THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

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SC Court of Appeals

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.

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. Did the lower court err in granting Respondents' Motion for Judgment on the Pleadings as to Great American's duty to defend?

STATEMENT OF THE CASE

This appeal arises from an order of the Horry County Court of Common Pleas granting Respondents' Motion for Judgment on the Pleadings. (R. pp. 9-24). The lower court held Appellant Great American Insurance Company ("Great American") has a duty to defend Respondents under a policy of directors and officers liability insurance ("D&O") issued to Respondent Tilghman Beach and Racquet Club Condominium Association, Inc. ("Association"). (R. p. 23).

On July 7, 2016, Plaintiffs, a group of homeowners, filed a Complaint against Respondents, Association and its board members, seeking recovery for property damage allegedly due to Respondents' failure to properly maintain the common elements of Tilghman Beach and Racquet Club Condominium Regime ("Tilghman Beach"), a horizontal property regime located in Myrtle Beach. (R. pp. 25-61). Plaintiffs filed amended complaints on August 24, 2017, October 28, 2016, and March 8, 2017 (collectively, the "Complaints"). (R. pp. 295-328). In each of these Complaints, Plaintiffs seek monetary and non-monetary relief and set forth various iterations of similar factual allegations against Respondents. (*Id.*; R. p. 60).

On March 28, 2017, Respondents filed a consent motion for leave to file a Third-Party Complaint against Great American pursuant to Rule 14(a), SCRCP. (R. p. 3061). That motion was granted on May 2, 2017. (R. pp. 1-3). Respondents filed the Third-Party Complaint on May 2, 2017, and it was served on Great American on May 9, 2017. (R. p. 2634). Great American answered the Third-Party Complaint on July 10, 2017 and filed an amended answer on August 30, 2017. (R. p. 2849; R. p. 2860). In these pleadings, Great American asserted affirmative

defenses based in part upon certain exclusions contained within the Policy it had issued to Association.[1] (R. pp. 2854-55; R. pp. 2865-67). It also asserted a counterclaim for a declaratory judgment that coverage for the Claim[2] is excluded by one or more exclusions in the Policy. (R. pp. 2857-59; R. pp. 2867-70). In the Amended Answer, Great American added counterclaims seeking rescission of the Policy on the ground that Association had made material misrepresentations of fact in the applications for both the 2015-16 and 2016-17 policy periods. (R. pp. 2870-74).

On July 14, 2017, Great American filed a Motion to Dismiss or in the Alternative Motion to Sever, requesting that the third-party action be severed from the underlying Claim. On February 23, 2018, the lower court entered an Order Denying Great American's Motion to Dismiss and to Sever, but it nonetheless ordered that the underlying Claim and the third-party action would be tried separately.

On January 15, 2018, Respondents filed a Motion for Judgment on the Pleadings requesting the lower court to find as a matter of law that Great American owes a duty to defend Respondents with respect to Plaintiffs' Claim. (R. p. 3279). Great American filed a Motion to Amend its Amended Answer and Counterclaim on February 23, 2018. (R. p. 3600). That motion was argued along with Respondents' Motion for Judgment on the Pleadings on March 27, 2018. (R. pp. 2999-3046). Among several arguments, Great American submitted that it was procedurally improper for the lower court to grant judgment on the pleadings on its alleged duty to defend when its answer contained causes of action for rescission of the Policy. (R. p. 3334; R. p. 3017, line 2-p. 3018, line 22).

[1] Policy is defined herein. *See infra* page 3.
[2] "Claim" is a defined term under Appellant's policy, as described below.

On April 23, 2018, the lower court granted leave for Great American to file a Second Amended Answer and Counterclaim, which it did on the same day. (R. pp. 5-8). Although Great American had sought to amend its Amended Answer and Counterclaim in numerous ways, the lower court limited the relief so that only changes based upon a new policy defense, which had not existed as of the date the prior pleading had been filed, could be made. (R. p. 7). Great American therefore asserted an additional affirmative defense and counterclaim based on Respondents' commercial general liability ("CGL") insurer, Lexington Insurance Company, having agreed to provide a defense to Respondents. (R. pp. 2867-70). It also dropped one of the two rescission claims it had previously asserted. (*See generally*, R. p. 2860-2874).

On June 15, 2018, the lower court entered an Order Granting Respondents' Motion for Judgment on the Pleadings, holding Great American has a duty to defend Respondents as a matter of law, and that this duty has existed since the inception of Plaintiffs' Claim. (R. pp. 15-24); (Order on Defendants'/Third-Party Plaintiffs' Motion for Judgment on the Pleadings ("Order on Appeal")). The Order on Appeal addressed not only the pleadings as they existed on the day the motion was filed, but also the Second Amended Answer and Counterclaim filed after the March 27, 2018 motion hearing. (*Id.*).

On June 22, 2018, Great American timely filed and served its Notice of Appeal.

STATEMENT OF FACTS

Great American issued a D&O insurance policy (policy number EPP3654704-00) to Respondent Association for the policy period beginning February 10, 2015 and ending February 10, 2016. (R. p. 2888); (*See* Ex. 1 to Third-Party Defendant's Amended Answer and Counterclaim to Defendants'/Third-Party Plaintiffs' Third-Party Complaint). The policy was renewed for the policy period beginning February 10, 2016 and ending February 10, 2017

(policy number EPP3654704-01) (both policy periods collectively referred to as "Policy"). (R. p. 2916); (*See* Ex. 2 to Third-Party Defendant's Amended Answer and Counterclaim to Defendants'/Third-Party Plaintiffs' Third-Party Complaint). Subject to all of its provisions, the Policy insures those persons or entities who meet the Policy's definition of an "Insured" against a "Claim"[3] arising from a "Wrongful Act." (R. pp. 2877-80; R. pp. 2905-08). It is undisputed that all of Plaintiffs' Complaints collectively constitute a Claim alleging Wrongful Acts, as those terms are defined in the Policy. (R. pp. 12-13; R. p. 2878; R. p. 2906). It is further undisputed that all Respondents meet the Policy's definition of an Insured. (R. pp. 12-13; R. p. 2880; R. p. 2908).

Respondents tendered the defense of Plaintiffs' initial Complaint to Great American by email dated August 1, 2016. (R. pp. 2841-45). Plaintiffs' Second Amended Complaint was provided to Great American by letter dated November 3, 2016. (R. pp. 2834-2840). Great American received notice of the Third Amended Complaint as an attachment to Respondents' Third-Party Complaint when it was served on May 9, 2017. (R. p. 2764; R. p. 2634).

As set forth in its Second Amended Answer and Counterclaim, Great American asserts its Policy contains several exclusions that bear upon Plaintiffs' Claim. (R. pp. 2935-2942). For instance, the Policy does not apply to any Claim made against any Insured:

> B. to the extent it is insured in whole or in part by any other valid and collectible policy or policies, (except with respect to any excess beyond the amount or amounts of coverage under such other policy or policies), whether such other policy or policies are stated to be primary, contributory, excess, contingent, or otherwise . . .

---

[3] A "Claim" is defined by the Policy, in relevant part, as:

> (1) a written demand for monetary relief made against any Insured; [or]
>
> (2) a civil proceeding, including any appeals therefrom made against any Insured seeking monetary of non-monetary (including injunctive) relief commenced by service of a complaint or similar pleading;....

(Policy, Section III.A) (emphasis removed). (R. p. 2947).

(R. p. 2950); (Policy, Section IV.B). The Policy further states that "Costs of Defense shall not include . . . any amounts incurred in defense of any Claim which any other insurer has a duty to defend, regardless of whether or not such other insurer undertakes such duty." (R. p. 2946); (Policy Section III(D)). It is undisputed that Respondents' CGL insurance carrier, Lexington Insurance Company, is providing them with a defense in this case. (R. p. 3003, lines 1-9; R. pp. 3377-78). The Policy also excludes any Claim made against any Insured:

> D. *based upon, 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;

[or]

> G. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged seepage, pollution, radiation, emission, contamination or irritant of any kind, including, but not limited to smoke, vapor, dust, fibers, mold, spores, fungi, germs, soot, fumes, acids, alkalis, asbestos, chemicals or waste of any kind, provided, however, this exclusion shall not apply to coverage provided under Insuring Agreement 1.A....

(R. p. 2951); (Policy, Sections IV.D and G) (emphasis added).

The gravamen of Plaintiffs' Complaints is that Respondents have failed to properly maintain Tilghman Beach's common elements, which has resulted in property damage, including, among other things, moisture penetration of building envelopes, the need for extensive repairs to rotten wood, rusted and corroded joints and hardware, and sundry other structural issues. (R. p. 11; R. pp. 811-12). Plaintiffs' Complaints further allege Respondents failed to maintain sufficient reserves to pay for such repairs as they became necessary. (R. p. 11; R. p. 51; R. p. 821).

The Policy further excludes any Claim made against any Insured:

H. by, or for the benefit of, or at the behest of the Organization or any Subsidiary or any entity which controls, is controlled by, or is under common control with the Organization or any Subsidiary, or any person or entity which succeeds to the interest of the Organization or any Subsidiary....

(R. p. 2951); (Policy, Section IV.H). At the outset of this litigation, Plaintiffs' Claim was allegedly brought as a putative class action on behalf of all homeowners within Tilghman Beach. (R. pp. 27-28). The class action allegations were not dropped from the Plaintiffs' Claim until after Respondents had removed the case to federal court and then reached an agreement that Plaintiffs would remove those allegations in exchange for Respondents consenting to a motion to remand. (R. p. 543; R. p. 3292).

Finally, the Policy excludes from coverage any Claim made against any Insured:

C. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving: ... (1) any Wrongful Act or Related Wrongful Act or any fact, circumstance or situation which has been the subject of any notice or Claim given under any other policy of which this Policy is a renewal or replacement. ...

(R. pp. 2950-51; Policy, Section IV.C). As described in its pleadings, Great American received notice in April 2015 from Respondent Association of a potential Claim because Respondent Steele Brice Windle, III had threatened to initiate litigation against it. (R. p. 2868; R. p. 2937). Whether and to what extent Mr. Windle's threats of litigation implicate Exclusion C under the Policy has not been addressed by the lower court. (R. pp. 9-24).

The lower court purported to constrain its ruling so as not to determine the "damages that might have been caused to [Respondents] by Great American's failure to defend" or "whether Great American has a duty to indemnify [Respondents] from any judgment that Plaintiffs might obtain or "who has the right to control the defense in this matter." (R. p. 10).

STANDARD OF REVIEW

"All properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings." *FOC Lawshe L.P. v. Int'l Paper Co.*, 352 S.C. 408, 413, 574 S.E.2d 228, 230 (Ct. App. 2002). In reviewing such a motion, a court may only consider matters contained within the pleadings. *Falk v. Sadler*, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000). The appellate court "applies the same standard of review implemented by the circuit court." *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 121-22, 634 S.E.2d 5, 7 (Ct. App. 2006) (citing *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001)).

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. A suit to determine coverage under an insurance policy is an action at law." *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009) (citing *State Farm Mut. Auto Ins. Co. v. James*, 337 S.C. 86, 93, 522 S.E.2d 345, 348-49 (Ct. App. 1999), and *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "An action for breach of contract seeking money damages is an action at law." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 84, 594 S.E.2d 485, 488 (Ct. App. 2004).

ARGUMENTS

I. JUDGMENT ON THE PLEADINGS WAS PROCEDURALLY IMPROPER, PARTICULARLY WHERE GREAT AMERICAN'S ANSWER INCLUDED COUNTERCLAIMS THAT COULD RESULT IN THE RESCISSION OF THE VERY POLICY THE LOWER COURT DETERMINED GAVE RISE TO A DUTY TO DEFEND.

Judgment upon the pleadings is reserved for the "proper cases." *Wooten v. Standard Life & Cas. Ins. Co.*, 239 S.C. 243, 248, 122 S.E.2d 637, 639 (1961). It is considered a drastic remedy. *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991). "Therefore, 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." *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005); *Stroud v. Riddle*, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973). Granting judgment on the pleadings is only appropriate where the pleading at issue is fatally deficient in substance or raises solely an issue of law. *Wooten*, 239 S.C. at 248, 122 S.E.2d at 639.

In determining the right of a moving party to judgment on the pleadings, "the real question to be determined is the sufficiency of the admitted facts to warrant the judgment rendered, and the materiality of those upon which issue is joined." *Id.* "If there is joined an issue of fact upon which, if supported by the evidence, a valid judgment may be based, a judgment on the pleadings is improper." *Id.* at 249, 122 S.E.2d at 639; *see also Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014) ("in determining whether a party is entitled to judgment on the pleadings, [the court] accepts as true all material facts alleged in the non-moving party's pleading, and [it] views those facts in the light most favorable to the non-moving party"). Such a "motion . . . is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader." *See Wooten*, 239 S.C. at 248, 122 S.E.2d at 639.

In addition, a motion for judgment on the pleadings "cannot be sustained except where, under the conceded facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced." *Id.* Moreover, a pleading is sufficient if it states any cause of action or it appears that the pleader is entitled to any relief whatsoever. *Baldwin v. Sanders*, 266 S.C. 394, 223 S.E.2d 602 (1976).

A judgment on the pleadings can only be entered where the pleading at issue is, *in its entirety*, fatally deficient or, *in its entirety*, raises solely an issue of law. *See Wooten*, 239 S.C. at 248, 122 S.E.2d at 639. Here, although the lower court's order is limited to the duty to defend, there are other issues and causes of action yet to be determined in this case, which directly impact whether a duty to defend exists. (*See generally*, Order on Appeal; R. p. 9-24). Great American raised counterclaims against Respondents for declaratory judgment and rescission *ab initio* of policy numbers EPP3654704-00 and EPP3654704-01.[4] R. pp. 2870-74). As part of its rationale for granting Respondents' Motion, the lower court noted that, post-hearing, Great American dropped its counterclaim for rescission of policy number EPP3654704-01. (R. p. 16). Irrespective of the lower court's conclusion, it remains true that questions of fact exist as to whether Great American will succeed on its counterclaims for declaratory judgment and rescission of policy number EPP3654704-00. Judgment on the pleadings is therefore not proper because a judgment different from that pronounced in the lower court's judgment on the pleadings may yet be rendered. *See Wooten*, 239 S.C. at 248, 122 S.E.2d at 639.

The lower court found it to be "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." (R. p. 16). This "well-settled" principle apparently has no support in South Carolina jurisprudence, and there are several extant decisions that contradict the holdings in the cases from other jurisdictions cited by the lower court in support of its conclusion. *See, e.g., Atmel Corp. v. St. Paul Fire & Marine Ins. Co.*, 416 F. Supp. 2d 802, 807 (N.D. Cal. 2006) ("[I]f St.

[4] Great American questions whether the lower court's order properly addressed amendments to the pleadings which occurred after the motion was filed *and argued*, particularly in light of the limited standard of review to which it was required to adhere. Great American recognizes that this error cuts both ways, as the lower court both seized upon Great American's decision to drop one of its rescission counterclaims following the motion hearing and also chose to address, albeit incorrectly, a new coverage defense that had not been asserted at the time the motion was filed.

Paul is entitled to rescission, then it never owed Atmel a duty to defend. . . . 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"); *Ironwood Country Club v. Liberty Ins. Underwriters, Inc.*, 2014 U.S. Dist. LEXIS 190440, at *6-7 (C.D. Cal. Mar. 24, 2014); *Rocklin Park Place Condos. Owners Ass'n v. Liberty Ins. Underwriters, Inc.*, 2013 U.S. Dist. LEXIS 127669, at *3-4 (E.D. Cal. Sept. 6, 2013); *CPS Chem. Co. v. Continental Ins. Co.*, 495 A.2d 886 (N.J. App. Div. 1985).

The lower court reasoned that judgment on the pleadings is proper, irrespective of the fact that it does not grant total relief on all causes of action in the Third-Party Complaint, because the South Carolina Uniform Declaratory Judgments Act gives courts the authority to "declare rights, status or other legal relations, whether or not further relief is or could be claimed." (R. p. 16). Great American does not dispute the lower court's interpretation of the South Carolina Uniform Declaratory Judgments Act; however, that interpretation misses the point. The *authority* to declare the rights and status of the parties under the Uniform Declaratory Judgments Act has no bearing upon the *procedural propriety* of granting judgment on the pleadings – relief that is reserved for the rare occasions where the non-moving party's pleading states no cause of action or the pleader is entitled to no relief whatsoever. *See Baldwin*, 266 S.C. 394, 223 S.E.2d 602.

Another procedural defect in the lower court's order is that it circumscribes the universe of facts that must be examined to determine whether an insurer owes a duty to defend too narrowly. The order concludes: "The determination of whether there is a duty to defend is made

by examining the allegations of the underlying complaint against the insured." (Order on Appeal, p. 5). The court cited *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009), for this proposition, even though that case also states "an insurer's duty to defend is not strictly controlled by the allegations in the complaint. Instead, the duty to defend may also be determined by facts outside of the complaint that are known by the insurer." *Id.* at 545, 677 S.E.2d at 578-579; *see also USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 793 (2008). This proposition necessarily begs the question of whether an insurer's duty to defend can ever 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.

Given that South Carolina regards judgment on the pleadings as extraordinary relief that should only be granted in exceptional circumstances, none of which is present here, the lower court's order should be reversed.

II. THE LOWER COURT MISCONSTRUED GREAT AMERICAN'S BROAD PROPERTY DAMAGE EXCLUSION.

Even if it were procedurally appropriate for the lower court to have considered the merits of Respondents' motion, the court erred in its analysis. The broad Property Damage Exclusion in Great American's Policy precludes *even the possibility* of coverage for Plaintiffs' Claim.

Exclusions from coverage in a policy may operate to foreclose an insurer's duty to defend. "Although exclusions in an insurance policy are construed against the insurer, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition." *B.L.G. Enters. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999) (citing *Burns v. State Farm Mut.*

Auto. Ins. Co., 297 S.C. 520, 377 S.E.2d 569 (1989); *Rhame v. Nat'l Grange Mut. Ins. Co.*, 238 S.C. 539, 121 S.E.2d 94 (1961)).

An insurance company bears the burden of establishing the applicability of policy exclusions. *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) (citing *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979)). "[I]f the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage that was never intended by the parties." *S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 530, 544 S.E.2d 848, 850 (Ct. App. 2001); *State Auto Prop. & Cas. Co. v. Brannon*, 310 S.C. 388, 426 S.E.2d 810 (Ct. App. 1992); *Capitol Specialty Ins. Corp. v. Ellis Wise Landscaping, Inc.*, 2015 U.S. Dist. LEXIS 142782 (D.S.C. October 20, 2015).

Plaintiffs' Claim unquestionably is based upon property damage, i.e., damage to buildings in Tilghman Beach allegedly resulting from Respondents' act and/or omissions. (R. pp. 811-13). The Complaints (and thus the Claim) all were grounded upon Plaintiffs' allegations that Tilghman Beach's common elements have not been properly maintained, and that Respondents should be held liable for the resulting damage and/or required to fix it. These allegations invoke the broad Property Damage Exclusion in the Policy, which states in relevant part:

> This Policy does not apply to any Claim[5] made against any Insured: ...
>
> based upon, 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....

(R. p. 2979); (Policy, Section IV(D)).

[5] Again, Claim is defined in relevant part as a "civil proceeding." (R. p. 2975). Respondents acknowledged this definition. (R. p. 3620).

On its face, this exclusion is very broad, and for good reason. Maintaining common elements in a horizontal property regime requires the regime's board of directors to assess members of the regime, including themselves, to raise sufficient funds to conduct necessary repairs and replacement of items that have outlasted their useful lives. In the absence of a property damage exclusion in their policy, board members could make the self-serving decision to ignore their fiduciary obligation to maintain the common elements, knowing that the consequences could be sloughed off to their insurance carrier. That is not the purpose of D&O insurance.[6] Both the courts of this state and its General Assembly understand that a fundamental tenet of insurance coverage is that it insures against "unintended, unforeseen, fortuitous" risks, not circumstances within the control or direction of the insured. *See, e.g.*, *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 736 S.E.2d 651 (2012); S.C. Code Ann. § 38-61-70 (Rev. ed. 2015) (defining "occurrence" for purposes of CGL insurance); S.C. Code Ann. § 38-1-20(25) (Rev. ed. 2015) (defining "insurance" to mean a contract to indemnify against "determinable contingencies").

Property damage exclusions similar to the one at issue here are frequently found to be unambiguous and enforceable by courts in other jurisdictions. *See, e.g.*, *Eastpointe Condo. I Ass'n v. Travelers Cas. & Sur. Co. of Am.*, 379 F. App'x 906, 908-09 (11th Cir. 2010) (applying narrower property damage exclusion in D&O policy in similar situation); *Huntingdon Ridge Townhouse Homeowners Ass'n v. QBE Ins. Corp.*, No. 3:09-cv-00071, 2009 WL 4060458, 2009

[6] Great American notes that South Carolina has a long history of declining to enforce contracts that promote irresponsible behavior as violating sound public policy. *See, e.g.*, *Henderson v. Life Ins. Co.*, 176 S.C. 100, 179 S.E. 680 (1935) (without insurable interest, life insurance policy is mere wagering contract and a temptation to commit fraud); *Fisher v. Stevens*, 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003) (exculpatory agreement contravenes public policy if it would absolve defendant from any injury to plaintiff for any reason).

U.S. Dist. LEXIS 108558 (M.D. Tenn. Nov. 20, 2009); *Bd. of Managers of Yardarm Condo. II v. Federal Ins. Co.*, 699 N.Y.S.2d 332, 247 A.D.2d 499 (N.Y. App. Div. 1998).

Plaintiffs' Claim is clearly *"based upon, 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 the loss of use of any tangible property." (R. p. 810-820; R. p. 2979); (*Compare* Plaintiffs' Third Amended Complaint, ¶¶ 32-50 *with* Policy, Section IV(D)(2)) (emphasis added). For example, Plaintiffs allege Respondents "failed or otherwise refused to undertake . . . necessary repairs to eliminate the major structural and water intrusion damage, the leaks, and to protect the General Common Elements and Limited Common Elements from future damage, or even to assess the Co-owners for the necessary repair cost thereof, all as required under the Master Deed and By-Laws." (R. p. 817).

Plaintiffs also allege "the existing and ongoing water intrusion problems and defective building conditions at the Project are the result of [Respondents'] failure to follow their own recommended construction procedure and/or process for determining and completing all necessary repairs to defective and deficient General Common Elements and Limited Common Elements as well as their failure to comply with their expressed affirmative duties under the governing documents and State law." (R. p. 818). Plaintiffs outline the numerous "defects in the maintenance, replacement, and repair of the General Common Elements and Limited Common Elements" in ¶ 46(a)-(q) and assert that "[a]ctual property damage to the Project has been caused by continuous and repeated exposure to moisture and water seeping into and around the walls, terminations, windows, doors, and intersections, resulting from the negligent and grossly negligent maintenance, replacement, and repair of the Project's General Common Elements and Limited Common Elements performed by" Respondents. (R. p. 819-820).

The case of *Eastpointe Condominium I Association v. Travelers Casualty & Surety Co. of America*, 379 F. App'x 906 (11th Cir. 2010) (applying Florida law), directly supports applying the Property Damage Exclusion to Plaintiffs' Claim in this case. *Eastpointe* involved an association's lawsuit for breach of contract and declaratory judgment against its D&O insurer, asserting the insurer had a duty to defend a unit owner's lawsuit against the association. *Id.* at 906. The unit owner alleged the association failed to adequately maintain and repair the roof and air conditioning system of the condominium building before, between, and after two hurricanes, resulting in water intrusion, mold, and other damage to the unit. *Id.* at 907. The unit owner asserted negligence, breach of fiduciary duty, and breach of contract. *Id.* The association's CGL insurer accepted defense of the suit under a reservation of rights, while the D&O insurer denied coverage, including any duty to defend, pursuant to its narrower property damage exclusion. *Id.* The court held the exclusion of claims "for or arising out of any damage, destruction, loss of use or deterioration of any tangible property" precluded coverage outright, and the D&O insurer had no duty to defend. *Id.* at 907-08. The court interpreted the phrase "arising out of" broadly. *Id.* at 908.

As in *Eastpointe*, this Court should apply the Property Damage Exclusion in Great American's Policy as written, without differentiating between losses originating from property damage and losses originating from breaches of fiduciary duty that ultimately result in property damage. *Eastpointe*, 379 F. App'x at 908. The plain language of the Policy excludes coverage for any Claim "*based upon, 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 the loss of use of any tangible property . . . ." (R. p. 2979); (Policy, Section IV(D)(2)) (emphasis

added). This language yields but one conclusion: so long as Plaintiffs' Claim in any way involves property damage, the Claim is excluded.

The lower court's reliance on *Pulliam v. Travelers Indemnity Co.*, 403 S.C. 332, 342, 743 S.E.2d 117, 122 (Ct. App. 2013) is misplaced. (Order on Appeal, p. 12). In *Pulliam*, this court opined that an allegation in a complaint that a developer had not established adequate monetary reserves for a homeowners' association before turning over control of the association's board of directors to the homeowners themselves was not unambiguously excluded from coverage under a D&O policy. The *Pulliam* court's holding should be limited to that case's facts because the property damage exclusion at issue in this case is much broader than the one at issue in *Pulliam.*[7]

The D&O Endorsement in *Pulliam* stated in pertinent part:

(I.)(D.) The insurance provided by this endorsement does not apply to:

(1) "Bodily injury," "property damage," . . . .

(V.)(F.) "Property Damage" means:

Physical injury to tangible property, including all resulting use of that property;

Loss of use of tangible property that is not physically injured; or

Diminution of property value.

Pulliam at 340, 743 S.E.2d at 121. Thus, only a claim directly for property damage was excluded. The *Pulliam* opinion holds that the failure to establish monetary reserves is not property damage. The Property Damage Exclusion in this case includes much broader language, excluding any Claim "*based upon, 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

[7] It is also important to note that the plaintiffs in *Pulliam* complained that they had to expend money out of their own pockets that they would not have had to pay if the developer had fulfilled its duty to the regime. That is a far different scenario than what is presented here. The Plaintiffs here claim the Association failed to assess *them* enough to establish the necessary reserves.

property or the loss of use of any tangible property . . . . " (R. p. 2979); (Policy, Section IV(D)(2))(emphasis added). Therefore, the inquiry here is whether Plaintiffs' lawsuit—their Claim—*has some nexus with* property damage. It absolutely does.

It makes no difference to the outcome of this case as to what particular theories of recovery make up Plaintiffs' Claim—they all depend in some respect upon the existence of property damage. The failure to establish monetary reserves would have no importance if Tilghman Beach were not allegedly facing the expenditure of significant sums to address damage to its common elements. Thus, while it is true that failing to establish adequate reserves is not the same as property damage under South Carolina law,[8] for purposes of this Claim and Great American's Policy, that distinction is immaterial.

The lower court was obviously straining in its attempts to twist the meaning of "damage" or "destruction" so as not to encompass "deterioration." (R. p. 19). This is a textbook example of "tortur[ing] the meaning of policy language to extend coverage that was never intended by the parties"[9] and should not be approved by this Court. Likewise, the lower court's suggestion that Plaintiffs' Complaints "contain allegations of conditions on the property which have nothing to do with damage, destruction or even deterioration" is similarly absurd. (R. p. 19). As an example of such conditions, the court highlighted an allegation of the need to replace sliding glass doors "that have exceeded their typical life expectancy," but it completely ignored Plaintiffs' allegations that the property has sustained:

f. Moisture penetration/leaking ocean side facing sliding glass doors;
g. Moisture penetration/leaking sliding glass doors;
h. Corroded window and sliding glass door casings;

[8] The decision in *Builders Mutual Insurance Co. v. Lacey Construction Co.*, No. CIV. A. 3:11-cv-400-CMC, 2012 WL 1032539 (D.S.C. Mar. 7, 2012), which was also cited by the lower court for this proposition, is also distinguishable for the same reasons, even though a different kind of policy was involved.

[9] *S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 530, 544 S.E.2d 848, 850 (Ct. App. 2001).

i. Corroded sliding glass door sills;
j Moisture affected and rotten wood framing around sliding glass doors;

(R. p. 811-13); (Third Amended Complaint, ¶ 35 "Building Envelope Items of Concern"). Similarly, the lower court's finding that the allegations of failure to conduct reserve studies and maintain repair records are unconnected to damage or destruction of property makes no sense at all.

The lower court also pointed out that Plaintiffs allege that the failure to maintain the common elements has caused their units to diminish in value and cited *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 163, 588 S.E.2d 112, 115-16 (2003), for the notion that diminution in value "is economic loss under South Carolina law, not damage to, or destruction of, 'tangible property.'" (R. p. 19-20). Great American agrees, but once again, the lower court missed the mark. The question is not whether diminution in value *is* property damage, but whether the Claim (i.e., lawsuit) in any way involves property damage. The answer is certainly yes (and the diminution in value is related to the property damage in any event), which is why the Property Damage Exclusion applies.

Great American does not have a duty to defend Respondents against Plaintiffs' Claim because it is unambiguously excluded pursuant to the plain and ordinary reading of the Policy's Property Damage Exclusion. This Court should reverse the lower court.

III. LEXINGTON INSURANCE COMPANY'S AGREEMENT TO PROVIDE A DEFENSE GIVES EFFECT TO GREAT AMERICAN'S OTHER INSURANCE EXCLUSION.

If the lower court was correct in addressing the pleadings as they were amended post-hearing, its analysis of Great American's Other Insurance Exclusion was erroneous.

"Other-insurance clauses are generally valid and enforceable . . . ." *Horace Mann Ins. Co. v. Gen. Star Nat'l Ins. Co.*, 514 F.3d 327, 330-31 (4th Cir. 2008); *see also Bardsley v. Gov't*

Emps. Ins. Co., 405 S.C. 68, 81-82, 747 S.E.2d 436, 443 (2013) (describing a frequent "method insurance companies use to indicate whether they intend to provide primary, secondary, or other coverage is to include in their policies 'other insurance' clauses that attempt to apportion liability among multiple insurers"). "Generally speaking, in cases where the other-insurance clauses can be reconciled, the clauses will be enforced in accordance with their terms." *Id.* at 331 (citing *Citgo Petroleum Corp. v. Yeargin, Inc.*, La. App. 95-1574, 690 So. 2d 154, 167 (1997); *Northland Ins. Co. v. Cont'l W. Ins. Co.*, 550 N.W.2d 298, 303 (Minn. Ct. App. 1996)).

Moreover, other insurance *exclusions* in policies are frequently enforced. *See, e.g., Motor Club of Am. Ins. Co. v. Phillips*, 330 A.2d 360, 368 (N.J. 1974) (rejecting "theory that another insurance exclusion deprives the insured of consideration for the premium paid for the ... endorsement"); *State Farm Fire & Cas. Co. v. Bd. of Governors*, 50 Ill. Ct. Cl. 304, 309, 1997 Ill. Ct. Cl. LEXIS 54, at *9 (1997) ("'other insurance' exclusion clause in an insurance policy is the principle, and usually the sole, determinant of whether a particular insurance policy or coverage is primary or excess coverage."). Although South Carolina courts have acknowledged the existence and operation of other insurance exclusions,[10] they have not had an occasion to analyze such an exclusion previously.

During the relevant time period, February 10, 2015 to February 10, 2017, Respondents carried CGL insurance policies issued by Lexington Insurance Company ("Lexington"). (R. p. 3629). Lexington agreed to defend Respondents under a reservation of rights, as stated in its September 2017 letter. (R. p. 3629). Therefore, in addition to the Property Damage Exclusion discussed above, the Other Insurance Exclusion in Great American's Policy applies.

Great American's Other Insurance Exclusion states in relevant part:

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[10] *See, e.g., South Carolina Ins. Co. v. Fidelity & Guar. Ins. Underwriters*, 327 S.C. 207, 211-212, 489 S.E.2d 200, 202 (1996).

> This Policy does not apply to any Claim made against any Insured: ...
>
> to the extent it is insured in whole or in part by any other valid and collectible policy or policies, (except with respect to any excess beyond the amount or amounts of coverage under such other policy or policies), whether such other policy or policies are stated to be primary, contributory, excess, contingent, or otherwise.

(R. p. 2978); (Policy, Section IV(B)). If the language of this exclusion left any doubt as to whether Great American owes a duty to defend, the Policy further provides that "Costs of Defense shall not include . . . any amounts incurred in defense of any Claim which any other insurer has a duty to defend, regardless of whether or not such other insurer undertakes such duty."[11] (R. p. 2976); (Policy Section III(D)).

It is important to bear in mind that Lexington took no position as to Respondents' motion at the hearing or otherwise. Nonetheless, Respondents argued, for whatever reason, that both Great American's Policy and Lexington's policy are primary such that each owes a duty to defend in this case.[12]

Rather than merely: (a) accept the undisputed fact that Lexington has agreed to defend Respondents from Plaintiffs' Claim since its inception, or (b) compare Lexington's "other insurance" clause with Great American's Other Insurance Exclusion, the lower court went to great lengths to discuss other insurance clauses in the context where they typically arise—disputes *between carriers* as to whether their respective policies are primary, excess or concurrent. It concluded that because the policies cover different risks, this is not a true other

[11] Costs of Defense generally include reasonable and necessary legal fees, costs and expenses incurred in the investigation or defense of any Claim...." (R. p. 2976); (Policy, Section III(D)).

[12] The lower court appeared to wonder at the hearing, as did Great American, whether Respondents had standing to be making an argument on Lexington's behalf, given that Respondents have not been aggrieved by Great American's denial of coverage. (R. p. 3003, line 1-p. 3006, line 2).

insurance clause dispute, so both policies are primary and both carriers owe a duty to defend. (R. p. 21-23). The logical gymnastics required to reach this conclusion are rather astonishing.[13]

First, the lower court completely ignored the language of Great American's Other Insurance Exclusion, focusing solely upon the Costs of Defense definition (which it blithely cast off as "just a definition"). Second, it ignored, or perhaps distorted, the language of Lexington's other insurance clause—which clearly makes it primary. The lower court focused upon the following wording as the basis for its holding that "[e]ven if the Lexington CGL Policy's "Other Insurance" provision applies, the Lexington CGL Policy attempts to make Lexington excess coverage and, therefore, the Lexington and Great American excess provisions cancel each other out":

> [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 ...***

(R. p. 22 (emphasis added)). The lower court's use of an ellipsis in the quoted sentence was improper (although it was the only way for it to reach its desired conclusion). A review of the entire other insurance clause in the Lexington policy reveals why that is the case:

> 4. Other Insurance
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A [Bodily Injury and Property Damage Liability] or B [Personal and Advertising Injury Liability] of this Coverage Part, our obligations are limited as follows:
>
> a. *Primary Insurance*
>
> This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below. [Emphasis added.]

[13] And, one may add, wholly inappropriate in resolving a motion for judgment on the pleadings.

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
(ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, ***for which you have been added as an additional insured.***

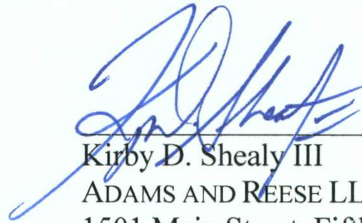
(R. p. 3346; R. p. 3378; R. pp. 3383-85); (Lexington Policy, Section IV(4)) (emphasis added). The highlighted language at the end of the quoted provision confirms that paragraph (b) only applies in a situation where the Association has been named as an additional insured on another entity's (such as a general contractor) policy.

Reading the entire other insurance clause together reveals that none of the situations that give rise to Lexington's policy being deemed excess is present here. Lexington's policy is primary, and Great American's Policy is, at most, excess (although the Property Damage Exclusion eliminates all coverage).[14] The two policies therefore do not conflict, and Great American's Policy excludes this Claim from coverage in this circumstance.

[14] Regarding Lexington's duty to defend, it continues until its policy limits are exhausted in payment of judgments or settlements. (R. p. 3378; R. pp. 3383-84); (Lexington Policy, Section I(A)(1), attached to

CONCLUSION

Appellant Great American respectfully requests this Court reverse the lower court's order Granting Respondents' Motion for Judgment on the Pleadings. The lower court's order was procedurally improper, particularly where Great American's answer at the time the court considered Respondents' Motion for Judgment on the Pleadings included two counterclaims for rescission of the Policy as well as substantive defenses sufficient to allow Great American to deny coverage based on the Policy's Property Damage and Other Insurance Exclusions. Given that South Carolina regards judgment on the pleadings as extraordinary relief that should only be granted in exceptional circumstances, none of which is present here, the lower court's order should be reversed.



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Great American's Response in Opposition to Respondents' Motion for Judgment on the Pleadings, Affidavit of Kathleen Van Deven). In other words, defense costs are in addition to those limits.