

Precision Walls are not covered "property damage" as defined in the insurance policy, did not result from an "occurrence," and were excluded from coverage.

FINDINGS OF FACT

Precision Walls, Inc. was a subcontractor to SYS Constructors, Inc. ("SYS") on a construction project referred to as the Tri-County Technical College Occupational Center (the "Project"). For a one-year period during the Project, from September 30, 2009 to September 30, 2010, Precision Walls was insured under a commercial general liability policy (Policy No. TB2-651-287492-029) issued to Precision Walls by Liberty Mutual (the "Policy").

Insofar as pertinent to this case, the scope of work to be performed by Precision Walls was described as follows in its subcontract:

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

After Precision Walls had begun to install the insulation board ("blue board"), but before its work was complete, SYS observed that some of the tape used by Precision Walls to seal the seams between insulation boards was coming loose. Upon further investigation, SYS determined that the tape was unsuitable and would have to be replaced with another tape. In some wall sections, the brick veneer siding had already been installed by the masonry subcontractor over the insulation board. SYS engaged its masonry subcontractor to remove the brick veneer from those wall sections in order to allow Precision Walls access to the underlying insulation board to replace the seal tape. After Precision Walls re-sealed the seams of the insulation board with new tape, the masonry subcontractor installed new brick veneer siding on those walls.



When SYS made the decision to remove the brick veneer it was fully intact and there was no damage, according to the testimony of Kevin Howell, Precision Walls' project manager. The only reason SYS required the removal of the brick veneer was to allow access to the insulation board underneath so the seal tape could be replaced. There was nothing wrong with the brick veneer itself.

By change order, SYS deducted the costs of tearing down and rebuilding the brick veneer from the Precision Walls subcontract. The deductive change order was issued by SYS on September 27, 2010 and accepted by Precision Walls in November 2011. The amount deducted from the Precision Walls subcontract for the cost of tearing down and replacing the brick veneer was \$97,500. Precision Walls submitted a claim to Liberty Mutual seeking coverage for this loss under the Liberty Mutual CGL policy. Liberty Mutual denied coverage. This lawsuit ensued.

CONCLUSIONS OF LAW

1. Precision Walls' losses are not "property damage" as defined in the Policy.

The insuring agreement of the Policy provides, in pertinent part, that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'property damage' to which this insurance applies. . . ." In this case, the Court applies subpart "a" of the Policy definition of "property damage" according to which "property damage" is defined as "[p]hysical injury to tangible property, including all resulting loss of use of that property." Precision Walls makes no claim under subpart "b" of the "property damage" definition, which pertains to "loss of use of tangible property that is not physically injured."

Recently, in *Walde v. Association Ins. Co.*, Op. No. 5061, Shearouse Advance Sheets (filed December 12, 2012)(*rehearing denied* February 26, 2013), the South Carolina Court of Appeals applied the same definition of "property damage" to analogous facts. *Walde* held that



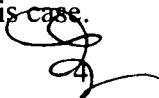
the costs of a contractor's partial tear-down of a portion of a new barn and apartment building then under construction in order to bring the building into compliance with county zoning ordinances did not constitute "physical injury to tangible property" within the definition of "property damage" in a Commercial General Liability ("CGL") insurance policy. *Id.* at 89. *See also, Crossman Communities of North Carolina, Inc. v. Harleyville Mutual Insurance Co.*, ___ S.C. ___, 717 S.E.2d 589 (2011)(cost of repairing or removing defective work is not "property damage.").

In this case, the only loss claimed by Precision Walls is the liability it incurred because of the tear-down and reconstruction of an otherwise undamaged brick veneer wall at the direction of the project owner and general contractor for the remedial purpose of bringing the work of Precision Walls on the underlying insulation into compliance with subcontract specifications. The Court finds the losses claimed by Precision Walls are not "property damage," and therefore, are not covered losses under the Liberty Mutual Policy.

2. The losses claimed by Precision Walls were not the result of an "occurrence."

The insuring agreement covers "property damage" only if it is caused by an "occurrence." According to the Policy Definitions, the term "occurrence" means "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."² In *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), the South Carolina Supreme Court, following the majority rule, held that faulty workmanship is not an "occurrence" where the claim is for money damages to compensate for

² The Liberty Mutual Policy was issued September 30, 2009, prior to the effective date of the S.C. Code Ann. §38-61-70 (Supp. 2011), which was May 17, 2011. *Harleysville Mut. Ins. Co. v. State of South Carolina*, Op. No. 27189, Shearouse Advance Sheets (filed November 21, 2012) held unconstitutional the retroactivity clause of S.C. Code Ann. § 38-61-70 so the statute applies only prospectively. It does not apply to this case.



repairing the defective work. 366 S.C. at 124, 621 S.E.2d at 36. To hold otherwise, the court said, would transform the CGL policy into a performance bond, which guarantees the work, rather than an insurance policy, which is intended to insure against accidents. *Id.*

Here, the losses claimed by Precision Walls resulted from a deductive change order charging Precision Walls for costs incurred by SYS in correcting Precision Walls non-conforming work. The Court finds these losses were not caused by an "occurrence" and, therefore, are not covered under the Liberty Mutual Policy.

3. Coverage for the losses claimed by Precision Walls is excluded by the "Damage to Property" Exclusion.

Even if the losses claimed by Precision Walls were found to be within the terms of the insuring agreement, there would be no coverage because the losses are excluded by Policy Exclusion 2(j)(6). In pertinent part, it excludes coverage for "property damage" to:

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

The term "your work" is defined as follows in Policy Definitions:

22. "Your Work":

a. Means:

- (1) Work or operations performed by you or on your behalf;
and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
- (2) The providing of or failure to provide warnings or instructions.

An exclusion virtually identical to this one was applied by the South Carolina Supreme Court in *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355



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


Following *Century Indemnity*, the Court of Appeals held in *Walde* that an exclusion identical to 2(j)(6) "excluded coverage not only for (1) 'property damage' to defective work caused by that defective work but also (2) 'property damage' to non-defective work caused by the defective work." These authorities confirm that any coverage for the losses claimed by Precision Walls is excluded by Policy Exclusion 2(j)(6).



THEREFORE, IT IS ORDERED AND ADJUDGED that the Liberty Mutual Policy provides no coverage for Precision Walls' losses, and judgment is granted in favor of the Defendant on all claims and causes of action.

AND IT IS SO ORDERED.

Greenville, South Carolina
Date: 3/6/13



Letitia H. Verdin, Circuit Court Judge



STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP2302028 2013 APR 10 A 10:38

COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

Precision Walls Inc vs. Liberty Mutual Fire Insurance Co

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 10th day of April, 2013, and a copy mailed first class this 10th day of April, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court