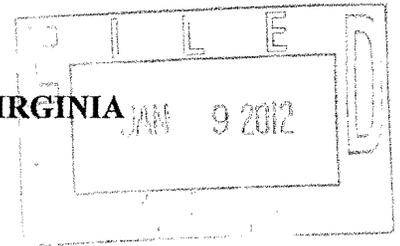


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



NEW HAMPSHIRE INSURANCE COMPANY,

Defendant Below,
Petitioner,

v.

Case No. 11-1099

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

Plaintiff Below,
Respondent.

**Petitioner's Reply Brief and
Response to Cross-Assignment of Error**

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ASSIGNMENTS OF ERROR

New Hampshire reiterates the six assignments of error set forth in its Petitioner's Brief; however, for the purposes of this reply brief, New Hampshire will address the assignments of error as reformulated by RRK in Respondent's Brief With Cross-Assignment of Error.

REBUTTAL OF RESPONDENT'S STATEMENT OF THE CASE

This appeal involves the lower court's June 22, 2011 order reforming a commercial marine property insurance policy to *eliminate all policy exclusions*. (A.R. 0001-0025)¹. New Hampshire incorporates herein its Statement of the Case as set forth in Petitioner's Brief. Additionally, New Hampshire addresses errors in the Statement of the Case set forth in Respondent's Brief With Cross-Assignment of Error.

RRK asserts in its Statement of Case that it asked in September of 2007 to see the "coverage forms" and obtained from the insurance agent a seventeen-page facsimile (A.R. 0220). The record does not reveal which "coverage forms" RRK's corporate officer Rudy Lee requested. However, a review of the documents contained in the September 20, 2007 facsimile makes it clear that the facsimile was not "the Policy" as RRK argues. The seventeen-page facsimile included four pages of finance agreement documents inasmuch as RRK sought to finance its insurance premiums through the insurance agent and needed the forms for the premium financing. The facsimile did not include a declarations page, a reference to an assigned policy number, information expressing specific limits of coverage, schedules of property insured, effective dates of coverage, or listings of all the policy forms and endorsements which would be included in a policy of insurance. Additionally, the facsimile contained a yacht dealer's coverage form section A, which was not purchased by RRK. Thus, it is incredible that RRK

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

suggests that the facsimile was “the Policy” covering a loss that occurred on February 23, 2009, after subsequent receipt of the full policy, cover letter and a renewal Policy.

Moreover, as will be discussed *infra*, RRK’s officers testified that they received a full copy of the relevant policy before the loss, but did not read it. Throughout RRK’s response brief, RRK is inconsistent and also misleading about actual receipt of the complete insurance policy. RRK argues that, although it received the 2007-2008 policy that contained all exclusions at issue here and no separate listing of the barge as covered property, it did not receive the 2008-2009 renewal policy. Although it is not necessary for an insurance carrier to mail annual copies of renewal policies that contain identical language to an insured, the record reveals here, as will be discussed below, RRK’s corporate officers acknowledged in deposition that they received the 2008-2009 renewal policy, but Kelly Lee did not bother to read it and Rudy Lee testified that he probably did not read it. In the cases cited by RRK, unlike RRK’s situation, the insureds did not receive a copy of the insurance policy before their losses and relied upon the only documents in their possession—the advertising materials. Thus, RRK cannot rely upon the cases it cites for the proposition that the insured who receives only advertising material can rely upon that material because here, the policy was received, but not read.

RRK asserts that it expected coverage, but it jumbles the doctrines of reasonable expectations and contract reformation. New Hampshire acknowledged that its agent by operation of law, Arch Keller (“Keller”), and RRK intended for the barge to be covered property as it was part of the piers, wharves and dock structure. However, there was no expectation of *anyone* that the property would be covered with no exclusions. Insurance Agent Keller testified that he “offered them [RRK] the policy that they purchased.” (A.R. 0118). Keller, while advocating to New Hampshire on behalf of RRK that the barge and contents were intended to be

covered property, indicated his understanding in an April 3, 2009 e-mail to Mr. Robert Milana, an employee of New Hampshire's agent, AI Marine:

To date, you [Mr. Milana] 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.**

(A.R. 0100) (emphasis added). Keller stated his understanding that the barge and contents were covered property, "subject to the terms and conditions of the policy." Thus, Keller acknowledged that the exclusions and all other terms of the Policy applied to the barge and its contents as covered property.

The Policy was reformed after the loss to include the barge and contents as covered property to reflect the mutual intentions of RRK and Keller. There was no "pretext" or new argument for the denial of the barge claim as asserted by RRK. Because the barge was functioning as part of the dock structure, the barge and contents coverage was included in the only portion of the Policy to which it could be set forth—the list of covered property that included the other covered docks. It was thereby subject to the clear, unambiguous, universal and basic exclusions and section exclusions, all as set forth in the original 2007-2008 Policy and renewal 2008-2009 Policy. The lower court turned the basic rules of insurance contract reformation on their head, disregarded the mutual intentions of the parties and created a new insurance contract that no one expected or intended.

Additionally, in an apparent attempt to garner sympathy from this Court, in RRK's Statement of the Case and its Conclusion, it states that the corporate officers of RRK, Rudy Lee and Kelly Lee ("the Lees"), invested their life savings to purchase the Showboat Marina. RRK does not reveal that the Lees borrowed money against their Riverside, California, home year-after-year prior to purchasing the Showboat Marina, encumbering their home to the point where

their mortgage interest deduction (not their mortgage payments—their mortgage interest deduction) exceeded their reported income. The facts surrounding the Lees' finances have not been fully developed, but their personal finances should not be a factor in this Court's decision-making, particularly those facts that have no relevance but for their emotional appeal.

**REBUTTAL OF RESPONDENT'S STATEMENT
REGARDING ORAL ARGUMENT AND DECISION**

RRK argues that the incorrect decision of the lower court will have no effect on the insurance industry in West Virginia. This case holds the attention of the insurance industry and affects all lines of insurance in West Virginia. Insurers must be able to reform insurance policies to correct mutual mistakes and insurers cannot be held to a standard of explaining to insureds each and every exclusion, even exclusions that are unambiguous and easy to understand. The traditional mailing or emailing of an insurance policy, followed by renewals, with or without subsequent mailings or e-mailings of the same policy language, is sufficient to communicate the policy language and clear and unambiguous exclusions to the insured.

REBUTTAL OF RESPONDENT'S SUMMARY OF ARGUMENT

RRK's Summary of Argument focuses on three primary points, all of which are incorrect. It asserts that the failure to include the barge as covered property was a unilateral mistake. However, a unilateral mistake is made when one party to a contract has an understanding that the other party to the contract does not. The mistake in the RRK barge coverage was a mutual mistake—one in which the written contract did not reflect what both parties to the contract intended. A mutual mistake can be corrected by either of the parties to the contract. Here, New Hampshire reformed the insurance contract to include the barge as covered property, as originally contemplated by RRK and New Hampshire's agent, and as the law of contract reformation provides.

RRK cries that the decision in this case is not meaningful to the insurance industry in West Virginia. However, it is clear that insurance carriers will be unable to conduct meaningful underwriting, assess risks and rely on clear and unambiguous exclusions in West Virginia if the lower court's decision stands.

RRK also references its Cross-Assignment of Error as to the lower court's finding that the corporate officers of RRK received the renewal policy. The cross-assignment is wholly without merit and completely contradictory to the record below. The corporate officers of RRK acknowledged in deposition that they received the renewal Policy.

I. THE CIRCUIT COURT IMPROPERLY IGNORED NEW HAMPSHIRE'S REFORMATION OF THE INSURANCE CONTRACT TO REFLECT THE MUTUAL INTENTION OF THE CONTRACTING PARTIES THAT THE BARGE BE COVERED PROPERTY AND INCORRECTLY APPLIED THE DOCTRINES OF REASONABLE EXPECTATIONS AND EQUITABLE ESTOPPEL TO FIND COVERAGE FOR THE BARGE AND ITS CONTENTS.

RRK argues in opposition to New Hampshire's Policy reformation, which included the barge and contents that functioned as a pier, wharf or dock at the Showboat Marina as covered property along with the other two docks listed in the Policy. However, in examining the lower court's order, it is clear that the lower court not only reformed the insurance policy, but also created an entirely new insurance policy that does not reflect the mutual intentions of the parties to the contract. The lower court's reformation creates a policy with no policy exclusions, a result not contemplated by either party to the contract. The stripping of these policy exclusions provides an inequitable result for RRK. Clearly, the purchase of an all-risk, no-exclusion policy is not a "reasonable" expectation of an insured and, in most instances, is not affordable.²

RRK asserts that as part of the reformation, the barge and contents were "strategically" placed "into a section of the Policy that would allow the continued denial of coverage by

² "If they [RRK] can't afford to even pay for what [coverage] they have I think it is ludicrous to argue that they would have been [sic] bought something else." Deposition of Arch Keller. (A. R. 0118).

exclusion.” This is simply nonsense. Upon reformation, the barge and contents were added as covered property to the Policy, and the particular exclusion asserted to deny coverage for the loss was for “wear, tear and/or gradual deterioration” as contained in both the Basic Exclusions provision of the Policy, as well as Section D, paragraph 6B of the Piers, Wharves and Docks Coverage Form. (A.R. 0048, 0061). These exclusions apply universally to all covered property.

Even while recognizing that New Hampshire has the burden of proving facts necessary for the operation of the “wear, tear and/or gradual deterioration” exclusion under the Policy, the lower court’s ruling has, as a matter of law, eliminated *all* policy exclusions. Therefore, New Hampshire may be barred from offering facts to support its denial of RRK’s claim which are consistent with the terms and conditions of the Policy as issued. See syl. pt. 7. *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987) (modified on other grounds by *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998)). This denial of RRK’s claim under the Policy based upon wear, tear and/or gradual deterioration does not preclude RRK from asserting that the sinking of the barge, as covered property, was caused by a fortuitous event or some other covered event.

A. THE ASSERTION BY RRK THAT THE MISTAKE REFORMED BY NEW HAMPSHIRE WAS UNILATERAL AND NOT A MUTUAL MISTAKE IS INCONSISTENT WITH THE LAW AND THE FACTS.

A mutual mistake in an insurance contract is a mistake that is a material variance between the mutual intention of the parties and the written instrument. RRK argues incorrectly that, although New Hampshire’s agent and RRK intended the barge to be covered property, the mistake was unilateral because RRK intended for the barge to be covered property. This twisting of the doctrine of contract reformation and mutual mistake is incorrect. RRK relies primarily upon *Ohio Farmers Ins. Co. v. Video Bank, Inc.*, 200 W. Va. 39, 488 S.E.2d 39 (1997), however,

RRK's reliance on *Ohio Farmers* is misplaced. In *Ohio Farmers*, there was no mutual mistake between the insurer and the insured to the insurance contract. The mistake was between the insured and a non-party to the insurance contract. That type of mistake, which is not between the parties to the contract, is unilateral.

Here, the mistake was mutual. Both RRK and New Hampshire's agent intended for the barge to be covered property. Thus, the principles of contract reformation apply.

B. THE CIRCUIT COURT INCORRECTLY APPLIED THE DOCTRINE OF REASONABLE EXPECTATIONS TO ELIMINATE ALL POLICY EXCLUSIONS TO FIND COVERAGE FOR THE BARGE AND CONTENTS.

The lower court incorrectly applied the doctrine of reasonable expectations to conclude that the reformation of a policy to add inadvertently omitted property to the list of covered property necessarily means that no written policy exclusions may apply to that property. The doctrine of reasonable expectations is not applicable when an insurance carrier has reformed an insurance policy to include omitted property as covered property. RRK has cited no case in which the doctrine of reasonable expectations was invoked after an insurance policy reformation. Instead, RRK relies upon cases that do not support its position. RRK relies upon *Keller v. First Nat'l Bank*, 184 W. Va. 681, 403 S.E.2d 424 (1991) in which a credit insurance policy was issued and later canceled by a bank without notifying the insureds. The *Keller* case has no application here because New Hampshire is not arguing that the policy was canceled, but is simply seeking to apply it as the parties intended. RRK also relies upon *Costello v. Costello*, 195 W. Va. 349, 465 S.E.2d 620 (1995), a case in which a husband and estranged wife argued that the wife should be covered by the husband's underinsured motorist coverage because they told the agent they wanted the same coverage. Nowhere in the *Costello* or *Am. Equity Ins. Co. v.*

Lignetics, Inc., 284 F. Supp. 2d 399, 405 (N.D.W. Va. 2003), also cited by RRK, is there a suggestion that coverage equates to no policy exclusions.

In *American Equity*, unlike RRK, the policyholder did not receive the policy until *after* the event which was the subject of the claim. The United States District Court held that while the doctrine of reasonable expectations applied, there were factual issues that precluded summary judgment. *Costello*, likewise, was a jury question and the case was reversed and remanded because the lower court did not instruct the jury on the issue of reasonable expectations. Further, the holdings in both *Keller* and *Costello* appear to have been implicitly overruled by this Court. One year after deciding *Costello*, this Court held that “[before] the doctrine of reasonable expectations is applicable to an insurance contract, **there must be an ambiguity regarding the terms of that contract.**” Syl. pt. 2, *Robertson v. Fowler*, 197 W. Va. 116, 475 S.E.2d 116 (1996) (emphasis added).

In *Robertson*, the customer of an insured automobile dealership sued the insured and others, alleging, *inter alia*, odometer tampering. The insured, Car Spot, filed a third-party complaint against its garage insurer (USF&G), seeking a declaration of the duty to defend and indemnify Car Spot under the terms of a commercial insurance policy issued to Car Spot. Cross-motions for summary judgment were filed by Car Spot and USF&G. The Circuit Court of Cabell County granted summary judgment to Car Spot on its third-party complaint and USF&G appealed. The lower court concluded that a false pretense endorsement, when viewed in conjunction with the doctrine of reasonable expectations, “oblige coverage and a duty to defend.” On appeal, USF&G argued that the circuit court erred by applying the doctrine of reasonable expectations without first finding that the policy language was ambiguous. The Supreme Court of Appeals, Workman, J., held in pertinent part that (1) the doctrine of reasonable

expectations did not permit construing the policy as providing liability coverage for an odometer tampering claim, notwithstanding that the policy provided first-party false pretense coverage. This Court first examined the USF&G policy language to determine if an ambiguity existed that would then permit the application of the doctrine of reasonable expectations. *Id.* Additionally, and as important, the *Robertson* Court likewise recognized that:

. . .when the language is plain and unambiguous, the court must refrain from application of rules of construction in order to find coverage for a risk of loss not intended nor contemplated within the contract. *See Transamerica Ins. Co. v. Arbogast*, 662 F. Supp. 164, 168 (N.D.W. Va.), *aff'd*, 835 F.2d 875 (4th Cir. 1987).

Robertson, 197 W. Va. at 121, 415 S.E.2d at 121.

In the RRK case, there is no ambiguity. There was a mutual mistake. The lower court did not make a finding that any of the terms and conditions in the Policy were ambiguous. The lower court erred in concluding that in every instance, an insurer has an affirmative duty to prove that the insured read and understood even clearly written, unambiguous policy exclusions contained in the policy of insurance. Reliance upon the doctrine of reasonable expectation is misplaced, particularly since New Hampshire reformed the Policy to include the barge and contents as covered property. Also, although the reformation of the Policy by New Hampshire resolved the issue of the barge and contents being covered property, the lower court engaged in an improper “application of rules of construction” that stripped away all policy exclusions relative to the barge and contents to create a no-exclusions, all-risk policy despite the lack of evidence of any intent to purchase or sell an all-risk, no-exclusion policy.

C. THE CIRCUIT COURT’S APPLICATION OF THE DOCTRINE OF EQUITABLE ESTOPPEL WAS MOOTED BY THE REFORMATION OF THE POLICY, IS OTHERWISE INAPPLICABLE, AND IS CLEARLY DISTINGUISHABLE FROM THE HOLDING IN *MARLIN V. WETZEL COUNTY BOARD OF EDUCATION*

The doctrine of equitable estoppel does not apply here. In *Marlin v. Wetzel Cnty Bd. of Educ.*, 212 W. Va. 215, 569 S.E.2d 462 (2002), this Court applied the doctrine of equitable estoppel to find coverage owing as a matter of law, notwithstanding a variance with the literal terms of an insurance policy, because a certificate of insurance was issued in favor of an additional insured, although the carrier had not been notified to add the additional insured to the policy.

In *Marlin*, the Wetzel County Board of Education (“the Board”) entered into a construction contract with Bill Rich Construction (“Rich Construction”) to renovate a high school. 212 W. Va. at 218, 569 S.E.2d at 465. The contract required Rich Construction to “indemnify and hold harmless the Board from and against all claims arising from Bill Rich Construction’s performance of the contract.” *Id.* The contract also required Rich Construction to purchase and maintain liability insurance to include contractual liability insurance coverage for its indemnity obligations. *Id.* Further, the contract required Rich Construction to include the Board as an “additional insured” on the policy, and to provide the Board with a certificate of insurance indicating the Board was an additional insured. *Id.*

In accordance with the contract, Rich Construction purchased both a commercial general liability policy and an umbrella policy from Commercial Union Insurance Company (“Commercial Union”). *Id.* at 219, 466. Rich Construction also provided the Board with an Acord 25 Certificate of Insurance describing the Board as an additional insured and certificate

holder. *Id.* Subsequently, as a result of the high school renovation, Rich Construction's workers alleged they were exposed to high levels of asbestos dust and filed suit against the Board and Rich Construction for their alleged negligence in exposing the workers. *Id.* The Board demanded a legal defense and indemnity from Commercial Union for the workers' claims. *Id.* However, Commercial Union denied coverage indicating it was only obligated to provide coverage to Rich Construction under the policies, not the Board. *Id.* (emphasis added). Commercial Union further indicated it did not receive notification from the agent to add the Board to the policy as an additional insured. *Id.*

The Board then filed a third-party complaint for a declaratory judgment against Commercial Union asserting it was an additional insured under the policies. *Id.* at 220, 467. The circuit court awarded summary judgment to Commercial Union indicating the certificate of insurance contained a prominent disclaimer, thus, "the Board could not have reasonably expected coverage under the insurance policies at issue." *Id.*

On appeal, the Board argued its entitlement to coverage under the policy "because the construction contract with Bill Rich Construction was a contract insured by the policy." *Id.* at 221, 468. In addition, the Board argued it relied upon the misrepresentation of the certificate of insurance that it was an "additional insured" and, thus, according to the doctrine of estoppel, Commercial Union could not deny coverage. *Id.*

The court decided the issue whether the construction contract between the Board and Rich Construction was an "insured contract" under the Commercial Union policy. *Id.* Upon examination of the contract language, the court held that it was an insured contract which clearly shifted legal responsibility for some part of the workers' alleged tort liability from the Board to Rich Construction and Commercial Union. *Id.* at 222, 469. Because of the insured contract, the

Board stood “in the same shoes as Bill Rich Construction for coverage purposes.” *Id.* As a result of the contract and language contained in the policy, the Board could directly seek coverage under the policy and the circuit court erred in holding that Commercial Union did not have to provide a legal defense and indemnity to the Board. *Id.*

In regard to the certificate of insurance provided to the Board the Court held:

. . . a certificate of insurance is evidence of insurance coverage, and is not a separate and distinct contract for insurance. However, **because a certificate of insurance is an insurance company’s written representation that a policyholder has certain insurance coverage in effect at the time the certificate is issued, the insurance company may be estopped from later denying the existence of that coverage when the policyholder or recipient of a certificate has reasonably relied to their detriment upon a misrepresentation in the certificate.**

Id. at 225-226, 472-473 (emphasis added). The Court further held that Commercial Union could not benefit from the mistake of its agent in issuing a certificate of insurance misrepresenting that the Board was an additional insured under the policy. *Id.* Thus, Commercial Union was estopped from denying coverage to the Board.

In *Marlin*, this Court was not presented with any of the issues that are presented in this case. While ignoring the reformation of the Policy, which added the barge and contents as covered property, RRK continues to assert that RRK is entitled to all-risk, no-exclusion coverage for the barge and contents. However, there is no support for such a concept in *Marlin* or other decisions of this Court. “The doctrine of equitable estoppel applies when a party is induced to act or to refrain from acting to [his/]her detriment because of [his/]her reasonable reliance on another party’s misrepresentation or concealment of fact.” *Id.* at 225, 472.³ “Estoppel is

³ “[T]he general rule governing the doctrine of equitable estoppel is that in order to constitute estoppel . . . there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive[,] of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to

properly invoked **to prevent a litigant from asserting a claim or defense against a party who has detrimentally changed its position in reliance upon the litigant's misrepresentation or failure to disclose a material fact.**" *Id.* (other citations omitted) (emphasis added).

Although this Court extended coverage in its *Marlin* decision based upon the doctrine of equitable estoppel, that decision does not stand for the proposition that coverage should be extended without restriction. And, in this case, the doctrine of equitable estoppel does not apply because the requisite elements are not satisfied. First, New Hampshire is not presenting a claim or defense that coverage does not apply to the barge and contents as would be necessary for the doctrine of equitable estoppel to be invoked. New Hampshire has reformed the Policy to cover the barge and contents. New Hampshire is entitled to rely upon all terms and conditions of the Policy including the wear, tear and/or gradual deterioration exclusion, which is applicable based upon the investigation that New Hampshire performed immediately following the marina's sinking.

Secondly, RRK did not detrimentally change its position in reliance upon New Hampshire's agent's representation of coverage. RRK did not rely upon the Policy being an all-risk, no-exclusion policy. RRK argues that the Policy's "wear and tear" exclusion should not apply under the doctrine of equitable estoppel, suggesting that RRK detrimentally relied upon the representations of New Hampshire's agent that coverage existed for the barge and contents. RRK has presented no evidence whatsoever that it would have sought other coverage which had no wear, tear and gradual deterioration exclusion or that RRK could have afforded such a policy in light of the fact that RRK financed its initial and renewal policy premiums. Thus, there is no

whom it was made must have relied on or acted on it to his prejudice." *Am. Hardware Mut. Ins. Co. v. BIM, Inc.*, 885 F.2d 132, 138 (1999) (emphasis added).

evidence that RRK detrimentally changed its position in reliance on the insurance agent's representation of coverage for the barge and contents.

Clearly, RRK was not precluded from procuring the coverage it sought because that coverage was put in place by reformation of the Policy, subject to the terms, conditions, limitations and exclusions contained within the Policy. As a result, the doctrine of equitable estoppel is not applicable in this matter and was erroneously applied by the lower court to strip the Policy of all exclusions after New Hampshire reformed the Policy to include the barge and contents as covered property.

II. THE CIRCUIT COURT IGNORED ADMITTEDLY CONSPICUOUS EXCLUSIONS, MADE NO FINDINGS OF AN AMBIGUITY AND OTHERWISE IMPROPERLY ELIMINATED ALL POLICY EXCLUSIONS.

As set forth in the Petitioner's Brief, New Hampshire reformed the Policy to meet the mutual intentions and expectations of the parties to include the barge and contents as covered property in the Policy, subject to the terms and exclusions of the Policy. The barge and contents were included as covered property along with the other two docks. RRK ignores the basic Policy exclusions (A.R. 0048) that applied to the entire policy because RRK's officers admit they never read or probably did not read the policies that were received by them. To the extent that RRK received long before the loss a seventeen-page facsimile of what was identified as "coverage forms" which included financing forms, these "forms" were not the Policy which RRK's officers testified they received before the loss. The basic exclusions, contained on the first substantive page of the Policy, which universally applied to the whole policy, were admittedly conspicuous. (A.R. 0293). No matter where the barge and contents and all other property were included in the reformed policy, the exclusions, specifically the "wear, tear and/or gradual deterioration" exclusion, which existed from the inception of the Policy, would have been applicable to the

loss. Likewise, there was no finding by the lower court of any ambiguity in the Policy relating to the “wear, tear and/or gradual deterioration” exclusion. Therefore, it was improper for the lower court to disregard the conspicuous, unambiguous exclusion that applied before and after reformation of the policy.

A. NEW HAMPSHIRE DID NOT SUGGEST THE NON-EXISTENCE OF THE WEAR AND TEAR EXCLUSION PER *ROMANO V. NEW ENGLAND MUT. LIFE INS. CO.*

In *Romano v. New England Life Ins. Co.*, 178 W. Va. 523, 362 S.E.2d 334 (1987), this Court considered whether a trial court erred in holding, as a matter of law, that a condition contained within a master policy of a group life insurance plan was binding upon an insured. The master policy was issued the day before the insured’s death. The policy was not provided to the insured in advance of his claim and the plaintiff asserted reliance upon promotional materials prepared by the insurer in the absence of the receipt of a policy. In syl. pt. 3 of *Romano*, the Court held that “[w]here an insurer provided sales or promotional materials to an insured under a group policy, the insurer knows or should know will be relied upon by the insured, any conflict between such materials and the master policy will be resolved in favor of the insured.” *Id.* However, in *Romano*, the insured’s death occurred prior to the receipt by him of the insurance policy—at a time when he possessed only promotional materials of the insurance carrier. In the case at bar, RRK received not one, but two copies of its Policy prior to any claim being asserted. RRK’s officers chose not to read either of them.

RRK’s argument, and the lower court’s finding, can only encourage insureds to fail to read insurance policies, claim lack of knowledge, and seek the voiding of all exclusions. RRK expected that the barge and contents were covered property, but RRK had no expectation that no exclusionary provisions would apply to the insured risk, particularly the very same risks and

coverages that were, without dispute, applied to the two docks for which New Hampshire paid RRK under the Policy.

B. THE CIRCUIT COURT INCORRECTLY FOUND THAT NEW HAMPSHIRE FAILED TO MEET THE LEGAL BURDENS NECESSARY TO RENDER THE WEAR AND TEAR EXCLUSION OPERABLE.

RRK chooses to ignore New Hampshire's reformation of the policy to include the barge and contents as covered property under the Policy, subject to the terms and conditions of the Policy. RRK argues that "as a matter of logic and fundamental fairness, *McMahon* requires the Insurance Company seeking to rely upon exclusionary language to place such language in a manner that makes clear its application to the coverage to be excluded." (Respondent's Brief at page 29). Where can universal basic policy exclusions be more prominently displayed than on the first substantive page of a policy? It is likewise illogical and unfair that in every case in which an insurer seeks to exert a policy exclusion, an insurance carrier must demonstrate not only receipt by the insured of the mailed policy, but also a thorough reading and understanding of any and all policy exclusion by the insured.

In the Policy at issue, the first substantive page lists in boldface type the "BASIC EXCLUSIONS: THIS POLICY DOES NOT COVER." (A.R. 0048). RRK acknowledges that the exclusionary language was conspicuous. (A.R. 0293). The exclusions that apply to "this policy" simply cannot be more universal. Among the basic universal exclusions is "wear, tear, and/or gradual deterioration" This page was part of both the initial and the renewal Policies that were received but apparently were not read by the officers before the date of loss on February 23, 2009. Reliance on a facsimile dated September 20, 2007, is misplaced. These basic exclusions apply to everything in "this policy" so the lower court, in its ruling, essentially carved out an exception to these exclusions for the barge and contents as covered property, but not the other

docks. While these same exclusions were in force on the date of the loss, RRK continues to assert that there can be no obvious relationship between exclusions that apply to the Policy as a whole and the covered property to which the barge and contents would have been included in the absence of the mutual mistake.

This Court has held:

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.

Mitchell v. Broadnax, 208 W. Va. 36, 49, 537 S.E.2d 882, 895, n. 24 (2000) (internal citations omitted). The list, again, is expressly non-exhaustive (“not necessarily limited to...”), thus, West Virginia law recognizes other methods to effectively communicate exclusions. *Id.* The placement of exclusions on the first substantive page of an insurance policy, using large, conspicuous, bold-faced type, is a common and accepted manner of bringing the exclusions to the attention of the insured.

This Court recently reaffirmed its rules of construction relating to interpretation of insurance policies in the *per curiam* opinion of *Municipal Mut. Ins. Co. of West Virginia v. Hundley*, 2011 WL 5984498, W. Va. (Nov. 23, 2011):

“When this Court is charged with construing an insurance policy, we are guided by several points of law. First, “[l]anguage in an insurance policy should be given its plain, ordinary meaning.” Syl. pt. 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986), *overruled on other grounds by National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987). Further, “[w]here 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.” Syl., *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970). Finally, we have held that “[a]

contract must be considered as a whole, effect being given, if possible, to all parts of the instrument.” Syl., *Clayton v. Nicely*, 116 W. Va. 460, 182 S.E. 569 (1935).

Disregarding these rules of construction, the lower court in this case improperly concluded, as a matter of law, that the exclusions were not adequately communicated to RRK because the exclusions were not read by RRK’s corporate officers. The lower court disregarded the reformation of the Policy and the plain language of the Policy. Thus, the lower court did not give the Policy its “plain, ordinary meaning.”

RRK also discounts this Court’s prior analysis of the factually similar situation that occurred in *Farm Family Mutual Insurance Company v. Bobo*, 199 W. Va. 598, 486 S.E.2d 582 (1997)(*per curiam*). RRK asserts that, because in *Bobo* the proof of mailing was confirmed by an agent’s affidavit, it is factually dissimilar. However, the affidavit is not an issue here because RRK’s corporate officers confirmed in deposition testimony that they had received the Policy.

In *Bobo*, it was the intention of the insured to have a motor boat insured under the policy but the agent was alleged to have failed to disclose language within the policy that excluded motor boats. The lower court in *Bobo* found that the complete policy was mailed to the insured three years before the loss and that the exclusionary language under the policy was clear and unambiguous and did not contravene any public policy. The lower court granted summary judgment in favor of the insurance carrier and this Court affirmed. Under the lower court’s rationale in this matter, the exclusionary language in *Bobo* would be stripped from the policy and Mr. Bobo would have had coverage for his loss. However, the *Bobo* Court examined the policy and found that the written exclusionary language was sufficiently conspicuous and obvious in its relationship to the policy terms to be valid. *Id.*

In this instance, the lower court ignored New Hampshire's reformation of the Policy and, thus, improperly provided relief to RRK without regard to the terms and conditions of the Policy, which was clearly in error.

III. RESPONSE TO RRK'S CROSS-ASSIGNMENT OF ERROR THAT THE CIRCUIT COURT IMPROPERLY FOUND THAT THE PARTIES AGREED THAT THE 2008-2009 RENEWAL POLICY WAS MAILED TO AND RECEIVED BY RRK.

RRK's cross-assignment of error is without merit and is contrary to the evidence presented to the lower court. The corporate officers of RRK, Kelly Lee and Rudy Lee, were presented with copies of the 2008-2009 New Hampshire renewal Policy during their August 28, 2009, discovery depositions. The Policy was marked as Exhibit 7 to the depositions. While Mr. and Mrs. Lee both indicated that they had not taken the time to read the Policy prior to the loss in question, both acknowledged receipt of the Policy.

RRK's corporate officer, Kelly Lee, testified as follows when presented with a copy of the 2008- 2009 Policy at her deposition:

Q [Do you remember receiving a copy of this] document, Exhibit 7, at any time before the marina – **before the barge sank?**

A **I remember receiving a packet, yes, of documents.**

Q From Arch Keller?

A Correct.

Q **And you believe that this Exhibit 7 [the 2008-2009 Renewal Policy] was in that packet?**

A **Yes.**

Q And did you read it when you received it?

A No.

Q Probably put it in a file somewhere?

A Probably.

Q Did you read it after the barge sank?

A Yes.

Q So you've had a chance, between the time the barge sank and now, to go over this Exhibit No. 7; correct?

A Yes.

(A.R. 0183).

Similarly, RRK's corporate officer, Rudy Lee, testified in his deposition when presented with a copy of the 2008-2009 Policy:

Q Okay. Is it fair to say that you did not look at this document, Exhibit 7, before the barge sank?

A This – yeah – ask me that again, please.

Q Sure.
I'm sort of following up on something we sort of covered before. It sounded like you did not read Exhibit 7 when you first got it.

A Correct.

Q And, you know, it sounded like you put it in a file and, you know, you had it, you know, in your files. And I'm moving forward to did you look at it any time between that time and when the barge sank?

A I don't think so.

Q And it would sound –

A I don't think so.

(A.R. 0180)

RRK attempted to assert that the 2008-2009 New Hampshire renewal policy had never been mailed and/or received by RRK's corporate officers as a "finding of fact" in its proposed order to the lower court. New Hampshire's counsel appropriately noted its objection to the lower

court regarding this representation in its January 25, 2011 filing of New Hampshire Insurance Company's Objections to Order Granting Plaintiff, RRK, Inc.'s Motion for Partial Summary Judgment on Insurance Coverage under Property Policy. (A.R. 0312 -0318).

At the October 14, 2010 hearing on RRK's Motion for Summary Judgment, the lower court was advised by counsel for New Hampshire that "we had testimony from the Lees that they had received the policies and hadn't read them, but they had at least received them." The lower court then inquired of RRK's counsel as to whether he was "disputing that?" Counsel responded, in pertinent part, "No, your Honor. That's what I said earlier..." (A.R. 0288). The court also inquired of both counsel later during the same hearing:

THE COURT "[o]kay. Let me get this straight. You're alleging that you [New Hampshire] - - before the barge sank, sent them a complete policy and the wear and tear was included in it?

MS. LUSK: Yes.

THE COURT: And you're [RRK] alleging that they never received a complete policy with a wear and tear in it before the barge sank?

MR. DUFFIELD: No your Honor. What I'm telling you is the 17-page fax had not the exclusions.

THE COURT: I understand that. What I'm asking you is did they receive any policy that was the full policy?

MR. DUFFIELD: About two or three weeks later, as suggested, there was a policy mailed, that was not read, the exclusions were not read. Fitting all the case law.

THE COURT: But they received it.

MR. DUFFIELD: Yes, they received it.

THE COURT: Okay, I'm just trying to get my facts straight.

(A.R. 0294)

Thus, at hearing, RRK acknowledged receipt of the 2007-2008 Policy and, during depositions, RRK's corporate officers acknowledged receipt of the 2008-2009 renewal Policy.

As further evidence, agency employee Patricia Stutler testified in her July 16, 2010, deposition that she thought the 2008-2009 Policy was sent to the Lees based upon custom and habit, and information contained within an agency log. (A.R. 0095). Additionally, an October 29, 2007, letter from Mrs. Stutler to Showboat Marina [RRK], evidences the forwarding of the 2007-2008 “new business policies” with a request to “[p]lease review and if you have questions or problems, please let us know.” (A.R. 0177).

Agency President Arch Keller testified in his May 25, 2010, deposition, when asked about the Policy being sent to the Lees, that “[a]nd there may not be [a cover letter], so I don’t know. But I know that **after the loss** that Kelly and Rudy told me that their copy of the insurance policy was in the apartment that sunk, so they got it [the policy] somehow.” (A.R. 0098) (emphasis added).

Agency employee Alene Lyons testified in her deposition that while she did not have actual recall of the mailing of the 2008-2009 Policy, usual office custom and practice indicated to her that it had been mailed:

Q So your only basis-the only knowledge you have about a letter comes from reviewing the log. Right? Because you don’t have any independent memory of writing a letter.

A When we mail a policy, we typically do a letter with it.

Q But in this instance, you don’t have any personal knowledge of having done so, correct?

A No.

Q Your thoughts about whether a letter was done only comes from reviewing your log. Right?

A I do not remember doing the letter, but it is normal **procedure for us to do a letter when we mail out a policy**. Am I answering you?

(A.R. 0120) (emphasis added). The letter to which Ms. Lyons refers is a January 20, 2009, letter to Showboat Marina [RRK] stating in pertinent part that “[e]nclosed you will find your renewal policies for the coming year.” (A.R. 0178)

RRK’s cross-assignment of error goes solely to an alleged improper finding of fact by the lower court that RRK received a copy of its Policy prior to the loss. RRK’s corporate representatives testified in their depositions that they received the 2008-2009 Policy prior to the sinking of the barge. RRK’s corporate officers told insurance agent Keller that the “policy sank with the barge.” Therefore, there is abundant evidence before this Court to substantiate the lower court’s finding that the renewal Policy was received by RRK.

RRK’s cross-assignment of error should be denied. However, if this Court were to determine that RRK did not receive a copy of the renewal Policy, it is still undisputed that RRK received its initial Policy following its payment of the financed premium, thus, RRK was provided with the exclusions which were on the first substantive page of the Policy.

CONCLUSION

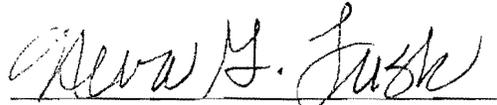
The lower court’s partial summary judgment order must be reversed. New Hampshire reformed the Policy to include the barge and contents, as covered property subject to the terms and conditions of the Policy. Thus, the lower court’s focus on reasonable expectations and collateral estoppel to create coverage was in error. Additionally, the clear, unambiguous and conspicuous exclusions were brought to the attention of the insured by placement of the exclusions on the first substantive page of the Policy. RRK’s officers acknowledge receipt of the Policy.

Contrary to the representations of RRK, the lower court’s ruling, if upheld, will have the broad-based implications on insurers and their insureds contrary to RRK’s assertion that this case

is “very specific.” This Court has heard from the West Virginia Insurance Federation that this case has broad, negative implications for the insurance industry in West Virginia.

Therefore, for the reasons set forth herein, and for other reasons that may be apparent, the lower court’s order granting partial summary judgment in favor of RRK should be reversed, the cross-assignment of error should be denied, 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

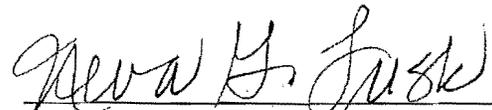
RRK, INC., d/b/a SHOWBOAT MARINA,

Plaintiff Below,
Respondent.

CERTIFICATE OF SERVICE

I, Neva G. Lusk, hereby certify that on this 9th day of January, 2012, a true and accurate copy of the foregoing **Petitioner's Reply Brief and Response to Cross-Assignment of Error** was deposited in the U.S. Mail, first-class postage prepaid, addressed to counsel as follows:

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