

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No. 2016-CP-26-4464

RECEIVED

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SC Court of Appeals

Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, Whitmel L. Brown, Jr., Gary Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson Plaintiffs,

v.

Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach and Racquet Club Condominium Association, Inc. Respondents,

v.

Great American Insurance Company Appellant.

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court correctly determine that Great American Insurance Company ("Great American") had a duty to defend its Insureds based on Great American's admissions, the allegations of the underlying action, and the applicable policy language?

STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court correctly determine that Great American Insurance Company ("Great American") had a duty to defend its Insureds based on Great American's admissions, the allegations of the underlying action, and the applicable policy language?

STATEMENT OF THE CASE AND FACTS

I. The Underlying Action.

Tilghman Beach and Racquet Club is a condominium community in North Myrtle Beach. On July 7, 2016, Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, Whitmel L. Brown, Jr., Gary Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson (“Plaintiffs”) filed their original Complaint against Tilghman Beach and Racquet Club Condominium Association, Inc. (“HOA”) and the members of its Board of Directors (collectively, “TBRC”). (Complaint, R. at ____). Plaintiffs alleged numerous causes of action stemming from what they perceived as failures by TBRC to maintain adequate reserves for the repair of common elements and to maintain adequately the common elements of the condominium community. (*Id.*). Among other things, Plaintiffs sought to recover alleged diminution in value of the Plaintiffs’ individual condominium units. (*Id.* ¶¶ 51, 64, 65, R. at ____). After preliminary motion practice, which included a removal and remand¹ and several amended pleadings, Plaintiffs filed a Third Amended Complaint on March 8, 2017 that TBRC timely answered.² (Third Amended Complaint, Answer to Third Amended Complaint, R. at ____).

¹ The parties agreed to the remand of the underlying action based on Plaintiffs’ stipulation that “Plaintiffs will seek to maintain this lawsuit, whether in state or federal court, solely and only in their individual capacities and will not seek to maintain this case as a class action or derivative action.” (Stipulation, R. at ____).

² The Third Amended Complaint repeated the same material allegations as the earlier complaints and provided additional factual allegations as to the members of TBRC’s Board of Directors. (*Compare* Complaint, R. at ____, Amended Complaint, R. at ____, Second Amended Complaint, R. at ____, *with* Third Amended Complaint, R. at ____). Plaintiffs’ Complaint, Amended Complaint, Second Amended Complaint, and Third Amended Complaint are collectively referred to as “Complaints.”

II. TBRC sues Great American.

On March 28, 2017, TBRC filed a Consent Motion for Leave to file a Third-Party Complaint against Great American, which was granted on May 2, 2017. (Consent Motion, Order, R. at ____). On the same day, TBRC filed the Third-Party Complaint, alleging claims for breach of contract, attorney's fees under S.C. Code Ann § 38-59-40, bad faith, and declaratory judgment. TBRC attached and incorporated into the Third-Party Complaint a copy of ExecPro Community Association Solution Insurance Policy No. EPP3654704-01 with a Policy Period of February 10, 2016 to February 10, 2017 ("2016 Policy"). (Third-Party Complaint, R. at ____). Great American filed an Answer on July 10, 2017, which attached as separate exhibits, copies of: (1) ExecPro Community Association Solution Insurance Policy No. EPP3654704-00 with a Policy Period of February 10, 2015 to February 10, 2016 ("2015 Policy") and (2) the 2016 Policy (the 2015 and 2016 Policies are collectively referred to as the "Great American Policies"). (Answer and Exhibits, R. at ____). On August 30, 2017, Great American filed an Amended Answer and Counterclaim, adding counterclaims for rescission of the Great American Policies. (Amended Answer and Exhibits, R. at ____).³

A. The Great American Policies and Great American's admissions.

The Great American Policies provide director and officer ("D&O") coverage on a claims made basis as follows:

Section I. Insuring Agreements

A. If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against any **Insured Persons** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Insured Persons**, **Loss and Costs of Defense** resulting from such **Claim**,

³ This claim for rescission came more than a year after Great American received notice of the underlying action on July 13, 2016. (See Third-Party Complaint at ¶ 12, Amended Answer and Counterclaim at ¶ 10, R. at ____).

except for any **Loss** and **Costs of Defense** which the **Organization** or any **Subsidiary** actually pays as indemnification.

B. If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against any **Insured Persons** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Organization** or any **Subsidiary**, **Loss** and **Costs of Defense** resulting from such **Claim**, but only to the extent the **Organization** or any **Subsidiary** is required or permitted by law to indemnify the **Insured Persons**.

C. If during the **Policy Period** or the **Discovery Period** any **Claim** is first made against the **Organization**, any **Subsidiary**, or the **Property Manager** for a **Wrongful Act**, the **Insurer** shall pay on behalf of the **Organization**, any **Subsidiary**, or the **Property Manager**, **Loss** and **Costs of Defense** resulting from such **Claim**.

The Insurer has the right and duty to defend any Claim to which this insurance applies, even if the allegations of such Claim are groundless, false or fraudulent.

(2015 Policy, 2016 Policy, R. at ____).⁴

Great American admits the authenticity of the Great American Policies and that the 2016 Policy is the controlling policy with respect to TBRC's claim. (Amended Answer ¶¶ 5, 6, 34, R. at ____). Great American also admits the authenticity of the Complaints. (See *Id.* ¶¶ 7, 38, R. at ____). Great American admits that TBRC is an Insured as defined by the policy (*Id.* ¶¶ 5, 37, R. at ____), that the Complaints allege a claim within the Policy Period for the 2016 Policy (*Id.* ¶ 8, R. at ____), and that the Complaints in the underlying action allege Wrongful Acts by the Insured for purposes of the 2016 Policy (*Id.* ¶ 9, R. at ____).⁵

On the issue of notice, Great American admits receiving demand letters from TBRC dated August 10, 2016, August 25, 2016, and November 3, 2016, and admits that it denied coverage and a defense to TBRC, its Insured, in this matter. (*Id.* ¶ 10, R. at ____). Great American further

⁴ The terms in bold are defined terms within the Great American Policies. TBRC has capitalized all terms defined in the Great American Policies throughout this brief.

⁵ The same is true with respect to Great American's Second Amended Answer and Counterclaim, which was filed after the motion at issue was heard, but before the circuit court entered its order. (See Second Amended Answer and Counterclaim at ¶¶ 5, 6, 8, 9, R. at ____).

admits the authenticity of an August 1, 2016 letter in which it acknowledged receiving notice of the underlying action on July 13, 2016. (*Id.* ¶¶ 11; R. at ____). Great American also admits the authenticity of a November 3, 2016 letter transmitting a copy of the Plaintiffs' Second Amended Complaint. (*Id.* ¶ 10, R. at ____).

Great American does not dispute that TBRC's claim with respect to the underlying action falls within the scope of the coverage language. It, instead, argues that certain policy exclusions apply. In its Statement of the Facts in this appeal, Great American again admits the existence of the Great American Policies, that TBRC is an Insured, and that the Complaints in the underlying action constitute claims alleging Wrongful Acts under the Great American Policies.

B. TBRC moves for Judgment on the Pleadings as to Great American's duty to defend in the underlying action.

On January 15, 2018, TBRC filed a Motion for Judgment on the Pleadings as to Great American's duty to defend. (Motion, R. at ____). The grounds for this motion were that Great American's Amended Answer admitted facts establishing, as a matter of law, that Great American had a duty to defend TBRC in the underlying action.

On February 23, 2018, Great American filed a Motion to Amend with a proposed Second Amended Answer and Counterclaim. (Motion and Proposed Answer, R. at ____). In this proposed Second Amended Answer and Counterclaim, Great American sought to allege, for the first time, that the 2015 Policy controlled. (*See id.* at ¶ 6, R. at ____). Both motions were heard on March 27, 2018.

On April 23, 2018, the circuit court entered an order allowing Great American to amend its answer and counterclaims, but only as to policy defenses and counterclaims that had arisen since it filed its amended answer. (Order, R. at ____). Great American was not allowed to amend its answer and counterclaims to assert that the 2015 Policy controlled. (*Id.*). Great American filed

a Second Amended Answer and Counterclaim on April 23, 2018, which, among other things, voluntarily deleted the rescission counterclaim for the 2016 Policy. (Second Amended Answer and Counterclaim, R. at ____).

On June 15, 2018, the circuit court entered an order on TBRC's Motion for Judgment on the Pleadings, granting a declaratory judgment that "Great American had and has, under its 2016 Great American Policy, a duty to defend Defendants/Third-Party Plaintiffs . . . against the allegations in Plaintiffs' original Complaint and the allegations of the Complaints subsequently filed by Plaintiffs." (Order, R. at ____). With respect to whether any exclusion might apply, the circuit court found that Great American had abandoned all of its arguments except those pertaining to Exclusion D(2) and "other insurance" and that Great American had failed to demonstrate that any other exclusion might apply to the Complaints.⁶ (Order at 9, R. at ____). As for Exclusion D(2), the circuit court found that "not all of the allegations in Plaintiffs' Complaints unambiguously fall with the terms of [this exclusion]" and therefore the duty to defend remains. (Order at 10, R. at ____). The circuit court further found that there was not an "other insurance" exclusion at issue here because there was not another policy in place covering the same risk and same interest and because language of the policies at issue did not give rise to an exclusion. (Order at 13-14, R. at ____).

Great American did not seek to alter or amend either of these orders. Instead, on June 22, 2018, it filed a Notice of Appeal solely as to the order granting Judgment on the Pleadings.

⁶ Although Great American refers to Exclusions C, G, and H in its Statement of Facts, it does not make any argument or cite any cases with respect to these exclusions; therefore, any argument relating to these provisions has also been abandoned on appeal. *See Shealy v. Doe*, 370 S.C. 194, 205-06, 634 S.E.2d 45, 51 (Ct. App. 2006) ("[W]hen an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal.").

STANDARD OF REVIEW

This appeal arises from the grant of Judgment on the Pleadings as to some, but not all, of the claims raised by TBRC against Great American. The circuit court considered the pleadings and their attachments and found that the 2016 Policy requires Great American to defend TBRC in the underlying action. In reaching this result, the circuit court relied on Rule 12(c), SCRCP and S.C. Code Ann. § 15-53-20 (authorizing courts to declare “rights, status and other legal relations whether or not further relief is or could be claimed” under the South Carolina Uniform Declaratory Judgments Act (S.C. Code Ann. §§ 15-53-10 through -140, the “Act”) and Rule 54(b), SCRCP (“[w]hen more than one claim for relief is presented in an action, whether as a claim. . . or third-party claim . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.”). (Order, R. at ___).

As noted by Great American, South Carolina courts consider judgment on the pleadings to be a drastic procedure. *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). As a result, “pleadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties.” *Id.* However, “[a] motion for judgment on the pleadings should be sustained when, under the admitted facts, the moving party would be entitled to judgment on the merits, without regard to what the findings might be on the facts on which issue is joined.” *Wooten v. Standard Life & Cas. Ins. Co.*, 239 S.C. 243, 248, 122 S.E.2d 637, 639 (1961) (quoting 41 Am. Jur. *Pleading* § 336). “It has been held that a judgment on the pleadings is allowable, not for lack of proof, but for lack of an issue; hence, it is proper where the pleadings entitled the party to judgment without proof, as where they disclose all the facts, or where the pleadings present no issue of fact or where the pleadings, under other circumstances, present an immaterial issue.” *Id.*, 122 S.E.2d at 640.

With respect to the circuit court's analysis of the Great American Policies, construction of an unambiguous contract is a matter of law for the Court. *Pearson v. Church of God*, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996) (citing *Rental Unif. Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 676, 301 S.E.2d 142, 144 (1983)). In addition,

Words in insurance contracts are to be given their "plain, ordinary and popular meaning." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012) (internal citations omitted). Whether language is ambiguous is a question of law for the Court, and any ambiguous terms are to be construed liberally in favor of the insured. *Id.* Further, exclusionary terms in a policy are narrowly construed to the benefit of the insured. *McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 426 S.E.2d 770 (1993).

Hutchinson v. Liberty Life Ins. Co., 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013).

ARGUMENT

Under South Carolina law, a liability insurer like Great American has two separate duties to its Insureds, the duty to indemnify and the duty to defend. *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009). The duty to defend is distinct from and broader than the duty to indemnify. *Id.* at 544, 677 S.E.2d at 578; *Ross Dev. Corp. v. Fireman's Fund Ins. Co.*, 809 F. Supp. 2d 449, 457 (D.S.C. 2011). This appeal solely relates to Great American's duty to defend.

The determination of whether there is a duty to defend is made by examining the allegations of the complaint against the insured in light of the applicable policy language. *City of Hartsville*, 382 S.C. at 544, 677 S.E.2d at 578; *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 491, 709 S.E.2d 71, 77 (Ct. App. 2011). South Carolina courts require that the policy be broadly construed in favor of the insured, and thus, in favor of the duty to defend. *See, e.g., Town of Duncan v. State Budget & Control Bd.*, 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997); *Torrington Co. v. Aetna Cas. & Sur. Co.*, 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975); 14 Couch on Ins. § 200:12 (3rd ed.). If the underlying complaint against the insured creates "a possibility of coverage under an

insurance policy, the insurer is obligated to defend.” *City of Hartsville*, 382 S.C. at 543, 677 S.E.2d at 578 (emphasis added). The circuit court’s order includes a lengthy discussion of this duty, which TBRC incorporates here by reference. (Order at 5-7, R. at ____). Great American does not challenge this standard in its appeal, but instead argues (1) that the partial grant of Judgment on the Pleadings was procedurally inappropriate, (2) that the “property damage” exclusion applies and precludes coverage, and (3) that an “other insurance” exclusion applies and renders Great American’s obligations excess rather than primary.

I. The 2016 Policy controls.

The circuit court found that the 2016 Policy Controls. (Order at 8, R. at ____). Great American does not appeal that finding, but spends much of its brief trying to sow confusion by discussing the 2015 Policy.

As discussed above, Great American admits that two separate insurance policies, with two separate policy numbers, premiums, policy periods and declarations pages, were issued by Great American to TBRC, the 2015 Policy and the 2016 Policy. Although Great American concedes in its Statement of the Facts that it issued two separate policies, it attempts to distract from this fact by characterizing the 2016 Policy as a renewal of the 2015 Policy and claiming the two policies were one common “Policy” with different policy periods.

This attempt must fail. Under South Carolina law, the renewal of an insurance policy, even if it contains the same terms, constitutes a new contract between the parties. *Knight v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 20, 22, 374 S.E.2d 520, 522 (Ct. App. 1988) (“general rule is that the renewal of a policy of insurance for a fixed term is in effect a new contract and must contain all the essentials of a valid contract”); *In re Georgetown Steel Co., LLC*, 318 B.R. 313, 331 (Bankr. D.S.C. 2004) (“South Carolina holds that a renewal of an insurance contract is a new contract, unless the policy requires both parties to renew and no terms of the policy (including the premium),

are changed from year to year.”). Here, nothing in the 2015 Policy required both TBRC and Great American to renew the 2015 Policy in 2016. (Great American Policies, R. at ____). Thus, the 2015 and 2016 Policies are different policies for purposes of South Carolina law.

Furthermore, Great American repeatedly stated in its coverage denial letters that the relevant Policy Period was February 10, 2016 to February 10, 2017, which is the Policy Period of the 2016 Policy. (8/1/16 letter, 10/12/16 letter, 11/28/16 letter, R. at ____). As a result, Great American is now estopped from asserting that a different policy applies because a liability carrier is bound by the defenses presented in its coverage letters. See *Washington v. Nat'l Serv. Fire Ins. Co.*, 252 S.C. 635, 641, 168 S.E.2d 90, 92–93 (1969) (“It is well settled that an insurer which has denied coverage on some other basis is precluded from defending against an action on a liability policy on the ground that the insured failed to comply with its requirements as to notice and forwarding of suit papers.”); *Baldwin v. Metro. Life Ins. Co.*, 176 S.C. 250, 180 S.E. 31 (1935) (finding that an insurer’s failure to assert a three month investigation period before denying plaintiff’s claim constituted waiver of that provision in the insurance contract).

Similarly, as discussed above, Great American’s answers repeatedly reference the controlling policy number here as EPP3654704-01, the 2016 Policy.⁷ By way of example, each answer “craves reference to policy number EPP3654704-01 for its terms and conditions,” admits that Plaintiffs’ Complaints here “meet policy number EPP3654704-01’s definition of a ‘Claim,’” admits that Plaintiffs’ Complaints “allege acts or omissions by the Third-Party Plaintiffs that meet policy number EPP3654704-01’s definition of ‘Wrongful Act,’ as that term is defined in the policy,” and asserts “one or more exclusionary clauses in its policy of insurance number

⁷ Great American’s motion to amend its answer on this point was denied by the circuit court. (Order, R. at ____). Great American has not appealed that ruling.

EPP3654704-01 . . . ” as a basis for refusing to defend. (See Answer ¶¶ 6, 8, 9, and 27, Amended Answer, ¶¶ 6, 8, 9, 27, Second Amended Answer ¶¶ 6, 8, 9, and 27, R. at ____). These admissions are binding. See *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) (“Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions.”) (citing *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964)).

Finally, the language of both Great American Policies establishes that the applicable policy is the 2016 Policy. Page 1 of each policy states: “**THIS IS A CLAIMS MADE POLICY.**” (Amended Answer at Exs. 1 and 2, p.1, R. at ____). Insuring Agreements A, B, and C in Section I of each policy provides coverage for “any **Claim** [that] is first made against any **Insured Persons** for a **Wrongful Act** . . .” during the **Policy Period**. (*Id.*) A claim includes “a civil proceeding . . . commenced by service of a complaint . . .” (*Id.* at p.2, R. at ____). The Claim here is the original Complaint in the underlying action, which was filed on July 7, 2016. This date fits squarely within the Policy Period for the 2016 Policy.⁸

⁸ Great American attempts to avoid the plain language of the 2016 Policy by asserting that Plaintiffs’ claims “relate back” to the 2015 Policy because they are the same claims as those discussed in the April 2015 letter of Steele B. Windle, which Great American received in April 2015. As an initial matter, the circuit court did not allow Great American to amend its answer to take this position. (Order and Exhibit A, R. at ____). In the April 2015 letter, Windle threatened to bring a lawsuit as a plaintiff rather than seeking a defense for an action in which he is a defendant. Moreover, the matters raised in that letter are unrelated to the allegations raised in Plaintiffs’ Complaints and thus, they are not the same claim. (*Compare* Letter, R. at ____, *with* Complaints, R. at ____).

II. Great American has a duty to defend under the 2016 Policy.

A. Given Great American's admissions, the circuit court correctly granted TBRC's Motion for Judgment on the Pleadings with respect to the duty to defend.

As discussed earlier, Great American admits the authenticity of Plaintiffs' Complaints. Those Complaints, when construed broadly in favor of TBRC, clearly allege a possibility of coverage under the 2016 Policy given the admissions contained in Great American's answers. *Allstate Ins. Co. v. Wilson*, 259 S.C. 586, 592, 193 S.E.2d 527, 530 (1972) ("it is generally recognized that the insurer is under a duty to defend a suit against the insured where the complaint in such suit alleges a state of facts within the coverage of the policy"). Great American's pleadings do not dispute this point. Instead, Great American argues that the grant of Judgment on the Pleadings as to the duty to defend was procedurally inappropriate because it did not resolve all of the issues raised by TBRC or those presented in Great American's Counterclaims.

1. Judgment on the Pleadings was appropriate under the Act and the South Carolina Rules of Civil Procedure.

Rule 12(c), SCRPC, provides that, "[a]fter the pleadings are closed but within such time as not to delay the trial, *any party* may move for judgment on the pleadings." (emphasis added). Thus, the rule may be invoked by plaintiffs as well as defendants. The facts required to decide the issue of the duty to defend under the 2016 Policy were undisputed and squarely before the circuit court at the pleadings stage.

The admissions and attachments to the pleadings in this case clearly distinguish it from *Wooten v. Standard Life & Cas. Ins. Co.*, 239 S.C. 243, 122 S.E.2d 637 (1961), a case cited repeatedly in Great American's brief. In *Wooten*, the insurer sought judgment on the pleadings in a coverage action seeking benefits under a life insurance policy because the complaint was filed outside the statute of limitations. The circuit court denied the motion because there were issues of

fact relating to when the claim accrued and the effect of the notice given. The South Carolina Supreme Court affirmed, noting:

We cannot determine from the record before us when the respondent had the right to institute and maintain his action upon the policy in question. The record before us does not contain (1) the policy in question; (2) the notice given by the respondent . . . ; and (3) the letter of the appellant to the respondent The policy could contain a contractual limitation as to the time in which an action may be filed upon such policy. We cannot anticipate what factual conclusions would be reached when the above mentioned policy, notice and letter are before the Court.

Id. at 249, 122 S.E.2d at 640. It is these facts, which are markedly different from the facts presented to the circuit court in this case, which drove the result in *Wooten*. The *Wooten* court acknowledged that judgment on the pleadings is appropriate in other cases. “Certainly, if the facts were admitted, then only an issue of law would be raised.” *Id.* This is exactly the sort of case the *Wooten* court had in mind. The Complaints in the underlying action and the pleadings as between TBRC and Great American, together with the referenced and attached exhibits, provide all of the admitted information required to make a determination on the merits of the duty to defend.

Great American also attempts to dodge the effects of its admissions by citation to *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009) based on the following quotation: “the duty to defend may also be determined by facts outside the complaint that are known to the insurer.” Relying on this isolated language, Great American suggests in Section I of its brief that an insurer’s duty to defend can never “be resolved on a motion for judgment on the pleadings, without the development of a factual record to ascertain what facts may be known by the insurer outside the allegations contained in the pleadings.” Great American did not raise this argument to the circuit court and it is not preserved for this Court’s review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (“It is axiomatic that an issue

cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”).

Nevertheless, *City of Hartsville* did not change the general rule that “the allegations of the [underlying complaint] determine the insurer’s duty to defend.” 382 S.C. at 544, 677 S.E.2d at 578; see *Walde v. Ass’n Ins. Co.*, 401 S.C. 431, 440, 737 S.E.2d 631, 635 (Ct. App. 2012) (“Questions of . . . the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the third party’s complaint. . . . If [the] alleged acts create ‘a possibility of coverage under an insurance policy, the insurer is obligated to defend.’”). Instead, the court merely held that, where the underlying complaint did not allege a claim possibly within the coverage of the insurance policy, the liability carrier might nevertheless have a duty to defend if facts in its file demonstrated a potentially covered claim.

In addition, a declaratory judgment on Great American’s duty to defend was appropriate under the South Carolina Rules of Civil Procedure and the provisions of the Act. Rule 57, SCRPC, provides that the “existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate” and states that a circuit court “may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar.” Rule 54, SCRPC also contemplates partial judgments in appropriate cases.

This is consistent with the Act’s stated purpose, which is “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It is to be liberally construed and administered.” S.C. Code Ann. § 15-53-130. This purpose is further reflected in S.C. Code Ann. § 15-53-30 (“[a]ny person interested under a . . . written contract or other writings constituting a contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations

thereunder”) and S.C. Code Ann. § 15-53-20 (“Courts of record within their respective jurisdictions shall have power to declare rights, status or other legal relations whether or not further relief is or could be claimed.”). The circuit court’s ruling, which was based on the admitted facts and contracts, was therefore also appropriate under these provisions and provided relief from “uncertainty and insecurity” with respect to the parties’ rights under the insurance contracts at issue.

2. Great American’s Counterclaim for rescission does not render the grant of Judgment on the Pleadings premature.

Great American argues in its brief that its pending, but unproven, counterclaim for rescission of the 2015 Policy precluded the granting of Judgment on the Pleadings. The fact that the circuit court’s ruling did not resolve the entire case does not change the analysis as to whether Judgment on the Pleadings was proper with respect to the duty to defend. The Act and the Rules of Civil Procedure both contemplate partial judgments. *See* Rule 54(b), SCRPC; S.C. Code Ann. § 15-53-20.⁹

⁹ Appellate courts in other jurisdictions have uniformly held that a court may enter a declaratory judgment even though other issues, such as damages, remain open. *See Powell v. McCormack*, 395 U.S. 486, 499 (1969); *Nautilus Ins. Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 379 (4th Cir. 1994), *overruled on other grounds by Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). A declaratory judgment may be entered to answer the particular question on which a declaration was sought, even though litigation remains ongoing between the parties. *Bank One Ky., NA v. Woodfield Fin. Consortium LP*, 957 S.W.2d 276, 280-81 (Ky. Ct. App. 1997) (“the mere fact that litigation may not be terminated by the declaration is not grounds for denying declaratory relief because the statute itself contemplates that further litigation may result. If an advance determination of the rights, duties or liabilities of the parties will ‘eliminate or minimize the risk of wrong action or mistakes,’ then the court may make a declaration.”) (alteration in original) (internal citations omitted); *Junkins v. Branstad*, 421 N.W.2d 130, 134 (Iowa 1988) (holding court may not refuse declaratory “relief simply because such relief would not terminate the entire controversy”); *Kronovet v. Lipchen*, 288 Md. 30, 59, 415 A.2d 1096, 1112 (Md. 1980) (court may not “refuse a declaratory judgment ‘merely because it may be preliminary to further litigation, if [the declaratory judgment] terminates and decides the particular legal question at issue.’”).

In addition, as found in the circuit court's order and discussed above, the 2016 Policy controls and there is not a pending claim for rescission of the 2016 Policy. (Order at 8, Second Amended Answer and Counterclaim, R. at ____). Should this Court determine that the 2015 Policy applies, a pending claim for rescission does not affect the insurance company's duty to defend until the policy is actually rescinded. See *Fed. Ins. Co. v. Tyco Int'l Ltd.*, No. 600507/03, 2004 WL 583829, at *6 (N.Y. Sup. Ct. Mar. 5, 2004) ("Until [the insurer's] rescission claims are litigated in its favor and the Policies are declared void *ab initio*, they remain in effect and bind the parties."); *Gon v. First State Ins. Co.*, 871 F.2d 863, 864-65 (9th Cir. 1989) (affirming district court's order that insurer pay insured's defense costs after the district court held insurer's rescission action "in abeyance"); *Indep. Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 654 F.Supp. 1334, 1345-46 (D.D.C. 1986), *rev'd in part on other grounds*, 944 F.2d 940 (D.C. Cir. 1991) (finding that insured's primary carrier had duty to defend its insured until the insurer proved that the policy was "negated by fraud"); *Nat'l Union Fire Ins. Co. of Pitt. v. Brown*, 787 F.Supp. 1424, 1427 n.8 (S.D.Fla. 1991) (court could not declare directors and officers policy *void ab initio* until the insurer's rescission action was "fully litigated"; until then, policy remained in effect); *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 683 F.Supp. 1139, 1151-52 (W.D. Mich. 1988) (when insurer's motion for summary judgment on rescission claim was denied, due to a genuine dispute as to whether the insured obtained the policy by fraud and misrepresentation, the insurer had duty to defend).

Great American does not contend that the cases cited by the circuit court do not stand for the proposition cited or have been overruled. Instead, Great American quarrels with whether it is "settled law" that the duty to defend continues until the insured actually proves its rescission claim. Great American cites to four cases that it contends stands for the opposite proposition. Three of

these cases are United States District Court orders from California. Of those three, *Atmel Corp. v. St. Paul Fire & Marine Ins. Co.*, 416 F.Supp.2d 802, 807 (N.D. Cal. 2006) contains the referenced quote, although the discussion relates to insurance rescission claims in California generally and not the specific issue here. *Rocklin Park Place Condos. Owners Ass'n v. Liberty Ins. Underwriters, Inc.*, No. 2:12-CV-02247-TLN, 2013 WL 4828154 (E.D. Cal. Sept. 6, 2013) is an unpublished order following *Amtel*. The third case does not relate to the stated proposition at all. See *Ironwood Country Club v. Liberty Ins. Underwriters, Inc.*, No. EDCV13-00996-VAP(DTBX), 2014 WL 12597633 (C.D. Cal. Jan. 16, 2014) (granting motion to amend to add rescission counterclaim). The fourth case, a New Jersey appellate decision, does not reference rescission. *CPS Chem. Co. v. Cont'l Ins. Co.*, 203 N.J.Super. 15, 495 A.2d 886 (App.Div.1985).

To the extent there is disagreement among other jurisdictions on this issue, the rule adopted by the circuit court, that there is a duty to defend until the insurer actually prevails on its rescission claim, comports with South Carolina insurance law and policy. South Carolina law has long required that parties must stand by the contracts they make and that one party cannot revoke a contract at will. *Cunningham v. Independence Ins. Co.*, 182 S.C. 520, 189 S.E. 800 (1937). An "agreement to defend contemplates the rendering of services." *Sloan Const. Co. v. Cent. Nat'l Ins. of Omaha*, 269 S.C. 183, 187, 236 S.E.2d 818, 820 (1977). As pointed out by the circuit court (Order at 5, R at ____), "[t]he defense of . . . suits by the insurer is a valuable right of the insured for which [the insured] pays and to which [the insured] is entitled by the very words of the policy." See *Nationwide Mut. Ins. Co. v. Simmonds*, 315 S.C. 404, 407, 434 S.E.2d 277, 278 (1993) (quoting *American Cas. Co. v. Howard*, 187 F.2d 322, 327 (4th Cir. 1951)). In addition, an insurance policy cannot be voided by an insurer for fraud unless and until the insurance company actually proves its claim for rescission. *Carroll v. Jackson Nat'l Life Ins. Co.*, 307 S.C. 267, 268-69, 414 S.E.2d

777, 778 (1992); *Strickland v. Prudential Ins. Co. of Am.*, 278 S.C. 82, 86-87, 292 S.E.2d 301, 304 (1982). Under these established principles, it stands to reason that the duty to defend, as an obligation under the insurance contract, runs until the insurer is excused from the contract. The argument advanced by Great American is contrary to this law and would allow the insurer to avoid its ongoing obligation to defend for the duration of the litigation simply by filing a counterclaim for rescission.

This result is also sound policy. First, such a rule will encourage the insurer to file a prompt claim for rescission at the time it becomes aware of facts it contends justify this relief. Second, this rule imposes the defense costs on the insurer: the party better able to pay them, the party that has collected a premium from the insured, and the party that has the burden of proof on the rescission counterclaim.

Lastly, even if a pending claim or counterclaim for rescission as to the 2015 Policy would prevent Judgment on the Pleadings as to Great American's duty to defend its Insureds in the ordinary case, an additional sustaining ground for the circuit court's ruling here is the fact that the admissions and allegations contained in Great American's answers demonstrate that Great American has waived any right to rescind the Great American Policies.¹⁰ The sole basis for Great American's rescission Counterclaims is its allegation that, in the application for the 2015 Policy, TBRC was asked whether "the Association anticipate[d] any major building renovations in the next year" and TBRC's agent answered "No." (Second Amended Answer and Counterclaim at ¶¶ 49-62, R. at ____). Great American alleges that, if that question had been answered "yes," and Great American knew "major building renovations" were "anticipate[d]", Great American would not have issued either the 2015 or the 2016 Policy. However, Great American admits facts

¹⁰ This Court may affirm for any reason appearing in the record. Rule 220, SCACR.

establishing that Great American had specific and detailed information about building renovations planned at TBRC by at least April 2015, and Great American failed to take any action to rescind the 2015 Policy and then subsequently issued the 2016 Policy.¹¹ (*Id.*, R. at ____). Great American took no steps to rescind the 2015 Policy until its Amended Answer containing the rescission Counterclaims was filed in this case on August 30, 2017, more than two years later.

Under South Carolina law, “[a]n insurance company may waive, or be estopped to assert, a ground for avoidance or forfeiture of an insurance policy, and the courts are prompt to seize on any circumstance which indicate a waiver on the part of the company or raise an estoppel against it.” *Dubuque Fire & Marine Ins. Co. v. Miller*, 219 S.C. 17, 27, 64 S.E.2d 8, 12 (1951) (quoting 45 C.J.S. *Insurance* 672, p. 610). A party seeking to rescind a contract must “promptly and unequivocally” provide notice of intent to rescind. *ZAN, LLC v. Ripley Cove, LLC*, 406 S.C. 404, 414, 751 S.E.2d 664, 670 (Ct. App. 2013). Where an insurer fails to act after it discovers a ground for rescission or after it learns facts that would put a reasonably prudent insurer on notice to inquire further, the right to rescind is waived. *Foremost Guar. Corp. v. Meritor Sav. Bank*, 910 F.2d 118,

¹¹ Great American’s Answers reference a potential claim made by Steele B. Windle in April 2015. (Amended Answer and Counterclaim at ¶ 36, Second Amended Answer and Counterclaim at ¶ 39, R. at ____). This letter provides detailed information on major construction and renovation work at TBRC as of the date of the letter and renovations that were planned for the future. (Letter, R. at ____). Although the letter was not attached to the Answers, it was referenced there and before the circuit court; therefore, it could properly be considered at the judgment on the pleadings stage. See *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (holding that the trial court did not convert a Rule 12(b)(6), SCRCP motion into a summary judgment motion by considering a document incorporated into the complaint, but not attached because “allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.”).

129 (4th Cir. 1990): Given the lengthy delay in seeking to rescind the 2015 Policy, Great American has waived any right to rescission as a matter of law.¹²

Moreover, Great American issued the 2016 Policy after learning about possible building renovations. It is well-established that “[a]n insurance company cannot avoid liability on the basis of facts known to it at the time the policy was delivered.” *Foremost Guar. Corp.*, 910 F.2d at 127 (quoting *Rutherford v. John Hancock Mut. Life Ins. Co.*, 562 F.2d 290, 293 (4th Cir. 1977)); see also *S. Farm Bureau Cas. Ins. Co. v. Ausborn*, 249 S.C. 627, 636, 155 S.E.2d 902, 907 (1967) (if the insurer, “at the inception of the contract, had knowledge of facts which render the policy void at its option, and the [insurer] delivers the binder as a valid one, it is estopped to assert such ground as a forfeiture.”); *Nationwide Life Ins. Co. v. Attaway*, 254 F.2d 30, 35 (4th Cir. 1958) (“If an insurance company issues a life policy with knowledge that the insured has misrepresented his physical condition and is in fact not in good health, the company is deemed to have waived the

¹²This is consistent with the law in other jurisdictions. See *Star Ins. Co. v. Sunwest Metals, Inc.*, 691 F. App'x 358, 361 (9th Cir. 2017) (insurer's rescission claim waived due to two year delay in rescinding policy based on misstatements in the application); *Mass. Bonding & Ins. Co. v. Anderegg*, 83 F.2d 622, 625-26 (9th Cir. 1936) (insurer's suit to rescind policy barred, in part, due to insurer waiting one month to announce intent to rescind policy after discovering fraud in the application, and waiting two additional weeks before commencing suit to rescind); *GuideOne Specialty Mut. Ins. Co. v. Congregation Adas Yereim*, 593 F.Supp.2d 471, 484 (E.D.N.Y. 2009) (ten-month delay after insurer had knowledge of facts justifying rescission is unreasonable as a matter of law); *Am. Safety Indem. Co. v. Sto Corp.*, 342 Ga. App. 263, 272-73, 802 S.E.2d 448, 456 (Ga. Ct. App. 2017) (affirming trial court's decision that the insurer waived its rescission defense as a matter of law where insurer waited six months from the time it learned that the insured made misrepresentations on its application to announce its intent to rescind); *U.S. Life Ins. Co. in City of N.Y. v. Blumenfeld*, 92 A.D.3d 487, 489, 938 N.Y.S.2d 84 (N.Y. App. Div. 2012) (finding that the insurer's delay of one year after learning of misstatements in the insured's application and continued acceptance of premiums constituted a waiver of the insurer's right to rescind); *Garbin v. Mut. Life Ins. Co. of N.Y.*, 77 Misc. 2d 689, 690, 356 N.Y.S.2d 741, 741 (N.Y. App. Term 1974) (finding that the insurer's knowledge for thirteen months of the misrepresentation in the insured's application and acceptance of premiums for one year constituted a waiver of the insured's right to rescind).

right to object and is bound by its contract”). Thus, there is no basis for rescission of the 2016 Policy.

For all of these reasons, the circuit court’s grant of Judgment on the Pleadings was proper as a matter of procedure.

B. No policy exclusion absolves Great American of its duty to defend.

1. Exclusion D(2) does not eliminate Great American’s duty to defend.

Exclusion D(2) of the Great American Policies provides as follows: “This Policy does not apply to any Claim made against any Insured: . . . D. based on, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: . . . (2) damage to or destruction of any tangible property or the loss of use of any tangible property” (Great American Policies, R. at ____). This language must be strictly, narrowly and “most strongly” construed against Great American, which has the burden of proving that the exclusion applies. *Auto. Owners Ins. Co. v. Pers. Touch Med Spa, LLC*, 763 F.Supp.2d 769, 780 (D.S.C. 2011); *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005); *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 464, 252 S.E.2d 565, 568 (1979); *see also M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010) (stating “[p]olicies are construed in favor of coverage, and exclusions in insurance policy are construed against the insurer”).

Exclusion D(2) only applies to a claim for “damage to or destruction of any tangible property.” Great American repeatedly asserts in its brief that the “gravamen” or “gist” of the Plaintiffs’ Complaints is for “property damage” to the common elements at TBRC, and then points to various isolated provisions of Plaintiffs’ Complaints that allegedly assert property damage. However, the fact that some allegations of the Complaints might be excluded will not negate the duty to defend. To prevail on its arguments with respect to the exclusions, including Exclusion

D(2), Great American must show that no portion of the Complaints could possibly be covered. See *City of Hartsville*, 382 S.C. at 543, 677 S.E.2d at 578.¹³

Great American accuses the circuit court of “straining in its attempts to twist the meaning of ‘damage’ or ‘destruction’ so as not to encompass ‘deterioration[.]’” (Appellant’s Brief at Section II). However, with respect to this exclusion, the circuit court did exactly what it was supposed to do, which is examine the language of the exclusion and construe it narrowly and “most strongly” against Great American. See *Cobb v. Benjamin*, 325 S.C. 573, 579 n.1, 482 S.E.2d 589, 592 n.1 (Ct. App. 1997) (“When a dispute arises over an insurer’s liability to cover a given loss, the written insurance contract must be read to ascertain the precise duties undertaken by the insurer”). Since the terms “damage” or “destruction” are not defined in the 2016 Policy, the words must be given their plain, ordinary, popular dictionary meaning. *Am. Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co.*, 378 S.C. 623, 628, 663 S.E.2d 492, 495 (2008); *Walde* 401 S.C. at 444-45, 737 S.E.2d at 637-38 (looking at dictionary definitions to determine meaning of an undefined term in insurance policy).

“Damage” is commonly defined as “[d]estruction or loss in value, usefulness or ability resulting from an action or event” (*American Heritage Dictionary of The English Language* (“*American Heritage*”) 457 (5th Ed. (2016)) or “loss or harm resulting from injury to person,

¹³ This is consistent with the law in other jurisdictions. See *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 312, 476 N.E.2d 272, 276 (N.Y. 1984) (if an insurer is to be “relieved of [its] duty to defend it is obligated to demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation.”) (citations omitted); *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1204–05 (2d Cir. 1989) (“To avoid the duty therefore the insurer must demonstrate that the allegations in the underlying complaints are ‘solely and entirely’ within specific and unambiguous exclusions from the policy’s coverage.”) (citations omitted); *Haygood v. Dies*, 174 So. 3d 1211, 1214 (La. Ct. App. 2 Cir. 2015) (stating an “insurer has a duty to defend if there exists a ‘single allegation in the plaintiff’s [complaint] . . . under which coverage is not unambiguously excluded.”) (quoting *Vaughn v. Franklin*, 785 So. 2d 79, 88 (La. Ct. App. 1st Cir. 2001)).

property, or reputation” (*Merriam-Webster’s Collegiate Dictionary* (“*Merriam-Webster’s*”) 291 (10th ed. 2002)) or “loss or harm resulting from injury to person, property, or reputation// flood damage” (*Merriam-Webster.com*. 2018. <https://www.merriam-webster.com> (November 15, 2018): “Destruction” is defined as the “act or process of destroying” as in “[t]he destruction of the house was completed in two days.” *American Heritage* at 493. “Destroy” is defined as to “break apart the structure of, render physically unusable, or cause to cease to exist as a distinguishable, physical entity” as in the “fire destroyed the library.” *Id.* As found by the circuit court, these definitions clearly demonstrate that the terms “damage” or “destruction” require allegations of some type of specific causative action or event.

“Deteriorate,” on the other hand, is defined as “[t]o diminish or impair in quality, character or value” or “[t]o grow worse, degenerate” as in “time and neglect have deteriorated the property” or “the nation’s highways are deteriorating at a rapid pace.” *Id.* at 94; *Merriam-Webster’s* at 314 (“to make inferior in quality or value: IMPAIR” and “DISINTEGRATE”). “Deterioration” is “the action or process of becoming impaired or inferior in quality, functioning, or condition: the state of having deteriorated// rust deterioration.” *Merriam-Webster.com*. 2018. <https://www.merriam-webster.com> (November 15, 2018). These passive definitions do not require any triggering action, event, or injury.

Here, all of Plaintiffs’ Complaints allege that TBRC breached its duties by failing to maintain the common elements from the time the development was constructed in 1982-1983 through the present, and, as a result, the property has deteriorated.¹⁴ (See Third Am. Compl. ¶¶

¹⁴ Plaintiffs’ Complaints allege numerous problems related to structural issues with the buildings which describe deterioration, not damage or destruction caused by some specific causative event or action, including the following:

- Connection hardware . . . corroded and delaminating,
- Delaminated and decayed band boards around perimeter of buildings,

30, 32, 33, R. at ____). The Complaints do not allege any specific triggering event, such as a flood or hurricane; thus, the term “damage” is inapplicable. The plain, ordinary, popular meaning of “deterioration” more aptly describes the property conditions Plaintiffs describe in their Complaints. If Great American intended for Exclusion D(2) to apply to gradual deterioration or deterioration of tangible property over time, then it should have included the words like “deterioration” or “decline or deterioration due to lack of maintenance” in the exclusion. See *Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013) (refusing to expand term “narcotic” found in an exclusion of an insurance policy to cover all unlawful drugs because exclusionary language in an insurance policy is narrowly construed in favor of the insured). Great American chose not to do so.

Plaintiffs’ Complaints further allege that the deteriorated condition of the common elements has caused the individual units owned by Plaintiffs to diminish in value resulting in economic loss. (*Id.* at ¶ 54, R. at ____). Diminution in value is economic loss under South Carolina law, not damage to or destruction of tangible property. *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 163, 588 S.E.2d 112, 115–16 (2003); *Walde*, 401 S.C. at 442,

-
- Post anchorage connections have severe metal loss.
 - Connections of cradle beams to wood piling have severe metal loss and are corroded,
 - Connectors of the metal connecting plate to the module have corroded,
 - Balcony beams . . . deflected as much as two (2) inches, and
 - Corridor subflooring exhibiting loss of strength and deflecting floor joists.

(*E.g.*, Plaintiffs’ Complaint ¶ 33, R. at ____). Similarly, Plaintiffs’ Complaints contain numerous allegations about “deteriorated cedar siding;” “deteriorated post connections on all balconies and corridors;” “delaminated cradle framing on all balconies and corridors;” “corroded bolts, nuts, and washers;” “distressed exterior trim, siding, and flashing;” and “[r]eplacement of all existing defective building components.” (*Id.* at ¶ 34, R. at ____).

737 S.E.2d at 637 (holding economic loss is not property damage). As such, Plaintiffs' economic loss claim does not fit within Exclusion D(2) (or any other exclusion in the 2016 Policy).

Great American also overlooks the portions of the Plaintiffs' Complaints that are unrelated to deterioration. For example, ¶ 36(g) of the Third Amended Complaint calls for the "[r]eplacement of all balcony sliding glass doors that have exceeded their typical life expectancy (greater than 20 years since installed)." (R. at ____). This allegation does not allege that the sliding doors are damaged, destroyed, deteriorated, or leaking. Instead, the argument is simply that TBRC breached its duties by failing to replace these doors at the end of their life expectancy.

Similarly, Plaintiffs' Complaints allege that TBRC breached duties in failing to follow the Master Deed and Bylaws or to conduct proper reserve studies and maintain detailed repair records. (*Id.* at ¶ 46(q), R. at ____). Although Great American argues in Section II of its brief that the circuit court's reliance on these allegations "makes no sense at all," these allegations are included within Plaintiffs' Complaints and are not necessarily dependent on any "damage to or destruction of any tangible property or the loss of use of any tangible property." Thus, they are enough to trigger a possibility of coverage and a duty to defend that is not subject to Exclusion D(2). The merits of these claims in the underlying action are irrelevant to the issue of the duty to defend because the 2016 Policy provides that Great American has the "duty to defend any **Claim** to which this insurance applies, even if the allegations of such **Claim** are groundless, false or fraudulent." (2016 Policy; R. at ____).

Additionally, Plaintiffs' Complaints allege that TBRC failed to maintain adequate reserves to repair and perform maintenance on the common elements and, as a result, Plaintiffs are now being required to make up the difference in those inadequate reserves. (*See, e.g.*, original Compl. ¶¶ 26, 27, 31, 49, 50.g., 50.j., 50.k., 55, and 62.e.; Third Am. Compl. ¶¶ 28, 29, 33, 52, 53.g., 53.j.,

53.k., 64, 71.e., and 71.f., R. at ____). In essence, Plaintiffs have alleged that the HOA's Board of Directors historically failed to make adequate assessments for the maintenance of the common elements, and as a result, the current condominium owners will be required to pay significantly more than they would have if the reserves had been properly built up over time. Under settled law, Plaintiffs' inadequate reserves claim is economic loss and does not result in physical damage to tangible property, nor is it dependent on physical damage or destruction of tangible property. *Pulliam v. Travelers Indem. Co.*, 403 S.C. 332, 342, 743 S.E.2d 117, 122 (Ct. App. 2013). Plaintiffs would still "possibly" have their inadequate reserve claim regardless of whether there was actual damage to the property, or even if no repairs were needed. Therefore, this portion of Plaintiffs' Complaints is, again, not necessarily subject to Exclusion D(2).

Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am., 379 F. App'x 906, 907 (11th Cir. 2010), the unpublished Eleventh Circuit case relied upon by Great American to support its interpretation of Exclusion D(2), is irrelevant and inapplicable.¹⁵ *Eastpointe* does not involve South Carolina law nor does it involve interpretation of an insurance policy issued in South Carolina.¹⁶ In *Eastpointe*, two hurricanes damaged a condominium complex, resulting in a disputed claim for coverage. There was no allegation relating to the operation of the HOA, reserve levels, or deterioration or maintenance. In addition, the property damage exclusion in *Eastpointe* specifically included "deterioration" of tangible property. *Id.* In reaching its decision that the

¹⁵ The Eleventh Circuit's Internal Operating Procedures provide that "[t]he court generally does not cite to its 'unpublished' opinions because they are not binding precedent." See 11th Cir. R. 36 at IOP 7. Thus, this opinion is not binding even in the Eleventh Circuit.

¹⁶ The legal principles applied in *Eastpointe* differ from South Carolina law. For example, the fundamental underpinning of the interpretation of the exclusion in *Eastpointe* was that Florida law requires the phrase "arising out of" be given a "broad interpretation." *Id.* at 907. Under South Carolina law, when the phrase "arising out of" appears in an exclusion, that phrase "should be narrowly construed as 'caused by.'" *McPherson by and through McPherson v. Mich. Mut. Ins. Co.*, 310 S.C. 316, 319-20, 426 S.E.2d 770, 771 (1993).

plaintiff's claims in the underlying action originated from property damage, the *Eastpointe* court noted that plaintiff's "claim thus depended upon the existence of the property damage." *Id.* at 908. Given the distinctions between the language of the exclusions and the facts of the underlying claims, this case is highly distinguishable and does not lend support to Great American's position.

As an additional sustaining ground for the circuit court's ruling on Exclusion D(2), the interpretation proposed by Great American violates public policy. Under South Carolina law, a court may refuse to enforce a provision in an insurance policy that is against public policy. *Williams v. Gov't Emps. Ins. Co.*, 409 S.C. 586, 608, 762 S.E.2d 705, 717 (2014). Whether a particular provision in an insurance policy violates the public policy of South Carolina is a question of law, which takes into account "a determination whether the agreement is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare." *Id.* at 599, 762 S.E.2d at 712.

Relying on the phrase "in any way involving," Great American argues that "the inquiry here is whether Plaintiffs' lawsuit *has some nexus with* property damage" and "whether the claim (i.e., lawsuit) in any way involves property damage." (Appellant's Brief at Section II). In other words, Great American argues that Exclusion D(2) should be interpreted such that if there is *any* allegation in Plaintiffs' Complaints of property damage, Great American has no duty to defend even if the vast majority of the allegations do not allege "damage to or destruction of tangible property." This result is the opposite of the law in South Carolina, which requires an insurer to defend if there is *any* allegation in the underlying complaint that could *possibly* be covered. See *City of Hartsville*, 382 S.C. at 543, 677 S.E.2d at 578.

For these reasons, Exclusion D(2) does not extinguish the duty to defend in this case.

2. **Great American cannot avoid its duty to defend based on any “other insurance” provision.**¹⁷

The interpretation and application of “other insurance” provisions under South Carolina law is set forth in *S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc.*, 327 S.C. 207, 211, 489 S.E.2d 200, 202 (1997). The court there described insurance companies’ attempted use of “other insurance” provisions to avoid their contractual duties as follows:

We failed utterly to anticipate the linguistic excesses to which the insurance industry would resort in order to avoid paying claims when “other insurance” may be available. This is an area in which hair splitting and nit picking has been elevated to an art form. “Other insurance” clauses have been variously described as: “the catacombs of insurance policy English, a dimly lit underworld where many have lost their way,” a circular riddle, and “polic[ies] which cross one’s eyes and boggle one’s mind.”

Id. at 211, 489 S.E.2d at 201–02 (citations omitted). As aptly noted, “[i]t seems that insurers generally are attempting to convince the customer when selling the policy that everything is covered and *convince the court when a claim is made that nothing is covered.*” *Id.* at 219, 489 S.E.2d at 206 (emphasis added). Great American is no exception, going to great “linguistic excesses” to avoid its duty to defend in this case.

a. **The Lexington CGL Policies.**

In its Memorandum in Opposition to the Motion for Judgment on the Pleadings, Great American raised an argument relating to Commercial General Liability (“CGL”) insurance policies issued by Lexington Insurance Company to TBRC (“Lexington CGL Policies”). (Memo at 12, R.

¹⁷ In footnote 12 of its brief, Great American questions whether TBRC has “standing” to assert the claims here because another carrier is providing a defense. Although briefly discussed at the hearing, the issue of standing is not addressed in the circuit court’s order and is not preserved. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998). Further, even if the issue is preserved, TBRC has standing because where two insurers have a duty to defend the insured, the insured may elect to pay for its own defense and proceed against the carriers pro rata. *Sloan Constr. Co.*, 269 S.C. at 187, 236 S.E.2d at 820.

at ____). The memorandum attaches the Lexington CGL policies and quotes the “other insurance” provision in those policies in full. (Memo at 12-13, R. at ____). Great American argues that this language put Great American’s own “other insurance” provision into play and provided a defense against the duty to defend. The circuit court disagreed. (Order at 12-15, R. at ____).

b. The Lexington CGL Policies do not cover the same risk as the Great American Policies.

“Other insurance” clauses only come into play if there are two or more policies that cover the same risk and the same interest. *S.C. Ins. Co.*, 327 S.C. at 211, 489 S.E.2d at 202; *Bardsley v. Gov’t Emps. Ins. Co.*, 405 S.C. 68, 82, 747 S.E.2d 436, 443 (2013) (stating that “other insurance” provisions are implicated only if the two policies “cover[] the same risk to the same”); *see also* 15 Couch on Ins. § 218:5 (“‘Other insurance’ clauses become relevant *only* where several insurers *insure the same risk* at the same level of coverage”) (emphasis added). “Without undertaking to give an all-inclusive definition of concurrent insurance, all the authorities agree that as a prerequisite to enforcing contribution between insurers, it is essential that both policies insure the same interest against the same casualty.” *Lucas v. Garrett*, 209 S.C. 521, 527, 41 S.E.2d 212, 214–15 (1947) (citations omitted).

Here, Great American’s Policies and Lexington’s CGL Policies do *not* insure the *same* risk or the *same* interest. Compare *Pulliam v. Travelers Indem. Co.*, 403 S.C. 332, 743 S.E.2d 117 (Ct. App. 2013) (discussing provisions of D&O claims made policy) with *Auto-Owners Ins. Co. v. Travelers Cas. & Sur. Co. of Am.*, No. 4:12-CV-3423-RBH, 2014 WL 3687338, at *6 n.4 (D.S.C. July 22, 2014) (acknowledging that a CGL policy which insured “an occurrence of property damage that takes place during the policy period,” and a D&O policy that insured “wrongful acts

that cause damages, including economic loss, but not property damage” insure different risks) (internal quotation marks omitted).¹⁸

This distinction is also apparent from the policies at issue. (Policies, R. at ____). The Lexington CGL Policy is an “occurrence” policy that insures against occurrences during the policy period that cause bodily injury or property damage. In contrast, the Great American Policies are “claims made” policies, which protect the insureds from suits or claims based on the wrongful acts of the HOA and its Board of Directors if that claim is made during the policy period. For these reasons, “other insurance” does not factor into the analysis of the duty to defend in this case.

c. The language of the 2016 Policy does not give rise to an “other insurance” exclusion here.

Great American does not dispute these general rules, but instead argues that the circuit court engaged in “logical gymnastics” and “completely ignored the language of Great American’s other insurance exclusion in the 2016 Policy, focusing solely upon the ‘Costs of Defense’ definition” Without citation to any case law, Great American suggests in Section III of its brief that the holding in the cases cited by the circuit court are limited to “disputes between carriers” and, therefore, do not apply in a dispute between the insured and its insurer. This argument was not raised to the circuit court and is, therefore, not preserved for appeal. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998). Moreover, there is no reason why this legal principle would not apply in a dispute involving the insured, especially given the rule that insurance policies

¹⁸ Courts in other jurisdictions have provided further guidance on the distinctions between the risks insured by claims-made policies and occurrence policies. See *Uhlich Children’s Advantage Network v. Nat’l Union Fire Co. of Pitt., Pa.*, 398 Ill. App. 3d 710, 715, 929 N.E.2d 531, 537 (Ill. App. Ct. 2010); *Cont’l Cas. Co. v. Coregis Ins. Co.*, 316 Ill.App.3d 1052, 1062, 738 N.E.2d 509, 518 (Ill. App. Ct. 2000) (quoting *Gen. Ins. Co. of Am. v. Robert B. McManus, Inc.*, 272 Ill.App.3d 510, 514, 650 N.E.2d 1080 (Ill. App. Ct. 1995)); see also *Med. Protective Co. v. Kim*, 507 F.3d 1076, 1082 (7th Cir. 2007).

must be construed liberally in favor of the insured and the alleged “other insurance” language appears in an exclusion which is to be strictly construed against the insurer.

Additionally, contrary to the assertion in Section III of Great American’s brief, the circuit court did not focus exclusively on the “Costs of Defense” definition or ignore this exclusion. As recognized by the circuit court, a true reading of the 2016 Policy reveals that there is no specific “other insurance” provision included. Instead, Great American attempts to cobble together the definition of “Costs of Defense” and Exclusion B of the 2016 Policy to create an “other insurance” provision.

As set forth in *S.C. Ins. Co.*, two of the four most common types of “other insurance” clauses are described as follows:

an “escape” clause, which provides that an insurer is absolved of all liability if other coverage is available and . . . an “excess escape” clause, which provides that the insurer is liable for that amount of a loss exceeding other available coverage and that the insurer is not liable when other available insurance has limits equal to or greater than its own.

327 S.C. at 211–12, 489 S.E.2d at 202. An examination of the “Costs of Defense” definition and Exclusion B in the 2016 Policy reveals that those provisions are inherently in conflict. The definition of “Costs of Defense” appears to be an attempt at an “escape” clause while Exclusion B is an attempt at an “excess escape” provision. Quite simply, the two are mutually exclusive.

Notwithstanding the foregoing, and with regard to the definition of “Costs of Defense,” it is just that – a definition. It is neither an exclusion nor a coverage provision, and only has effect when examining where the definition is actually used within the 2016 Policy. The term “Costs of Defense” appears in Insuring Agreements A, B, and C, which are the indemnification provisions of the 2016 Policy. The fact that the “Costs of Defense” definition is related to indemnification is

confirmed by Section VI of the 2016 Policy “Costs of Defense and Settlements,” which provides in subsection VI(A) that the “Insureds shall not incur Costs of Defense”

TBRC’s claim for a defense is based on a separate and distinct provision in the 2016 Policy, which provides that Great American “has the right and duty to defend any **Claim** to which this insurance applies, even if the allegations of such **Claim** are groundless, false or fraudulent.” (2016 Policy, R. at ____). Under South Carolina law, the “agreement to defend contemplates the rendering of services,” not the payment of indemnification. *Sloan Constr. Co.*, 269 S.C. at 187-88, 236 S.E.2d at 820. Thus, the defined term “Costs of Defense” does not appear in the duty to defend provision at issue here.

As for Exclusion B, the circuit court correctly considered this language in the context of the “other insurance” provision in the Lexington CGL Policy. (Order at 14-15, R. at ____). An “other insurance” provision in a liability policy cannot be viewed in isolation but must be interpreted with the “other insurance” provisions in the liability insurance policy which is allegedly “other insurance.” *S.C. Ins. Co.*, 327 S.C. at 214, 489 S.E.2d at 203. The language of the policies is just the beginning of the analysis. *Id.*

The Lexington CGL Policies attempt to provide excess coverage and, therefore, the Lexington and Great American excess provisions cancel each other out under *S.C. Ins. Co.* The Lexington CGL Policies provide as follows: “[t]his insurance is excess over: (b) Any other primary insurance available to you *covering liability for damages arising out of the premises or operations*” (Lexington CGL Policy, Section IV(4), p. 12 of 16, attached as Exs. 3 and 4 to the Van Deven Aff. filed with Great American’s Opposition Memorandum) (emphasis added). The common ordinary definition of “operations” is the “act or process of operating or functioning” “Operate” means to “control the functioning; run” or to “conduct the affairs of;

manage” as in “operate a business”. *American Heritage* at 1236. The 2016 Policy provides coverage for claims made against TBRC for Wrongful Acts associated with the operations of Tilghman Beach and Racquet Club, *i.e.* the actions of the HOA and its Board of Directors in managing and maintaining the common elements of the property. Indeed, Great American has conceded that the allegations in Plaintiffs’ Complaints related to the breaches of duty by TBRC with respect to management and maintenance of the common elements allege Wrongful Acts within the coverage provision of the Great American Policies.

As a result, even if the Lexington CGL Policies’ “other insurance” provision was implicated because it covers the “same risk” as the 2016 Policy, which it does not, Lexington tries to make its CGL Policy an excess policy. Under *S.C. Ins. Co.*, when two liability policies whose “other insurance” provisions try to make each policy excess, the “other insurance” clauses should cancel each other out because two policies with such clauses cannot *both* be treated as ‘excess’ policies.” *S.C. Ins. Co.*, 327 S.C. at 215, 489 S.E.2d at 204. The policies are then both treated as primary with the loss prorated among them based on their policy limits. *Id.* In such a case, the insured may look to both insurers to pay its defense fees and costs pro rata. *Sloan Constr. Co.*, 269 S.C. at 187, 236 S.E.2d at 820. The fact that Lexington has voluntarily agreed to provide TBRC with a defense does not change that result because Section 4(b)(2) of the “Other Insurance” provision in the Lexington CGL Policies provides that, even where Lexington is excess to other liability insurance, “[i]f no other insurer defends, [Lexington] will undertake to do so, but [Lexington] will be entitled to the insured’s rights against all those other insurers.” (Lexington CGL Policy, Section IV(4), p. 12 of 16, attached as Exs. 3 and 4 to the Van Deven Aff. filed with Great American’s Opposition Memorandum, R. at ____).

Great American argues that the circuit court erred in its analysis of the “excess insurance” section of Lexington’s “other insurance” provision because the circuit court failed to consider the language “for which you have been added as an additional insured” at the end of subsection B(1)(b) in the Lexington CGL Policies’ “other insurance” provision. Great American argues that this language makes the Lexington CGL Policies excess for “[a]ny other primary insurance available to [the Defendants] covering liability for damages arising out of the premises or operations” only if the Defendants “have been added as an additional insured” to that other policy.

This argument fails for two reasons. First, because the language “for which you have been added as an additional insured” is not addressed in the circuit court’s order and was not brought to the circuit court’s attention in a Rule 59(e) motion, any issue related to this language is not preserved for appeal. *BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc.*, 399 S.C. 444, 454-55, 731 S.E.2d 902, 908 (Ct. App. 2012) (holding appellant waived for appellate review its claim that provision in insurance policy created illusory coverage where circuit court did not address claim in its summary judgment order and appellant failed to raise claim in a Rule 59(e) motion); *Plott v. Justin Enters.*, 374 S.C. 504, 649 S.E.2d 92 (Ct. App. 2007) (argument that trial judge’s ruling on easement was inconsistent with the language used by the parties in creating the easement was not preserved for appeal where it was not explicitly ruled on by trial judge and was not raised in a 59(e) motion). Second, Great American’s suggested interpretation of this provision ignores the well-settled “last antecedent” rule of construction. *Jama v. Immigration & Customs Enforcement*, 543 US 335, 343 (2005) (holding that “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows”) (alteration in original); *Bakery & Confectionery Union & Indus. Int’l Pension Fund v. Ralph’s Grocery Co.*, 118 F.3d 1018, 1026 (4th Cir. 1997) (“Grammatical construction of contracts

generally requires that a qualifying phrase be construed as referring to its nearest antecedent.”) (quoting *Gibbs v. Air Can.*, 810 F.2d 1529, 1536 (11th Cir.1987)); *Auto-Owners Ins. Co. v. Sarata*, 33 F. App'x 675, 678 (4th Cir. 2002) (“qualifying clauses typically modify only the immediately preceding words and phrases. This basic rule of both grammar and interpretation is commonly known as the last antecedent rule.”) Under the last antecedent rule, the phrase “for which you have been added as an additional insured” only modifies the phrase “the products and completed operations” but does not modify the phrase “arising out of premises or operations.”

For these reasons, the circuit court correctly found that there was not an “other insurance” exclusion in this case that would serve to excuse Great American from its duty to defend.

CONCLUSION

The circuit court correctly granted TBRC’s motion for judgment on the pleadings based on Great American’s admissions, the Complaints in the underlying action, and the language of the 2016 Policy. Accordingly, this Court should affirm the circuit court’s ruling and remand this matter for a resolution on the merits.

Respectfully submitted,

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November 16, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No. 2016-CP-26-4464

RECEIVED

NOV 19 2018

SC Court of Appeals

Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, Whitmel L. Brown, Jr., Gary
Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson Plaintiffs,

v.

Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel
G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III, individually and as
Members of the Board of Directors of the Tilghman Beach and Racquet Club Condominium
Association, Inc. Respondents,

v.

Great American Insurance Company Appellant.

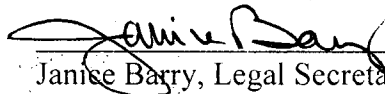
PROOF OF SERVICE

I certify that I have served the *Initial Brief of Respondents* and *Designation of Matter to be
Included in the Record on Appeal* upon all counsel of record by depositing copies of the same in
the United States Mail, First Class postage prepaid, on this the 16th day of November, 2018,
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November 16, 2018

NOV 19 2018

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, Whitmel L. Brown, Jr., Gary Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson v. Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach and Racquet Club Condominium Association, Inc. v. Great American Insurance Company
Appellate Case No. 2018-001180

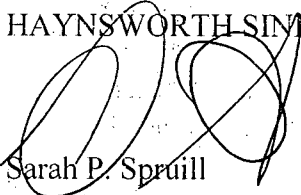
Dear Ms. Kitchings:

Enclosed herewith for filing is an original and one (1) copy of the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal regarding the above-referenced case together with a Proof of Service. Please file the originals and return a clocked copy to me in the enclosed self-addressed stamped envelope.

Thank you for your assistance.

Sincerely yours,

HAYNSWORTH SINKLER BOYD, P.A.


Sarah P. Spruill

SPS/jmb

Enclosures

cc: Howell V. Bellamy III, Esq.
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Charles B. Jordan, Jr., Esq.
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