The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF KENNETH B. MASSEY, PETITIONER

On February 23, 2004, Petitioner was definitely suspended from the practice of law for two (2) years. In the Matter of Massey, 357 S.C. 439, 594 S.E.2d 159 (2004). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than March 7, 2011.

Columbia, South Carolina
January 4, 2011

The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

ORDER

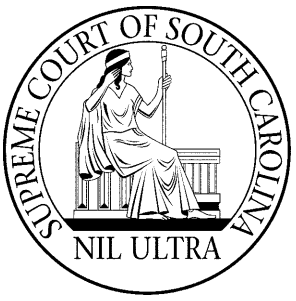
S.C. Code Ann. § 34-31-20 (B) (Supp. 2009) provides that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points."

The Wall Street Journal for January 3, 2011, the first edition after January 1, 2011, listed the prime rate as 3.25%. Therefore, for the period January 15, 2011, through January 14, 2012, the legal rate of interest for judgments and money decrees is 7.25% compounded annually.

s/ Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina

January 6, 2011



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1
January 7, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Stephen Corey Bryant, Appellant.

Appeal from Sumter County
Thomas A. Russo, Circuit Court Judge

Opinion No. 26906
Heard November 30, 2010 – Filed January 7, 2011

AFFIRMED

Chief Appellate Defender Robert M. Dudek and Senior Appellate Defender Joseph L. Savitz, III, both of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, and Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

JUSTICE PLEICONES: This is an appeal from a capital plea and sentencing. The opinion consolidates the appeal and the mandatory proportionality review. We affirm.

FACTS

Appellant began a crime spree with a first degree burglary on October 5, 2004. By the time the spree ended eight days later, appellant had committed three murders, assault and battery with intent to kill (ABIK), two more burglaries, and arson. While incarcerated awaiting trial, appellant threatened a correctional officer and subsequently attacked and seriously injured another.

Appellant "cased" isolated rural homes looking for vulnerable victims. He would appear midday at homes, claiming to be looking for someone or having car trouble. Appellant burglarized Dennis's home office a day after visiting Dennis's home. He next broke into Ammons' home while no one was there, cutting the phone wires and stealing a pistol and ammunition. Later that same day he shot victim Brown, who was fishing along the Wateree River, in the back.

On October 9, appellant killed an acquaintance (victim Gainey), leaving his body on a rural road, then stole electronics and an aquarium from Mr. Gainey's trailer before setting it on fire. Two days later, appellant went to victim Tietjen's home, shot him nine times, and looted the house. Appellant answered several calls made to Mr. Tietjen's cell phone by Mr. Tietjen's wife and daughter, telling both of them that he was the "prowler" and that Mr. Tietjen was dead. He burned Mr. Tietjen's face and eyes with a cigarette. Appellant left two notes on paper and scrawled a message on the wall: "victim number four in two weeks, catch me if you can." On another wall the word “catch” and some letters were written in blood.

Two days later appellant met victim Burgess at a convenience store around 4:30 am. They left together, and less than two hours later, a hunter found Mr. Burgess dead from gunshot wounds on a road bed in a rural area.

Appellant pled guilty to these offenses, in chronological order by date of offense:

- October 5, 2004: Second degree burglary (Dennis);
- October 8, 2004: First degree burglary (Ammons);
- October 8, 2004: ABIK (Brown);
- October 9, 2004: Murder, first degree burglary, second degree arson (Gainey);
- October 11, 2004: Murder, armed robbery, possession of a stolen handgun (Tietjen);
- October 13, 2004: Murder (Burgess);
- March 9, 2005: Threatening the life of a public employee (Correctional Officer Jones); and
- October 13, 2005: ABIK (Correctional Officer Justice).

Appellant received a death sentence for the Tietjen murder, the aggravating circumstance being armed robbery, and received concurrent life sentences for the two other murders (Gainey and Burgess) and the two first degree burglaries (Ammons and Gainey), thirty years for armed robbery (Tietjen), twenty-five years for the second degree arson (Gainey), twenty years for the two ABIKs (Brown and Justice), fifteen years for the second degree burglary (Dennis), five years for possessing a handgun (Tietjen), and thirty days for threatening (Correctional Officer Jones).

Appellant was unquestionably a deeply troubled individual who was first institutionalized in the South Carolina Department of Juvenile Justice (DJJ) when he was eleven years old, and whose elementary school records showed low intelligence and placement in emotionally handicapped classes. He had sought mental health counseling in September 2004 before beginning this crime spree. After his arrest in October 2004, he was diagnosed with

Post-Traumatic Stress Disorder (PTSD) based on childhood sexual abuse by family members, Attention Deficit Disorder (ADD), and chronic depression. The ADD and depression diagnoses had first been made when appellant was incarcerated in DJJ. Appellant also regularly abused marijuana sprayed with RAID insecticide, methamphetamine, and Benadryl.

Appellant called his paternal grandmother as a mitigation witness. She testified that in August 2004 appellant, then aged twenty-three, confided to her and her daughter, Terry, appellant's aunt, that he had been sexually abused beginning around the age of 6 or 7 by his paternal grandfather, his mother's brother, and an older half-brother. Appellant was extremely agitated, and his grandmother and Aunt Terry called a deputy and received information on getting help for appellant as a sexual abuse victim. Appellant sought help from two agencies before the spree began.

Appellant next called Aunt Terry as a witness. She confirmed her mother's testimony about appellant's August 2004 confession. During Aunt Terry's direct examination, the following exchange occurred:

> Q. Okay. And what is your relationship to [appellant's] grandfather William Edward Bryant?
>
> A. He's my biological father.
>
> Q. Okay. And did you ever have any problems specifically with him?
>
> A. Yes, sir.
>
> SOLICITOR: Your Honor, I object to the relevance of any problems she may have had with family members. This is about [appellant].
>
> THE COURT: Sustained.

MR. HOWELL: Your Honor, I think these problems are of the same nature. I think it goes to the same person committing them and –

THE COURT: It may go to this but it has no relevance as to [appellant]. I mean, you can testify as to [appellant].

MR. HOWELL: Your Honor, we feel it adds credibility to what [appellant] has said about the same type molestation.

THE COURT: And she can testify as to what she may have observed, if she has any personal knowledge, about any abuse to [appellant], but I don't think it goes to – it's not relevant to [appellant's] case as to what abuse this grandfather may have inflicted on others. It's not a question of how extensive his abuse but it's the relevancy to this defendant.

MR. HOWELL: Okay.

BY MR. HOWELL:

Q. Let me ask you this. What kind of relationship did you have? Were you close to your father at all?

A. No. I was, as a child, for a time and then things started happening and –

SOLICITOR: Your Honor, again, I –

THE COURT: Sustained.

ISSUE

Whether the trial judge erred in refusing to allow Aunt Terry to testify that she had been sexually abused by appellant's grandfather?

ANALYSIS

Appellant contends that the trial judge committed reversible error in refusing to allow Aunt Terry to testify that she was sexually abused by her father. We find no abuse of discretion here. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010).

Appellant's childhood sexual abuse, as well as that inflicted upon appellant's aunt, were part of the foundation upon which appellant's mental health expert and his social history expert based their opinions. Both experts testified, without objection, to these opinions. Accordingly, whether the aunt should have been allowed to testify directly to her abuse is irrelevant to appellant's mitigation case. The purpose of Aunt Terry's testimony was to establish intrafamilial sexual abuse. Since appellant's experts were permitted to testify to this abuse, appellant was not prejudiced by the trial court's decision to sustain the solicitor's objection. Cf. State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009) (no reversible error where excluded evidence was presented through other witnesses). Accordingly, even if that ruling were error, appellant could not demonstrate prejudice warranting reversal. E.g., State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995).

PROPORTIONALITY REVIEW

We have conducted the proportionality review required by S.C. Code Ann. § 16-3-25(C) (2003), and find the capital sentence imposed here is not the result of passion, prejudice, or other arbitrary factor. Further, we find the sentence here is neither arbitrary nor capricious. E.g. State v. Shuler, 344

S.C. 604, 545 S.E.2d 805 (2001) (capital sentence for murder in commission of armed robbery).

CONCLUSION

Appellant's convictions and sentences are

AFFIRMED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael James Sarratt, Respondent.

Opinion No. 26907
Heard December 1, 2010 – Filed January 7, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Michael James Sarratt, of Landrum, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a public reprimand or a definite suspension from the practice of law not to exceed nine (9) months, retroactive to February 4, 2010, the date of his interim suspension. In the Matter of Sarratt, 387 S.C. 220, 692 S.E.2d 892 (2010). In addition, respondent agrees to attend and complete an anger management course approved by ODC prior to petitioning for reinstatement. We accept the agreement and impose a nine month

suspension, retroactive to the date of respondent's interim suspension. Before he may petition for reinstatement, respondent shall attend and successfully complete an anger management course which is acceptable to ODC. The facts, as set forth in the agreement, are as follows.

FACTS

On January 20, 2010, an arrest warrant was issued against respondent charging him with simple assault. The Spartanburg County Sheriff's Department investigated the charge against respondent and took written statements from the victim and several witnesses to the assault.

Respondent requested a jury trial. On May 5, 2010, a jury found respondent guilty of the criminal charge. He was sentenced to a fine of $470.00 or thirty (30) days in jail. Respondent paid the fine.

LAW

Respondent admits that by his misconduct he has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct) and Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects). In addition, respondent admits that his actions constitute grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct), Rule 7(a)(4) (it shall be a ground for discipline for a lawyer to be convicted of a crime of moral turpitude or a serious crime), and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute).

Respondent's disciplinary history includes an admonition and a four (4) month suspension from the practice of law, due, in part, to instances in which respondent failed to control his anger. In the Matter of Sarratt, 382 S.C. 228, 676 S.E.2d 317 (2009).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for nine (9) months, retroactive to the date of his interim suspension. Before he may file a petition for reinstatement, respondent shall attend and successfully complete an anger management course which is acceptable to ODC. Within fifteen days of the filing of this opinion, respondent shall file an affidavit demonstrating he has complied with the requirements of Rule 30 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Heather Anne Glover, Respondent.

Opinion No. 26908
Submitted October 20, 2010 – Filed January 7, 2011

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Heather Anne Glover, *pro se*, of Horatio.

PER CURIAM: In this attorney discipline matter, Respondent Heather Anne Glover failed to respond to several charges of failure to communicate with or diligently represent her clients. Though she was served with notice of a full investigation, Respondent failed to cooperate in the Office of Disciplinary Counsel's investigation and failed to appear at a hearing before the Commission on Lawyer Conduct. Moreover, it appears Respondent has moved from the state without providing a forwarding address. Accordingly, we find Respondent has abandoned the practice of law. Respondent is disbarred.

I.

Ms. Glover was employed by a Georgia law firm and served as the South Carolina representative of that firm. When the Georgia law firm closed, Ms. Glover notified her clients that they could either continue the representation or retrieve their files. Beginning in late 2006, the Office of Disciplinary Counsel ("ODC") began receiving complaints alleging Ms. Glover failed to respond to her clients' attempts to contact her by telephone, electronic mail, and fax. ODC received seven complaints of this kind.

According to these complaints, Ms. Glover's inaction resulted in prejudice to several of her clients. Specifically, in three matters, Ms. Glover purported to withdraw from representation but did not notify the opposing parties of this fact. As a result, the opposing parties refused to negotiate settlements with Ms. Glover's clients directly, and the statute of limitations expired without a lawsuit having been filed on the clients' behalf. Similarly, in a fourth matter, Ms. Glover failed to file a lawsuit on behalf of her client before the statute of limitations expired.

Respondent was served with Supplementary Notices of Full Investigation with regard to six of these complaints on June 4, 2008. She did not respond to these notices.

ODC mailed a Notice of Formal Charges to the address Respondent had on file with the South Carolina Bar, but the notice was returned undelivered with a note indicating Respondent had moved and had not left a forwarding address.[1] Respondent has not notified the South Carolina Bar of any change of address. *See* Rule 410(e), SCACR ("It shall be the responsibility of all members of the Bar to

[1] ODC obtained an address for Respondent from another member of the Bar. This address was in Colorado. ODC mailed a Notice of Formal Charges to the Colorado address, but the notice was returned unclaimed.

notify the Secretary of the South Carolina Bar . . . of any change of physical or e-mail address within ten days of such change. The member's address which is on file with the South Carolina Bar shall be the address which is used for all purposes of notifying and serving the member.").

Respondent failed to respond to the formal charges filed against her. ODC moved for a default and requested a hearing before a panel of the Commission on Lawyer Conduct ("the Panel") to determine the appropriate sanction. Respondent failed to appear at the hearing.

II.

The Panel found Respondent violated the following Rules of Professional Conduct: Rule 1.1 (competence), Rule 1.3 (diligence), Rule 1.4 (communication), Rule 1.16 (declining or terminating representation), Rule 3.2 (expediting litigation), Rule 8.1 (bar admission and disciplinary matters), and Rule 8.4(d) (misconduct involving dishonesty, fraud, deceit, or misrepresentation).[2]

Further, the Panel found two aggravating factors: failure to cooperate in disciplinary investigations; and failure to answer formal charges or appear at the Panel hearing.[3] In light of these findings, the Panel recommended Respondent be disbarred.

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[2] In addition to the seven client complaints, ODC received a complaint from Ms. Glover's former employer alleging Ms. Glover failed to remit the employer's portion of certain fees. The Panel did not make any finding of misconduct based on this allegation, other than that Ms. Glover failed to respond.

[3] In addition to the aggravating factors found by the Panel, we note Respondent has a disciplinary history that includes an April 2008 suspension for failure to pay annual license fees and assessments and a June 2008 suspension for failure to comply with continuing legal education requirements. In October 2008, Respondent was placed on

III.

This Court "may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission." Rule 27(e)(2), RLDE, Rule 413, SCACR.

An attorney's failure to answer the formal charges against her is an admission of the factual allegations set forth in those charges. Rule 24(a), RLDE, Rule 413, SCACR. Similarly, an attorney's failure to appear before the Panel when ordered to do so is an admission of the factual allegations that were the subject of the hearing. Rule 24(b), RLDE, Rule 413, SCACR.

IV.

We find Respondent has committed misconduct in the respects identified by the Panel, except that there is no evidence Respondent committed misconduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(d), RPC, Rule 407, SCACR. Thus, we find Respondent violated the following Rules of Professional Conduct: Rule 1.1 (competence), Rule 1.3 (diligence), Rule 1.4(a) (communication), Rule 1.16 (declining or terminating representation), Rule 3.2 (expediting litigation), and Rule 8.1(b) (knowing failure to respond to a lawful demand for information from a disciplinary authority).

We find the Panel's recommendation of disbarment is appropriate. As we have stated on numerous occasions, an attorney who "fail[s] to answer charges or appear to defend or explain alleged misconduct indicates an obvious disinterest in the practice of law." Attorneys who engage in such conduct face severe sanctions "because a central purpose of the disciplinary process is to protect the public from unscrupulous and indifferent lawyers." *In re Hall*, 333 S.C. 247, 251,

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interim suspension and an attorney was appointed to represent her clients' interests.

509 S.E.2d 266, 268 (1998); *see, e.g.*, *In re Tullis*, 375 S.C. 190, 192, 652 S.E.2d 395, 395-96 (2007) (quoting this language from *Hall*); *In re Murph*, 350 S.C. 1, 4, 564 S.E.2d 673, 675 (2002) (same); *see also In re Sifly*, 279 S.C. 113, 302 S.E.2d 858 (1983) (disbarring an attorney who failed to timely file an appeal on behalf of a client, failed to adequately represent a client in a trust fund matter resulting in significant monetary loss to the client, drew checks on his personal account that were not sufficiently funded, had a civil default judgment entered against him, and failed to cooperate with disciplinary authorities or appear to contest the charges against him).

Respondent's failure to respond to ODC or to the Panel, together with her failure to provide the South Carolina Bar with a current address, indicates Respondent has abandoned the practice of law. This conduct warrants disbarment. In addition, Respondent's lack of diligence resulted in serious harm to her clients: they were prevented from reaching settlements and their potentially meritorious claims were time-barred.

V.

Respondent is hereby disbarred, in accord with our precedent regarding the abandonment of the practice of law. Within fifteen days of the date of this opinion, Respondent shall surrender her certificate of admission to practice law and shall file an affidavit with the Clerk of Court showing she has complied with Rule 30, RLDE, Rule 413, SCACR. Pursuant to the Panel's recommendations, Respondent shall pay the costs of the Panel proceedings and, before she may be readmitted to practice in this state, Respondent shall reimburse the Lawyers' Fund for Client Protection for any amounts paid to her clients as a result of her misconduct.

DISBARRED.

TOAL, C.J.., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

REVERSED

Appeal from Horry County
Steven H. John, Circuit Court Judge

Opinion No. 26909
Heard February 17, 2010 – Filed January 7, 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, North Carolina, 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.

JUSTICE KITTREDGE: 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

[1] By way of example, the following allegations contained in 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

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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.

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

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

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

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

> 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.*

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[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

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*

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.

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).

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[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.

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.

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[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."

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

[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."

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

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[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).

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.

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

JUSTICE PLEICONES: 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.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

M&T Group, LLC, Respondent,

v.

Palmetto Point of Williamston, LLC, Jill L. Cox, individually and as Personal Representative of the Estate of John A. Cox, Appellants.

Appeal from Anderson County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 26910
Heard October 7, 2010 – Filed January 7, 2011

REVERSED

J. Calhoun Pruitt, Jr., of Pruitt & Pruitt, of Anderson, for Appellants.

Matthew P. Head, of Head Law Firm, of Greenville, and William S.F. Freeman, of Greenville, for Respondent.

JUSTICE KITTREDGE: This is a direct appeal from a grant of summary judgment to Respondent M&T Group, LLC. (M&T) in a breach of contract action. We reverse and remand for trial.

I.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56(c), SCRCP; *see also Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). Having carefully reviewed the record under the appropriate standard, we find a genuine issue of material fact exists.

II.

On February 5, 2005, John Cox (John) conveyed the real property subject to this action to Palmetto Point of Williamston, LLC (Palmetto Point). John Cox was the sole shareholder and officer of Palmetto Point. John died intestate on May 10, 2006, leaving his wife, Jill Cox (Jill), and two minor children as his intestate heirs. Jill was appointed personal representative of John's estate on June 2, 2006.

On October 30, 2007, Jill, as personal representative of John's estate, entered into a contract for the sale of the land from Palmetto Point to M&T. As required by the agreement, M&T placed $50,000 in escrow towards the purchase as earnest money. Only one contract provision (addressing M&T's ability to obtain title insurance) is relevant in resolving this appeal. Section 5 of the contract provides:

> The purchaser shall be under no obligation to purchase the Property from the Seller **unless the Purchaser can obtain from a nationally recognized title insurance company**, **at its regular rates, satisfactory title insurance for the subject property, insuring that the title is marketable.** Purchaser shall have 30 days from the date hereof to notify Seller of any **reasonable objections** to the state of the title to the Property . . . If Purchaser makes any objections to title, Seller shall have the option to take the necessary steps to correct such objection . . . If Seller elects not to correct such objection(s), and so notifies purchaser, Purchaser shall have fifteen (15) days from the date of notice . . . to continue the terms of this contract with the title "as is" or to terminate all terms and conditions of this agreement and receive a full refund of all monies paid hereunder, and neither party shall have any further liability hereunder. (Emphasis added.)

On November 28, 2007, Matthew Head (Head), counsel for M&T, timely sent a letter to Calhoun Pruitt (Pruitt), counsel for Palmetto Point pursuant to section 5 of the contract. In the November 28 letter, Head outlined numerous objections, and one objection concerned Jill's authority to sell the property. On December 14, M&T sought to cancel the sale and obtain the return of the earnest money. Nevertheless, Head and Pruitt continued discussions, especially Jill's authority and concomitantly M&T's ability to acquire title insurance. On January 15, 2008, the underwriting counsel at Head's title company sent an email to Head, outlining his concerns over the ability to issue title insurance.

Pruitt responded by offering to issue title insurance to M&T. M&T refused and declared the contract terminated. When Palmetto Point refused to refund the earnest money, M&T filed this action. The trial court granted M&T summary judgment on the basis that its objections were reasonable and that, pursuant to the contract, the "seller … [failed to] take the necessary steps to correct such objection." This appeal followed.

III.

While M&T's position may prevail at trial, the record before us presents a genuine issue of material fact and precludes summary judgment.

That M&T was concerned about acquiring good title and title insurance is undeniable. In the November 28, 2007, letter to Pruitt, Head wrote that "my client is . . . highly concerned about receiving good title to the property and whether the title is insurable." The record, however, contains evidence that title insurance was available. Ray L. Derrick, Underwriting and Claims Counsel for the Security Title Guarantee Corporation of Baltimore, Maryland, submitted an affidavit that the title was insurable. Furthermore, Pruitt testified that he would have issued title insurance to M&T for the amount of the purchase price. M&T countered this evidence with a memorandum from its title insurance company stating title insurance was not available. Whether the seller took the "necessary steps to correct such objection" is a question of fact.

Therefore, we reverse the order granting summary judgment and remand for trial.[1]

REVERSED AND REMANDED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

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[1] We do not reach the remaining issues.