

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

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MAY 04 2012

SC Court of Appeals

Brian and Deborah C. Pulliam, Monica Bradshaw, Helen K. Cook, Lala Craig, Victor E. Dirienzo, Cynthia Ditursi, J. Scott Drexel, Kathleen Kramer, Robert Loebe, Melanie McDnaiel, Davis Osborne, Cleeste Arrowood, 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 which  
Travelers Indemnity Company is the . . . . . Appellant.

**NOTICE OF APPEAL**

Travelers Indemnity Company appeals the order and judgment of The Honorable S. Jackson Kimball granting Respondents' motion for summary judgment, entered on January 30, 2012, and the order and judgment of The Honorable S. Jackson Kimball denying Appellant's motion for reconsideration and to alter or amend judgment pursuant to Rule 59(e), *SCRPC*,

entered on April 9, 2012. Appellant received written notice of the entry of said order denying its motion for reconsideration and to alter or amend judgment on April 12, 2012.



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[wdavis@brblegal.com](mailto:wdavis@brblegal.com) File No.: 7746.1830  
*Attorneys for Appellant Travelers Indemnity Company*

May 4, 2012  
Columbia, SC

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THE STATE OF SOUTH CAROLINA  
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The Honorable S. Jackson Kimball  
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v.

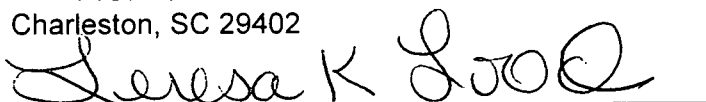
Travelers Indemnity Company, M.U.I. Carolina Corporation, Kensington Place Owners' Association, Inc., Regent Carolina Corporation and Regent Corporation . . . . . Defendants,

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

**CERTIFICATE OF SERVICE**

I, Teresa K. Todd, Legal Assistant to Jenny A. Draffin, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with an Notice of Appeal 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

  
Teresa K. Todd

May 4, 2012



# BAKER RAVENEL BENDER

ATTORNEYS AT LAW

May 4, 2012

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\*\*\*PATRICK D. QUINN

CHARLES E. BAKER  
(1935-2010)

\*OF COUNSEL

\*\*ALSO ADMITTED IN GEORGIA

\*\*\*ALSO ADMITTED IN VIRGINIA

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

RE: Brian and Deborah Pulliam, et al. v. Travelers Indemnity Co., et al.  
Civil Action No.: 2011-CP-46-01090  
Our File No.: 7746.1830

RECEIVED  
MAY 04 2012  
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed herein please find Appellant's Notice of Appeal and Certificate of Service for filing in the above-referenced case. I am also enclosing a check in the amount of \$100.00 for the filing fee. Finally, I am enclosing a copy of an order granting Plaintiffs'/Respondents' motion for summary judgment and an order denying Traveler's/Appellant's motion for reconsideration and to alter or amend judgment pursuant to Rule 59(e), *SCRPC*, which are being challenged on appeal. I am including extra copies of all that I would appreciate your clocking in and returning to me via courier delivering same. By copy of this letter to other counsel of record, I am serving them with a copy of the same.

I am also copying the Clerk of Court of York County with a copy of this letter and the Notice of Appeal.

Sincerely,

Jenny A. Draffin  
JAD/tkt  
Enclosures

cc: The Honorable David Hamilton  
W. Jefferson Leath, Jr., Esquire (w/enclosure) E-Mail and U.S. Mail  
Michael S. Seekings, Esquire (w/enclosure) E-Mail and U.S. Mail





FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF YORK  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2011CP4601090

Brian Pulliam Monica Bradshaw	Deborah C Pulliam Helen K Cook	Travelers Indemnity Company Kensington Place Owners Associatio Inc Regent Corporation	M U I Carolina Corporation Regent Carolina Corporation
Kala Craig Cynthia Ditursi Kathleen Kramer	Victor E Dirienzo J Scott Drexel		
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by: \_\_\_\_\_ Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:

Order

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/S: Jackson Kimball

Circuit Court Judge

3063

Judge Code

1/27/2012

Date

**For Clerk of Court Office Use Only**

This judgment was entered on January 30, 2011, and a copy mailed first class or placed in the appropriate attorney's box on January 30, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Michael S. Seekings Leath & Bouch Seekings, Llc 92 Broad Street  
Charleston, SC 29401

---

ATTORNEY(S) FOR THE PLAINTIFF(S)

William Pearce Davis Baker Ravenel & Bender, LLP P.O. Box 8057  
Columbia, SC 29202

---

ATTORNEY(S) FOR THE DEFENDANT(S)

*David Hamilton*

David Hamilton - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) SIXTEENTH JUDICIAL CIRCUIT  
 COUNTY OF YORK ) CASE NUMBER: 2011-CP-46-1090

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, )  
 DAVID OSBORNE, CELESTE )  
 ARWOOD, 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, )

Plaintiffs, )

vs. )

TRAVELERS INDEMNITY COMPANY, )  
 M.U.I. CAROLINA CORPORATION, )  
 KENSINGTON PLACE OWNERS' )  
 ASSOCIATION, INC., REGENT )  
 CAROLINA CORPORATION, and )  
 REGENT CORPORATION, )

Defendants. )

**ORDER**

FILED-RECEIVED  
 2012 JAN 30 PM 1:23  
 DAVID HAMILTON  
 C.C.P. & GS  
 YORK COUNTY, SC

This matter came before me on November 22, 2011, upon cross motions for summary judgment of Plaintiffs and Defendant Travelers Indemnity Company ("Travelers"). Present and representing the parties at the hearing were: W. Jefferson Leath, Jr., for Plaintiffs; and, William P. Davis for Travelers. Based on the record before the Court, the applicable law, and the arguments of counsel, I find and conclude as follows.

**STANDARD FOR SUMMARY JUDGMENT**

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), S.C.R.C.P. In determining whether any

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triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App. 1997). In ruling on a summary judgment motion, the Court should consider the pleadings, depositions, interrogatory answers, admissions, and affidavits in determining whether there is a genuine issue of fact for trial. *See Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659 (Ct.App. 1994).

In the present case, both parties rely upon the same construction of the facts, and the issue presented is one of law involving the construction of Travelers's insurance policy.

#### STATEMENT OF THE CASE

This is a Declaratory Judgment action instituted by the Plaintiffs, seeking a determination of coverage provided by a Directors and Officers Liability Endorsement ("Endorsement") to policy number I-680-3467M656-IND-08 issued by Travelers to Defendant Kensington Place HOA, Inc. ("POA"). Travelers answered and counterclaimed, and both parties filed Motions for Summary Judgment asserting there are no genuine issues of material fact, and that the Court should rule on the construction of coverage under the Endorsement as a matter of law.

The procedural history of the litigation is as follows. Travelers issued its policy to the POA, and the policy contains the Endorsement referenced above.

In an underlying action, *Pulliam et al. v. M.U.I. Carolina Corporation et al.*, Case No. 2008CP4602158, Plaintiffs have asserted causes of action against the POA for negligence and breach of fiduciary duty by the POA during the period preceding turnover of the condominium to the homeowners at Kensington on April 24, 2007. In the underlying Complaint, Plaintiffs allege that the actions of the POA were negligent as follows:

- a. In failing to perform adequate inspections of the Common Elements from 1996-2007;
- b. In failing to retain experts to assess the conditions of the building from 1996-2007;
- c. In failing to maintain the Common Elements to an adequate state of repair from 1996-2007;
- d. In failing to repair the Common Elements of the building from 1996-2007;
- e. In negligently placing the Developers' interests ahead of those of the individual property owners, so as to place the entire financial burden of deferred maintenance upon the property owners, including these Plaintiffs, while acting in the capacity of a fiduciary;
- f. In failing to establish and fund adequate reserve funds;
- g. In failing to establish an adequate depreciation schedule and adequately fund known building component repair and replacement; and

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h. In failing to advise the homeowners of the various conflicts of interest inherent in a developer-controlled POA, and in failing to provide for independent representation of non-developer homeowners both with respect to POA actions, and also regarding property management and maintenance. (Complaint at ¶ 26.)

Plaintiffs allege the following as their damages:

As 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.

Travelers, in its Counterclaim, asserts that policy exclusions operate to bar coverage under the policy based on the allegations made in the Plaintiffs' underlying Complaint because those allegations assert claims for "property damage". The following policy language is at issue:

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.
- (3) Damages resulting from:

\* \* \*

- (f) The failure of any insured to enforce the rights of the Named Insured against the builder, sponsor or developer of the property designated in the Declarations.

\* \* \*

- (h) The "wrongful act" of any developer/sponsor who is an officer or member of the condominium, or other community association, board of directors.

\* \* \*

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.

### DISCUSSION

Plaintiffs' underlying action makes claims of negligence and breach of fiduciary duty against the POA, and state that Plaintiff homeowners will be required to pay for repairs to the property as damages. Applying the requisite standard of review for summary judgment, 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 damage as well. Likewise, the allegations of failure to maintain adequate funds and establish adequate reserves for repair and maintenance pertain to the alleged defective design and construction.

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(See Complaint at ¶ 23.) Thus, inferably, the damages sustained relate to both the correction of initially defective construction, and repair of other components of the condominium damaged as a result of the defective construction.

As in all cases, the Court is required to review a contract and interpret its meaning in accordance with established standards for judicial review of contracts. The parameters of judicial contract interpretation are well-defined in *Gambrell v. Travelers Insurance Company*, 280 S.C. 69, 310 S.E.2d 814 (1983). One of the fundamental axioms to be followed is to ". . . enforce, not write, contracts . . . and . . . give . . . language its plain, ordinary and popular meaning." (*Id.* 280 S.C. at 71.) "The construction of a clear and unambiguous contract is a question of law for the court." *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct.App. 1997). Construction and interpretation of insurance contracts is to be done in accordance with these general rules. See *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275 (Ct.App. 1993).

The policy exclusion relied upon by Travelers to bar coverage of these claims is that the insurance does not apply to "property damage." Under the definition section of the policy at Form CG DO 28 10 91, "Property Damage", as quoted above, includes "physical injury to tangible property", "loss of use", and "diminution in value."

Additionally, Travelers asserts that Exclusion (3)f, cited above, bars coverage as to claims that the POA failed to enforce its rights against the developers. From my review of the pleadings and arguments of counsel, I find and conclude that Plaintiffs' underlying Complaint asserts only direct responsibility of the POA in failing to perform a duty to attend to the maintenance and repair of the condominium. This does not fall within the cited exclusion, and thus, it is not pertinent to the ruling on these motions.

Existing South Carolina cases do not directly discuss "property damage" as a coverage exclusion in the context of the facts alleged in this case. However, in the similar context of trying to establish coverage, the recent case of *Crossman Communities of N.C., Inc. v. Harleysville Mutual Insurance Company*, Supreme Court Opinion No. 26909, Re-filed August 22, 2011, is instructive.

In *Crossman*, the exterior components of several condominium projects were negligently constructed, resulting in water damage to both the negligently constructed components, and the nondefective components. The Court was required to apply the policy definition of "property damage" to the facts at issue. The policy definition was "[p]hysical injury to tangible property,

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including all resulting loss of use of that property”, the same as the present policy.

In its reasoning of what constituted “property damage” under the quoted definition, the Court stated:

With respect to the first quoted definition of “property damage,” the critical phrase is “physical injury,” which suggests the property was not defective at the outset, but rather was initially proper and injured thereafter. We emphasize the “difference between a claim for the costs of repairing or removing defective work, which is not a claim for ‘property damage,’ and a claim for the costs of repairing damage caused by the defective work, which is a claim for ‘property damage.’” [Internal citations omitted.] (*Crossman, supra*, at page 5.)

However construed, the allegations of the Complaint must be fairly read to seek to require Travelers to cover the cost of remediation of damage to components of the condominium, namely, damage to individual condominium units. Liability for remediation of such damage would be premised upon the POA’s negligence or breach of fiduciary duty, as alleged in the Complaint. Under the reasoning in *Crossman*, remediation of defective construction would be covered by Travelers’ policy; whereas, remediation of damage to other components caused by the defective construction would not.

Plaintiffs have asserted that all of the cost of remediation falls within the definition of “economic loss”, rather than property damage, at least in part because such costs result in a diminution in value of the condominium units. However, I find and conclude that such a distinction is not viable here. In *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857 (Ct.App. 2009), the Court of Appeals recognized “diminution in value” as a form of property damage. Cases that appear to hold otherwise typically deal with loss of value that is not related directly to physical damage to the “property” in question. See, e.g., *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995). In any event, recovery of “diminution in value” is specifically excluded from coverage in the subject policy, as it is expressly made a part of the definition of “property damage.”

The policy here must be broadly construed in favor of the insured, and thus, in favor coverage. See, e.g., *Town of Duncan v. State Budget and Control Bd., Div. of Ins. Services*, 326 S.C. 6, 482 S.E.2d 768 (1997); *Torrington Co. v. Aetna Cas. and Sur. Co.*, 264 S.C. 636, 216 S.E.2d 547 (1975). Further, exclusions of coverage are always to be construed strongly against the insurer. *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 614 S.E.2d 611 (2005); *Boggs v. Aetna Casualty and Surety Company*, 272 S.C. 460, 252 S.E.2d 565 (1979). Application of these

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principles dictates that damages for correction of initial defective construction are covered. Other property damage caused by such defective construction is not.

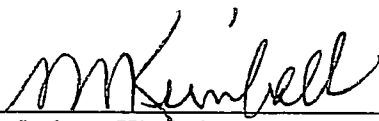
Thus, based upon the allegations of the Complaint and the facts presented in argument of the motions, I find and conclude that there is coverage under the Endorsement. Nevertheless, I make no determination of what damages are or may be covered by the policy, and it is not the purpose of this action for this court to make that determination. *See, e.g., Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009). The ruling herein is limited to a determination of whether any coverage exists. The application of such coverage is left to a determination of the facts of the case.

**ORDER**

Based on the record presented and the discussion herein, it is ordered that Plaintiffs' motion for summary judgment be granted, and Travelers' motion for summary judgment is hereby denied.

AND IT IS SO ORDERED.

January 27, 2012

  
\_\_\_\_\_  
S. Jackson Kimball  
Special Circuit Court Judge  
York County

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