

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

68494

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable S. Jackson Kimball
Special Circuit Court Judge

2011-CP-46-01090
2012-211939

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MAY 23 2013

SC Court of Appeals

Brian Pulliam, Deborah C. Pulliam, Monica Bradshaw, Helen K. Cook, Kala Craig, Victor E. Dirienzo, Cynthia Ditursi, J. Scott Drexel, Kathleen Kramer, Robert Loebe, Melanie McDaniel, David Osborne, Celeste Arrowwood, Vincent Dionna, Mikel Marcuse, James P. Wheaton, Jr., Joseph Manfredini, Elena Manfredini, David Cox, Jonathan B. Dillard, Eric Wilson, Don and Debbie Neff, and Marianna Junda, Respondents,

v.

Travelers Indemnity Company, M.U.I. Carolina Corporation, Kensington Place Owners Association, Inc., Regent Carolina Corporation and Regent Corporation, Defendants,

Of whom Travelers Indemnity Company is the Appellant.

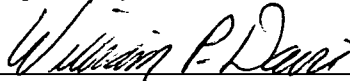
**APPELLANT TRAVELERS INDEMNITY COMPANY'S
PETITION FOR REHEARING**

Pursuant to Rule 221(a), SCACR, the above-named Appellant, Travelers Indemnity Company (hereinafter "Travelers"), respectfully petitions for a rehearing of the above-captioned appeal in which the Court filed its Opinion No. 5130 on May 8, 2013. Travelers bases this petition on the grounds that this Court overlooked or

misapprehended the case law in (1) holding that Respondents' allegations regarding the KPOA's alleged breach of fiduciary duty were not addressed by the *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 379 Fed. Appx. 906 (11th Cir. 2010) decision, overlooking case law applying *Eastpointe*, and finding that damages from any alleged breach of a fiduciary duty by KPOA are not excluded as property damage, (2) failing to address the special damages argument presented by Travelers, and (3) ruling that Travelers' policy exclusions 3(b), 3(f), and 3(i) did not apply.

This Petition is supported by the Record in this matter and the Memorandum filed contemporaneously herewith.

Respectfully Submitted,



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Columbia, South Carolina

May 23, 2013

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Of whom Travelers Indemnity Company is the Appellant.

**APPELLANT TRAVELERS INDEMNITY COMPANY'S
MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING**

Appellant Travelers Indemnity Company ("Travelers") has respectfully petitioned this Honorable Court pursuant to Rule 221, SCACR for a rehearing of the above-captioned appeal in which the Court filed its Opinion No. 5130 on May 8, 2013. Travelers bases this petition on the grounds that this Court overlooked or misapprehended

the case law in (1) holding that Respondents' allegations regarding the KPOA's alleged breach of fiduciary duty were not addressed by the *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 379 Fed. Appx. 906 (11th Cir. 2010) decision, overlooking case law applying *Eastpointe*, and finding that damages from any alleged breach of a fiduciary duty by KPOA are not excluded as property damage, (2) failing to address the special damages argument, and (3) ruling that Travelers' policy exclusions 3(b), 3(f), and 3(i) did not apply. Travelers submits this memorandum in support of its petition.

ARGUMENT

1. This Court misapprehended the decision in *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 379 Fed. Appx. 906 (11th Cir. 2010) and overlooked case law following the *Eastpointe* decision when it held that damages from any alleged breach of fiduciary duty by KPOA are not excluded from the Travelers policy as property damage.

As this Court held, *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 379 Fed. Appx. 906 (11th Cir. 2010) does not specifically address allegations of a breach of fiduciary duty through the failure to establish a reserve fund or warn of inherent conflicts of interest. However, *Eastpointe* does address allegations of a breach of fiduciary duty and its analysis regarding that issue is instructive in the instant matter.

In *Eastpointe*, the United States Court of Appeals for the Eleventh Circuit affirmed a district court's grant of summary judgment in Travelers' favor holding that the underlying claims, including the claim for a breach of fiduciary duty, fell within the property damage exclusion of a Directors and Officers policy. The Court explained its reasoning as follows:

First, we are not persuaded by Eastpointe's attempt to differentiate between losses originating from property damage, and losses originating from breaches of fiduciary duty that ultimately result in property damage. The plain language of the D & O policy excludes coverage for any claim made "for or arising out of any damage, destruction, loss of use or deterioration of any tangible property." . . .

Id. at 908. The *Eastpointe* court looked beyond the labels attached to the fiduciary duty claim and determined that the claims sought coverage for property damage, which was excluded. It also concluded that the premise of the fiduciary duty claims against the condominium association depended upon the existence of property damage. The same is true of Respondents' claims against KPOA. Those claims, like the fiduciary duty claim in *Eastpointe*, depend on the existence of property damage.

The recent case of *Hess v. Travelers Casualty and Surety Co. of America*, 2013 WL 623981 (N.D. Ill Feb. 20, 2013), which was referred to at oral argument by counsel for Travelers, cites the *Eastpointe* decision and deals specifically with allegations of a breach of fiduciary duty by members of a the board of directors of a homeowner's association by failing to establish a proper reserve fund. This Court overlooked the *Hess* decision, which is directly applicable. The United States District Court for the Northern District of Illinois held in *Hess* that the breach of fiduciary duty allegations were excluded by the property damage exclusion in the non-profit management and organization liability policy. See *Hess v. Travelers Casualty and Surety Co. of America*, 2013 WL 623981 (N.D. Ill Feb. 20, 2013).

The *Hess* Court, like the court in *Eastpointe*, looked beyond the legal labels of the allegations and noted that the fiduciary duty claims were tied to the complaint's "core allegations" about the building's defects. Similarly, the Respondents claims regarding

fiduciary duty in the instant matter seek coverage for property damage despite the labels of “fiduciary duty”, “reserve fund” and “conflict of interest”. The fiduciary duty cause of action in the Fifth Amended Complaint seeks “damages for the continued deterioration of the common elements”. (R. p. 70, ¶ 20). Respondents also allege that “as a direct and proximate result of the negligence, recklessness, willfulness and wantonness of the Defendants as set forth above, the Plaintiffs Homeowners will be required to expend considerable sums **for the repair and refit of this property, all to their damage**. (R. p. 72. ¶ 27) (emphasis added). Respondents’ claims against KPOA are based on, arise out of, are caused by, and seek compensation for property damage. Respondents’ attempt to avoid the exclusion by characterizing their claims as something other than for “property damage” does not pass muster. A cursory review of the Complaint reveals that, regardless of the label, Respondents fiduciary duty claims seek compensation for “property damage”, which is excluded by the policy.

2. This Court failed to address Travelers’ argument that the damages for which coverage is sought are special damages, which were not specifically pled in the underlying action.

This Court failed to address Travelers’ argument regarding Respondents’ failure to allege any special damages in the underlying action, which was discussed in Appellants Brief. *See* Final Brief of Appellant, pp. 27-28. The Fifth Amended Complaint in the underlying action (“Fifth AC”) alleges that KPOA failed to maintain and repair the property and maintain a reserve fund for maintenance of the common elements. (R. pp. 67-70, p. 72 ¶¶ 7, 13, 19, 20, 26 and 27). It alleges that KPOA is liable for all damages proximately flowing from an alleged breach of its fiduciary duty “to insure that the

Common Elements were properly inspected, repaired, and maintained” and to “create and fund an adequate fund for reserves for the normal replacement of the components of the Common Elements”.” (R. p. 70, ¶¶ 19, 20). It also alleges that, “[a]s a direct and proximate result of the negligence, recklessness, willfulness and wantonness of the Defendants as set out above, the Plaintiffs Homeowners will be required to expend considerable sums for the repair and refit of this property, all to their damage.” (R. p. 72, ¶ 27).

Special damages are those that “naturally and proximately, but not necessarily, accrue from the unlawful acts alleged, and are not recoverable unless specifically alleged.” *Epstin v. Berman*, 78 S.C. 327, 58 S.E. 1013, 1015 (1907); *see also Crozier v. Charleston & W. C. Ry. Co.*, 222 S.C. 121, 130, 71 S.E.2d 800, 805 (1952); *Preferred Sav. Bank, Inc. v. Elkholy*, 303 S.C. 95, 99, 399 S.E.2d 19, 21 (S.C. Ct. App. 1990); *see also* Rule 9, SCRCP (“When items of special damage are claimed, they shall be specifically stated.”).

If Respondents seek to recover damages for inadequate reserves or for a failure to warn of conflicts of interest in a developer-controlled POA in the underlying action, they were required to specify the damages claimed. The Fifth AC not specify these damages. In other words, as to KPOA, there are no allegations of liability for the damages that the Court’s opinion indicates may be covered by the policy. Such damages have not been specifically pled, and may not be inferred. The only damages specifically claimed regarding these breaches are for “damages for the continued deterioration of the common elements” (Fifth AC ¶ 20, R. p. 70) and the “Homeowners will be required to expend considerable sums for the repair and refit of this property” (Fifth AC ¶ 27, R. p. 72). The

claimed damages for these breaches are property damage and are excluded by Travelers' policy.

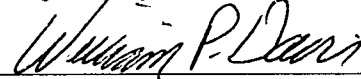
3. Additional Policy Exclusions Apply

It is respectfully submitted that the conduct alleged in the Fifth Amended Complaint constitutes dishonest, fraudulent, or malicious acts of an insured that fall within exclusion 3(b) of the policy. *See* Fifth AC, ¶ 9 and 26 (R. p. 68 and p. 72). Furthermore, exclusions 3(f) and 3(i) also apply.

CONCLUSION

For the reasons stated above, this Court should grant Travelers' petition for a rehearing.

Respectfully Submitted,



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Of Whom Travelers Indemnity Company is the Appellant.

CERTIFICATE OF SERVICE

I, Teresa K. Todd, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Appellant Travelers Indemnity Company's Petition for Rehearing and Memorandum in Support of Petition for Rehearing by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

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Michael S. Seekings, Esquire
Leath, Bouch & Seekings, LLP
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Teresa K. Todd

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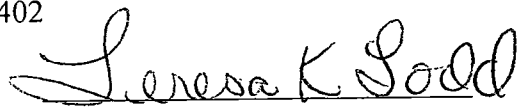
Of Whom Travelers Indemnity Company is the Appellant.

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I, Teresa K. Todd, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Appellant Travelers Indemnity Company's Petition for Rehearing and Memorandum in Support of Petition for Rehearing by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

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May 23, 2013


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