

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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in granting Plaintiffs partial Summary Judgment on the issue of duty to defend when the allegations in the underlying Demand for Arbitration do not assert an "occurrence" as defined in the Association policy?
- II. Did the trial court err in granting Plaintiffs partial Summary Judgment on the issue of duty to defend when no property damage took place within the meaning of "property damage" in the Association policy?
- III. Did the trial court err in granting Plaintiffs partial Summary Judgment on the ground that the "Your Work" exclusion in the Association policy does not apply to bar coverage?
- IV. Did the trial court err in granting Plaintiffs partial Summary Judgment on the ground that the "Products-Completed Operations Hazard" exclusion in the Association policy does not apply to bar coverage?
- V. Did the trial court err in granting Plaintiffs partial Summary Judgment on the ground that the Intentional Acts exclusion in the Association policy does not apply to bar coverage?
- VI. Did the trial court err in granting Plaintiffs partial Summary Judgment on the issue of duty to defend when the contract at issue was not an "insured contract" under the definition in the Association policy?
- VII. Did the trial court err in holding Association breached its duty to defend Johnson and by ordering Association to pay costs and fees as a result?

STATEMENT OF THE CASE

This case arises from a declination of coverage by Association Insurance Company ("Appellant") in an underlying Demand for Arbitration filed by the Plaintiffs, William and Mary Frances Walde ("Respondents"), against Association's insured, Johnson Construction Company. As part of a settlement agreement with Respondents, Johnson Construction Company assigned its right to the present action against Association.

On October 14, 2009, Respondents filed a breach of contract action against Appellant in the Aiken County Court of Common Pleas. (Compl.; R. pp. 23-151). Association thereafter filed its Answer on November 17, 2009. (Answer; R. pp. 152-161). Respondents then filed a Motion for Partial Summary Judgment on or about November 17, 2009, and the Appellant filed a cross Motion for Summary Judgment on December 18, 2009. (Respt's Notice of Mot. and Mot. for Partial Summ. J. and Appellant's Notice of Mot. and Mot. for Summ. J.; R. pp. 162-165 and pp. 166-169). The circuit court, Judge Edgar Dickson presiding, heard oral arguments for the cross motions on January 20, 2010, and granted Respondents' Motion for Partial Summary Judgment on September 2, 2010. (Order; R. pp. 2-22.) The court held that, based on the facts and law, Association Insurance Company owed Johnson a duty to defend the Waldes' claims in the underlying Arbitration. (Order; R. pp. 2-22.) The Court also ordered that Association breached its duty to defend Johnson by refusing to defend Johnson in the Arbitration. Furthermore, the Court ordered Appellant pay Respondents' attorneys fees and costs incurred in the defense of the Arbitration. Finally, the Court ordered Appellant to pay

Respondents' costs and attorneys fees arising from to the litigation portion of the lawsuit related to Association's breach of its duty to defend. (Order; R. pp. 2-22.)

Appellant filed the Notice of Appeal on September 22, 2010.

STATEMENT OF THE FACTS

Respondents contracted with Johnson Construction Company (hereinafter "Johnson") to build a horse stable on their property located in Aiken County. Respondents contended that this work was done improperly and that they sustained damage as a result. The underlying action giving rise to Respondents' Complaint was a Demand for Arbitration against Johnson. As part of a settlement agreement with Respondents, Johnson assigned its right to the present action against Appellant.

Prior to the events giving rise to the underlying action, Johnson purchased a Commercial General Liability ("CGL") insurance policy, Policy Number GLP 0003940 04, through Frank B. Norris & Co. with effective dates of July 11, 2009 to July 11, 2010. The policy was issued by Appellant. (Compl. Ex. A; R. pp. 39-105). 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 or 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 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) 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.

(Compl. Ex. A; R. pp. 39-105).

Upon information and belief, the Waldes 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 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.

(Compl. Ex. B; R. p. 106). On September 25, 2008, Appellant sent Johnson a detailed letter outlining the reasons that the acts complained of in the Demand did not trigger coverage under the policy. (Compl. Ex. C; R. pp. 107-116). In that letter,

Association cited several specific grounds for denying coverage. Upon receiving another letter from Johnson's counsel eleven months later enclosing the Waldes' 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. (Compl. Ex. E, R. pp. 136-151; Compl. Ex. D, R. pp. 117-135). Upon information and belief, on August 19, 2009, a settlement was reached between the Waldes and Johnson prior to the arbitration. (Compl. ¶ 25, R. 32). The terms of the settlement included the assignment of the current claim against Association to the Waldes. (Id.)

On October 14, 2009, Respondents 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.

(Compl.; R. pp. 26-38). Respondents seek damages in an amount not to exceed \$74,999.00. For the reasons that follow, and pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Appellant respectfully requests that this Court reverse the trial court's Order granting Respondents' Motion for Partial Summary Judgment.

STANDARD OF REVIEW

The appellate court will apply the same standard which governs the trial court under Rule 56(c), SCRPC: “the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Connor Holdings, LLC v. Cousins, 373 S.C. 81, 84, 644 S.E.2d 58, 60 (2007); Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF DUTY TO DEFEND BECAUSE COVERAGE IS PRECLUDED UNDER THE PLAIN LANGUAGE OF THE ASSOCIATION POLICY

A. THE ALLEGATIONS OF THE UNDERLYING DEMAND FOR ARBITRATION DO NOT GIVE RISE TO AN "OCCURRENCE" AS DEFINED IN THE ASSOCIATION POLICY.

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." (Compl. Ex. A; R. pp. 39-105). An "occurrence" policy covers negligent acts and omissions occurring within the policy period. "Occurrence" is defined within the subject insurance policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Id.)

If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend. Gordan-Gallup Realtors, Inc. v. Cincinnati Insurance Company, 274 S.C. 468, 470-71, 265 S.E.2d 38, 40 (1980). An insurer's duty to defend may also be determined by facts outside of the complaint that are known by the insurer. USAA Property and Casualty Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d at 791 (2008). Specifically, the Clegg court noted

[a]lthough the cases addressing an insurer's duty to defend generally limit this duty to whether the allegations in a complaint are sufficient to bring the claims within the coverage of an insurance policy, an insurer's duty to defend is not strictly controlled by the allegations in the complaint. Instead, the duty to defend may also be determined by facts outside of the complaint that are known by the insurer.

Id. Moreover, "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 insurer." Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 577, 666 S.E.2d 897, 899 (2008). This creates a duty for the insurer to investigate the facts to determine if there is the possibility of coverage before refusing to defend. Clegg, 377 S.C. at 654, 661 S.E.2d at 796. 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). For the reasons set forth below, it is clear that none of the Respondents' claims fell within the ambit of coverage. Therefore, no duty to defend on the part of Association was triggered.

In response to the claim by Johnson, Association denied a duty to defend, in part, based upon the fact that the allegations of the underlying Demand for Arbitration failed to assert an accidental occurrence as required by the policy. Those claims, set forth in "The Nature of the Dispute" portion of the underlying Demand, 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 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.

(Compl. Ex. B; R. p. 106). 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. The Waldes' Complaint also alleges in part that the language contained within the 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. (Compl. ¶ 30; R. p. 33). 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. (Compl. Ex. E; R. pp. 136-151). 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 Waldes' Pre-Trial Brief do not provide facts that give rise to an "occurrence" resulting in "property damage." (Compl. ¶ 36; R. pp. 34-35). Therefore, there is no duty to defend based on the facts alleged, and the trial court's grant of partial summary judgment in favor of Respondents should be reversed.

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. . . . [t]his 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'." (Compl. Ex. A; R. pp. 39-105). "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. The Waldes' Complaint alleges that the claim for negligent

misrepresentation located in the Demand for Arbitration and the Pre-Trial Brief resulted in damage, and therefore gives rise to coverage. (Compl.; R. pp. 26-38). The Demand for Arbitration states that Johnson "wrongly told Claimants that an addition to original plans was permissible." (Compl. Ex. B; R. p. 106). Respondents also cite portions of their own Pre-Trial Brief in the underlying action in an apparent attempt to frame the issue to allow coverage. 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.

(Compl. Ex. D, p. 8; R. p. 124). Any implication that this language in the Respondents' Pre-Trial Brief should have triggered coverage, however, is misplaced.

In South Carolina, a claim for negligent misrepresentation does not automatically trigger coverage. In Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 578, 666 S.E.2d 897, 900 (2008), our Supreme Court held that the trial court erred in finding the possibility of coverage for 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. They also alleged the machines were configured to be used in a manner that violated laws expressly designed to protect the public from the lure of excessive

gambling. Collins, 666 S.E.2d at 899. 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).

A comprehensive general liability policy, such as the one at issue, provides coverage "for all the risks of legal liability encountered by a business entity," with coverage excluded for certain specific risks. Crossman Communities of North Carolina, Inc. v. Harleystown Mutual Insurance Company, et al., No. 26909 (S. C. Sup. Ct. filed Jan. 7, 2011) (citing Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 565-66, 561 S.E.2d 355, 358 (2002)). CGL policies are not intended to insure business risks that are the normal, frequent, or predictable consequences of doing business.

Crossman at *4. 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).

Even though passages of Johnson's testimony while pleading 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. Indeed, such a ruling would give insureds the freedom to "promise the moon" to prospective clients, expecting coverage upon their failure to deliver. Accordingly, couching intentional acts in negligent terms by 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. As such, the trial court's Order granting partial Summary Judgment in favor of the Respondents was improper.

B. NO PROPERTY DAMAGE TOOK PLACE WITHIN THE MEANING OF "PROPERTY DAMAGE" IN THE ASSOCIATION POLICY

Building a structure in the "wrong location," as alleged in the Waldes' underlying Demand for Arbitration does not fall within the meaning of "property damage," above. (Compl. Ex. B; R. p. 106). Furthermore, nothing in the Demand sets forth any allegations

that the building at issue was physically injured or that any "loss of use" resulted. The mere economic hardship resulting from Johnson's inability to obtain the variance he promised to the Waldes does not constitute "property damage" which would give rise to coverage. The South Carolina Supreme Court has clearly held that a CGL policy is not intended to cover economic loss resulting from faulty workmanship. Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 563-64, 561 S.E.2d 355, 357 (2002). Also, in L-J, Inc. v. Bituminous Fire & Marine Insurance Co., 366 S.C. 117, 123-24, 621 S.E.2d 33, 36-37 (2005) our Supreme Court found that a developer's claim alleged negligent construction causing damage *only to the work product itself* (i.e., the roadway), so it was merely a claim for faulty workmanship," and, therefore, was not covered under the general contractor's CGL policy. Id. (emphasis added). The L-J court reasoned that because "faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, . . . the developer's claim did not allege an occurrence falling within the policy's scope of coverage." Id. at 123, 621 S.E.2d at 36. Likewise, in this case, any "damage" to the building at issue was to the building itself, and therefore a result of mere faulty workmanship on the part of Johnson.

In the recent Crossman v. Harleysville Mutual Ins. Co. decision, our Supreme Court conducted an in-depth review of the L-J opinion and addressed whether there can be "property damage," as defined in a CGL policy, where the damage is only to the contractor's work product, Crossman, No. 26909 (S. C. Sup. Ct. filed Jan. 7, 2011), and defined "work product" narrowly as meaning "only the alleged negligently constructed component and not the non-defective components." Id. Just as in the L-J case, Respondents in their underlying Demand for Arbitration seek the costs associated with

tearing down and rebuilding the defectively placed building. As set forth clearly in L-J and Crossman, this type of damage is not covered under South Carolina law. Therefore, as no "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.

C. THE "YOUR WORK" EXCLUSION IN THE ASSOCIATION POLICY APPLIES TO BAR COVERAGE

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)).

Association 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"

(Compl. Ex. A; R. pp. 39-105). Typical CGL policies include this exclusion which preclude 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. At issue are damages the Waldes face as a result of having to tear down and move a structure built in the wrong place. Clearly, these damages are purely economical in nature arising from a "business risk" as opposed to a "consequential risk" stemming from Johnson's work.

The Demand for Arbitration alleges that "Respondents represented Claimants before Aiken Board of Zoning Appeals [and] [r]espondents then built the building." (Compl. Ex. B; R. p. 106). The Pre-Trial Brief alleges in its introduction that Johnson "promised that he could and would build a stable in compliance with the zoning ordinance then that the builder had violated the zoning ordinance by building the stable in the wrong location and by building a different structure than what had been allowed..." (Compl. Ex. D, p. 1; R. p. 117). Finally, in their Complaint, Respondents allege that their damages arise from "the demolition of this accessory apartment and partial rebuilding of the stable as the BZA approved the location of the stable where it had been built so that the entire stable did not need to be torn down." (Compl. ¶ 32; R. pp. 33-34). To the extent that the Waldes' damages involve the repair or replacement of Johnson's faulty workmanship, those damages would clearly not be covered. Therefore, this exclusion would operate to bar coverage for any such claims for damage, and Association had no duty to defend.

D. THE "PRODUCTS-COMPLETED OPERATIONS HAZARD" EXCLUSION IN THE ASSOCIATION POLICY APPLIES 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.

(Compl. Ex. A.; R. pp. 39-105). The policy also contains Endorsement 21 34 01 87 that states "[t]his insurance does not apply to 'bodily injury' or 'property damage' included in the 'products-completed operations hazard.'" (Compl. Ex. A; R. pp. 39-105). Based on Association's review of the Pre-Trial Brief, coverage was denied under the Products-Completed Operations Hazard ("PCOH") exclusion because Respondents alleged that the stable was "not even now finished." (Compl. Ex. D; R. p. 127).

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. Likewise, 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; R. pp. 125-126). In an attempt to disclaim this exclusion, Respondents have mischaracterized Johnson's work for the Waldes as two separate projects: 1) his advice regarding the BZA and 2) the construction contract. (Tr. p. 17; R. p. 231, lines 17-25). All work, however, revolved around the construction of the stable. Therefore, despite Respondents' efforts to portray Johnson's involvement otherwise, Johnson's abandonment clearly invoked the Products-Completed Operations exclusion, precluding Respondents' claims and failing to trigger any duty to defend.

E. THE INTENTIONAL ACTS EXCLUSION IN THE ASSOCIATION POLICY APPLIES TO BAR COVERAGE

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. Intentional wrongful

conduct resulting in injury does not constitute an occurrence. Therefore, there is no duty to defend the insured for intentional harmful acts. See State Farm Fire and Cas. Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132 (Ct. App. 2000).

The underlying Demand for Arbitration alleges Johnson “wrongfully told claimants that an addition to the original plans was permissible.” (Compl. Ex. B; R. p. 106 (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. It is clear from the underlying Demand for Arbitration and Pre-Trial Brief that Johnson intended for the Waldes to rely on his representation in order to induce them into paying him additional money for a larger project. Telling the Waldes that an addition to their original plans was permissible was intentional - not accidental. Respondents correctly pointed out in their argument that, in South Carolina, 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, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998); (Tr. pp. 29-30; R. pp. 243-244). In citing that test, Respondents take the position that the “results” of Johnson’s act was the misplaced building, insisting that no one would intentionally build something in the wrong place. To the contrary, the “result” of Johnson’s misrepresentation was not the misplaced building - the “result” was, in fact, the Waldes’ reliance upon his statement and agreement to allow Johnson to perform the work and enter into a business transaction. The nature of this alleged “wrongful” conduct is intentional and not negligent or accidental.

In their Complaint, the Waldes attempt to remedy this problem by citing statements from the Pre-Trial Brief that were made by Johnson in the BZA hearing. (Compl. ¶ 36; R. pp. 34-35). 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.” (Compl. Ex. D, pp. 8-9; R. pp. 124-125; Compl. ¶ 36; R. pp. 34-35). 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. Additionally, labeling a cause of action as “negligent misrepresentation” is not sufficient to establish an accidental occurrence under the policy in issue. Therefore, Association had no duty to defend Johnson for his intentional conduct.

F. THE CONTRACT AT ISSUE WAS NOT AN "INSURED CONTRACT" UNDER THE DEFINITION IN THE ASSOCIATION POLICY

Paragraph 9 of the Policy at issue defines “[i]nsured contract.” (Compl. Ex. A; R. pp. 39-105). 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 “[i]nsured contract” such that the contract at issue between Johnson and Respondents was not covered under the Policy, as follows:

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.

(Id.) Therefore, no coverage for any claim arising out of the contract between Johnson and Respondents is covered under the plain meaning of the Policy, and Association owed no duty to defend any such claims.

In its Order, the trial court held that Association's reliance upon the "insured contract" provision within the policy is irrelevant in a duty to defend analysis unless it is the only claim made. The underlying Demand for Arbitration included a claim for breach of contract and breach of fiduciary duty, in addition to the claim for negligent misrepresentation. (Compl. Ex. B; R. p. 106). While the present duty to defend analysis hinges on the negligent misrepresentation claim, Association's reasoning for its denial of the other claims is relevant as evidence that Association acted reasonably and issued a thorough analysis of all of Respondents' claims.

II. THE TRIAL COURT ERRED IN HOLDING ASSOCIATION BREACHED ITS DUTY TO DEFEND JOHNSON AND BY ORDERING ASSOCIATION TO PAY COSTS AND FEES

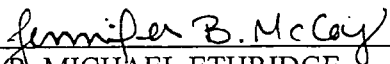
In its Order, the trial court found that Association breached its duty to defend Johnson by refusing to defend Johnson in the Arbitration and awarded the Waldes reasonable attorneys fees and costs incurred in both the Arbitration and the instant litigation. (Order, p. 19; R. p. 20). The mere fact that 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 of the South Carolina Code. S.C. Code Ann. § 38-59-40

(1976). 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." Shiflet 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). Therefore, even upon the grant of the Waldes' motion for partial Summary Judgment, the trial court cannot order costs and fees absent a finding that Association's refusal to defend was without reasonable cause. Therefore, Respondents are not entitled to costs or fees association with either the underlying Arbitration or the instant lawsuit.

CONCLUSION

For the reasons states herein and those presented at oral argument, Appellant respectfully requests that this Court reverse the Circuit Court's grant of Partial Summary Judgment in Respondents' favor.

Respectfully submitted,


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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,

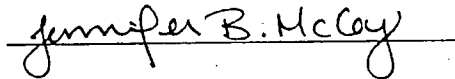
v.

Association Insurance Company,.....Appellant.

APPELLANT'S CERTIFICATE OF COMPLIANCE

The undersigned certify that the Final Brief of Appellant complies with Rule
211(b), SCACR.

This 1 day of June, 2011.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

2009-CP-02-02420

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

v

Association Insurance Company, Appellant.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES

1. The Appellant failed to appeal the trial court's holding that the allegations of breach of fiduciary duty created a duty to defend, so that it is the law of the case, thereby mooting all of Appellant's other arguments.
2. The trial court correctly held that the allegations in the underlying Demand for Arbitration and Pre-Trial Brief asserted an "occurrence" as defined in the insurance policy, and the Appellant failed to appeal an additional sustaining ground for the trial court's decision, which moots Appellant's argument.
3. The trial court correctly held that the Demand for Arbitration and Pre-Trial Brief asserted "property damage" as defined in the insurance policy.
4. The trial court correctly held that the "Your Work" and the "Products-Completed Operations Hazard Exclusion" did not apply to bar coverage because the "occurrence" complained of had been completed on a different project before the "property damage" occurred.
5. The trial court correctly held that the "Intentional Acts Exclusion" and the "Insured Contract Exclusion" did not affect Appellant's duty to defend the claims made in the underlying Demand for Arbitration and Pre-Trial Brief as claims were made other than those that could be construed as being intentional.
6. The trial court correctly ruled that the "Insured Contract" Exclusion did not preclude the duty to defend.
7. The trial court correctly held as a matter of law that Appellant breached its duty to defend it insured and therefore is liable for its insured's attorney's fees and costs in the underlying action as well as the attorney's fees and costs of its insured's assigns in bringing the present action.

STATEMENT OF FACTS

This matter arises out of a settlement of an arbitration claim by the Respondents, William and Mary Frances Walde ("the Waldes"), against Johnson Construction Company of Aiken, Inc. ("Johnson"), which was insured through a Comprehensive General Liability insurance policy by the Appellant 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. The Waldes paid Johnson Five Hundred (\$500.00) Dollars and no/cents to represent them before the BZA before they executed and went forward with a construction contract with Johnson for the barn. (R. 2; 3, n.1; 29, ¶¶12-13.) Thus, Johnson was paid separately for its work before the BZA than for its work under its construction contract later executed with the Waldes. Johnson's BZA representation was a different type of work for the Waldes than its construction of the barn. The key fact is that Johnson's efforts were two different projects undertaken for the Waldes, not all part of the same deal.

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, R. 107-116.) The Waldes subsequently filed an extensive Pre-Trial Brief which in more detail outlined the subject matter of the Arbitration Demand. (R. 117-135.) (The Arbitration Demand and the Pre-Trial Brief may hereinafter collectively referred to as "the Arbitration Demands.") Johnson tendered the Pre-Trial Brief to AIC as well and AIC still refused coverage. (See Exhibit E attached to the Complaint, R. 136-151.)

The operative allegations against Johnson by the Waldes upon which the trial court based its decision were first found in the Arbitration Demand (attached to the Complaint as Exhibit B, R. 106) 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.

(R. 106.) Thereafter, the Waldes filed a Pre-Trial Brief (attached to the Complaint as Exhibit D, R. 117-135), upon which the trial court further relied upon for its decision. In this Pre-Trial Brief, 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, R. 117.) Later the Pre-Trial Brief stated:

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, R. 119-120.) Later the Pre-Trial Brief stated:

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, R. 120-121.) (citations omitted.) Later the Pre-Trial Brief stated:

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, R. 122.) Later the Pre-Trial Brief stated:

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, R. 133.)

AIC also relied upon this Pre-Trial Brief for its decision to deny coverage to Johnson when it refused to defend Johnson in the Arbitration. Appellant's Initial Brief, p. 19. Also see, Appellant's Memorandum in Opposition to Partial Summary Judgment, p. 10 & Exhibit C thereto. (R. 196.)

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. (R. 5; 32, ¶25.)

After this lawsuit was filed, the Waldes moved for partial summary judgment on the issues stated. The trial court's decision granting partial summary judgment was 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. When the trial Court so held, it then additionally held that under South Carolina

law, AIC was 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 the Waldes' costs and attorneys fees in seeking that specific relief before the trial court.

All the facts in the Record are uncontested.

ARGUMENTS

I. The Appellant failed to appeal the trial court's holding that the allegations of breach of fiduciary duty created a duty to defend, so that it is the law of the case, thereby mooting all of Appellant's other arguments.

Appellant's appeal boils down to two issues: (1) did Appellant have a duty to defend Johnson in the underlying arbitration and (2) if there was such a duty, is Appellant required under South Carolina law to pay Johnson's attorney's fees and costs in the underlying action and the Respondents' attorneys fees and costs in bringing this action.

The first question must be answered in the affirmative because the Appellant failed to appeal one of the findings by the trial court that there was a duty to defend under the insurance policy, so that this finding becomes the law of the case. Specifically, on page 10, footnote 4 of the trial court's Order, it held that "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" citing *Unified Western Grocers, Inc. v. Twin City Fire Ins. Co.*, 457 F.3d 1106, 1113-14 (9th Cir. 2006)(noting that breach of fiduciary duty claim may be covered by insurance as it does not necessarily require intentional conduct.) (R. 11, n.4.) It is axiomatic that rulings not challenged on appeal are the law of the case and, right or wrong, must be affirmed. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544 (S.C. 1970). See *Ex Parte Morris*, 624 S.E. 2d 649, 653-54 (S.C. 2006)("This unappealed ruling is the law of the case and requires affirmance."); *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 525 S.E. 2d 869, 871-72 (S.C. 2000).

Likewise, Appellant's appeal is barred by the two issue rule. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 692 S.E.2d 900, 903 (S.C. 2010)(noting that two issue rule applies to trial court orders as well, citing *Anderson v. S.C. Dep't of Highways & Public Trans.*, 472 S.E.2d 253, 255 n. 1 (S.C. 1996)); see also *Anderson v. Short*, 476 S.E.2d 475, 477 (S.C. 1996). The failure of Appellant to appeal the trial court's express finding of breach of fiduciary duty as an alternative basis for Appellant's breach of its duty to defend renders that ruling the law of the case, and moots any argument that Appellant could make that there was no coverage in the first instance or that coverage was barred by an exclusion; the trial judge's order is all encompassing as to the "duty to defend" and thus necessarily means that the trial judge rejected all possible exclusions that otherwise might be argued to apply.

Further, there was no argument in Appellant's Initial Brief with respect to the breach of fiduciary duty claim by Appellant, so that even if that issue was appealed, it was abandoned. Conclusory arguments constitute an abandonment of the issue on appeal. *Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.C. 7, 17 n. 5, 620 S.E.2d 326, 332 n. 5 (2005) (noting an issue is abandoned if the appellant's brief treats it in a conclusory manner).

II. The trial court correctly held that there was an "occurrence" under the insurance policy because it recognized that Johnson's work before the BZA was a separate project from the construction of the barn itself.

A. APPELLANT FAILED TO APPEAL AN ALTERNATIVE SUSTAINING GROUND FOR THE TRIAL COURT'S DECISION, RENDERING THE APPEAL OF THIS ISSUE MOOT.

Appellant argues that there was no “occurrence” as defined in insurance policy and so the trial court erred in holding there was an occurrence. Appellant relies on an argument that negligent misrepresentations do not constitute an “occurrence.” Appellant’s Initial Brief, pp. 19-22.

However, the trial court when holding that there was an “occurrence” under the insurance policy held that there was such an occurrence under two additional grounds that were not appealed by Appellant. As stated, on page 10, footnote 4 of the trial court’s Order, it held that “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.” (R. 11, n.4.)

The trial Court in the next footnote, No. 5, on page 10 of its Order further found: “[b]y 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” citing *Crowley v. Spivey*, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985). (R. 11-12, n.5.)

Consistent with this finding, the trial court later at Footnote 6 of its Order at pages 12-14 expressly found that there was a claim for negligence in addition to a claim for negligent misrepresentation alleged:

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, 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.*

(R. 13-15, n.6.) (Italics added.)

Therefore, once again these rulings not challenged on appeal are the law of the case and, right or wrong, must be affirmed. *Buckner v. Preferred Mut. Ins. Co.*, *supra*. Further, these alternative rulings that were not appealed require affirmance based on the “two issue rule” as well.

Jones v. Lott, 692 S.E.2d at 903. Appellant did not challenge either alternative finding by the trial court that the conduct of Johnson was a breach of fiduciary duty or its finding that a breach of duty in ordinary negligence occurred as a result of Johnson's undertakings. Therefore, the law of the case is that the breach of fiduciary duty was an "occurrence," and the law of the case is that ordinary negligence was an "occurrence" since neither of those express findings by the trial court were appealed. Thus, Appellant's arguments that negligent misrepresentations are not an "occurrence" under the insurance policy are thereby mooted.

B. THE SERVICES JOHNSON PERFORMED BEFORE THE BZA WERE A DIFFERENT PROJECT AND WERE COMPLETED BEFORE JOHNSON SIGNED THE CONTRACT FOR CONSTRUCTION OF THE BARN.

i. The Scope of An Insurer's Duty to Defend is Broad.

Even if the Appellant's argument that the claims by the Waldes in the Arbitration Demand and Pre-Trial Brief are not mooted by the law of the case, the trial court correctly held that the allegations made created a duty to defend.

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 748, 750 (4th Cir. 1963).

ii. **The Insurance Policy is Construed Liberally in Favor of the 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).

“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.*, 524 S.E.2d at 879.

iii. **The Trial Court Correctly Held that the Arbitration Demand and the Pre-Trial Brief Allege an “Occurrence”.**

The trial court reviewed the Arbitration Demand and the Pre-Trial Brief and held that there was an “occurrence” under the insurance policy. The trial court held:

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. 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.

(R. 10-11.)(Footnotes 4 & 5 omitted.)

These are the key factual rulings by the trial court based on the sections of the Arbitration Demands that apply to nearly every issue argued by the Appellant. These findings support not only that there was an “occurrence” under the insurance policy, but also that “property damage” occurred as defined by the insurance policy and that none of the exclusions claimed by the Appellant apply to the claims made.

Notably, the Appellant did not attempt to distinguish either *Boggs v. Aetna Cas. & Sur. Co.* or *Isle of Palms Pest Control Co. v. Monticello Ins. Co.* upon which the trial court relied for its decision. That is because those cases are logically indistinguishable from the circumstances alleged in the Arbitration Demand and the Pre-Trial Brief.

Appellant concentrates on its subjective characterization of the allegations of the Arbitration Demand and the Pre-Trial Brief for its arguments, ignoring the Supreme Court’s rule that the claims made in the Complaint (which in this case are undisputedly the Arbitration Demand and the Pre-Trial Brief) must be broadly read and any possibility of coverage means the court must rule that the insurer has a duty to defend *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 459 S.E.2d at 319 (“If the underlying complaint creates a **possibility of coverage** under an insurance policy, the insurer is obligated to defend.”)(Emphasis added.)

iv. **The Negligent Misrepresentation Claim is an “Accident” Covered by the Insurance Policy.**

There is no dispute that, among other things, the Arbitration Demands alleged a claim for negligent misrepresentation against Johnson. The trial court held that “a claim for negligent misrepresentation is an “occurrence” under a general liability insurance policy” citing *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 (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). (R. 11-12.) The trial court also cited *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 265 S.E.2d 38, 40 (S.C. 1980), noting that in that case, the insurer breached its duty to defend since the policy covered negligence and negligent misrepresentation.

Appellant cites *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 666 S.E.2d 897 (S.C. 2008), for the proposition that claims for negligent misrepresentation are not covered by CGL policies. However, that is a misreading of *Collins*. The Court in *Collins* noted that “we must look beyond the label of negligence to determine if [the insurer] had a duty to defend...” to hold that all of the allegations of “negligence” in that case 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.* In other words, the claim in *Collins* was not really a negligence claim, but was a claim for fraud and intentional torts dressed up with allegations of negligence. That is a far cry from the type of conduct alleged in the Arbitration Demands, which specifically included negligent mistakes by Johnson.

Nowhere does *Collins* state that a claim for negligent misrepresentation based on negligence is barred. 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.” *Collins* is not a case that says negligent misrepresentations are not covered; *Collins* is a case that says intentional illegal conduct couched in negligence terms is not covered.

Indeed, Appellant admits that “neither the Demand for Arbitration nor the Pre-Trial Brief cite fraudulent activity on the part of the insured.” Appellant’s Initial Brief, p. 21. Appellant also admits that “passages of Johnson’s testimony while pleading for a variance at a BZA hearing indicate that he made a mistake in hindsight...” Appellant’s Initial Brief, p. 22. The type of conduct alleged does not rise to “intentional” conduct that barred coverage in *Collins*.

Appellant relies on one word, “wrongful,” in the many allegations of the Arbitration Demand and Pre-Trial Brief to base its conclusion that there is no coverage for negligent misrepresentation. However, the word “wrongful” is not the equivalent to “intentional” so that the *Collins* rule applies.

The trial court in its Order at pages 11-12 engaged in a thoughtful analysis of what the word “wrongful” really meant in the context of the demands made against Johnson:

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, 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.

(R. 12-13.)

Appellant argues that even though it is undisputed that Johnson made a mistake, “he nevertheless wrongfully and willfully told claimants that he could obtain a variance in order to induce them to hire him for the project” and that “such a ruling would give insureds the freedom to ‘promise the moon’ to prospective clients, expecting coverage upon their failure to deliver.” Appellant’s Initial Brief, p. 22. This argument would make any mistake by a contractor indistinguishable from a non-fortuitous act. Every act by a contractor undertaken for a customer is willful; however, every willful act does not result in a mistake. (Practically speaking, the argument also ignores all of the exclusions in CGL policies which prevent this sort of scenario from happening anyway.)¹

Therefore, the trial court correctly held that the genesis claim for negligent misrepresentation in the Arbitration Demand and Pre-Trial Brief was based on accidental and fortuitous conduct by Johnson, who did not intend the consequences of his acts to result in damage to the Waldes.

III. The trial court correctly held that the Arbitration Demand and Pre-Trial Brief alleged “property damage” as defined in the insurance policy.

A. APPELLANT FAILED TO ARGUE BEFORE THE TRIAL COURT OR SPECIFICALLY APPEAL THE TRIAL COURT’S RULING THAT THERE WERE TWO DIFFERENT PROJECTS AT ISSUE.

Appellant’s arguments that there was no “property damage” as defined in the insurance policy fail, once again, to recognize the distinction between the services provided by Johnson for the BZA work and the later actual construction work it performed under a separate construction

¹ Appellant also cites *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Ins. Co.*, No. 26909 (S.C. Sup. Ct. filed Jan. 7, 2011) generally at times with regard to public policy issues involving CGL policies. After Appellant’s Initial Brief was filed, the Supreme Court granted a Petition for Rehearing in *Crossmann*, and it is obviously anyone’s guess as to what will become of that case. Regardless, the various principals stated in *Crossmann* do not affect the trial court’s analysis in its Order here as there is no dispute that Johnson made a mistake, the only dispute is whether or not the consequences of the mistake can be characterized as intentional or not.

contract. The trial court held that the services and then the work performed by Johnson for the Waldes were two different projects. (R. 3, n.1; 15-16.) Appellant does argue this point at page 28 of its Initial Brief with regard to its argument that the “Products-Completed Operations Hazard” exclusion applies, but it neither raised that argument with reference to the definition of “property damage” or the application of any exclusion before the trial court at any time.

Therefore, since the Appellant did not argue this point before the trial judge, or specifically appeal this point in its Initial Brief, the Appellant is precluded from arguing that point on appeal. It is axiomatic that an appellate court will not reverse on an issue not timely raised to the trial court. *Pye v. Estate of Fox*, 633 S.E.2d 505, 510 (S.C. 2006). It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. *E.g., Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997).

Appellant’s conclusory argument regarding the trial court’s finding on two different projects in only one section of its Initial Brief and without reference to its application at any other point in the appeal is insufficient. This failure is tantamount to an abandonment of the stated issues, which cannot be cured by any argument in a subsequent reply brief. *Fields v. The Melrose Ltd. Partnership*, 439 S.E.2d 283 (S.C. App. 1993). Assuming the Appellant’s brief makes any genuine arguments, they are mere assertions of error, which are too conclusory to present any issue for appellate review. *Id.*; accord *First Sav. Bank v. McLean*, 444 S.E.2d 513 (S.C. 1994).

The failure to appeal that issue also results it being the “law of the case.” *Buckner v. Preferred Mut. Ins. Co.*, *supra*. Finally, Appellant once again falls afoul of the “two issue rule” as the trial court ruled that there was “property damage” on two distinct grounds: (1) there was ‘physical damage,’ and (2) there was a ‘loss of use.’ (R. 13-14.) Although the Appellant argues

that there was no 'physical damage,' it does not address in its Initial Brief the trial court's holding that there was a 'loss of use.' Appellant's Initial Brief, pp. 22-24. Therefore, under the "two issue rule," the trial court's determination that there was property damage because of a loss of use must be affirmed. See *Jones v. Lott*, 692 S.E. 2d at 903.

B. THE TRIAL COURT PROPERLY FOUND THAT THERE WAS 'PROPERTY DAMAGE' AS THERE WERE TWO DIFFERENT PROJECTS AT ISSUE.

The trial court held that the Arbitration Demands that alleged "property damage" in two ways: because "there was 'physical damage' to the barn; it had to be partially torn down" and because "there was also a 'loss of use' of the barn as it could not be used..." (R. 13 - 14..)

Again, Appellant's conclusions are based on the false assumption that Johnson's services before the BZA and its later contract to construct the barn were part of the same project. They were not. There is no allegation in either the Arbitration Demand or the Pre-Trial brief that could lead to the conclusion that the two projects were one and the same, and Appellant has pointed to none. To the contrary, the Pre-Trial Brief states at pages 3-4 that the Waldes wanted Johnson to get the Variance and Special Exception approvals before they entered into a contract for construction with him. (R. 3, n.1; 119-122.) This occurred in February and March of 2008. (R.120-121.) The Waldes agreed to pay Johnson separately for this work and ended up paying him Five Hundred (\$500.00) Dollars for those services. (R. 3, n1.) The construction contract for the barn itself was not signed until April 22, 2008, after Johnson had obtained the Variance and Special Exception for the Waldes. (Pre-Trial Brief, p.6, R. 122.)

Clearly, the Pre-Trial Brief, which the Appellant agrees that it relied upon in making its determination of no coverage, alleges that the work performed by Johnson for its representation of the Waldes before the BZA is separate from the contract for construction of the barn and paddock

for the Waldes. Indeed, if Johnson had not obtained the Special Exception and Variance from the BZA, there would not have been a construction contract at all.

Even if it was unclear from the Arbitration Demands that there were separate contracts for the BZA services and the construction work, the Appellant was required to defend Johnson, because that duty to defend exists even where the claims are “ambiguous.” *Donnelly v. Transportation Ins. Co.*, 589 F.2d at 767. The Pre-Trial Brief need only establish that there is a “possibility of coverage” *Spartan Petroleum Co., Inc. v. Federated Mut. Ins. Co.*, 162 F.3d at 808, n. 2. For Appellant to be excused from its duty to defend, the Arbitration Demands would have to establish that “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 at 242. It cannot be said that the Arbitration Demands and their allegations make Appellant’s decision that there were not two separate deals “free from doubt.” *Employers Mut. Liability Ins. Co. v. Hendrix*, 199 F.2d at 56-7.

Finally, as held by the trial court, there were two types of damages alleged by the Waldes against Johnson. First, there was “physical damage” to the barn built under the contract for construction because of Johnson’s negligent representation of the Waldes before the BZA since the barn 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.”) 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.*, 659 F.Supp. 2d 1115, 1130 (D. Colo. 2009).

Second, the trial court held that there was 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.” Order, p. 13 (R. 14.) Again, Appellant did not appeal this factual finding of the trial court and it is law of the case. *Buckner v. Preferred Mut. Ins. Co., supra*.

Therefore, the Appellant’s arguments that there was no “property damage” as defined in the insurance policy must be rejected for two reasons: first, the Appellant failed to appeal an alternative factual basis of “loss of use” and are bound by the “two issue rule” to accept that part of the trial court’s Order as the law of the case, and second, the trial judge properly found that the barn built under a separate contract from the BZA representation deal suffered “physical damage” and “loss of use” as a result of Johnson’s conduct.

IV. The trial court correctly held that the “Your Work” and the “Products-Completed Operations Hazard Exclusion” did not apply to bar coverage because the “occurrence” alleged in the Arbitration Demand and Pre-Trial Brief had been completed before the “property damage” occurred.

Generally, as noted by the trial court:

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.”)

Order, p. 13 (R. 14.) “A liability insurer must defend any suit alleging bodily injury or property damage seeking damages payable under the terms of the policy.” *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 514 S.E.2d 327, 330 (S.C. 1999). “However, an insurer has no duty to defend an insured where the damage was caused for a reason unambiguously excluded under the policy.” *Id.*

(Emphasis added.) Thus, for the Appellant to prove that an exclusion applies in a duty to defend case, it must show that the exclusion “unambiguously applies” from the content of the Arbitration Demands. Appellant cannot meet that burden on any exclusion offered.

A. THE TRIAL COURT PROPERLY FOUND THAT THE “YOUR WORK” EXCLUSION DID NOT APPLY TO THE CLAIMS AS ALLEGED.

i. The Appellant Failed to Appeal an Alternative Basis for the Trial Court’s Order that the “Your Work” Exclusion did Not Apply and therefore is Barred from Raising the Question Now.

The trial court held that the “Your Work” exclusion did not apply for two reasons. First, the trial court held that the exclusion did not apply because the insured act did not damage the same project that was part of the negligent services. Order, p. 14-15. (R. 15-16.) Second, the trial court held that as applied on these facts, the “Your Work” exclusion was ambiguous, and therefore must be construed against the insurer to not apply to the claims made. Order, p. 15. (R. 16.) Appellant failed to appeal or argue that the “Your Work” exclusion was not ambiguous as applied to these facts. This factual finding of the trial court is therefore the law of the case. *Buckner v. Preferred Mut. Ins. Co., supra.*

Further, under the “two issue rule,” the trial court’s determination that there was property damage because of a loss of use must be affirmed. *See Jones v. Lott*, 692 S.E.2d at 903. Also, the failure to argue against the ambiguity of the exclusion is an abandonment of the argument even if it was appealed. *Fields v. The Melrose Ltd. Partnership, supra.* Thus, the trial court’s ruling on the “Your Work” exclusion must be affirmed.

ii. The Trial Court Found that the “Your Work” Exclusion Did not Apply as the Damage was Not to the same Work.

The trial court, consistent with its prior ruling that there were two separate projects performed by Johnson for the Waldes, held that the “Your Work” exclusion in the insurance policy

did not bar coverage. Appellant's argument rests entirely upon rejection of that distinction and upon the assumption that this was all one big project, and so that the negligent performance of one part of the project would only cause damage to the same but later part of the project.² Respondent cannot better put the rejection of that argument than did the trial court:

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 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.

Order, pp. 14-15. (R. 15-16.)

iii. **The Trial Court Found that the "Your Work" Exclusion Did not Apply as it is Ambiguous as Applied.**

² And, as noted *supra*, the Appellant failed to appeal that factual portion of the trial court's order finding that the Arbitration Demands alleged two separate deals, so that it is bound by that law of the case anyway.

As stated supra, the trial court found the “Your Work” exclusion ambiguous as applied to the set of facts alleged in the Arbitration Demands:

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.

Order, p. 15, citing *Brooklyn Bridge, Inc. v. South Carolina Insurance Company*, 420 S.E.2d 511, 512 (S.C. App: 1993). (R. 16.) This is logical as demonstrated by the trial court’s analogy in its discussion of why the exclusion did not apply on its face, *supra*.

B. THE TRIAL COURT PROPERLY FOUND THAT THE “PRODUCTS-COMPLETED OPERATIONS HAZARD” EXCLUSION DID NOT APPLY TO THE CLAIMS AS ALLEGED.

i. The Appellant Failed to Appeal an Alternative Basis for the Trial Court’s Order that the “Products-Completed Operations Hazard” Exclusion did Not Apply and therefore is Barred from Raising the Question Now.

The trial court held that the “Products-Completed Operations Hazard” exclusion did not apply for four reasons. First, the trial court held that the exclusion did not apply because the type of damages covered by the exclusion did not include the type of damages that occurred in this case. Order, p. 16. (R. 17.) Second, the trial court held that the claims made in the Arbitration Demand and the Pre-Trial Brief were not claims for defective design and construction with regard to the barn, so that the exclusion did not apply to that ‘product.’ Order, p. 16. (R. 17.) Third, the trial court held that Johnson’s work before the BZA was completed before the construction contract was signed, so that the exclusion did not apply. Order, p. 17. (R. 18.) Fourth, the trial court held that as applied on these facts, the “Products-Completed Operations Hazard” exclusion was ambiguous, and

therefore must be construed against the insurer to not apply to the claims made. Order, p. 17, n.7. (R. 18.)

However, Appellant failed to appeal or argue the fourth ground, that the “Products-Completed Operations Hazard” exclusion was ambiguous as applied to these facts as stated in footnote 7 of the Order, and therefore did not apply. Order, p. 17, citing *Nixon v. USF&G*, 290 So.2d 26 (Fla. 1973)(Court held duty to defend existed as the same exclusion was ambiguous as applied.) (R. 18, n.7.) Since the effect of an ambiguous policy provision is that it is construed against the insurer, and in favor of coverage for the insured, then this alternative holding means that the PCOH exclusion did not apply. “Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.” *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 456 S.E.2d 912, 915 (S.C. 1995).

Since appellant did not appeal this factual finding of the trial court, it is law of the case. *Buckner v. Preferred Mut. Ins. Co.*, *supra*. Further, under the “two issue rule,” the trial court’s determination that this exclusion does not apply must be affirmed. See *Jones v. Lott*, 692 S.E. 2d at 903. Also, the failure to argue against the ambiguity of the exclusion is an abandonment of the argument even if it was appealed. *Fields v. The Melrose Ltd. Partnership*, *supra*. Thus, the trial court’s ruling on the “Products-Completed Operations Hazard” exclusion must be affirmed.

ii. **The “Products-Completed Operations Hazard” Exclusion did Not Apply to the Type of Damages Claimed.**

Again, the trial court best explained how it viewed the “Products-Completed Operations Hazard” (“PCOH”) exclusion:

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.

Order, p. 16 citing *Pursell Const. Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67, 69 (Iowa 1999). (R. 16-17.) The trial court thus concluded as follows:

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.

Order, p. 16. (R. 17.) While Appellant, for the first and only time in its Initial Brief, argues at page 28 that Johnson’s work is “mischaracterized” as two separate projects, this argument ignores the rule that the insurer is required to read the allegations and provide a defense if there is any “ambiguity” or “possibility” of coverage, and it ignores that the insurer has the burden of proving its exclusion applies. Appellant cannot possibly read the Arbitration Demand and Pre-Trial Brief as unambiguously referring to one continuous project. Therefore, the trial court properly held that the exclusion did not apply for purposes of its determination of the duty to defend.

iii. The “Products-Completed Operations Hazard” Exclusion did Not Apply to the Type of Damages Claimed.

Again, the trial court best explained how it viewed the “Products-Completed Operations Hazard:

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.

Order, pp. 16-17 *citing Gaylord Chemical Corp. v. ProPump, Inc.*, 753 So.2d 349, 354-55 (La. App. 2000). (R. 17-18.)

iv. **The “Products–Completed Operations Hazard” Exclusion did Not Apply Because the BZA Work was Completed.**

The trial court held that the “Products-Completed Operations Hazard” exclusion did not apply because the exclusion applied only to uncompleted work, and Johnson’s work before the BZA was completed:

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

Order, p. 17. (R. 18.) The Appellant fails to distinguish this alternative basis as it did the prior ones since it incorrectly took one view of the allegations in the Arbitration Demands and failed to consider any other view.

V. **The trial court correctly held that the “Intentional Acts Exclusion” did not affect Appellant’s duty to defend the claims made in the underlying Demand for Arbitration and Pre-Trial Brief as claims were made other than those that could be construed as being intentional.**

A. **THE LAW OF THE CASE IS THAT CLAIMS FOR NEGLIGENCE WERE MADE, THEREBY MOOTING THE INTENTIONAL ACTS EXCLUSION FOR THE DUTY TO DEFEND HOLDING.**

The trial court held that the “Intentional Acts” exclusion did not apply for two reasons. First, the trial court held that the conduct alleged in the Arbitration Demand and Pre-Trial Brief did not meet the definition of ‘intentional conduct’ for that exclusion under South Carolina law. Second, the trial court held that since the Arbitration Demand and Pre-Trial Brief properly alleged a negligent misrepresentation claim, that in and of itself precluded the intentional acts exclusion from applying. Order, pp. 17-18. (R. 18-19.)

However, there is a third reason not reflected in the trial court's Order why this Court should reject Appellant's arguments that the intentional acts exclusion applies. As stated *supra* at Section II. A., it is the law of the case that the Arbitration Demand and Pre-Trial Brief properly stated a claim for straight negligence. Intuitively, this means that the intentional acts exclusion cannot apply to that claim for pure negligence. "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, 229 (S.C. App. 1998) *citing Miller v. Fidelity-Phoenix Ins. Co.*, 231 S.E.2d 701 (S.C. 1977).

As noted in *Manufacturers and Merchants Mutual Ins. Co. v. Harvey*, allegations of a complaint properly stated claims for negligence, as opposed to intentional conduct, where "[t]he acts alleged in these portions of the complaint are not inherently injurious." 498 S.E. 2d at 229. In that case, the Court, distinguishing claims for child abuse as intentional acts from the acts of those negligently entrusting children to the abusers, noted: "[w]hile Norman and Joyce Harvey may each have intentionally allowed the children to be in the presence of abusers, this is different from an allegation that the Harveys intentionally abused the children." *Id.* Thus, the intentional acts exclusion refers to an intended result, not a lack of due care, which is the basis of a negligence claim.

Therefore, since it is the law of the case that a negligence claim was properly stated, the intentional acts exclusion by definition could not apply to every claim made in the Arbitration Demand and Pre-Trial Brief. Since the Appellant had a duty to defend all the claims as long as there was at least one covered claim, *see Town of Duncan v. State Budget and Control Board*, 482

S.E.2d at 774, the intentional act exclusion is not a defense to the breach of Appellant's duty to defend.

B. THE TRIAL COURT CORRECTLY HELD THAT THE ALLEGATIONS DID NOT MEET THE DEFINITION OF "INTENT" FOR APPLICATION OF THE INTENTIONAL ACTS EXCLUSION.

The trial court rejected Appellant's arguments that the operative allegations were primarily for "intentional conduct." As the trial court stated:

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.

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.

Order, p.p. 17-18. (R. 18-19.)

Under Appellant's definition of "intentional" for purposes of the application of the exclusion, any mistake of any kind by a contractor would have "intentional consequences" as the contractor certainly would have "intended" that its customer rely on its expertise to construct a structure. For example, if a contractor told a customer that it should use a certain type of wood to

frame a building because it was cheaper, and that would induce the customer to take that contractor's low bid, but then the building constructed collapsed because the wood was not strong enough for its use, under Appellant's argument it could deny coverage under the intentional acts exclusion because the contractor made a mistake in using the wrong kind of wood as part of an attempt to be the low bidder. This would not only be harmful to the contractor, but also would to its customer and third parties that might be injured by that collapsing building. Appellant's explanation of this exclusion would eviscerate general liability coverage.

Finally, once again the Appellant does not state an argument that unambiguously demonstrates that the exclusion should apply, as is its burden. See *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 514 S.E.2d at 330. Appellant theorizes that "Johnson intended for the Waldes to rely on his representation in order to induce him them into paying him additional money for a larger project." Appellant's Initial Brief, p. 29. However, that is just a conclusion Appellant reached and is not stated anywhere in the underlying allegations. It is an example of there being no way to unambiguously apply this exclusion. Indeed, Appellant itself cannot conclusively state that Johnson's conduct was intentional; Appellant admits in its Initial Brief that Johnson was "mistaken," Appellant's Initial Brief, p. 22, and that his conduct was not "fraudulent." Appellant's Initial Brief, p. 21. Since Appellant itself is confused as to whether or not Johnson's conduct was intentional, it can hardly argue that the intentional acts exclusion can be unambiguously applied.

C. THE TRIAL COURT CORRECTLY HELD THAT THE ALLEGATIONS DID NOT MEET THE THRESHOLD REQUIREMENT OF "INTENT" FOR APPLICATION OF THE INTENTIONAL ACTS EXCLUSION.

Finally, the trial court correctly noted the simple proposition that the properly made claim for negligent misrepresentation could not also be the basis of the intentional acts exclusion:

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.”

Order, p. 18. (R. 19.) This, again, is consistent with a true negligent misrepresentation claim, a claim based on negligence, not fraud or some other intentional act. The Court should affirm the trial court.

VI. The trial court properly found that the “Insured Contract” exclusion did not apply to the relevant claims that created a duty to defend.

A. APPELLANT ONCE AGAIN FOCUSES ON THE WRONG CONTRACT.

Appellant argues that “[t]he contract at issue was for the construction of a paddock and stable.” Appellant’s Initial Brief, p. 30. As found by the trial court on multiple occasions, that is not correct. The central issue for purposes of coverage is the negligent advice given by Johnson to the Waldes about actions to take with respect to the BZA.

B. THE TRIAL COURT CORRECTLY HELD THAT THE “INSURED CONTRACT” EXCLUSION DID NOT APPLY TO THE TORT CLAIMS MADE.

The trial court correctly held that the “insured contract” exclusion was irrelevant to its ultimate decision that Appellant had a duty to defend as there were tort claims that were not contract-based upon which it made the decision. Order, p. 11. (R. 12.) As stated, so long as one claim made triggered the duty to defend, all other claims were required to be defended by Appellant as well. *Town of Duncan, supra*.

VII. The trial court correctly held that AIC breached its duty to defend it insured and therefore is liable for its insured's attorney's fees and costs in the underlying action as well as the attorney's fees and costs of its insured's assigns in bringing the present action.

A. APPELLANT FAILS TO ADDRESS THE ANALYSIS OF THE TRIAL COURT HOLDING THAT IT WAS LIABLE TO PAY ATTORNEYS FEES AND COSTS.

The trial court ordered that Appellant was liable to Respondents to pay Johnson's attorneys fees, costs and prejudgment interest in defense of the underlying action, and that Appellant would have to pay Respondents' attorneys fees and costs for that portion of this lawsuit that sought relief with respect to the breach of the duty to defend. Order, pp. 7-8; 19-20. (R. 8-9; 20-21.) However, Appellant does not address any case cited or argument made in the trial court's Order to that effect. Appellant therefore has abandoned any right to challenge the trial court's Order on this point. *First Savings Bank v. McLean*, 444 S.E. 2d 513 (S.C. 1994)(where appellant merely alleges error, without providing arguments or supporting authority, it abandons the issue.); see also *Houck v. State Farm Fire and Cas. Ins. Co.*, 620 S.E.2d at 332 n. 5.

B. THE TRIAL COURT PROPERLY FOUND THAT THE RESPONDENTS WERE ENTITLED TO AN AWARD OF ATTORNEYS FEES AND COSTS.

i. The Trial Court Correctly Held that when an Insurer Breaches its Duty to Defend, the Cost of Defense are part of the Damages Recoverable.

"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).

Thus, the trial court correctly held that the Appellant was liable to pay to Respondents the “reasonable attorney’s fees and costs incurred in the defense of the Arbitration.” Order, p. 10. (R. 11.)³

ii. **The Trial Court Correctly Held that Respondents Could Also Recover their Attorneys Fees in this Lawsuit Against the Appellant For Breach of Duty to Defend.**

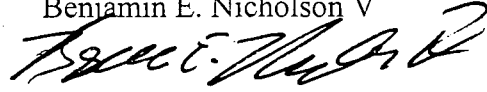
Because the insured suing an insurer in a breach of duty to defend case has to file a lawsuit to determine its rights under the policy, it is entitled to an award of its attorney’s fees and costs for this action as well. *See e.g., BP Oil Company v. Federated Mutual Ins. Co.*, 329 S.C. 631, 496 S.E.2d 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 trial court properly held that the Waldes, as the assignees of Johnson, should recover their attorneys fees and costs in this action related to Appellant’s breach of its duty to defend. Order p. 19-20. (R. 20-21.)

³ The trial court did not make an actual award of attorney’s fees and costs, reserving the determination of such for later in the proceedings. Order, p. 20. (R. 21.)

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appealed Order should be affirmed.

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Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

2009-CP-02-02420

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

v.

Association Insurance Company..... Appellant.

RESPONDENTS' CERTIFICATE OF COMPLIANCE

I hereby certify that the Final Brief of Respondents complies with Rule 211(b)

This 26th day of May, 2011.



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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.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. RESPONDENTS' ARGUMENTS THAT THE ALTERNATIVE GROUNDS IN THE FOOTNOTES OF JUDGE DICKSON'S ORDER WERE NOT SPECIFICALLY APPEALED ARE RED HERRINGS TO DIVERT THE COURT'S ATTENTION AWAY FROM THE CRITICAL ISSUES SURROUNDING THIS COVERAGE CASE

A. All applicable grounds were addressed in Appellant's Initial Brief

In their Initial Brief, Respondents attempt to manufacture issues pertaining to preservation of all grounds for appeal, citing so-called "alternative grounds" contained in footnotes 4, 5, 6 and 7 of Judge Dickson's Order. (Resp't. Br. at 5, 7, 23.) Appellant asserts this is merely a red herring tactic in an attempt to divert the court's attention away from the trial court's error in ruling that Appellant owed a duty to defend Johnson for the underlying claim. The simple fact remains that the allegations in the underlying Demand for Arbitration or Pre-Trial Brief do not give rise to a duty to defend, based on the reasons set forth in Appellant's Initial Brief. If the facts alleged in a complaint against an insured fail to bring a claim within policy coverage, an insurer has no duty to defend. *R.A. Earnhardt Textile Mach. Div. v. S.C. Ins. Co.*, 277 S.C. 88, 282 S.E.2d 856 (1981). Furthermore, none of the facts presented in the Pre-Trial Brief, which was provided to Appellant eleven months after an initial denial letter was sent to the insured, are sufficient to bring Respondent's claims within coverage. (Compl. Ex. D; R. pp. 117-135).

i. Footnote 4 of the trial court's Order is not the law of the case

Respondent's argument that footnote 4 of the trial court's Order stating "the Court finds that the allegation of harm caused by Johnson's breach of fiduciary duty is covered" is the law of the case is a red herring. While the underlying Demand for Arbitration included a claim for breach of contract and breach of fiduciary duty, in addition to the claim for negligent misrepresentation, the present duty to defend analysis hinges on the claim for negligent misrepresentation. (Compl. Ex. B.; R. p. 106). Appellant's Initial Brief clearly sets forth this proposition. (Appellant's Br. at 32.) Respondent's attempt now to rely upon the footnote contained in the trial court's Order is nothing more than a veiled attempt to divert this court's attention away from the critical issue of whether or not negligent misrepresentation is a covered "occurrence" giving rise to a duty to defend. Furthermore, Respondent made no arguments as to the breach of fiduciary duty claim before the trial court. (R. pp. 170-185; R. pp. 208-213; R. pp. 215-245). The "two-issue rule" cited in Respondent's Brief is only applicable where separate issues are raised to and ruled upon the lower court. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) citing *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). The breach of fiduciary duty claim was not properly raised before the lower court. Therefore, Respondent's reliance upon this "alternative" ground is misplaced.

Appellant cannot frame the issue; trial court order doct

But it is in the order and our memo in support of it



R. 179, p. 10 of memo

II. THERE WAS NO OCCURRENCE UNDER THE POLICY

A. Footnotes 5 and 6 of the trial court's Order turn on the same set of facts as the trial court's erroneous grounds, all of which are properly appealed

Respondent's other alleged "alternative" bases fail because they necessarily rely upon the same set of facts supporting the trial court's erroneous rulings which are addressed in Appellant's Brief. Specifically, footnotes 5 and 6 of the trial court's Order, cited by Respondent in its brief, necessarily rely upon the same language in the underlying Demand for Arbitration and Pre-Trial Brief. All legal conclusions flowing from the allegations contained in the underlying Demand for Arbitration and Pre-Trial brief likewise fail for the reasons cited in Appellant's arguments on appeal. The facts and allegations contained therein failed to assert an accidental occurrence as required by the policy. Without an occurrence, there is no duty to defend based on the facts alleged, and the trial court's grant of partial summary judgment in favor of Respondents should be reversed.

B. Nothing in the Demand for Arbitration or Pre-Trial Brief gives rise to an "occurrence"

Respondent's mistaken reliance upon the *Boggs v. Aetna Cas. & Sur. Co.*, 252 S.E.2d 565 (S.C. 1979) was also addressed at the hearing before the lower court. (Tr. pp. 26-27; R. pp. 240-241). Respondents improperly rely upon the *Boggs* case for the premise that an alleged negligent location of the house creates an occurrence. *Id.* A more detailed reading of that case, however, reveals that the house was moved and then later water intruded into the house. So – the occurrence was actually the intrusion of water into the house – not the mere placement of the house with nothing more.

Respondent also cites *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 459 S.E.2d 318 (Ct. App. 1995) for the proposition that the court's ruling in that case is "logically indistinguishable" from the circumstances alleged in the case at hand. (Respt's Br. at 12). Respectfully, Appellant points out that the *Isle of Palms* case involved the negligent issuance of a termite letter. More precisely, the court held there that the faulty workmanship alleged caused an accident – the improperly performed termite inspection resulted in continued termite damage. *Id.* at 320. Again, nothing in the allegations of the Demand for Arbitration or Pre-Trial Brief give rise to truly accidental or fortuitous events which would create coverage, despite Respondents' attempts to argue otherwise. Therefore, as no accident took place, nor did an occurrence. The trial court's finding otherwise is erroneous and should be reversed.

C. Respondents' reliance upon the *Gordon Gallup* case for the premise that negligent misrepresentation is a covered occurrence is misplaced because that case involved a different type of policy than the one at issue here

In their brief, Respondents cite *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 265 S.E.2d 38 (S.C. 1980) as dispositive on the issue of whether negligent misrepresentation is a covered occurrence. (Respt's Br. at 13). As argued before the trial court, the *Gordon-Gallup* court was analyzing a different type of policy altogether – an E&O policy for a real estate firm – rather than a CGL policy like the one presently at issue. (Tr. at 27; R. p. 241). Clearly, the differing types of policies alone distinguish the facts – and therefore the analysis – which must be utilized in determining whether negligent misrepresentation is covered here.

Additionally, for the precise reasons Respondent asserts the *Collins* case is inapplicable to our facts – Respondent would assert *Collins* is instructive. *Collins*

Holding Corp. v. Wausau Underwriters Ins. Co., 666 S.E.2d 897 (2008). Respondents in their brief state that the Collins claim was one “for fraud and intentional torts dressed up with allegations of negligence.” (Respt’s Br. at 13). Likewise, the Pre-Trial Brief, forwarded to Appellant some eleven months after their denial of coverage based on the Demand for Arbitration, was dressed up with allegations of negligence in an attempt to create coverage for the damages which arose from Johnson’s underlying actions. (Compl. Ex. D; R. pp. 117-135). Couching allegations in terms of negligence does not give rise to an occurrence.

Respondents’ Supplemental Citation of Authority for their Initial Brief also cites the South Carolina Supreme Court’s recent decision of *Berberich v. Jack*, Op. No. 26955 (S.C. Sup. Ct. filed April 4, 2011)(Shearouse Advance Sheet No. 12 at 26-28; 31-33) in support of their argument “that the Arbitration Demands sufficiently alleged negligent conduct as opposed to mere intentional conduct.” Appellant asserts this case is not supportive of Respondents’ position in this regard, however, because the *Berberich* case addresses whether “reckless, willful, and wanton conduct can be compared to ordinary or simple negligence” with respect alone to the comparative negligence doctrine. Without more, this case does not broadly negate South Carolina jurisprudence holding that an insurer will not pay for a loss unless it is fortuitous. 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).

Therefore, the trial court's ruling that the "genesis claim" for negligent misrepresentation gives rise to an occurrence is erroneous and should be reversed. (Resp't. Br. at 15).

III. RESPONDENTS' ATTEMPT TO BIFURCATE THE INSURED'S PROJECT FOR THE WALDES AS TWO SEPARATE CONTRACTS IN ORDER TO CREATE "PROPERTY DAMAGE" IS INSUFFICIENT TO INVOKE COVERAGE

A. Appellant Addressed This Holding In The Proper Manner And Place In Its Brief

Contrary to Respondents' assertion that Appellant failed to specifically appeal the trial court's ruling that there were two different projects at issue, Appellant would point out to the court that it did address this factual holding in its Initial Brief under the same section of grounds the court makes reference to the two separate projects in its Order – the "your work" and "products completed operations hazard" exclusions. (Appellant's Br. at 28.) Respondents' argument that this factual holding somehow clinches their argument as to "property damage" is a red herring.

B. Respondents' attempt to characterize insured's work as "two separate projects" is tenuous

Regardless of Respondents' characterization of the insured's work as two separate projects, no "property damage" as defined within the Policy took place as a result of the insured's actions. There is nothing "ambiguous" about the nature of the damages claimed by the Waldes in the underlying Demand for Arbitration and Pre-Trial Brief. A review of the underlying claims reveals that Respondents' damages were purely economic in nature. As this court is well-aware, a CGL policy is not intended to cover economic loss

resulting from faulty workmanship. *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 563-64, 561 S.E.2d 355, 357 (2002).

Furthermore, Appellant asserts it fully appealed the trial court's Order on "property damage" grounds, and that Respondents' attempt to state otherwise is, yet again, another red herring to divert the court's attention away from the fact that (a) only economic damages were alleged in the underlying Demand for Arbitration and Pre-Trial Brief and (b) an "occurrence" is still required even if "property damage" is established, in order to establish a duty to defend. The subject policy covers "bodily injury" or "property damage" that is caused by an "occurrence." (Compl. Ex. A; R. pp. 39-105).

IV. THE YOUR WORK EXCLUSION APPLIES TO BAR COVERAGE

Respondents' assertion that the "Your Work" exclusion is ambiguous is the law of the case is misplaced. Once again, this conclusion is based upon the same factual assertion already argued by Appellant – that is, it relies upon the trial court's erroneous holding that the insured performed two separate projects. Appellant has stated in full its position to the contrary, and any legal conclusions arising from the same erroneous facts must also fail. Therefore, for the reasons set forth in Appellant's Initial Brief, Appellant asserts the "Your Work" exclusion applies to bar coverage, and the trial court's holding otherwise should be reversed.

V. THE PRODUCTS COMPLETED OPERATIONS HAZARD PROVISION APPLIES TO BAR COVERAGE

Respondents put up yet another red herring with respect to its argument that Appellant failed to appeal footnote 7 of the trial court's Order, which states that the exclusion is ambiguous as it does not contemplate the work of the insured damaging

other product (sic) of the insured. (Order, p. 17; R. p. 18). This assertion by the trial court, however, is again based upon its contemplation of the exclusion's application to the same erroneous holding that the insured performed two separate projects - facts against which Appellant has argued in full. Therefore, it would follow that this, and all legal conclusions based upon that erroneous holding, must fail.

As to the remaining grounds upon which Respondents assert the Products-Completed Operations Hazard "PCOH" exclusion does not apply, Appellant relies fully upon the arguments set forth in its Initial Brief, as well as the simple fact that coverage was denied under the PCOH exclusion because Respondents alleged that the stable was "not even now finished." (Compl. Ex. D; R. p. 127). The only logical postulation that can follow is that the insured's work was abandoned, thereby invoking the PCOH exclusion. Therefore, Appellant requests this court reverse the trial court's holding that the PCOH exclusion does not apply to preclude Appellant's duty to defend.

VI. THE INTENTIONAL ACTS EXCLUSION APPLIES TO BAR COVERAGE

A. The appellate court should not consider Respondents' additional sustaining grounds which were not ruled upon by the lower court

In their Initial Brief of Respondents, the Waldes ask this court to base its ruling upon matters which were not ruled upon by the trial court below. (Respt's Br. at 26). It is recognized that "[t]he appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716 (2000). The Appellant respectfully submits that based

upon the facts of this case, it would not be proper and fair and that the court should decline to do so.

The matter which Respondents seek to have the court rule upon involves a new ground that the underlying case properly stated a claim for straight negligence. (Respt's Br. at 26). According to Respondents, this "intuitively" means that the intentional acts exclusion cannot apply. *Id.*

When the South Carolina Supreme Court issued its opinion clarifying the law relating to additional sustaining grounds, the Court was careful to point out that: "In clarifying the law, we do not mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716 (2000). A party who has prevailed below is not guaranteed that the appellate court will choose to address additional sustaining grounds which were not fully developed in the record below. In the instant case, the Respondent neither argued at the hearing nor briefed in his Memorandum in Support of Partial Summary Judgment this new ground that the Arbitration Demand and Pre-Trial Brief properly state a claim for straight negligence. Instead, Respondents now rely upon footnote 6 of the trial court's order, addressed *supra*, and *Manufacturers and Merchants Mutual Ins. Co. v. Harvey* to support their proposition that the intentional acts exclusion refers to an intended result, not a lack of due care, which is the basis of a negligence claim. 498 S.E.2d at 229. It is axiomatic that by the very term "intentional acts exclusion," coverage is excluded for intentional acts – not merely intentional results. Otherwise, it would be called the "intentional results exclusion." Johnson's representation to the Waldes that an addition to their original plans

was permissible – the basis of the Waldes’ underlying claim of negligent misrepresentation – was intentional. There is nothing accidental or fortuitous in making such a statement which induced the Waldes’ reliance and agreement to allow Johnson to perform the work and enter into a business transaction. The nature of this alleged “wrongful” conduct is intentional and not negligent or accidental. Appellant again refers this court to the holdings in *Holz-Her U.S., Inc. v. U.S. Fidelity and Guar. Co.*, 539 S.E.2d 348 (N.C. Ct. App. 2000) and *Nationwide Property & Cas. v. Comer*, 559 F. Supp. 2d 685 (S. D. W. Va. 2008) for the proposition 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. (Appellant’s Br. at 21-22).

B. Respondents’ attempts to characterize the underlying claim as straight negligence are misplaced

Despite their attempts to argue otherwise, the underlying Demand for Arbitration alleges “wrongful” conduct on the part of the insured. In an effort to overcome the applicability of the intentional acts exclusion, Respondents assert that the allegations do not meet the definition of “intent” for the application of the intentional acts exclusion. (Respt’s Br. at 27.) Furthermore, Respondents’ analogy involving a contractor inducing a client to use a cheaper wood that doesn’t at all represent Appellant’s position with respect to this issue, which remains that both the insured’s conduct – his wrongful misrepresentation, and the direct result – their reliance, were intentional. (Respt’s Br. at 27-28).

C. The intentional acts exclusion unambiguously applies

Respondents allege Appellant is “confused as to whether or not Johnson’s conduct was intentional.” (Respt’s Br. at 28). Appellant is not confused. Without repeating its arguments set forth in Appellant’s Initial Brief, the underlying Demand for Arbitration clearly states that Johnson “wrongly told” claimants he could obtain a variance required to build their structure. (R. p. 106). 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). Nothing about the underlying claims gives rise to a question of whether or not the intentional acts exclusion applies. As such, the trial court’s holding that the intentional acts exclusion does not apply is erroneous and should be reversed.

VII. RESPONDENTS’ ARGUMENT THAT APPELLANT FOCUSED ON THE “WRONG CONTRACT” IN ITS ARGUMENT WITH RESPECT TO THE INSURED CONTRACT EXCLUSION FAILS

Respondents assert that Appellant focuses on the “wrong contract” with respect to its argument that the insured contract exclusion applies. For the reason set forth herein, this argument again rests upon the erroneous holding that the insured performed two separate projects for the Waldes. Therefore, Respondents’ cursory argument fails, and the insured contract exclusion applies to all work performed by the insured, thereby precluding a duty to defend for the claims arising out of the same.

VIII. APPELLANT COMPLETELY ADDRESSED THE TRIAL COURT’S ORDER REGARDING ATTORNEYS FEES AND COSTS


Respondents’ statement that Appellant “has abandoned any right to challenge the trial court’s Order” as to its award of attorneys fees and costs is erroneous. (Respt’s Br. at 30; Appellant’s Br. at 32-33). For the reasons set forth fully in Appellant’s Initial Brief,

Appellant maintains that Respondents are not entitled to attorney's fees or costs because its refusal to defend was not wrongful. Therefore, Appellant requests this court reverse the trial court's order awarding attorneys fees and costs.

CONCLUSION

For the reasons states herein, in Appellant's Initial Brief, and those presented at oral argument, Appellant respectfully requests that this Court reverse the Circuit Court's grant of Partial Summary Judgment.

Respectfully submitted,


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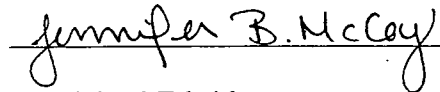
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APPELLANT'S CERTIFICATE OF COMPLIANCE

The undersigned certify that the Final Reply Brief of Appellant complies with
Rule 211(b), SCACR.

This 1 day of June, 2011.



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