THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM AIKEN COUNTY
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.

RESPONDENT'S RETURN TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rule 242(f), SCACR, Respondent Association Insurance Company ("AIC") provides this Return to the Petition for Writ of Certiorari filed by Petitioners William and Mary Frances Walde, as assignees of Johnson Construction Company of Aiken, Inc. ("Waldes") regarding the decision in Walde v. Association Insurance Company, Op. No. 5061 (S.C. Ct. App. filed December 12, 2012).

The Waldes contend that the Court of Appeals erred in holding that no coverage exists under a CGL policy for claims made against a contractor who, after applying for and receiving a variance and special exception to build a specific barn in a specific location, inexplicably built the wrong barn in the wrong location. The Waldes assert that the Court of Appeals delved too deeply in the terms and conditions contained in the policy to mistakenly apply an applicable exclusion, when the entire appeal should have been decided on a one-sentence footnote that they read in a vacuum rather than in the context of the trial court's twenty-page order. While, respectfully, there may be certain aspects of the Court of Appeals' decision with which AIC does not agree, the decision correctly reaffirms the long-standing principle of South Carolina insurance jurisprudence that CGL policies are not intended to provide coverage for business risks such as this. For the reasons stated herein, this Court should find that the Waldes' arguments are not persuasive and deny their Petition.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly determine that remedial measures to bring the structure into compliance with Aiken's regulations did not fall within the definition of "physical injury to tangible property"?

2. Did the Court of Appeals correctly apply Exclusion A.2(j)(6) to property damage for loss of use without physical injury?

3. Did the Court of Appeals correctly construe the trial court's one-sentence footnote as not encompassing an alternative finding to support a blanket grant of summary judgment?

4. Did the Court of Appeals err in finding that the allegations sufficiently alleged "property damage" caused by an "occurrence"?

5. Did the Court of Appeals err in failing to address whether it was appropriate for the trial court to treat the work as separate projects for purposes of construing the policy exclusions?

COUNTER-STATEMENT OF THE CASE

This appeal arises from a case involving a contractor's claim for coverage under a Commercial General Liability ("CGL") insurance policy issued by Respondent Association Insurance Company ("AIC") to Johnson Construction Company ("Johnson"). Petitioners William and Mary Frances Walde ("Waldes"), pursued an underlying arbitration claim against Johnson, which the Waldes settled and then pursued the instant claim for coverage under the policy as assignees of Johnson.

The Waldes filed suit against AIC in the Court of Common Pleas for Aiken County. On cross-motions for summary judgment, the trial court granted partial summary judgment to the Waldes finding there was a duty to defend, and denied AIC's motion for summary judgment. On appeal, the Court of Appeals reversed. Walde v. Association Insurance Company, Op. No. 5061 (S.C. Ct. App. filed December 12, 2012). The Court of Appeals denied Petitioners' petition for rehearing, and Petitioners have timely petitioned for a writ of certiorari from this Court.

COUNTER-STATEMENT OF THE FACTS

This insurance coverage dispute arises out of a claim for coverage under a CGL policy issued by Association Insurance Company ("AIC") to Johnson Construction Company ("Johnson") for an underlying arbitration demand brought by William and Mary Frances Walde ("Waldes"). The Demand for Arbitration described the nature of the dispute as follows:

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

(R. 106).

Johnson submitted the claim to AIC seeking coverage under his CGL policy. AIC denied coverage on September 25, 2008 after determining that there was no occurrence or property damage within the meaning of the policy and that various exclusions were applicable. Thirteen months later, on August 17, 2009, the Waldes filed their Pre-Trial Brief in the Arbitration Demand. (R.117-135). The introductory paragraph of the Pre-Trial Brief provides the following:

> This is a case 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.

(R. 117).

The Waldes Pre-Trial Brief sets forth the underlying sequence of events. Johnson's work started in February of 2008, and he provided the Waldes with drafts of applications to the Board of Zoning Appeals ("BZA") and a construction proposal for a one-story stable and paddock that

same month. (R. 120). Johnson submitted the applications for a variance and special exception to the BZA on March 17, 2008 with an attached sketch plan of the stable and the proposed location. (R. 120-121). Beginning before the BZA meeting on March 25, 2008, the Waldes inquired about including an apartment above the stable; Johnson advised them that this would be no problem and began working on the plan and preparing an estimate. (R. 121). Johnson appeared at the BZA hearing on behalf of the Waldes on March 25, 2008 seeking approval for the one-story stable and paddock shown in the sketch plan submitted with the application. (R. 121). On April 22, 2008, Johnson signed the construction contract, which included the accessory apartment in the scope of work. (R. 122). Johnson received the formal ruling of the BZA by letter dated April 24, 2008. (R. 122).

On May 2, 2008, Johnson applied for a building permit to construct a two-story stable with an accessory apartment. (R. 123). On June 27, 2008, when the construction was approximately 80% complete, the City of Aiken's building inspector determined that the stable did not comply with the variance or special exception. (R. 123). In July 2008, Johnson filed a second application with the BZA seeking after-the-fact approval, which was denied. (R.124-125). In December of 2008, the Waldes then filed another application for approval, proposing that the accessory apartment be removed and the roof lowered so that the stable could stay in its current location. (R. 126). The BZA approved the proposal in January of 2009, and Johnson performed the "remedial work" on the stable in late-March and early-April 2009. (R. 126).

The Waldes' arbitration claims sought damages for the difference between the value of the barn they contracted for and the value of the barn they received, costs and attorneys fees, costs of paying additional professionals to supervise, plan, and survey construction of the property due to Johnson's acts and omissions, travel costs, and the arbitrator's fee. (R. 128-131).

The Waldes settled with Johnson before arbitration, and as part of the settlement, Johnson assigned to the Waldes any rights he had to insurance proceeds under the policy. (R. 32). The Waldes filed suit against AIC on October 14, 2009, attaching the policy, Arbitration Demand and Pre-Trial Brief to the Complaint. (R. 26-38). Cross motions for summary judgment were filed, with the Waldes seeking partial summary judgment on the duty to defend, and AIC seeking summary judgment as to all of the claims asserted in the Complaint. The trial court granted the Waldes' motion for partial summary judgment, finding that there was a duty to defend because the Waldes alleged "property damage" caused by an "occurrence" and no exclusions were applicable. (R. 2-21).

The Court of Appeals reversed, recognizing that all the claims specifically alleged by the Waldes were economic loss, which "does not by itself trigger coverage under the Policy[,]" (Op., Appendix p. 8 fn. 7), but inferring from the allegations that the Waldes possibly alleged loss of use without physical injury. This inference was the sole basis for finding that Waldes went "beyond alleging mere economic loss." (Op., Appendix p. 9). The Court of Appeals held that the Waldes established the possibility of an "occurrence" in alleging that Johnson wrongly said the plans complied with the BZA variance and exception, (Op., Appendix p. 11), but found that Exclusion A.2(j)(6) unambiguously excluded coverage. (Op., Appendix pp. 11-14).

ARGUMENTS

I. The Court of Appeals appropriately addressed the distinction between the two types of "property damage" defined in the policy as part of its analyses of whether the Waldes alleged the possibility of "property damage" within the meaning of the policy and whether exclusions were applicable.

(PETITIONERS' QUESTION 1)

A. The issue of whether the Waldes alleged property damage within the meaning of the policy could not have been decided without construing the definition of "property damage" in the policy.

The issue of whether "property damage" is alleged within the meaning of the policy is a fundamental aspect of the framework this Court has suggested for analyzing CGL coverage. Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 49, 717 S.E.2d 589, 594 (S.C. 2011) ("[I]t is only after 'property damage' has been alleged that the question of "occurrence' is reached.").[1]

While it seems obvious that the Court of Appeals would need to construe a policy definition when that defined term is a key issue in the appeal, Petitioners' lead argument is that the Court of Appeals should not have even addressed the policy definition of "property damage." Petitioners claim that AIC failed to even ask what constitutes "property damage," despite the fact that AIC raised the issue in its Statement of Issues on Appeal, and specifically argued the issue in its Brief of Appellant under the heading "NO PROPERTY DAMAGE TOOK PLACE WITHIN THE MEANING OF 'PROPERTY DAMAGE' IN THE ASSOCIATION POLICY":

[1] In fairness to both parties, the briefing phase of this appeal took place entirely within the period between this Court's initial decision in Crossmann (Op. No. 26909, filed January 7, 2011), and the opinion issued after rehearing on August 22, 2011. The initial Crossmann opinion, which emphasized an occurrence-first analysis and declined to even address property damage, was subsequently withdrawn and replaced by an opinion that emphasized the policy term "property damage" and stressed that with respect to the first type of property damage defined in the policy, "the critical phrase is 'physical injury'. . . ." Crossmann, 717 S.E.2d at 593.

> "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."
>
> * * *
>
> "[N]othing 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."
>
> * * *
>
> "[N]o '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."

(Brief of Appellant, pp. 22-24).

Petitioners further complain that "[i]f the Court of Appeals had not answered that unasked question, it could not have separated 'property damage' between 'loss of use' and 'physical injury'. . . ." (Pet., p. 6). In doing so, Petitioners implicitly concede that addressing what constitutes "property damage" necessarily requires the court to delve into the definition contained in the policy, which specifically includes two types of "property damage." The Court of Appeals did just that, and correctly held that remedial measures to bring the structure into compliance with Aiken's regulations did not fall within the meaning of "physical injury to tangible property." (Op., Appendix p. 9).

B. In construing "physical injury" under the facts alleged, the proper focus was on the injury component.

In evaluating the Court of Appeals' holding that the only damage possibly falling within the definition of "property damage" was loss of use without physical injury, it is important to consider the context of the underlying claim, or more specifically, the manner in which Petitioners framed the underlying claim. The Waldes carefully crafted their underlying

arbitration claim in hopes of avoiding the straightforward coverage analysis that the claim deserves: that building the wrong barn in the wrong location is not covered under a CGL policy.

The Waldes presented their claims against Johnson as causes of action for negligence, negligent misrepresentation, and breach of fiduciary duty, all premised on an illusory distinction between obtaining approval and building in accordance with that approval. But labels do not change facts, *see* Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 577, 666 S.E.2d 897, 899 (S.C. 2008) (the "court must look beyond the labels describing the acts to the acts themselves which form the basis of the claim against the insurer"), and the essential facts underlying this claim are that Johnson applied for and received approval to build a specific barn in a specific location, but then built the wrong barn in the wrong location.

The Waldes made a claim against Johnson for failing to build what he promised; their damages were based on the failure to receive what they bargained for and the costs of remediating what Johnson improperly built. Nonetheless, as the trial court pointed out in its Order, "[t]he Waldes did not allege, nor have they ever alleged, that the construction itself was defective." (R. 11). However, beneath all of the creative pleading there still lies a claim for faulty workmanship, which is precisely the type of business risk that a CGL policy is not intended to cover.

The Court of Appeals began its property damage analysis by recognizing that the claims specifically alleged by the Waldes were economic loss, which "does not by itself trigger coverage under the Policy." (Op., Appendix p. 8); *compare* (Op., Appendix p. 4) (describing the damages sought by the Waldes) *with* (Op., Appendix p. 8 fn. 7) (characterizing those damages as economic loss). Because the Waldes did not specifically allege loss of use damages in their arbitration demand or brief, (R. 128-131), the Court of Appeals implicitly held that loss of use

damages could be inferred from the allegations, and this inference was the sole basis for finding that Waldes went "beyond alleging mere economic loss." (Op., Appendix p. 9).

The Court of Appeals correctly held that these potential loss of use damages stemmed from the building inspector's determination that the barn did not comply with the Variance and Special Exception. (Op., Appendix p. 9). Thus, the injury was the construction that placed the Waldes in violation of Aiken's ordinances, not the remedial measures Johnson performed to correct the injury. (Op., Appendix p. 9). This potential injury was legal or regulatory; it was unaccompanied by physical injury. It was irrelevant whether there was a physical component to the remedial measures, because the remedial measure did not constitute an injury. Accordingly, the Court of Appeals properly focused on the injury component of physical injury in construing the term in the context of the Waldes' underlying claim.

The Court of Appeals' holding that remedial measures to the barn do not raise the possibility of "physical injury to tangible property" is consistent with this Court's discussion of the physical injury component of "property damage" in Crossmann, 717 S.E.2d at 593. As this Court explained:

> With respect to the first quoted definition of "property damage," the critical phrase is "physical injury," which suggests the property was not defective at the outset, but rather was initially proper and injured thereafter. We emphasize the difference between a claim for the costs of repairing or removing defective work, which is not a claim for "property damage," and a claim for the costs of repairing damage caused by the defective work, which is a claim for "property damage."

Id. (internal citations and quotations omitted).

Here, Johnson applied for and received a variance and special exception to build a specific barn in a specific location, then applied for a permit to build and started constructing a different barn in a different location. The barn was not "initially proper and injured thereafter[,]" but was non-compliant from the outset. *See* id. ("[T]he property allegedly damaged has to have

been undamaged or uninjured at some previous point in time.") (*quoting* Wm. C. Vick Constr. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 52 F.Supp.2d 569, 582 (E.D.N.C. 1999), *aff'd*, 213 F.3d 634 (4th Cir. 2000) (unpublished table decision)).

While AIC respectfully disagrees that any "property damage" was alleged, the distinction by the Court of Appeals between property damage with and without physical injury was not an afterthought, but aptly described the only potential damages within the meaning of the policy that could be inferred from the arbitration demand.[2]

C. The decision of the Court of Appeals was not controlled by Rhodes.

The Court of Appeals' holding does not conflict with its prior holding in Auto-Owners Insurance Co. v. Rhodes, 385 S.C. 83, 682 S.E.2d 857 (S.C. App. 2009). This Court is familiar with the facts of Rhodes, having recently held oral arguments after granting Auto-Owners' petition for a writ of certiorari to review the decision. Regardless of whether the Court of Appeals' decision in Rhodes stands, the facts are distinguishable.

Rhodes did not involve a situation where an insured applied for and received a permit to construct a specific sign in a specific location, only to build a different sign in a different location and then have it ordered taken down. Rather, Rhodes involved a property owner's claim against a sign manufacturer arising out of the defective construction and installation of three billboards on Rhodes' property. Id. at 861. Seventeen months after the billboards were installed on Rhodes' property under a permit obtained by Rhodes, one of the signs fell to the ground, physically

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[2] Petitioners attach a Form 4 order in the case styled Precision Walls, Inc. v. Liberty Mutual Fire Insurance Co., Civil Action No: 2011-CP-23-2028, to support their position that the Court of Appeals' construction of "physical injury" is "already having a ripple effect on the lower courts in this state." (Pet. p.11). It is difficult to see how this single Form 4 order makes Petitioners' point. The primary finding was that there was no occurrence under the policy, and the order contains no analysis of Walde whatsoever. Accordingly, this Court should disregard Petitioners' attempt to characterize the Form 4 order for anything more than what it is.

damaging property owned by Rhodes and others. Id. Another sign was leaning, and the SCDOT ordered the third sign taken down because it was defectively constructed like the other two. Id. Unlike the Waldes, who have been careful not to allege that the construction of the barn itself was defective, the claim in Rhodes was premised on the defective construction and installation of the signs. Id. Here, Johnson simply built the wrong barn in the wrong location.

II. The Court of Appeals correctly applied Exclusion A.2(j)(6) to the only damage possibly falling within the meaning of "property damage."

(PETITIONERS' QUESTION 2)

After finding that potential loss of use was the only property damage within the meaning of the policy that could be inferred from the allegations, the Court of Appeals determined the Waldes established the possibility of an "occurrence" in alleging that Johnson wrongly said the plans complied with the BZA variance and special exception. (Op., Appendix p. 11). AIC respectfully disagrees that there has been an occurrence under the facts alleged here; when a contractor who applies for and receives special approval to build a specific structure in a specific location then wrongly tells his clients that it would be acceptable to build a different structure in a different location without seeking any further modification of the original approval he obtained, the damages are foreseeable. *See* Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. 187, 194, 684 S.E.2d 541, 545 (S.C. 2009) ("[W]hether an 'accident' has occurred under the terms of a CGL policy requires a court to determine whether damages would have been foreseeable if the insured had completed the work properly.") (*citing* Travelers Indem. Co. of Am. v. Moore & Assocs., 216 S.W.3d 302, 309 (Tenn. 2007)). Nonetheless, the Court of Appeals correctly held that the policy did not provide coverage by applying Exclusion A.2(j)(6).

A. The policy unambiguously states that all loss of use to property that is not physically injured is deemed to occur at the time of the "occurrence" that caused it.

Despite Petitioners' characterization of the Court of Appeals' decision as "affirm[ing] most of the trial court's holdings that coverage existed[,]" (Pet., p. 6), the Court of Appeals actually held that out of all the damages alleged in the arbitration claim, the only possibility of "property damage" raised by the Waldes was loss of use, which was inferred by the court rather than specifically alleged by the Waldes. (Op., Appendix p. 9). The court considered the damages actually alleged by the Waldes to be merely "economic loss that does not by itself trigger coverage under the policy." (Op., Appendix p. 8). Petitioners take no exception to this holding in the Petition for Rehearing or the Petition for Writ of Certiorari; nor do they assert that the loss of use damages do not constitute "'property damage' to [t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." Rather, Petitioner argues that Exclusion A.2(j)(6) is not applicable because if the property damage were accompanied by physical injury, the Products Completed Operations Hazard exception would restore coverage. Incorporating the physical injury component discussion above, Petitioners' question turns on the Products Completed Operations Hazard.

B. The Court of Appeals correctly found that the variance work was not included in the Products-Completed Operations Hazard exception to Exclusion A.2(j)(6).

Notwithstanding Petitioners' assertion that the BZA work was separate and apart from the construction work, and despite their attempt to capitalize on the "one contract versus two contracts" issue, the Court of Appeals' properly determined that the loss of use was not within the Products-Completed Operations Hazard because the "occurrence" alleged by the Waldes was Johnson wrongly representing to the Waldes that the modified barn could be built, and the policy

unambiguously states that all loss of use to property that is not physically injured is deemed to occur at the time of the "occurrence" that caused it. (Op., Appendix p. 13). Any complaints about the logic underlying the Court of Appeals' decision is directly attributable to the tortured framing of Petitioners' claim in an attempt to establish coverage where none exists.

Petitioners' argument that Exclusion A.2(j)(6) was not properly applied to the facts is premised on the assertion that "[o]nce the BZA ruled, Johnson's work under the Permitting Contract was complete." (Pet. p. 11). Even assuming the permitting work was complete when the BZA approved the plan for a different barn than the one Johnson actually constructed, the Waldes specifically alleged in their arbitration brief that Johnson advised them regarding the accessory apartment – that it would be "no problem" – before the initial BZA hearing for approval of the original plans. (R. 121). Thus, the Waldes' allegations establish that the occurrence found by the Court of Appeals – wrongly advising them regarding the accessory apartment – happened before the BZA even considered the original application.

Petitioners further claim that "[t]he BZA had to rule the barn could be built before the Construction Contract was to be executed[,]" (Pet. p. 11), but this ignores the reality that the Construction Contract was in fact executed before the BZA issued its formal ruling approving the original plan. (R. 122). Moreover, Johnson prepared plans for the accessory apartment, prepared an estimate for the accessory apartment, and included the accessory apartment in the scope of work in the Construction Contract before the BZA's formal decision on the original plan. (R. 121-122).

The distinction that Petitioners attempt to draw between the permitting work and the construction work simply fails. That Johnson's permitting work was not complete is demonstrated by the simple fact that the barn he was in the process of constructing was

determined to be in violation of the variance and special exception he obtained; Johnson had not completed the task of obtaining the requisite approval for the barn he was building, and he returned to the BZA to apply for after-the-fact approval. (R. 125).

Regardless of whether there was one contract or two, the "occurrence" as determined by the Court of Appeals – Johnson wrongly advising the Waldes that the accessory apartment could be constructed – happened before Johnson appeared at the BZA hearing to request approval for the original plans and before the BZA issued it formal decision approving the original plans. (R. 121-122). Accordingly, the Court of Appeals correctly found that the loss of use deemed to have occurred at the time of the occurrence was not included in the Products-Completed Operations Hazard exception to Exclusion A.2(j)(6).

C. Coverage would have been excluded notwithstanding the existence or non-existence of physical injury.

Although the Court of Appeals declined to address the "Your Work" Exclusion, the exclusion unambiguously applies and its application renders moot any arguments by Petitioners that the distinction between property damage with and without physical injury was dispositive to this appeal.

If the Court of Appeals had determined that the inferred loss of use was accompanied by physical injury, coverage would have likewise been excluded, albeit under a different exclusion. Exclusion A.2(l), the "Your Work" exclusion, excludes coverage for "[p]roperty damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard." (R. 63). Petitioners assert that the remedial measures by Johnson to bring the barn into compliance constituted "physical injury" that occurred after the variance work was complete, (Pet., p. 9), which would place the resulting damage within the products-completed operations hazard. Petitioners do not take issue with the characterization of Johnson's variance work and

construction work as falling within the definition of "your work," but rather attempt to capitalize on the purported separate and distinct nature of the work, conveniently ignoring the Waldes' own allegations in the arbitration pleadings showing that the work was intertwined and ongoing. (R. 119-125).

Nonetheless, the "Your Work" Exclusion applies to "'[p]roperty damage' to 'your work' *arising out of it or any part of it. . . .*" (R. 63) (emphasis added). Narrowly construing the term "arising out of" to mean "caused by," McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 320, 426 S.E.2d 770, 771 (S.C. 1993), there is no question that the underlying cause of the non-compliant barn was Johnson's variance work, including advising the Waldes that the modified barn would comply with the variance and special exception. The Waldes sought out assistance from Johnson to obtain the necessary approval, and Johnson represented to them that he had in fact obtained the necessary approval. If Johnson had obtained the necessary approval, there would have been no compliance issue. If Johnson had informed the Waldes that the necessary approval could not be obtained, the Waldes would not have had Johnson build the barn that he did. *See* id. at 771-772 (finding policy exclusion for injuries arising out of the ownership, operation, or use of an automobile applied to city's alleged negligent failure to train and supervise police officers, which either caused or contributed to the negligent operation of the vehicle by police officer).

If the construction of the barn itself was not defective, then there can be no other cause of the non-compliant barn than Johnson's variance work, which included wrongfully advising the Waldes that the modified barn was approved. Accordingly, whether the alleged "property damage" was within or outside of the products-completed operations hazard, coverage would have been excluded under the policy.

III. The Court of Appeals correctly construed the trial court's footnote in the context of the Order and properly declined Petitioners' invitation to avoid a decision on the merits.

(PETITIONERS' QUESTION 3)

As with their opening argument, Petitioners' closing argument again asserts that the Court of Appeals erred in deciding this appeal on the merits. Among the several "law of the case" arguments made by Petitioners and rejected by the Court of Appeals, Petitioners continue to maintain that the appeal should have been decided on a one-sentence footnote in the trial court's twenty-page Order. Petitioners assert that the trial court's finding in footnote four, that Johnson's breach of a fiduciary constituted an occurrence, was in fact a blanket grant of summary judgment on the duty to defend that was not appealed by AIC. (Pet., p. 14).

The Court of Appeals properly disposed of this argument by considering the footnote in the context of the entire Order rather than reading the single sentence in a vacuum as Petitioner would have this Court do. The footnote was contained in the trial court's discussion of whether an "occurrence" was alleged, and was devoid of any discussion whatsoever of whether there was "property damage" within the meaning of the policy or whether any exclusions were applicable. (Op., Appendix p. 7 fn. 6).

The trial court's citation to Unified Western Grocers, Inc. v. Twin City Fire Ins. Co., 457 F.3d 1106 (9th Cir. 2006) in the footnote provides further context. Although a pinpoint citation is not provided, the Ninth Circuit's discussion of breach of fiduciary duty involved whether the claim arose out of intentional and willful conduct. Id. at 1113-1114. *See* Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 578, 666 S.E.2d 897, 900 (S.C. 2008) (in analyzing whether there has been an *occurrence*, the term accident does not include intentional and willful conduct).

To use the words of Petitioners, the footnote "simply cannot be read to create an absurd fiction." It would truly be absurd to read this footnote as an unappealed blanket grant of summary judgment on the duty to defend when the premise of AIC's entire appeal is that there was no duty to defend because there was no occurrence, no property damage and the Policy unambiguously excludes coverage for the Waldes' claims.

IV. Alternatively, should this Court undertake a review of the Court of Appeals' decision, that review should include consideration of the issues raised in Respondent's Counter-Questions 4 and 5.

AIC believes the Court of Appeals correctly held that no coverage existed under the policy and properly applied Exclusion A.2(j)(6), and this Court should deny Petitioners' request for a writ of certiorari accordingly. Nonetheless, in the event this Court decides to review the Court of Appeals' decision, AIC respectfully submits that any such review should include consideration of the issues raised in Respondents Counter-Questions 4 and 5 discussed below.

A. To the extent the Court of Appeals erred, it was in finding that the Waldes sufficiently alleged "property damage" caused by an "occurrence."

AIC submits that its position on whether the Waldes sufficiently alleged "property damage" caused by an "occurrence" has been thoroughly raised and argued in this Return and previously in the trial court and the Court of Appeals. Nonetheless, AIC reiterates that that it disagrees with the Court of Appeals' finding that the Waldes sufficiently alleged "property damage" caused by an "occurrence."

The Waldes' claim for the damages associated with repairing or removing defective work is not a claim for "property damage." This Court's discussion of "property damage" in Crossmann, 717 S.E.2d at 593, emphasized "the difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim

for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.'" The Waldes' arbitration pleadings demonstrate that their claims against Johnson were purely for the costs associated with repairing or removing defective work. (R. 128-131). The Waldes have not alleged "property damage" within the meaning of the policy.

Nor have the Waldes alleged damage caused by an "occurrence." Where a contractor who applies for and receives special approval to build a specific structure in a specific location then wrongly tells his clients that it would be acceptable to build a different structure in a different location without seeking any further modification of the original approval he obtained, the damages are foreseeable. *See* Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. 187, 194, 684 S.E.2d 541, 545 (S.C. 2009) ("[W]hether an 'accident' has occurred under the terms of a CGL policy requires a court to determine whether damages would have been foreseeable if the insured had completed the work properly.") (*citing* Travelers Indem. Co. of Am. v. Moore & Assocs., 216 S.W.3d 302, 309 (Tenn. 2007)).

Accordingly, in the event this Court undertakes a review of the Court of Appeals' decision, the analysis should begin with whether the Waldes alleged "property damage" caused by an "occurrence."

B. To the extent the Court of Appeals erred, it was in declining to address whether there were two separate contracts as subsidiary to the issue of whether the "Your Work" Exclusion and Exclusion 2.A(j)(6) were applicable.

AIC respectfully submits that the Court of Appeals erred in failing to address whether it was appropriate for the trial court to treat the work as separate contracts for purposes of construing the policy exclusions. (Op., Appendix p. 2 fn. 1). The trial court characterized the work as two separate contracts in its discussion of the "Your Work" Exclusion and Exclusion A.2(j)(6) and relied on that illusory distinction in finding the exclusions inapplicable. (R. 14-17).

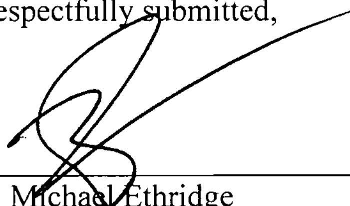
AIC included in its Statement of Issues on Appeal that the trial court erred in finding these exclusions inapplicable, (Brief of Appellant, p. 6), and in the portion of the Brief of Appellant addressing those exclusions, AIC disputed the characterization that Johnson's work for the Waldes was performed under two separate projects. (Brief of Appellant, p. 28). The trial court's characterization was encompassed in its finding that the exclusions were inapplicable, which AIC raised and argued on appeal.

"When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from an appellant's arguments." Herron v. Cent. BMW, 395 S.C. 461, 719 S.E.2d 640, 642-43 (S.C. 2011). Accordingly, any review of the Court of Appeals' decision should include whether it was proper for the Court of Appeals to decline to address this issue.

Conclusion

For the reasons stated, this Court should deny the Petition for Writ of Certiorari and should remit this matter to the circuit court to enter judgment accordingly.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM AIKEN COUNTY
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.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Respondent's Return to Petitioners' Petition for Writ of Certiorari and Certificate of Counsel upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to all parties of record as follows:

Benjamin E. Nicholson V
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, SC 29201

This 9th day of May, 2013

Michael B. McCall

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