Supreme Court of South Carolina.

CROSSMANN COMMUNITIES OF NORTH CAROLINA INC v. HARLEYSVILLE MUTUAL INSURANCE COMPANY

CROSSMANN COMMUNITIES OF NORTH CAROLINA, INC., Beazer Homes Investment Corp., and Daniel Rogers, Respondents/Appellants, v. HARLEYSVILLE MUTUAL INSURANCE COMPANY, Cincinnati Insurance Company, and Associated Insurors, Inc., of Myrtle Beach, Defendants, Of whom Harleysville Mutual Insurance Company is Appellant/Respondent.

No. 26909.

-- January 07, 2011

C. Mitchell Brown, William C. Wood, Jr., Matthew D. Patterson and A. Mattison Bogan, all of Nelson Mullins Riley & Scarborough, of Columbia, Clifford Leon Welsh, of Welsh & Hughes, of N. Myrtle Beach, David L. Brown, of Pinto Cooates Kyre & Brown, of Greensboro, NC, Robert Curt Calamari, of Nelson Mullins Riley & Scarborough, of Myrtle Beach, for Appellant-Respondent.David B. Miller, Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, of Myrtle Beach, Martin M. McNerney, Emily R. Sweet and Zachary D. Tripp, all of King & Spalding, of Washington, DC, for Respondents-Appellants.

Appellant/Respondent Harleysville Mutual Insurance Company ("Harleysville") issued a standard commercial general liability (CGL) policy to the developers ("Respondents") of a series of condominium projects in Myrtle Beach, South Carolina. The condominium project was fraught with negligent construction, which resulted in claims filed by the homeowners. Respondents settled the construction lawsuit and then sought coverage from

Harleysville under the CGL policy. The trial court determined the homeowners' claim fell within the definition of “occurrence” and found coverage existed for Respondents' claims. We reverse.

I.

Respondents constructed five condominium projects from 1992 through 1999, which are at issue in this case. In 2001, the homeowners filed suit against Respondents after they discovered numerous construction defects and problems with the units. The homeowners alleged Respondents defectively constructed the units, and as a result, the units experienced substantial decay and deterioration.[1] The homeowners asserted causes of action against Respondents including: negligence; breach of express and implied warranties; unfair trade practices; and breach of fiduciary duty. Homeowners sought actual damages for the repair, maintenance, and reconstruction costs; punitive damages; and loss of use and diminution in value. Respondents settled with the homeowners of the five projects for approximately $16.8 million.

Following the settlement, Respondents sought coverage for damages arising out of the lawsuit pursuant to their CGL policy issued by Harleysville, but Harleysville refused to provide coverage.[2] Respondents filed a declaratory judgment action to determine whether the policy covered the homeowners' damages. The parties stipulated to the facts and amount of damages and only presented the coverage question to the trial court.

The trial court first noted that the parties stipulated that the property damage resulted from water intrusion, that the damage was progressive in nature, and that the damage was caused by the negligent construction of the subcontractors. The trial court ruled there was property damage “that resulted from, and was in addition to, the subcontractors' negligent work itself,” and thus, “the property damage was caused by an occurrence.” The trial court also ruled that Harleysville was jointly and severally liable and was not entitled to a set-off based on other insurers' pre-trial settlements with Respondents.[3] Additionally, the trial court found that Respondents were entitled to an award of post-judgment interest, but not entitled to an award of prejudgment interest. Both parties have appealed the trial court's order.

II.

A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue. Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. Id. In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them. Id. In this case, the parties have stipulated to the facts, and thus we are presented with a pure question of law. Where the action presents a question of law, as does this declaratory action, this Court's review is plenary and without deference to the trial court.

J.K. Const., Inc. v. W. Carolina Reg'l Sewer Authority, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

III.

A. Commercial General Liability Policies And An "Occurrence"

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. Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 565 -66, 561 S.E.2d 355, 358 (2002) (quoting Rowland H. Long, LL.M., The Law of Liability Insurance, § 3.06[1] (2001)). CGL policies are not intended to insure business risks that are the normal, frequent, or predictable consequences of doing business. More to the point, CGL policies are not intended to insure risks that the business can and should control or manage. Id. To this end, the policies do not insure the work itself, but rather, they generally insure consequential risks.

The first standard CGL policy was drafted by the insurance industry in the 1940s and has been revised several times since then.[4] Prior to 1976, the standard CGL policy contained broad exclusions for damages to a contractor's work. In 1976, however, a contractor could purchase a Broad Form Property Damage Endorsement ("Endorsement"). The Endorsement deleted several exclusions and replaced them with more specific exclusions, thereby effectively broadening coverage. Am. Family Mut. Ins. Co. v. Am. Girl, Inc., 673 N.W.2d 65, 83 (Wis.2004). In 1986, the standard CGL policy was revised to incorporate the Endorsement into the CGL policy to provide an exclusion for damage to "your work," but also provided an exception to this exclusion if the work was performed by a subcontractor:

This insurance does not apply to: .

Property damage to "your work" arising out of it or any part of it and included in the products-completed operations hazard. This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

It has been observed that:

[T]he insurance and policyholder communities agreed that the CGL policy should provide coverage for defective construction claims so long as the allegedly defective work had been performed by a subcontractor rather than the policyholder itself. This resulted both because of the demands of the policyholder community (which wanted this sort of coverage) and the view of insurers that the CGL was a more attractive product that could be better sold if it contained this coverage.

U.S. Fire Ins. Co. v. J.S. U.B., Inc., 979 So.2d 871, 879 (Fla .2007) (quoting 2 Jeffrey W. Stempel, Stempel on Insurance Contracts § 14.13[D] at 14-224.8 (3d ed. Supp.2007).

Respondents argue this case directly implicates the “subcontractor exception” and provides coverage which would otherwise be excluded under the “your work” exclusion. However, the subcontractor exception is relevant only if there is a finding of initial coverage. That is, any property damage for which an insured seeks coverage must have been caused by an occurrence before the policy is triggered.

Courts across the country have struggled with CGL policies, in particular the “subcontractor exception” to the “your work” exclusion. In analyzing difficult and complex issues which arise in these cases, courts have taken differing approaches. The result is an intellectual mess.

We believe the initial focus should be on the policy term “occurrence.” The standard CGL policy provides coverage for property damage that is caused by an “occurrence.” CGL policies first defined an “occurrence” in its traditionally understood insurance context, as an “accident” with its fortuity underpinnings.

The definition of an “occurrence” was changed in 1966 to “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Courts across the country, including this Court, have struggled with understanding the “continuous or repeated exposure to substantially the same general harmful conditions” language. Specifically, does this additional phrase create an ambiguity in the policy or otherwise diminish the fortuity element inherent in the term “accident”? Today we ultimately answer these questions in the negative.

A resolution of this issue requires an understanding of the concept of “faulty workmanship.”

B. Faulty Workmanship

Courts across the country have wrestled with whether a CGL policy covers damage to property caused by faulty workmanship. A review of these cases reflects two divergent approaches courts have taken in deciding whether coverage exists.

1. Majority Rule

Under the majority rule, claims of poor workmanship, standing alone, are not occurrences that trigger coverage under a CGL policy. See Christopher Burke, Construction Defects and the Insuring Agreement in the CGL Policy-There is no Coverage for a Contractor's Failure to Do What it Promised, Prac. L. Inst.: Litig. No. 8412, Insurance Coverage 2006: Claim Trends and Litigation 73, 82 (May 2006) (Burke) (collecting cases) (“Courts from no less than 25 states have adopted the position that there is no coverage [under CGL policies] for construction defect claims.”). And although not before us today, we note a seemingly incongruent feature of the majority approach is to provide coverage where faulty workmanship causes injury to persons or to a third party's property.[5] See Gen. Sec. Indem. Co. of Arizona v. Mountain States Mut. Cas. Co., 205 P.3d 529, 535, 538 (Colo.App.2009) (observing that a “corollary to the majority rule is that ‘accident’ and

'occurrence' are present when consequential property damage has been inflicted upon a third party as a result of the insured's activity," but finding "the corollary rule . not applicable"); Auto-Owners Ins. Co. v. Home Pride Cos., Inc., 684 N.W.2d 571, 578 (Neb.2004) (noting that "if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, an unintended and unexpected event has occurred, and coverage exists").

Courts that have adopted the majority rule have used various analyses to justify this rule. Although it is difficult to synthesize and reconcile the holdings of the numerous cases from all of the courts across the country, the differing analyses can be generally categorized into two viewpoints.[6] Under one viewpoint, courts rely on the business-risk/tort-risk distinction for justification. Business risks are the risks that the product will not meet the buyer's expectations and the contractor may be liable for breach of contract. Tort risks, on the other hand, are the risks that the contractor's product will cause bodily injury or property damage to other property. Courts applying this distinction reason that CGL policies are intended to insure tort risks, but not business risks. To this end, faulty workmanship that causes damage only to a contractor's work product constitutes economic loss, which is a business risk, and economic loss is not "property damage" under the terms of the policy. See R.N. Thompson & Assocs., Inc. v. Monroe Guar. Ins. Co., 686 N.E.2d 160 (Ind.App.1997) (applying the business risk/tort risk distinction and finding no "property damage" because the claim arose from economic loss). This relates back to the principle that CGL policies are not intended to insure risks that the business can and should control.

Under a second viewpoint, courts reason that faulty workmanship does not possess any element of fortuity and the resulting damages are a natural and ordinary consequence of the faulty work and, therefore, not accidental. See Monticello Ins. Co. v. Wil-Freds Const., Inc., 661 N.E.2d 451 (Ill.App.1996) (holding no CGL coverage for various construction defects because the construction defects were the "natural and ordinary consequences" of the negligent construction and natural and ordinary consequences cannot constitute an occurrence).

Generally speaking, courts taking the former viewpoint first address whether there has been "property damage" while courts using the latter reasoning first address whether there has been "an occurrence." But see Group Builders, Inc. v. Admiral Ins. Co., 231 P.3d 67, 73 (Haw.App.2010) (holding mold damage qualified as "property damage," but "breach of contract claims based on allegations of shoddy performance" are not occurrences). The different approaches will typically lead to the same conclusion regarding whether the CGL policy provides coverage.[7] See Cincinnati Ins. Co. v. Crossman Communities Partnership, 621 F.Supp.2d 453 (E.D.Ky.2008), aff'd by 594 F.3d 441 (6th Cir.2010) (finding no property damage because the faulty workmanship only injured the product itself (i.e., only economic loss), but even if there were property damage, it was not caused by an occurrence because the damage was the natural and ordinary consequence of faulty workmanship); see also Gen. Sec. Indem. Co., 205 P.3d 529 (using both approaches to find no coverage).

2. Minority Rule

Under the minority rule, damage flowing from faulty workmanship constitutes an occurrence, regardless of whether only the contractor's product is injured or a third party's property is injured, so long as the insured did not intend or expect the resulting damage. Courts using this approach make no distinction between tort liability and contract liability. See U.S. Fire Ins. Co., 979 So.2d at 889 (holding faulty workmanship that is neither intended nor expected from the standpoint of the insured can constitute an “accident” and thus an “occurrence”); Travelers Indem. Co. of America v. Moore & Associates, Inc., 216 S.W.3d 302, 310-11 (Tenn.2007) (holding that an “occurrence,” which is defined as an “accident,” is an event that is unforeseen by the insured). It should be noted, however, that even under the minority rule, the costs associated with replacing a defective component of the project (i.e., costs of a defective product or costs of correcting the faulty workmanship) are not covered because such claims are not “property damage.”

3. Contrasting the Rules

The majority rule and the minority rule both have their strengths and weaknesses, and advocates for each side present strong arguments that their rule better reflects the purpose and intent of standard CGL policies. For example, courts applying the majority rule opine that to apply the minority rule transforms the policy into a performance bond. On the other hand, courts applying the minority rule observe that distinguishing between faulty workmanship that injures only the contractor's work as opposed to faulty workmanship that injures a third party's property is illogical because it makes the definition of “occurrence” dependent on which property is damaged.

IV.

South Carolina Law

This Court recently addressed issues involving CGL coverage and faulty workmanship in L-J, Inc. v. Bituminous Fire and Marine Ins. Co., 366 S.C. 117, 621 S.E.2d 33 (2005) and Auto Owners Ins. Co., Inc. v. Newman, 285 S.C. 187, 684 S.E.2d 541 (2009). In L-J, the claim was for damages solely to repair faulty workmanship. In Newman, the claim was for damages resulting from faulty workmanship, not merely to repair the faulty workmanship. An in depth review of these cases is instructive.

L-J

In L-J, a developer of a construction project hired a contractor who, in turn, hired a subcontractor to construct roads for the project. Years later, the roads began to crack and deteriorate. After the developer settled his claim with the contractor, the contractor sought indemnification from Bituminous pursuant to its CGL policy. A special master found the damage to the road system constituted an “occurrence” and was covered under the policy.

On appeal, we addressed the novel issue of "whether property damage to the work product alone, caused by faulty workmanship, constitutes an occurrence." First, we found the evidence revealed the cracking was the result of negligent acts including failure to prepare the subgrade; improperly designed drainage system; ill-prepared, thin road course; and improperly designed curb-edge detail. Next, we found these negligent acts constituted faulty workmanship, which damaged the roadway system only. Finally, we held the damage was not caused by an occurrence "because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions." Therefore, because the claim was merely one for damages to repair the defective roadway, there was no occurrence and no coverage. We did, however, leave open the possibility that a CGL policy may provide coverage in cases where faulty workmanship causes damage to other property,[8] and in Newman, we had the opportunity to address that issue.

Newman

In Newman, a homeowner brought a suit against the builder alleging breach of warranty, breach of contract, and negligence. The homeowner claimed the builder's subcontractor negligently applied stucco to the side of her house and, as a result, water seeped into the home causing damage to the home's framing and exterior sheathing.

We first found the claim was not one merely for faulty workmanship since, unlike the damage in L-J, "there was 'property damage' beyond that of the defective work product itself." Stated differently, while the insured in L-J sought damages to repair the defective work product itself (i.e., the roadway), the insured in Newman sought damages beyond the defective work product (i.e., the stucco) and made a claim for damage to other property (i.e., the walls and exterior sheathing). Had the insured in Newman merely been seeking damages for the defective stucco, we would have denied coverage since, pursuant to L-J, this would have been a claim only for faulty workmanship and nothing more. Indeed, we held the policy did not provide any coverage for costs associated with removing and replacing the defective stucco.[9] Rather, the insured in Newman sought coverage for the damage to the walls and exterior sheathing, damage which was caused by faulty workmanship.

We went on to hold while the defective application of the stucco did not on its own constitute an occurrence, the continuous moisture intrusion resulting from the subcontractor's negligence was an occurrence. In so holding, we focused on the policy language that "continuous or repeated exposure to substantially the same general harmful conditions" is part of the "occurrence" definition. Id . at 194, 684 S.E.2d at 545 (citing Travelers Indem. Co. of Am., 216 S.W.3d at 309). We read out of the definition of an "occurrence" the fortuity component of an accident, and instead defined "the continuous moisture intrusion as 'an unexpected happening or event not intended by [the contractor]- in other words, an 'accident'-involving 'continuous or repeated exposure to substantially the same harmful conditions." Newman, 385 S.C. at 194, 684 S.E.2d at 544-45. This finding of an "occurrence" without regard to the fortuity component of an "accident" was error.

The dissent in Newman would have held the general contractor's "work product" was the entire home and, because we held in L-J that "faulty workmanship by a subcontractor which results in property damage only to the work product itself is not an occurrence," there was no coverage. Id. at 199, 684 S.E.2d at 547.

Harleysville asserts this Court adopted the majority rule in L-J and the minority rule in Newman, and it contends the two are irreconcilable. Harleysville is correct that Newman was incorrectly decided, but the analytical framework of "property damage" in Newman remains sound, provided there is in the first instance an "occurrence." While CGL policies do not provide coverage for the defective work product itself,[10] we believe the bright-line rule advocated by Harleysville and the dissent in Newman goes too far. That is so because CGL policies potentially apply coverage to property damage to the work product where the damage is caused by an "occurrence."

Harleysville has presented two examples provided in a publication by the National Underwriter Company which support the view that faulty workmanship can cause an "occurrence," which results in "property damage," yet the damage is only to the project itself. The following National Underwriter Company illustrations submitted by Harleysville are examples of where a standard CGL policy would provide coverage:

Assume the insured is a general contractor that built an apartment building using various subcontractors to complete the work. Also assume a subcontractor installed all wiring in the apartment building. After the building is complete and put to its intended use, a defect in the building's wiring causes the building to sustain substantial fire damage . In such an instance, an occurrence would exist, the insurer could point to the "your work" exclusion, but then the "subcontractor exception" would provide an exception to the exclusion.

Assume that a subcontractor failed to properly construct the foundation of a new home. After the home is complete, the new homeowner moves into the home. The new homeowner then hires a landscaping company to plant shrubs near the house. During the landscaping project, while using a Bobcat machine to dig a hole for a shrub, the landscaper bumps the foundation of the home with the machine. Due to the poorly constructed foundation, after the landscaper hit the home with the machine, a collapse of all or some portion of the home occurs.

National Underwriter Co., Fire, Casualty & Surety Bulletins, Public Liability, A 3-14 (2001)

In both of these examples, although there was only damage to the contractor's project, there would be an initial grant of coverage because of an "occurrence." Giving effect to other policy provisions, this coverage would be excluded under the "your work" exclusion, but restored under the subcontractor exception. These examples further illustrate fortuitous events that were caused by faulty workmanship. Thus, under these scenarios, there was faulty workmanship, which caused an occurrence and resulted in property damage, which led to coverage.

As applied to this case

In deciding this case, we elect to revisit our opinions in L-J and Newman. We start with the proposition espoused in L-J and reaffirmed in Newman: faulty workmanship is not an "occurrence." Indeed, the negligent construction of roads was not an occurrence in L-J, nor was the negligent installation of stucco an occurrence in Newman. However, we hold that faulty workmanship can cause an occurrence, as the illustrations relied on by Harleysville (provided by the National Underwriter Company) reflect the insurance industry's intent. Thus, the issue we must resolve is: When faulty workmanship directly causes further damage to non-defective components of an insured's project, does this necessarily constitute an occurrence? A review of our insurance jurisprudence is instructive on this issue.

As stated above, the policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Although accident is not defined in the policy, we have defined accident as "as an unexpected happening or event, which occurs by chance and usually suddenly, with harmful results, not intended or designed by the person suffering the harm or hurt." Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 578, 666 S.E.2d 897, 900 (2008) (citing Green v. U. Ins. Co. of Am., 254 S.C. 202, 205, 174 S.E.2d 400, 402 (1970)). Indeed, an accident includes a fortuity component, which is defined as a "chance." Additionally, Black's Law Dictionary defines "accident" as an "unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated." Illinois courts have held the natural and ordinary consequences of faulty workmanship do not constitute an "occurrence ." See Viking Constr. Mgmt. Inc. v. Liberty Mut. Ins. Co., 831 N.E.2d 1 (Ill.App.2005) (finding no duty to defend where the damages claimed by the insured were the natural and ordinary consequences of defective workmanship and, accordingly, did not constitute an occurrence); State Farm Fire & Cas. Co. v. Tillerson, 777 N.E.2d 986, 991 (Ill.App.2002) ("Where the defect is no more than the natural and ordinary consequences of faulty workmanship, it is not caused by an accident.").

Applying an "occurrence" as embracing the definition of "accident" with its fortuity component, we hold the damage here was not caused by or the result of an "occurrence." The homeowners' complaints allege Respondents negligently designed, developed and constructed the condominium units and breached the express and implied warranties that the project would be constructed free of defects. The homeowners asserted that they suffered "injuries and damages in the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and expended and to be expended in the future over the expected life of the structure, loss of use, and diminution in value." The natural and expected consequence of negligently installing siding to these condominiums is water intrusion and damage to the interior of the units. There is no fortuity element present under this factual scenario. We hold that where the damage to the insured's property is no more than the natural and probable consequences of faulty workmanship such that the two cannot be distinguished, this does not constitute an occurrence. Accordingly, Respondents have failed to show an "occurrence."

In finding no occurrence, we need not determine whether there is "property damage" and we believe to address the issue creates unnecessary confusion. In doing so, we follow those courts which first analyze whether there has been an "occurrence." We reject, however, the view that there can never be "property damage" when the damage is only to the insured's product itself, for the insurance industry's own interpretation of the CGL policy refutes such a position. Moreover, to find no "property damage" where only the contractor's work product has been damaged effectively writes out the subcontractor exception to the "your work" exclusion. The National Underwriter Company's hypothetical factual scenarios provide some evidence of an intent to provide coverage to an insured's work product, provided the loss is caused by an "occurrence."

In addressing whether there can be "property damage" where the damage is only to the contractor's work product, we take this opportunity to clarify our holding in L-J. In L-J, we observed "[t]he issue of whether property damage to the work product alone, caused by faulty workmanship, constitutes an occurrence is a question of first impression in South Carolina." In a footnote we stated the CGL policy may provide coverage where faulty workmanship causes "damage to other property, not in cases where faulty workmanship damages the work product alone." (emphasis in original). However, we did not define "work product" in the opinion. See James P. Sullivan, L-J, Inc. v. Bituminous Fire & Marine Insurance Co.: A comedy of "Occurrences", 58 S.C. L. Rev 533, 542 (2007) (observing that after L-J opinion, "whether coverage exists under a CGL policy turns entirely upon how a court defines work product"). Courts have defined "work product" broadly and narrowly. To give effect to the standard CGL policy as a whole, we believe a narrow construction of work product is required. That is, the work product encompasses only the alleged negligently constructed component and not the non-defective components.

We observed in L-J that "the complaint did not allege property damage beyond the improper performance of the task itself." Dispositive to the denial of coverage in L-J was the absence of an occurrence. We clarify that L-J does not stand for the proposition that a CGL policy will never provide coverage where faulty workmanship causes damage to non-defective components of a project. Where faulty workmanship causes damage to non-defective components of a project, it is the presence or absence of an occurrence that will answer the coverage question. In L-J, however, the claim asserted was one for the costs of repairing the defective work. This type of damage is not covered under either the majority or minority rule and was not covered in Newman.

In sum, in analyzing whether a claim is covered under a CGL policy, we first focus on whether there has been an "occurrence." Damage that does not arise from a fortuitous event is not an occurrence. Damages to the insured's project that are the natural and probable consequences of faulty workmanship do not constitute an "occurrence." For faulty workmanship to give rise to potential coverage, the faulty workmanship must result in an occurrence, that is, an unintended, unforeseen, fortuitous, or injurious event. If there has been an occurrence, then we will look to whether there has been "property damage" as defined by the policy.

The preceding analysis reveals the error in our Newman opinion. Newman lacked the predicate "occurrence," as does the case before us. We overrule Newman to the extent it permitted coverage for faulty workmanship that directly causes further damage to property in the absence of an "occurrence" with its fortuity underpinnings. In this regard, we hold the additional language of "continuous or repeated exposure to substantially the same harmful conditions" neither creates an ambiguity for insurance contract construction purposes nor diminishes the fortuity element inherent in an "accident."

We recognize that other courts have taken a different view.[11] However, we believe the facts of this case show that a CGL policy was not intended to provide coverage under these circumstances. To provide coverage under these circumstances would transform the CGL policy into a performance bond.

We hold Respondents cannot show the damage here was the result of an occurrence. Rather, the damage was a direct result and the natural and expected consequence of faulty workmanship; faulty workmanship did not cause an occurrence resulting in damage.

V.

For the foregoing reasons, we reverse the trial court's decision and hold the CGL policy does not provide coverage.

REVERSED.

I concur, but write separately as I adhere to the position set forth in my dissent in Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. 187, 684 S.E.2d 541 (2009). In my opinion, faulty workmanship, whether performed by the contractor or one of the subcontractors, which results in property damage to the work product itself is not an "occurrence" within the meaning of that term in a comprehensive general liability (CGL) policy.

As the majority notes, the homeowners allege "negligent construction on many fronts, including improper installation of siding, windows, flashing at the windows, walkway floor sheathing, and wind resistant tie down straps; deterioration of structural columns and structural components; failure to completely install the building wrap; flooding of units; water infiltration; failure to properly attach handrails; failure to properly construct emergency stairs; termite infestation and destruction; and defective storm water drainage system." This complaint alleges nothing more than negligent acts constituting faulty workmanship, not an 'occurrence.' L-J, Inc. v. Bituminous Fire and Marine Ins. Co., 366 S.C. 117, 621 S.E.2d 33 (2005). On the other hand, where there is truly an accident caused by a contractor, e.g. a stray spark that ignites a fire resulting in damage to the work product, then there has been an "occurrence" within the meaning of the policy. There may be cases where the line between accident/occurrence and faulty workmanship is fuzzy, but such is not the situation here.

I concur in the majority's decision to reverse the trial court.

FOOTNOTES

1. By way of example, the following allegations contained in the complaint reflect the extent of the homeowners' suit: negligent construction on many fronts, including improper installation of siding, windows, flashing at the windows, walkway floor sheathing, and wind resistant tie down straps; deterioration of structural columns and structural components; failure to completely install the building wrap; flooding of units; water infiltration; failure to properly attach handrails; failure to properly construct emergency stairs; termite infestation and destruction; and defective storm water drainage system.

2. Harleysville represented Respondents in the claim with a reservation of its right to deny coverage.

3. Prior to trial, Respondents settled with their other insurance companies for $8.6 million.

4. The Insurance Service Office (ISO), formed in 1971, writes various standard insurance policies, including the standard CGL policy.

5. This seeming inconsistency is perhaps best understood in the context of distinctions between contract and tort liability, discussed infra. Faulty workmanship that damages only the insured's project creates contractual liability, and the absence of an unforeseeable occurrence is manifest. Faulty workmanship that damages the property of a third party or injures a person implicates tort liability, and such damage is not the natural consequence of the negligent construction. Damage to the property of a third party or injury to persons, therefore, is more easily understood as an occurrence with its fortuity underpinnings. As one court put it, the standard CGL policy “does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident.” Weedo v. Stone-E -Brick, Inc., 405 A.2d 788, 796 (N.J.1979). The requirement of an accident is more easily met when a person is injured or the property of a third party is damaged because the injury or damage is unexpected and not the natural consequence of the negligent construction. The issue before us is whether alleged faulty construction work, giving rise to contractual claims, constitutes an “occurrence” under a CGL policy.

6. This is not to say that courts have “cleanly” applied these approaches. Courts have strictly applied one approach, applied a combination of each approach, and applied variations and modifications of each approach.

7. As will be discussed infra, although the different approaches usually lead to the same result, they can lead to different results when the “subcontractor exception” to the “your work exclusion” becomes applicable.

8. “The CGL policy may, however, provide coverage in cases where faulty workmanship causes . damage to other property.” Id. at 123, n. 4, 621 S.E.2d at 36, n. 4.

9. Notwithstanding this ruling, however, the insurance company failed to request the arbitrator to delineate the portion of the award attributable to the removal of the defective

stucco. We were therefore constrained to affirm the arbitrator's award, as “it is not the purpose of this declaratory judgment action to relitigate the issue of damages.”

10. As noted above, even under the minority rule, a claim to replace the defective stucco would not have been covered under the policy, for claims only for the defective product itself do not allege “property damage.”

11. See U.S. Fire Ins. Co., 979 So.2d 871; Travelers Indem. Co. of Am., 216 S.W.3d 302, 305; Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex.2007).

Justice PLEICONES.

TOAL, C.J., BEATTY and HEARN, JJ., concur.PLEICONES, J., concurring in a separate opinion.