

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

30 2011

CASE NO. 11-0750

(Monongalia County Docket No. 10-C-56)

ROSE L. THOMAS, As Administratrix
of the Estate of Dennis L. Thomas,

Petitioner-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Respondent-Appellee.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

The Petitioner-Appellant, in response to the Respondent-Appellee's Brief filed herein, says as follows:

With respect to the first asserted ground for appeal, State Farm seems to concede that the singular stated ground for the Lower Court's Order was in error.¹ State Farm contends, however, that there was another, unstated, reason upon which the Court should properly have relied, that would have made the summary judgment proper, and therefore urges this Court to find that the Order should be affirmed regardless.² Petitioner acknowledges the two cases cited and this Court's authority to so determine.³ The problem is that the Circuit Judge specifically

¹Respondent's Brief at pages 8-9.

²Respondent's Brief at pages 9-10.

³Respondent's Brief at page 9, citing Syl. Pt 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965) and *Cumberland Chevrolet Oldsmobile Cadillac, Inc., v. General Motors Corp.*, 187 W.Va. 535, 420 S.E.2d 295, 298, n.4 (1992).

disagreed with State Farm and distinguished the case upon which State Farm now urges this Court to rely.⁴ In other words, in order to make that argument, State Farm needed to cross appeal, which it did not. As the record stands, both parties now agree that reliance upon the Doctrine of Reasonable Expectations was wrong, and it was State Farm which lost on the alternative ground now asserted. Accordingly, Petitioner's appeal should be granted and the Order below reversed.

On the merits, State Farm seems to stand mute. Its Brief is completely devoid of any response regarding Professor Widiss' views and extensive authority regarding the proper purpose and use of an OBNI exclusion⁵, or even this Court's prior references to the general principal that first party coverage follows the person, not the vehicle⁶. It simply relies on *Deel*⁷ and ignores the distinguishing facts which prompted the Circuit Judge to reject that argument below.⁸ State Farm's protestations to the contrary notwithstanding, the issue here remains an undecided question under West Virginia law. Petitioner merely asks that it be decided, on its face, and not on the basis of inapposite expectations. As Professor Widiss clearly states, no doubt, the insurer intended to incorporate and rely upon the exclusion, but it's a strain to even imagine that the insured relied upon same.⁹ In any event, there was certainly no evidence to that effect, and the Circuit Judge's unilateral conclusion otherwise was simply wrong.¹⁰

Further, as is set forth in the case recently decided by this Court on September 22, 2011 in Loudin v. National Liability and Fire Insurance Company; Jack Sergent; D. L.

⁴Hearing transcript at page 149 of Joint Appendix

⁵Petitioner's Brief at pages 6-14

⁶Petitioner's Brief at page 13

⁷181 W.Va. 460, 383 S.E.2d 92 (1989).

⁸*Supra* at footnote 4.

⁹Petitioner's Brief at page 10

¹⁰Indeed, as previously stated, this Court typically does not even apply that doctrine absent a finding of ambiguity. Petitioner's Brief at page 5

Thompson; and Consolidated Claim Services, Inc., No. 35763, whereby it was held that as a general rule, a trial court may not grant summary judgment *sua sponte* on grounds not requested by the moving party. An exception to this general rule exists when a trial court provides the adverse party reasonable notice and an opportunity to address the grounds for which the Circuit Court is *sua sponte* considering granting summary judgment.

The petitioner says that based upon the records herein, the holding in Loudin is applicable to the facts herein and the Court ruling should be reversed.

Petitioner stands on her unanswered Petition and respectfully asks that this Court reverse.

ROSE L. THOMAS, as Administratrix
Of the Estate of Dennis L. Thomas,
Petitioner/Appellant,

By Counsel



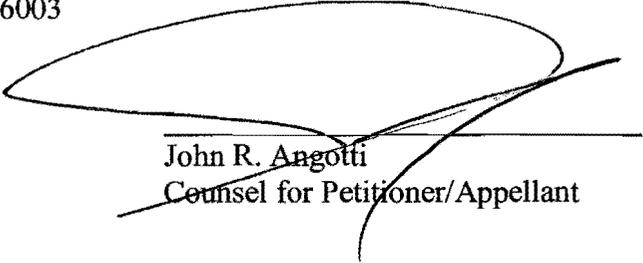
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CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of September, 2011, I served a true and actual copy of the foregoing Petitioner's Reply to Respondent's Brief on the following counsel of record, by depositing the same in the United States Mail, postage prepaid and addressed to them as follows:

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