mentioned,
20 some exclusions that Association also relied on to
21 preclude coverage under the policy. And the first one of
22 those I'll address is the intentional acts exclusion that
23 Mr. Nicholson said, you know, obviously intentional acts
24 are not covered by a CGL policy.

25 Plaintiff argues the result was unintended. The

1 unintended loss of use of the barn; that Mr. Johnson
2 didn't intend for the Plaintiffs to lose use of their
3 barn. However, the result of his misrepresentation wasn't
4 the barn being built in the wrong place. The result of
5 his acts were intentional in that the Plaintiffs relied on
6 his representations in order to form a contract with
7 Mr. Johnson.

8 He intended for them to rely. He induced them
9 into accepting his services. And the pretrial brief
10 states that the Plaintiffs in fact did, the result of his
11 misrepresentations therefore wasn't the property damage
12 itself. The result was their reliance on his getting the
13 contract for the project. So it was intentional.

14 Next, the your-work exclusion that Association
15 cites in their denial letters we would argue is applicable
16 because even if there are two separate acts, his
17 representation of them in the BZA meeting and then his,
18 you know, subsequent construction of the barn, both of
19 those acts would be precluded from coverage because
20 they're both, would be considered faulty workmanship on
21 his part.

22 And then finally, Plaintiffs also brought up the
23 products-completed operation hazard exclusion. We would
24 argue that that does apply in this case. As alleged in
25 the pretrial brief multiple times, the barn, was still

1 incomplete as of the time insured's tendered fix of this
2 matter to Association.

3 The pretrial brief stated that even after Johnson
4 was given an opportunity to mitigate his damages by fixing
5 the barn, that he still didn't complete the work. So when
6 Association was reviewing the demand in the pretrial brief
7 in deciding whether or not to cover the claim it says and
8 it's stated and even emphasized in italics, the barn has
9 not been completed to date. You read it plainly it
10 constitutes a ban on the project and therefore Association
11 determined that it had no duty to defend.

12 THE COURT: Would it break your chain of thought
13 if I asked you a question?

14 MS. BLANCHARD: No. Go ahead. Please.

15 THE COURT: So, let me just make sure I got this
16 right. Had he completed -- he's been put on notice that
17 it's built in the wrong place and it's too high. Is that
18 correct?

19 MS. BLANCHARD: Yes.

20 THE COURT: And they're on notice before they
21 finished it?

22 MS. BLANCHARD: I believe so.

23 THE COURT: Okay.

24 MS. BLANCHARD: And all my facts of course are
25 coming from just the demand and the pretrial brief.

1 THE COURT: I understand. I'm not holding you to
2 any -- but my question is this --

3 MS. BLANCHARD: Uh-huh.

4 THE COURT: -- they know it's in the wrong place,
5 they know it's too high. If they go ahead and complete
6 building of it in the wrong place and complete building it
7 too high, would it then be covered?

8 MS. BLANCHARD: Your Honor, I can take a look at
9 that, but I think our position is a little bit, you know,
10 in the pretrial brief it states he was given a chance to
11 complete the project to mitigate his damages. It's my
12 understanding that even then they still weren't completed.

13 THE COURT: Okay.

14 MS. BLANCHARD: So it's sort of a second go
15 around, even then it wasn't completed it could be amended
16 within the variance required.

17 THE COURT: Okay.

18 MS. BLANCHARD: All right. And Plaintiff's
19 counsel stated a couple cases that I just would address
20 briefly, you know, as distinguishable from the facts of
21 our case.

22 The Boggs versus Aetna case. Plaintiffs state
23 that in that case the alleged negligent location of the
24 house created an occurrence. That case is actually
25 distinguishable though because in that case there was a

1 condition creating the occurrence.

2 In other words, the house was moved and then
3 seepage of water into the house allegedly caused by the
4 insured's negligent decision to place a house in the
5 portion, was the occurrence. So it was the water seeping
6 into the house in that case was the occurrence. It wasn't
7 the wrongful location of the house.

8 The Gordon-Gallop Realtor versus Cincinnati
9 Insurance case they cited was a policy covering negligence
10 and negligent misrepresentation claim. It's a different
11 type of policy. It was analyzed in that case by the Court
12 in that case, it was an E&O policy for a real estate firm
13 expressly covering different types of actions and events.

14 So I would just bring that to your attention. I
15 think that's what I've got right now.

16 THE COURT: But to go back to the basic question
17 of, if one of your insureds gets sued --

18 MS. BLANCHARD: Uh-huh.

19 THE COURT: -- you don't have to step in and
20 defend him?

21 MS. BLANCHARD: Well, Your Honor, based on --
22 again, basically -- it's sort of a causation here. What
23 it boils down to --

24 THE COURT: That's what I want you to --

25 MS. BLANCHARD: -- if you read the demand and you

1 read the pretrial brief, they say his negligent
2 misrepresentations and the things that he said caused the
3 building to be built in the wrong place.

4 His negligent misrepresentations were intended to
5 ensure a contract between him and the Waldes. Okay. That
6 was an intentional act that he made and it states in the
7 pretrial brief that they were induced by these intentional
8 representations that he made.

9 And then the actual construction problems,
10 Association will argue, arose out of his faulty
11 workmanship and that that would be precluded under the
12 your-work exclusion.

13 THE COURT: The only faulty workmanship was that
14 it was built in the wrong place and too high?

15 MS. BLANCHARD: Correct. They don't allege any
16 other construction defects that I'm aware of.

17 THE COURT: Okay. Thank you, ma'am.

18 MS. BLANCHARD: Yes, sir.

19 THE COURT: Did you get everything?

20 MS. BLANCHARD: I think so.

21 THE COURT: Anything in reply?

22 MR. NICHOLSON: Briefly, Your Honor.

23 First of all, there were no construction defects
24 because it was built to the height it was planned to be
25 built. It was built in the place that Johnson earlier

1 directed that it be built.

2 So we're not really talking about any
3 construction defects. Now, even if there were
4 construction defects, we're not asking for that kind of
5 relief.

6 But briefly on the no-occurrence issue and
7 negligent misrepresentation, again, I point out that I
8 think that the arbitration demand and the pretrial brief
9 can be fairly read to show a duty and negligence which you
10 can look behind the pleadings and decide what it really
11 says as stated in the Collins Holding's Supreme Court
12 case.

13 Also, on page 10 of our brief we cite our string
14 of cases which all say negligent misrepresentation is
15 covered by an occurrence policy because as stated by the
16 Iowa Supreme Court, the very word negligent
17 misrepresentation, by the very word says it ain't
18 intentional.

19 So I tend to think that -- I understand there's a
20 difference of opinion on that, but I think if you look at
21 a lot of those negligent misrepresentation cases that are
22 cited by the insurers, they're more of a true fraudulent
23 kind of activity claim, which this is not what we have.

24 Finally, Your Honor, as stated in our reply
25 brief, we just have a disagreement, I suppose, on the law

1 as to what the law is on intentional act.

2 And I think it's pretty clear. We cite a South
3 Carolina Supreme Court case, actually it's a Court of
4 Appeals case cite. It says, the South Carolina Supreme
5 Court has held that for an act to be an intentional act
6 excluded by the intentional act exclusion of the policy,
7 one, the act which produces the loss must be intentional
8 and, two, the results of the act must be intended.

9 Now, there's no allegation that Mr. Johnson
10 intended that he give, number one, that he give bad
11 advice, number two, that there'd be some defect. And I
12 think it's kind of ludicrous to think that he did.

13 So I think it's simply that the insurer is
14 relying on part one of the prong that the act be
15 intentional but they haven't really concentrated on act
16 two, that the damage -- that is, that is the occurrence,
17 was intended to be caused by the insured. So, I just
18 don't think that that's applicable based on the law.

19 So, Your Honor, with that said, we appreciate
20 your time and consideration and all this great reading
21 material that Jennifer and I have bombarded you and your
22 clerk with in the last few days.

23 THE COURT: And I'm so concerned with what they
24 do in Colorado and Iowa, you know, but I do appreciate it
25 and I will read these over and get back with y'all on

1 this. Okay.

2 MR. NICHOLSON: Thank you, Your Honor.

3 THE COURT: Thank you very much. I appreciate
4 it.

5 MS. BLANCHARD: Thank you, Your Honor.

6 END OF CASE: 12:15 P.M.

7 * * *

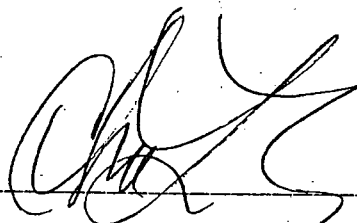
8 CERTIFICATE OF REPORTER

9 I, Cheri L. Young, Registered Professional Reporter,
10 and Official Court Reporter for the State of South
11 Carolina, do hereby certify that the foregoing transcript
12 of proceedings heard on Wednesday, January 20, 2010, in
13 Aiken, South Carolina, was reported by me using machine
14 shorthand and realtime computer-aided translation and is a
15 true, accurate and complete transcript of the proceedings
16 had and evidence introduced in the hearing of the matter.

17 I do further certify that I am neither of kin, counsel
18 nor interest to any party hereto.

19 I have hereunto set my hand this Friday, the 10th day
20 of December, 2010.

21
22
23
24
25



Cheri L. Young RPR
Official Court Reporter

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

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

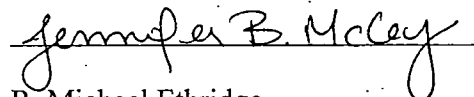
v.

Association Insurance Company,.....Appellant.

CERTIFICATE OF APPELLANT

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

This 17th day of May, 2011



R. Michael Ethridge
Jennifer B. McCoy
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
(843) 727-0307
Attorneys for Appellant