

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

The Honorable S. Jackson Kimball  
Special Circuit Court Judge

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2011-CP-46-01090  
2012-211939

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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.

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**APPELLANT TRAVELERS INDEMNITY COMPANY'S  
REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO  
APPELLANT'S PETITION FOR REHEARING**

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Appellant Travelers Indemnity Company ("Travelers") respectfully submits this Reply in response to Respondents' Memorandum in Opposition to Appellant's Petition for Rehearing. Respondents' memorandum contains several legal assertions and factual

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statements that necessitate a response or clarification from Travelers. Therefore, Travelers respectfully submits this reply for the Court's consideration.

## ARGUMENT

### **1. *Lumbermens v. Dadeland* was specifically discredited in the *Eastpointe* decision**

Respondents urge this Court to discount *Hess v. Travelers Casualty and Surety Co. of America*, 2013 WL 623981 (N.D. Ill Feb. 20, 2013) and *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 379 Fed. Appx. 906 (11<sup>th</sup> Cir. 2010) and direct the Court's attention to the decision of *Lumbermens Mutual Casualty Co. v. Dadeland Cove Section One HOA, Inc.*, 2007 WL 2979829 (USDC Miami Div. 2007). As pointed out in Appellant's Final Reply Brief, contrary to Respondents' contention, *Eastpointe* does more than merely "refer to" the *Lumbermens* decision. See Final Reply Brief of Appellant at I, C pp. 5-8. *Eastpointe* expressly discusses the district court and appellate court *Lumbermens* decisions, discounts their value, and declines to follow them. See *id.*

Given the lack of case law interpreting property damage exclusions in Directors and Officers liability coverage, the *Eastpointe* and *Hess* decisions are instructive in the instant matter. Both cases include allegations of a breach of fiduciary duty, with the *Hess* decision specifically addressing allegations regarding failure to establish a reserve fund. Although these cases are not factually identical to the instant matter, they are analogous and offer guidance in interpreting the issues in this appeal.

### **2. Travelers Properly Raised the Issue of Special Damages**

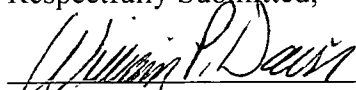
Respondents' continue to assert in their Memorandum in Opposition To Appellant's Petition for Rehearing that Traveler's raised the issue of special damages for

the first time in its Rule 59(e) motion. This is incorrect. As previously addressed in Appellant's Final Brief, Travelers raised the issue of special damages, and Respondents' failure to plead them, to the lower court in its Memorandum of Law in Support of its Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment. *See* Final Brief of Appellant at II., pp. 27-28 and R. pp. 86-87. This matter was timely and properly raised before the lower court and, when the lower court failed to rule on the issue, Travelers was required to file a Rule 59(e) motion to preserve the issue for appellate review. Travelers followed the appropriate procedure. *See* Final Brief of Appellant at II., pp. 27-28. Travelers maintains that the damages Respondents are now seeking to recover were not specifically pled and may not be inferred. The only damages pled were for property damage, which is excluded by the policy.

### CONCLUSION

For the reasons stated above and in Appellant's Memorandum In Support of Petition for Rehearing, this Court should grant Travelers' petition for a rehearing.

Respectfully Submitted,



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Columbia, South Carolina  
June 3, 2013

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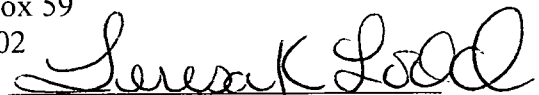
**CERTIFICATE OF SERVICE**

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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 Reply to Respondents' Memorandum in Opposition to Appellant's 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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June 3, 2013

  
Teresa K. Todd