

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

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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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

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
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,

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.

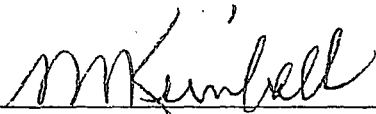
Thus, based upon the allegations of the Complaint and the facts presented in argument of the motions, I find and conclude that there is coverage under the Endorsement. Nevertheless, I make no determination of what damages are or may be covered by the policy, and it is not the purpose of this action for 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

#6

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER **2011CP4601090**

FILED - RECEIVED

Brian Pulliam	Deborah C. Pulliam	Travelers Indemnity Company	M U I Carolina Corporation
Mónica Bradshaw	Helen K. Cook	Kensington Place	Regent Carolina Corporation
Kala Craig	Victor E. Drexel	Owners Associatio Inc	
Cynthia Diturisi	J Scott Drexel	Regent Corporation	
Kathleen Kramer			

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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ 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):
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:

This matter came before me on April 4, 2012, upon Defendant Traveler's motion pursuant to Rule 59(e), S.C.R.C.P., asking the Court to alter or amend the Court's Order filed January 30, 2012. Representing the parties were: W. Jefferson Leath for Plaintiffs; and, William P. Davis for Defendant Travelers.

Upon considering the memoranda and arguments of counsel, including further consideration of *Eastpointe Condominium I v. Travelers Casualty & Surety Company of America*, 379 Fed.Appx. 906 (2010), I find no matter presented that was not addressed by the Court expressly or by clear implication in the prior order. Plaintiffs have asserted liability for damages not related to "physical injury to tangible property", which phrase is an integral part of the property damage definition in the policy exclusion at issue. Thus, I further find no basis for reconsideration or amendment of the Court's ruling in the prior order.

Therefore, it is ordered that Plaintiffs/Defendant's Motion pursuant to Rule 59(e), S.C.R.C.P., be denied.
AND IT IS SO ORDERED.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

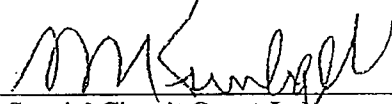
INFORMATION FOR THE PUBLIC INDEX

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.


Special Circuit Court Judge

3063

Judge Code

4/5/2012

Date

For Clerk of Court Office Use Only

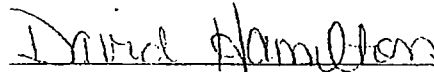
This judgment was entered on ⁴⁻⁹⁻¹², and a copy mailed first class or placed in the appropriate attorney's box on ⁴⁻⁹⁻¹², to attorneys of record or to parties (when appearing pro se) as follows:

W. Jefferson Leath 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 - Clerk of Court

#2

Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF YORK

) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
) CASE NUMBER: 11-CP-46- 01090

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
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,

Plaintiffs,

vs.

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

Defendants.

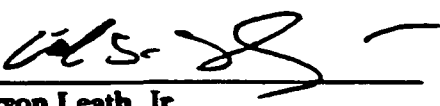
SUMMONS
(Non-jury, Declaratory Judgment)

FILED - RECEIVED
2011 MAR 21 PM 2:41
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscribers at their offices at 92 Broad Street, Charleston, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

LEATH, BOUCH & SEEKINGS, LLP

By. 

W. Jefferson Leath, Jr.

Michael S. Seekings

92 Broad Street

P.O. Box 59

Charleston, SC 29402

(843) 937-8811

Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: 3/16/11

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK) CASE NUMBER: 11-CP-46- 01090

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)
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,)

Plaintiffs,)

vs.)

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

Defendants.)

COMPLAINT
(Non-jury, Declaratory Judgment)

FILED - RECEIVED
2011 MAR 21 PM 2:41
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

1. The Plaintiffs are residents of York County, South Carolina and are owners of condominium real estate in a property known as the Kensington Place Horizontal Property Regime located in Fort Mill, South Carolina.
2. The Defendant Travelers Indemnity Company (hereinafter "Travelers") is, upon information and belief, a corporation organized under the laws of Connecticut and at all times relevant hereto is and was qualified to do business in the State of South Carolina.
3. The Defendant M.U.I. Carolina Corporation is a South Carolina corporation having its

principal place of business at 7000 Regent Parkway, Fort Mill, South Carolina 29715, and was the developer of the Kensington Place Horizontal Property Regime which consists of a seven story building containing 110 condominium units (hereinafter "Property") and at all times the Defendant was the "Declarant" and controlled the regime until April 24, 2007.

4. The Defendant Kensington Place Owners' Association, Inc., (hereinafter "POA"), is a South Carolina non-profit corporation which was created by the developer, M.U.I. Carolina Corporation in order to manage and govern the Kensington Place Horizontal Property Regime.

5. The Defendant Regent Corporation is a Delaware corporation which owns Regent Carolina Corporation, a South Carolina corporation. At all times herein, Regent Corporation acted through its agent and servant, Regent Carolina Corporation, and it is the principal of Regent Carolina Corporation.

6. This is an action for declaratory judgment brought pursuant to the Uniform Declaratory Judgment Act, S.C. Code §15-53-10 et seq. and seeks a declaration by this court of the rights and liabilities of the parties to a Traveler's Custom Insurance policy, no. I-680-3467M656-IND-08, issued by Travelers on May 9, 2008, in favor and to the benefit of the POA (Exhibit "A")(hereinafter the "Policy").

DECLARATORY JUDGMENT

7. By way of Fifth Amended Complaint dated July 6, 2010, the Plaintiffs herein brought an action for money damages and economic loss sustained as a result of the negligence and breach of fiduciary duty of the POA.

8. Specifically, as to the POA, the Plaintiffs alleged as follows:

14. During their tenure as controlling entity of the Kensington Place HPR until April 24, 2007, the Defendant Developers, as well as the Defendant POA, failed to adequately maintain the common elements of the Property and failed to maintain all of the elements and common elements of the Property in reasonably

good repair. At the time of transfer of the ownership of the common elements to the individual members of the Regime, including these Plaintiffs, the common elements of the Kensington Place HPR were, and remain now, in substandard condition requiring a substantial upfit of all major building elements and systems, and remediation of mold and other unsanitary conditions, and were turned over with no replacement reserve fund account.

16. Pursuant to applicable law, the POA, having a duty to maintain and repair the property, had and has a fiduciary duty to accomplish these duties for the benefit of the individual owners, including these Plaintiffs.

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

27. That the actions of the POA were negligent, reckless, willful, and wanton, in one or more of the following of the following particulars, to wit:

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

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.

9. These negligent acts and breaches of fiduciary duty are "wrongful acts" pursuant to the terms of the Travelers Policy and are therefore covered under the Policy which provides as follows:

I. Insuring Agreement – Directors and Officers Condominium and Community Associations Liability

A. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of any "wrongful act" to which this insured applies. We will have the right to seek those damages. We may at our discretion investigate any "wrongful act" and settle any claim or "suit" that may result. But:

(1) The amount we will pay is limited as described in LIMITS OF INSURANCE (Section III); and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance by any payment, including but not limited to any payment toward judgment, settlement, or "defense expense."

B. This insurance applies to "wrongful acts" committed at any time prior to the end of the coverage period, but only if:

(1) The "wrongful act" took place in the "coverage territory"; and

(2) A claim for compensatory damages because of the "wrongful act" is first made against any insured, in accordance with paragraph C. below, during the coverage period or any Extended Reporting Period we provide under CONDITIONS – Extended Reporting Period (Section IV).

C. A claim by a person or organization seeking compensatory damages will be deemed to have been made at the earlier of the following times:

(1) When notice of such claim is received by any insured or by us, whichever comes first; or

(2) When we make settlement in accordance with paragraph A. above.

All claims arising out of the same or related "wrongful acts" which will be deemed to have been made at the time the first of these claims is made against any insured.

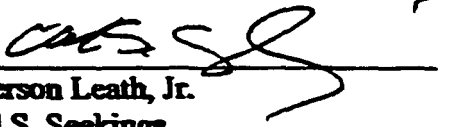
10. Upon information and belief, Travelers now takes the position that the wrongful acts of the POA, as alleged in the Fifth Amended Complaint are not covered and therefore no indemnity will be provided under the Policy.

11. The Plaintiffs are informed that in respect to the matter set forth above, a justiciable controversy exists among the parties in which the parties have a legal and actual interest and which is ripe for resolution. Plaintiffs pray that the Court inquire into the dispute between the parties, review the policies of insurance issued by Travelers in light of the underlying facts and law and issue a declaratory judgment as to the rights of the parties in the above-referenced insurance policy, finding that Travelers is obligated to cover the POA up to its One Million Dollar (\$1,000,000.00) aggregate limit.

WHEREFORE, the Plaintiffs pray as follows:

- A. That the Court issue an order declaring the rights of the parties, including the POA, under the Travelers policy of insurance referenced above in regard to the claims made against the POA in the above referenced matter;**
- B. That the Court issue an order declaring that as a result of the coverage issues and policy language, the POA is entitled to be covered up to the amount of One Million Dollars (\$1,000,000.00) aggregate for the Travelers policy;**
- C. That the Court issue an order granting the Plaintiffs attorneys' fees and costs pursuant to law; and**
- D. That the Court grant such other and further relief as may be just and proper.**

LEATH, BOUCH & SEEKINGS, LLP

By: 

W. Jefferson Leath, Jr.

Michael S. Seekings

92 Broad Street

P.O. Box 59

Charleston, SC 29402

(843) 937-8811

Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: 3/16/11

EXHIBIT A



CONDOMINIUM PAC

CONDOMINIUMS

A Custom Insurance Policy Prepared for:

**KENSINGTON PLACE HOA, INC
211 HERITAGE BLVD.
SUITE 108
FORT MILL**

SC 29715

Presented by: AMERICAN INSURANCE AGCY





One Tower Square, Hartford, Connecticut 06183

COMMON POLICY DECLARATIONS

CONDOMINIUM PAC PLUS

BUSINESS: CONDO/13+

INSURING COMPANY:

THE TRAVELERS INDEMNITY COMPANY

POLICY NO.: I-680-34672656-IND-08

ISSUE DATE: 05-09-08

1. NAMED INSURED AND MAILING ADDRESS:

KENSINGTON PLACE HOA, INC

211 HERITAGE BLVD.

SUITE 108

FORT MILL

SC 29715

2. POLICY PERIOD: From 04-06-08 to 04-06-09 12:01 A.M. Standard Time at your mailing address.

3. DESCRIPTION OF PREMISES:

PREM. LOC. NO.	BLDG. NO.	OCCUPANCY	ADDRESS (same as Mailing Address unless specified otherwise)
01	01	CONDO/13+	211 HERITAGE BLVD. FORT MILL SC 29715
01	02	CONDO/13+	211 HERITAGE BLVD. FORT MILL SC 29715

4. COVERAGE PARTS AND SUPPLEMENTS FORMING PART OF THIS POLICY AND INSURING COMPANIES

COVERAGE PARTS and SUPPLEMENTS	INSURING COMPANY
Businessowners Coverage Part	IND
Directors & Officers Coverage Supplement	IND

5. The COMPLETE POLICY consists of this declarations and all other declarations, and the forms and endorsements for which symbol numbers are attached on a separate listing.

6. SUPPLEMENTAL POLICIES: Each of the following is a separate policy containing its complete provisions.

POLICY	POLICY NUMBER	INSURING COMPANY
--------	---------------	------------------

DIRECT BILL

7. PREMIUM SUMMARY:

Provisional Premium	\$ 12,452.00
Due at Inception	\$
Due at Each	\$

NAME AND ADDRESS OF AGENT OR BROKER

AMERICAN INSURANCE AGCY TNS73

PO BOX 308

FORT MILL

SC 29716

IL TO 19 02 05 (Page 1 of 01)

Office: COLUMBIA

DOWN

COUNTERSIGNED BY

Authorized Representative

DATE: 5-12-08



One Tower Square, Hartford, Connecticut 06183

BUSINESSOWNERS COVERAGE PART DECLARATIONS

CONDOMINIUM PAC PLUS

POLICY NO.: I-680-3467M656-IND-08

ISSUE DATE: 05-09-08

INSURING COMPANY:

THE TRAVELERS INDEMNITY COMPANY

POLICY PERIOD:

From 04-06-08 to 04-06-09 12:01 A.M. Standard Time at your mailing address.

FORM OF BUSINESS: NOT FOR PROFIT ORG

COVERAGES AND LIMITS OF INSURANCE: Insurance applies only to an item for which a "limit" or the word "included" is shown.

COMMERCIAL GENERAL LIABILITY COVERAGE

OCCURRENCE FORM

	LIMITS OF INSURANCE	
General Aggregate (except Products-Completed Operations Limit)	\$	2,000,000
Products-Completed Operations Aggregate Limit	\$	2,000,000
Personal and Advertising Injury Limit	\$	1,000,000
Each Occurrence Limit	\$	1,000,000
Damage to Premises Rented to You	\$	300,000
Medical Payments Limit (any one person)	\$	5,000

BUSINESSOWNERS PROPERTY COVERAGE

DEDUCTIBLE AMOUNT: Businessowners Property Coverage: \$ 2,500 per occurrence.
Building Glass: \$ 2,500 per occurrence.

BUSINESS INCOME/EXTRA EXPENSE LIMIT: Actual loss subject to a maximum limit of
\$ 25,000

Period of Restoration-Time Period: Immediately

Other additional coverages apply and may be changed by an endorsement. Please read the policy.

SPECIAL PROVISIONS:

**COMMERCIAL GENERAL LIABILITY COVERAGE
IS SUBJECT TO A GENERAL AGGREGATE LIMIT**

MP TO 01 02 05 (Page 1 of 02)

BUSINESSOWNERS PROPERTY COVERAGE

PREMISES LOCATION NO.: 01

BUILDING NO.: 01

	COVERAGE	LIMIT OF INSURANCE	VALUATION	COINSURANCE	INFLATION GUARD
BUILDING		\$ 9,200,000	RC*	N/A	4.0%
	*Replacement Cost				

PREMISES LOCATION NO.: 01

BUILDING NO.: 02

	COVERAGE	LIMIT OF INSURANCE	VALUATION	COINSURANCE	INFLATION GUARD
BUILDING		\$ 150,000	RC*	N/A	0.0%
	*Replacement Cost				

Other coverage extensions apply and may be changed by an endorsement. Please read the policy.

POLICY NUMBER: I-680-3467M656-IND-08

EFFECTIVE DATE: 04-06-08

ISSUE DATE: 05-09-08

LISTING OF FORMS, ENDORSEMENTS AND SCHEDULE NUMBERS

THIS LISTING SHOWS THE NUMBER OF FORMS, SCHEDULES AND ENDORSEMENTS BY LINE OF BUSINESS.

IL T0 19 02 05	COMMON POLICY DEC
MP T0 01 02 05	BUSINESSOWNERS COVERAGE PART DECS
IL T8 01 01 01	FORMS, ENDORSEMENTS AND SCHEDULE NUMBERS
IL T3 15 02 04	COMMON POLICY CONDITIONS

BUSINESSOWNERS

MP T1 30 02 05	TBL OF CONT-BUSINESSOWNERS COV-DELUXE
MP T1 02 02 05	BUSINESSOWNERS PROPERTY COV-SPEC FORM
MP T1 03 02 05	AMENDATORY PROVISIONS-CONDOMINIUM
MP T3 25 01 08	TERRORISM RISK INS ACT OF 2002 NOTICE
MP T3 49 10 06	BUS INC & EXTRA EXP POL LEVEL DOLLAR LMT
MP T3 50 11 06	EQUIP BREAKDOWN SERV INTERRUPTION LIM
MP T1 55 02 05	AMEND EMPLOYER DISHONESTY LIMIT
MP T3 23 08 06	FUNGUS, WET ROT, DRY ROT CAUSE OF LOSS CHG
MP T3 32 02 05	THEFT OF MONEY AND SECURITIES EXCLUSION
MP T4 18 05 91	SC CHANGES

COMMERCIAL GENERAL LIABILITY

CG T0 07 11 05	DECLARATIONS PREMIUM SCHEDULE
CG T0 34 11 03	TABLE OF CONTENTS
CG T0 59 10 91	TABLE OF CONTENTS DIR & OFFICERS
CG 00 01 10 01	COMMERCIAL GENERAL LIABILITY COV FORM
CG D0 64 08 92	SC-PUNITIVE DAMAGES
CG D2 37 11 03	EXCLUSION-REAL ESTATE DEV ACTIVITIES
CG D2 55 11 03	AMENDMENT OF COVERAGE - POLLUTION
CG D3 09 11 03	AMEND ENDT-PRODUCTS-COMPLETED OPR HAZARD
CG 21 70 01 08	CAP ON LOSSES-CERTIFIED ACTS-TERRORISM
CG D0 28 10 91	DIR & OFFICERS LIAB END COMMUNITY ASSOC
CG D0 37 04 05	OTHER INSURANCE-ADDITIONAL INSUREDS
CG D2 03 12 97	AMEND-NON CUMULATION OF EACH OCC
CG D2 34 01 05	WEB XTEND - LIABILITY
CG D2 43 01 02	FUNGI OR BACTERIA EXCLUSION
CG D2 56 11 03	AMENDMENT OF COVERAGE
CG D2 88 11 03	EMPLOYMENT-RELATED PRACTICES EXCLUSION
CG D3 26 01 04	EXCLUSION-UNSOLICITED COMMUNICATIONS
CG D3 56 01 05	MOBILE EQUIP/EXCL VEHICLES SUB TO MV LAW
CG D0 76 06 93	EXCLUSION-LEAD
CG D1 42 01 99	EXCLUSION-DISCRIMINATION
CG D2 42 01 02	EXCLUSION WAR
CG T4 78 02 90	EXCLUSION-ASBESTOS
CG T3 33 11 03	LIMIT WHEN TWO OR MORE POLICIES APPLY

POLICY NUMBER: I-680-3467M656-IND-08

EFFECTIVE DATE: 04-06-08

ISSUE DATE: 05-09-08

INTERLINE ENDORSEMENTS

IL T3 82 08 06	EXCL OF LOSS DUE TO VIRUS OR BACTERIA
IL T3 79 01 08	CAPS ON LOSSES FROM CERT ACTS OF TERROR
IL 00 21 07 02	NUCLEAR ENERGY LIAB EXCL END-BROAD FORM
IL 01 94 07 02	S CAROLINA CECS-LEGAL ACTION AGAINST US
IL 02 49 10 07	SC CHANGES - CANCELLATIONS NONRENEWAL

POLICY NUMBER: I-680-34678656-IND-08

BUSINESSOWNERS
ISSUE DATE: 05-09-08

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYEE DISHONESTY AND FORGERY OR ALTERATION INCREASED LIMIT

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS PROPERTY COVERAGE SPECIAL FORM

A. The BUSINESSOWNERS PROPERTY COVERAGE SPECIAL FORM is changed as follows:

1. The limit applicable to the Additional Coverage – Employee Dishonesty is increased from \$25,000 to \$ 75,000 .
2. The limit applicable to the Additional Coverage – Forgery or Alteration is increased from \$25,000 to \$ 75,000 .

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FUNGUS, WET ROT, DRY ROT AND OTHER CAUSES OF LOSS CHANGES

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS PROPERTY COVERAGE PART

A. SCHEDULE

Limited "Fungus", Wet Rot or Dry Rot Coverage:

Direct Damage Limit of Insurance

\$15,000 OR ☐ \$25,000 ☐ \$50,000 ☐ \$100,000 ☐ \$250,000

B. The EXCLUSIONS contained in Section B. of the BUSINESSOWNERS PROPERTY COVERAGE FORM are amended as follows:

1. The following exclusion is added to B.1.:

"Fungus", Wet Rot or Dry Rot

a. We will not pay for loss or damage, or any increase in the amount of loss or damage, caused directly or indirectly by or resulting from the presence, growth, proliferation, spread or any activity of "fungus", wet rot or dry rot.

But if "fungus", wet rot or dry rot results in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

This exclusion does not apply:

(1) When "fungus", wet rot or dry rot results from fire or lightning; or

(2) To the extent that coverage is provided in the Additional Coverage - Limited "Fungus", Wet Rot or Dry Rot in Section C.1. below of this endorsement with respect to loss or damage by a cause of loss other than fire or lightning.

2. The exclusions contained in B.2. are amended as follows:

a. Under exclusion B.2.d.(2), reference to fungus, wet rot or dry rot, mold is deleted.

b. Exclusion B.2.f. is deleted and replaced by the following:

We will not pay for loss or damage caused by or resulting from continuous or repeated seepage or leakage of water, or the presence or condensation of humidity,

moisture or vapor that occurs over a period of 14 days or more.

C. The Additional Coverages contained in Section A.6. of the BUSINESSOWNERS PROPERTY COVERAGE FORM are amended as follows:

1. The following Additional Coverage is added:

Additional Coverage - Limited "Fungus", Wet Rot or Dry Rot

a. The coverage described in b. and c. below only applies when the "fungus", wet rot or dry rot is the result of a "specified cause of loss", other than fire or lightning, that occurs during the policy period and only if all reasonable means have been used to save and preserve the property from further damage at the time of and after that occurrence.

b. **Limited "Fungus", Wet Rot or Dry Rot - Direct Damage**

(1) We will pay for direct physical loss or damage to Covered Property caused by "fungus", wet rot or dry rot, including:

(a) The cost of removal of the "fungus", wet rot or dry rot;

(b) The cost to tear out and replace any part of the building or other property as needed to gain access to the "fungus", wet rot or dry rot; and

(c) The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that

BUSINESSOWNERS

"fungus", wet rot or dry rot are present.

- (2) The coverage described in b.(1) above is limited to \$15,000, or the limit of insurance shown in the Schedule of this endorsement for Limited "Fungus", Wet Rot or Dry Rot Coverage - Direct Damage. Regardless of the number of claims, this limit is the most we will pay for the total of all loss or damage under this coverage arising out of all occurrences of "specified causes of loss" (other than fire or lightning) which take place in a 12 month period (starting with the beginning of the present annual policy period). With respect to a particular occurrence of loss which results in "fungus", wet rot or dry rot, we will not pay more than a total of this annual limit even if the "fungus", wet rot or dry rot continues to be present or active, or recurs, in a later policy period.
 - (3) The coverage provided under this Limited "Fungus", Wet Rot or Dry Rot Coverage - Direct Damage does not increase the applicable Limit of Insurance on any Covered Property. If a particular occurrence results in loss or damage by "fungus", wet rot or dry rot, and other loss or damage, we will not pay more for the total of all loss or damage than the applicable Limit of Insurance on the Covered Property.
 - (4) If there is covered loss or damage to Covered Property that is not caused by "fungus", wet rot or dry rot, loss payment will not be limited by the terms of this Limited "Fungus", Wet Rot or Dry Rot Coverage - Direct Damage, except to the extent that "fungus", wet rot or dry rot causes an increase in the loss. Any such increase in the loss will be subject to the terms of this Limited "Fungus", Wet Rot or Dry Rot Coverage - Direct Damage.
- c. Limited "Fungus", Wet Rot or Dry Rot Coverage - Business Income and Extra Expense
- The following Limited "Fungus", Wet Rot or Dry Rot Coverage provisions for Business Income and Extra Expense apply only if Business Income and/or Extra Ex-

pense coverage applies to the described premises and only if the suspension of "operations" satisfies all of the terms of the applicable Business Income and/or Extra Expense coverage:

- (1) If the loss which results in the "fungus", wet rot or dry rot does not in itself necessitate a suspension of "operations", but such suspension of "operations" is necessary due to loss or damage to property at the described premises caused by "fungus", wet rot or dry rot, then our payment for Business Income and/or Extra Expense is limited to the amount of loss and/or expense sustained in a period of not more than 30 days. The days need not be consecutive.
- (2) If a covered suspension of "operations" is caused by loss or damage at the described premises by other than "fungus", wet rot or dry rot, but remediation of "fungus", wet rot or dry rot prolongs the "period of restoration", we will pay for loss and/or expense sustained during the delay, regardless of when such a delay occurs during the "period of restoration", but such coverage is limited to 30 days. The days need not be consecutive.

The coverage provided under this Limited "Fungus", Wet Rot or Dry Rot Coverage - Business Income and Extra Expense is included in, and not in addition to any limit or description of coverage for Business Income shown on the Businessowners Coverage Part Declarations or under the Extra Expense Additional Coverage.

- d. The terms of this Limited Coverage do not increase or reduce the coverage under the Water Damage, Other Liquids, Powder or Molten Damage Additional Coverage Extension or the coverage provided for collapse of buildings or structures under the Collapse of Buildings exclusion.
- D. The DEFINITIONS contained in Section G. are amended as follows:
1. The definition of "Specified Causes of Loss" is deleted and replaced by the following:
"Specified Causes of Loss" means the following: Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil

BUSINESSOWNERS

commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse as defined below; volcanic action; falling objects as limited below; weight of snow, ice or sleet; and water damage as defined below; all only as otherwise insured against in this Coverage Form.

- a. Sinkhole collapse means the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite. This cause of loss does not include:
 - (1) The cost of filling sinkholes; or
 - (2) Sinking or collapse of land into man-made underground cavities.
- b. Falling objects does not include loss or damage to:
 - (1) Personal property in the open; or
 - (2) The "interior of a building or structure", or property inside a building or structure, unless the roof or an outside wall of the building or structure is first damaged by a falling object.
- c. Water damage means accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of any part of a system or appliance (other than a sump system including its related equipment and parts) containing water or steam.

When the Causes of Loss - Earthquake endorsement, Causes of Loss - Earthquake Sprinkler Leakage endorsement or Causes of Loss - Broad Form Flood endorsement is included in this policy, "specified causes of loss" also includes such cause of loss, but

only to the extent such cause of loss is insured against under this Coverage Form.

- 2. The following definition is added:

"Fungus" means any type or form of fungus, including but not limited to mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.

E. Ordinance or Law Coverage Change

Under:

- 1. The ordinance or law coverage in Section A.6.L Increased Cost of Construction of the Businessowners Property Coverage Form;
- 2. Ordinance or Law Coverage endorsement MP T1 35; and
- 3. Any other Ordinance or Law coverage or Ordinance or Law - Increased "Period of Restoration" coverage provided under this Coverage Part;

the following exclusion is added:

This coverage does not apply to:

- a. Loss caused by or resulting from the enforcement of any ordinance or law which requires the demolition, repair, replacement, reconstruction, remodeling or remediation of property due to the presence, growth, proliferation, spread or any activity of "fungus", wet rot or dry rot; or
- b. Costs associated with the enforcement of any ordinance or law which requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "fungus", wet rot or dry rot.

POLICY NUMBER: I-680-3467M656-IND-08

BUSINESSOWNERS
ISSUE DATE: 05-09-08

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SOUTH CAROLINA CHANGES

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS COVERAGE PART

Prem. No.	Bldg. No.	SCHEDULE	
		Agreed Value of Building	Total Amount of Insurance to be Carried
01	01	\$ 9,200,000	\$ 9,200,000
01	02	150,000	150,000

A. Paragraphs 2. and 3. of CANCELLATION Common Policy Condition are replaced by the following:

2. We may cancel this policy by mailing or delivering to the first Named Insured and the agent, if any, written notice of cancellation at least:

- 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
- 30 days before the effective date of cancellation if we cancel for any other reason.

3. We may mail or deliver our notice to the first Named Insured's and agent's last known addresses.

B. The following is added to the CANCELLATION Common Policy Condition:

7. CANCELLATION OF POLICIES IN EFFECT FOR 90 DAYS OR MORE

If this policy has been in effect for 90 days or more, or is a renewal or continuation of a pol-

icy only for one or more of the following reasons:

- Nonpayment of premium;
- Material misrepresentation of fact which, if known to us, would have caused us not to issue the policy;
- Substantial change in the risk assumed, except to the extent that we should reasonably have foreseen the change or contemplated the risk in writing the policy;
- Substantial breaches of contractual duties, conditions or warranties; or
- Loss of our reinsurance covering all or a significant portion of the particular policy insured, or where continuation of the policy would imperil our solvency or place us in violation of the insurance laws of South Carolina.

Notice of cancellation will state the reason for cancellation.

* Information required to complete schedule, if not shown on this endorsement, will be shown in the Declarations.

BUSINESSOWNERS

- C. The following is added and supersedes any provisions to the contrary:

NONRENEWAL

1. If we decide not to renew this policy, we will mail or deliver written notice of nonrenewal, along with the reason for nonrenewal, to the first Named Insured, and the agent, if any, at least 30 days before:
 - a. the expiration date; or
 - b. The anniversary date if this is a continuous policy.
2. Any notice of nonrenewal will be mailed or delivered to the first Named Insured's and

agent's last known addresses. If notice is mailed, proof of mailing will be sufficient proof of notice.

- D. The following is added to the LOSS PAYMENT Property Loss Condition:

For loss or damage to the buildings caused by or resulting from fire or lightning, you and we agree that:

1. The value of buildings described in this policy; and
 2. The total amount of insurance to be carried on the buildings, including this policy
- are the amount shown in the Schedule.

DECLARATIONS PREMIUM SCHEDULE
Issue Date: 05-09-08

Policy Number: I-680-3467M656-IND-08

This Schedule applies to the Declarations for the period of 04-06-08 to 04-06-09 .

It shows all of your known rating classes as of the effective date. Any exceptions will be so noted. This includes all locations you own, rent or occupy.

STATE	ZIP	CLASS DESCRIPTION/CODE NUMBER		PREMIUM BASE/ EXPOSURE	RATES	ADVANCE PREMIUM
SC	29715	Buildings (13 + Units)	u	110	14.485	1,593

Premium Base Legend:

Premium Base

a = area
c = cost
e = employees
m = admissions
p = payroll

How Rates Apply

per 1000 sq. feet
per \$1000 of total cost
per employee
per 1000 of admissions
per \$1000 of payroll

Premium Base

s = gross sales
u = units
t =

How Rates Apply

per \$1000 of gross sales
per unit
This premium base is reserved
for unusual applications. Base
and how rates apply are shown
above.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DIRECTORS AND OFFICERS LIABILITY ENDORSEMENT COMMUNITY ASSOCIATIONS

THIS ENDORSEMENT PROVIDES CLAIMS MADE COVERAGE. DEFENSE COSTS ARE INCLUDED WITHIN THE LIMITS OF INSURANCE. PLEASE READ THE ENTIRE FORM CAREFULLY.

DECLARATIONS:

1. Named Insured:
KENSINGTON PLACE HOA, INC
2. Address: **211 HERITAGE BLVD.
SUITE 108
FORT MILL SC 29715**
3. Coverage Period: **04-06-08 to 04-06-09**
4. Limit of Insurance: \$ **1,000,000** Each Claim
\$ **1,000,000** Aggregate
5. Premium: \$ **INCLUDED**
6. Special Provisions, if any:

Throughout this endorsement the words "you" and "your" refer to the Named Insured shown in Item 1 of the Declarations above, and any other person or organization qualifying as a Named Insured under this endorsement. The words "we," "us" and "our" refer to the Company providing this insurance. The word "insured" means any person or organization qualifying as such under SECTION II - WHO IS AN INSURED.

PROVISIONS

I. Insuring Agreement - Directors and Officers Condominium and Community Associations Liability

A. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of any "wrongful act" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "wrongful act" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay is limited as described in LIMITS OF INSURANCE (Section III); and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance by any payment, including but

not limited to any payment toward judgment, settlement or "defense expense."

B. This insurance applies to "wrongful acts" committed at any time prior to the end of the coverage period, but only if:

- (1) The "wrongful act" took place in the "coverage territory"; and
- (2) A claim for compensatory damages because of the "wrongful act" is first made against any insured, in accordance with paragraph C. below, during the coverage period or any Extended Reporting Period we provide under CONDITIONS - Extended Reporting Period (Section IV).

C. A claim by a person or organization seeking compensatory damages will be deemed to have been made at the earlier of the following times:

COMMERCIAL GENERAL LIABILITY

(1) When notice of such claim is received by any insured or by us, whichever comes first; or

(2) When we make settlement in accordance with paragraph A. above.

All claims arising out of the same or related "wrongful acts" will be deemed to have been made at the time the first of these claims is made against any insured.

D. 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.

(3) Damages resulting from:

- a. "Wrongful acts" which result in any insured gaining personal profit, remuneration or advantage to which such insured is not legally entitled.
- b. Any dishonest, fraudulent, criminal or malicious act, error or omission committed by or with the knowledge or consent of any insured.
- c. The failure of any person to effect or maintain acceptable amounts, forms, conditions or provisions of any insurance or bonds.
- d. Any violation of the Employee Retirement Income Security Act of 1974, the Pension Reform Act of 1974, or similar provisions of any Federal, state or local statutory or common law.
- e. Operations (including but not limited to construction, design, survey and engineering services) performed by or on behalf of the builder, sponsor or developer of the property designated in the Declarations.
- 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.
- g. Discrimination.
- h. The "wrongful act" of any developer/sponsor who is an officer or

member of the condominium, or other community association, board of directors.

i. Any claim or "suit" made by any insured against another insured.

j. Employment-related practices, policies, acts or omissions.

(4) Damages resulting from:

- a. The actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" or asbestos.
- b. Any request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants" or asbestos.
- c. Any claim or "suit" by or on behalf of a governmental authority because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing or in any way responding to or assessing the effects of "pollutants" or asbestos.

"Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.

(5) Damages resulting from:

- a. Any claim made or "suit" brought prior to or pending as of the inception date of the coverage period, as shown in the Declarations. However, if this insurance is a renewal of the same or similar coverage provided by us, this exclusion applies to claims made or "suits" brought prior to or pending as of the date such coverage was first provided by us.
- b. Any subsequent claims made or "suits" brought which arise from or are based upon substantially the same matters as alleged in the pleadings of such prior or pending claims or "suits."

- c. Any act of any insured which gave rise to such prior or pending claim or "suit."
- d. Any claim or "suit" which may be reasonably anticipated as of the inception date of the coverage period, as shown in the Declarations.

II. WHO IS AN INSURED

- A. If you are named in Item 1 of the Declarations above, you are an insured.
- B. Your directors, trustees or officers are also insureds, but only while acting within the scope of their duties for you. This includes:
 - 1. Those who currently are directors, trustees or officers;
 - 2. Those who were directors, trustees or officers when the "wrongful act" took place;
 - 3. Those who become directors, trustees or officers after the effective date of this insurance, but only for subsequent "wrongful acts."
- C. Your employees and members are insureds, but only while acting at your direction and within the scope of their duties for you.

III. LIMITS OF INSURANCE

- A. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - 1. Insureds;
 - 2. Claims made or "suits" brought;
 - 3. Persons or organizations making claims or bringing "suits."
- B. The Limit of Insurance shown in the Declarations above as "Aggregate" is the most we will pay for all damages and "defense expense" for all claims made during the Coverage Period shown in the Declarations.
- C. Subject to B. above, the Limit of Insurance shown as "Each Claim" is the most we will pay for damages and "defense expense" arising out of any one claim. For the purposes of determining the Limit of Insurance, all claims arising out of the same or related "wrongful acts" will be considered as one claim.

IV. CONDITIONS

A. Extended Reporting Period.

- 1. If this insurance is canceled or nonrenewed for any reason other than nonpayment of premium, we will provide an Extended Reporting Period of one year. This Extended Reporting Period does not extend the coverage period or change the scope of coverage provided. It applies only to claims for "wrongful acts" committed before the end of the coverage period.
- 2. The Extended Reporting Period does not apply to claims that are covered under any subsequent insurance you purchase, or that would be covered but for exhaustion of the amount of insurance applicable to such claims.
- 3. The Extended Reporting Period does not reinstate or increase the Limits of Insurance.

B. Bankruptcy.

Bankruptcy or insolvency on the part of the insured will not relieve us of our obligations under this insurance.

C. Insured's Duties In The Event Of A Wrongful Act, Claim Or Suit.

- 1. In the event of a "wrongful act", you must see to it that we are notified as soon as is practicable. To the extent possible, notice should include:
 - a. How, when and where the "wrongful act" took place;
 - b. The nature of the "wrongful act"; and
 - c. The names and addresses of injured parties and witnesses.

Notice of such a "wrongful act" does not constitute notice of a claim.
- 2. If a claim is received by any insured, you must immediately record the specifics of the claim and the date received, and notify us immediately. Written notice should be provided as soon as is practicable.
- 3. You and any other involved insured must:
 - a. Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or a "suit";

COMMERCIAL GENERAL LIABILITY

- b. Authorize us to obtain records and other information;
 - c. Cooperate with us in the investigation of any "wrongful act," or the investigation, settlement or defense of the claim or "suit"; and
 - d. Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to any insured because of damages to which this insurance applies.
4. No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense without our consent.
- D. Legal Action Against Us.**
- No person or organization has a right under this insurance:
- 1. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
 - 2. To sue us on this insurance unless all of its terms have been fully complied with.
- A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this insurance or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.
- E. Other Insurance.**
- This insurance is excess over any other valid and collectible insurance available to any insured, whether primary, excess, contingent, or on any other basis, unless such other insurance was purchased specifically to be excess over the limits of insurance this insurance provides.
- F. Changes.**
- This endorsement contains all of the agreements between you and us concerning the insurance afforded under this endorsement. The first Named Insured shown in the Declarations is authorized to make changes in the

terms of this insurance with our consent. This endorsement's terms can be amended or waived only by endorsement issued specifically to amend this insurance.

G. Transfer Of Rights Of Recovery Against Others To Us.

If the insured has rights to recover all or part of any payment we have made under this insurance, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

H. Conformity To Statute.

The terms of this insurance which are in conflict with the statutes of the state wherein this insurance is delivered are hereby amended to conform to such statutes.

I. Representations.

By accepting this insurance you agree:

- 1. The statements in the application are accurate and complete;
- 2. Those statements are based upon representations you made to us; and
- 3. We have issued this insurance in reliance upon your representations.

V. DEFINITIONS

- A. "Advertising injury"** means injury arising out of one or more of the following offenses:
- 1. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 - 2. Oral or written publication of material that violates a person's right of privacy;
 - 3. Misappropriation of advertising ideas or style of doing business; or
 - 4. Infringement of copyright, title or slogan.
- B. "Bodily injury"** means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
- C. "Coverage territory"** means the United States of America (including its territories and possessions), Puerto Rico and Canada.
- D. "Defense expense"** means fees charged by (an) attorney(s) designated or approved in writing by us and all other fees, costs, and expenses resulting from the investigation, ad-

COMMERCIAL GENERAL LIABILITY

justment, defense and appeal of a claim, "suit" or proceeding arising in connection therewith, if incurred by us or by an insured with our written consent.

E. "Personal injury means injury, other than "bodily injury," arising out of one or more of the following offenses:

1. False arrest, detention or imprisonment;
2. Malicious prosecution;
3. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
4. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
5. Oral or written publication of material that violates a person's right of privacy.

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.
- G. "Suit" means a civil proceeding in which damages because of a "wrongful act" to which this insurance applies are alleged. "Suit" includes:
1. An arbitration proceeding in which such damages are claimed and to which you must submit or do submit with our consent; or
 2. Any other alternative dispute resolution proceeding in which such damages are claimed and to which you submit with our consent.
- H. "Wrongful act" means any actual or alleged error, mistake, misstatement or misleading statement, act, omission or neglect or breach of duty by any insured.

COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions:

A. CANCELLATION

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy or any Coverage Part by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. If the policy is cancelled, that date will become the end of the policy period. If a Coverage Part is cancelled, that date will become the end of the policy period as respects that Coverage Part only.
5. If this policy or any Coverage Part is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. CHANGES

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us as part of this policy.

C. EXAMINATION OF YOUR BOOKS AND RECORDS

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

D. INSPECTIONS AND SURVEYS

We have the right but are not obligated to:

1. Make inspections and surveys at any time;
2. Give you reports on the conditions we find; and
3. Recommend changes.

Any inspection, surveys, reports or recommendations relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

1. Are safe or healthful; or
2. Comply with laws, regulations, codes or standards.

This condition applies not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

E. PREMIUMS

1. The first Named Insured shown in the Declarations:
 - a. Is responsible for the payment of all premiums; and
 - b. Will be the payee for any return premiums we pay.
2. We compute all premiums for this policy in accordance with our rules, rates, rating plans, premiums and minimum premiums. The premium shown in the Declarations was computed based on rates and rules in effect at the time the policy was issued. On each renewal, continuation or anniversary of the effective date of this policy, we will compute the premium in accordance with our rates and rules then in effect.



F. TRANSFER OF YOUR RIGHTS AND DUTIES UNDER THIS POLICY

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

G. BUSINESSOWNERS COVERAGE PART - REFERENCES TO FORMS AND ENDORSEMENTS

In some instances, the Common Policy Declarations may list endorsements included in the Businessowners Coverage Part that reference:

1. The Commercial Property Coverage Part;
2. The Commercial General Liability or Liquor Liability Coverage Part; or
3. Standard Property forms including, but not limited to, the following:
 - a. Building and Personal Property Coverage Form;
 - b. Business Income Coverage Form;
 - c. Commercial Property Conditions;
 - d. Condominium Association Coverage Form;
 - e. Condominium Commercial Unit-Owners Coverage Form;
 - f. Causes of Loss Basic Form;

The Travelers Indemnity Company (IND)
The Phoenix Insurance Company (PHX)
The Charter Oak Fire Insurance Company (COF)
Travelers Property Casualty Company of America (TIL)
The Travelers Indemnity Company of Connecticut (TCT)
The Travelers Indemnity Company of America (TIA)


Secretary

- g. Causes of Loss Special Form; and
- h. Causes of Loss Earthquake Form.

Endorsements referencing the Commercial Property Coverage Part or the Standard Property Forms referenced above apply to the Businessowners Property Coverage Form (Standard or Special version) in the same manner as they apply to the forms they reference.

Endorsements referencing the Commercial General Liability Coverage Part apply to the Commercial General Liability Coverage Form (Included in the Businessowners Coverage Part) in the same manner as they apply to the form they reference.

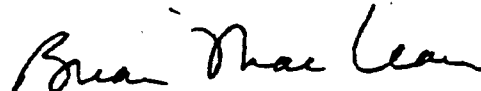
H. INSURANCE UNDER TWO OR MORE COVERAGE PARTS

If two or more of this policy's Coverage Parts apply to the same loss or damage, we will not pay more than the actual amount of the loss or damage.

I. INSURING COMPANIES

In return for payment of the premium, we agree with the Named Insured to provide the insurance afforded by a Coverage Part forming part of this policy. That insurance will be provided by the company indicated as insuring company in the Common Policy Declarations by the abbreviation of its name opposite that Coverage Part.

The companies listed below (each a stock company) have executed this policy, but it is valid only if countersigned on the Common Policy Declarations by our authorized representative.


President

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C.A. No.: 2011-CP-46-01090

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 Os)
borne, 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)

Plaintiffs,)

v.)

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

Defendants.)

**ANSWER AND COUNTERCLAIM OF
TRAVELERS INDEMNITY COMPANY
(NON-JURY/DECLARATORY
JUDGMENT)**

FILED-RECEIVED
2011 MAY 17 AM 11:06
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

Defendant Travelers Indemnity Company (hereinafter "Defendant") answers the complaint as follows:

FOR A FIRST DEFENSE

1. All matters and things alleged in the Complaint not hereinafter specifically admitted, qualified or explained are denied.

2. On information and belief, Defendant admits so much of paragraph 1 as alleges that some of the Plaintiffs are residents of York County, South Carolina and are owners of condominium real estate in a property known as the Kensington Place Horizontal Property Regime in Fort Mill, South Carolina, but Defendant is without knowledge or information

sufficient to form a belief as to the truth of said allegations as they relate to all of the Plaintiffs, and said allegations are therefore denied.

3. Defendant admits the allegations contained in paragraph 2.

4. On information and belief, Defendant admits the allegations contained in paragraph 3.

5. On information and belief, Defendant admits the allegations contained in paragraph 4.

6. On information and belief, Defendant admits the allegations contained in paragraph 5.

7. Defendant admits the allegations contained in paragraph 6, except that Defendant denies that Exhibit A attached to the Complaint is a copy of the entire policy referenced in paragraph 6, and Defendant denies that Plaintiffs are entitled to the declaratory judgment they seek.

8. Defendant admits so much of paragraph 7 as alleges that Plaintiffs' Fifth Amended Complaint dated July 6, 2010 seeks, among other things, money damages allegedly sustained as a result of the alleged negligence and alleged breach of fiduciary duty of Kensington Place Owners' Association, Inc. ("POA"). Said Fifth Amended Complaint, a copy of which is attached as Exhibit A, speaks for itself as to its allegations and prayer for relief.

9. Defendant admits that the paragraphs quoted in paragraph 8 are similar to those that appear in the Fifth Amended Complaint (Exhibit A), but Defendant denies that they are quoted verbatim and would refer to Exhibit A for the exact language of the Fifth Amended Complaint, which speaks for itself.

10. Defendant admits that paragraph 9 of the Fifth Amended Complaint accurately quotes from a portion of the policy that it issued to the POA, but denies the remaining allegations

contained in paragraph 9 and denies that the Plaintiffs' allegations against the POA are covered under the policy in question.

11. Defendant admits the allegations contained in paragraph 10.

12. Defendant denies the allegations contained in paragraph 11.

FOR A SECOND DEFENSE

13. Plaintiffs are without standing to prosecute this action.

FOR A THIRD DEFENSE

14. The complaint fails to state facts sufficient to constitute a cause of action, in that there is no justiciable controversy ripe for adjudication.

COUNTERCLAIM

15. Defendant has been defending the POA in the action brought by the Plaintiffs against the POA and others (C.A. No. 08-CP-46-2158) under a reservation of rights to deny coverage.

16. The aforementioned policy, of which pertinent portions have been copied and attached to the Complaint in this action as Exhibit A, 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.
- (3) Damages resulting from:

* * *

(b) Any dishonest, fraudulent, criminal or malicious act, error or omission committed by or with the knowledge of any insured.

* * *

(e) Operations (including but not limited to construction, design, survey and engineering services) performed by or no behalf of the builder, sponsor or developer of the property designated in the Declarations.

(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.

(i) any claim or “suit” made by any insured against another insured.

17. The Plaintiffs’ allegations against the POA fall within one or more of the above-quoted exclusions, as a result of which coverage for same is not available for the POA under the aforementioned policy and Defendant therefore is not obligated to continue to provide a defense for the POA in the aforementioned action, nor to afford coverage and indemnity in the event of a judgment against the POA.

18. The gravamen of the aforementioned Fifth Amended Complaint is that the POA negligently and in breach of its fiduciary duties to the Plaintiffs failed to adequately maintain the common elements of the property in question, as a result of which they sustained property damage, namely, the costs of necessary repairs and, inferentially (in that they seek “all damages proximately flowing from the breach” of said fiduciary duties) damages for any alleged diminution in the value of their individual units, all of which constitutes “property damage,” defined in the aforementioned policy 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.

19. In addition, in paragraph 19 of their Fifth Amended Complaint, Plaintiffs allege that the POA placed the interests of the developer of the property ahead of the owners, including

the Plaintiffs, thereby breaching its fiduciary duties to them. Moreover, in paragraph 26, the Plaintiffs allege, among other things, that the POA was negligent in placing the developers' interests ahead of those of the individual property owners, so as to place the entire financial burden of deferred maintenance upon them, including the Plaintiffs, and failing to advise them of its conflict of interest.

20. The gravamen of the portions of the Fifth Amended Complaint referred to in paragraph 19 above is that the POA failed to enforce its rights against the developers of the property in question, which is specifically excluded by exclusion (3) f quoted in paragraph 16 above.

WHEREFORE, having fully answered the complaint, Defendant respectfully prays that;

- (a) the complaint be dismissed with costs;
- (b) this Court inquire into the matter and issue its order declaring the rights and responsibilities of the parties, and specifically declaring that there is no coverage available under the aforementioned policy for the Plaintiffs' allegations against Kensington Place Owners' Association, Inc. for the Plaintiffs' allegations against it.


William P. Davis
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Columbia, South Carolina 29202
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wdavis@brblegal.com
ATTORNEYS FOR DEFENDANT TRAVELERS
INDEMNITY COMPANY

May 13, 2011
Columbia, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 11-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
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,

Plaintiffs,

vs.

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

Defendants.

**PLAINTIFFS' REPLY TO
COUNTERCLAIM**

Plaintiffs, replying to the Counterclaim of the Defendant, allege and say:

1. That they repeat and reallege the allegations of the complaint as if set forth herein verbatim, and the deny all allegations of the counterclaim not specifically admitted;
2. That they admit the allegations of Paragraphs 15 and 16 of the Counterclaim;
3. That they deny the allegations of Paragraphs 17, 18, 19, and 20 of the Counterclaim, being the remaining allegations of the Counterclaim.

Wherefore, Plaintiffs pray that the Counterclaim be dismissed, and that they have judgment as prayed for in their Complaint

LEATH, BOUCH & SEEKINGS, LLP

By: Jefferson Leath
W. Jefferson Leath, Jr.
Michael S. Seekings
92 Broad Street
P.O. Box 59
Charleston, SC 29402
(843) 937-8811

Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: May 16 2011

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was e-mailed to all counsel of record in this proceeding this 15th day of May, 2011.

Dolores M. Catz

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 11-CP-46-1090

BRIAN AND DEBORAH C. PULLIAM,
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ELENA MANFREDINI, DAVID COX,
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MARIANNA JUNDA,

Plaintiffs,

vs.

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

Defendants.

**PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that the Plaintiffs, through the undersigned counsel, hereby move for an Order granting them Summary Judgment as to Defendant Travelers Indemnity Company on the grounds that there is no genuine dispute as to any material fact and the Plaintiffs are entitled to judgment as a matter of law. This Motion will be supported by a memorandum of law together with attachments.

LEATH, BOUCH & SEEKINGS, LLP

By: Jefferson Leath
W. Jefferson Leath, Jr.
Michael S. Seekings
92 Broad Street
P.O. Box 59
Charleston, SC 29402
(843) 937-8811

Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: October 14, 2011

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was e-mailed to all counsel of record in this proceeding this 14th day of October, 2011.

Dolores M. Citipani

COPY

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C.A. No.: 2011-CP-46-01090

Brian and Deborah C. Pulliam, Monica)
Bradshaw, Helen K. Cook, Lala Craig,)
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Dionna, Mikel Marcuse, James P.)
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Manfredini, David Cox, Jonathan B.)
Dillard, Eric Wilson, Don and Debbie)
Neff, and Marianna Junda)

Plaintiffs,)

v.)

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

Defendants.)

**TRAVELERS INDEMNITY
COMPANY'S MOTION FOR
SUMMARY JUDGMENT**

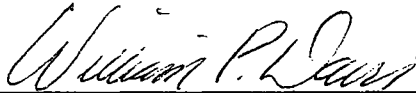
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2011 NOV 15 AM 8:27
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

**TO: W. JEFFERSON LEATH, JR., ESQUIRE AND MICHAEL S. SEEKINGS,
ESQUIRE, ATTORNEYS FOR PLAINTIFFS:**

Pursuant to Rule 56, SCRCP, Defendant Travelers Indemnity Company (hereinafter "Travelers") hereby moves for an order granting it summary judgment in this action on the grounds that there exists no genuine issue of material fact, and Travelers is entitled to judgment as a matter of law, in that (1) the complaint fails to state facts sufficient to constitute a cause of action; (2) Plaintiffs lack standing to bring this action, in that Plaintiffs are not parties to the insurance contract between Travelers and its insured and therefore lack privity; (3) there is no justiciable controversy ripe for adjudication between Plaintiffs and Travelers, in that Plaintiffs have not obtained a judgment against Defendants Kensington Place Owners' Association, Inc.,

Regent Carolina Corporation, and Regent Corporation and, even if they had, they could not collect on it because The Honorable John C. Hayes, III ruled in the underlying action that, while Plaintiffs have the right to maintain their action, any recovery would belong to Defendant Kensington Place Owners' Association (KPOA) ("Plaintiffs can sue, but [*Concerned Dunes West Residents, Inc. v. Georgia Pacific Corporation*, 349 S.C. 251, 562 S.E.2d 633 (2002)] seems to vest the right of recovery in KPOA."); (4) Plaintiffs' claims are for property damage, and punitive damages, both of which are excluded under the policy in question; and (5) Plaintiffs' allegations against KPOA fall within one or more exclusions in the subject policy.

This motion is based upon the pleadings, the discovery exchanged between the parties in this and the underlying action, the depositions in the underlying action, affidavits, expert reports, and all other evidence which this court deems appropriate to consider.



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Phone: (803) 799-9091; Fax: (803) 779-3423
wdavis@brblegal.com
File No.: 7746.1830
ATTORNEYS FOR DEFENDANT TRAVELERS
INDEMNITY COMPANY

November 10, 2011
Columbia, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK) CASE NUMBER: 11-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)
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,)

Plaintiffs,

vs.

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

Defendants.

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

SUMMARY

Plaintiffs in the underlying litigation sued the developer-controlled Kensington Place Owners Association Inc. (HOA) for negligence in management of the condominium during the time of developer control prior to turnover of the common elements in April 2007. The HOA is insured under a Travelers Directors and Officers policy. Travelers asserts two exclusions to coverage in its policy: 1. The "Property Damage" exclusion (that in effect Plaintiffs allege property damage), and 2. The "Failure to sue the Developer" exclusion, (that Plaintiffs are suing

the HOA for failing to sue the Developer, MUI). Plaintiffs' position in their motion for Summary Judgment demonstrate that neither exclusion is applicable, in that they do not allege "Property Damage", rather they allege Economic Loss, and further that they are not suing the HOA for any failure to bring a claim against the Developer, as the HOA has in fact asserted such a claim in the underlying litigation.

STATEMENT OF FACTS

This case involves the construction and interpretation of the Directors and Officers Liability Endorsement to the Commercial General Liability ("CGL") policy Defendant Travelers Indemnity Company issued to its insured, Kensington Place Owners' Association ("POA").

In the underlying litigation, the Plaintiffs filed suit against the Defendant POA, and others, alleging breach of fiduciary duty, breach of warranty and negligence. (See Plaintiffs' Fifth Amended Complaint, attached hereto as Exhibit A).

In the underlying Complaint, the Plaintiffs allege that the actions of the Defendant POA were negligent:

- 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

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.

(See Complaint at ¶ 26)., and as a result of this negligence, Plaintiffs allege:

“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.”

(See Complaint at ¶ 27).

The language of Defendant’s Directors and Officer’s liability policy endorsement states the following with regard to property damage:

D. Exclusions

The insurance provided by this endorsement does not apply to:

- (1) “Bodily Injury,” “property damage,” “personal injury,” or “advertising injury.”

(See Travelers’ D&O Endorsement at p. 2, attached hereto as Exhibit B). The Policy endorsement specifically defines property damage:

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.

(Travelers’ D&O Endorsement at p. 5). Pursuant to that Policy and Endorsement, Travelers has been defending the Defendant POA in the underlying litigation under a reservation of rights.

On March 21, 2011, the Plaintiffs filed the instant Declaratory Judgment action against Travelers Indemnity Company, the POA, and others. (See Declaratory Judgment Complaint, attached hereto as Exhibit C). Travelers Answered and Counterclaimed. (See Answer and Counterclaim, attached hereto as Exhibit D). In its Counterclaim, Travelers alleges that the allegations in the underlying complaint against the POA fall within one or more of the policy's exclusions, and, as a result, do not afford coverage or indemnity to the POA. (Counterclaim at ¶ 17).

Specifically, Travelers asserts that "the gravamen of the aforementioned Fifth Amended Complaint is that the POA negligently and in breach of its fiduciary duties to the Plaintiffs failed to adequately maintain the common elements of the property in question, as a result of which they sustained property damage, namely, the costs of necessary repairs and, inferentially (in that they seek 'all damages proximately flowing from the breach' of said fiduciary duties) damages for any alleged diminution in value of their individual units, all of which constitute 'property damage' as defined in the policy.

Travelers also asserts that the gravamen of "Plaintiffs['] alleg[ations] that the POA placed the interests of the developer of the property ahead of the owners, including the Plaintiffs, thereby breaching its fiduciary duties to them" and "Plaintiffs['] alleg[ations], among other things, that the POA was negligent in placing the developers' interests ahead of those of the individual property owners, so as to place the entire financial burden of deferred maintenance upon them, including the Plaintiffs, and failing to advise them of its conflict of interest" (Counterclaim at ¶ 19) "is that the POA failed to enforce its rights against the developers of the property in question, which is specifically excluded by exclusion (3) f." (Counterclaim at ¶ 20). Exclusion (3) f states as follows:

D. Exclusions

The insurance provided by this endorsement does not apply to:

(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.

(Travelers' D&O Endorsement at p. 2). Put simply, Travelers' counterclaim is that property damage is not covered by the policy.

THE "PROPERTY DAMAGE" EXCLUSION IS NOT APPLICABLE TO PLAINTIFFS' UNDERLYING CLAIMS

Here, the Plaintiffs claim only economic loss; they do not allege "property damage." Because economic loss does not constitute "property damage," defined as "physical injury to tangible property," the property damage exclusion does not operate to bar claims which allege only economic loss.

While there is no South Carolina case directly on point, Courts around the country interpreting the phrase "physical injury to tangible property" hold that economic loss does not constitute "property damage." In Qualman v. Bruckmoser, the Bruckmosers sold the Qualmans a home with, allegedly, "cracked basement walls and defective kitchen pipes." 163 Wis. 2d 361, 363, 471 N.W.2d 282, 284 (1991). The Qualmans sued the Bruckmosers, alleging "the Bruckmosers misrepresented these known conditions and breached the contract." Id. The insurance policy at issue, the Bruckmosers' homeowners' policy, covered "property damage" defined as "injury to or destruction of tangible property, including the loss of its use." Qualman, 471 N.W.2d at 285.

Stating "the causes of action against the Bruckmosers relate to breach of contract and misrepresentation of structural defects," the Court reasoned "the damages for such claims, if

proven, would be the difference between the market value of the property at the time of purchase and the amount actually paid.” Qualman, 471 N.W.2d at 285. The Court held that the alleged damages “are pecuniary in nature and do not constitute property damage as defined by the insurance policy,” concluding “there is no coverage in the policy for the pecuniary loss” the Qualmans alleged. Id.

Compared with Qualman, where the policy covered “property damage” defined as “injury to or destruction of tangible property, including the loss of its use” and the Court held the Plaintiffs’ pecuniary damages did not constitute property damage and were not covered, here, the policy excludes “property damage” defined as “physical injury to tangible property, including all resulting loss of use of that property.” The Plaintiffs’ allegations that the POA failed to: a) perform adequate inspections of the Common Elements; b) retain experts to assess the conditions of the building; c) maintain the Common Elements to an adequate state of repair; and d) repair the Common Elements of the building (Complaint at ¶ 26) do not allege “property damage” defined as “injury to or destruction of tangible property, including the loss of its use.” The POA’s failure to inspect the property and repair the defects injured the Plaintiffs. The measure of damages for those injuries is purely financial. The POA’s failure to “establish and fund adequate reserve funds” and to “establish an adequate depreciation schedule and adequately fund known building component repair and replacement” (Complaint at ¶ 26) injured the Plaintiffs. The measure of damages for those injuries is purely financial. Pecuniary or economic losses do not constitute “property damage.” Because these pecuniary losses do not constitute property damage, they do not fall within the exclusion. Consequently, because the pecuniary losses are not excluded, they are covered under the D&O endorsement.

In Safeco Ins. Co. of America v. Andrews, Kuehl, the Plaintiff in the underlying litigation, sued Andrews following the sale of a house, alleging Andrews failed to disclose certain defects in the property. 915 F.2d 500, 501 (9th Cir. 1990). Kuehl's Complaint alleged damages flowing from Andrew's "negligent failure to inspect the property and inform Kuehl of certain alleged defects in the [...] property" and misrepresentation of "facts materially affecting the value or desirability" of the real property. Safeco, 915 F.2d at 501-502. Specifically, Kuehl alleged that Andrews failed to inform Kuehl that: 1) the property "had a serious problem with unstable, shifting and moving earth, which produced and continues to produce sudden landslides"; 2) the property "had defective and inadequate electrical wiring"; 3) the property "had defective plumbing including improper drainage from the main sewer line"; and 4) the "basement addition had severe water leakage." Safeco, 915 F.2d at 501.

The Safeco homeowners' policy covered "property damage," which it defined as "physical injury to or destruction of tangible property, including loss of use of this property." Safeco, 915 F.2d at 502. The Court held that "Kuehl's claims do not expose Andrews to liability for any damage to tangible property, but rather for economic loss resulting from Andrew's failure to discover and disclose facts relevant to the property's value and desirability. Such harm is outside the scope of the policy." Safeco, 915 F.2d at 502. The Court reasoned: "although the defective condition of the property is an element of Kuehl's claims, the defects cannot, even when interpreting the policy broadly, be considered the *cause* of Kuehl's damages. The cause of the damage was Andrews's alleged misrepresentations, which are not an "occurrence" or a "peril insured against" under the terms of the policy. There is, therefore, no potential for liability that arguably comes within the scope of the insurance coverage provided by Safeco." Safeco, 915 F.2d at 502 (emphasis in original).

In Safeco, the homeowners' policy covered "property damage" defined as "physical injury to or destruction of tangible property, including loss of use of this property." Safeco, 915 F.2d at 502. There, the Court held the alleged harm – economic loss – was "outside the scope of the policy" and thus not covered. Safeco, 915 F.2d at 502. Compare that to the facts in this case, where the policy's D&O endorsement excludes "property damage" which is defined as "physical injury to tangible property, including all resulting loss of use of that property." Though the defective condition of the property is an element of the Plaintiffs' claims, the alleged harm the Plaintiffs suffered is, likewise, only economic loss. Economic loss does not constitute property damage and does not fall within the property damage exclusion. Consequently, economic loss triggers coverage under the D&O endorsement.

Economic and pecuniary losses simply do not constitute "property damage" defined as "physical injury to tangible property." See Allstate Ins. Co. v. Miller, 743 F.Supp. 723 (1990) (holding that "economic loss is simply not within the Allstate policy's coverage of tangible property damage"); and Wisconsin Label Corp. v. Northbrook Property & Casualty Ins. Co., 221 Wis.2d 800 (1998) (holding that "economic losses are not property damage within the 'physical injury' provision of the definition of property damage."). See also: Auto-Owners Ins. Co. v. Rhodes, 385 S.C. 83, 104, 682 S.E.2d 857, 868 (2009) (stating that "the current law of [South Carolina] appears to be that a commercial general liability policy is intended to provide coverage for tort liability for physical damage to property of others, but not for the insured's contractual liability which causes economic losses."); Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 16, 459 S.E.2d 318, 320 (Ct. App.1995), aff'd, 321 S.C. 310, 468 S.E.2d 304 (1996) ("a general liability policy is intended to provide coverage for tort liability for physical damage

to property of others; it is not intended to provide coverage for insured's contractual liability which causes economic losses").

Travelers' assertion that the POA's failure to adequately maintain the common elements of the property resulted in the Plaintiffs' sustaining "property damage, namely, the costs of necessary repairs" fails as a matter of law. The Plaintiffs' claim against the POA is for failure to properly manage the property and reserve adequate money to fund any repairs. The POA had a duty to properly manage the property and set aside adequate reserves and the POA breached its duty. Had the POA inspected and repaired defects in the property when and as they occurred, the Plaintiffs would be in a better financial position than they now are. But the POA failed to inspect and repair defects in the property and now the Plaintiffs are far worse off financially. The POA failed to adequately reserve for the costs of the necessary repairs, and the Plaintiffs now must bear a far greater financial burden. The financial burden, the cost of necessary repairs, is purely an economic loss, and is not considered a "physical injury to tangible property." See Travelers Ins. Co. v. Eljer Mfg., Inc., 197 Ill.2d 278, 757 N.E.2d 481 (2001) (concluding that "under its plain and ordinary meaning, the phrase 'physical injury' does not include intangible damage to property, such as economic loss"; and holding "that indemnity coverage under the [policies] is not triggered by '[p]urely economic losses, such as damages for inadequate value, costs of repair or replacement, and diminution in value'" (internal citation omitted); Qualls v. Country Mut. Ins. Co., 462 N.E.2d 1288, 123 Ill.App.3d 831 (Ct. App. 1984) ("the costs associated with repairing or replacing the insured's defective work and products [...] are purely economic losses.").

The cases interpreting the phrase "physical injury to tangible property" make clear that economic losses do not constitute "property damage." The insurance companies cannot have it

both ways. Just as economic losses are not covered under a commercial general liability policy because they do not constitute "property damage," they are not excluded under a Directors and Officers endorsement because they do not constitute "property damage." The Plaintiffs' damages in this case are solely economic and are not excluded under the Directors and Officers endorsement.

Travelers may point to the (unpublished) decision from the Eleventh Circuit in Florida in the matter of Eastpointe Condominium I Association, Inc. v. Travelers, Docket no. 08-81187-CV-DTKH, where it was successful in having a US District Court find that the "property damage" exclusion permitted a denial of coverage in a Directors and Officers claim. A review of this decision, however, will speedily demonstrate that in Eastpointe, the "property damage" exclusion language was far different than in the instant case and specifically excluded damage from "mold, toxic mold, spores, mildew, fungus, or wet or dry rot". These particular issues as it turned out were precisely those claimed in the underlying litigation, and therefore this decision has no similarity to the Kensington matter.

In the Eastpointe decision, however, the Court does refer to an earlier US District Court decision in Florida which is in fact similar to our case. Thus in the decision in Lumbermens Mutual 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 duty claim brought against a homeowners association after the association allowed the common areas to deteriorate. Lumbermans was affirmed on appeal 295 App x 361 (11th Cir. 2008).

EXCLUSION (D)(3)(f) DOES NOT EXCLUDE COVERAGE FOR THIS CLAIM

This exclusion permits coverage denial where the underlying suit is against the HOA for failing to bring a claim against the builder or developer of the Condominium on behalf of itself. This is not the claim alleged in the underlying litigation, and therefore, this exclusion has no relevance. The exclusion reads: "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." Not only do the Plaintiffs herein not allege this claim, the POA has in fact asserted a claim against the developer in this matter by way of a cross-claim, and has counterclaimed against the Plaintiffs taking the position that the HOA is the proper party to assert the developer claims. This Court issued its Order in these matters on June 14, 2010, denying the Plaintiffs' motion to dismiss the HOA counterclaim.

Thus, Plaintiffs have not sued the HOA for matters covered by the language of this exclusion, and it has no applicability.

CONCLUSION

In interpreting an insurance policy language, two concepts are paramount: 1. Any ambiguities must be construed against the Insurer as the drafter, and 2. Policies are to be construed against the drafter and in favor of coverage where possible. Here, Travelers accepted premiums to insure the HOA for the liability of its Directors and Officers. "Property Damage" being defined in the Policy as "Physical Injury to Tangible Property" could not be more clear in excepting the concept of economic loss occurring to the homeowners of the condominium project resulting from the negligent management of their condominium by the HOA Directors from that exclusion. The Plaintiffs have not sued the HOA for failing to sue the Developer. Thus, no exclusions apply, and coverage is in place for the underlying claims.

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Dated: November 17, 2011

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 17th day of November, 2011.

Dolores M. Catapano

EXHIBIT A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C/A NO. 08-CP-46-2158

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 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, individually and)
on behalf of all other similarly situated)
Plaintiffs,)

Plaintiffs,)

vs.)

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

Defendants.)

**FIFTH
AMENDED SUMMONS**

(Jury Trial Demanded)

FILED - RECEIVED
2010 JUL -9 PM 2:13
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Fifth Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Fifth Amended Complaint on the subscribers at their offices at 92 Broad Street, Charleston, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Fifth Amended Complaint.

LEATH, BOUCH & SEEKINGS, LLP.

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Attorneys for the Plaintiffs

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Dated: July 6, 2010

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C/A NO. 08-CP-46-2158

BRIAN AND DEBORAH C. PULLIAM,)
MONICA BRADSHAW, HELEN K.)
COOK, KALA CRAIG, VICTOR E.)
DIRIENZO, CYNTHIA DITURSI,)
J. SCOTT DREXEL, KATHLEEN)
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JAMES P. WHEATON, JR., JOSEPH)
MANFREDINI, ELENA MANFREDINI,)
DAVID COX, JONATHAN B. DILLARD,)
ERIC WILSON, DON AND DEBBIE NEFF,)
and MARIANNA JUNDA,)

Plaintiffs,

vs.

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

Defendants.

**FIFTH
AMENDED COMPLAINT**

(Jury Trial Demanded)

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DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

JURISDICTIONAL ALLEGATIONS

1. Plaintiffs are residents of York County, South Carolina, and are owners of condominium real estate in a Property known as the Kensington Place Horizontal Property Regime located in Fort Mill, South Carolina.

2. The Defendant M.U.I. Carolina Corporation is a South Carolina corporation having its principal place of business at 7000 Regent Parkway, Fort Mill, South Carolina 29715, and was the developer of the Kensington Place Horizontal Property Regime which consists of a seven story building containing 110 condominium units ("Property") and at all times the

Defendant was the "Declarant" and controlled the regime until April 24, 2007.

3. The Defendant Kensington Place Owners' Association, Inc., (hereinafter "POA"), is a South Carolina non-profit corporation which was created by the developer, M.U.I. Carolina Corporation in order to manage and govern the Kensington Place Horizontal Property Regime.

4. The Defendant Regent Carolina Corporation is a South Carolina corporation headquartered at the same address.

5. That at all times relevant hereto regarding the management and turnover of the Kensington common elements to the present homeowners, Regent Carolina Corporation and MUI acted as the developer, acted to amalgamate corporate interests, entities, and activities so as to blur any legal distinction between the corporations and their activities, and otherwise acted as a joint enterprise to pursue a common purpose. Officers of all corporations acted as agents of the others, took direction from superiors at other corporations, and held themselves out as agents of one another in pursuit of the joint enterprise, they are hereinafter referred to as "Developer Defendants."

FACTUAL BACKGROUND

6. The Defendant M.U.I. created the condominium regime at issue by recording a Master Deed and By-Laws on September 24, 1996, and thereafter, M.U.I. sold individual condominium units to these Plaintiffs. The building had originally been commenced by a former developer of the Property. M.U.I. purchased the unfinished Property from the bankruptcy estate in December of 1990 and proceeded to complete the construction of the building and make repairs during 1994 and 1995 prior to marketing the units to the public.

7. That the POA Defendant has, and at all times, had the duties, pursuant to the By-Laws created by the developer, to provide for the care and upkeep of the property and Common

Elements, and to maintain and make repairs to the property, and had the additional duty to create and fund a reserve fund for common element repairs and replacement.

8. That subsequent to the initial marketing and sale of units, Defendants M.U.I. and Regent Carolina Corporation combined to form the developer entity by, among other things, amalgamating corporate interests, entities, and activities so as to blur any legal distinction between these corporations and their activities, acted as a joint enterprise to pursue the common purpose of development, control of the Kensington POA, turnover of the Common Elements of the Kensington property, and each undertook to control the means and the agencies to pursue such common purposes.

9. That from its inception in 1996 until April 24, 2007, the POA was wholly controlled by the Defendant Developers, pursuant to provisions in the By-Laws, and was operated by a three-member Board constituted of Defendant Developers' employees or designates.

10. Pursuant to the Master Deed created by M.U.I. and specifically in Article XII thereof, the Plaintiffs herein have an exclusive and particular right over his or her respective condominium unit and have an undivided interest in the common elements of the Property.

11. Until April 24, 2007, the Defendant Developers as "Declarant" controlled the Kensington Place HPR, controlled the maintenance, inspection, repair and upkeep of the Property through property managers which they had hired and through a board of directors which they controlled.

12. In addition to the foregoing activities, prior to marketing the Property, the Defendant/Developers undertook to inspect, repair, and renovate the Property. The Defendant Developers therefore occupied the position of developer/seller of a new residential dwelling unit.

13. During their tenure as controlling entity of the Kensington Place HPR until April 24,

2007, the Defendant Developers, as well as the Defendant POA, failed to adequately maintain the common elements of the Property and failed to maintain all of the elements and common elements of the Property in reasonably good repair. At the time of transfer of the ownership of the common elements to the individual members of the Regime, including these Plaintiffs, the common elements of the Kensington Place HPR were, and remain now, in substandard condition requiring a substantial upfit of all major building elements and systems, and remediation of mold and other unsanitary conditions, and were turned over with no replacement reserve fund account.

14. Pursuant to South Carolina law, at the time of the transfer of the common elements of the Horizontal Property Regime from the Defendant/Developers to the homeowners, including these Plaintiffs, the Defendant/Developers had the 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. As of the date of the transfer, the Defendant/Developers failed to insure that the common elements of the Kensington Place HPR were in good repair and additionally has failed to provide the owners with the funds necessary to bring the common elements of the building up to a standard of reasonably good repair.

15. Pursuant to applicable law, the POA, having a duty to maintain and repair the property, had and has a fiduciary duty to accomplish these duties for the benefit of the individual owners, including these Plaintiffs.

FOR A FIRST CAUSE OF ACTION
(Breach of Fiduciary Duty as Against All Defendants)

16. Plaintiffs repeat and reallege their allegations as set for in paragraphs 1 through 15 above, as if set forth herein verbatim.

17. The Defendant/Developers had the legal duty, as a fiduciary, to the homeowners at

the time of the turnover of the common elements of Kensington Place HPR to the homeowners to insure that the common elements were in good repair or alternatively to provide the homeowners with the funds necessary to bring the common elements up to a standard of reasonably good repair.

18. At the time of the Property turnover, the Defendant/Developers breached their fiduciary duty and failed to bring the common elements up to a standard of reasonably good repair as well as failed to provide the homeowners with the funds necessary to bring the common areas up to standard.

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

FOR A SECOND CAUSE OF ACTION
(Breach of Implied Warranty of Habitability/Developer Defendants)

21. Plaintiffs repeat and reallege their allegations as set for in paragraphs 1 through 20 above, as if set forth herein verbatim.

22. That in conveying the condominium units to these Plaintiffs and acting as a developer/seller of a new condominium unit, the Defendant/Developers marketed the units and sold the same to these Plaintiffs and as such, an implied warranty of habitability sprang from the sale of new condominium dwelling units to the Plaintiffs.

23. That the Defendant/Developers breached the implied warranty of habitability, in that condominium units purchased by the Plaintiffs contained construction, design, and material defects, were defective, so that Plaintiffs will be and are required to spend significant sums for the repair, replacement, reengineering, redesign of the common elements all to their damage.

FOR A THIRD CAUSE OF ACTION
(Negligence as Against All Defendants)

24. Plaintiffs repeat and reallege their allegations as set for in paragraphs 1 through 23 above, as if set forth herein verbatim.

25. That the actions of the Defendant/Developers as above set out were negligent, reckless, willful, and wanton, in one or more of the following particulars, to wit:

- a. In taking over an existing building, completing its construction, and developing it as a condominium, and marketing it while failing and omitting to perform adequate inspections, quality control, and materials inspections to prevent building defects.
- b. In failing to properly manage and maintain the property.
- c. In failing to establish and fund adequate reserve funds.
- d. In failing to establish an adequate depreciation schedule and adequately fund known building component repair and replacement.
- e. In failing to maintain the property in a reasonably good condition at the time of turnover to the Homeowners.
- f. In failing and omitting to have an adequate inspection performed of all the building components including destructive and non-destructive testing prior to turnover to the Homeowners.

- g. In failing to advise Homeowners of the Developers various conflicts of interest while in control of the Board and in failing to provide for independent representation of non-developer homeowners both with respect to Board actions and also regarding property management and maintenance.

26. That the actions of the POA were negligent, reckless, willful, and wanton, in one or more of the following of the following particulars, to wit:

- 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
- 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.

27. 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.

WHEREFORE, the Plaintiffs pray that they have judgment against the Defendants as follows:

1. Actual damages.
2. Actual and punitive damages on their cause of action for negligence and breach of fiduciary duty.
3. Such other and further relief as this Court deems just and proper.

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Dated: July 6, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	C.A. No.: 2011-CP-46-01090
Brian and Deborah C. Pulliam, Monica	)	
Bradshaw, Helen K. Cook, Lala Craig,	)	TRAVELERS INDEMNITY COMPANY'S
Victor E. Dirienzo, Cynthia Ditursi, J.	)	MEMORANDUM OF LAW IN SUPPORT
Scott Drexel, Kathleen Kramer, Robert	)	OF ITS MOTION FOR SUMMARY
Loebe, Melanie McDnaiel, Davis Os	)	JUDGMENT AND IN OPPOSITION TO
borne, Celeste Arrowood, Vincent	)	PLAINTIFFS' MOTION FOR SUMMARY
Dionna, Mikel Marcuse, James P.	)	JUDGMENT
Wheaton, Jr., Joseph Manfredini, Elena	)	
Manfredini, David Cox, Jonathan B.	)	
Dillard, Eric Wilson, Don and Debbie	)	
Neff, and Marianna Junda	)	
	)	
Plaintiffs,.	)	
	)	
v.	)	
	)	
Travelers Indemnity Company, M.U.I.	)	
Carolina Corporation, Kensington	)	
Place Owners' Association, Inc.,	)	
Regent Carolina Corporation, and	)	
Regent Corporation,	)	
	)	
Defendants.	)	

Plaintiffs brought this declaratory judgment action seeking a judicial declaration that Travelers Indemnity Company ("Travelers") is obligated to provide coverage for its insured, Defendant Kensington Place Owners' Association, Inc. ("KPOA") pursuant to an insurance policy issued by Travelers to KPOA, in connection with claims asserted by Plaintiffs against KPOA and others in a separate action (Pulliam, et al v. M.U.I. Carolina Corporation, et al, C.A. No.: 08-CP-46-2158). In its answer, Travelers denied that the policy in question affords coverage, and asserted the affirmative defenses of Plaintiffs' lack of standing and lack of a justiciable controversy. Travelers also asserted a counterclaim seeking a judicial declaration that coverage for the Plaintiffs' claims is not available by virtue of several exclusions in the policy.

BACKGROUND

This dispute arises out of claims that had been asserted by the Plaintiffs, who are some of the owners of condominiums at Kensington Place Horizontal Property Regime (“Kensington Place”). Kensington Place had originally been a hotel at the PTL property near Ft. Mill, South Carolina. Plaintiffs allege that MUI purchased the property from the PTL bankruptcy estate in December 1990, completed construction, made repairs, and then began marketing condominium units. Fifth Amended Complaint, Pulliam, et al v. MUI Carolina Corp., et al. C.A. No. 08-CP-46- 2158, ¶ 6. (Exhibit A) Plaintiffs also allege that the Master Deed to the subject property provides that the unit owners have an undivided interest in the common elements. *Id.*, ¶ 10; Master Deed, Article XII. (Exhibit B)

Plaintiffs also allege that MUI and Defendant Regent Carolina Corporation (“Regent”) combined to develop the property, and that they transferred the common elements to the unit owners on April 24, 2007. Fifth Amended Complaint, ¶¶ 8, 11 and 14. They further allege 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. . . .” *Id.*, ¶ 13. They also allege that the common elements “were turned over with no replacement reserve fund account.” *Id.* They also contend 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.*, ¶ 14. Finally, they allege that KPOA, “having a duty to maintain and repair the property, had and has a fiduciary duty to accomplish these duties for the benefit of the individual owners, including these Plaintiffs.” *Id.*, ¶ 15.

KPOA's policy (Exhibit A to the Plaintiffs' Memorandum of Law) 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.
- (3) Damages resulting from:

* * *

(b) Any dishonest, fraudulent, criminal or malicious act, error or omission committed by or with the knowledge of any insured.

* * *

(e) Operations (including but not limited to construction, design, survey and engineering services) performed by or no behalf of the builder, sponsor or developer of the property designated in the Declarations.

(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.

(i) any claim or "suit" made by any insured against another insured.

SUMMARY OF ARGUMENT

Because Plaintiffs are not parties to the insurance contract at issue, nor have they obtained any judgment against KPOA, they do not have standing to bring this action, nor is there a justiciable controversy ripe for adjudication. Moreover, even if the coverage issues are considered, there is no coverage for the Plaintiffs' claims. Their claims for breach of fiduciary duties and negligence are all claims for "property damage" as defined by the policy. Moreover, said claims fall within one or more of the other exclusions quoted above.

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO DECLARATORY RELIEF.

A. Plaintiffs lack standing to bring this action, in that they are not parties to the insurance contract between Travelers and KPOA, and therefore lack privity.

“Standing to sue is a fundamental requirement in instituting an action.” *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 84, 644 S.E.2d 58, 60 (2007). It is a part of the concept of justiciability that concerns whether a party may make a legal claim or argument. *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008). The general rule in South Carolina is that for parties to have standing, they must have (1) a personal stake in the subject matter of a lawsuit and (2) be a real party in interest. *Ex Parte Gov’t Employee’s Ins. Co.*, 373 S.C. 132, 644 S.E.2d 699 (2007). “A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.” *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994).

Beyond the general rule are three elements that must be met: (1) the plaintiff must have suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Smiley v. S.C. Dep’t of Health and Envtl Control*, 374 S.C. 326, 649 S.E.2d 31 (2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). “The party seeking to establish standing carries the burden of

demonstrating each of the three elements.” *Sea Pines Ass’n for the Protection of Wildlife, Inc. v. S.C. Dep’t of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

In *Park v. Safeco Insurance Co. of America*, 251 S.C. 410, 162 S.E.2d 709 (1968), Mr. Park, who alleged that he had been injured in a motor vehicle accident in which a Mr. McCall was at fault, brought a declaratory judgment action against McCall’s automobile liability carrier, Safeco Insurance Company (“Safeco”). Mr. Park also named his own uninsured motorist carrier, Southern Home Insurance Company (“Southern Home”), as a defendant. He sought a judicial determination as to whether Safeco had successfully denied liability to McCall, among other things. He had not brought suit against McCall. The Supreme Court affirmed the lower court’s having sustained Safeco’s demurrer. One of the grounds was that, because Mr. Park had not procured a judgment against McCall, and was a stranger to the Safeco insurance contract, he lacked standing to seek declaratory judgment as to that policy:

Counsel for plaintiff argues, with some appeal, that an injured party should have as much right to ask the court to determine the validity of a tortfeasor’s liability insurance policy as the insurer or the insured. We think the fallacy of this argument lies in the fact that the insured person is not a party to the contract and has, on the facts of this case, no primary standing to litigate a dispute between the insured and the insurer until and unless he establishes his liability against McCall.

Id. at 415, 162 S.E.2d at 711.

Before so holding, the court had observed that:

Plaintiff’s alleged right to sue is at this time primarily and basically against McCall. He has no right to call upon McCall for payment of damages until he establishes liability, and accordingly, he has no right to call upon any insurance company alleged to protect McCall, nor to call upon his own insurance carrier under the uninsured motorist endorsement of his own policy until such liability is fixed. Stated another way, no right to recover can accrue to plaintiff against either insurance company until and unless McCall becomes liable to pay. An insured person has no greater right against an insurer under a liability insurance policy than the insured.

Id. at 413, 162 S.E.2d at 710.

In the case at bar, Plaintiffs have brought suit against Travelers' insured, KPOA, but have not established liability, and they therefore have no right to call upon Travelers to provide coverage.

- B. There is no justiciable controversy, in that Plaintiffs have not procured a judgment against KPOA, and even if they had done so, they would not have been able to recover against KPOA because The Honorable John C. Hayes, III ruled in the underlying action that, while Plaintiffs have the right to maintain their action, any recovery would belong to KPOA.

"Before any action can be maintained, a justiciable controversy must be present." *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). This, of course, includes actions that are brought pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10 to -140 (Supp. 2008). *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857 (Ct. App. 2009) (citing *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970)). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). "The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." *Sloan*, 356 S.C. at 547, 590 S.E.2d at 346. A justiciable controversy exists when (1) a concrete issue is present; (2) there is a definite assertion of legal rights; and (3) a positive legal duty which is denied by the adverse party. *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). The threshold inquiry of all South Carolina courts is a determination of justiciability, i.e., whether the litigation presents an active case or controversy. *E.g., Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (Ct. App. 2002).

In *Park*, the court also held that there was no justiciable controversy between Mr. Park and Safeco:

There is at this time no real or actual controversy between the plaintiff and Safeco. Should the court rule, as suggested by the plaintiff, that Safeco has successfully denied liability coverage, his controversy with McCall would not be solved. He would still have to sue McCall.

251 S.C. at 413, 162 S.E.2d at 710. The court continued:

[W]e think the lower court correctly sustained the demurrer because there is presently between plaintiff and Safeco no justiciable issue ripe for judicial pronouncement, because the possible issues are not sufficiently immediate and real to warrant action by the court.

Id. at 414, 162 S.E.2d at 711.

The jurisdiction to render a declaratory judgment is discretionary, and should be “exercised with great care, and with due regard to all the circumstances of the case.” *S. Ry. Co. v. Order of Ry. Conductors of Am.*, 210 S.C. 121, 134, 41 S.E.2d 774, 779 (1947). It is respectfully submitted that because a declaratory judgment in this action would essentially be an advisory opinion, this court should exercise its discretion and decline to hear this action. See *City of Columbia v. Sanders*, 231 S.C. 61, 97 S.E.2d 210 (1957).

There is still another reason why there is no justiciable controversy ripe for adjudication. Not only have Plaintiffs not obtained a judgment against KPOA, but even if they had done so, they could not collect on it by virtue of the The Honorable John C. Hayes, III’s order of April 1, 2011 in the underlying suit, in which, when denying MUI’s motion for summary judgment based on Plaintiffs’ lack of standing, he ruled as follows:

The Court observes that [*Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 562 S.E.2d 633 (2002)] (“CDWR”) did not address who could pursue the claim against the developer as it did not have that issue before it. However, the Supreme Court seems to have established who is the beneficiary of any recovery. The Court uses the word “seems” advisedly. Here

lies the catch 22. Plaintiffs can sue, but CDWR seems to vest the right of recovery in KPOA.

(April 1, 2001 order of The Hon. John C. Hayes, III, top of p. 6.) (Emphasis added.) (Exhibit C).

Thus, Plaintiffs lack standing because, even if they were to obtain a judgment against KPOA, any recovery would go to KPOA. That is, Plaintiffs have no stake in the coverage issue in their own right.

II. PLAINTIFFS' CLAIMS ARE NOT COVERED UNDER KPOA'S POLICY.

- A. In the event that this Court does not grant Travelers' motion based on Plaintiffs' lack of standing and lack of a justiciable controversy, Travelers is nevertheless entitled to summary judgment on the ground that the subject policy clearly excludes coverage for Plaintiffs' claims.

Under South Carolina law, the construction and interpretation of an insurance policy is for the court. *TC X, Inc. v. Commonwealth Land Title Ins. Co.*, 928 F.Supp. 618 (D.S.C. 1995), *aff'd* 86 F.3d 1152 (4th Cir. 1996). *See also B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 328 S.C. 374, 491 S.E.2d 695 (Ct. App. 1997).

An insurance policy is a contract between the insured and the insurance company, and its terms are to be construed according to contract law. *Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 656 S.E.2d 17 (2007); *Cook v. State Farm Auto. Ins. Co.*, 376 S.C. 426, 656 S.E.2d 784 (Ct. App. 2008); *Estate of Revis by Revis v. Revis*, 326 S.C. 470, 484 S.E.2d 112 (Ct. App. 1997). If the language of the policy is clear and unambiguous, the language alone determines the contract's force and effect. *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993). That is, the declarations of the parties as to what they intended by the language used are inadmissible and the writing must speak for itself, by its terms alone, without the aid of extrinsic evidence. *Montalbano v. Automobile Ins. Co. of Hartford, Conn.*, 217 S.C.

157, 60 S.E.2d 77 (1950). See also *Spencer v. Republic Nat'l Life Ins. Co.*, 243 S.C. 317, 133 S.E.2d 826 (1963); *Grayson v. Aetna Ins. Co.*, 308 F.Supp. 922 (D.S.C. 1970).

Parties to a contract of insurance have the right to make their own contract, and it is not the function of the courts to rewrite or torture it. *Sphere Drake Ins. Co.*, 313 S.C. at 473, 438 S.E.2d at 277. When the contract is “unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense.” *Id.* The fact that a policy purports to afford coverage in its insuring agreement, then excludes it in an exclusion, does not create an ambiguity. See *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 614 S.E.2d 611 (2005).

Questions of coverage are determined by the allegations of the third party's complaint. *City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578, citing *C.D. Walters Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, N.J.*, 281 S.C. 593, 316 S.E.2d 709 (Ct.App. 1984). A suit to determine coverage under an insurance policy is an action at law. *Id.*, citing *State Farm Mut. Auto. Ins. Co. v. James*, 337 S.C. 86, 93, 522 S.E.2d 345, 348-49 (Ct.App. 1999). In an action for declaratory judgment, the obligation of a liability insurance company to indemnify is determined by the allegations in the complaint. See *Manufacturers and Merchants Mut. Ins. Co. v. Harvey*, 330 S.C. 152, 162, 498 S.E.2d 222, 227 (Ct.App. 1998). However, the duty to defend and the duty to indemnify are interrelated, and the duty to defend may also be determined by facts outside of the complaint that are known by the insurer. *City of Hartsville* at 544, 578, citing *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 657, 661 S.E.2d 791, 798 (2008).

1. **There is no reasonable interpretation of Plaintiffs' claims other than that they are for “property damage” and punitive damages.**

Plaintiffs' most recent amended complaint in the underlying action alleges that KPOA "had the duties . . . to provide for the **care and upkeep** of the property and Common Elements, and to **maintain and make repairs** to the property, and had the additional duty to create and fund a reserve fund **for common element repairs and replacement.**" Fifth Amended Complaint, ¶ 7. (Exhibit A) (Emphasis added.) They also allege that KPOA "**failed to adequately maintain** the common elements of the Property and failed to maintain all of the elements and common elements of the Property **in reasonably good repair.**" *Id.*, ¶ 13. (Exhibit A) In addition, they allege that KPOA "having a duty to **maintain and repair the property**, had and has a fiduciary duty to accomplish these duties for the benefit of the individual owners, including these Plaintiffs." *Id.*, ¶ 15. (Emphasis added.)

In addition, in the first cause of action, Plaintiffs 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 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.

Id., ¶¶ 19-20. (Emphasis added.)

Plaintiffs' second cause of action is directed solely against other defendants. Their third cause of action for negligence against all defendants contains the following allegations against

KPOA:

26. That the actions of the POA were negligent, reckless, willful, and wanton, in one or more of the following . . . particulars, to wit:
- 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
 - 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.
27. 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.

Id., ¶¶ 26-27 (Exhibit A) (Emphasis added.)

Plaintiffs seek actual and punitive damages.

In summary, Plaintiffs allege that KPOA negligently and in breach of its fiduciary duties failed to adequately maintain the common elements of the property, as a result of which they sustained property damage, i.e., the costs of necessary repairs. It may be inferred that they also seek damages for the alleged diminution in the value of their individual units, in that they seek "all damages proximately flowing from the breach" of said fiduciary duties. No other damages are specified. Moreover, it is clear from a review of all allegations against KPOA (especially those emphasized in bold type above) that Plaintiffs seek redress for property damage and punitive damages allegedly sustained as a result of KPOA's alleged (1) breach of fiduciary duties and (2) negligence. However, the policy excludes both property damage and punitive damages:

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 Number I-680-3467M656-IND-08, Directors and Officers Endorsement, p. 2 of 5 at D. (1), (2).

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.

Id., p. 5 of 5 at F.

There is no other reasonable conclusion except that the damages sought by Plaintiffs in the underlying action are for “property damage” and punitive damages – both of which are unambiguously excluded by the policy.

It is anticipated that Plaintiffs will argue that, even though their claims as set forth in their complaint are all about the failure to inspect, maintain and repair the common elements and the failure to provide for the funding of such repairs, their case is actually for breach of fiduciary duties. Their complaint does include such a cause of action, in which Plaintiffs contend that Defendants “are liable to the homeowners for all damages proximately flowing from the breach, including damages for the continued deterioration of the common elements.” Fifth Amended Complaint, ¶ 20. (Exhibit A) However, a review of the complaint in its entirety reveals that there can be no other reasonable inference than that Plaintiffs seek to recover damages for the alleged failure to maintain and repair, or provide for the maintenance and repair, of the common elements and that no other damages, except for punitive damages, are sought. While the cause of action for breach of fiduciary duties alleges that Defendants are liable for “all damages proximately flowing from the breach,” no damages other than those falling within the definition of “property damage” are specified.

Any damages being sought by Plaintiffs other than those constituting “property damage” would necessarily constitute general damages and not special damages. General damages are such as necessarily accrue from the unlawful acts alleged, and are recoverable under a general averment of damage, while special damages are such as 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). *Crozier v. Charleston & W. C. Ry. Co.*, 222 S.C. 121, 130, 71 S.E.2d 800, 805 (1952); see also *Preferred Sav. Bank, Inc. v.*

Elkholy, 303 S.C. 95, 399 S.E.2d 19 (Ct. App. 1990). This rule is specifically stated in Rule 9 of South Carolina Civil Procedure which states, "When items of special damage are claimed, they shall be specifically stated." Rule 9, S.C. R. Civ. P.

Plaintiffs have not specifically alleged any damages other than property damage and punitive damages, and cannot contend that they are seeking any other such damages. Even if such damages were specifically pled, however, it is very clear that the gravamen of the complaint is that Plaintiffs allegedly sustained property damage to the common elements as a result of KPOA's purported breach of fiduciary duties and negligence.

2. Plaintiffs' claims are also excluded by exclusions other than the exclusions for "property damage" and punitive damages.

KPOA's policy also contains the following exclusion:

The insurance provided by this endorsement does not apply to:

* * *

(3) Damages resulting from:

* * *

(b) Any dishonest, fraudulent, criminal or malicious act, error or omission committed by or with the knowledge of any insured.

* * *

(e) Operations (including but not limited to construction, design, survey and engineering services) performed by or no behalf of the builder, sponsor or developer of the property designated in the Declarations.

(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.

(i) any claim or “suit” made by any insured against another insured.

While the complaint never uses the words, “dishonest, fraudulent, criminal or malicious,” as set forth in exclusion (b) above, it does allege that KPOA, “in placing the interests of the Defendant Developers ahead of the owners, the POA failed to develop and fund an adequate reserve fund.” Fifth Amended Complaint, ¶ 19. (Exhibit A) It also alleges that KPOA was negligent “[i]n 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.” *Id.*, ¶ 26. h. Thus, in addition to the exclusion of “property damage,” exclusion (b) applies.

Plaintiffs allege that, while under the control of the developer from 1996 until April 24, 2007, KPOA negligently, recklessly, willfully and wantonly (1) failed to perform adequate inspections of the common elements; (2) failed to retain experts to assess the condition of the building; and failed to maintain and repair the common elements. *Id.*, ¶¶ 19, 26. They also allege that KPOA negligently, recklessly, willfully, and wantonly failed to establish and fund adequate reserve funds and an adequate depreciation schedule. All of these allegations fall within exclusion (b). *Id.*, ¶ 26. f. g.

The complaint alleges that from its inception in 1996 until April 24, 2007, KPOA was “wholly controlled by the Defendant Developers . . . and was operated by a three member board constituted of Defendant Developers’ employees or designates” and that said developers

“controlled the maintenance, inspection, repair and upkeep of the Property through property managers which they had hired and through a board of directors which they controlled.” *Id.*, ¶¶ 9, 11. It further alleges that, at the time of the transfer of the common elements to the homeowners, the common elements were in “substandard condition requiring a substantial upfit of all major building elements and systems, and remediation of mold and other unsanitary conditions, and were turned over with no replacement reserve fund account,” because KPOA had “failed to adequately maintain the common elements of the Property and failed to maintain all of the elements and common elements of the property in reasonably good repair.” *Id.*, ¶ 13. They also allege that KPOA “being controlled by the developer,” failed in its duties and “placed the interests of the developer ahead of the owners” *Id.*, ¶ 19. It further alleges that KPOA failed to advise them of various conflicts of interest “inherent in a developer-controlled POA” *Id.*, ¶ 26.h. Exclusion (f) applies to these allegations.

Plaintiffs allege that “from its inception in 1996 until April 24, 2007, the POA was wholly controlled by the Defendant Developers . . . and was operated by a three-member Board constituted of Defendant Developers’ employees or designants” and that “[u]ntil April 24, 2007, the Defendant Developers . . . controlled the Kensington Place [Horizontal Property Regime], controlled the maintenance, inspection, repair and upkeep of the Property through property managers which they had hired and through a board of directors which they controlled.” *Id.*, ¶¶ 9, 11. Since Plaintiffs allege that the board was “controlled” by the developers, exclusion (h) also applies.

The policy defines “an insured,” in part as follows:

WHO IS AN INSURED

* * *

- B. Your directors, trustees or officers are also insureds, but only while acting within the scope of their duties for you. This includes:
1. Those who currently are directors, trustees or officers;
 2. Those who were directors, trustees or officers when the "wrongful act" took place;
 3. Those who become directors, trustees or officers after the effective date of the insurance, but only for subsequent "wrongful acts."
- C. Your employees and members are insureds, but only while acting at your direction and within the scope of their duties for you.

To the extent that one or more of the Plaintiffs qualify as "insureds" exclusion (i) would apply as well.

B. There is no reasonable interpretation of Plaintiffs' claims in the underlying litigation that brings them outside the scope of the policy's exclusions.

The case of *Sphere Drake Ins. Co. v. Litchfield* is instructive. 313 S.C. 471, 438 S.E.2d 275 (Ct.App. 1993). The coverage issue in the declaratory judgment action that was a subject of that appeal arose out of an assault that occurred at a nightclub owned by Sphere Drake's insureds. Sphere Drake refused to defend on the ground that the policy excluded coverage for such claims:

Notwithstanding anything contained herein to the contrary, it is understood and agreed that this policy excludes claims arising out of Assault and Battery, whether caused by or at the direction of, the insured, his employees, patrons of [sic] any cause whatsoever.

The insureds argued that the apparent "typo," whereby the word "of" was apparently inadvertently substituted for the word "or," rendered the exclusion ambiguous, and the circuit court agreed. On appeal, the South Carolina Court of Appeals found that "the exclusionary clause unambiguously applies to the claim", having utilized "readily understandable language,"

which was “not obscured” by the apparent typographical error, since “the intention to exclude coverage of claims arising from assault and battery is unmistakable.” *Id.* at 473-474, 438 S.E.2d at 277.

Similarly, Travelers’ exclusions are unambiguous, readily understandable, and clearly express the intention to exclude coverage for “property damage,” as well as the damages resulting from the insured’s alleged failure to enforce the named insured’s rights against the developer, and the other matters described in the exclusions discussed above.

Plaintiffs’ attempt to avoid the exclusions by characterizing their claims as something other than for “property damage” does not pass muster. It is apparent from a review of the complaint that, regardless of the legal theory, Plaintiffs are seeking compensation for alleged “property damage” to the common elements, as well as punitive damages – both of which are clearly excluded.

In a case involving a declaratory judgment action to determine whether JUA owed a duty to defend its physician-insured in a medical malpractice action in which he was accused of sexually assaulting a patient, the Court observed that, when examining the patient’s complaint to determine whether its allegations bring the claim within the policy’s coverage so as to invoke the duty to defend, it must look beyond the labels describing the acts to the acts themselves that form the basis of the claim, and concluded that:

In the case before us, despite the label of negligence, the act the Patient complained of was sexual assault, an intentional tort. Intentional torts are not covered in Prior’s medical malpractice insurance policy, therefore, JUA had no duty to defend or to pay the claim.

Prior v. S.C. Med. Malpractice Liability Ins. Joint Underwriting Ass’n, 305 S.C. 245, 249, 407 S.E.2d 655, 657 (Ct. App. 1991); see also *Collins Holding Corp. v. Wausau Underwriters Ins.*

Co., 379 S.C. 573, 577, 666 S.E.2d 897, 899 (“In examining the complaint, a court must look beyond the labels describing the acts to the acts themselves which form the basis of the claim against the insurer.”); *Manufacturers and Merchants Mut. Ins. Co. v. Harvey*, 330 S.C. 152, 161, 498 S.E.2d 222, 227 (1998) (“Since the Harveys’ intentional acts of sexual abuse carry with them the inferred intent to harm their grandchildren, the acts alleged against the Harveys are not occurrences and, therefore, are beyond the scope of the Harveys’ insurance coverage.”)

Similarly, when determining whether Plaintiffs’ claims are excluded, the Court must determine whether they are for “property damage,” regardless of whether such claims are contained in their causes of action for breach of fiduciary duty or negligence. The same is true with regard to the other exclusions. It is respectfully submitted that Plaintiffs cannot escape the fact that their claims are indeed for “property damage,” and fall within one or more of the other exclusions as well.

The *Sphere Drake* Court’s holding is easily adaptable to the case at bar:

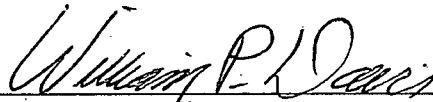
We find the exclusionary clause[s] unambiguously appl[y] to the claim[s] at issue here. In readily understandable language, [they] exclude[] claims [for property damage], no matter what the cause. . . . The intention to exclude coverage of claims [for property damage] is unmistakable. While a policy should be liberally construed in favor of coverage and against exclusion, courts are not permitted to torture the ordinary meaning of language to extend coverage expressly excluded by the terms of the policy.

Sphere Drake Ins. Co. v. Litchfield, 313 S.C. at 474, 438 S.E.2d at 277. (Citation omitted.)

CONCLUSION

Travelers is entitled to summary judgment because Plaintiffs lack standing and there is no justiciable controversy ripe for adjudication. In the event that the merits are considered, with each side having moved for summary judgment based on the language of the subject policy, there are no genuine issues of material fact, and the legal issue as to the applicability of the aforementioned exclusions to Plaintiffs’ allegations should be determined by summary

judgment. Because Plaintiffs' allegations in the underlying litigation are that KPOA failed to "provide for the care and upkeep of the property and Common Elements, and to maintain and make repairs to the property" and failed in their "duty to create and fund a reserve fund for common element repairs and replacement", for which they suffered damages, Plaintiffs' claims are for "property damage" and excluded by the policy. For this and the other reasons set forth above, Travelers respectfully submits that it is entitled to a judicial declaration to the effect that Plaintiffs' claims are not covered by its policies.



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File No.: 7746.1830

ATTORNEYS FOR DEFENDANT TRAVELERS
INDEMNITY COMPANY

November 21, 2011
Columbia, SC

Section 3. RULES AND REGULATIONS

Rules and regulations concerning the use of the Property may be promulgated and amended from time to time by the Association in the manner provided in its By-laws. Copies of such regulations and amendments thereto shall be furnished by the Association to all Owners and residents of the Regime upon request.

ARTICLE XII HORIZONTAL PROPERTY REGIME CONSTITUTED

As appears above, a Horizontal Property Regime is hereby constituted under and subject to the provisions of the Horizontal Property Act of the State of South Carolina, so that Units may be conveyed and recorded as individual properties capable of independent use and each having its own exit to the common elements of the Property, and each Co-owner having an exclusive and particular right over his or her respective Unit and in addition the specified undivided interest in the common elements of the Property.

ARTICLE XIII DECLARANT SUBJECT TO MASTER DEED: DECLARANT USE

So long as the Declarant owns one or more of the Units, the Declarant shall be subject to the provisions of this Master Deed and the Exhibits attached hereto and the Declarant covenants to take no action except in defense or as otherwise allowed by law which will adversely affect the rights of the Regime as provided by law with respect to the assurances against latent defects in the Property or other rights assigned to the Regime by reason of the establishment of said Horizontal Property Regime; provided, however, that Declarant, shall have the absolute right and privilege of leasing any or all of the Units owned by it on a short or long term basis for the uses permitted by this Master Deed, and that Declarant's lessees, invitees, guests, etc., shall be entitled to all of the privileges and rights, and be subject to the requirements hereunder, of a co-owner with respect to the use of the Property excluding voting rights which shall remain with the Declarant. Declarant, and its successors and assigns, shall be entitled to use one or more of the Units as models for purposes of a sales model and/or office and/or guest accommodations until all of the Units in the Regime have been sold, it being the intent of Declarant that said reserved rights do not conflict with the residential use restriction described hereinabove. Declarant reserves the right to assign, in whole or in part, to its successors in title to any of Declarant's Units hereunder, or to its agent, or to an independent third party, or to the Association, any of the rights reserved to the Declarant in this Master Deed. All references to Declarant and Declarant's rights hereunder shall be deemed to include any specific assignee of Declarant.

ARTICLE XIV COMMON ELEMENTS NOT PARTITIONED

Except as provided, the common elements shall remain undivided and no Co-owner shall bring any action for partition and/or division.

Master Deed - Page 15
Kensington Place Horizontal Property Regime

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
) CASE NUMBER: 11-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
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,

Plaintiffs,

VS.

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

Defendants.

**TRAVELERS INDEMNITY COMPANY'S
MOTION FOR RECONSIDERATION AND
TO ALTER OR AMEND JUDGMENT**

FILED-RECEIVED
2012 FEB 13 AM 8:39
DAVID HAMILTON
C.O. 11-46-1090
YORK COUNTY, SC

Pursuant to Rule 59(e), SCRCF, Defendant Travelers Indemnity Company ("Travelers") hereby moves for an order altering or amending the Order of The Honorable S. Jackson Kimball, entered on January 30, 2012, of which undersigned counsel received written notice on February 1, 2012.

Travelers respectfully requests reconsideration and that the aforementioned Order be altered or amended on the grounds that (1) its reliance on *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) is misplaced, in

that *Crossmann* is distinguishable in several important respects; (2) construing the pertinent policy language in its plain, ordinary and popular sense, it may not be reasonably construed to mean that the named insured, Kensington Place Owners' Association, Inc., is covered for liability arising out of defective construction; (3) the most recent amended complaint 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, in that such an interpretation would actually have the effect of rewarding homeowners' associations for deferring repairs and maintenance, so that may be paid by their liability carrier, rather than through assessments of the homeowners; (5) the Order does ~~not address Travelers' argument that the only damages sought are those constituting "property~~
~~damage,"~~ and that special damages, such as those inferably the result of defective construction, must be specifically pled; (6) the Order concludes that exclusion (3)(f) is inapplicable because the underlying complaint does not allege that KPOA failed to enforce its rights against the developers, but said complaint does allege that KPOA "being controlled by the developer," failed in its duties and "placed the interests of the developer ahead of the owners" and that it failed to advise Plaintiffs of various conflicts of interests "inherent in a developer-controlled KPOA", all of which implies that KPOA failed to enforce its rights against said developers; (7) the Order does not address Travelers' argument that exclusion (3)(b) bars coverage; (8) the Order does not address Travelers' argument that exclusion (3)(i) applies; (9) the Order does not address Travelers' argument that Plaintiffs' claims for punitive damages are excluded; and (10) the order does not address Travelers' argument that Plaintiffs inferably are seeking damages for the alleged diminution in value, which falls within the policy's definition of "property damage."

Travelers respectfully requests that this Court reconsider its decision and alter or amend its order on the grounds set forth above and in the memorandum of law filed herewith.



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Attorneys for Defendant Travelers Indemnity Company

February 10, 2012
Columbia, SC

 COPY

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 11-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,
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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.

TRAVELERS INDEMNITY COMPANY'S
MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR RECONSIDERATION
AND TO ALTER OR AMEND JUDGMENT

FILED-RECEIVED
2012 FEB 13 AM 8:39
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

Defendant Travelers Indemnity Company ("Travelers") submits this memorandum of law in support of its motion for reconsideration and to alter or amend this court's order entered January 30, 2012 granting Plaintiffs' motion for summary judgment and denying Travelers' motion for summary judgment.

I. This 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) is misplaced, in that *Crossmann* is distinguishable in several important respects.

It is respectfully submitted that, the Supreme Court's conclusions in *Crossmann* concerning the meaning of "property damage" are inapplicable to the case at bar, as acknowledged by both sides at oral argument, for the following reasons.

First, the policy at issue in *Crossmann* was a commercial general liability (CGL) policy issued to a developer of several condominium projects, while the policy at issue in the case at bar involves a Directors and Officers Liability Endorsement for a condominium homeowners' association. The nature and the purpose of the coverage is obviously very different.

Second, the issue in *Crossmann* was whether the intrusion of water over time as a result of negligent construction constituted an "occurrence" within the meaning of the CGL policy. The parties actually stipulated that the damage from the water intrusion constituted "property damage". The Court addressed the meaning of the term "property damage" in the context of whether the damage stipulated to have been "property damage" had been caused by an "occurrence." In that context, the Court concluded that, "negligent or defective construction resulting in damage to otherwise non-defective components may constitute 'property damage,' but the defective construction would not." *Id.* at 50, 717 S.E.2d at 594. In the case at bar, the question is not whether there was an "occurrence" covered under a CGL policy, but whether the damages claimed in the underlying litigation constitute "property damage" as defined in the Directors and Officers Liability Endorsement.

Finally, another important distinction is that, in *Crossmann*, the parties stipulated that they would not argue the applicability of any exclusions, and the Court even noted "that various exclusions may preclude coverage in some instances." *Id.* at 46, 50, 717 S.E.2d at 592, 594. Thus, the *Crossmann* opinion, with respect to coverage for property damage, is limited to the question of whether there had been an "occurrence." The applicability of exclusions were not a

part of the analysis.

A. **This Court's inference that the damages being sought from Travelers' insured "relate to . . . the correction of initially defective construction" is unfounded.**

The most recent amended complaint in the underlying action never alleges that KPOA is liable for damages arising out of any construction defect or negligent construction. Rather, those allegations are directed against the developer defendants. (A copy of the Fifth Amended Complaint is attached as Exhibit A to Travelers' Memorandum of Law in Support of Its Motion for Summary Judgment, a complete copy of which is attached as Exhibit A hereto and incorporated herein by reference.) The second cause of action, directed only against the developer defendants, alleges that they:

~~breached the implied warranty of habitability, in that condominium units~~
~~purchased by the Plaintiffs contained construction, design, and material defects,~~
were defective, so that Plaintiffs will be and are required to spend significant sums for the repair, replacement, reengineering, redesign of the common elements all to their damage.

Fifth Amended Complaint, ¶ 23.

In the third cause of action, Plaintiffs also allege that the developer defendants were negligent, reckless, and willful in the following respects, among others:

In taking over an existing building, completing its construction, and developing it as a condominium, and marketing it while failing and omitting to perform adequate inspections, quality control, and materials inspections to prevent building defects.

Id., ¶ 25.a.

As set forth in Travelers' prior memorandum, Plaintiffs allege that KPOA negligently and in breach of its fiduciary duties failed to adequately maintain the common elements of the property. There is no allegation that KPOA is liable for negligent or defective construction. Nor

would such allegations be expected. After all, the developers are co-defendants. As set forth above, those allegations had been asserted against the developers – not KPOA.

In *Crossmann*, the coverage issue involved the developer-insured's liability for property damage that resulted from negligent construction, which was clearly covered so long as there had been an "occurrence." The issue in the case at bar is whether the damages alleged to have resulted from KPOA's alleged failure to maintain and repair the property constitute "property damage."

In *Crossmann*, the question of what constitutes "property damage" was analyzed solely in the context of the determination of whether there had been an "occurrence." In the case at bar, property damage is excluded from coverage. The *Crossmann* Court's analysis of the "property damage" issue was specifically limited to the nature of the case presented:

We believe a more complete understanding of the coverage issue **in this kind of progressive property damage case** should involve the policy term "property damage."

Crossmann, 395 S.C. at 48, 717 S.E.2d at 593. (emphasis added).

The allegations against KPOA are that it failed to inspect, maintain and repair the common elements, and to maintain the funds necessary to do so, as a result of which the common areas are now "in substandard condition requiring a substantial up-fit of all major building elements and systems, and remediation of mold and other unsanitary conditions" Fifth Amended Complaint, ¶ 13. Deterioration of physical property as a result of a failure to maintain and repair it constitutes "property damage" defined in the policy 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.

Policy Number I-680-3467M656-IND-08, Directors and Officers Endorsement, p. 5 of 5 at F.

The deterioration of the common elements of a building to the point that remediation is necessary results in “physical injury” to that property, loss of use, and diminution of its value. In short, the damages sought in connection with the allegations against KPOA are indeed “property damage” as defined in the policy at issue. The damages arising out of the allegations against the developers concerning defective construction are irrelevant. However, it is noteworthy that those allegations are quite similar to those that formed the backdrop of the coverage issue in *Crossmann*, which involved a **developer’s** CGL policy.

B. The parties to the insurance contract at issue could not have intended that liability arising out of construction defects would be covered.

Not only does the Fifth Amended Complaint not allege that KPOA is liable for construction defects, it stands to reason that the parties to a policy containing a Directors and Officers endorsement would not have contemplated such liability, and certainly would not have intended that it would be an exception to the unambiguous exclusion of “property damage.” It is reasonable to conclude that a contractor or developer, as in *Crossmann*, might need and expect such coverage. However, it is respectfully submitted that such an exception to the “property damage” exclusion could not have been intended by the parties to the insurance contract in question, as it provides coverage for potential liability that a homeowners’ association might reasonably be expected to encounter, which, it is submitted, would not include liability for construction defects, especially considering that the policy specifically excludes coverage for “property damage.”

“As with contracts generally, the cardinal principle in construing insurance contracts is that the *intention of the parties* controls.” *Poston v. Nat’l.Fid. Ins. Co.*, 303 S.C. 182, 185, 399 S.E.2d 770, 772 (1990). As our Supreme Court explained:

[I]n cases where there is no ambiguity, contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense. If the intention of the parties is clear, the Courts have no authority to change the contract in any particular and have no power to interpolate into the agreement between the insurer and the insured, a condition or stipulation not contemplated either by the law or by the contract between the parties.

Carroway v. Johnson, 245 S.C. 200, 203, 139 S.E.2d 908, 909-10 (1965); *see also Blanton v. Nationwide Mut. Ins. Co.*, 247 S.C. 148, 146 S.E.2d 156 (1966).

To ascertain the parties’ intent, the type of policy at issue should be considered:

~~In construing an insurance policy, the determinative question is the intent of the policies — that is, what coverage the insured **expected to receive** and what the insurer **was to provide**, as disclosed by the provisions of the policy. An insurance policy is enforced in accordance with the **real intent of the parties** as expressed in the language employed in the policy. To ascertain the meaning of an insurance policy’s language and the parties’ intent, the court must construe the policy as a whole and **take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract**. If the intention of the parties can be clearly discovered, the court will **give effect to that intention** within the sphere of its proper and legal operation and will construe accordingly the terms used in the policy, no matter how inapt, ungrammatical, or inaccurate they may appear when viewed strictly or legally. The rule is that once the intention of the parties is clearly ascertained, a policy of insurance is to be **liberally construed in order to carry out that intention, especially where a liberal construction is the reasonable one** and a literal construction would lead to manifest injustice.~~

Where an insurance contract is clear and unambiguous, court inquiry into the intent of the parties is limited to the four corners of the document.

43 AM. JUR.2d *Insurance* § 295 (2011) (emphasis added).

It could not have been the parties’ intent that damage claimed as a direct result of the developers’ or contractors’ defective construction would be covered, while damage flowing

indirectly from the same defective construction would not.

C. This Court's construction of the policy not only could not have been intended by the parties thereto, but, if adopted, could have consequences that are against public policy.

Another reason that the parties could not have intended that the Directors and Officers endorsement would provide coverage for defective construction, or even for negligent failure to maintain the common areas, is that such coverage would encourage collusion and would be against public policy. Travelers is not alleging such collusion in this case. However, if Directors and Officers Liability Endorsements are deemed to provide coverage for homeowners associations' purported failure to maintain the property, then such associations could avoid ~~assessing their members for necessary maintenance and repairs by failing to impose them and awaiting a suit by their members, thereby making their liability coverage available to cover the~~

expense. The association and its members would have the benefit of upgrades to the property without the necessity of an expensive assessment. Collusion would be difficult to prove. Such a result is against public policy.

II. The damages for which coverage is sought are special damages, which were not specifically pled in the underlying action.

A related issue raised in Travelers' previous memorandum is the Plaintiffs' failure to allege any special damages. Again, the complaint alleges that KPOA failed to maintain and repair the property and maintain a reserve fund for maintenance of the common elements. Fifth Amended Complaint, ¶¶ 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”.” *Id.*, ¶¶ 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.” *Id.*, ¶ 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). *Crozier v. Charleston & W. C. Ry. Co.*, 222 S.C. 121, 130, 71 S.E.2d 800, 805 (1952); *see also Preferred Sav. Bank, Inc. v. Elkholy*, 303 S.C. 95, 399 S.E.2d 19 (Ct. App. 1990). This rule is specifically stated in Rule 9 of South Carolina Civil Procedure which states, “When items of special damage are claimed, they shall be

~~specifically stated.” S.C. R. Civ. P. 9. If the Plaintiffs are seeking to recover damages from~~
~~KPOA, as opposed to the developers, arising out of defective construction, they are required to~~
~~specify the damages claimed, as it is by no means clear how a homeowners’ association would~~
~~be liable to its members for damages arising out of the developers’ negligent construction. Not~~
~~only does the complaint not specify any damages allegedly arising out of defective construction,~~
~~it does not even allege that KPOA is liable for any damages whatsoever arising out of negligent~~
~~construction. In other words, as to KPOA, there are no allegations of liability for the damages~~
~~that the Order indicates are covered. Such damages have not been specifically pled, as required~~
~~by law, and may not be inferred.~~

III. The policy contains additional exclusions that preclude coverage.

KPOA’s policy also contains the following exclusions:

The insurance provided by this endorsement does not apply to:

* * *

(3) Damages resulting from:

* * *

(b) Any dishonest, fraudulent, criminal or malicious act, error or omission committed by or with the knowledge of any insured.

* * *

(e) Operations (including but not limited to construction, design, survey and engineering services) performed by or no behalf of the builder, sponsor or developer of the property designated in the Declarations.

(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.

(i) any claim or "suit" made by any insured against another insured.

A. Allegations in the Fifth Amended Complaint fall within exclusion (3)(b).

The insurance provided by this endorsement does not apply to:

* * *

(3) Damages resulting from:

* * *

(b) Any dishonest, fraudulent, criminal or malicious act, error or omission committed by or with the knowledge of any insured.

While the complaint never uses the words, "dishonest, fraudulent, criminal or malicious," as set forth in exclusion (b) above, it does allege that, "in placing the interests of the Defendant Developers ahead of the owners, the POA failed to develop and fund an adequate reserve fund." Fifth Amended Complaint, ¶ 19. It also alleges that KPOA willfully "fail[ed] to advise the homeowners of the various conflicts of interest inherent in a developer-controlled POA, and . . .

fail[ed] to provide for independent representation of non-developer homeowners both with respect to POA actions, and also regarding property management and maintenance.” *Id.*, ¶ 26. h. It also alleges that “from its inception in 1996 until April 24, 2007, the POA was wholly controlled by the Defendant Developers, pursuant to provisions in the By Laws, and was operated by a three-member Board constituted of Defendant Developers’ employees or designates.” *Id.*, ¶ 9.

In short, the complaint alleges that KPOA, being under the control of the developer, placed the developer’s interests ahead of the owners and intentionally did not advise the homeowners of its conflict of interest. It is respectfully submitted that these allegations are of dishonest and fraudulent conduct, allegedly committed with KPOA’s knowledge, and fall within

~~exclusion (3)(b).~~

B. Allegations in the Fifth Amended Complaint fall within exclusion (3)(f).

The insurance provided by this endorsement does not apply to:

* * *

(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.

Moreover, the Plaintiffs have alleged that KPOA (1) intentionally failed to advise the homeowners of conflicts of interest; (2) placed developers’ interests ahead of the owners’; (3) willfully failed to maintain the property; and (4) willfully failed to provide for independent representation of the owners. In other words, the complaint alleges that KPOA, due to a conflict of interest, has failed to enforce the owners’ rights against the developers. It is respectfully submitted that exclusion (3)(f) therefore applies.

C. **Allegations in the Fifth Amended Complaint fall within exclusion (3)(h).**

The insurance provided by this endorsement does not apply to:

* * *

(3) **Damages resulting from:**

* * *

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

The aforementioned allegations also essentially allege that the “wrongful acts” of the board, allegedly controlled by the developers, occurred at least in part because KPOA was “operated by a three-member Board constituted of Defendant Developers’ employees or designates” and that said developers “controlled the maintenance, inspection, repair and upkeep of the Property through property managers which they had hired and through a board of directors which they controlled.” *Id.*, ¶¶ 9, 11. Thus, the complaint alleges that the purported wrongful acts in question were those of the developers, via their agents and employees. It is respectfully submitted that these allegations fall within exclusion (3)(h).

D. **Allegations in the Fifth Amended Complaint fall within exclusion (3)(i).**

The insurance provided by this endorsement does not apply to:

* * *

(3) **Damages resulting from:**

* * *

(i) any claim or “suit” made by any insured against another insured.

The Plaintiffs in this action are identical to the Plaintiffs in the underlying action. Of the twenty-four plaintiffs, seven of them (Deborah C. Pulliam, Vincent Dionna, Elena Manferdini, Helen K. Cook, Kathleen Kramer, Mikel Marcuse and David Osborne) have served on the

KPOA Board. (Please see pertinent excerpts from their interrogatory answers in the underlying suit, attached hereto collectively as Exhibit B) They therefore fall within the policy's definition of "insured":

WHO IS AN INSURED

* * *

B. Your directors, trustees or officers are also insureds, but only while acting within the scope of their duties for you. This includes:

1. Those who currently are directors, trustees or officers;
2. Those who were directors, trustees or officers when the "wrongful act" took place;
3. Those who become directors, trustees or officers after the effective date of the insurance, but only for subsequent "wrongful acts."

C. Your employees and members are insureds, but only while acting at your direction and within the scope of their duties for you.

Thus, the claims of these seven Plaintiffs are excluded under (3)(i) as they are "insureds" who have asserted claims against the named insured, KPOA.

IV. The Fifth Amended Complaint seeks punitive damages, which are clearly excluded by the policy.

The Order did not address Travelers' contention that punitive damages are excluded.

Traveler respectfully requests a ruling to that effect.

V. The damages that Plaintiffs seek include alleged diminution in the value of the common areas and their individual units, which falls within the policy's definition of "property damage" and are therefore excluded.

The Order did not address Travelers' contention that it may be inferred that Plaintiffs seek damages for the alleged diminution in the value of their individual units, as well as in the

value of the common areas, in that they seek “all damages proximately flowing from the breach” of fiduciary duties.

The policy defines “property damage” as follows:

G. “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.

Id., p. 5 of 5 at F.

Any of Plaintiffs’ claims for damages arising out of diminution in property value clearly

~~fall within the definition of “property damage” and would be excluded. Travelers respectfully~~

requests a ruling to that effect.

CONCLUSION

For the reasons set forth above, in Travelers’ motion, and its previous motion and memorandum, Travelers respectfully requests reconsideration of this Court’s Order granting Plaintiffs’ motion for summary judgment and denying its motion for summary judgment, and that said Order be altered or amended to address the issues and arguments set forth herein and in Travelers’ motion.



William P. Davis

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wdavis@brblegal.com File No.: 7746.1830

Attorneys for Defendant Travelers Indemnity Company

February 10, 2012
Columbia, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C/A NO. 08-CP-46-2158

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, JESSICA 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, individually and on behalf of all)
other similarly situated Plaintiffs,)

Plaintiffs,)

vs.)

M.U.I. CAROLINA CORPORATION, AND)
KENSINGTON PLACE OWNERS')
ASSOCIATION, INC.,)

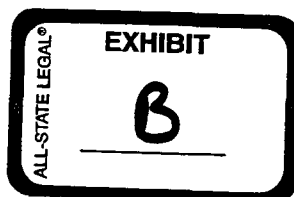
Defendant.)

**PLAINTIFF DEBORAH
C. PULLIAM'S ANSWERS TO
KENSINGTON PLACE OWNERS'
ASSOCIATION, INC.'S FIRST SET
OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION
OF DOCUMENTS**

TO: KENNETH R. RAYNOR, ESQUIRE, COUNSEL FOR DEFENDANT KENSINGTON
PLACE OWNERS' ASSOCIATION, INC.:

Plaintiff Deborah C. Pulliam, pursuant to Rule 33 of the South Carolina Rules of Civil
Procedure, hereby answers Defendant Kensington Place Owners' Association, Inc.'s First Set of
Interrogatories and Requests for Production of Documents as follows:

INTERROGATORIES



ANSWER: See Answer to Interrogatory Number One above.

5. Identify any invoices, cancelled checks, bank statements, estimates, appraisals, or other documents that reflect expenses incurred by you as a result of the allegations in your Complaint.

ANSWER:

Common Areas: estimates/bids from Carolina Stucco, Atkins Paving, S&R Services and for costs of new roof, water pump controls, HVAC unit in the elevator control room, walkway trim, walkway ceiling tiles.

Unit # 310: (A) Water leaks from units above on 3 separate occasions about 4 years ago – my insurance company would not pay because it was the responsibility of the 3 owners whose units caused the problems; at least 8 contacts - phone calls, in-person reports to the management company office, consults with KP maintenance staff & e-mails have resulted in no response or action to repair the damage - water stains on ceilings/wall in 2 rooms; don't have the funds to repair damage; (B) Water leaking in from the walkway (a) through the kitchen window during heavy rainstorms floods my kitchen countertop and has left stains on the window casing (b) caused rust to form on front door frame (c) caused the paint on the walkway bathroom wall to peel down to the drywall which revealed the walls had never been painted with primer; Primary problem causing these issues from common area must first be corrected to prevent water from seeping from outdoors through stucco and block to unit walls; (C) Heavy condensation of windows and patio door during cooler/cold months causes water to run down windows and pool at bottom which creates mold and in other units led to decay of the sill; to prevent deterioration of sill, had ceramic tile installed at bottom of windows; lack of adequate ventilation and excessive moisture has caused some items in a bedroom to rust; (D) Excessive air from windows/doors caused the need to purchase and install insulated cellular blinds and insulated draperies to reduce energy bills @ approximate cost of \$900; (E) HVAC unit fan blade broke after about 5 years; replacement cost of about \$800; (F) Purchased and installed screen door for balcony as there was none at approximate cost of \$400; (G) Lack of adequate ventilation for heating and cooling caused need to purchase and install ceiling fans, space heater; cost approximately \$400; (H) Electric outlets not secured into wall; (I) Doors to balcony and bathroom installed incorrectly; prevents real use of balcony; (J) fogging windows – had to consult attorney before management agreed to replace windows, so fogged one could not see out.

6. Identify any time period during which you served on the Board of the Kensington Place Owners' Association, Inc.

ANSWER: Mrs. Pulliam served from April 24, 2007, to February 21, 2008.

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK) IN THE COURT OF COMMON PLEAS
)
) C/A NO. 08-CP-46-2158

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, JESSICA 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, individually and on behalf of all)
other similarly situated Plaintiffs,)

Plaintiffs,)

vs.)

M.U.I. CAROLINA CORPORATION, AND))
KENSINGTON PLACE OWNERS')
ASSOCIATION, INC.,)
)

Defendant.)

)

**PLAINTIFF VINCENT DIONNA'S
ANSWERS TO DEFENDANT
KENSINGTON PLACE OWNERS'
ASSOCIATION, INC.'S FIRST SET
OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION
OF DOCUMENTS**

TO: KENNETH R. RAYNOR, ESQUIRE, COUNSEL FOR DEFENDANT KENSINGTON
 PLACE OWNERS' ASSOCIATION, INC.:

Plaintiff Vincent Dionna, pursuant to Rule 33 of the South Carolina Rules of Civil
Procedure, hereby answers Defendant Kensington Place Owners' Association, Inc.'s First Set of
Interrogatories and Requests for Production of Documents as follows:

INTERROGATORIES

4. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: See Answer to Interrogatory Number One above.

5. Identify any invoices, cancelled checks, bank statements, estimates, appraisals, or other documents that reflect expenses incurred by you as a result of the allegations in your Complaint.

ANSWER: None.

6. Identify any time period during which you served on the Board of the Kensington Place Owners' Association, Inc.

ANSWER: Mr. Dionna served on the Board for one year in 2007.

7. If you identified any time period in your answer to the previous Interrogatory, please identify any minutes, notes, emails, communications, or other documents in your possession related to your participation on the Board of the Kensington Place Owners' Association, Inc.

ANSWER: None.

8. Identify any conversations, communications, emails, or other documents between you and any other resident that relate to the allegations in your Complaint.

ANSWER: None.

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK) IN THE COURT OF COMMON PLEAS
) C/A NO. 08-CP-46-2158

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, JESSICA 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, individually and on behalf of all)
other similarly situated Plaintiffs,)

Plaintiffs,

vs.

M.U.I. CAROLINA CORPORATION, AND)
KENSINGTON PLACE OWNERS')
ASSOCIATION, INC.,)
)

Defendant.

**PLAINTIFFS JOSEPH AND
ELENA MANFREDINI'S
ANSWERS TO DEFENDANT
KENSINGTON PLACE OWNERS'
ASSOCIATION, INC.'S FIRST SET
OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION
OF DOCUMENTS**

TO: KENNETH R. RAYNOR, ESQUIRE, COUNSEL FOR DEFENDANT KENSINGTON
PLACE OWNERS' ASSOCIATION, INC.:

Plaintiffs Joseph and Elena Manfredini, pursuant to Rule 33 of the South Carolina Rules
of Civil Procedure, hereby answer Defendant Kensington Place Owners' Association, Inc.'s First
Set of Interrogatories and Requests for Production of Documents as follows:

INTERROGATORIES

4. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: See Answer to Interrogatory Number One above.

5. Identify any invoices, cancelled checks, bank statements, estimates, appraisals, or other documents that reflect expenses incurred by you as a result of the allegations in your Complaint.

ANSWER: None.

6. Identify any time period during which you served on the Board of the Kensington Place Owners' Association, Inc.

ANSWER: Elena Manfredini served on the Board for two months in 2008.

7. If you identified any time period in your answer to the previous Interrogatory, please identify any minutes, notes, emails, communications, or other documents in your possession related to your participation on the Board of the Kensington Place Owners' Association, Inc.

ANSWER: None.

8. Identify any conversations, communications, emails, or other documents between you and any other resident that relate to the allegations in your Complaint.

ANSWER: None.

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK) IN THE COURT OF COMMON PLEAS
) C/A NO. 08-CP-46-2158

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, JESSICA 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, individually and on behalf of all)
other similarly situated Plaintiffs,)

Plaintiffs,)

vs.)

M.U.I. CAROLINA CORPORATION, AND))
KENSINGTON PLACE OWNERS')
ASSOCIATION, INC.,)
)

Defendant.)
_____)

**PLAINTIFF HELEN K. COOK'S
ANSWERS TO DEFENDANT
KENSINGTON PLACE OWNERS'
ASSOCIATION, INC.'S FIRST SET
OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION
OF DOCUMENTS**

TO: KENNETH R. RAYNOR, ESQUIRE, COUNSEL FOR DEFENDANT KENSINGTON
 PLACE OWNERS' ASSOCIATION, INC.:

Plaintiff Helen K. Cook, pursuant to Rule 33 of the South Carolina Rules of Civil
Procedure, hereby answers Defendant Kensington Place Owners' Association, Inc.'s First Set of
Interrogatories and Requests for Production of Documents as follows:

INTERROGATORIES

- c. Bob Gallagher
Procon & Associates, Inc.
P. O. Box 4466
North Myrtle Beach, SC 29597-4466

Plaintiffs reserve the right to call as its expert witnesses any experts listed by all parties to this action in Answers to Interrogatories, supplements thereto or any expert witness submissions to the court.

4. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: See Answer to Interrogatory Number One above.

5. Identify any invoices, cancelled checks, bank statements, estimates, appraisals, or other documents that reflect expenses incurred by you as a result of the allegations in your Complaint.

ANSWER: None.

6. Identify any time period during which you served on the Board of the Kensington Place Owners' Association, Inc.

ANSWER: Vice President, May 2007 to February 2008

7. If you identified any time period in your answer to the previous Interrogatory, please identify any minutes, notes, emails, communications, or other documents in your possession

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK) IN THE COURT OF COMMON PLEAS
) C/A NO. 08-CP-46-2158

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, JESSICA 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, individually and on behalf of all)
other similarly situated Plaintiffs,)

Plaintiffs,

vs.

M.U.I. CAROLINA CORPORATION, AND)
KENSINGTON PLACE OWNERS')
ASSOCIATION, INC.,)
)

Defendant.

**PLAINTIFF KATHLEEN KRAMER'S
ANSWERS TO DEFENDANT
KENSINGTON PLACE OWNERS'
ASSOCIATION, INC.'S FIRST SET
OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION
OF DOCUMENTS**

TO: KENNETH R. RAYNOR, ESQUIRE, COUNSEL FOR DEFENDANT KENSINGTON
PLACE OWNERS' ASSOCIATION, INC.:

Plaintiff Kathleen Kramer, pursuant to Rule 33 of the South Carolina Rules of Civil
Procedure, hereby answers Defendant Kensington Place Owners' Association, Inc.'s First Set of
Interrogatories and Requests for Production of Documents as follows:

INTERROGATORIES

the court.

4. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: See Answer to Interrogatory Number One above.

5. Identify any invoices, cancelled checks, bank statements, estimates, appraisals, or other documents that reflect expenses incurred by you as a result of the allegations in your Complaint.

ANSWER: None.

6. Identify any time period during which you served on the Board of the Kensington Place Owners' Association, Inc.

ANSWER: Secretary/Treasurer, November 2007 – February 2008, April 2008 to present.

7. If you identified any time period in your answer to the previous Interrogatory, please identify any minutes, notes, emails, communications, or other documents in your possession related to your participation on the Board of the Kensington Place Owners' Association, Inc.

ANSWER: None.

8. Identify any conversations, communications, emails, or other documents between you and

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C/A NO. 08-CP-46-2158

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, JESSICA 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, individually and on behalf of all)
other similarly situated Plaintiffs,)

Plaintiffs,)

vs.)

M.U.I. CAROLINA CORPORATION, AND)
KENSINGTON PLACE OWNERS')
ASSOCIATION, INC.,)

Defendant.)

**PLAINTIFF MIKEL MARCUSE'S
ANSWERS TO DEFENDANT
KENSINGTON PLACE OWNERS'
ASSOCIATION, INC.'S FIRST SET
OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION
OF DOCUMENTS**

TO: KENNETH R. RAYNOR, ESQUIRE, COUNSEL FOR DEFENDANT KENSINGTON
PLACE OWNERS' ASSOCIATION, INC.:

Plaintiff Mikel Marcuse, pursuant to Rule 33 of the South Carolina Rules of Civil
Procedure, hereby answers Defendant Kensington Place Owners' Association, Inc.'s First Set of
Interrogatories and Requests for Production of Documents as follows:

INTERROGATORIES

- b. Gary D. Freeman, AIA, CCS
Gary Freeman Architect, Inc.
1469 Diamond Blvd.
Mt. Pleasant, SC 29466
- c. Bob Gallagher
Procon & Associates, Inc.
P. O. Box 4466
North Myrtle Beach, SC 29597-4466

~~Plaintiffs reserve the right to call as its expert witnesses any experts listed by all parties to this~~
action in Answers to Interrogatories, supplements thereto or any expert witness submissions to
the court.

4. For each person known to the parties or counsel to be a witness concerning the facts of the
case, set forth either a summary sufficient to inform the other party of the important facts known to
or observed by such witness, or provide a copy of any written or recorded statements taken from
such witnesses.

ANSWER: See Answer to Interrogatory Number One above.

5. Identify any invoices, cancelled checks, bank statements, estimates, appraisals, or other
documents that reflect expenses incurred by you as a result of the allegations in your Complaint.

ANSWER: None.

6. Identify any time period during which you served on the Board of the Kensington Place
Owners' Association, Inc.

ANSWER: President, July 2007 to February 2008

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C/A NO. 08-CP-46-2158

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, JESSICA NEFF,)
DAVID OSBORNE, CELESTE)
ARWOOD, VINCENT DIONNA,)
MIKEL MARCUSE, JAMES P.)
WHEATON, JR., JOSEPH MANFREDINI,)
ELENA MANFREDINI, DAVID COX,)
JONATHAN B. DILLARD, and ERIC)
WILSON, individually and on behalf of all)
other similarly situated Plaintiffs,)

Plaintiffs,)

vs.)

M.U.I. CAROLINA CORPORATION, AND)
KENSINGTON PLACE OWNERS')
ASSOCIATION, INC.,)

Defendant.)

**PLAINTIFF DAVID OSBORNE'S
ANSWERS TO DEFENDANT
KENSINGTON PLACE OWNERS'
ASSOCIATION, INC.'S FIRST SET
OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION
OF DOCUMENTS**

TO: KENNETH R. RAYNOR, ESQUIRE, COUNSEL FOR DEFENDANT KENSINGTON
PLACE OWNERS' ASSOCIATION, INC.:

Plaintiff David Osborne, pursuant to Rule 33 of the South Carolina Rules of Civil
Procedure, hereby answers Defendant Kensington Place Owners' Association, Inc.'s First Set of
Interrogatories and Requests for Production of Documents as follows:

INTERROGATORIES

4. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: See Answer to Interrogatory Number One above.

5. Identify any invoices, cancelled checks, bank statements, estimates, appraisals, or other documents that reflect expenses incurred by you as a result of the allegations in your Complaint.

ANSWER: None.

6. Identify any time period during which you served on the Board of the Kensington Place Owners' Association, Inc.

ANSWER: December 2007 through April 2008.

7. If you identified any time period in your answer to the previous Interrogatory, please identify any minutes, notes, emails, communications, or other documents in your possession related to your participation on the Board of the Kensington Place Owners' Association, Inc.

ANSWER: None.

8. Identify any conversations, communications, emails, or other documents between you and any other resident that relate to the allegations in your Complaint.

ANSWER: None.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
 COUNTY OF YORK) CASE NUMBER: 11-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)
 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,)

Plaintiffs,

vs.

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

Defendants.

**PLAINTIFFS' MEMORANDUM IN
 OPPOSITION TO DEFENDANT
 TRAVELERS INDEMNITY
 COMPANY'S MOTION FOR
 RECONSIDERATION AND
 TO ALTER OR AMEND JUDGMENT**

INTRODUCTION AND SUMMARY

Travelers' Rule 59(e), SCRCP, Motion seeks, essentially to have this Court reverse itself by making a combination of arguments - disagreements with the Court's use of definitions and analyses taken from the Supreme Court's decision in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), together with new, first-time, additional arguments, not made below prior to trial/hearing, and therefore not

permitted by Rule 59(e). Taken as a whole or in parts, none of this reasoning should induce the Court to alter or amend its judgment.

I. TRAVELERS' DISAGREEMENT WITH THE COURT'S ADOPTION OF SOME OF THE CROSSMANN RATIONALE DOES NOT CONSTITUTE GROUNDS FOR ALTERATION OR AMENDMENT

The Court's Order filed on January 30, 2012, discusses the *Crossmann, supra*, decision as the only recent State Appellate decision to have considered "property damage" in the construction defect coverage context. Since the Travelers policy at issue here defines "property damage" to mean, "Physical injury to tangible property," and *Crossmann* discusses the concept of "physical injury" in this context, utilization of some of the *Crossmann* reasoning in the Court's decision is not problematical, but rather is appropriate. Essentially, the Court reasons that this concept of "physical injury" contemplates initially proper and complete "property" which was thereafter "physically injured," as *Crossmann* states. Here, the Court finds, the Plaintiffs do not allege the property was initially correctly built and thereafter "physically injured," rather that initial defective construction was not properly inspected and maintained, thus taking the complained-of negligent activities of the Defendant out of the "property damage" exclusion.

While this position, admittedly, is not one on which the Plaintiffs focused their attention, and briefed case law from other jurisdictions, nonetheless, just because the Trial Court here, instead, partially adopted the rationale from the *Crossmann* decision, there is no error and nothing which Travelers raises in its Motion could constitute grounds for amendment or alteration.

II. TRAVELERS' RE-ARGUMENT OF TWO POSITIONS IT ARGUED BELOW CONSTITUTE NO REASON TO ALTER OR AMEND THE JUDGMENT

1. The argument that Policy Exclusion (3)(f) bars coverage was correctly dealt within the Order.

The Order correctly states: "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."

Travelers' re-argument here flatly ignores the plain language of the Complaint in the underlying action and on the record arguments which clearly demonstrate that no such claim has been made.

2. The argument that Policy Exclusion (3)(i) bars coverage, while not addressed specifically below, affords no grounds for alteration or amendment.

The Policy Exclusion at issue here is one prohibiting one insured suing another. Travelers here seems to fail to appreciate that this claim involves individual claims against a separate corporate entity - the insured. This Court is aware through its involvement in prior proceedings in the underlying litigation that there is a huge difference between these entities, so much so, that the POA has asserted that it-not the Plaintiffs here - has the right to assert claims for defective construction against the developer, has filed cross-claims to that effect, and has instituted an Appeal from the denial of its cross-claims. The Policy Exclusion cited on its face cannot bar coverage - it relates to "Your employees and members are insureds, but only while acting at your direction and within the scope of their duties for you." Here, of course, the opposite is occurring - Plaintiffs are not acting FOR and at the direction OF the POA - exactly the opposite.

III. TRAVELERS ADDITIONAL ARGUMENTS ARE ONES NOT MADE BELOW AT TRIAL/HEARING AND MAY NOT BE RAISED IN A RULE 59(e) MOTION.

If there is any unambiguous statement from the case law regarding Civil Procedure, it is the following: "A party cannot use Rule 59(e) to present to the Court an issue the party could have raised prior to judgment, but did not." *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436, 437 (Ct. App. 1995). *MailSource, LLC v. M.A. Bailey & Associates, Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003). *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 443 S.E.2d 399, 400 (Ct. App. 1994). *C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268, 270 (1993).

Travelers' 59(e) Motion here attempts to do just that - to argue new issues which could have been presented, but were not, and this Court does not have the authority pursuant to Rule 59 to grant relief based on those arguments - assuming that any of them had merit-which they do not.

In any event, even though these belated arguments may not now be considered, they merit addressing in order to demonstrate the real lack of prejudice to Travelers when they are not considered. They fall into several categories:

1. The Intention of the Parties as seen through the Insuring Agreement.

The Court's Order got it right in stating that the policy must be broadly construed in favor of the insured, and thus, in favor of coverage. Unlike Travelers' strained reasoning here, the question might be asked this way to determine the Parties' intent: "Why would the POA pay a premium to cover its Officers and Directors for their negligent acts if not to cover their failure to inspect and maintain the one thing they are charged with the care of - the condominium, and additionally who could be the potential claimants in such a negligence claim if not the owners of the individual condominiums?" Travelers now wants to say that the coverage it has written is

collusive? Under what theory? In fact this fact situation represents the exact reason to maintain Directors and Officers coverage.

2. The (3)(h) Exclusion.

Here, for the first time, Travelers asserts that coverage is perhaps excluded because developers or "sponsor"(s) as board members committed "wrongful acts." Well, to begin with, there is no evidence in this record, or indeed in the underlying litigation that any "developer" or "sponsor" served on the POA Board at the time of the acts complained of. While it is true that under the Master Deed, the developer, MUI, controlled the Board until 2007, there is a complete absence of information regarding the identity of the Board members, and no information that any of them were officers or directors of the Developer. Indeed, the answers to interrogatories provided by the POA as to these identities only states, "Upon information and belief, the Board was staffed by individuals chosen by MUI or one of its affiliate companies from 1996 until the turnover in 2007." Additionally, the question arises as to whether this negligence is a "Wrongful Act" or is mere negligence, which is covered.

3. Catchall New Arguments.

Here, Travelers argues, apparently that the Plaintiffs are asking for a damages award in the underlying litigation - which they are not making - of diminution of value. Also, Travelers is looking for a finding that punitive damages aren't covered - this prior to any verdict or any information that punitive damages would be considered at the trial level, so that contention is premature. Additionally, Travelers, somehow wants to require the Plaintiffs to re-plead their underlying Complaint to specifically allege how much the building repairs will cost. This concept is not only not required by the Rules of Civil Procedure in a construction defect case, but also it has no applicability to this coverage dispute, and such re-pleading motion, if necessary,

could and should have been made by Travelers' retained defense counsel in the underlying litigation.

CONCLUSION

Nothing raised by Travelers in its Rule 59(e) Motion advances any reason for this Court to Alter or Amend its Judgment in this matter, and such Motion must be denied.

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Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: Feb. 15 2012

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was e-mailed to all counsel of record in this proceeding this 15th day of February, 2012.

Dolores M. Catapano

 COPY

STATE OF SOUTH CAROLINA

COUNTY OF YORK

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 Os borne, 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

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C.A. No.: 2011-CP-46-01090

**TRAVELERS' REPLY TO
PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO ITS MOTION FOR
RECONSIDERATION AND TO ALTER
OR AMEND JUDGMENT**

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DAVID H. HARRISON
CLERK OF COURT
YORK COUNTY, SC

Defendant Travelers Indemnity Company ("Travelers") respectfully submits this reply and response to Plaintiff's Memorandum in Opposition to Defendant Travelers Indemnity Company's Motion for Reconsideration and to Alter or Amend Judgment. Plaintiff's memorandum contains several legal assertions and factual statements that necessitate a response or clarification from Travelers. Therefore, Travelers respectfully submits this reply for the Court's consideration.

SCOPE OF RULE 59(e), SCRPC MOTIONS

In *Elam v. S.C. Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the South Carolina Supreme Court recognized the two separate roles that Rule 59(e) motions can serve. The Court stated:

[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam v. S. Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). The Court noted that although Rule 59(e), SCRPC does not use the term “reconsideration,” it is well established that the rule is an appropriate vehicle for requesting that a court reconsider an issue or argument. *Id.* See also *Arnold v. State*, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992)(holding “[t]he purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to ‘reconsider matters properly encompassed in a decision on the merits.’”). When making such a motion, “it is appropriate to request a court to review a ruling which the party contends fails to use the proper standard.” *Mailsources, LLC v. M.A. Bailey & Assoc., Inc.*, 356 S.C. 370, 588 S.E.2d 639 (Ct. App. 2003).

ARGUMENT

Plaintiffs assert that Travelers’ motion raises several arguments and issues which are “belated” and may not be raised for the first time in a Rule 59(e) motion. Plaintiffs mischaracterize the issues as new. As outlined below, all of the issues objected to by Plaintiffs are properly before this Court for either reconsideration or consideration under Rule 59(e).

I. The Intention of the Parties

Plaintiffs contend that Travelers has raised a new issue by asking the Court to consider the intention of the parties. This is a declaratory judgment action that hinges on the interpretation and scope of an insurance contract. South Carolina has well established principles regarding the interpretation of such contracts. Travelers is not introducing a new issue. The issue, the interpretation of the property damage exclusion, is the crux of this action and was already presented to the Court. Travelers is merely asking the Court to reconsider its interpretation of the property damage exclusion in light of what Travelers contends is the appropriate standard for interpretation of this insurance contract.. “[T]he cardinal principle in construing insurance contracts is that the *intention of the parties* controls.” *Poston v. Nat’l Fid. Ins. Co.*, 303 S.C. 182, 185, 399 S.E.2d 770, 772 (1990). Travelers respectfully suggests that the Court should fully consider how its interpretation of the exclusion frustrates the intent of the parties.

To answer Plaintiffs’ hypothetical question regarding why the POA would pay a premium for a directors and officers policy if not to cover the property, Travelers would like to redirect the Court’s attention to *Eastpointe Condominium I Assoc. Inc. v. Travelers Casualty & Surety Company of America*, 379 Fed. Appx. 906 (11th Cir. 2010). In *Eastpointe* the Eleventh Circuit Court of Appeals upheld an identical property damage exclusion in a directors and officers policy and held that the plaintiff’s claims were excluded because they arose out of damage to the property. The court specifically responded to the plaintiff’s argument that enforcing the exclusion would render the policy illusory as follows:

The fact that Eastpointe’s primary responsibilities relate to the operation and maintenance of tangible property does not mean that the property damage exclusion bars coverage for all claims that might be asserted against Eastpointe. The claims at issue here are excluded because they arise out of damage to

Bursten's property. But there are other claims that could be asserted against Eastpointe that would not fall within the property damage exclusion and might therefore be covered by the D & O policy. *See, e.g., Lime Tree Vill. Cmty. Club Ass'n v. State Farm Gen. Ins. Co.*, 980 F.2d 1402, 1405–06 (11th Cir.1993) (finding that D & O insurer had duty to defend homeowners' association against claims of slander or disparagement of title, breach of residential development's declaration of covenants and restrictions, and restraint of trade).

Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am., 379 F. App'x 906, 909 (11th Cir. 2010); *see also Resource Bank v. Progressive Cas. Ins. Co.*, 503 F.Supp.2d 789 (E.D. Va. 2007) (“Because the harms alleged in the TCPA Class Actions are invasion of privacy and property damage, Resource seeks coverage of claims ‘for invasion of privacy’ and ‘for property damage’ that Exclusion A [the “Bodily Injury and Property Damage Exclusion” of the Directors & Officers policy in question] expressly identifies.”).

The case of *Cytosol Laboratories, Inc. v. Federal Ins. Co.* involved the applicability of a property damage exclusion to the insured’s potential liability for business losses incurred when its ophthalmic solution was recalled. 536 F.Supp.2d 80 (D. Mass. 2008). A distributor sought damages against the insured for expenses associated with effectuating the recall, lost inventory, and reimbursement to customers, among other things. The Court held that all the distributor’s claims fell within the following exclusion of the Directors & Officers Liability Policy:

No coverage will be available under this Coverage Section for any **Claim** against an **Insured**:

4. for bodily injury, mental anguish, emotional distress, sickness, disease or death of any person *or damage to or destruction of any tangible property including the loss of use thereof whether or not it is damaged or destroyed*

(emphasis in original).

The Court reasoned as follows:

D & O insurance typically covers directors and officers of a corporation for claims of wrongdoing in connection with the corporation’s business. Consequently, it is somewhat difficult to reconcile [the insured’s] claims here with the fundamental purpose of such policies. Even assuming, however, that this provision of the D & O provision may provide coverage, a major exclusion operates independently to bar coverage.

* * *

Here, this broad exclusion precludes all of [the distributor's] claims under the D & O Policy. The Endosol solution is tangible property that allegedly has a high level of dangerous endotoxins. As a result, the solution is damaged and cannot be used, and [the distributor] seeks to recover for these damages.

Id., at 93-94.

In summary, claims of the kind asserted by Plaintiffs were never intended to be covered under Directors & Officers Liability coverage. Certain wrongful acts are covered, but not if the claim that results is for "property damage." It is respectfully submitted that the aforementioned cases, copies of which are attached hereto, support this conclusion.

II. 3(h) Exclusion

Plaintiffs' statement that Travelers asserted the 3(h) exclusion for the first time in its Rule 59(e) motion is incorrect. This issue was specifically raised and discussed on page sixteen of Travelers Memorandum of Law in Support of its Motion for Summary Judgment. Travelers appropriately raised the issue and is respectfully seeking a ruling that the Plaintiffs' allegations fall within this exclusion.

III. Punitive Damages Exclusion

Plaintiffs also imply that the applicability of the punitive damages exclusion is a new issue by discussing it in a section of its memorandum labeled "Catchall New Arguments." This is misleading. Travelers quoted the exclusion of punitive and exemplary damages in its Answer and raised the exclusion again in its Motion for Summary Judgment and in its Memorandum of Law in Support of its Motion for Summary Judgment. This is not a new issue. In fact, all of the issues listed in this section as "Catchall New Arguments" were raised prior to the Rule 59(e) motion.

Plaintiffs' also contend that the issue of whether the subject policy covers punitive damages is premature given that Plaintiffs have not received a verdict for punitive damages. This argument is surprising since Plaintiffs initiated this declaratory judgment action prior to receiving any verdict in the underlying tort suit. Travelers raised this very issue in its Answer to this action, asserting a lack of standing and the absence of a justiciable controversy. Travelers raised the issue in its Motion for Summary Judgment and discussed it extensively in the supporting memorandum of law. Travelers ultimately agreed to waive the issue at the summary judgment motion hearing in exchange for Plaintiffs' agreement to drop their motion to compel.

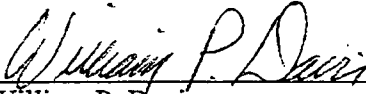
Plaintiffs filed this declaratory judgment action to determine the rights and liabilities under the policy prior to receiving any verdict in the underlying tort suit. Furthermore, the Fifth Amended Complaint in the underlying suit expressly alleges the right to recover punitive damages. "Under the Declaratory Judgment Act, a party whose rights, status, or other legal relations are affected by a contract may seek a court's determination of any question of construction or validity of the contract and obtain a declaration of the party's rights, status, or other legal relations thereunder." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 459 S.E.2d 844, 845 (1995). Travelers is entitled to a decision regarding whether there is coverage for punitive damages under this policy. Not ruling on the applicability of this one exclusion on the grounds that there is no verdict while allowing rulings on other exclusions where the same argument regarding the lack of a verdict could be made is inconsistent and frustrates judicial economy.

The determination of the rights and obligations under this policy are before this Court based on Plaintiffs' complaint. Plaintiffs have made a claim for punitive damages in the tort suit underlying this declaratory judgment action. There is no more appropriate time than now to

determine whether this policy affords coverage for punitive damages. Travelers contends that punitive damages are explicitly excluded from the policy at issue and respectfully requests that this Court make a judicial determination that there is no coverage for punitive damages.

CONCLUSION

The issues raised by Travelers in its motion and memorandum of law are matters that are properly before this Court for its consideration. Therefore, Travelers respectfully requests that this Court reconsider its Order and alter or amend its judgment in this matter as requested.



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February 27, 2012
Columbia, SC

379 Fed.Appx. 906

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,
Eleventh Circuit.

EASTPOINTE CONDOMINIUM
I ASSOCIATION, INC.,
Plaintiff–Appellant,

v.

TRAVELERS CASUALTY
& SURETY COMPANY OF
AMERICA, Defendant–Appellee.

No. 09–15866 | Non–Argument
Calendar. | May 20, 2010.

Synopsis

Background: Insured condominium association brought declaratory judgment and breach of contract action against insurer, seeking to establish insurer's duty to defend under a directors and officers (D & O) policy and to recover attorney's fees paid in underlying suit against the insured brought by condominium unit owner for breach of fiduciary duty, breach of contract, and negligence in failing to properly maintain, repair, and replace the condominium building's roof and air conditioning units before, between, and after two hurricanes. The United States District Court for the Southern District of Florida, No. 08–81187–CV–DTKH, Daniel

T.K. Hurley, J., 664 F.Supp.2d 1281, granted summary judgment in favor of insurer. Insured appealed.

Holding: The Court of Appeals held that the property damage exclusion in the policy barred coverage for loss in connection with unit owner's claims.

Affirmed.

West Headnotes (1)

1 Insurance

Particular Exclusions

Property damage exclusion in condominium association's directors and officers (D & O) policy barred coverage for loss in connection with condominium unit owner's claims against the association for breach of fiduciary duty, breach of contract, and negligence in failing to properly maintain, repair, and replace the condominium building's roof and air conditioning units, which allegedly caused pervasive mold and other damage to owner's unit, as owner's claims depended on the existence of property damage.

3 Cases that cite this headnote

Attorneys and Law Firms

***906** Francisco Xavier Novoa, West Palm Beach, FL, for Plaintiff–Appellant.

John R. Catizone, Litchfield Cavo, LLP, Fort Lauderdale, FL, Stacey Lynn Papp, Litchfield Cavo, LLP, Tampa, FL, for Defendant–Appellee.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 08–81187–CV–DTKH.

Before HULL, MARTIN and FAY, Circuit Judges.

Opinion

PER CURIAM:

Eastpointe Condominium I Association, Inc. (“Eastpointe”) appeals the district court’s entry of summary judgment in favor of Travelers Casualty & Surety Company of America (“Travelers”) on Eastpointe’s claims for breach of contract and declaratory judgment. Eastpointe contends that the district court erred in concluding that an insurance policy exclusion relieved Travelers of its duty to defend Eastpointe in a lawsuit brought by a condominium unit owner. Following a brief recitation of the relevant facts, we affirm.

I.

Eastpointe is a Florida corporation that owns and operates a condominium building in Singer Island, Florida. One of the condominium unit owners, Lynn Bursten, ***907** sued

Eastpointe for failing to adequately maintain and repair the roof and air conditioning system of the condominium building before, between, and after two hurricanes hit south Florida in October 2004. The condominium building sustained severe water intrusion, which allegedly caused pervasive mold and other damage to Bursten’s unit. Bursten brought claims for negligence, breach of fiduciary duty, and breach of contract.

During the times relevant to this appeal, Eastpointe had insurance liability coverage under two different policies: a commercial general liability policy from QBE Insurance Corporation (“QBE”), and a non-profit management and organization liability policy, or directors and officers (“D & O”) policy from Travelers. The D & O policy contained a “property damage” exclusion, which excluded coverage 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.”

Eastpointe tendered notice of the Bursten complaint to both QBE and Travelers. QBE, accepting defense of the Bursten suit under a reservation of rights, designated and paid for defense counsel. Travelers, however, denied coverage and disclaimed any duty to defend pursuant to the property damage exclusion. Eastpointe then hired its own lawyer to defend its interests in the Bursten lawsuit. The Bursten suit proceeded to trial, where Eastpointe—jointly represented by QBE’s designated counsel and its own personal counsel—obtained a defense verdict on all counts.

Eastpointe then filed this declaratory judgment and breach of contract action, seeking to establish Travelers's duty to defend under the D & O policy and to recover attorney's fees paid in the underlying Bursten suit. After considering the parties' cross-motions for summary judgment and hearing oral argument, the district court entered summary judgment in Travelers's favor. Because the sole basis for Bursten's lawsuit was water damage to the condominium property that resulted in leaking, mold, and loss of use of the owner's unit, the district court determined that the underlying claim arose out of damage or destruction to tangible property. The district court therefore concluded that the property damage exclusion applied and that Travelers had no duty to defend Eastpointe. This appeal followed.

II.

We review the district court's grant of summary judgment *de novo*. *Rine v. Imagitas, Inc.*, 590 F.3d 1215, 1222 (11th Cir.2009). Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact and compels judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). We likewise review the district court's determination of coverage under an insurance policy *de novo*. *Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co.*, 254 F.3d 987, 1003 (11th Cir.2001). Because our subject matter jurisdiction in this case is based on diversity of citizenship, 28 U.S.C. § 1332, “Florida law governs the determination

of the issues on this appeal.” *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1230 (11th Cir.2004).

In interpreting insurance contracts, the Florida Supreme Court has made clear that “the language of the policy is the most important factor.” *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So.2d 528, 537 (Fla.2005). “Under Florida law, insurance contracts are construed according to their plain meaning,” and any ambiguities *908 must be construed in favor of the insured. *Id.* at 532. Policy provisions are ambiguous if “susceptible to more than one reasonable interpretation, one providing coverage and the [] other limiting coverage.” *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla.2000).

Eastpointe presents three main arguments on appeal: (1) that the origin of the claims in this case is a breach of fiduciary duty, so the fact that the breach resulted in property damage does not trigger the property damage exclusion; (2) that the policy language is ambiguous, as demonstrated by the fact that two district judges have reached different interpretations of the same policy language, and therefore must be construed against Travelers; and (3) that any wrongful acts committed by Eastpointe necessarily relate to property, so enforcing the property damage exclusion would render the policy illusory. We address each of these arguments in turn.

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.” According to the Florida Supreme Court, the phrase “arising out of” should be interpreted broadly and encompasses all of the following meanings: “originating from, having its origin in, growing out of, flowing from, incident to, or having a connection with.” *Taurus Holdings*, 913 So.2d at 539 (internal quotation marks omitted).

Eastpointe's putative breach of fiduciary duty plainly “ha[d] a connection with” the property damage alleged in Bursten's complaint. *Id.* The premise of Bursten's breach of fiduciary duty claim was that Eastpointe failed in its duty to properly maintain, repair, and replace the building's roof and air conditioning units, and that, as a result, water infiltrated the building and caused extensive damage to Bursten's unit. Bursten's claim thus depended upon the existence of the property damage. *See James River Ins. Co. v. Ground Down Eng'g, Inc.*, 540 F.3d 1270, 1275 (11th Cir.2008) (no insurance coverage under pollution exclusion containing “arising out of” language, because “[a]lthough the alleged conduct was negligence in performing the site assessment, Priority's claim depends upon the existence of the environmental contamination”). In light of the broad interpretation given to the phrase “arising out of,” we agree with the district court that the property damage exclusion applies to Bursten's breach of fiduciary duty claim.

Second, we are not convinced that the policy language is ambiguous. While it is true that ambiguous policy provisions are

interpreted strictly against the insurer and ambiguous policy exclusions are construed even more strictly, these rules apply “ ‘[o]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction.’ ” *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245, 1248 (Fla.1986) (alteration in original) (quoting *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 942 (Fla.1979)).

Eastpointe directs our attention to *Lumbermens Mutual Casualty Co. v. Dadeland Cove Section One Homeowners' Ass'n (Lumbermens I)*, No. 06-22222-CIV, 2007 WL 2979828 (S.D.Fla. Oct.11, 2007), in which a judge in the Southern District of Florida interpreted a property damage exclusion similar to the exclusion we consider here. That district judge found that the property damage exclusion did not apply to breach of fiduciary duty claims brought *909 against a condominium homeowners' association after the association purportedly allowed the common areas to deteriorate. Relying on *Lumbermens I*, Eastpointe argues that the property damage exclusion must be ambiguous because the *Lumbermens I* court came to the opposite conclusion as the district judge in this case. However, the fact that different judges have reached different interpretations of similar policy language does not necessarily mean that the language is ambiguous. *See, e.g., Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1137-38 (Fla.1998) (finding an exclusion unambiguous even though courts in other jurisdictions had found the same clause ambiguous); *Indian Harbor Ins. Co. v. Williams*, 998 So.2d 677, 678-79 (Fla. 4th

DCA 2009) (finding an exclusion unambiguous even though one trial judge had ruled that the insured was not entitled to coverage and another trial judge had reached the opposite conclusion).

Neither does the fact that the *Lumbermens* case was affirmed on appeal alter our analysis. We affirmed in an unpublished opinion. See *Lumbermens Mut. Cas. Co. v. Dadeland Cove Section One Homeowners Ass'n (Lumbermens II)*, 295 Fed.Appx. 361 (11th Cir.2008). Unpublished opinions are not controlling authority and are “persuasive only to the extent that a subsequent panel finds the rationale expressed in that opinion to be persuasive after an independent consideration of the legal issue.” *Twin City Fire Ins. Co. v. Ohio Cas. Ins. Co.*, 480 F.3d 1254, 1260 n. 3 (11th Cir.2007). The one-sentence legal analysis in *Lumbermens II* provides little guidance here. See *Lumbermens II*, 295 Fed.Appx. at 362 (“We find no error in the court's application of the law in its March 27 order.”). It is also worth noting that *Lumbermens* appealed from the denial of its motion for relief under Federal Rule of Civil Procedure 60(b), so the court's consideration was governed by a different standard than the summary judgment we affirm today. See *Nisson v. Lundy*, 975 F.2d 802, 806 (11th Cir.1992) (noting that a party seeking relief under Rule 60(b) based on a court's mistake generally must show “a ‘plain misconstruction’ of the law and the erroneous application of that law to the facts” (quoting *Compton v. Alton Steamship Co.*, 608 F.2d 96, 104 (4th Cir.1979))).

As for Eastpointe's third argument, we do not agree that enforcing the property damage exclusion would render the D & O policy illusory. The fact that Eastpointe's primary responsibilities relate to the operation and maintenance of tangible property does not mean that the property damage exclusion bars coverage for all claims that might be asserted against Eastpointe. The claims at issue here are excluded because they arise out of damage to Bursten's property. But there are other claims that could be asserted against Eastpointe that would not fall within the property damage exclusion and might therefore be covered by the D & O policy. See, e.g., *Lime Tree Vill. Cmty. Club Ass'n v. State Farm Gen. Ins. Co.*, 980 F.2d 1402, 1405–06 (11th Cir.1993) (finding that D & O insurer had duty to defend homeowners' association against claims of slander or disparagement of title, breach of residential development's declaration of covenants and restrictions, and restraint of trade).

III.

Because Bursten's claims fell within the D & O policy's property damage exclusion, Travelers had no duty to defend Eastpointe against the claims brought in Bursten's original complaint. Accordingly, the district court's entry of summary judgment in favor of Travelers is **AFFIRMED**.

Parallel Citations

2010 WL 1995841 (C.A.11 (Fla.))

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

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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,

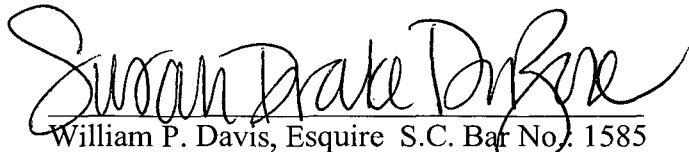
v.

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.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210(g), *SCACR*, the undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and does not contain any other material.


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November 1, 2012

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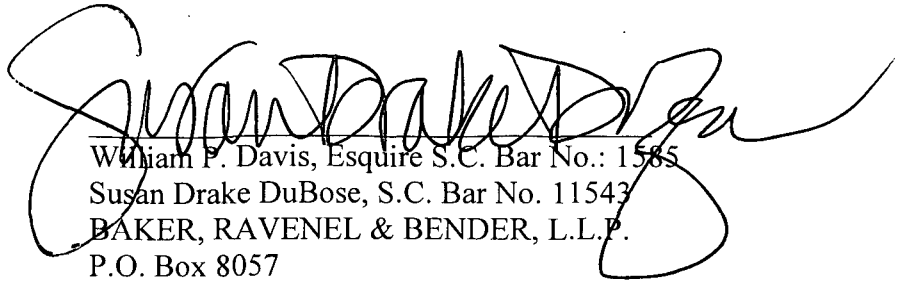
Travelers Indemnity Company, M.U.I. Carolina Corporation, Kensington Place Owners Association, Inc., Regent Carolina Corporation and Regent Corporation, ... Defendants,

Of whom Travelers Indemnity Company is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal complies with the August 13, 2007 order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings" and, pursuant to Rule 210(g), SCACR contains all material proposed to be included by any of the parties and does not contain any other material.

(Signature on following page)



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November 7, 2012
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

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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,

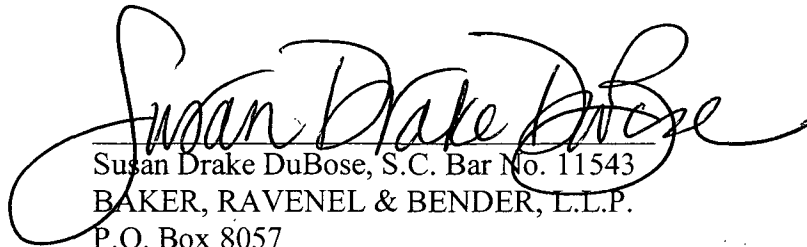
Of whom Travelers Indemnity Company is the Appellant.

PROOF OF SERVICE

I, Susan Drake DuBose, attorney of Baker, Ravenel & Bender, L.L.P., attorneys for Appellant, do hereby certify that on the 2nd day of November 2012, I have served the following named attorneys with the Record on Appeal by mailing copies of same by United States Mail, postage prepaid, to the following at the address shown below:

(Signature on following page)

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November 2, 2012
Columbia, South Carolina