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

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,

And

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.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENTS

I. THE LOWER COURT'S ORDER IS INAPPROPRIATE BECAUSE ITS RULING MAY BE RENDERED MOOT BY A LATER ORDER FINDING THE POLICY DOES NOT EXIST OR EXCLUSIONS PRECLUDE COVERAGE.

It defies logic for a court to enter judgment on the pleadings where such judgment may be rendered moot by a later order. Here, Great American raised as affirmative defenses policy exclusions and an affirmative counterclaim for rescission. These adverse claims create a procedural posture which makes this case inappropriate for partial adjudication or premature judgment with respect to Great American's alleged duty to defend. Such a judgment—which has the same finality as a judgment entered after a trial—may be rendered moot or merely advisory if Great American succeeds on its affirmative defenses or counterclaim as a ruling in Great American's favor would either preclude coverage or void the Policy *ab initio*.

The potential reversal of the lower court's order in the event Great American succeeds on its affirmative defenses and counterclaims makes the order similar to an advisory opinion. *See Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions."). An "advisory opinion" is one which comments "on an issue [which] will have no practical effect on the outcome of the case." *Horry County v. Parbel*, 378 S.C. 253, 264, 662 S.E.2d 466, 472 (Ct. App. 2008). Here, Great American's defenses and counterclaims which are yet to be determined may directly impact, potentially rendering moot, the lower court's current order regarding Great American's duty to defend. As such, the order is, at best, premature and, moreover, procedurally inappropriate and is subject to reversal by this Court.

The lower court's refusal to allow for the development of a factual record in granting judgment on the pleadings as to Great American's duty to defend is inconsistent with applicable

law. In *USAA Prop. & Cas. Ins. Co. v. Clegg, 377* S.C. 643, 657, 661 S.E.2d 791, 798 (2008), the Court held the determination of the existence of a duty to defend is "not strictly controlled by allegations [in the complaint]" and "may also be determined by facts outside of the complaint that are known by the insurer." Relying, in part, upon *Clegg*, the U.S. District Court for the District of South Carolina in *Auto Owners Ins. Co. v. Pers. Touch Med Spa, LLC*, initially declined to grant summary judgment to Auto Owners based solely on the pleadings because it found "the factual allegations of the complaint are simply insufficient to reach a conclusion[.]" *Auto Owners Ins. Co. v. Pers. Touch Med Spa, L.L.C.*, 763 F. Supp. 2d 769 (D.S.C. 2011). Later, on reconsideration, the district court granted summary judgment to Auto Owners, finding that the policy provided no coverage for claims asserted in the case based on a stipulation that filled a critical hole left open by the pleadings. *Auto Owners Ins. Co. v. Pers. Touch Med Spa, L.L.C.*, No.: 4:10-cv-683-TLW, 2011 U.S. Dist. LEXIS 120549, 2011 WL 4962917 (D.S.C. Oct. 18, 2011).

The lower court's finding that it is "well-settled that an insurer's present duty to defend the insured under a liability policy is unaffected by an unproven claim for rescission of that policy," (Order on Appeal, p. 8), both lacks authoritative support under South Carolina law and also contradicts extant law in other jurisdictions. Respondents contend Great American's case citations either do not address the specific issue before the Court, do not "relate to the stated proposition at all,"[1] or "do[] not reference rescission," and thus should be ignored. Respondents' Brief, p. 17. However, all four of the cited cases expressly hold that if an insurer asserts

[1] Great American notes that the *Ironwood* decision cited by Respondents, which Respondents assert "does not relate to the stated proposition at all" (Respondents' Brief at p. 17), is the wrong opinion. *See id.* (citing *Ironwood Country Club v. Liberty Ins. Underwriters, Inc.*, No. EDCV13-00996-VAP(DTBW), 2014 WL 12597633 (C.D. Cal. Jan. 16, 2014). Great American does not reference the District Court's January 16, 2014 opinion, but rather, a decision issued in March 2014. *See* Appellant's Brief at p. 10 (citing *Ironwood Country Club v. Liberty Ins. Underwriters, Inc.*, 2014 U.S. Dist LEXIS 190440, at *6-7 (C.D. Cal. Mar. 24, 2014)).

entitlement to rescission of the applicable policy, it is inappropriate for a court to determine the insurer owes a duty to defend under that policy.

The U.S. District Court for the Northern District of California in *Atmel Corp. v. St. Paul Fire & Marine Ins. Co.*, 416 F. Supp. 2d 802 (N.D. Cal. 2006), discusses not only the circumstances under which an insurer may unilaterally rescind a contract but also addresses whether summary adjudication of an insurer's duty to defend is appropriate when the insurer has asserted rescission as an affirmative defense. *Id.* at 807. In *Atmel*, the insured "contended that St. Paul had breached its duty to defend, notwithstanding St. Paul's allegation of rescission, and that St. Paul was liable for Atmel's defense costs unless and until it was adjudicated that the policies were rescinded." *Id.* The Court disagreed, holding "any preliminary declaration that the policies 'are currently in effect' or that [the insured] is currently 'in breach of its duties' would be inappropriate" as "[the insured] is attempt[ing] to res[cind] the policy." *Id.*

The court reasoned:

> [B]ecause rescission is retroactive to the time that the representation becomes false, if St. Paul is entitled to rescission, then it never owed Atmel a duty to defend. There is no dispute that St. Paul is permitted to raise rescission as an affirmative defense, and Atmel agrees that if St. Paul prevails on its affirmative defense, the policies are rendered void *ab initio.* Because a valid rescission voids a policy *ab initio*, and because both plaintiff's attempted enforcement of and defendant's attempted rescission of the policy are being decided in this one action, any preliminary declaration that the policies are currently in effect or that St. Paul is currently in breach of its duties would be inappropriate. Rescission is from the time the representation becomes false, and, of necessity, will avoid liability even on pending claims. Thus, a rescission effectively renders the policy totally unenforceable from the outset so that there never was any coverage and no benefits are payable.

Id. The *Atmel* case does not, as Respondents contend, "discuss[] [only] insurance rescission claims in California generally and not the specific issue" presented in this case. Respondents' Brief at p. 17. Indeed, the *Atmel* case is almost directly on point, concluding that a preliminary judgment as to an insurer's duty to defend, which the lower court granted here by entering

judgment on the pleadings in Respondents' favor, is procedurally inappropriate prior to a determination of the insurer's policy defenses and/or its counterclaim for rescission.

The other cases cited by Great American, some or all of which follow the California District Court's logic in *Atmel*, similarly conclude a judgment as to a duty to defend should not be made prior to a determination of a pending rescission claim in the same proceeding. *See Ironwood Country Club*, 2014 U.S. Dist. LEXIS 190440, at *6-7 ("When ... the insurer has not only denied coverage, but also asserted rescission, [courts] have found that summary adjudication of whether a duty to defend exists is premature.") (citations omitted); *Rocklin Park Place Condos. Owners Ass'n v. Liberty Ins. Underwriters, Inc.*, 2013 U.S. Dist. LEXIS 127669, at *12 (E.D. Cal. Sept. 6, 2016) ("[B]ecause Defendant's rescission defense could potentially void the policy, this is not the proper juncture for summary adjudication of th[e] issue" of whether Defendant breached its duty to defend); *CPS Chem. Co. v. Continental Ins. Co.*, 495 A.2d 886, 889 (N.J. App. Div. 1985) (holding "the existence of unresolved issues concerning the nature of the claims of the City and their impact on the allegations of coverage under the policies ... requires reversal of the order granting summary judgment on the issue of the duty to defend").

Great American agrees with Respondents' assertion that "court[s] may enter a declaratory judgment even though other issues, such as damages, remain open." Respondents' Brief, p. 15 n. 9. However, this remedy is not available in all cases, particularly where open issues may moot the declaratory relief. The cases cited by Respondents are distinguishable because in those cases the resolution of one claim for relief early in litigation had no bearing upon the remaining claims.

II. GREAT AMERICAN'S POLICY EXCLUSIONS EXCLUDE COVERAGE OUTRIGHT.

A. Great American's Property Damage Exclusion precludes coverage.

The lower court failed to interpret Great American's policy exclusions according to their plain and ordinary meaning. That error was induced in part by Respondents' subtle misquoting of the policy language, which continues to take place on appeal. For example, while conceding that terms in bold in the policy are defined terms (Respondents' Brief, p. 4 n. 4), Respondents fail to use bold type when quoting or referencing the Property Damage Exclusion twice on page 21. The exclusion does not apply to a "claim" for "damage to or destruction of any tangible property." (Respondents' Brief, p. 21.) It applies to a **Claim**[2] which seeks "damage to or destruction of any tangible property."[3]

It is therefore entirely appropriate to look at the underlying Complaint as a whole. If *any* allegation in the *entire civil proceeding* in any way relates to damage or destruction to tangible property, the Property Damage Exclusion applies and precludes coverage. Appellant notes that even if the exclusion only applied to a "claim," it would nonetheless exclude all coverage. *See B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (citations omitted) ("[A]n insurer has no duty to defend an insured where the damage was caused for a reason unambiguously excluded under the policy.").

The degree to which Respondents strain in an attempt to get around the language "based on, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving . . . damage to or destruction of any tangible property or loss of use of any tangible property" (Policy D(2)) is apparent from their examination of dictionary definitions.

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[2] "**Claim**" is, in relevant part, a "civil proceeding." (Policy, Section III(A)(2).)

[3] Respondents notably use the term "**Claim**" on page 25 of their brief when arguing Great American owes a duty to defend based on the "possibility of coverage." Respondents' Brief, p. 25.

Respondents argue the meaning of the terms "damage" or "destruction" in the policy does not encompass "deterioration" as alleged in the Complaint. *Id.* at pp. 22-23. Respondents cite several dictionary definitions of "damage" or "destruction" in hopes of convincing this Court that "the terms . . . require allegations of some type of specific causative action or event." *Id.* at p. 23. However, a plain reading of these terms and reference to other applicable case law in which these terms are defined, interpreted, and applied does not support their argument.

The *American Heritage Dictionary of The English Language* definition of "damage" includes "[d]estruction or loss in value, usefulness or ability," *see* Respondents' Brief at p. 22 (citing *American Heritage* at p. 457), which would clearly encompass "deterioration," defined by *American Heritage* as "[t]o diminish or impair in quality, character or value" or "[t]o grow worse, denigrate" as in "time and neglect have deteriorated the property." Respondents' Brief at p. 23 (citing *American Heritage* at p. 94; *Meriam*-Webster's at 314). The definition of "deteriorate" in *Webster's Third New International Dictionary* is "to make inferior in quality or value," "to grow worse," and "become impaired in quality, state, or condition." *Webster's Third New International Dictionary* 616 (1993) (cited in *Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 525 (Mo. 2015)).

The distinction between the words "damaged," "destroyed," and "deteriorated" suggested by Respondents is nonexistent based on these dictionary references' own terms. Becoming impaired or inferior in quality is the same as becoming damaged or destroyed. At the same time, something can be damaged or destroyed over time by deteriorating due to age.

Our own Supreme Court makes no distinction between the terms "damage," "destroy," and "deteriorate." In *L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366* S.C. 117, 621 S.E.2d 33 (2005), the Court considered "deteriorat[ing]" roads, many of which showed signs of

"'alligator cracking,' a form of cracking in asphalt that looks like alligator skin." *Id.* at 122, 621 S.E.2d at 36. The Court summarized two expert witnesses' testimony who opined that "the cause of the damage" was "insufficient road subgrade preparation, which was caused by Contractor's failure to properly (1) remove tree stumps from the subgrade and (2) compact the soft, wet clay in the subgrade" as well as "insufficiently thick road course, improper drainage, and excessive traffic." *Id.* The Court held "the alligator cracking . . . constituted property damage," but found no coverage under the policy because an "occurrence," as defined in the applicable policy, did not take place. *Id.* at 123, 621 S.E.2d at 36.[4]

In addition, Respondents assert diminution of value is economic loss and not property damage. Respondents' Brief at pp. 24-25. Great American agrees. However, whether economic loss *is the equivalent of* damage or destruction of tangible property is not the question. Rather, it is what such diminution of value is *caused by* and, here, Great American asserts that the alleged diminution of value is alleged to have resulted from the damage or destruction of tangible property, which is why the Property Damage Exclusion applies.

Finally, with respect to the Property Damage Exclusion, Respondents assert that certain damages "are unrelated to deterioration," including "[r]eplacement of all balcony sliding glass doors that have exceeded their typical life expectancy (greater than 20 years since installed)." Respondents' Brief at p. 25. This argument ignores the alleged damage to the sliding glass doors as alleged in the operative pleadings, including "moisture penetration/leaking," "corro[sion]," and "moisture affected and rotten wood framing." (Third Amended Complaint ¶ 35.) As such,

[4] Courts in other jurisdictions similarly equate "deterioration" with "damage" or "destruction." *See Seven Hills Master Cmt. Ass'n v.*, No. A-05-513374-C, 2014 Nev. Dist. LEXIS 917 (NV Dist. Ct. Dec. 22, 2014) (finding certain "decorative caps supplied by [the defendant] . . . deteriorated over time and damaged the adherence capability of the mortar bond. Thus, the mortar bond was damaged in a 'material dimension.' As such, there was physical injury to tangible property and thus the definition of 'property damage' in the CGL policy ... was satisfied."); *Verified Application & Petition of Liberty Energy (Midstates) Corp.*, 464 S.W.3d at 525.

the fact that these doors have been damaged because they have outlived their "useful life" is essentially the same as saying they have "los[t] . . . value, usefulness or ability." Respondents' Brief at p. 22 (citing *American Heritage* at p. 457 (defining "damage")). It is the same as saying the doors have been "made inferior in quality or value," "grow[n] worse," and "become impaired in quality, state, or condition" due to the passage of time. *See Webster's* at 616 (defining "deteriorate").

The plain, ordinary, and popular meaning of "useful life" assumes deterioration of or damage to an asset caused by time, conditions, or other circumstances. *See Merriam-Webster.com* https://www.merriam-webster.com at "useful life" (December 5, 2018) (defining "useful life" as "the amount of time during which something is in good enough condition to be used"); *see also Ocean Winds Corp. v. Lane*, 347 S.C. 416, 420, 556 S.E.2d 377, 380 (2001) (stating "improvements to real property have lengthy useful lives and are utilized, changed, and affected by many people, forces and things after completion"); *Gonzalez v. Corning*, 317 F.R.D. 443, 515 (W.D. Pa. 2016) (reciting evidence in the record that "Oakridge-brand shingles would have a useful life of at least 25 years, or would not crack, degranulate, fragment, or deteriorate for at least 25 years").

B. Great American's Other Insurance Exclusion precludes coverage.

Respondents once again miscast the fundamental purpose of the "Other Insurance" clause in Great American's policy, which is a policy defense—precluding coverage where other insurance is primary—not merely a mechanism for determining which carrier's coverage is primary. Respondents' confusion is evidenced by their reliance on *Lucas v. Garrett*, 209 S.C. 521, 527, 41 S.E.2d 212, 214-15 (1947) ("Without undertaking to give an all-inclusive definition of concurrent insurance, all authorities agree that as a perquisite for enforcing contribution

between insurers, it is essential that both policies insure the same interest against the same casualty."). Respondents' Brief, p. 29.

It is undisputed that Lexington is providing Respondents with a defense in this case. (Trans. p5, ll. 1-9; Great American's Memo. in Opp. to Motion for Judgment on the Pleadings, Ex. B.) Therefore, this case does not require the type of analysis that is often used by courts when one insurer is seeking contribution from another pursuant to the parties' other insurance policy provisions as occurred in the *Lucas* case. Here, the Other Insurance Exclusion applies on its face as an exclusion and absolves Great American from having to defend.

Curiously, Respondents argue the Policy definition of **Costs of Defense**[5] and the Other Insurance Exclusion are somehow in conflict (*see* Respondents' Brief, p. 31) by applying an analytical framework that is only appropriate when trying to determine which of two policies is primary and which is excess. Instead of being in conflict with the Other Insurance Exclusion, the **Costs of Defense** definition merely underscores the fact that Great American provides no coverage when another carrier undertakes the duty to defend.

III. GREAT AMERICAN HAS NOT WAIVED AND SHOULD NOT BE ESTOPPED FROM ASSERTING RESCISSION OF THE POLICY.

Respondents assert Great American has waived its right to rescind the 2015 Policy due to the Association's misrepresentation or should be estopped from asserting the misrepresentation as a basis for rescission. *See* Respondents' Brief at pp. 18-20. Respondents contend Great American was aware in April 2015 that the Association was contemplating, or even undertaking, a construction project. *See id.*, p. 19 n. 11. However, the fact that Great American was informed of a "major construction and renovation" project in *April* 2015 does not relate to Great American's knowledge that the Association made a misrepresentation in the application it

[5] **Costs of Defense** include "reasonable and necessary legal fees, costs and expenses incurred in the investigation or defense of any **Claim**...." (Policy, Section III(D)).

submitted in *January* 2015 when it indicated the Association did not "anticipate any major building renovations in the next year." The record has not yet been developed enough to determine when Great American became aware of the misrepresentation. Accordingly, this Court has no basis to affirmatively find that Great American failed to act within a reasonable time after discovering a ground for rescission.

IV. GREAT AMERICAN HAS PRESERVED ALL ARGUMENTS MADE ON APPEAL.

Respondents assert "Great American did not raise [certain] argument[s] to the circuit court and [therefore] [such arguments] are not preserved for this Court's review." Respondents' Brief, pp. 13, p. 28 n. 17, 30, p. 34. These alleged "unpreserved" arguments include:

(i) "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,'" *id.* at p. 13;
(ii) Respondents lack standing to assert claims against Great American because another carrier is providing a defense, *id.* at p. 28 n. 17;
(iii) cases cited by the circuit court are 'disputes between carriers' and, therefore, do not apply in a dispute between the insured and its insurer," *id.* at p. 30; and
(iv) the 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,'" *id.* at p. 34.

All of these arguments were made to the lower court and are sufficiently preserved for review.

"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." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citing *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)). The "objection must be sufficiently specific to inform the trial court of the point being urged by the objector." *Id.* (citing *Broom v. Southeastern Highway Contracting Co.*, 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986)). Courts consider the "context" in determining whether a party's objection "was specific enough to allow

the trial judge to understand and rule upon the alleged error." *Id.* at 76, 497 S.E.2d at 734; *see also* Rule 103(a)(1), SCRE (requiring a "timely objection" and a "specific ground of objection" *unless* "the specific ground was ... apparent from the context").

The purpose of preservation rules is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." *Atl. Coast Builders & Contrs., LLC v. Lewis*, 396 S.C. 479, 486, 722 S.E.2d 213, 216 (2011) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)).

Great American sufficiently preserved its argument that an insurer's duty to defend should not be resolved on a motion for judgment on the pleadings without the development of a record to ascertain what facts may be known by the insurer outside the pleadings. Appellant's Brief at p. 11. In its briefing and oral argument, Great American raised the procedural impropriety of granting a motion for judgment on the pleadings without considering application of policy exclusions or a counterclaim for rescission. By making these arguments, Great American sufficiently preserved the issue as to what facts may be known to an insurer because affirmative defenses and counterclaims exist outside of the plaintiffs' complaint. (Great American's Memo. in Opp. to Motion for Judgment on the Pleadings, pp. 3-4.) Great American argued: "[T]here are at least questions of fact as to the knowledge of the Defendants with respect to rescission and the exclusion in the application [and] Proposal Form." (*Id.* at p. 4.) In light of these arguments, and the context in which they were made, it cannot fairly be said that the lower court was not given "a fair opportunity to rule on the issue" of the impropriety of granting judgment on the pleadings without considering facts known to the parties.

Respondents also assert Great American has not preserved its arguments regarding Respondents' ability to stand in Lexington's shoes with respect to interpretation of the "Other Insurance" clauses, *see* Respondents' Brief, p. 28 n. 17, and that cases cited by the lower court regarding interpretation of other insurance clauses in disputes between carriers are inapplicable in this case. *Id.*, p. 30. Although neither issue is central to Great American's appeal, Respondents' assertion of failure to preserve these arguments should be ignored. Great American preserved its arguments by asserting to the lower court that the "Other Insurance" clauses in Great American and Lexington's policies did not conflict. (*See* Great American's Memo. in Opp. to Motion for Judgment on the Pleadings, pp. 14-15.) Notably, Lexington took no position as to Respondents' Motion or Great American's assertions regarding interpretation and application of the other insurance clauses. Great American's recognition that "[t]he lower court [itself] appeared to wonder . . . whether Respondents had standing to be making an argument on Lexington's behalf" is a statement of fact. (*See* Hearing Tr., p. 5, 1.1-p.8, 1.2.)

Finally, Respondents contend that Great American's argument regarding the lower court's error in analyzing the "excess insurance" section of Lexington's "Other Insurance" clause is also not preserved 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. *See* Respondents' Brief at p. 34. However, "[such] motions are not necessary to preserve issues that have been ruled upon[.]" *Wilder Corp.*, 330 S.C. at 77, 497 S.E.2d at 734 (citing *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939)). These motions are only required "to preserve those [issues or objections] that have been raised to the [lower] court but not yet ruled upon by it." *Id.* Here, Great American raised the issue of Lexington's "excess insurance" clause to the lower court, quoting such provision in its entirety. (*See* Great

American's Memo. in Opp. to Motion for Judgment on the Pleadings, p. 12.) Great American argued: "Reading the other insurance provisions in both the Great American Policy and the Lexington policies together, it is clear that Lexington's policies are primary, and Great American's Policy, is at most, excess . . . ." (*Id.*) In light of its positions before the lower court, Great American sufficiently preserved its arguments on appeal with respect to this issue.[6]

Great American preserved all arguments by presenting them to the lower court and providing it with an opportunity to first consider the issues before the subject appeal. By doing so, this Court has "a platform for meaningful appellate review" of all the issues Great American raised below.

CONCLUSION

For the reasons set forth in Appellant's Brief and the foregoing Reply, Great American respectfully requests this Court reverse the lower court's Order Granting Respondents' Motion for Judgment on the Pleadings.

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December 6, 2018.

[6] The Supreme Court has expressed concern over "over-zealous application" of the Court's "error preservation rules." *Atl. Coast Builders*, 396 S.C. at 486, 722 S.E.2d at 216. In Chief Justice Toal's dissenting opinion in that case, she explained: "an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and business community of this state by settling disputes and promoting justice." *Id.* at 491, 722 S.E.2d at 219. She further cautioned courts on the dangers of "scour[ing] the records before [the court] for the purpose of avoiding issues or, even worse, to play a 'gotcha' game with attorneys by showcasing their alleged mistakes, at the expense of their clients." *Id.* This is the tactic Respondents attempt to take with respect to preservation of issues in this case and such an over-zealous attempt to play "gotcha" with Great American should be rejected.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2018-001180

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,

And

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.

CERTIFICATE OF SERVICE

I certify that I have served **Appellant's Initial Reply Brief** on counsel by depositing a copy of said documents in the United States Mail, postage prepaid, on **December 6, 2018**, addressed to Respondents' attorneys of record as follows:

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December 6, 2018

VIA HAND-DELIVERY:
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Jill Keck Humphries, et.al. vs. Tilghman Beach & 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 & Racquet Club Condominium Association, Inc. v. Great American Insurance Company*
Appellate Case No. 2018-001180
AR File No.: 006347-000037

Dear Ms. Kitchings:

Enclosed are the original and one copy of Appellant's Initial Reply Brief in the above-referenced matter. Please file the original and return the clocked copy to my courier delivering same. By copy of this letter, I am serving all counsel with the brief as set forth in the enclosed Proof of Service. Thank you for your attention to this matter.

Sincerely,

Kirby D. Shealy III

KDSIII/vmc
Enclosures

cc: Howell V. Bellamy, III, Esquire
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