

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

242011

NEW HAMPSHIRE INSURANCE COMPANY,

Defendant Below,  
Petitioner,

v.

Case No. 11-1099

RRK, INC., d/b/a SHOWBOAT MARINA,

Plaintiff Below,  
Respondent.

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**Petitioner's Brief**

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### ASSIGNMENTS OF ERROR

1. THE LOWER COURT'S REFORMATION OF A COMMERCIAL MARINE INSURANCE POLICY TO STRIP ALL WRITTEN POLICY EXCLUSIONS FOR COVERED PROPERTY DID NOT MEET THE PARTIES' MUTUAL ORIGINAL INTENTIONS AND IS CONTRARY TO WEST VIRGINIA LAW OF CONTRACT REFORMATION.
2. THE LOWER COURT MISAPPLIED THE DOCTRINE OF REASONABLE EXPECTATIONS AND WEST VIRGINIA COMMON LAW SET FORTH IN *NAT'L MUT. INS. CO. V. MCMAHON & SONS, INC.* TO CONCLUDE THAT THE REFORMATION OF A POLICY TO ADD INADVERTENTLY EXCLUDED PROPERTY NECESSARILY MEANS THAT NO WRITTEN POLICY EXCLUSIONS APPLY TO THAT PROPERTY.
3. THE LOWER COURT'S INTERPRETATION OF THE COMMON LAW SET FORTH IN *NAT'L MUT. INS. CO. V. MCMAHON & SONS, INC.* IS CONTRARY TO PUBLIC POLICY.
4. THE LOWER COURT ERRED IN CONCLUDING THAT IN EVERY INSTANCE, AN INSURER HAS AN AFFIRMATIVE DUTY TO PROVE THAT THE INSURED UNDERSTOOD EVEN CLEARLY WRITTEN, UNAMBIGUOUS POLICY EXCLUSIONS CONTAINED IN THE POLICY OF INSURANCE.
5. THE LOWER COURT ERRED IN CONCLUDING THAT, AS A MATTER OF LAW, THE INSURANCE POLICY EXCLUSIONS WERE NOT ADEQUATELY COMMUNICATED TO RRK, INC.
6. THE LOWER COURT ERRED IN APPLYING THE DOCTRINE OF REASONABLE EXPECTATIONS IN ITS JUNE 22, 2011, ORDER TO ADD THE BARGE AS COVERED PROPERTY TO THE INSURANCE POLICY BECAUSE THE ISSUE WAS LEGALLY MOOT.

### STATEMENT OF THE CASE

This appeal involves the lower court's June 22, 2011, order ("the Order") reforming a commercial marine property insurance policy to *eliminate all policy exclusions*. (A.R. 0001-0025)<sup>1</sup>. As shown below, the court's Order is contrary to law and should be reversed.

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<sup>1</sup> References to the Appendix Record—the contents of which were agreed to by the parties—are set forth as "A.R. 0001-0479."

In the fall of 2007, Plaintiff RRK, Inc. (“RRK”) began operating an existing marina (“Showboat Marina”) in Huntington, West Virginia. (A.R. 0065, 0073). The marina dock structure included an approximately 80 year-old permanently moored barge. The barge was modified over the years by removing its deck and adding steel plates to its interior. It could not function as a navigable water craft, but did contribute support to docks, a bar/restaurant and video lottery enterprise on the Southern bank of the Ohio River. (A.R. 0083).

RRK is the named insured under a Yacht Dealers/Marina Operators (“DMO”) commercial marine property insurance policy (“Policy”) provided by New Hampshire Insurance Company (“New Hampshire”), with the renewal running from September 28, 2008, to September 28, 2009. (A.R. 0047-0064). RRK’s insurance application failed to list the 80 year-old barge as property to be covered, and as a consequence, it was not included in the policy as covered property. (A.R. 0073-0079). The Policy lists only two specific pieces of property insured under the Piers, Wharves and Docks—Section D portion of the Policy: a 600-foot long dock built in 2001, and a 650-foot long dock built in 1980. (A.R. 0077).

A complete copy of the Renewal Policy containing the same exclusions effective in the initial policy, was delivered to RRK’s corporate officers, by mail on or about January 20, 2009, several weeks before the February 23, 2009, loss at issue in this case. (A.R. 0178). RRK’s officers, Rudy Lee and Kelly Lee, admit they received the Renewal Policy, but state that they did not read it. (A.R. 0180, 0183, 0288).

The *first substantive page* of the Policy mailed to RRK lists exclusions applicable to all covered property, in all capital letters, 12-point font. The heading contains bold print:

**BASIC EXCLUSIONS: THIS POLICY DOES NOT COVER**

A) INHERENT VICE OR DEFECT: WEAR, TEAR AND/OR GRADUAL DETERIORATION...”

(A.R. 0048). These exclusions are contained on the first substantive page of the Policy, following a page with only a block and check marks to identify the insurer as New Hampshire. (A.R. 0047). RRK has stipulated that the exclusions were clear and conspicuous. (A.R. 0266).

On February 23, 2009, RRK's structure sank into the Ohio River. (A.R. 0350). New Hampshire promptly responded to RRK's claim for coverage, and paid the claim regarding the two docks listed as covered property in the policy. By correspondence dated February 25, 2009, New Hampshire denied coverage for the barge based upon the Policy's failure to include the barge as covered property. (A.R. 0185). New Hampshire also immediately initiated an investigation into the cause of the sinking. (A.R. 0136).

Experienced marine surveyor Michael J. McCook was dispatched by the insurer immediately after the structure sank. (A.R. 0133, 0136). McCook inspected the property the day after the sinking, on February 24, 2009, and several times thereafter. (A.R. 0136). He also spoke with divers who inspected the Showboat structure, and interviewed RRK's corporate officers in the presence of counsel. He found "structural deficiencies [to be] . . . the proximate cause of the barge sinking." (A.R. 0204).

Approximately one week after the structure sank, on Saturday, March 4, 2009, New Hampshire engaged Trident Marine Salvage to perform an underwater survey of the structure. The divers' report states, "diver observed significant deterioration of the outer hull skin. Several large holes were present ranging from 2" in diameter to sections where the outer skin was missing for several feet. (A.R. 0202). The diver could easily break off pieces of the hull using only his hands in many areas. (A.R. 0202).

As a result of its investigation, New Hampshire advised RRK that coverage was excluded *both* because the barge was not listed as covered property and because the loss was excluded by the Policy's "wear and tear" exclusion. (A.R. 0136-0138).

RRK filed suit against New Hampshire (and others who are no longer parties) on April 14, 2009, alleging breach of contract and bad faith and seeking coverage and extra contractual damages. (A.R. 0349-0358). New Hampshire timely answered the Complaint. On June 8, 2009, New Hampshire filed an Amended Answer in which it agreed to reform the Policy to retroactively add the barge as covered property along with the two docks as part of the piers, wharves and docks coverage, subject to all the terms, conditions, limitations and exclusions contained within the Policy. (A.R. 0374-0387). In the more than two years since New Hampshire filed its Amended Answer, it has remained ready and willing to insure the barge subject to the original policy terms and conditions. *See id.*

On September 30, 2010, RRK filed a motion for summary judgment on its declaratory judgment claim. RRK asserted that the cause of the sinking was not relevant and that New Hampshire should be strictly liable for the loss without regard to Commercial Marine Policy exclusions. While incorporating various legal theories, RRK's position was fundamentally that New Hampshire cannot reform the Policy to add the barge without simultaneously eliminating all Policy exclusions. New Hampshire maintains that this position is unsupported by law and that the contract's reformation should be limited to adding the barge as covered property along with the two docks.

A hearing was held on October 14, 2010. At the hearing, RRK acknowledged New Hampshire's efforts to reform the Policy and add the barge to the list of covered property under the piers, wharves and docks coverage. (A.R. 0256). RRK stipulated to receipt of the Policy

mailed in January 2009. RRK also stipulated that the exclusions were conspicuously set forth within the Policy. (A.R. 0266). RRK contended, however, that the exclusions should be eliminated from the Policy because New Hampshire cannot prove that RRK's officers understood them, even the plainly written and unambiguous wear and tear exclusion.

By Order entered June 22, 2011, the lower court granted Plaintiff's motion for partial summary judgment. The court concluded that New Hampshire failed to bring the exclusionary policy language, including the wear and tear exclusion, to the attention of the corporate insured. (A.R. 0023). According to the court's ruling, it is inadequate under West Virginia law to deliver by mail to the insured's president and vice president a copy of a policy which clearly and conspicuously lists policy exclusions on page 2, the first substantive page of the policy. (A.R. 0022-0023). *The court re-wrote the policy to not only add the barge as covered property, but to eliminate all written policy exclusions.* Under this ruling, New Hampshire must pay the policy limits without regard to whether the docking structure sank as a result of its decrepit condition even though the cause of the sinking is excluded from coverage by a clear Policy exclusion.

The lower court certified its summary judgment order pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, noting that its Order "completely disposes of Plaintiff RRK's Count 1 declaratory judgment claim." (A.R. 0024). The court also found that there was no just reason for delay in appealing this ruling to this Court because "a ruling by the Supreme Court now instead of later will best serve the legal interests of both parties to this action [and] [c]ertification will save both parties time and resources by preventing a post-trial appeal that could result in a completely new trial." (A.R. 0024).

In issuing judgment in favor of Plaintiff RRK, the lower court noted that, "[t]he 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....” (A.R. 0024, emphasis added). New Hampshire respectfully submits that the court’s “questionable” legal posture of the ruling is, in fact, erroneous.

### **SUMMARY OF ARGUMENT**

RRK and New Hampshire agree that the barge should be listed as covered property on the insurance application and on the resulting policy and renewals. RRK and New Hampshire agree that the Policy should be reformed to correct this mutual mistake. RRK and New Hampshire agree that the Policy’s exclusions are clear and conspicuous and were mailed to, and received by, the corporate insured prior to the loss.

Given these significant areas of accord between RRK and New Hampshire, this case should involve application of the basic rules of insurance contract reformation whereby the original intention of the contracting parties is honored and the barge is added to the other covered property in the Policy and subject to the terms, conditions and exclusions of the Policy. Instead of simply recognizing New Hampshire’s efforts to reform its insurance policy to add the barge as additional covered property, the lower court stripped all the Policy’s exclusions, creating an entirely new contract bearing no resemblance to the original written instrument. The lower court’s elimination of policy exclusions is contrary to West Virginia law, and defies both equity and logic. As shown below, the lower court’s order should be reversed to allow the case to proceed on the jury question of the applicability of the Policy exclusions to all covered property.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This case meets the criteria for oral argument under Rule 20 of the Rules of Appellate Procedure and a published, non-memorandum, decision because it involves several issues of first

impression for this Court and several issues of key public policy concerns for insurers offering insurance coverage in this State.

For example, the lower court's ruling effectively precludes the common practice of mailing or emailing insurance policies. Pursuant to the court's rationale, policy exclusions are not effectively communicated to an insured when a policy, with clear and conspicuous exclusions, is mailed to, and received by, the insured. Essentially, the ruling means that insurance policy exclusions will not apply unless each and every policy exclusion is specifically and personally explained to the insured, with the insured's acknowledgement of a complete comprehension of each exclusion. This is a practical impossibility for insurance carriers.

This appeal also involves questions regarding contract reformation and whether West Virginia law requires that property originally inadvertently omitted from the list of property to be covered, be added upon the policy's reformation subject to *no policy exclusions*. If the lower court's ruling applies, insurers will be faced with losing all policy exclusions upon a recognition and correction of an error in the policy. The decision discourages insurers from recognizing errors and reforming insurance policies.

A comprehensive public hearing and fully analyzed published decision is warranted in this case which significantly impacts both insurance carriers and insurance consumers in this State.

## ARGUMENT

1. **THE LOWER COURT'S REFORMATION OF A COMMERCIAL MARINE INSURANCE POLICY TO STRIP ALL WRITTEN POLICY EXCLUSIONS FOR COVERED PROPERTY DID NOT MEET THE PARTIES' MUTUAL ORIGINAL INTENTIONS AND IS CONTRARY TO WEST VIRGINIA LAW OF CONTRACT REFORMATION.**

The lower court ignored New Hampshire's efforts to reform the insurance policy to include a mutual mistakenly omitted barge as covered property, and instead, granted Plaintiff RRK's motion for summary judgment to conclude not only that the barge was additional covered property, but also that *no written policy exclusions* applied. This decision is contrary to the law of contract reformation because there is absolutely no evidence that the parties *originally* intended that the two docks be subject to the exclusions and the barge be subject to no exclusions. *If* the lower court was correct to disregard New Hampshire's Amended Answer seeking reformation (see Assignment of Error number 6) and instead address RRK's summary judgment motion on the issue of barge coverage, the court will still have erred by reforming the contract in a manner at odds with applicable West Virginia law.

In *Ohio Farmers Insurance Co., v. Video Bank, Inc.*, 200 W. Va. 39, 44, 488 S.E.2d 39, 44 (1997), this Court examined the doctrine of contract reformation as it pertains to an insurance policy and noted:

There are . . . three basic prerequisites for reformation of an insurance policy on the ground of mutual mistake: a bargain between the parties; a written instrument supposedly containing the terms of that bargain; and a material variance between the mutual intention of the parties and the written instrument.

*Id.* (citing Covington, Reformation of Contracts of Personal Insurance, 1964 Ill. L.F. 543, 459.)

And, this Court further explained:

[w]here both parties have an identical intention as to the terms to be embodied in a proposed written ... contract ... and a writing

executed by them is materially at variance with that intention, either party can get a decree that the writing shall be reformed so that it shall express *the intention of the parties*, if innocent third persons will not be unfairly affected thereby.

*Id.*, (emphasis added) (quoting the *Restatement of Contracts* § 504 (1932)).

As noted in Couch on Insurance:

Generally, a written insurance contract can be reformed to conform to the *original intention* of the parties. The purpose of reformation of a written instrument is not to create a new insurance policy, but rather, it is to bring the written instrument into conformity with the intent of the contracting parties. *The primary goal of insurance contract interpretation is to determine and give effect to the intention of the parties at the time the contract was made. . . . A contract should receive a construction that makes it reasonable, lawful, definite, and capable of being carried into effect if it can be done without violating the intent of the parties.*

2 *Couch on Ins.* §26.1 (emphasis added). Consistently, under West Virginia contract law, a court should apply -- and not revise, re-draft, or construe -- policy terms. *Witt v. Sutton*, 2011 WL 1460430, \*3 (W. Va., April 14, 2011); Syl. *Keffer v. Prudential Ins. Co. of America*, 153 W. Va. 813, 172 S.E.2d 714 (1970) (“Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.”)

In accord with West Virginia law, approximately three months after RRK’s barge sank into the Ohio River, New Hampshire recognized that there was a mutual mistake in the items listed as property covered under the Policy. The remainder of the Policy, however, including its written general exclusions applicable to all covered property, was not the subject of mistake, ambiguity, or uncertainty. RRK’s officers and New Hampshire agree that there was an intention for the barge to be listed as covered property just like the two docks. (A.R. 0259-0260, 0383-0387). And, there is no suggestion (and certainly no evidence) that RRK or its officers originally

believed the barge and docks were property covered subject to no policy exclusions. There is no evidence that New Hampshire intended to issue a no exclusion policy or that New Hampshire received premiums commensurate with a no exclusion policy. Accordingly, New Hampshire sought to reform its Policy to “express the intention of the parties” and add the barge to the docks as property to be covered, while maintaining the remainder of the written Policy as originally formed. *Video Bank*, 200 W. Va. at 44, 488 S.E.2d at 44.

When New Hampshire sought to reform its Policy, all of the elements of contract reformation were met: there was a bargain between the parties for an insurance policy insuring the barge and two docks as property to be covered subject to certain exclusions, but the resulting written instrument did not list the barge as property to be covered. *Video Bank*, 200 W. Va. at 44, 488 S.E.2d at 44. The charge of the lower court upon considering the reformation was to “give effect to the intention of the parties at the time the contract was made” (*2 Couch on Ins.* §26.1) and to “decree that the writing shall be reformed so that it shall express the intention of the parties” *Video Bank*, 200 W. Va. at 44, 488 S.E.2d at 44. It was not the role of the court to “create a new insurance policy.” *2 Couch on Ins.* §26.1.

Yet, instead of adding the barge as covered property with the docks to reflect the parties’ original intentions, in conformity with West Virginia common law, the lower court reformed the Policy to both add the barge *and void all policy exclusions that would apply to all covered property*. This reformation is legally unsupportable, as it renders unrecognizable “the intention of the parties at the time the contract was made.” *2 Couch on Ins.* §26.1. The only “material variance between the mutual intention of the parties and the written instrument” is that the barge was not originally listed with the docks as covered property. *Video Bank*, 200 W. Va. at 44, 488 S.E.2d at 44. The lower court’s reformation created an entirely “new insurance policy,” bearing

no semblance to the original contracted terms. *See id.* The lower court's reformation is contrary to law and cannot stand.

**2. THE LOWER COURT MISAPPLIED THE DOCTRINE OF REASONABLE EXPECTATIONS AND WEST VIRGINIA COMMON LAW SET FORTH IN *NAT'L MUT. INS. CO. V. MCMAHON & SONS, INC.* TO CONCLUDE THAT THE REFORMATION OF A POLICY TO ADD INADVERTENTLY EXCLUDED PROPERTY NECESSARILY MEANS THAT NO WRITTEN POLICY EXCLUSIONS APPLY TO THAT PROPERTY.**

The lower court cited *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987) for the proposition that, “[a]n 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...” 177 W. Va. at 742, 356 S.E.2d at 496 (internal citations omitted). The lower court reasoned that because the barge was inadvertently omitted from the commercial insurance policy as covered piers, wharves and docks property, the relationship between policy exclusions and the barge could not be obvious to the corporate insured. (A.R. 0023). The lower court ignored the fact that the barge would be listed as covered property in the same place in the Policy as the two docks. Under the court's flawed reasoning, *any insurance contract reformed to include inadvertently omitted property would create two classes of property with two types of coverage: originally listed property would be covered subject to the exclusions set forth in the policy, while inadvertently omitted property would be subject to no policy exclusions simply because it had been inadvertently omitted.* This is not consistent with the law of this State, as it conflicts with the standards of insurance policy reformation.

*McMahon* involved policy exclusions that were *unclear and ambiguous* when read in the context of the insuring agreement. The exclusion at issue was an exclusion for property damage to property in the care, custody or control of the insured. 177 W. Va. at 740, 356 S.E.2d at 494.

The insured was a general contractor, and this Court found that the care, custody or control exclusion was ambiguous, particularly in its application to the real property at which the insured was doing contracting work. *Id.* The *McMahon* Court noted that “[a]n insurance contract should be given a construction which a reasonable person standing in the shoes of the insured would expect the language to mean.” *Id.* at 741. And, “[w]here an insured has a reasonable expectation of coverage under a policy, he should not be subject to technical encumbrances of hidden pitfalls.” *Id.* at 742. Because the exclusions in *McMahon* were vague and unclear, this Court stated that “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 a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured.” *Id.* (internal citations omitted). The Court remanded *McMahon* to allow the lower court to develop a sufficiently detailed record to determine whether the “care, custody, and control exclusion” at issue in that case could equitably operate under the facts and circumstances of the case. *Id.*

Similarly, the later cases of this Court examining the doctrine of reasonable expectations to consider policy exclusions have examined whether there is either ambiguous policy language and/or unreasonable or inequitable exclusions. For example, in *Erie Ins. Property and Cas. Co. v. Stage Show Pizza*, 210 W. Va. 63, 553 S.E.2d 257 (2001), cited by the lower court, this Court examined the insured’s contention that the policy language and exclusions placed it in a “catch twenty-two” position. The insured claimed that “on the one hand . . . [the insurer] promised to [the insured] that it would ‘pay for damages because of bodily injury to your employees’-yet on the other hand, [the insurer] excludes from coverage any bodily injuries to employees ‘in the course of and resulting from their covered employment’ with [the insured].” 210 W. Va. at 67,

553 S.E.2d at 261. And, in *Mitchell v. Broadnax*, 208 W. Va. 36, 537 S.E.2d 882 (2000), this Court's "focus . . . was on the fundamental unfairness of the . . . exclusion." *Id.*, 208 W. Va. at 51, 537 S.E.2d 897.

The lower court's interpretation of *McMahon* places the settled legal doctrine of contract reformation squarely at odds with the doctrine of reasonable expectations. As suggested by its name, the doctrine of reasonable expectations focuses on the legitimate understanding of both the parties to the contract not just one party, in this case, the insured. Consistently, as noted above, the doctrine of contract reformation allows a contract to be altered to reflect the original understanding of the parties. *See 43 Am. Jur. 2d Insurance* § 369 ("Reformation of an insurance contract is an appropriate remedy when an alteration or amendment of the policy language is required to reflect the true intent of the parties."). Both doctrines allow deviation from the written letter of an instrument in certain circumstances, and both doctrines emphasize the legitimate expectations of the parties. When properly applied, these doctrines are perfectly harmonious with one another.

Yet, the lower court interpreted *McMahon* and the doctrine of reasonable expectations to mean that *whenever* an insurance policy by mutual mistake omits an item as property to be covered, the newly covered property is not subject to the same policy exclusions that apply to other covered property. This interpretation of the doctrine of reasonable expectations completely disregards the contracting parties' original intentions, thereby violating the principles of contract reformation. It is inconceivable that RRK's corporate president and New Hampshire reasonably expected that the policy exclusions would apply to the covered two docks and not to the barge. There was no testimony, evidence, or argument that the parties intended to enter into a contract with no exclusions applicable to the barge.

RRK's officers have testified that they believed that the Policy listed the barge with the two docks as insured property. (A.R. 0259-0260) *Ipsa facto*, if RRK's officers assumed the barge was included as property covered in the contract they failed to read, they cannot be heard to say that the page of exclusions, set forth in bold, all capitalized font, would apply to the listed two docks and not apply to the barge. *McMahon's* requirement that exclusions be "plac[ed] . . . in such a fashion as to make obvious their relationship to other policy terms" stands for the proposition that an insurer cannot rely upon unclear, ambiguous exclusions when the insuring agreement purports to give comprehensive coverage inasmuch as a reasonable insured would not expect to find operable such exclusions. In contrast, there was no suggestion that wear and tear exclusions are unusual or inappropriate to a commercial marine policy. In fact, they are indisputably common. *See, e.g., Andrew C. Hecker, Jr., M. Jane Goode, Wear and Tear, Inherent Vice, Deterioration, etc., the Multi-Faceted All-Risk Exclusion, 21 Tort and Insurance . . . 634, 638 (1986)* (noting that "a typical all-risk policy" may contain language stating "[t]his policy does not insure against deterioration, depletion, inherent vice or latent defect, rust or corrosion, erosion, or wear and tear.") Nor has there been a suggestion that RRK originally believed the Policy contained no exclusions, or that the exclusions constitute "technical encumbrances of hidden pitfalls." *McMahon*, 177 W. Va. at 742, 356 S.E.2d at 496. In fact, RRK has stipulated that the Policy exclusions are clear and conspicuous.

This matter is not factually or legally analogous to *McMahon* and its progeny, where exclusions or policy terms are vague, hidden, inconsistent or inequitable. The lower court's interpretation of *McMahon* strains the doctrine of reasonable expectations and renders it incompatible with the law of contract reformation, in which the parties' intentions at the time of contract formation are honored when a mutual mistake is made as to coverage. The lower court

erred by relying upon *McMahon* and the doctrine of reasonable expectations to eviscerate all policy exclusions simply because the barge was originally not listed as covered property along with the two docks.

**3. THE LOWER COURT’S INTERPRETATION OF THE COMMON LAW SET FORTH IN *NAT’L MUT. INS. CO. V. MCMAHON & SONS, INC.* IS CONTRARY TO PUBLIC POLICY.**

Under the lower court’s ruling, an insurance policy reformed to add inadvertently omitted covered property would not list that property in the same place as other covered property and would render all policy exclusions inapplicable to the inadvertently omitted property. Thus, applying the court’s reasoning, any property or individual mistakenly left off of a policy of insurance will not only be insured, but will be insured without regard to *policy exclusions applicable to other covered property*. This ruling creates an absurd result and would lead to unreasonable outcomes violative of public policy. For example, if a homeowner’s insurance policy inadvertently left off an outbuilding as covered property, under the lower court’s ruling, the property owner could intentionally set fire to the outbuilding and receive coverage on the basis that no arson policy exclusion could apply to property inadvertently not listed as covered. Similarly, the insurer of a medical professional liability insurance policy that inadvertently omitted from coverage one physician in a practice group would have to provide coverage for that physician’s sexual assault of a patient. All intentional, fraudulent and criminal conduct resulting in losses would be covered because insurers could not rely upon standard exclusions. Such an outcome would clearly contravene the public policy of the State. *See, e.g., Hensley v. Erie Ins. Co.*, 168 W. Va. 172, 283 S.E.2d 227 (1981) (“Most courts conclude that it is against public policy to permit insurance coverage for a purposeful or intentional tort.”). Additionally, “[a]n insurance policy should never be interpreted so as to create an absurd result, but instead should

receive a reasonable interpretation, consistent with the intent of the parties.” Syl. pt. 2, *D’Annunzio v. Security-Connecticut Life Ins. Co.*, 186 W. Va. 39, 410 S.E.2d 275 (1991).

The examples of the ramifications of the lower court’s ruling are distressing and endless. Insurers would be forced to cover risks never intended under insurance policies and not anticipated through generally accepted underwriting practices associated with policy premiums. This interpretation of *McMahon* contradicts public policy by discouraging insurance companies from correcting recognized coverage errors for fear of losing all policy exclusions. Because the lower court’s removal of policy exclusions is squarely at odds with West Virginia’s public policy of allowing appropriate exclusion and encouraging contract reformation to meet the contracting parties’ intentions, the decision cannot stand.

**4. THE LOWER COURT ERRED IN CONCLUDING THAT IN EVERY INSTANCE, AN INSURER HAS AN AFFIRMATIVE DUTY TO PROVE THAT THE INSURED UNDERSTOOD EVEN CLEARLY WRITTEN, UNAMBIGUOUS POLICY EXCLUSIONS CONTAINED IN THE POLICY OF INSURANCE.**

The lower court cited to *Mitchell v. Broadnax*, 208 W. Va. 36, 55, 537 S.E.2d 882, 901 (2000) for the proposition that insurance policy exclusions should be communicated 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.” (Starcher, J., concurring). The court construed *Mitchell* and other decisions involving communications of exclusions to mean that in *every case*, an insurer must prove that the insured read and understood the exclusions. This constitutes a misapplication of the cases examining the communication of policy exclusions. In these cases, the exclusions have been vague, unclear, oppressive, unusual, or hidden. *See, e.g., Mitchell*, 208 W.Va. at 47, 537 S.E.2d at 893 (exclusion at issue stated within the policy in “less certain terms”); *McMahon*, 177 W. Va. at 741, 356 S.E.2d at 495 (“we do not find the language of this exclusion to be plain and unambiguous...”) *See generally, Keller*

*v. First Natl. Bank*, 184 W. Va. 681, 403 S.E.2d 424 (1991)(since there was an expectation of insurance based upon Bank’s renewal note which appeared to offer life insurance, Bank must establish that denial of insurance communicated and understood.) *Cf. Luikart v. Valley Brook Concrete and Supply, Inc.*, 216 W. Va. 748, 753, 613 S.E.2d 896, 901 (2005) (“[i]f the language was both conspicuous and disclosed, then the plain language of the exclusions must be applied”). The *purpose* of requiring an insurer to bring exclusions to the attention of the insured is to prevent the insured from being subjected to ambiguous language, “technical encumbrances,” or “hidden pitfalls,” based upon the exclusionary language in the insurance policy. *McMahon*, 177 W. Va. at 742, 356 S.E.2d at 496.

In contrast, here, there is no allegation that the “wear and tear” exclusion is either unusual or oppressive, or that it could be a “technical encumbrance” or “hidden pitfall.” *Id.* The lower court had no reason to address the communication of policy exclusions in this case because none of the equitable issues involving hidden and unreasonable exclusions was at issue. The lower court incorrectly applied the law of communicating policy exclusions to find that *in every case*, regardless of the nature of exclusions relied upon, an insurer has a duty to demonstrate that the insured read and understood the policy exclusions.

If the law was that every insurer had an affirmative duty to show that every insured read and understood all policy exclusions, the burden would be impossible. Insurers would surely revisit doing business in West Virginia if all policy exclusions are stripped based merely upon an assertion that the insured did not read and understand the policy. An insured should not have an argument that all policy exclusions should be negated and that coverage should be extended beyond that for which he contracted by feigning ignorance of the exclusionary language’s meaning. Such a rule rewards ignorance and/or dishonesty since the exclusions would apply

only to those insureds who admitted that they had read and understood the policy and its terms. This cannot be this Court's intent with respect to all insurance policies.

**5. THE LOWER COURT ERRED IN CONCLUDING THAT, AS A MATTER OF LAW, THE INSURANCE POLICY EXCLUSIONS WERE NOT ADEQUATELY COMMUNICATED TO RRK, INC.**

New Hampshire mailed to RRK a complete commercial marine insurance policy. RRK's corporate president and vice president admit that they received the policy. RRK's officers also admit that the exclusions contained within the policy are clear and conspicuous. New Hampshire met its legal obligation to communicate policy exclusions. The *purpose* of requiring an insurer to bring exclusions to the attention of the insured is to prevent the insured from being subjected to ambiguous language, "technical encumbrances," or "hidden pitfalls," based upon the exclusionary language in the insurance policy. *McMahon*, 177 W. Va. at 742, 356 S.E.2d at 496.

New Hampshire met its burden of communicating policy exclusions when it provided the corporate insured a complete commercial insurance policy with clear and conspicuous policy exclusions. The lower court cited Justice Starcher's concurring opinion in *Mitchell v. Broadnax*, 537 S.E.2d 882, 901, 208 W. Va. 36, 55 (2000) (Starcher, J. concurring), for the proposition that "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." (A.R. 0018). In *Mitchell*, Justice Starcher's concurring opinion cites to *Louisiana Maintenance Services, Inc., v. Certain Underwriters at Lloyd's of London*, 616 So.2d 1250, 1252 (La. 1993) and notes that in Louisiana, exclusions are invalid unless communicated to an insured. *Id.* Significantly, the Louisiana Supreme Court and the Louisiana legislature *have*

*defined what it means to communicate a policy exclusion.* Under Louisiana law, policy **DELIVERY** equates to communication. According to *Louisiana Maintenance Services*, “[i]nsurance policy exclusions are not valid unless clearly communicated to the insured.” *Id.*

LSA-R.S. 22:628 mandates written insurance contracts. LSA-R.S. 22:634 provides that every policy shall be *delivered to the insured* within a reasonable time after its issuance. The statutes require that an insured be informed of a policy's contents.

*Id.* (Emphasis added). In *Louisiana Maintenance Services*, the Louisiana Supreme Court found in favor of the insured, concluding “[s]ince [insurer] failed to comply with the statutory requirement of delivery, it could not rely on its policy exclusions.” *Id.* at 1253.

Under the law of Louisiana, cited favorably as a basis for the rule of communication of exclusions in this State, delivering a complete policy to the insured is legally sufficient. See also *See also Straughter v. Hodnett*, 975 So.2d 81, 88 (La. App. 2 Cir. 2008) (“If an insurer fails to comply with the statutory requirement of delivery, it cannot rely on its policy exclusions.”) And, according to Louisiana statute, “[d]elivery may be by the United States Postal Service, personal delivery, private courier, or by electronic transaction in accordance with the Louisiana Uniform Electronic Transactions Act...” La. Rev. Stat Ann. § 22:867.

Likewise in the matter of *Farm Family Mutual Insurance Company v. Bobo*, 199 W. Va. 598, 486 S.E.2d 582 (1997)(per curiam), this Court appears to have recognized the sufficiency of the mailing a policy to an insured to impute to the insured knowledge of the policy and its written exclusions. In *Farm Family*, Mr. Bobo sought the reversal of a circuit court order granting summary judgment to the insurer, Farm Family Mutual Insurance Company, wherein the court concluded that Mr. Bobo’s policy expressly excluded coverage for boats with a motor exceeding 50 horsepower. Mr. Bobo owned such a boat and it was involved in an accident

which resulted in personal injury. Mr. Bobo asserted that his insurance agent was aware that he owned a boat at the time coverage was procured, the agent knew that Mr. Bobo wanted to have the boat insured and that his agent failed to disclose the exclusionary language regarding the boat within the policy at issue. In his appeal, Mr. Bobo relied, in large part, on the *McMahon* case for the proposition that the insurer has the duty to bring such exclusionary clauses to the insured's attention. *Farm Family*, W. Va. at 601, 486 S.E.2d at 585. *Farm Family*, on the other hand, contended that Mr. Bobo failed to establish a genuine issue of material fact to overcome its motion for summary judgment (that being in essence that the exclusion was sufficiently conspicuous to be valid). *Farm Family* asserted that Mr. Bobo's allegations were unsubstantiated, the insurance agent never knew about the boat at issue when the policy was purchased, and the exclusion was clear, unambiguous and conspicuously placed. In support of its motion for summary judgment, *Farm Family* provided an affidavit from the *Farm Family* Agent indicating, in pertinent part, that the policy had been sold and a complete copy of the policy had been *mailed* to Mr. Bobo. Thereafter, the policy was renewed annually. Mr. Bobo acknowledged receipt of the policy, just like the corporate representatives of RRK, and Court in *Farmers* appears to have recognized the significance of the mailing and receipt by noting "[a]s the circuit court also found, the appellants [Bobo] received a complete copy of the policy prior to the accident." *Farm Family*, W. Va. at 603, 486 S.E.2d at 587. The Court then examined and found that the written exclusionary language within the policy, which had been mailed and received, was in fact conspicuous, all apparently without regard to Mr. Bobo's personal understanding or expectations of coverage under the policy. There was no waiver or elimination of the written exclusion by the Court. The Court found in favor of the insurer. ("A per curiam

opinion may be cited as support for a legal argument.” Syl. pt. 4, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001).)

At a minimum, there exists a genuine issue of material fact as to whether New Hampshire adequately communicated the exclusions to RRK by delivering a policy with clear policy exclusions to the policyholders who did not read it. According to *Mitchell*, 208 W. Va. at 49, 537 S.E.2d at 895:

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.

208 W. Va. at 49, 537 S.E.2d at 895, n. 24 (internal citations omitted). This list is expressly non-exhaustive (“not necessarily limited to...”), meaning West Virginia law recognizes other methods to effectively communicate exclusions. *Id.*

The lower court found that RRK’s corporate president and vice president received a copy of the complete commercial insurance policy and that the first substantive page of the policy set forth, in boldface and in capital font, the policy exclusions, the first of which was listed, also in capital font, as: INHERENT VICE OR DEFECT: WEAR TEAR AND/OR GRADUAL DETERIORATION. RRK stipulated that the exclusions were set forth in a manner that is open, obvious and clear, but the lower court concluded that in spite of the acknowledged delivery of the policy, the exclusions were not adequately communicated because RRK’s corporate officers did not read the clear and conspicuous exclusions they received along with the policy.

Under Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is appropriate only when the record shows that there exists “no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law.” Here, RRK admits that its corporate officers received an insurance policy upon which clear and conspicuous policy exclusions were listed separately from, and on a page prior to, the policy itself. This factual scenario is sufficiently similar to the presentation of exclusions on a policy’s declarations page (a manner sanctioned by this Court in *Mitchell*) that this Court can find, as a matter of law, that the exclusions in the New Hampshire policy were adequately communicated to RRK. In the alternative, there is at least a genuine issue of material fact on the issue. That is, a trier-of-fact should determine whether mailing a copy of clear and conspicuous policy exclusions to a commercial insured’s officer is “calculated to advise the insured of the adverse effect that the exclusionary language would have on the general insurance coverage provided by the policy.” *See id.*, 208 W. Va. at 55, 537 S.E.2d at 901.

**6. THE LOWER COURT ERRED IN APPLYING THE DOCTRINE OF REASONABLE EXPECTATIONS IN ITS JUNE 22, 2011, ORDER TO ADD THE BARGE AS COVERED PROPERTY TO THE INSURANCE POLICY BECAUSE THE ISSUE WAS LEGALLY MOOT.**

The lower court applied the doctrine of reasonable expectations and ruled in Plaintiff’s favor on summary judgment, concluding that Plaintiff RRK’s barge was covered property under a policy of insurance which had originally inadvertently failed to list the barge. The court ruled, “[u]nder and, 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. (A.R. 0022). And, as the prevailing party on a declaratory judgment action, Plaintiff will seek attorney fees through the date of the summary judgment order. *See Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986). Yet, on June 8, 2009, *two years* prior to the lower court’s ruling, New Hampshire *agreed* with Plaintiff RRK’s contention that the barge was covered property and sought to reform the policy to add RRK’s barge with the two listed docks.

On June 8, 2009, when New Hampshire filed its Amended Answer seeking reformation, both parties *agreed* that the barge should be considered covered property, and the issue was legally moot, with no remaining justiciable controversy. *See State ex rel. Durkin v. Neely*, 166 W. Va. 553, 556, 276 S.E.2d 311, 313 (1981) (“Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property are not properly cognizable by a court.”). Syl. pt 3, *West Virginia Utility Contractors Ass'n v. Laidley*, 164 W. Va. 127, 260 S.E.2d 847 (1979) (emphasis added) (“For the purposes of a declaratory judgment action, a justiciable controversy exists when a legal right is claimed by one party and *denied* by another.”). The lower court, therefore, erred when it granted summary judgment on the legally moot issue of whether the barge is insured property.

### CONCLUSION

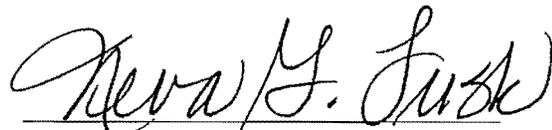
As indicated herein, the lower court’s ruling, if left intact, will have a significant impact upon the methods and manner in which insurers will have to conduct their future business in West Virginia. Policy exclusions will be routinely challenged in the courts as not being effectively communicated to an insured when policies, with clear and conspicuous exclusions, are delivered to, and received by, an insured. Insurers may face further uncertainty on the validity of even the simplest of exclusions, unless each and every policy exclusion is specifically and personally explained to the insured, with the insured’s acknowledgement of a complete comprehension of each and every exclusion. Insurers may also be faced with the conundrum of correcting recognized policy errors and reforming those errors while facing the risk of losing all policy exclusions as a result of their action.

Insurance is made more affordable in an environment of reasonable certainty. This reasonable certainty results in West Virginia having a more competitive insurance market. This

reasonable certainty likewise needs to be balanced with the recognized needs and expectations of insureds. The ruling of the lower court, if left intact, will clearly skew this balance in a manner that will impact an insurer's ability to conduct business within West Virginia.

Therefore, for the reason set forth herein, and for other reasons that may be apparent, the Circuit Court's order granting summary judgment in favor of Plaintiff RRK should be reversed, and this matter should be remanded for further proceedings.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NEW HAMPSHIRE INSURANCE COMPANY,

Defendant Below,  
Petitioner,

v.

Case No. 11-1099

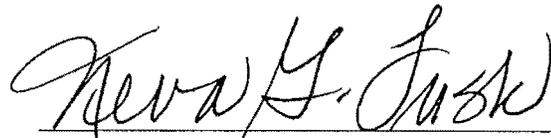
RRK, INC., d/b/a SHOWBOAT MARINA,

Plaintiff Below,  
Respondent.

CERTIFICATE OF SERVICE

I, Neva G. Lusk, hereby certify that on this 24th day of October, 2011, a true and accurate copy of the foregoing **Petitioner's Brief** was deposited in the U.S. Mail, first-class postage prepaid, addressed to counsel as follows:

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