THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
In the Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Opinion No. 5061 (S.C. Ct. App. filed December 12, 2012)

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

v.

Association Insurance Company, ...Respondent.

PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals and filed on February 26, 2013. (Appendix, p. 35.)

QUESTIONS PRESENTED

1. Did the Court of Appeals err in reversing the Trial Court on the basis of defining "physical injury" in a CGL insurance policy?

2. Did the Court of Appeals erred reversing the Trial Court by applying Exclusion A.2(j)(6) in the CGL policy to bar the claim?

3. Did the Court of Appeals err by not sustaining the Trial Court on an alternative unappealed sustaining ruling by the Trial Court?

STATEMENT OF THE CASE

This is a case about the interpretation of a standard Comprehensive General Liability (CGL) insurance policy to a set of facts in a duty to defend context. The Petitioners are the Plaintiffs in the lawsuit and the Respondents in the Court of Appeals.

Petitioners are the assignees of a construction company's rights under its standard Comprehensive General Liability ("CGL") policy with the Respondent insurance company ("AIC.") Both parties made cross-motions for summary judgment. The Petitioners moved for partial summary judgment on the basis that AIC owed a duty to defend the (assignor) construction company in an underlying arbitration brought by the Petitioners against the construction company. AIC moved for summary judgment on the basis there was no coverage. The trial court granted partial summary judgment to the Petitioners, holding that AIC had a duty to defend AIC and breached that duty, and denied AIC's Motion for Summary Judgment. AIC timely appealed, and the Court of Appeals reversed. *William and Frances Walde, as assignees of Johnson* Construction *Co. of Aiken, Inc. v. Association Insurance Company,* Op. No. 5061 (S.C. Ct. App. Filed December 12, 2012.) The Petitioners timely petitioned for rehearing, and

the Court of Appeals denied their petition. The Petitioners now seek a writ of certiorari from this Court, asserting that the Court of Appeals erred for the reasons stated below.

STATEMENT OF THE FACTS

This matter arises out of a settlement of an arbitration claim by the Petitioners, 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 Johnson's insurer, 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 allowed a barn to be 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. (Record, 2; 3, n.1; 29, ¶¶12-13.)[1] 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 Court of Appeals recognized that there were two separate agreements, and called Johnson's work before the BZA "the Permitting Contract," (Op., Appendix p. 2), and then deemed Johnson's actual construction of the barn "the Construction Contract." (Op., Appendix p. 3.)

[1] All the facts in the Record are uncontested.

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 Demands against Johnson claimed damages for the cost to tear down and 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.)(Emphasis added.) 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.)

AIC denied coverage to Johnson based on the Arbitration Demands and 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 Johnson defended itself against the Waldes. (Complaint, 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.

Most of the trial court's rulings were upheld by the Court of Appeals. The Court of Appeals found that there were two separate contracts and courses of action by Johnson, one being the process of representing the Waldes before the BZA (through the Permitting Contract) and a second and separate one being Johnson's actual construction of the barn (through the Construction Contract.) (Op., Appendix pp. 2-3.)

The Court of Appeals found that there was "property damage" as defined by the CGL policy because the allegations of the Arbitration Demand and Pre-Trial Brief alleged "loss of use." (Op.,

Appendix, pp. 9-10.) However, critically for this Appeal as explained *infra,* the Court of Appeals did not find that there was alleged a subset of property damage called "physical injury." (Op., Appendix p. 9.)

The Court of Appeals found that there was an "occurrence" properly alleged as well. (Op., Appendix pp. 10-11.) Thus, the Court of Appeals found that there was on the facts alleged an "occurrence" that created "property damage" and so the Insurance Policy, absent any other provision, provided coverage.

However, the Court of Appeals at the end of its analysis found that Exclusion A.2(j)(6), what is commonly known as the "Products Completed Operations Hazard Exclusion" (hereinafter, "the Exclusion") applied to the alleged "loss of use" type of "property damage," and therefore there was no coverage for Johnson and no duty to defend. (Op., Appendix pp. 11-14.)

Had the Court of Appeals not ruled on the issue of what constitutes "property damage" under the CGL, or had the Court properly defined "physical injury" to include the property damage alleged in by the Waldes, then the narrow basis upon which the Court of Appeals applied the Exclusion would not apply, and the trial court would have been affirmed. These two issues are the primary contentions by Petitioners herein.

STANDARD OF REVIEW

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). The question of whether a contract is ambiguous is a question of law for the court. *Laser Supply and Services, Inc. v. Orchard Park Assocs.*, 676 S.E.2d 139 (S.C. App. 2009). Thus, this Court may review the questions *de novo* without any deference to the trial court or the Court of Appeals.

To the extent there are questions of contract interpretation, "[i]t 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). 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).

ARGUMENT

The Court of Appeals affirmed most of the trial court's holdings that coverage existed. However, in order to reach the Exclusion upon which the Court of Appeals relied to hold coverage was excluded under the Policy, the Court of Appeals answered a question that was not asked of it by AIC, to wit, 'what is property damage' under the facts alleged. If the Court of Appeals had not answered that unasked question, it could not have separated "property damage" between "loss of use" and "physical injury" and thus would been unable to apply the Exclusion to "loss of use" damage only.

The Court of Appeals further compounded its mistake by then departing from prior South Carolina precedent and issuing an unduly restrictive definition of the "physical damage" component of "property damage" as defined in CGL insurance policies. As this Court is well aware, the interpretation of CGL insurance policies in the construction context has been a ripe subject of litigation in recent years in this state.

Finally, the Court of Appeals defied the laws of physics and the space-time continuum by holding that a loss of use of a structure occurred before the structure was built.

The Petitioners respectfully request this Court reverse the Court of Appeals on this subject matter, which seems to have arisen as an afterthought in the Court of Appeals' analysis

but which will have dramatic impacts on CGL coverage law in South Carolina. Thus, since the Waldes were entitled to partial summary judgment as assignees of Johnson's breach of the duty to defend by AIC, the Court of Appeals should be reversed.

I. The Court of Appeals erred in addressing the definition of "property damage" at all as AIC did not raise that issue.

AIC never raised the definition of "physical injury" as a limitation to the Petitioners' allegation of "property damage" to in its Brief to the Court of Appeals. AIC simply stated that no property damage was alleged, but made no argument that the *definition of property damage* barred coverage for the partial demolition of the barn. (Appellant's Brief, pp. 22-24.) Rather, AIC simply argued that the damages of tearing down and replacing the barn were not property damage under the Construction Contract (ignoring that the occurrence occurred as part of the work under the separate Permitting Contract.) (Appellant's Brief, pp. 23-24.)

AIC simply did not raise the definition of "property damage" in its appeal. By its own admission, AIC stated only in its Appellate Brief: "nothing in this Demand sets forth any allegations that the building at issue was physically injured..." (Return to Petition for Rehearing, Appendix p. 25.) That is the extent of AIC's 'argument' on this issue. Thus, this is not an argument properly reserved for an appeal and the Court of Appeals should not have ventured into the discussion. *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); *Fields v. The Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E. 2d 283, 285 n.3 (Ct. App. 1993).

This Court has stated "[w]e have held that the Court of Appeals may not decide an issue neither presented to the circuit court nor raised by proper exception on appeal." *Connolly v. People's Life Ins. Co. of South Carolina*, 299 S.C. 348, 384 S.E. 2d 38, 740 (1989)(Reversing Court of Appeals for basing its holding on matter not raised by appellant.) That is precisely what the Court of Appeals did by *sua sponte* raising the issue and then defining 'physical injury' in its

Opinion. Therefore, this point cannot be the basis for the Court of Appeals' reversal of the trial court. "[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Herron v. Century BMW*, 719 S.E.2d 640, 644 (S.C. 2011)

II. The Court of Appeals erred by ignoring precedent and issuing an improper and overly restrictive definition of the term "physical injury."

The Court of Appeals in defining "physical injury" focused on the word "injury," citing *Black's Law Dictionary.* (Op., Appendix pp. 9-10.) However, in doing so, the Court of Appeals ignored prior precedent and set a new precedent that unduly limited the definition of "physical injury" in CGL insurance policies by ignoring the descriptive adjective "physical."

The Court of Appeal's ruling directly contradicts its prior ruling in *Auto-Owners Insurance Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857 (Ct. App. 2009). In *Rhodes*, the Court held that where a billboard constructed by the insured and put on property owned by Rhodes fell onto a highway, and the South Carolina Department of Transportation ("SCDOT") required Rhodes to remove another billboard erected by the insured that SCDOT deemed was unsafe, "the costs associated with Rhodes' required removal of the final sign comports with the broader definition of damages or physical injury to tangible property defined in subsection 12.a." 385 S.C. at 103-104, 682 S.E.2d at 868.

There is no distinction between the SCDOT's order that billboard be removed in *Rhodes* and the BZA's Order that the barn be partially demolished in the present case. In both cases, the result of the order of authority was the demolition and removal of property which each were "physical injury" as defined by the insurance policy. Thus, this Court has held in *Rhodes* that the definition of "physical injury" includes remedial demolition.

The controlling contractual language is not just the word "injury," the language is the term "physical injury." *Black's Law Dictionary* 1032 (5th Ed. 1979) defined "physical injury as: "Bodily harm or hurt, excluding mental distress, fright, or emotional disturbance. See also **Physical harm**." (Bold in original.) Then, Black's defines **Physical harm** stating "[t]he words 'physical harm' are used throughout the Restatement of Torts to denote *the physical impairment* of the human body, or of land *or chattels*." (Italics added.) The partial demolition of the barn was a "physical impairment" by any definition.

Commentators have also recognized a broader definition of "physical injury to tangible property" in the standard CGL policy. "In relation to the first prong of the definition, property suffers physical, tangible injury when the property is altered in appearance, shape, color or in some other material dimension." 9A *Couch on Insurance* §129:6 (3rd Ed. 2012).

As stated, the Court improperly applied the definition of physical injury when it held that the remediation work performed by Johnson was not factually a "physical injury." First, the primary injury was the demolition, not the remedial work. Second, even absent the controlling precedent of *Rhodes*, that the work was remediation work and that the work was performed by Johnson is irrelevant to the analysis.

For example, had Johnson not performed the remediation work, the barn would have been ordered torn down by the Board of Zoning Appeals anyway (the logical and only conclusion given the BZA's Order). In such a case, there would be no "remediation work;" there would only be injury as the barn would have been torn down by someone other than Johnson. Under the Court's reasoning, a third party tearing down the barn would create a "physical injury." However, there is nothing in the definition of "physical injury" that restricts the damage created by the injury to be damage not remediated by the tortfeasor. Thus, the Court's ruling on this point discourages the

mitigation of damages by a tortfeasor; the tortfeasor would be incentivized to do nothing and allow a third party to take action so that the tortfeasor's conduct was covered by its insurance.

Further, in the absence of such an express restriction, the Court must read the policy to favor the insured, so that the "physical injury" cannot exclude damage caused by the tortfeasor's mitigation efforts. *Laidlaw Environ. Services (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 524 S.E.2d 874, 879 (Ct. App. 1999).

The Court of Appeals' incorrect and overly restrictive definition of "physical injury" is already having a ripple effect on the lower courts in this state. See e.g., *Precision Walls, Inc. v. Liberty Mutual Fire Ins. Co.*, C/A # 2011-CP-23-02028 (Order granting summary judgment citing the definition of "physical injury" in this case, filed 2/19/13. Code, J.)(Appendix, pp.36-37.) This is a significant holding that impairs the bargain by contractors, like Johnson, that expect "physical injury" to mean what it plainly means, and not simply "injury."

III. The Court of Appeals erred by improperly applied the Exclusion"

A. THE EXCLUSION DOES NOT APPLY IF THERE IS PHYSICAL INJURY

The Court of Appeals reversed the trial court based upon its conclusion that the Exclusion unambiguously applied to bar coverage. (Op., Appendix pp. 11-14.) The Court of Appeals to reach that exclusion held that Petitioners only alleged loss of use injury when it held "Johnson's partial tearing down of the barn's second story does not constitute an injury." (Op., Appendix p. 9.) Had the Court of Appeals found that there was the "physical injury" type of property damage, the Exclusion would not apply to bar coverage because the sole reason the Court of Appeals found that the Exclusion applied was that the Exclusion related back to the "loss of use" type of "property damage:" "[t]he loss of use is deemed to have happened at the time of those incorrect performances. Therefore, the alleged loss of use happened before Johnson's work pursuant to the Permitting

Contract was complete."[2] (Op., Appendix p.13.) Thus, if there is "physical injury," the "relating back" part of the Exclusion's definition would not apply and neither would the Exclusion.

B. THE COURT OF APPEALS DID NOT PROPERLY APPLY THE EXCLUSION TO THE FACTS.

The Exclusion does not apply pursuant to the "your work" definition (2)(a) which states that the "property damage" is damage *except* "(a) When all of the work called for in your contract has been completed." However, the Permitting Contract was necessarily completed before the work under the Construction Contract began. Once the BZA ruled, Johnson's work under the Permitting Contract was complete. The BZA had to rule that the barn could be built before the Construction Contract was to be executed. Thus, only after the Permitting Contract was complete did work occur pursuant to the Construction Contract.

The Court of Appeals erred by applying the Exclusion to the wrong occurrence. (Op., Appendix p. 13.) The Court lost the logic of its analysis when it forgot that there were two contracts, the Permitting Contract and then the Construction Contract, and improperly construed Johnson's advice before the Board and Johnson's construction of the barn as one connected occurrence or series of events. However, the Court acknowledged that it could not do so in footnotes 1 and 9, since there were two separate contracts, the Permitting Contract and the Construction Contract. (Op., Appendix pp. 2, 13.)[3] Thus, the "loss of use" to which the Exclusion would apply would only be a loss of use caused by an "occurrence" during the construction of the barn, such as a traditional construction defect. That is not the case here.

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[2] The absurdity of the logic compelling the result reached by the Court of Appeals is apparent from this sentence. The Court determined that a loss of use happened before the performance that caused the loss of use happened. This is the equivalent to declaring there was the loss of use of the barn before it was built.

[3] Had there been but one contract for both the permitting and construction, the Court of Appeals would be correct, but that is not the law of the case. Rather, the Court recognized that there was a separate "Permitting Contract" from the "Construction Contract."

The Exclusion cannot apply to a loss of use from an occurrence unconnected with the construction of the barn. If a third party instead of Johnson had built the barn and it was torn down because of the BZA's Order, there is no question but that the Exclusion would not apply. Since the Court must accept that Johnson engaged in two completely separate courses of conduct (per footnotes 1 & 9), the Exclusion could only apply to "loss of use" caused by Johnson's work under the Permitting Contract, and since the work under the Permitting Contract was completed before Johnson undertook the separate contract to construct the barn.

Thus, the Court's logic was improper where it states: "[t]he loss of use is deemed to have happened at the time of those incorrect performances. Therefore, the alleged loss of use happened before Johnson's work pursuant to the Permitting Contract was complete." (Op., Appendix p. 13.) Again, this is an incorrect statement of fact based on the Record and the Court's recognition at footnotes 1 & 9 that there were two contracts.

Johnson's work under the Permitting Contract was completed before he started work on the Construction Contract for the construction of the barn. Johnson could not start work under the Construction Contract until it completed its work under the Permitting Contract; that is, Johnson obtaining the proper BZA clearance. It was impossible to build the barn before the Permitting Contract was complete, so it was therefore impossible for a loss of use of the barn to occur before it was built. There simply could be no loss of use during the Permitting Contract. It is axiomatic that contracts will not be construed to result in absurd results. *Holden v. Alice Mfg., Inc.,* 317 S.C. 215, 452 S.E.2d 628, 631 (S.C. Ct. App. 1994); *Walters v. Summey Bldg. Sys., Inc.*, 311 S.C. 507, 510-11, 429 S.E.2d 854, 856 (Ct. App. 1993).

The CGL Policy simply cannot be read to create an absurd fiction: that a loss of use occurred before the loss of use actually occurred. This construction at best is ambiguous, and if so,

then it must be construed in favor of the insured so that the loss of use did not occur before the actual loss occurred. *Laidlaw Environ. Services (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 524 S.E.2d 874, 879 (Ct. App. 1999).

C. THE EXCLUSION AS APPLIED BY THE COURT OF APPEALS WAS AMBIGUOUS, ENTITLING PETITIONERS TO JUDGMENT AS A MATTER OF LAW.

The Court of Appeals found that the Exclusion unambiguously applied and barred coverage. (Op., Appendix p. 6 fn. 5, p. 13 fn. 9.) However, as the Court interpreted the Exclusion and the facts from the Record, the conclusion reached by the Court was that the "the alleged loss use happened before Johnson's work pursuant to the Permitting Contract was complete." (Op., Appendix p. 13.) The Court's opinion results in the interpretation of the Policy that a loss of use occurred *before the loss of use actually occurred.* That is factually impossible.

The incongruity of the facts and the policy language render the Exclusion at best ambiguous as applied to this set of facts where the same policy holder has two different contracts and the work under one contract harms the work it performs under a separate contract. Because this construction leads to an ambiguity in the Exclusion as applied, then such ambiguity must be construed in favor of the insured so that the loss of use did not occur before the actual loss occurred. *Crossman Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 49, 717 S.E.2d 592, 594 (2011); *Laidlaw Environ. Services (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 524 S.E.2d 874, 879 (Ct. App. 1999). Thus, the Court of Appeals erred by not construing the ambiguous Exclusion adversely to the Respondent.

IV. The Court of Appeals erred by reaching the merits of the Appeal as the Respondent failed to appeal an alternative sustaining ground.

The Court of Appeals at its footnote 6 interpreted the trial court's alternative finding that Respondent had a duty to defend based on the allegation of breach of fiduciary duty to apply only

to whether breach of fiduciary duty was an occurrence. (Op., Appendix p. 7 fn. 6.) However, the trial court did not say that. The trial court unambiguously stated "[a]dditionally, and as an alternative basis for finding a duty to defend, the Court finds that the allegations of harm caused by Johnson's breach of fiduciary duty is covered." (Trial Court Order, fn.4, R. 11.)

While the trial court's footnote was found in a section where the occurrence issue was addressed, the footnote by its express terms issued a blanket opinion that the allegations of harm were covered. A blanket finding by a trial court is just as effective as one that is explained by a trial court for purposes of appeal and error preservation. It was AIC's responsibility to seek a clarification of this ruling, but it did not do so. Therefore, the ruling is the law of the case.

Regardless, there is not a shred of argument anywhere in Respondent's Brief regarding the breach of fiduciary duty finding. The law is clear that in order the preserve an issue for appeal, the appellant must specifically designate the issue appealed from and make specific arguments and citations to authority regarding that issue. *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)(Supreme Court held that an issue is abandoned if the appellant's brief treats it in a conclusory manner.) A mere assertion of error is too conclusory to present an issue for appellate review. *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E. 2d 513, 514 (1994)("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."); *Fields v. The Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E. 2d 283, 285 n.3 (Ct. App. 1993); *Peirson v. Calhoun*, 308 S.C. 246, 417 S.E.2d 604, 609 (Ct. App. 1992)(Mere assertion that court "abused discretion" insufficient.) Here, Respondent did neither.

There is no ambiguity in the Trial Court's Order; footnote 4 did not say that breach of fiduciary duty was an occurrence, rather, it said that breach of fiduciary duty was an alternative

basis to find that Respondent had a duty to defend. The brevity of the note is irrelevant. *Porter v. Labor Depot,* 372 S.C. 560, 643 S.E. 2d 96, 100 (Ct. App. 2007). As the duty to defend was the heart of Petitioners' claim, the footnote was all-encompassing and the failure to appeal it renders all of Respondent's other arguments moot. Thus, the Court of Appeals should be reversed and the trial court's Order reinstated.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant certiorari and review this important and controlling issue of insurance law. As stated, the lower courts are already citing the Court of Appeal's decision in this matter to bar coverage. Petitioners respectfully request that the Court act on this Petition and correct the mistake of the Court of Appeals.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

Opinion No. 5061
Filed December 12, 2012

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

v.

Association Insurance Company.....Respondent.

PROOF OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, hereby certify that I have this day served a copy of the Petition for Writ of Certiorari and Appendix upon counsel for Respondent by depositing a copy of same in the United States Mail, sufficient postage pre-paid as follows:

R. Michael Ethridge, Esquire
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40 Calhoun Street, Suite 400
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This 12th day of April, 2013.

Ann Shuler

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Via Courier

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Re: William and Mary Frances Walde, as assignees of Johnson Construction Company of Aiken, Inc., Respondents v. Association Insurance Company, Appellant, Appellate Case No. 2010-172706
Opinion No. 5064 (filed December 12, 2012)

Dear Madam Clerk:

Please find enclosed for filing, the three copies of the Petition for Writ of Certiorari which has been filed in the South Carolina Supreme Court today. Please return one stamped copy to me via our courier.

Very truly yours,

McNAIR LAW FIRM, P.A.

Benjamin E. Nicholson, V

Enclosure

cc: Honorable Daniel E. Shearouse
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April 12, 2013

Via Courier

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: William and Mary Frances Walde, as assignees of Johnson Construction Company of Aiken, Inc., Respondents v. Association Insurance Company, Appellant, Appellate Case No. 2010-172706
Opinion No. 5064 (filed December 12, 2012)

Dear Mr. Shearouse:

Please find enclosed for filing with regard to the above referenced case:

Original and seven copies of the Petition for Writ of Certiorari;
Three copies of the Appendix;
Certificate of Service of the Petition and Appendix; and
Our check in the amount of $100.00.

Please file the Petition and Appendix and return the file stamped extra copies to me via our courier. A copy of the Petition is being filed with the Clerk of the South Carolina Court of Appeals today.

Very truly yours,

McNAIR LAW FIRM, P.A.

Ned Nicholson

Benjamin E. Nicholson, V

Enclosures

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

Opinion No. 5061
Filed December 12, 2012

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

v.

Association Insurance Company.....Respondent.

PROOF OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, hereby certify that I have this day served a copy of the Petition for Writ of Certiorari and Appendix upon counsel for Respondent by depositing a copy of same in the United States Mail, sufficient postage pre-paid as follows:

R. Michael Ethridge, Esquire
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401

This 12th day of April, 2013.

Ann Shuler