

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

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Case No. 2011-CP-46-1090

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

v.

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

Of whom Travelers Indemnity Company is the . . . . . Appellant.

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**RESPONDENTS PULLIAM, ET AL, MEMORANDUM IN OPPOSITION TO  
APPELLANT'S PETITION FOR REHEARING**

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INTRODUCTION

Travelers has petitioned this Court for a rehearing of this appeal in which this Court filed its Opinion No. 5130 on May 8, 2013. A review of this Petition together with this Court's Opinion will demonstrate that this Court neither overlooked nor misapprehended the Florida and Illinois decisions Travelers cites. The Opinion clearly points out that certain allegations in the underlying complaint are not subject to the Property Damage Exclusion as written in the

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applicable policy, and it further definitively dispenses with Travelers' additional policy exclusion arguments. Nothing new is presented in this Petition, and it should be denied.

### ARGUMENT

**1. This Court correctly discussed the Eastpointe Condo. I Ass'n decision, and the additional decision upon which Travelers relies has no applicability in its Policy Exclusion language or with its facts.**

Travelers, in its Petition, relies exclusively on Florida and Illinois Federal Court opinions which address Travelers' policy exclusion language different from the language in the policy before this Court, and which decisions also factually differ from the underlying claims here. The *Eastpointe* decision, 379 Fed. Appx. 906 (11th Cir. 2010), neither involved a similar policy exclusion as here, nor were the underlying claims against Travelers' insured similar to those before the Court here. There, the underlying claim against the insured involved specific claims of mold, toxic mold, fungus and rot. The Travelers' policy exclusion purported to exclude those exact underlying damages claims- "mold, toxic mold, spores, mildew, fungus, or wet or dry rot."

Interestingly, the *Eastpointe* Court does refer to an earlier US District Court decision in Florida which is similar to the underlying claim. Thus in the decision in *Lumbermans Casualty Company v. Dadeland Cove Section One HOA, Inc.*, 2007 WL 2979828 (USDC Miami Div. 2007), the Court, in interpreting a "Property Damage exclusion found that the property damage exclusion did not apply to a breach of fiduciary claim brought against a homeowners association after the association allowed the common areas to deteriorate. *Lumbermans* was affirmed. 295 Appx. 361 (11th Cir. 2008).

The *Hess* decision (*Hess v. Travelers and Surety Casualty and Surety Co. of America*, 2013 WL 623981, N.D. Ill), likewise has no application to the policy exclusion language nor to the underlying claims at issue before this Court. Significantly, the *Hess* Travelers' policy

exclusion language excludes any underlying claim, "arising out of...construction defects." (*Hess*, supra at pp. 3-4). This language is nowhere to be found in the Policy Property Damage Exclusion in the Instant Policy.

A review of the *Hess* decision will demonstrate that unlike Travelers' statements in its Petition, *Hess* does not stand for the proposition that a breach of fiduciary claim is excluded by Property Damage Exclusions in Directors and Officers' Policies. *Hess* permitted exclusion of the underlying claims only because the Exclusion at issue excluded claims in any way "arising out of" original construction defects, and the Court found that the underlying claims did just that—alleged original construction defects. Here, this Court has found, "Consequently, no reasonable interpretation of the allegations in the complaint can support a finding that KPOA was being sued for initial construction or repair defects" (Opinion, p.7, pp.1).

Thus, the underlying Claims in no way allege original construction defects having a connection with the KPOA, nor does the instant Travelers' Property Damage Exclusion exclude such claims as in the *Hess* decision.

**2. Travelers' Special Damages argument has no relation to the allegations of the underlying claims, and no policy exclusions apply.**

As pointed out in Respondent's Final Brief, this argument is one of the arguments advanced by Travelers for the first time in a Rule 59 Motion to the Trial Court. It is impermissible, and should not be considered. Nevertheless, it has no substance. Although difficult to understand, this argument seems to advance a novel theory in civil jurisprudence – that somehow Travelers is able to exclude coverage to its insured (without any exclusion in the policy permitting such exclusion), as Travelers' does not like the way the damages are pled in the underlying complaint. Is Travelers contending that it is able to deny coverage to any insured if an

underlying complaint does not contain a cost-accounting worksheet or exhibit? This would appear to constitute the logical conclusion of this argument and it is without merit.

**3. This Court has already rejected Travelers' arguments that Additional Policy Exclusions apply.**

The Court's Opinion specifically deals with the three additional policy exclusions advanced by Travelers, and finds that none of these exclusions apply, as they don't fit the facts before the Court. These rulings are correct, and Travelers adds nothing in its Petition which this Court has not considered. As the Court noted, "While the act of placing the developer's interests before the owners may constitute a breach of fiduciary duty, it does not allege any dishonest, fraudulent, criminal, or malicious action. Therefore this provision (Section I(D)(3)(b)) does not bar coverage for the remaining claims" (Opinion, p.8, pp. 3).

CONCLUSION

Travelers' Petition for a Rehearing in this matter must be denied. The Petition adds nothing to the issues already decided by this Court. On the contrary, it merely discusses additional inapplicable decisional law from Illinois based upon different facts and different policy language than in the matter before this Court. The additional arguments have either been specifically addressed correctly by the Court, or simply have no merit.

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I, W. Jefferson Leath, do hereby certify that on May 29, 2013 I served opposing counsel with a copy of Respondents Pulliam, et al, Memorandum in Opposition to Appellant's Petition for Rehearing via regular first class United States mail, postage prepaid, addressed as follows:

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