

**FILED**  
IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

RRK, INC., d/b/a SHOWBOAT MARINA,  
RUDY LEE and KELLY LEE,

Plaintiffs, ADELL CHANDLER  
CIRCUIT CLERK  
CABELL CO., WV

v.

Civil Action No.: 09-C-301  
Hon. F. Jane Hinstead, Judge

NEW HAMPSHIRE INSURANCE COMPANY,  
NORMAN SPENCER AGENCY, INC. and  
INSURANCE SYSTEMS, INC.,

Defendants,

**ORDER GRANTING PLAINTIFF, RRK, INC.'S'  
MOTION FOR PARTIAL SUMMARY JUDGMENT  
ON INSURANCE COVERAGE UNDER PROPERTY POLICY**

**PROCEDURAL POSTURE OF MOTION**

1. On the 14<sup>th</sup> day of October, 2010 came Plaintiff RRK, Inc., by counsel, L. David Duffield, Esquire, Chad S. Lovejoy, Esquire, and Thomas P. Boggs, Esquire; Defendant New Hampshire Insurance Company, by counsel Neva G. Lusk, Esquire and Lisa L. Bray, Esquire; Defendant Norman Spencer Agency, Inc., by counsel Kevin R. Nelson, Esquire and Alexis Mattingly, Esquire; Defendant Insurance Systems, Inc., by counsel Melvin O'Brien, Esquire and Third-Party Defendant Maritime General Agency, Inc., by counsel John D. Hoblitzell, III, Esquire, for Hearing on Plaintiff RRK, Inc.'s previously filed "Motion for Partial Summary Judgment on Insurance Coverage Under Property Policy."

2. The "Motion for Partial Summary Judgment on Insurance Coverage Under Property Policy" had been originally filed jointly by Plaintiffs RRK, Inc., Rudy Lee and Kelly Lee on September 30, 2010 and set for Hearing on October 14, 2010. On October 12, 2010, Defendant New Hampshire Insurance Company filed two (2) separate responsive pleadings

entitled “Opposition of New Hampshire Insurance Company to Motion for Summary Judgment of Rudy Lee and Kelly Lee and Cross Motion for Summary Judgment of New Hampshire Insurance Company” and “Opposition of New Hampshire Insurance Company to Motion for Summary Judgment of RRK, Inc.” Plaintiffs voluntarily agreed to postpone hearing on the “Motion for Partial Summary Judgment on Insurance Coverage Under Property Policy” as filed on behalf of the individual Plaintiffs Rudy Lee and Kelly Lee, and to proceed solely on behalf of Plaintiff RRK, Inc. As a result, the Plaintiffs’ Motion for Partial Summary Judgment on Insurance Coverage Under Property Policy as to Plaintiffs Rudy Lee and Kelly Lee, as well as Defendant New Hampshire Insurance Company’s Cross Motion for Summary Judgment as to Plaintiffs Rudy Lee and Kelly Lee are left for hearing on a later date by agreement of the Court and the parties.

3. Additionally, Defendant Insurance Systems, Inc. filed a Response to Plaintiffs’ Motion for Partial Summary Judgment, and Plaintiff RRK, Inc. filed a Reply to Defendant New Hampshire Insurance Company’s “Opposition of New Hampshire Insurance Company to Motion for Summary Judgment of RRK, Inc.”

4. The subject Motion was brought by Plaintiff RRK, Inc. under the Plaintiffs’ First Amended Complaint, which included a Count for Declaratory Judgment Action, seeking a declaration of rights under a policy of property insurance issued by Defendant New Hampshire Insurance Company to Plaintiff RRK, Inc. – Policy No. DMO (“Dealers, Marina Operators”) 690-93-92. Specifically, Plaintiff RRK, Inc. moved the Court for partial summary judgment, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, asserting that property coverage exists under the Policy as a matter of law for the February 23, 2009 sinking of the Showboat Marina Barge and Contents under the Doctrines of Reasonable Expectations and Equitable Estoppel. Further, Plaintiff argued that Defendant New Hampshire Insurance Company failed to meet its

legal burdens under West Virginia law such that the Exclusionary language proffered in denial of the Plaintiff's claim would be inoperable as a matter of law.

#### FINDINGS OF FACT

5. By Written Contract dated September 3, 2007, Plaintiffs Rudy Lee and Kelly Lee purchased the property known as the Showboat Marina and Cajun Kitchen Restaurant from Darrin Robin, which included a floating Barge upon which buildings were situate and two (2) strings of docks. See Purchase Agreement, September 3, 2007.

6. Plaintiff Rudy Lee then sought insurance coverage for the subject property from a local insurance agent, Defendant Insurance Systems, Inc., who then solicited the application for insurance that ultimately lead to the issuance of a DMO Policy (No. 690-93-92) by Defendant New Hampshire Insurance Company.<sup>1</sup>

7. In the process that led to the issuance of the Predecessor DMO Policy, Plaintiff dealt directly, and solely, with the Soliciting Agent, Defendant Insurance Systems, Inc ("the Insurance Agent"). The Insurance Agent, in turn, dealt with an Ohio Insurance Agency, Defendant Norman Spencer Agency, Inc. – referred to as ("the Producer"). The Producer then dealt directly with Third-Party Defendant, Maritime General Agency, Inc. ("the Underwriter"), which performed the underwriting services for issuing Insurer, Defendant New Hampshire Insurance Company ("the Insurance Company").<sup>2</sup>

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<sup>1</sup>The initial policy period ran from September 28, 2007 to September 28, 2008 and was later renewed with a Renewal policy period of September 28, 2008 to September 28, 2009, which renewal period encompassed the February 23, 2009 sinking of the Showboat Marina. For ease of discussion, the initial policy as issued by Defendant New Hampshire Insurance Company will be referred to as the "Predecessor DMO Policy" and the Renewal policy in effect as the "Renewal DMO Policy."

<sup>2</sup>For clarity and brevity, hereinafter, reference is made to the roles of the parties rather than repeatedly setting forth the lengthy names of the parties as follows:

Plaintiff RRK, Inc.: "the Plaintiff"

Defendant Norman Spence Agency, Inc: "the Producer"

Defendant Insurance Systems, Inc.: "the Insurance Agent"

Defendant Maritime General Agency: "the Underwriter"

Defendant New Hampshire Insurance Company: "The Insurance Company"

8. Because Plaintiff dealt solely with the Insurance Agent, it is undisputed by the parties that any and all information flowing to and/or from the Plaintiff did so only through the Insurance Agent. Depo. of Rudy Lee, p. 117, ll. 4-11.

9. Prior to the completion of the Application for the Predecessor DMO Policy, Plaintiff asked its Insurance Agency for the opportunity to review the actual Coverage Forms of the proposed Policy, which request was passed along in a September 20, 2007 e-mail from the Insurance Agent to the Producer. Depo. of Patricia Stutler, Vol. I, p. 20, l. 20 through p. 21, l. 10; Discovery Doc. NSA-000128.

10. Later on September 20, 2007, the Insurance Agent responded to Plaintiff's request to review the Policy Coverage Forms by sending a seventeen (17) page facsimile to Plaintiff, stating:

Rudy [Plaintiff Rudy Lee]

Per our phone conversation of this morning, attached you will find the coverage forms that you requested.

September 30, 2007 Facsimile from Insurance Agent to Plaintiff, attached as Original Exhibit 1 to Depo. of Patricia Stutler, Vol. I.

11. It is undisputed that the seventeen (17) page fax sent by the Insurance Agent was received and read by the Plaintiff, but the Coverage Forms provided made no reference whatsoever to any exclusions which are now sought to be applied to the Barge and its Contents. The requested Coverage Forms did contain several pages of Exclusions wholly unrelated to the disputed Coverage in the instant matter; however, such forms did not contain any of the specific Exclusionary Language now being proffered by the Insurance Company in denial of Plaintiff's insurance claim, including but not limited to, any Exclusion for "Wear and Tear." It is also undisputed that several weeks later the Insurance Agent mailed an insurance policy to the Plaintiff

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"The Soliciting Agent" is "The Insurance Agent" herein.

Insured. Depo. of Rudy Lee, p. 105, ll. 11-25; Depo. of Kelly Lee, p. 25, ll. 5-12. The Plaintiff Insured's representatives testified that they never read the subsequently mailed policy (received approximately four (4) weeks after the seventeen (17) page facsimile was received and read, which previously sent Coverage Forms omitted the applicable Exclusionary Language that the Insurance Company seeks herein to rely upon). Id. The Insurance Company has offered no evidence to contradict such sworn testimony by the Insured, nor offered any evidence to contradict the Insurance Agent's testimony, and date and time-stamped facsimile, showing that the Insurance Agent did, in fact, fax the seventeen (17) page fax in response to the Plaintiff's request to review the Coverage Forms and that the Coverage Forms provided omitted the subject Exclusionary language. See September 30, 2007 Facsimile from Insurance Agent to Plaintiff, attached as Original Exhibit 1 to Depo. of Patricia Stutler, Vol. I.

12. The DMO Application which led to the issuance of the Predecessor DMO Policy was then completed by, and in the handwriting of, the Insurance Agent's Principal, Arch Keller, with the signature page then faxed to Plaintiff for signature with a date of September 28, 2007. See Application, Discovery Doc. SHBT01119. The Plaintiff then signed the Signature Page and faxed the Application back to the Insurance Agent. Id.

13. The same completed DMO Application used for the Predecessor DMO Policy was used again for the Renewal DMO Policy, with no changes to the handwriting added in 2007, other than a second signature line written underneath the original September 28, 2007 signature date.

14. Under the "Piers, Wharves and Docks Coverage" Section of the DMO Application, used for both the Predecessor DMO Policy and Renewal DMO Policy, there is a handwritten entry by the Insurance Agent, which expressly references a "Head Barge" and later notes both that "It's a Barge Remodeled" and "Barge Hull." See Discovery Doc. SHBT01117.

15. However, when the Predecessor DMO Policy was ultimately issued in 2007 by the

Insurance Company, the Policy failed to list the Barge or its Contents as Covered Property. Instead, only the two (2) strings of docks that were attached to the Barge were listed as Covered Property. *See* DMO Policy No. 690-93-92. With reference to the Covered Property listed, the first page of the policy provided, in boldface and in capital font, for basic exclusions that the policy did not cover, the first of which was listed, also in capital font, as: INHERENT VICE OR DEFECT: WEAR TEAR AND/OR GRADUAL DETERIORATION. . .

16. Approximately seven (7) months after the issuance of the Predecessor DMO Policy, in April, 2008, the Insurance Agent realized that the Insurance Company had failed to list the Barge and Contents as Covered Property under the Predecessor DMO Policy.<sup>3</sup> Depo. of Patricia Stutler, Vol. I., p. 26 through p. 27, l. 12. By e-mail dated April 28, 2008, the Agent wrote the Producer and informed them that the property coverage under the Predecessor DMO Policy needed to be corrected to explicitly include the Barge and Contents. *See* Discovery Doc. ISI 00085, April 28, 2008 E-mail from Insurance Agent to Producer.

17. After several more months had passed, the Insurance Agent requested a face to face Meeting with the Plaintiff Insured's representative, Rudy Lee, in September 2008. Depo. Of Arch Keller, p. 10, l. 1. through p. 13, l. 18. At that in-person Meeting between Plaintiff Rudy Lee and the Insurance Agent, Arch Keller, the two specifically discussed Plaintiff's property insurance coverage. Id. It is undisputed that property coverage to include the Barge and Contents was discussed and agreed upon at the Meeting. Id. It is further undisputed that the Insurance Agent represented that he would take action to ensure that the Barge and Contents were covered under the DMO Policy, with Five Hundred Thousand Dollars (\$500,000) coverage on the property, including the Barge, and Fifty Thousand Dollars (\$50,000) of coverage on the Contents. Id. Principal Arch Keller of Soliciting Agent Defendant Insurance Systems, Inc. described this

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<sup>3</sup>By this time, when the Insurance Agent first realized the Plaintiffs Barge and Contents were not covered in the Policy, the Plaintiff had been paying monthly insurance premium payments for seven (7) months.

meeting as a "Meeting of the Minds," and that he left the meeting with an understanding that he, as Soliciting Insurance Agent, was "charged with lining up" property coverage for the Barge and Contents. Id.

18. That the Insurance Agent and Plaintiff Insured shared an expectation that the Barge and Contents were to be covered was agreed and undisputed by both parties. Further, the expectation of coverage was confirmed "up the chain" by Lynn Dorton, Representative for the Producer. Ms. Dorton also testified as the Producer's representative that the Producer understood and expected coverage for the Barge and Contents under the DMO Policies (both Predecessor and Renewal), and that such coverage had been understood as the undisputed, mutually shared intentions of the Plaintiff Insured, Soliciting Insurance Agent and Producer. Depo. of Lynn Dorton, p. 85, 11.9-19. The Insurance Agent's Principal testified that he never discussed any exclusions with the Plaintiff Insureds at any time. Depo. of Arch Keller, p. 147, 11. 6-23.

19. On October 29, 2007, Pat Sutler, Account Representative for the Insurance Agent, sent correspondence to "Showboat Marina" addressed to Mr. Lee. The letter enclosed the initial business insurance policies issued by the Insurance Company to Lee Homes, Inc. (which policy did not include coverage for the Barge and Contents) and stated "[p]lease review and if you have any questions or problems, please let us know." After changing the insured entity from Lee Homes, Inc. to West Virginia Corporation RRK, Inc., the policies, containing the same exclusions, were renewed and again mailed to "Showboat Marina" addressed to Mr. Lee. The policies were mailed to Showboat Marina, in care of corporate officer Rudy Lee, on January 20, 2009, and on February 23, 2009, the Barge sank into the Ohio River.<sup>4</sup>

20. Despite the representation made to the Plaintiff Insured, that the correction of

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<sup>4</sup>By this time, the Plaintiff Insured had been making monthly premium payments for sixteen (16) months with an expectation shared with the Insurance Agent and Producer that it is paying for insurance coverage for the Barge and Contents.

reapportionment of coverage requested by the Insurance Agent in April, 2008 would be done, the Insurance Company, thereafter, made no such correction to the Policy. Instead, the Insurance Company issued the Renewal Policy and, again, made no reference whatsoever to the requested and represented insurance coverage for the Barge and Contents. *See* DMO Renewal Policy.

21. Upon receipt and review of the DMO Renewal Policy in late January, 2009, the Insurance Agent acknowledges that it realized that the Insurance Company's error in failing to list the Barge and Contents on the Predecessor DMO Policy had been repeated again. Depo. of Patricia Stutler, Vol. II, p. 18, ll. 9-16. The Insurance Agent specifically realized that the DMO Renewal Policy, as issued by the Insurance Company, did not contain the reapportionment of property coverage to include the Barge and Contents, as had been requested in April, 2008 and had been represented to the Plaintiff Insured at the September 2008 "Meeting of the Minds." Id.

The first page of the document which RRK's officers received contained a statement that the policy was issued by New Hampshire. The second page mailed to the Plaintiff's officers was the page containing general exclusions, in boldface, capitalized font referencing the covered property. The first listed exclusion was the "wear and tear exclusion." The declarations page was on the fifth page of the policy provided to the Plaintiffs.

22. The Insurance Agent then took no action to alert the Plaintiff Insured that the Policy as issued did not contain the re-apportioned Insurance coverage for the Barge and Contents, contrary to what had been previously represented to the Plaintiff Insured. Depo. of Patricia Stutler, Vol II., p. 20, ll. 18-22.

23. On January 20, 2009, the Insurance Agent made an internal notation on its computer system of the need to "follow up" on the discrepancy between the coverage as represented to the Plaintiff Insured, and the coverage as issued by the Insurance Company in the DMO Renewal Policy. Depo. of Patricia Stutler, Vol. II at p. 17, ll. 7-18. The Insurance Agent

testified that after noting the need to “follow up” on the discrepancy, no follow up action was taken prior to the sinking of the Showboat Marina, thirty-three (33) days later on February 23, 2009. *Id.* at p. 19, l. 20 through p. 20, l. 1.

24. Approximately forty-eight (48) hours after the Barge sank on February 23, 2009, the Insurance Company denied Plaintiff’s insurance claim for the Barge and Contents, relying on the failure of the Barge and Contents to be listed as “Covered Property” under the DMO Renewal Policy as issued. *See* Discovery Doc. SHBT00382 (February 25, 2009 Denial Letter).

25. Following that initial denial of Plaintiff’s insurance claim on February 25, 2009, the Insurance Agent wrote the Claims Adjuster for the Insurance Company and forwarded the April, 2008 e-mail correspondence between the Insurance Agent and Producer, which email correspondence specifically referenced the need to take corrective action to provide coverage for the Barge and Contents. *See* Discovery Doc. SHBT00288 (April 3, 2009 E-mail from Insurance Agent to Insurance Company Claims Adjuster). The Insurance Agent’s e-mail confirmed to the Insurance Company that coverage for the Barge and Contents had been represented by the Insurance Agent prior to the loss and that the Plaintiff Insureds and Insurance Agent had shared, mutual expectations of such coverage, writing:

As you can plainly see, a request was made to your Maritime General Agency, Norman-Spencer, McKernan Agency, Inc. to not only add coverage for contents but also the building(s) housing the contents. Does this possibly answer your question as to why the policyholder thinks that they have coverage provided for their contents. **You and I have also had telephone conversations regarding the matter and I have made it perfectly clear that it was the intention of both our agency and the policyholders to have coverage amended as stated in the above email.** This loss occurred on 2/23/09 which has now been well over one month ago. To date, you have still not made your intentions clear as to whether or not you have accepted that the barge and its contents are covered property, subject to the terms and conditions of the policy. **This fact remains in spite of the fact that you have been supplied with documentation that it was the intent of the agent(s) and policyholder to have coverage for both the barge which sunk and its contents.**

*See* Discovery Doc. SHBT00288 (April 3, 2009 E-mail from Insurance Agent to Insurance

Company Claims Adjuster) (**bold emphasis added**).

26. Following some investigation by the Insurance Company, on or about May 13, 2009, through its claim administrator, AI Marine Adjustors, Inc., the Insurance Company sent a letter to Plaintiffs and asserted that, even if the Barge and Contents would have been listed as Covered Property, coverage would be denied because of the operation of Exclusionary language in the DMO Renewal Policy, including a "Wear and Tear" Exclusion. *See* Discovery Doc. SHBT00170-172 (May 13, 2009 Denial Letter). During this litigation, the Insurance Company agreed to reform the pertinent policy to add the barge as insured property, subject to the policy's terms, conditions and exclusions. Therefore, the Insurance Company asserts that the issue of whether the barge was covered is no longer germane to the issues raised in the motion for Partial Summary Judgment.

27. After taking discovery on this issue, on September 30, 2010, the Plaintiff moved for Partial Summary Judgment, asking that the Exclusionary language proffered in denial of the insurance claim be found inoperable as a matter of law because the Insurance Company cannot meet its legal burdens to prove that it: (1) placed the Exclusionary language in such a fashion as to make obvious its relationship to other policy terms, and (2) brought such exclusionary provisions to the attention of the insured, as required under Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488 (W.Va. 1987) and its progeny.

28. On October 12, 2010, the Insurance Company filed its Opposition of New Hampshire Insurance Company to Motion for Summary Judgment of RRK, Inc., in which New Hampshire requested that the Court deny RRK's motion on the following grounds: (1) New Hampshire had reformed the pertinent insurance policy so that the barge and its contents were considered covered property, and thus, RRK's motion should be disregarded insofar as it sought relief that is legally moot; (2) no legal doctrine would permit elimination of the policy exclusions,

as RRK's only objectively reasonable expectation could be that the policy exclusions would apply to all covered property, the policy exclusions were conspicuously displayed in accordance with West Virginia law, and elimination of the policy exclusions would lead to absurd results that would contradict public policy; and (3) a genuine issue of material fact exists as to the cause of the barge's sinking and thus, the applicability of the "wear and tear" policy exclusions, thereby precluding summary judgment.

29. In reviewing the DMO Renewal Policy (and Predecessor DMO Policy), as issued by the Insurance Company, it is clear that the Insurance Company never issued a policy that set forth both: (1) coverage for the Barge and Contents; and (2) the Exclusionary language now being proffered in denial of the Plaintiff's claim for coverage for the Barge and Contents.

30. In response to Plaintiff's Motion for Partial Summary Judgment on Property Coverage, and on inquiry by the Court, the Insurance Company provided no evidence, by testimony or otherwise, that the Plaintiff Insured had read and understood the Exclusionary language being proffered in denial of Plaintiff's claim.

31. In response to Plaintiff's Motion for Partial Summary Judgment on Property Coverage, the Insurance Company provided no evidence of having set forth any reference to the proffered Exclusions or any corresponding premium adjustment on the DMO Renewal Policy's Declarations Page, but instead made an averment by counsel that Exclusionary Language was found in preceding pages in the DMO Predecessor Policy, although that Policy, admittedly, omitted the Barge and Contents as covered property.

32. In response to Plaintiff's Motion for Partial Summary Judgment on Property Coverage, the Insurance Company provided no evidence of procurement of the Plaintiff Insured's signature on a separate waiver signifying that the Plaintiff Insured had read and understood the proffered Exclusionary Language.

33. Upon review of the DMO Renewal Policy, as issued, it is undisputed that the Policy as mailed did not contain both: (1) the property to be covered – i.e., the Barge and Contents; and (2) the Exclusionary Language which is proffered in denial of the Plaintiff's claim for the Barge and Contents. Further, there is no evidence that the Plaintiff Insured's ever read or understood any such Exclusionary Language with the DMO Renewal Policy.

34. Upon questioning at oral argument, counsel for the Insurance Company argued that providing a corporate president with a commercial insurance policy containing clear and conspicuous exclusions on a separate page placed in front of the policy itself is adequate under West Virginia law for purposes of making the Exclusionary Language sufficiently known to the Plaintiff Insured. The Plaintiff admits they received this latest January, 2009 revised policy, but that they did not read the same.

#### CONCLUSIONS OF LAW

35. The West Virginia Rules of Civil Procedure state that Summary Judgment :

. . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount or damages.

W.Va. R. Civ. Pro. 56 (c) (2010).

36. A genuine issue under the Rule "is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Jividen v. Law, 461 S.E.2d 451, 460 (W.Va. 1995) (citation omitted and internal punctuation altered). A material fact "is one that has the capacity to sway the outcome of the litigation under the applicable law." Jividen, 461 S.E.2d at 460 (citations omitted). Although inferences from facts presented at Summary Judgment are to be drawn in light most favorable to the non-moving party, "the non-moving party . . . must offer

more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in the non-moving party's favor." Williams v. Precision Coil, Inc., 459 S.E.2d 329, 337 (W.Va. 1995) (citations omitted). The non-moving party "cannot create a genuine issue of fact through mere speculation or building of one inference upon another.": Id. at 338 (citation omitted). Where there is no genuine issue of material fact, the Court should end the case by Summary Judgment. Id. at 335.

37. West Virginia Civil Procedure Rule 56 envisions a Summary Judgment determination made on the basis of evidence that is admissible under the West Virginia Rules of Evidence. The Rule states that the Court may consider the "pleadings, depositions, answers to interrogatories, and admissions on file . . ." W.Va. R. Civ. Pro. 56(c) (2010). Further, the Rule allows testimony by affidavit, but echoes a strict requirement that any such testimony be "made on personal knowledge" and "set[ting] forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." W.Va. R. Civ. Pro. 56(e) (2010).

38. In subsequent decisions, the Supreme Court of Appeals of West Virginia has recognized an expansion of the material to be considered, but maintained the requirement of admissibility:

Rule 56(c) of the West Virginia Rules of Civil Procedure does not contain an exhaustive list of materials that may be submitted in support of summary judgment. In addition to the material listed by that rule, a trial court may consider any material that would be admissible or usable at trial.

Aluise v. Nationwide Mut. Fire Ins. Co., 218 W. Va. 498 (2005).

39. The "[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syl. pt. 1, Tennant v. Smallwood, 568 S.E.2d 10 (2002). *See also* Syl. pt. 2, Riffe v. Home Finders Assocs., 517 S.E.2d 313 (W. Va. 1999) (noting that "the interpretation of an insurance contract . . . is a legal determination. . .")

40. West Virginia law provides additional well-established standards to aid in the interpretation of insurance policy contract language. The Court has held that “[t]he guiding principle of construction in cases of insurance contracts requires us to construe the language liberally in favor of the insured.” Prete v. Merchants Property Ins. Co. of Indiana, 223 S.E.2d 441, 443 (1975).

41. West Virginia has long recognized the Doctrine of Reasonable Expectations in the context of insurance coverage construction:

With respect to insurance contracts, the doctrine of reasonable expectations is that "the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."

Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488 (1987); *overruled on other grounds by* Potesta v. United States Fid. & Guar. Co., 504 S.E.2d 135 (W.Va. 1998) (*quoting* Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961 (1970)).

42. While initially applied only in the context of ambiguous policy language, West Virginia law has expanded the Doctrine of Reasonable Expectations to include certain cases when an ambiguity is not required. In Romano v. New England Mut. Life Ins. Co., 362 S.E.2d 334 (1987), the Supreme Court of Appeals of West Virginia refused to apply a policy exclusion when promotional materials provided to the insured did not alert him to the exclusion and, on the contrary, led him to a reasonable belief that he was covered under the policy. In so doing, the Romano Court reasoned that “[i]t would, we believe, be inequitable to permit [Insurer] to enforce the more onerous policy condition where previous communications with the insured suggested its nonexistence.” *Id.* at 340.

43. Likewise, West Virginia law has also applied the Doctrine to situations involving misconceptions about the coverage that had been sold. In Keller v. First Nat'l Bank, 403 S.E.2d 424 (1991), for instance, the Court held that after a Bank's offer to insure had been accepted with

consideration, the Bank had created an expectation of credit life insurance in the insured even though the bank's offer to insure had been made by mistake. Id. As a result, the Keller Court prohibited the Bank from denying coverage after it failed to adequately notify the insured that its offer of insurance was erroneous. Id.

44. The Keller Court applied the Doctrine of Reasonable Expectations in finding coverage to exist as a matter of law and prohibited the Insurer Bank from benefitting from its Agent's failed procedures:

Once the reasonableness of the expectation is established, any ambiguity concerning the health of the insured should be resolved in favor of the insured because the Bank, by its failure to give notice of the denial, created the problem and should not benefit by it. *See Virginia First, supra* at 696, 299 S.E.2d at 372-373 (holding that the Bank "having created the ambiguity [of insurability], will not be permitted to rely on it as a defense to the damages arising from its breach of contract."); Consumers, supra at 345, 127 S.E.2d at 916 (holding that because the finance company failed to notify the decedent that no insurance was obtained, equity and good conscience would not allow the finance company to "take advantage of the changed condition" of the plaintiff); Carrollton Federal Savings & Loans Association v. Young, 165 Ga.App. 262, 299 S.E.2d 395 (1983) (holding that even if the bank's mortgage life insurance was unavailable because of poor health, evidence of other types of coverage that may have been available was sufficient to show damages).

Keller, 403 S.E.2d at 430.

45. Subsequently, in Costello v. Costello, 465 S.E.2d 420 (W.Va. 1995), the Court affirmed the use of the Doctrine of Reasonable Expectations in instances of mistake and failed procedures by the Agent, stating: "[m]oreover, we indicated, in Keller, that procedures which foster a misconception about the insurance to be purchased may be considered with regard to the doctrine of reasonable expectation of insurance."

46. Akin to the use of the Doctrine of Reasonable Expectations, West Virginia law has also applied the Doctrine of Equitable Estoppel in order to find coverage owing as a matter of law, notwithstanding a variance with the literal terms of a Policy. In Marlin v. Wetzel County Bd. of Educ., et al., 569 S.E.2d 462 (2002), the Court addressed an instance where an Insurance Agent

had represented to an Additional Insured that it would be covered under a policy, but apparently failed to communicate that representation to the issuing Insurer. Estopping the Insurer from denying coverage for the putative Additional Insured, despite the fact that the Policy had been issued without literal coverage for the putative Additional Insured, the Court explained:

Exceptions to the general rule that the doctrine of estoppel may not be used to extend insurance coverage beyond the terms of an insurance contract, include, but are not limited to, instances where an insured has been prejudiced because: (1) an insurer's, or its agent's, misrepresentation made at the policy's inception resulted in the insured being prohibited from procuring the coverage s/he desired; (2) an insurer has represented the insured without a reservation of rights; and (3) the insurer has acted in bad faith.

Marlin, 569 S.E.2d 462 (2002) (*citing Potesta v. U.S.F. & G.*, 504 S.E.2d 135 (W.Va. 1998)).

47. The Marlin Court explained the rationale for prohibiting the Insurer from benefitting from the mistakes or failed procedures of its Agents, stating:

"Sometimes this problem stems from a lack of communication. The insurance agent, for example, may have the authority to add another party to a policy as an additional insured and may issue a certificate indicating that this has been done while forgetting to ask the insurer to issue the endorsement. When the insured later seeks protection, the insurer denies protection, shifting the blame elsewhere. This, of course, is really a matter of principal-agency liability and should not detrimentally affect the certificate holder . . . ."

Marlin, 569 S.E.2d at 471 (*quoting Donald S. Malecki, et al., The Additional Insured Book* 341 (4<sup>th</sup> Ed. 2000)).

48. West Virginia Code section 33-12-22 provides that "[a]ny person who shall solicit within this state an application for insurance shall, in any controversy between the insured or his or her beneficiary and the insurer issuing any policy upon such application, be regarded as the agent of the insurer and not the agent of the insured." *See also RRK, Inc. v. New Hampshire Ins. Co., et al.*, 2010 U.S. Dist. LEXIS 35467 at \*16 (S.D. W. Va. 2010) (Judge Chambers discussing applicability of statute to case at hand in Memorandum Order granting Plaintiff's Motion to Remand).

49. West Virginia jurisprudence has long held that “[w]here the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.” McMahon, 356 S.E.2d at 496; see also Jenkins v. State Farm Mut. Auto. Ins. Co., 632 S.E.2d 346, 350 (W.Va. 2006) (citations omitted).

50. Our Court has held that where provisions of an insurance contract “would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted.” McMahon, 356 S.E.2d at 496; see also Erie Ins. Property & Cas. Co. v. Stage Show Pizza, JTS, Inc., 553 S.E.2d 257, 261 (W.Va. 2001) (citations omitted).

51. In order for an Insurer to properly avoid coverage on the basis of Exclusionary Language, the Insurer must meet several burdens, described under West Virginia law as follows:

Where an insured has a reasonable expectation of coverage under a policy, he should not be subject to technical encumbrances or to hidden pitfalls. An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, **placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured.**

McMahon, 356 S.E.2d at 496 (citing Young v. Metropolitan Life Insurance Co., 20 Cal. App. 3d 777, 98 Cal. Rptr. 77 (1971), Gerhardt v. Continental Insurance Co., 48 N.J. 291, 225 A.2d 328 (1966), Mills v. Agrichemical Aviation, Inc., 250 N.W. 2d 663, 673 (N. D. 1977)) (bold emphasis added).

52. McMahon, thus, requires an Insurer seeking to avoid liability on the basis of Exclusionary Language to prove, separately and independently, that: (1) the Insurer placed the Exclusionary Language in such a fashion as to make obvious its relationship to other policy terms; and (2) the Insurer brought such Exclusionary Language to the attention of the insured. Id.

53. The Insurer’s burden to prove that it met its duty to bring Exclusionary Language to the attention of the Insured, as set forth in McMahon, has been explained as follows:

Our Legislature has established by law a similar rule as the public policy of this

State. Our insurance laws state that an insurance carrier may not issue an insurance policy which contains "exceptions or conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract." In sum, before an insurance carrier may rely on an exclusion to avoid liability on an insurance contract, it must demonstrate that the "exceptions or conditions" were not deceptive, and were communicated to the insured in a manner calculated to advise the insured of the adverse effect that the exclusionary language would have on the general insurance coverage provided by the policy.

Mitchell v. Broadnax, 537 S.E.2d 882 (W. Va. 2000) (Starcher, J., concurring), *superseded by statute as recognized* in Syl. pt. 7, Findley v. State Farm Mut. Auto. Ins. Co., 576 S.E.2d 807 (2002).

54. The Court has provided guidance by suggesting methods by which an Insurer may carry its burden of proving that it sufficiently brought Exclusionary Language to the attention of the Insured:

Of course, the insurer may avoid liability by proving that the insured read and understood the language in question, or that the insured indicated his understanding through words or conduct.

McMahon, 356 S.E.2d at 496 (citations omitted).

55. Further, the Court has provided other examples of methods by which Insurers can meet their burden of proof:

Methods by which insurers may effectively communicate an exclusion to an insured to secure his/her awareness thereof may include, but are not necessarily limited to, reference to the exclusion and corresponding premium adjustment on the policy's declarations page or procurement of the insured's signature on a separate waiver signifying that he/she has read and understood the coverage limitation.

Id. at 895, n.24 (internal citations omitted).

56. In Luikhart v. Valley Brook Concrete & Supply, Inc., 613 S.E.2d 896 (2005), the Court affirmed the principle that the Insurer bears the burden of proof with regard to exclusionary clauses and relied on deposition testimony that the Insured had not only received, but had read and understood, the Policy's Exclusions before validating the same as a matter of law. Luikart,

613 S.E.2d at 902.

57. An insightful discussion of the “duty to make exclusions known” requirement in McMahon and Luikart was made by the United States District Court for the Eastern District of Pennsylvania in deciding an insurance coverage dispute under West Virginia law. Canal Ins. Co. v. Sherman, 430 F. Supp.2d 478 (E.D. Pa. 2006). Like herein, the Plaintiff Insured in Canal sought Partial Summary Judgment under West Virginia law that its Insurer had failed to explain the Exclusions later proffered by Insurer in denial of a claim for insurance coverage. Id. After citing the above-referenced principles in Luikart and McMahon, the Court granted Partial Summary Judgment to the Insured that the exclusions were legally inoperable:

... as to [Plaintiff Insured’s] motion for summary judgment, [Plaintiff Insured] has the burden of showing there is no genuine issue of material fact that [Defendant Insurer] failed to explain the exclusions in the policy. In support of his motion, [Plaintiff Insured] has offered an affidavit indicating that [Defendant Insurer] did not explain any of the terms and conditions of the policy. As discussed above, even if [Defendant Insurer] did not explain the exclusions to [Plaintiff Insured], [Defendant Insurer] can still avoid liability for failure to explain, under West Virginia law, by showing that [Plaintiff Insured] (1) “read and understood the language in question” or (2) “indicated his understanding through words or conduct.” McMahon, 356 S.E.2d at 496. To that end, [Defendant Insurer] did not offer any deposition testimony indicating that [Plaintiff Insured] understood, through words or conduct, the exclusionary language in the policy and the only declaration offered states merely that [Plaintiff Insured] has been a policy holder for seven years and has filed nine claims. That [Plaintiff Insured] held a policy containing the exclusions for a number of years and has filed claims under the policy, which were not related to the exclusions relevant here, does not put at issue whether [Plaintiff Insured] indicated an understanding of the policy through words or conduct. **Therefore, [Plaintiff Insured] has shown there is no genuine issue of material fact that the policy was not explained to him and [Defendant Insurer] has failed to raise such an issue. Under West Virginia law, failure to explain the exclusion to the insured prevents the application of that exclusion. Therefore, [Plaintiff Insured] is entitled to judgment as a matter of law.**

Canal Ins. Co. v. Sherman, 430 F. Supp. 2d 478, 488-489 (E.D. Pa. 2006) (bold emphasis added).

58. Requiring more than an Insurer’s assertion that it mailed a Policy containing Exclusionary Language is consistent with other West Virginia law with regard to whether an Insured has a duty to read its Insurance Policy, recognized as a Contract of Adhesion. The West

Virginia Court has held:

In applying the doctrine of reasonable expectations to standardized insurance contracts, we must reject that portion of the reasoning in Soliva which is based on the general rule that a party to a contract has a duty to read the instrument. While this rule may equitably be enforced with regard to a contract negotiated at arm's length between parties of reasonably equivalent bargaining power and signed by each, it would be unfair to apply the general rule in the case of the modern insurance contract. These policies are contracts of adhesion, offered on a take-it-or-leave-it basis, often sight unseen until the premium is paid and accepted, full of complicated, almost mystical, language. "It is generally recognized the insured will not read the detailed, cross-referenced, standardized, mass-produced insurance form, nor understand it if he does." C & J Fertilizer, Inc. v. Allied Mutual Insurance Co., 227 N.W. 2d 169, 174 (1975); *accord*, 3 Corbin on Contracts § 559 (1960); Keeton, 83 Harv. L. Rev. at 968. The majority rule is that the insured is not presumed to know the contents of an adhesion-type insurance policy delivered to him, 7 Williston on Contracts § 906 B (1963), and we hereby adopt the majority view.

n.6, McMahon, 356 S.E.2d at 496. This principle was more recently affirmed in Luikart v. Valley

Brook Concrete & Supply, Inc.:

The application of the doctrine of reasonable expectations has resulted in a relaxation of our earlier-stated rule that a party to a contract has a duty to read the instrument. *See McMahon*, 177 W. Va. at 741 n.6, 356 S.E.2d at 495 n.6 (rejecting portion of Soliva v. Shand, Morahan & Co., Inc., 176 W. Va. 430, 345 S.E.2d 33 (1986), which is based on the general rule that a party to a contract has a duty to read the contract).

Id. at 903.

### CONCLUSIONS

59. With regard to the Plaintiff's Motion for Partial Summary Judgment under the Doctrine of Reasonable Expectations, there is no dispute between the Insurance Agent and the Plaintiff that insurance coverage was represented, intended and mutually expected for the Showboat Marina Barge and Contents, which sank into the Ohio River on February 23, 2009.

60. The Plaintiff, Insurance Agent (acting as the Insurance Company's Soliciting Agent under West Virginia Code section 33-12-23) and Producer are in complete agreement that it was the shared, mutual intention and expectation of all three (3) entities (i.e., the Plaintiff,

Insurance Agent and Producer) that the DMO Renewal Policy in effect at the time of the February 23, 2009 loss would provide property insurance coverage for the Barge and Contents. It is further undisputed that the Insurance Agent represented to the Plaintiff Insured in a “face to face” meeting, prior to the loss, that there would be property insurance coverage for the Barge and Contents under the DMO Renewal Policy. Following said representation by the Insurance Agent, the Plaintiff took no action to otherwise procure coverage for the Barge and Contents, as both parties to the meeting shared the expectation that the representation was true and accurate in that the Barge and Contents were covered.

61. With regard to the undisputed, reasonable expectations of the Plaintiff Insured that the Barge and Contents would be covered, West Virginia law will uphold and protect those reasonable expectations, whether under any one, or all, of the legal theories advanced by the Plaintiff Insured herein, whether in the event of an ambiguity (McMahon), or in the event of Agents’ Mistake(s) or Failed Procedures (Keller and Costello).

62. Closely akin, Marlin makes clear that the Doctrine of Equitable Estoppel will separately and independently apply to extend insurance coverage beyond the terms of an insurance contract in instances where an Insured has been prejudiced because of “an insurer’s, or its agent’s, misrepresentation made at the policy’s inception resulted in the insured being prohibited from procuring the coverage s/he desired.” Such misrepresentations can be innocently made, and it is undisputed herein that the Insurance Agent represented to the Plaintiff Insured that the Barge and Contents would be covered, despite the contrary reality of the DMO Renewal Policy, as actually issued. The Court in Marlin protected the putative Additional Insured Plaintiff therein based upon the Insurance Agency’s misrepresentation (albeit innocently made and without any intention to deceive) that it would have insurance coverage under the Policy. Likewise, the Plaintiff Insured herein should be protected by the Court equitably estopping its Insurance

Company from denying such coverage as had been represented to it by the Insurance Agent.

63. Under any, or all, of the legal theories advanced by Plaintiff, property coverage is owing for the Barge and Contents as a matter of law, and an award of Partial Summary Judgment is proper.

64. Further, West Virginia law will bar an Insurer from benefitting from its own mistake by now proffering Exclusionary Language to deny the claim for the loss to the Barge and Contents that the Insurer never intended to apply to this Barge and Contents. Exclusionary Language is to be strictly construed against an Insurer, who is also required to meet strict legal burdens as mandated by West Virginia law. Because it omitted the Barge and Contents from the DMO Renewal Policy, the Insurance Company cannot demonstrate the placement of exclusionary language to “make obvious the relationship” between that which is Covered and that which it now seeks to be excluded – the Barge and Contents.

65. Further, the Insurance Company cannot meet its legal burden to prove that it sufficiently made known any of the proffered Exclusionary Language to the Plaintiff, such that the reasonable Insured could appreciate the effects of such Exclusionary Language on its coverage. The Insurance Company’s only evidence is that its Insurance Agent mailed a revised Insurance Policy to the Plaintiff Insured in January 2009 and, although such Policy did not list the Barge and Contents as covered property, the Policy would have contained the Exclusionary Language which the Insurance Company now seeks to use to strip away and deny insurance coverage for that property.

66. As recognized for the Plaintiff in Canal Ins. Co. v. Sherman, West Virginia law strictly holds an Insurance Company to its burdens, and permits Summary Judgment to prohibit Insurance Companies from improperly using Exclusionary Language to strip away coverage when those strict legal burdens are not met.

67. Based on the evidence presented by the parties, hearing argument on the matter and being otherwise apprized, this Court **FINDS** that the Plaintiff had a Reasonable Expectation of Insurance Coverage for the subject Barge and Contents, and, therefore, the Plaintiff's Motion for Partial Summary Judgment with regard to the Reasonable Expectations of Insurance Coverage is **GRANTED**. Further, the Court **FINDS** that the Doctrine of Equitable Estoppel would apply to extend insurance coverage beyond the terms of the insurance contract as erroneously issued because of prejudice in light of the Insurance Agent's representation of Coverage resulting in the Plaintiff Insured being prohibited from procuring the coverage desired.

68. Further, this Court **FINDS** that the Insurance Company failed to meet its strict burdens of proof: (1) with regard to placement of the proffered Exclusionary Language because the Policy never contained **both** the proffered Exclusionary Language and the property upon which such Exclusionary Language would apply; and (2) with regard to having sufficiently made known such specific Exclusionary Language under the specific undisputed facts of this case in order to render the Exclusionary Language legally operable. Therefore, Plaintiff's Motion for Partial Summary Judgment on Property Coverage with regard to the legal invalidity of the Exclusionary Language is also **GRANTED**.

69. The Court allowed the parties to brief the issue of whether this ruling would be immediately appealable pursuant to Rule 54 (b) of the West Virginia Rules of Civil Procedure. The Plaintiff filed their brief on February 11, 2011 and the Defendant filed their reply brief on February 22, 2011. Whereupon, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, this Court **FINDS** that this Order granting Plaintiff RRK, Inc. partial summary judgment is **FINAL** and appealable, as the Court expressly determines that there is no just reason for delay and directs entry of judgment against Defendant New Hampshire Insurance Company as indicated herein.

Rule 54(b) states “When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.”

70. The Court’s ruling completely disposes of Plaintiff RRK’s Count 1 declaratory judgment claim. While there are still several outstanding claims against New Hampshire in this matter, including bad faith, negligence, and breach of contract, the Court stated in Province v. Province, 473 S.E.2d 894 (W.Va. 1996) that for an order to be certified under Rule 54(b), it must “completely dispose of at least one substantive claim.”

71. Further, this Court finds that there is no just reason for delay. The Court is well aware of the questionable legal posture of the ruling in this case based upon the fact specific nature of the claims in this particular case. The Court believes that a ruling by the Supreme Court now instead of later will best serve the legal interests of both parties to this action. Certification will save both parties time and resources by preventing a post-trial appeal that could result in a completely new trial. The Court’s decision granting partial summary judgment in the declaratory judgment action will result in this Court moving forward on the bad faith, negligence, and contract claims, all of which could result in protracted and unnecessary litigation if the Supreme Court reverses the Courts decision and remands the issue back to this court. This Court has determined that the needs of the litigants in this case clearly outweigh any detriment to judicial efficiency.

72. The Court further STAYS, pursuant to West Virginia Code §56-6-10, any further action in this matter until a ruling on said appeal is rendered. The Court finds that a stay of all proceedings is appropriate at this time because if the Court’s decision is reversed, the scope and

extent of required discovery will be significantly impacted. Both parties should not be burdened with the expense and hardship of discovery on the remaining claims until the appeal is resolved and the parties know exactly what discovery remains to be conducted.

73. The Court further STAYS execution of payment of any judgment and attorney fees and costs pending appeal of this Order.

All exceptions and objections of the Defendant, New Hampshire, are noted and expressly preserved.

The Clerk is directed to transmit copies of this Order to all parties of record.

ENTERED on the 22<sup>nd</sup> day of June, 2010.

  
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HON. F. JANE HUSTEAD, JUDGE

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No. \_\_\_\_\_ Page \_\_\_\_\_ this  
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STATE OF WEST VIRGINIA  
COUNTY OF CABELL  
I, ADELL CHANDLER, CLERK OF THE CIRCUIT  
COURT FOR THE COUNTY AND STATE AFORESAID  
DO HEREBY CERTIFY THAT THE FOREGOING IS  
A TRUE COPY FROM THE RECORDS OF SAID COURT  
ENTERED ON \_\_\_\_\_  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT  
THIS \_\_\_\_\_  
  
ADELL CHANDLER, CLERK  
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA  
JUN 22 2011