

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM YORK COUNTY  
Court of Common Pleas

The Honorable S. Jackson Kimball  
Special Circuit Court Judge

RECEIVED

AUG 21 2013

SC Court of Appeals

Opinion No. 5130 (S.C. Ct. App. Filed May 8, 2013)

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 . . . . . Petitioner.

PETITION FOR A WRIT OF CERTIORARI

William P. Davis, S.C. Bar No.: 1585  
Susan Drake DuBose, S.C. Bar No.: 11543  
BAKER, RAVENEL & BENDER, L.L.P.  
P.O. Box 8057  
Columbia, South Carolina 29202  
Phone: (803) 799-9091; Fax: (803) 779-3423  
[wdavis@brblegal.com](mailto:wdavis@brblegal.com) File No.: 7746.1830  
*Attorneys for Petitioner*

Other Counsel of Record:

W. Jefferson Leath, Jr., Esquire  
Michael S. Seekings, Esquire  
Leath, Bouch & Seekings, LLP  
92 Broad Street  
P.O. Box 59  
Charleston, SC 29402  
Phone: (843) 937-8811; Fax: (843) 937-0606  
*Attorneys of Record for Respondents*

**INDEX**

Table of Authorities.....iii

Certificate of Counsel ..... 1

Questions Presented..... 1

Statement of the Case ..... 1

Arguments ..... 5

I. THE COURT OF APPEALS ERRED IN HOLDING THAT DAMAGES FOR THE ALLEGED BREACHES OF FIDUCIARY DUTY BY KPOA ARE NOT EXCLUDED FROM THE TRAVELERS DIRECTORS AND OFFICERS ENDORSEMENT AS PROPERTY DAMAGE ..... 7

II. THE COURT OF APPEALS DID NOT ADDRESS TRAVELERS' ARGUMENT THAT ANY DAMAGES FOR THE FAILURE TO ESTABLISH A RESERVE FUND AND/OR WARN OF CONFLICTS OF INTEREST OTHER THAN THE CLAIMED PROPERTY DAMAGE, WHICH IS EXCLUDED BY THE POLICY, CONSTITUTE SPECIAL DAMAGES, WHICH WERE NOT SPECIFICALLY PLED AND MAY NOT BE INFERRED..... 13

Conclusion..... 15

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<i>Builders Mut. Ins. Co. v. Lacey Const. Co., Inc.</i> , 3:11-CV-400-CMC, 2012 WL 1032539 (D.S.C. Mar. 27, 2012) .....	8, 9
<i>Crozier v. Charleston &amp; W. C. Ry. Co.</i> , 222 S.C. 121, 71 S.E.2d 800 (1952) .....	14
<i>Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. &amp; Sur. Co. of Am.</i> , 379 Fed. Appx. 906 (11 <sup>th</sup> Cir. 2010) .....	7, 10, 11
<i>Epstin v. Berman</i> , 78 S.C. 327, 58 S.E. 1013 (1907) .....	14
<i>Hess v. Travelers Casualty and Surety Co. of America</i> , 2013 WL 623981 (N.D. Ill Feb. 20, 2013) .....	12, 13
<i>Preferred Sav. Bank, Inc. v. Elkholy</i> , 303 S.C. 95, 399 S.E.2d 19 (S.C. Ct. App. 1990) .....	14
 <b><u>OTHER AUTHORITIES</u></b>	
Rule 9, SCRCF .....	14

## CERTIFICATE OF COUNSEL

Counsel for Petitioner Travelers Indemnity Company (“Travelers”) certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 20, 2013.

### QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals err in holding that damages for the alleged breaches of fiduciary duty by KPOA for failure to establish a reserve fund and warn of conflicts of interest are not excluded by the Travelers Directors and Officers Endorsement as property damage?
- II. Did the Court of Appeals err in failing to address Travelers’ argument that any damages for which coverage is sought are special damages, which were not specifically pled and may not be inferred in the underlying action?

### STATEMENT OF THE CASE

This declaratory judgment action was commenced by Respondents, unit owners of Kensington Place Horizontal Property Regime (hereinafter “Kensington Place”), against Appellant Travelers Indemnity Company (hereinafter “Travelers”) and Defendants M.U.I. Carolina Corporation, Regent Carolina Corporation, Regent Corporation (collectively “Developers”) and Kensington Place Owners’ Association, Inc. (hereinafter “KPOA”), by the filing of a summons and complaint on March 21, 2011 and timely service thereof on Travelers. The action seeks a judicial determination of the rights and liabilities of the parties relating to an insurance policy issued by Travelers to the KPOA. (R. p. 14). Travelers timely served and filed its answer. The Developers did not appear.

Respondents' complaint alleged that, as owners of Kensington Place, they had previously brought a separate underlying action against KPOA seeking damages for losses sustained as a result of KPOA's alleged negligence and breach of fiduciary duty. (R. p. 14).<sup>1</sup> Respondents specifically alleged the KPOA breached these duties by failing to maintain the common elements of the property in reasonably good repair; transferring ownership of the common elements to them in substandard condition with no replacement reserve fund account; placing the interests of the developer ahead of the owners (thereby placing the financial burden of deferred maintenance upon the owners); failing to perform adequate inspections and retain experts to assess the condition of the building; failing to establish an adequate depreciation schedule; and failing to advise the owners of the conflicts of interest inherent in a developer-controlled property owners' association. (R. pp. 14-15, ¶¶ 7 – 8). They further alleged that these acts constitute "wrongful acts" covered under KPOA's Directors and Officers coverage with Travelers, and seek a judicial declaration to that effect. (R. pp. 16-17, ¶¶ 9 – 11).

In the First Cause of Action in the Fifth Amended Complaint against KPOA, MUI, and Regent, Respondents allege that:

19. The Defendant POA had the legal duty, as a fiduciary from 1996 until April 24, 2007, to ensure that the Common Elements were properly **inspected, repaired, and**

---

<sup>1</sup> In the Fifth Amended Complaint in the underlying suit, Respondents alleged that MUI purchased the property from the PTL bankruptcy estate in December 1990, completed construction and made repairs in 1994 and 1995, and then began marketing condominium units. (R. p. 67, ¶ 6). Respondents also alleged that MUI created the condominium regime on September 24, 1996. (R. p. 68, ¶ 10). Respondents also alleged that Developers MUI and Regent combined to develop the property, and transferred the common elements to the unit owners on April 24, 2007. (R. pp. 68-69, ¶¶ 8, 11 and 14). They further alleged that, at the time of said transfer, the common elements were, and continue to be, "in substandard condition requiring a substantial upfit of all major building elements and systems, and remediation of mold and other unsanitary conditions. . . .", the common elements "were turned over with no replacement reserve fund account" and that the developers "had a duty to insure that the common elements were in good repair, or in the alternative to provide the owners with sufficient funds to bring the common areas up to standard as of the date of the transfer." *Id.*, ¶¶ 13 - 14.

**maintained**, yet the POA, Inc., being controlled by the developer, failed in these duties, placed the interests of the developer ahead of the owners, including these Plaintiffs, and therefore breached its fiduciary duties. Additionally, the Defendant POA had the duty to create and fund an adequate fund for reserves **for the normal replacement of the components of the Common Elements**, yet, in placing the interests of the Defendant Developers ahead of the owners, the POA failed to develop and fund an adequate reserve fund.

20. As a result of the aforesaid breaches of fiduciary duty, the Defendants are liable to the homeowners for all damages proximately flowing from the breach, including damages for the continued deterioration of the common elements.

(R. p. 70, ¶¶ 19-20) (emphasis added).

KPOA's policy contains a Directors and Officers Endorsement which contains the following exclusions:

The insurance provided by this endorsement does not apply to:

- (1) "Bodily injury," "property damage," "personal injury," or "advertising injury."
- (2) Punitive or exemplary damages.

\* \* \*

Policy No. I-680-3467M656-IND-08, Directors and Officers Endorsement, p. 2 of 5 at D. (1), (2). (R. p. 34).

The policy defines "property damage" as follows:

- F. "Property damage" means:
  1. Physical injury to tangible property, including all resulting loss of use of that property;
  2. Loss of use of tangible property that is not physically injured; or
  3. Diminution of property value.

(R. p. 37 at F).

In its answer and counterclaim, Travelers denied that the allegations in Respondents' Fifth Amended Complaint in the underlying action are covered under the Travelers' policy and asserted a counterclaim alleging, *inter alia*, that it is defending KPOA in the underlying action under a reservation of rights; that the policy excludes coverage for "property damage" and "punitive damages"; and that the gravamen of the Fifth Amended Complaint is that, as a result of KPOA's alleged negligence and breach of fiduciary duties, the common elements of the building were not adequately maintained, resulting in property damage, which is excluded under the policy. (R. pp. 42-44, ¶¶ 10, 15-20). In their Reply, Respondents denied that their allegations fall within any of the policy's exclusions and reiterated their prior allegations. (R. pp. 45-46, ¶¶ 1 – 3).

Respondents filed a motion for summary judgment and memorandum in support on November 17, 2011, arguing, *inter alia*, that their Fifth Amended Complaint in the underlying action seeks only economic loss, not "property damage," making the "property damage" exclusion inapplicable. (R. p. 52, end of ¶ 1). Travelers filed its motion for summary judgment on November 15, 2011 arguing, *inter alia*, that there is no reasonable interpretation of Plaintiffs' claims other than that they are for "property damage" and punitive damages, both of which are excluded by the policy. (R. pp. 83-87). Both motions were heard by The Honorable S. Jackson Kimball on November 22, 2011. By Order entered January 30, 2012, Judge Kimball granted Respondents' motion and denied Travelers' motion, concluding that "it is inferable from the allegations of the Complaint, as well as from the arguments of counsel at the hearing, that the failure to repair and failure to inspect pertains to defective design and construction of the common

elements of the condominium that has resulted in other damages as well.” (R. p. 5, last ¶). He ruled that “damages for correction of initial defective construction are covered . . . [and that] [o]ther property damage caused by such defective construction is not.” (R. p. 8, lines 1-2).

Travelers received notice of the entry of the order on February 1, 2012. On February 10, 2012, Travelers timely served its Motion for Reconsideration and to Alter or Amend Judgment and Memorandum in Support thereof on the grounds that:

- (1) the court’s reliance on *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) was misplaced, in that *Crossmann* is distinguishable in several important respects;
- (2) the pertinent policy language may not be reasonably construed to provide coverage for KPOA for liability arising out of defective construction;
- (3) the Fifth AC in the underlying action does not allege that KPOA is liable for defective construction, nor can such a claim be inferred;
- (4) public policy is not served by inferring that the alleged damages relate to the correction of defective construction, which the Directors and Officers Liability Endorsement was never intended to cover;
- (5) the order did not address Travelers’ argument that special damages, such as those inferably the result of defective construction, must be specifically pled; and
- (6) the order did not address Travelers’ arguments regarding various other exclusions or that Plaintiffs are inferably seeking damages for alleged diminution in value, which falls within the policy’s definition of “property damage.”

Travelers’ Motion for Reconsideration and to Alter or Amend Judgment and Memorandum in Support. (R. pp. 95-110).

Judge Kimball denied Travelers’ motion by order entered on April 9, 2012, of which Travelers received written notice on April 12, 2012. (R. pp. 9-10). Travelers

timely served and filed its Notice of Appeal on May 4, 2012. All parties served and filed briefs and oral argument was held. (*See Appendix*).

On May 8, 2013 the Court of Appeals issued its opinion. (Appendix pp. A2-A12). The Court of Appeals affirmed the circuit court's holding that "claims alleging damage to other property as a result of defective design or construction" fell within the policy's property damage exclusion. (Appendix p. A12). The Court of Appeals also concluded that "the circuit court erred in determining damages for correction of defective construction are covered under the D&O Endorsement." (Appendix p. A9). However, the Court of Appeals held that Respondents allegations regarding a breach of fiduciary duty in the KPOA's failure to establish a reserve fund and warn of conflicts of interest were covered causes of action under the D&O endorsement. (Appendix p. A9). The Court of Appeals found that punitive damages were excluded by the D&O policy endorsement but ruled that several additional policy exclusions were not applicable. (Appendix pp. A11-A12). The Court of Appeals did not rule on the special damages argument presented in the appeal.

A Petition for Rehearing was timely filed and denied by the Court of Appeals on June 20, 2013. (Appendix pp. A14-A35). Travelers was granted an extension until August 21, 2013 to file its Petition for Writ of *Certiorari*. With this petition, timely filed on August 21, 2013, Travelers prays that this Honorable Court exercise its discretion and grant *certiorari* to review the Court of Appeals' decision of this novel issue.

## ARGUMENT

### **I. THE COURT OF APPEALS ERRED IN HOLDING THAT DAMAGES FOR THE ALLEGED BREACHES OF FIDUCIARY DUTY BY KPOA ARE NOT EXCLUDED FROM THE TRAVELERS DIRECTORS AND OFFICERS ENDORSEMENT AS PROPERTY DAMAGE**

The Court of Appeals erred in holding that “the D&O Endorsement provides coverage for Respondents’ allegations against KPOA for breach of fiduciary duty in failing to establish a reserve fund and warn of the potential conflicts in a developer-controlled POA.” (Appendix p. A12). A review of the allegations of the Fifth Amended Complaint clearly reveals that the damages claimed by Respondents for these alleged breaches are “property damage” as defined by Travelers’ policy. (R. pp. 63-73). Furthermore, it is respectfully submitted that the Court of Appeals misapprehended the decision in *Eastpointe Condo. I Ass’n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 379 Fed. Appx. 906 (11<sup>th</sup> Cir. 2010) and overlooked case law following the *Eastpointe* decision which have found similar allegations excluded under Directors and Officers liability policies in this novel area of the law.

#### **Respondents’ Fifth Amended Complaint only alleges “property damage”**

In their Fifth Amended Complaint, Respondents raised no allegations which support the conclusion that they sustained an “economic loss.” They only alleged “property damage.” See R. pp. 63-73. In particular, they alleged that: (a) KPOA had a legal and fiduciary duty (from 1996 until April 24, 2007) to properly inspect, repair, and maintain the common elements; and (b) breached that duty by failing to create a reserve fund and by failing to warn of the potential conflicts in a developer-controlled POA. (R.

p. 70, ¶ 19). By failing to undertake such action, KPOA is allegedly liable for the “**continued deterioration** of the common elements.” (R. p. 70, ¶ 20) (emphasis added). Stated differently, through its “inaction,” KPOA allegedly caused an increase in the damage that already existed due to the allegedly defective construction of the condominium complex.

The Court of Appeals began its opinion by correctly stating that Travelers’ D&O Endorsement cannot be read to cover any damages for the correction of allegedly defective construction. (Appendix p. A9). The Court then stated that the Endorsement also cannot be read to cover any damages related to the “**further deterioration** of the faulty construction or repairs” that may have been caused by KPOA’s “inaction.” *Id.* (emphasis added). As the Court correctly pointed out, such damages constitute “property damage” as defined by Travelers policy. *Id.* Given the allegations raised against KPOA, this conclusion should have ended the Court’s analysis. However, the Court then proceeded to hold that the underlying lawsuit raised a claim for “economic damage” because KPOA’s alleged failure to act may have “resulted in Respondents having to expend more from their own pockets **to make the repairs** than they might have otherwise had to expend.” (Appendix p. A9) (emphasis added). Accordingly, the Court, on the one hand, concluded that “deterioration” caused by “inaction” constitutes “property damage,” but then, on the other hand, found that the cost of repairing that “deterioration” is somehow “economic damage.” This ruling cannot be permitted to stand.

To reach the conclusion that these damages are economic, the Court relied on *Builders Mut. Ins. Co. v. Lacey Const. Co., Inc.*, 3:11-CV-400-CMC, 2012 WL 1032539

(D.S.C. Mar. 27, 2012). Reliance on this case is misplaced. The cause of action in *Builders Mutual* for failure to establish a reserve fund was based on a breach of contract claim for a failure to meet a contractual duty to establish a reserve fund and, therefore, necessarily resulted in economic loss. *See Builders Mut. Ins. Co. v. Lacey Const. Co., Inc.*, 3:11-CV-400-CMC, 2012 WL 1032539 at \*9, (D.S.C. Mar. 27, 2012). In fact, the heading to the section of the opinion discussing the issue included the phrase “[p]urely economic losses caused by breach of contract”. *Id.* Given that the claim in *Builders Mutual* was based on a contractual obligation, it necessarily resulted in economic loss. There is no breach of contract claim against the KPOA in the instant matter. The allegations against KPOA regarding the failure to establish a reserve fund are founded on an alleged breach of a fiduciary duty, not contract, and therefore the *Builders Mutual* holding is distinguishable.

Respondents’ fiduciary duty claims against KPOA are based on, arise out of, are caused by, and seek compensation for property damage. The only damages claimed as a result of the alleged breaches of fiduciary duty due to KPOA’s inaction are for the “continued deterioration of the common elements”. (R. p. 70, ¶ 20). As the Court of Appeals held, deterioration is “property damage”. (Appendix p. A9). Therefore, there is no coverage under the Travelers Directors and Officers Endorsement for these causes of action. (R. p. 37 at F).

*Eastpointe Condominium I Ass'n v. Travelers Casualty & Surety Co. of America*

Cases interpreting the property damage exclusion in the novel area of Directors and Officers liability coverage policies are few and far between. The most analogous case to the instant matter is *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 379 Fed. Appx. 906 (11<sup>th</sup> Cir. 2010). In *Easpointe*, the United States Court of Appeals for the Eleventh Circuit upheld a district court's holding that the property damage exclusion in a D&O policy barred coverage for fiduciary duty claims against a condominium association. *Id.* The Court of Appeals opinion in the current matter appears to discount the decision in *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 379 Fed. Appx. 906 (11<sup>th</sup> Cir. 2010) because it 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. (Appendix p. A9). However, *Eastpointe* does address allegations of a breach of fiduciary duty and its analysis regarding that issue in a Directors and Officers policy is instructive in the instant matter

In *Eastpointe*, an owner of a condominium unit sued the Association for failing to adequately maintain and repair the roof and air conditioning system before, between, and after two hurricanes struck the area, causing water intrusion that allegedly caused mold and other damage to her unit. *Eastpointe Condo.*, 379 Fed. Appx. at 907. The unit owner sued alleging negligence, breach of fiduciary duty, and breach of contract. *Id.* Eastpointe had a Directors and Officers policy with Travelers that "contained a 'property damage' exclusion . . . for loss in connection with any claim made 'for or arising out of any damage, destruction, loss of use or deterioration of any tangible property including . . . mold, toxic mold, spores, mildew, fungus, or wet or dry rot.'" *Id.* Travelers denied

coverage based on this exclusion, after which, having obtained a defense verdict in the underlying action, Eastpointe sued Travelers for declaratory judgment and breach of contract, seeking to recover attorneys' fees paid in defending the underlying suit. *Id.* The district court granted summary judgment in Travelers' favor holding that the underlying claims, including the claim for breach of fiduciary duty, fell within the "property damage" exclusion of the Directors and Officers policy. *Id.*

The United States Court of Appeals for the Eleventh Circuit affirmed, explaining 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 (emphasis added).

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 for breach of fiduciary duties. As in *Eastpointe*, the breaches of fiduciary duty alleged by Respondents have "ultimately resulted in property damage". *See supra* pp. 7-9. In short, *Eastpointe* is persuasive authority involving a similar situation and Directors and Officers coverage. The Court of Appeals, it is respectfully submitted, erred in overlooking the applicability of the decision in the current matter and in failing to find that the damages for the alleged breaches of

fiduciary duty are property damage and are excluded by the Travelers policy.

**Hess v. Travelers Casualty and Surety Co. of America**

The Court of Appeals also overlooked the recent case of *Hess v. Travelers Casualty and Surety Co. of America*, 2013 WL 623981 (N.D. Ill Feb. 20, 2013), which is directly applicable to the instant matter and was referred to at oral argument by counsel for Travelers. *Hess* cites the *Eastpointe* decision and deals specifically with allegations of a breach of fiduciary duty by members of the board of directors of a homeowner's association for failing to establish a proper reserve fund. *See Hess v. Travelers Casualty and Surety Co. of America*, 2013 WL 623981 (N.D. Ill Feb. 20, 2013). 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 id.*

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). As discussed above, the Court of Appeals' own opinion in this matter states that their review of the Fifth Amended Complaint revealed that "any further deterioration" attributable to inaction by KPOA would constitute "property damage". (*See discussion supra* p.8 and Appendix p. A9). Respondents'

claims against KPOA are based on, arise out of, are caused by, and seek compensation for property damage. Any 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 Fifth Amended Complaint reveals that, regardless of the labels attached to the causes of action, Respondents claims seek compensation for “property damage”, which is excluded by the Travelers policy.

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 looking beyond the labels and interpreting the issues in this appeal and this novel area of the law. The Court of Appeals, it is respectfully submitted, erred in misapprehending and/or overlooking these cases.

**II. THE COURT OF APPEALS DID NOT ADDRESS TRAVELERS’ ARGUMENT THAT ANY DAMAGES FOR THE FAILURE TO ESTABLISH A RESERVE FUND AND/OR WARN OF CONFLICTS OF INTEREST OTHER THAN THE CLAIMED PROPERTY DAMAGE, WHICH IS EXCLUDED BY THE POLICY, CONSTITUTE SPECIAL DAMAGES, WHICH WERE NOT SPECIFICALLY PLED AND MAY NOT BE INFERRED**

The Court of Appeals failed to address Travelers’ argument regarding Respondents’ failure to allege any special damages in the underlying action, which was properly raised in the lower court and discussed in Appellants Brief. *See* Final Brief of

Appellant, pp. 27-28 and R. pp. 86-87. 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 Amended Complaint does not specify any damages other than property damage. *See* discussion *supra* pp. 7-9. In other words, as to KPOA, there are no allegations of liability for the damages that the Court of Appeals’ 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” (R. p. 70, ¶ 20). The damages pled are property damage and are clearly excluded by Travelers’ policy.

**CONCLUSION**

For the reasons stated, Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



William P. Davis, S.C. Bar No.: 1585  
Susan Drake DuBose, S.C. Bar No.: 11543  
Baker, Ravenel & Bender, L.L.P.  
3710 Landmark Drive, Suite 400  
Post Office Box 8057  
Columbia, South Carolina 29202  
Phone: (803) 799-9091 Facsimile: (803) 779-3423  
E-Mail: [wdavis@brblegal.com](mailto:wdavis@brblegal.com) File No.: 7746.1830  
*Attorneys for Petitioner Travelers Indemnity  
Company*

Columbia, South Carolina

August 21, 2013.

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

Appellate Case No. 2013-001510

RECEIVED

AUG 21 2013

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, Davis 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.

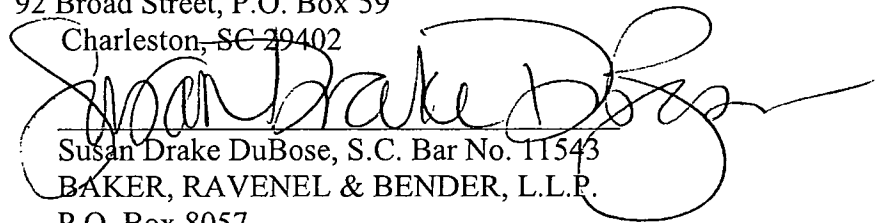
Travelers Indemnity Company, M.U.I. Carolina Corporation, Kensington Place Owners' Association, Inc., Regent Carolina Corporation and Regent Corporation . . . . . Defendants,

Of Whom Travelers Indemnity Company is the . . . . . Petitioner.

**PROOF OF SERVICE**

I, Susan Drake DuBose, of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on this 21<sup>st</sup> day of August, 2013, served counsel below with Petitioner Travelers Indemnity Company's Petition for Writ of Certiorari 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:

W. Jefferson Leath, Jr., Esquire  
Michael S. Seekings, Esquire  
Leath, Bouch & Seekings, LLP  
92 Broad Street, P.O. Box 59  
Charleston, SC 29402



Susan Drake DuBose, S.C. Bar No. 11543  
BAKER, RAVENEL & BENDER, L.L.P.  
P.O. Box 8057  
Columbia, South Carolina 29202  
Phone: (803) 799-9091; Fax: (803) 779-3423  
*Attorneys for Appellant Travelers Indemnity Company*

August 21, 2013

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

The Honorable S. Jackson Kimball  
Special Circuit Court Judge

2011-CP-46-01090  
2012-211939

RECEIVED

AUG 21 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, Davis 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,

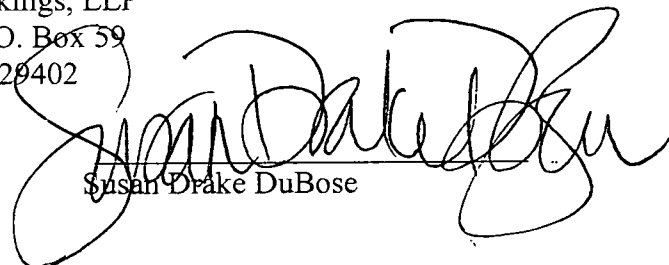
Of Whom Travelers Indemnity Company is the ..... Appellant.

**PROOF OF SERVICE**

I, Susan Drake DuBose, an attorney with Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Travelers Indemnity Company's Petition for Writ of Certiorari 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:

W. Jefferson Leath, Jr., Esquire  
Michael S. Seekings, Esquire  
Leath, Bouch & Seekings, LLP  
92 Broad Street, P.O. Box 59  
Charleston, SC 29402

August 21, 2013

  
Susan Drake DuBose



# BAKER RAVENEL BENDER

ATTORNEYS AT LAW

D CRAVENS RAVENEL  
JAY BENDER  
S MARKEY STUBBS  
CATHARINE GARBEE GRIFFIN  
WILLIAM PEARCE DAVIS  
BRADLEY L LANFORD  
SAMUEL M MOKEBA  
SUSAN DRAKE DUBOSE  
ROBERT L BROWN  
MARIEL D NORTON  
PATRICK D QUINN  
WILSON P DAVIS

CHARLES E BAKER  
(1935-2010)

<sup>1</sup>OF COUNSEL  
<sup>2</sup>ALSO ADMITTED IN GEORGIA  
<sup>3</sup>ALSO ADMITTED IN VIRGINIA

August 21, 2013

**HAND DELIVERY**

The Honorable Jenny Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE: Brian Pulliam, et al. v. Travelers Indemnity Company, et al.  
Appellate Case No. 2012-211939  
Our File No.: 7746.1830

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter is a copy of Petitioner Travelers Indemnity Company's Petition for Writ of Certiorari. I have enclosed an additional copy which I would appreciate your clocking in and returning to me via my courier.

By copy hereof, I am serving a copy of same upon counsel for Respondents.

Your assistance in this matter is greatly appreciated.

Sincerely,

Susan Drake DuBose  
SDD/tkt

Enclosures

cc: W. Jefferson Leath, Jr., Esquire (w/enclosure)  
Michael S. Seekings, Esquire (w/enclosure)