THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable S. Jackson Kimball
Special Circuit Court Judge

2011-CP-46-01090
2012-211939

Brian Pulliam, Deborah C. Pulliam, Monica Bradshaw, Helen K. Cook, Kala Craig, Victor E. Dirienzo, Cynthia Ditursi, J. Scott Drexel, Kathleen Kramer, Robert Loebe, Melanie McDaniel, David Osborne, Celeste Arrowwood, Vincent Dionna, Mikel Marcuse, James P. Wheaton, Jr., Joseph Manfredini, Elena Manfredini, David Cox, Jonathan B. Dillard, Eric Wilson, Don and Debbie Neff, and Marianna Junda, ... Respondents,

v.

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

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

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

INTRODUCTION

Travelers Indemnity Company ("Travelers") respectfully submits this reply and response to Respondents' brief. Respondents' brief contains several legal and factual statements that necessitate a response or clarification. Therefore, Travelers respectfully submits this reply.

ARGUMENT

I. RESPONDENTS' CLAIMS ARE FOR PROPERTY DAMAGE, NOT ECONOMIC LOSS, AND ARE THEREFORE EXCLUDED FROM COVERAGE BY THE DIRECTORS AND OFFICERS LIABILITY ENODRSEMENT IN THE KPOA POLICY.

A. Respondents' Fifth Amended Complaint alleges property damage

Respondents attempt to circumvent the clearly applicable property damage exclusion in the Kensington Place Owners' Association ("KPOA") Directors and Officers ("D&O") liability policy by characterizing the allegations in the Fifth Amended Complaint ("Fifth AC") as falling outside the scope of the exclusion. Noting that the policy defines "property damage" as "physical injury to tangible property", Respondents assert that the exclusion does not apply because the Fifth AC "is wholly bare of any allegations that the POA Board members 'physically injured' anything." Resp. Br. 3. A review of the allegations of the complaint clearly reveals otherwise.

Two paragraphs after making this assertion, Respondents cite to allegations in the Fifth AC regarding KPOA's failure to inspect, maintain, and repair the common elements. *See* Resp. Br. 3-4 and R. p 72, ¶ 26. Paragraph seven of the Fifth AC alleges

that KPOA had a duty "to provide for the care and upkeep of the property and Common Elements, and **to maintain and make repairs to the property**, and had the additional duty to create and fund a reserve fund for common element repairs and replacement." (R. pp. 67-68, ¶ 7) (emphasis added). The complaint also alleges: "Pursuant to the applicable law, the POA, having **a duty to maintain and repair the property**, had and has a fiduciary duty to accomplish these duties for the benefit of the individual owners, including these Plaintiffs." (R. p. 69, ¶ 15) (emphasis added). Finally, the complaint also alleges that KPOA failed "to insure that the Common Elements were properly inspected, repaired, and maintained." (R. p. 70, ¶ 19). As a result of this alleged breach, the complaint seeks "damages for the continued deterioration of the common elements". *Id.*, ¶ 20. Respondents' complaint also alleges:

> 27. As a direct and proximate result of the negligence, recklessness, willfulness and wantonness of the Defendants as set forth above, the Plaintiffs Homeowners will be required to expend considerable sums **for the repair and refit of this property, all to their damage**.

(R. p. 72, ¶ 27) (emphasis added).

The complaint clearly alleges that KPOA failed to maintain and repair the property which resulted in physical injury to the property. Respondents' assertion to the contrary is unfounded. The underlying case is a dispute over who is responsible for paying to repair the defects and damages associated with the property. Respondents' claims against KPOA are based on, arise out of, are caused by, and seek compensation for property damage. Therefore, Respondents' claims are excluded from coverage.

B. The Fifth Amended Complaint does not allege "economic loss"

Respondents' attempt to place an "economic loss" label on their claim does not transform a property damage claim into a covered risk. The Fifth AC contains no reference to claims for "economic loss" and clearly refers to property damage. *See* Fifth AC. (R. pp. 66-73). A review of the complaint in its entirety reveals that there can be no other reasonable inference than that Respondents seek to recover damages for the alleged failure to maintain and repair, or provide for the maintenance and repair, of the common elements and that no other damages (except punitive damages) are sought. *See id.* Respondents provide no support for the blanket assertion that the underlying complaint seeks only "economic loss".

Additionally, the authorities cited by Respondents to support their economic loss theory are clearly inapplicable as they involve actions for negligent misrepresentation in real estate contracts where state statutes mandated that any recovery was limited to economic loss. *See Qualman v. Bruckmoser*, 163 Wis.2d 361, 471 N.W.2d 282, 285 (Ct. App. 1991) (applying Wisconsin statute limiting damages for misrepresentation "to the difference between the market value of the property at the time of purchase and the amount actually paid" to hold loss was pecuniary and not covered under homeowner's policy as property damage); *Safeco Ins. Co. of America v. Andrews,* 915 F.2d 500 (9th Cir. 1990) (applying California law and citing *Allstate Ins. Co. v. Miller*, 743 F.Supp. 723 (N.D. Cal. 1990) to hold home buyer's claims did not expose seller to liability for damage to the property, but rather for economic loss, where seller allegedly negligently misrepresented condition of property sold); *Allstate Ins. Co. v. Miller,* 743 F.Supp. 723 (N.D. Cal. 1990) (applying California statute limiting a purchaser's recovery in

fraudulent transactions to economic loss to hold that a claim based on negligent misrepresentation in the sale of a home was outside the scope of a homeowner's policy covering property damage since statute limited recovery to economic loss).

Furthermore, the cases cited by Respondents involve contract actions for misrepresentations regarding the sale of property where there was pre-existing property damage that was not disclosed. As stated in *Safeco* and quoted in Respondents' brief, there was no allegation that the insureds were actually liable for the property damage and "the cause of the damage was [the] alleged misrepresentations", not the damage to the property. *See Safeco*, 915 F.2d at 502 and Resp. Br. 9. *See also Qualman,* 471 N.W.2d at 285 (noting that "the buyer's claims did not expose [the insured] to liability for any damage to tangible property" and "[a]ny property damage that existed in the home existed before the making of the alleged misrepresentations which are the theory of recovery in the complaint."); *Allstate*, 743 F.Supp. at 727 (stating "[n]o one contends that the alleged misrepresentations caused physical injury to the condominium itself.").

The underlying suit is not a breach of contract action for negligent misrepresentation and contains direct allegations against KPOA for property damage due to its alleged failure to maintain and repair the property. *See supra* Part I.A. Respondents' attempt to avoid the exclusion by characterizing their claims as something other than for "property damage" does not pass muster. Even from a cursory review of the Complaint, it is apparent that, regardless of the "economic loss" label, Respondents seek compensation for alleged "property damage" to the common elements, which is clearly excluded by the policy.

C. Respondents' brief mischaracterizes *Eastpointe Condo. I Ass'n, Inc. v. Travelers Casualty & Surety Company of America*

The most analogous case to the instant matter, cited by Travelers in its initial brief, is *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 379 Fed. Appx. 906 (11th Cir. 2010).[1] App. Br. 22-24. In *Eastpointe*, the Eleventh Circuit Court of Appeals upheld the Southern District of Florida's holding that the property damage exclusion in a D&O policy barred coverage for fiduciary duty claims against a condominium association. Respondents' brief mischaracterizes the case cited by Travelers, asserting that Travelers cited an unpublished decision entitled "*Eastpointe Condominium Association, Inc. v. Travelers*, Docket no. 08081187-CV-DTKH." Resp. Br. 11.[2] This assertion is incorrect.

Travelers cited *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 379 Fed. Appx. 906 (11th Cir. 2010). Respondents' brief also states that, in *Eastpointe,* "it was successful in having a US District Court find that the 'property damage' exclusion permitted a denial of coverage in a Directors and Officers claim." Resp. Br. 11-12. However, as discussed above, the *Eastpointe* decision cited by Travelers is a decision by the Eleventh Circuit Court of Appeals affirming a **published**

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[1] Travelers also presented this case to the lower court at the summary judgment hearing and discussed it extensively in its Motion for Reconsideration. (R. pp. 133-134).

[2] Respondents cited this case and docket number in their submission to the lower court on page 10 of their Memorandum in Support of Motion for Summary Judgment. (R. p. 60). Travelers has not used this citation. Respondents may be referring to the decision of *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 664 F. Supp. 2d 1281 (S.D. Fla. 2009), which is the district court case affirmed in *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 379 Fed. Appx. 906 (11th Cir. 2010). Travelers did cite to the Eleventh Circuit decision affirming the district court decision. *See* App. Br. 22-24. *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 664 F. Supp. 2d 1281, 1286-87 (S.D. Fla. 2009) does have a case number of 08-81187-CIV but is obviously a published decision and not unpublished, as Respondents assert.

decision by the United States District Court for the Southern District of Florida in *Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 664 F. Supp. 2d 1281, 1286-87 (S.D. Fla. 2009) aff'd, 379 F. App'x 906 (11th Cir. 2010).

Respondents urge this Court to ignore the *Eastpointe* decisions and adopt the unpublished decision of *Lumbermens Mutual Casualty Co. v. Dadeland Cove Section One HOA, Inc.*, 2007 WL 2979829 (USDC Miami Div. 2007), as it was referred to in the *Eastpointe* decision and affirmed on appeal in 2008.[3] Resp. Br. 12. Respondents ignore the fact that the *Eastpointe* decision cited by Travelers was decided by the Eleventh Circuit Court of Appeals **after** *Lumbermens*. *See Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 379 Fed. Appx. 906 (11th Cir. 2010). More importantly, contrary to Respondents' contention, *Eastpointe* does more than merely "refer to" the *Lumbermens* decision. *Eastpointe* expressly discusses the district court and appellate court *Lumbermens* decisions, discounts their value, and declines to follow them:

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

[3] Respondents made this same argument to the lower court on page 10 of their Memorandum in Support of Motion for Summary Judgment. (R. p. 60).

> of the law and the erroneous application of that law to the facts" (quoting *Compton v. Alton Steamship Co.*, 608 F.2d 96, 104 (4th Cir.1979))).

Eastpointe Condo. I Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am., 379 F. Appx. 906, 909 (11th Cir. 2010).

The *Eastpointe* courts interpreted a property damage exclusion in a D&O policy and found that the exclusion barred coverage for fiduciary duty claims against a condominium board based on the board's failure to maintain/repair the property. *See Eastpointe*, 664 F.Supp.2d at 1284 and *Eastpointe*, 379 Fed. Appx. at 909. Other cases are in accord. *See Board of Managers of Yardarm Condominium II v. Federal Ins. Co.*, 247 A.D.2d 499, 669 N.Y.S.2d 332 (1998) (a "property damage" exclusion in a D&O policy barred coverage for a claim for living expenses incurred after the underlying plaintiff's condominium unit was damaged by fire); *Scharf v. Federal Ins. Co.*, 261 A.D.2d 257, 690 N.Y.S.2d 265 (1999) (holding that a property damage exclusion in a D&O policy barred coverage for claims related to property damage); *Employers Ins. of Wausau v. Duplan Corp.*, 899 F. Supp. 1112, 1129 (S.D.N.Y. 1995) (holding that a property damage exclusion in a D&O policy barred coverage for fiduciary duty claims against officers of a manufacturing company based on alleged pollution, stating "the fiduciary duty claim owes its very existence to the pollution damage claim."); *Federal Ins. Co. v. Everest National Ins. Co.*, 257 S.W.3d 771 (Tex. App. 2008) (claims against association for misrepresentation excluded by property damage exclusion because there would be no suit but for alleged property damage).

Respondents attempt to circumvent the property damage exclusion by labeling their damages as "economic loss". As demonstrated above, this argument is unpersuasive. *See supra* Part I.B. There would be no suit but for the alleged property damage. The connection between the allegations and the excluded damages is

undeniable. Respondents offer neither facts nor persuasive legal authority to support their claim for coverage under the policy at issue.

II. ALL MATTERS IN TRAVELERS' RULE 59(E) MOTION WERE PROPER AND DID NOT RAISE NEW ISSUES.

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

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

Id., 361 S.C. at 24, 602 S.E.2d at 780.

Respondents incorrectly assert that Travelers improperly raised arguments and issues for the first time in a Rule 59(e) motion. Resp. Br. 13-15. Respondents mischaracterized these issues as new, accusing Travelers of attempting "to introduce new matters post-trial." Resp. Br. 14. All of the issues raised by Travelers were properly before the lower court for consideration under Rule 59(e).

A. Special Damages

Travelers raised the issue of special damages, and Respondents' failure to plead them, to the lower court in its Memorandum of Law in Support of its Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment. (R. pp. 86-87). This matter was timely and properly raised before the lower court and, when the lower court failed to rule on the issue, Travelers was required to file a Rule 59(e)

motion to preserve the issue for appellate review. Travelers followed the appropriate procedure. *See* Final Brief of Appellant at II., pp. 27-28.

B. 3(b) Exclusion

Respondents' insinuation that Travelers raised the 3(b) exclusion for the first time in its Rule 59(e) motion is also incorrect. The exclusion was raised in Travelers' Answer and Counterclaim. (R. p. 42). The exclusion was also raised and discussed on pages 14-15 of Travelers' Memorandum in Support of its Motion for Summary Judgment. (R. pp. 87-88). Travelers appropriately raised the issue in its Rule 59(e) motion and requested a ruling that the Respondents' allegations fell within this exclusion.

Respondents assert that this exclusion is irrelevant since "[n]o reading of the underlying Complaint can find any mention of claims of intentional, fraudulent, or criminal acts." *See* Resp. Brief 15. A reading of the underlying Complaint clearly reveals allegations of not only negligent, but "reckless, willful, and wanton," actions. *See* Fifth AC, ¶ 26. (R. p. 72). Paragraph 26 alleges that KPOA's actions were "negligent, reckless, willful, and wanton" in failing to: 1. perform adequate inspections; 2. retain experts to assess the conditions of the building; 3. maintain the Common Elements to an adequate state of repair; 4. repair the Common Elements (placing the Developers' interests ahead of the property owners), 5. establish and fund adequate reserve funds; 6. establish an adequate depreciation schedule and adequately fund building repairs and replacement; 7. advise the homeowners of the conflicts of interest inherent in a developer-controlled POA, and 8. provide for independent representation of non-developer homeowners with respect to POA actions and property management and maintenance. (R. p. 72). It also alleges that "from its inception in 1996 until April 24, 2007, the POA was wholly

controlled by the Defendant Developers, pursuant to provisions in the By Laws, and was operated by a three-member Board constituted of Defendant Developers' employees or designates." (R. p. 68, ¶ 9). This is clearly intentional conduct.

There can be no dispute that the conduct alleged in the Fifth AC clearly constitutes at the very least a dishonest, fraudulent, or malicious act of an insured. These allegations are of dishonest and fraudulent conduct, allegedly committed with KPOA's knowledge, and clearly fall within exclusion (3)(b).

C. 3(I) Exclusion

Travelers raised this exclusion in its Answer and Counterclaim. (R. pp. 42-43). Travelers also raised and discussed this exclusion on pages 14-17 of its Memorandum of Law in Support of its Motion for Summary Judgment. (R. pp. 87-90). As Travelers clearly noted in its brief, it is only seeking to apply this exclusion to those Plaintiffs who served on the KPOA board. *See* App. Br. 32.

III. THE LOWER COURT IMPROPERLY FAILED TO ADDRESS TRAVELERS' ARGUMENT THAT PUNITIVE DAMAGES ARE EXCLUDED.

Respondents appear to concede that Travelers' policy excludes punitive damages but then suggest that, since the lower court failed to rule on the issue, Travelers should wait to see whether punitive damages are awarded at trial and then "reinstitute another Declaratory Judgment Action if it felt the necessity." Resp. Br. 16. This suggestion frustrates judicial economy. All issues regarding coverage should be decided in the instant action to avoid piecemeal litigation and wasting judicial resources. *See Knowles v. Standard Sav. And Loan Ass'n*, 274 S.C. 58, 60, 261 S.E.2d 49 (1979) (recognizing the

"debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequences, but a single controversy").

"Under the Declaratory Judgment Act, a party whose rights, status, or other legal relations are affected by a contract may seek a court's determination of any question of construction or validity of the contract and obtain a declaration of the party's rights, status, or other legal relations thereunder." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 459 S.E.2d 844, 845 (1995). Respondents instituted an action regarding the determination of the rights and obligations under this policy. Respondents made a claim for punitive damages in the suit underlying this declaratory judgment action. *See* Fifth AC, p. 8. (R. p. 73). Travelers filed a counterclaim in the instant declaratory judgment action seeking, among other issues, a declaration that punitive damages are excluded under the policy. *See* Answer and Countercl. 3. (R. p. 42). Travelers also raised the issue in its motion for summary judgment and Rule 59(e) motion.

The punitive damages exclusion was properly before the lower court and this issue is ripe for adjudication. Travelers is entitled to a ruling as to whether the policy covers punitive damages. Not ruling on this exclusion on the grounds that there is no verdict while allowing rulings on other exclusions where the same argument regarding the lack of a verdict could be made is inconsistent and frustrates judicial economy.

This is the appropriate time to determine whether this policy affords coverage for punitive damages. Travelers contends that punitive damages are explicitly and unequivocally excluded from coverage by virtue of the following:

The insurance provided by this endorsement does not apply to:

* * *

(2) Punitive or exemplary damages

* * *

Policy No. I-680-3467M656-IND-08, Directors and Officers Liability Endorsement, p. 2 of 5 at D.(2). (R. p. 34).

Travelers requests that this Court make a judicial determination that there is no coverage for punitive damages.

CONCLUSION

Based on the arguments and authorities set forth above and in Travelers' Initial Brief, Travelers submits that the order of the court below should be reversed and that judgment should be entered in its favor to the effect that Respondents' allegations against KPOA in the underlying action are excluded from coverage by the Directors and Officers Liability Endorsement in the Travelers policy.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR and the August 13, 2007 order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings".

(Signature on following page)

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PROOF OF SERVICE

I, Susan Drake DuBose, attorney of Baker, Ravenel & Bender, L.L.P., attorneys for Appellant, do hereby certify that on the 21st day of November 2012, I have served the following named attorneys with the Final Reply Brief of Appellant, Final Reply Brief of Appellant, and Certificate of Compliance by mailing copies of same by United States Mail, postage prepaid, to the following at the address shown below:

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