

No. 11-1099

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JUL 8 2011

NEW HAMPSHIRE INSURANCE COMPANY,

Defendant Below, Petitioner,

v.

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

Plaintiff Below, Respondent.

RESPONDENT'S BRIEF WITH CROSS-ASSIGNMENT OF ERROR

Petition for Appeal taken from Order dated June 22, 2011
in the Circuit Court of Cabell County
Civil Action No. 09-C-301
(Judge F. Jane Hustead)

DUFFIELD, LOVEJOY & STEMPLE, PLLC

L. David Duffield (WV 4585)

Chad S. Lovejoy (WV 7478)

Thomas P. Boggs (WV 10681)

P.O. Box 608

Huntington, WV 25710-0608

(304) 522-3038 (Telephone)

(304) 522-0088 (Facsimile)

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	iii-v
STATEMENT OF THE CASE	1
STANDARD OF REVIEW	9
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	9
SUMMARY OF ARGUMENT	10
ARGUMENT	12

- I. The Circuit Court Properly Rejected the Petitioner’s Unilateral Attempt at Reformation and Instead Correctly Applied the Doctrines of Reasonable Expectations and Equitable Estoppel to Find Coverage for the Barge and its Contents
 - A. Petitioner’s Unilateral Attempt at Reformation is Unavailing in the Event of Unilateral Mistake, from which it Cannot Inequitably Derive Benefit
 - B. The Circuit Court Correctly Applied the Doctrine of Reasonable Expectations as an Appropriate Avenue to Find Coverage for the Barge and Contents
 - C. The Circuit Court Correctly Applied the Doctrine of Equitable Estoppel as an Appropriate Avenue to Uphold Expected Coverage for the Barge and Contents

- II. The Circuit Court Properly Held Petitioner to its Well-Established Legal Burdens Regarding Wear/Tear Exclusion
 - A. The Circuit Court Correctly Prohibited the Petitioner Insurer from Relying Upon an Exclusion that it Previously Suggested to be Non-Existent per *Romano*
 - B. The Circuit Court Correctly Found that Petitioner Failed to Meet Both Predicate Legal Burdens Necessary to Render Purported Wear/Tear Exclusion Operable

1. The Circuit Court Correctly Found the Wear/Tear Exclusion Inoperable Because the Petitioner's Error Resulted in a Failure to Place the Exclusion in a Manner as to Make Obvious the Relationship Between the Exclusion and Covered Property
 2. The Circuit Court Correctly Found the Wear/Tear Exclusion Invalid Because the Petitioner Failed to Sufficiently Make it Known to the Respondent Insured as Required
- III. The Circuit Court Erred in Finding that the Parties Agreed That the 2008-09 Renewal Policy Was Mailed to, and Received by, the Respondent

CONCLUSION 36

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<i>Painter v. Peavy</i> , 192 W. Va. 189, 451 S.E.2d 755 (1994)	9
<i>Hayseeds, Inc. v. State Farm Fire & Casualty</i> , 177 W.Va. 323, 352 S.E.2d 73 (1986)	10
<i>Chicago Towel Co. v. Reynolds</i> , 108 W. Va. 615, 152 S.E. 200 (1930)	13
<i>Ohio Farmers Ins. Co. v. Video Bank, Inc.</i> , 200 W.Va. 39, 488 S.E.2d 39 (1997)	14 - 16
<i>American Employers Ins. Co. v. St. Paul Fire and Marine Ins. Co., Ltd.</i> , 594 F.2d 973 (4 th Cir. 1979)	15
<i>National Mut. Ins. Co. v. McMahon & Sons, Inc.</i> , 177 W.Va. 734, 356 S.E.2d 488 (1997), <i>overruled on other grounds by</i> <i>Potesta v. United States Fid. & Guar. Co.</i> , 202 W.Va. 308, 504 S.E.2d 135 (1998).	<i>passim</i>
<i>Am. Equity Ins. Co. v. Lignetics, Inc.</i> , 284 F. Supp. 2d 399, 405 (N.D. W. Va. 2003)	18, 31
<i>Romano v. New England Mut. Life Ins. Co.</i> , 178 W.Va. 523, 362 S.E.2d 334 (1987)	<i>passim</i>
<i>Keller v. First Nat'l Bank</i> , 184 W. Va. 681, 403 S.E.2d 424 (1991)	18 - 20
<i>Costello v. Costello</i> , 195 W. Va. 349, 465 S.E.2d 620 (1995)	18, 20
<i>Burlington Ins. Co. v. Shipp</i> , 2000 U.S. App. LEXIS 10609 (4th Cir. W. Va. May 15, 2000)	18, 31
<i>Marlin v. Wetzel County Bd. of Educ., et al.</i> , 212 W.Va. 215, 569 S.E.2d 462 (2002)	21 - 23

<i>Potesta v. United States Fid. & Guar. Co.</i> , 202 W.Va. 308, 504 S.E.2d 135 (1998)	23
<i>Riffe v. Home Finders Associates, Inc.</i> , 205 W. Va. 216, 517 S.E.2d 313 (1999)	27 - 28, 38
<i>Mitchell v. Broadnax</i> , 208 W.Va. 36, 537 S.E.2d 882 (2000) <i>superseded by statute as recognized in</i> <i>Syl. pt. 7, Findley v. State Farm Mut. Auto. Ins. Co.</i> , 213 W.Va. 80, 576 S.E.2d 807 (2002)	30 - 31
<i>Luikart v. Valley Brook Concrete & Supply, Inc.</i> , 216 W.Va. 748, 613 S.E.2d 896 (2005)	31, 33
<i>Canal Ins. Co. v. Sherman</i> , 430 F. Supp.2d 478 (E.D. Pa. 2006)	31 - 32
<i>Family Farm Mut. Ins. Co. v. Bobo</i> , 100 W.Va. 598, 486 S.E.2d 582 (1997)	34
<i>Soliva v. Shand, Morahan & Co.</i> , 176 W.Va. 430, 345 S.E.2d 33 (1986)	35
<i>C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.</i> 227 N.W. 2d 169, 174 (Iowa 1975)	35

Statutes

W.Va. Code § 33-12-22 (2008)	1
------------------------------------	---

Reference Material

13A Appleman, Insurance Law and Practice § 7607 (1976)	15
13A Appleman, Insurance Law and Practice § 7608 (1976)	15, 16
Restatement of Contracts, § 504 (1932)	15, 16
Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961 (1970)	17
Donald S. Malecki, et al., <i>The Additional Insured Book</i> 341 (4 th Ed. 2000)	23

3 Corbin on Contracts § 559 (1960)	35
7 Williston on Contracts § 906 B (1963)	35

STATEMENT OF THE CASE

This Appeal arises from the Circuit Court's June 22, 2011 Order ("Order") granting Respondent RRK, Inc.'s Motion for Partial Summary Judgment for Declaratory Relief on Insurance Coverage for a Barge and its Contents, which sank on February 23, 2009 in Huntington, West Virginia. Specifically, the Circuit Court correctly found as a matter of law that the Petitioner Insurer owed property coverage under both the Doctrines of Reasonable Expectations and Equitable Estoppel, and that its proffered "Wear and Tear" exclusionary language was unavailing as a matter of law.

In September, 2007, Rudy Lee and his wife, Kelly, purchased a small Barge on the banks of the Ohio River in Huntington, upon which sat a restaurant, marina, apartments and boat docks, and then sought insurance from the Petitioner's local Soliciting Agent, Insurance Systems, Inc.¹ (Order at A.R. 0003, ¶ 5-6; Purchase Contract at 0065-70). In seeking insurance coverage for the Property, Rudy and Kelly dealt directly and solely with the Agent, who in turn dealt with a Producer, Norman Spencer Agency, Inc., a larger, more experienced agency in Dayton, Ohio. (Order at A.R. 0003, ¶ 7). The Producer then dealt directly with the Petitioner's Underwriter, Maritime General Agency ("Underwriter"). Because the Lees dealt solely with the Agent, any and all information flowing to and/or from them did so only through the Agent. (Order at A.R. 0004, ¶ 8; Depo. Tr., p.117, ll.4-11 at A.R. 0071-72).

Critically, and omitted entirely from the Petitioner's Brief, it was undisputed below that when the Lees first sought insurance coverage, they specifically asked the Petitioner's Agent if

¹See West Virginia Code section 33-12-22 (2008): "[a]ny person who shall solicit within this state an application for insurance shall, in any controversy between the insured or his or her beneficiary and the insurer issuing any policy upon such application, be regarded as the agent of the insurer and not the agent of the insured."

they could have the Petitioner's Coverage Forms ("the Policy") faxed to them to review the Policy before purchase. (Order at A.R. 0004, ¶ 9; Depo. Tr. at p.21, ll.3-19 at A.R. 0218-19). In response to the Lees' "pre-purchase" request to review the Policy Coverage Forms, the Agent secured them from the Producer and faxed them to Rudy Lee on September 20, 2007, stating "[p]er our phone conversation of this morning, attached you will find the coverage forms that you requested." (E-mail at A.R. 0220, Entire Fax at 0221-237).

The Circuit Court correctly recognized that all parties clearly agree that the seventeen (17) page fax of Policy Forms contained several pages of exclusions including, *inter alia*, exclusions for certain Intentional Acts and Governmental Action, but **entirely omitted** the specific exclusion later proffered to deny the claim – the Wear/Tear Exclusion:

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

(Order at A.R. 0005, ¶ 11; Exclusions disclosed in faxed Forms at A.R. 0225, 0234, 0237).

Trusting that the contents of the Policy Forms faxed by Petitioner's Agent were complete, the Lees purchased the Insurance Policy with policy period of September 30, 2007-08 ("2007-08 Prior Policy"). This 2007-08 Prior Policy was based on the Application completed entirely by the Agent who submitted it to the Petitioner. (Order at A.R. 0005, ¶ 12). The Application clearly and explicitly referenced the Barge and need for Five Hundred, Fifty Thousand Dollars (\$550,000.00) in property coverage. (Application at A.R. 0073-79). In contrast, the Policy issued by the Petitioner in September, 2007 **erroneously** listed only two (2) strings of docks as Covered Property and failed to reference or provide any coverage whatsoever for the Barge and

Contents. (Order at A.R. 0080-81). One week after the 2007-08 Prior Policy went into effect, in October, 2007, the Lees formed RRK, Inc. as an Operating Entity for the family business.²

In April, 2008, approximately seven (7) months after the Petitioner Insurance Company issued the 2007-08 Prior Policy, the Agent was startled to realize that the Petitioner had failed to list the Barge and Contents as Covered Property. (Depo. Tr. at p.26, l.17 through p.27, l.12 at A.R. 0082-83). Alarmed, the Agent wrote the Producer, demanding that the Petitioner move quickly to carry out the coverage expectations of the Respondent Insureds – by “re-apportioning” the Five Hundred, Fifty Thousand Dollars (\$550,000.00) in property coverage **to explicitly include the Barge and Contents:**

It has just been brought to our attention that in addition to purchasing the wharves, piers & Bldgs that they also purchased the restaurant building and equipment that is attached to the marina. They are leasing the restaurant back to the same folks that operated it before. **We need to correct the property building limit to \$500,000 (Restaurant bldg., convenience store bldg, & repair bldg, wharves, piers) and included \$50,000 on contents of the above buildings.**

(E-mail at A.R. 0084) (emphasis added).

This startling realization by Petitioner’s Agent that the Barge and Contents had not ever been listed as Covered Property was followed by an in-person meeting between the Agent and Rudy Lee in the early fall of 2008. (Order at A.R. 0006, ¶ 17; Depo. Tr., p.10, ll.1-24 at A.R. 0087). The meeting concluded with the Agent representing that he would ensure that the Barge and Contents were covered, who testified that he left the meeting “charged with lining up” \$500,000 coverage on the property, including Barge, and \$50,000 on Contents.” (Depo. Tr., p.13, ll.1-18 at A.R. 0087.) The Respondent Insured’s expectation of coverage was undisputed

²Rudy, Kelly and their nineteen (19) year old son, Ryan, invested their life’s savings and moved from California to make a new life in West Virginia, living on the Barge and operating their small family business, which they named “RRK, Inc.” after “**R**udy, **R**yan and **K**elly.”

with pristine clarity – the Barge and Contents were promised to be covered, and the property limit of Five Hundred Thousand Dollars (\$500,000.00) was to be apportioned over all property, including the Barge, and Fifty Thousand Dollars (\$50,000.00) coverage for Contents.³ *Id.* The Agent further testified that he did not discuss any exclusions with the Insured, including the Wear/Tear Exclusion omitted from the September, 2007 faxed Policy. (Order at A.R. 0007, ¶ 18, Depo. Tr., p.147, ll.6-23 at A.R. 0118). The Insured’s expectation that coverage would be “re-apportioned,” was likewise confirmed “up the chain” by the Producer that it also understood that coverage was expected for the Barge/Contents. (Depo. Tr., p.85, ll.4-12 at A.R. 0088-89).

From the time of the Agent’s promised representations of coverage at that Fall, 2008 “in person meeting” until the February 23, 2009 sinking of the Barge, there were no further communications with the Respondent Insureds alerting them that there would be no “re-apportionment,” as promised, to correct the omission of coverage for the Barge and Contents. Having reviewed the September, 2007 Coverage Forms by fax prior to purchase, and having relied upon the Agent’s “in person” promises in the Fall of 2008 that Barge and Contents coverage was corrected through “re-apportionment,” the Insureds sought no coverage elsewhere for the property. Unbeknownst to Respondent Insureds, however, the 2008-09 Renewal Policy (effective at the time of the loss), as issued, again failed to list the Barge and Contents as Covered Property and, thus, did not comport with the Agent’s undisputed promises. (Order at A.R. 0007, ¶ 20, Policy Excerpt at A.R. 0047-64).

³Corroboration of the Agent’s promise of coverage, and the Insured’s expectations, was even recorded in writing with the issuance of an Insurance Binder by the Agent reflecting the correct “re-apportionment” of coverage that had been represented to the Insureds. (Insurance Binder at A.R. 0090).

Although the subject 2008-09 Renewal Policy was issued in September, 2008, the Producer delayed transmitting it to the Soliciting Agent until January, 2009, a mere twenty-eight (28) days before the Barge sank. (Depo. Tr., p.49, ll.10-17 at A.R. 0091-92). Then the 2008-09 Renewal Policy was reviewed by the Agent's staff, who confessed to making another startling discovery. (Order at A.R. 0008, ¶¶ 20,21; Depo. Tr., p.17, l.19 – p.18, l.12 at A.R. 0093-96). Conceding actual knowledge, the Agent documented internally that the Petitioner AGAIN FAILED to carry out the promised re-apportionment of property coverage to specifically include the previously omitted Barge and Contents, contrary to both the Insured's expectations of coverage since September, 2007 and the Agent's promises made in Fall, 2008. *Id.* When the Agent then discovered that Petitioner had, again, failed to correct the policy to meet the Agent's representations and the Insured's expectations, stunningly, the Agent **took no action whatsoever** to disclose the failure to the Insured (which could have allowed the Insured to buy coverage from an Insurance Company that could "get it right"):

Q. . . . After the discrepancy is realized, did you take any action to tell the Lees that the policies as issued did not comport with the breakdown in coverages, the 500 and the 50?

A. No sir.

(Depo. Tr., p.20, ll.18-22; Order at A.R. 0008, ¶ 23). Instead of an honest, candid disclosure of the repeated error, the Agent merely made an internal notation of the **need to "follow up"** on the sharp contrast between the coverage as represented to the Insured and that issued by the Petitioner. (Order at A.R. 0008, ¶ 22, 23; Depo. Tr., p.17, ll.7-18 at A.R. 0093-96). Petitioner's Agent chose to sit in silence, when follow up was logically required in good faith to warn the Insured of the error, the recognized need to "follow up," or the perilous position of this family business, again left naked without coverage. (Depo. Tr., p.19, l.20 – p.20, l.1 at A.R. 0093-96).

Contrary to the Petitioner's assertions (and single erroneous finding of the lower Court, as discussed *supra*), the Respondent Insured **never received** a copy of the 2008-09 Renewal Policy from the Agent. This point was vigorously made by the Respondent Insured and demonstrated by the submission of deposition testimony by every person in the chain of operations at Agent's office, including the employee that discovered the error. (Motion at A.R. 0044; Motion Exhibits at 0093-96 and 0119-120). Petitioner responded with no testimony from any witness with personal knowledge that the 2008-09 Renewal Policy was actually ever mailed to the Respondent Insureds. The Agent was in a conundrum that tended to prove circumstantially that it never mailed the 2008-09 Renewal Policy to the Insured after discovering that Petitioner had repeated its error. The Agent either: (1) knowingly mailed the Insured a Renewal Policy that the alarmed Agent actually realized was erroneous and contrary to both its representations and the Insured's expectations; or (2) neglected to mail out the erroneous 2008-09 Renewal Policy, not yet having taken the opportunity to "follow up" on the noted discrepancy.

The Circuit Court apparently misunderstood the Lees' statement that it had received, by regular mail, *the 2007-08 Prior Policy in October, 2007*, approximately three (3) weeks after Rudy and Kelly had reviewed the initial September, 2007 seventeen (17) page faxed Policy Forms from the Agent. Specifically, the Circuit Court **erroneously found** that there was agreement between the parties that the *2008-09 Renewal Policy* had been mailed and received by the Respondent Insured in January, 2009, despite Respondent's argument and submission of evidence in support *Id.* To be clear, however, the Respondent made clear below and in this Appeal that they NEVER RECEIVED any policy after the faxed Policy in September, 2007 and mailed Policy in October, 2007.

A mere forty-eight (48) hours after the “uninsured” Barge sank into the murky waters of the Ohio River, the Petitioner denied the property claim, amazingly asserting its own failure to list the Barge and Contents as “Covered Property” as the basis. (February 25, 2009 Denial Letter at A.R. 0099). Long after the Barge sank and the claim had been denied, the Agent confessed its agreement with the Respondent Insured that the claim was improperly denied as not being Covered Property. Vehemently arguing with Petitioner’s Adjuster, the local **Agent** wrote:

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

(E-mail at A.R. 0100) (emphasis added).

Tersely confronted by its own Agent confirming that representations of coverage had been made and that expectations of coverage for the Barge and Contents were well-founded, the Petitioner adamantly refused to simply reassess its position and pay the claim. Instead, while the Barge and Insured’s family business sank further, the Petitioner continued to deny the claim because the Barge and Contents were not Covered Property (deriving benefit from its own mistake). Further, Petitioner asserted a new, additional pretext for denial, arguing that *even if it had listed the Barge and Contents as Covered Property*, coverage would then be avoided by policy exclusions – specifically the Wear/Tear Exclusion. (May 13, 2009 Denial Letter at A.R. 0101-103). The exclusionary language newly raised in denial of the claim had been omitted from

the Policy faxed to the Respondent Insureds in 2007. (Entire Fax at A.R. 0221-237). Instead, the Wear/Tear Exclusion was found in other Policy Forms that were never issued in a policy *that also listed the Barge and Contents*.

The Insured's legal challenge was, simply, that under the peculiar facts of this case, Petitioner's Wear/Tear Exclusion was neither: (1) conspicuously placed in close proximity to the property otherwise insured (because the Barge and Contents were entirely omitted from any Policy as issued); nor (2) made known to the Insureds as required by law. Additionally, the Petitioner's faxed Policy Forms documented the *suggestion of the non-existence of this specific exclusion* by entirely omitting it when Rudy and Kelly Lee specifically asked to review the Coverage Forms prior to purchasing this specific insurance product.

Facing multiple pretexts for the denial of the claim, and while their family business sank, Respondent was forced to retain legal counsel and file a lawsuit in the Circuit Court of Cabell County on April 14, 2009 for declaratory relief as to insurance coverage for the loss (as well as various counts for claims misconduct). (Complaint at A.R. 0349-358). Petitioner filed an Answer on May 21, 2009. (Answer at A.R. 0359-373). An AIG Member Company, Petitioner responded that its Insured was not entitled to declaratory relief and *even filed "circular"* (see fn 1, *infra*) *cross-claims suing its own Soliciting Agent and Producer*, blaming them for its failure to cover the Barge and Contents. (Cross-Claims at A.R. 0370-371). Petitioner then filed an Amended Answer on June 8, 2009, dropping the Cross-Claims against its own Agent and Producer, but continuing to deny the claim. (Amended Answer at A.R. 0374-387). Petitioner announced therein *sua sponte* that it was unilaterally reforming its own erroneously issued policy to now include the property that it had wrongfully omitted, but in such a way as to now exclude coverage. Specifically, it would choose to place the omitted Barge and Contents coverage

declaration near to the Wear/Tear Exclusion that it had omitted from the faxed Policy Forms in September, 2007.⁴

After discovery commenced, the Respondent successfully moved for declaratory relief that coverage for the Barge and Contents was owing as a matter of law under the Doctrines of Reasonable Expectations and Equitable Estoppel, and that Petitioner's Wear/Tear Exclusion was unavailing as a matter of law. (Order at A.R. 0001-25). This Appeal followed.

STANDARD OF REVIEW

Procedurally, the instant Appeal results from the Circuit Court's grant of summary judgment to the Respondent Insureds on issues of insurance coverage. Typically, the Court will apply a plenary review to an entry of summary judgment. Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) (holding "entry of summary judgment is reviewed *de novo*.")

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent respectfully submits that this case is one in which the dispositive issues have been authoritatively decided through clearly established West Virginia law. The circumstances of the case are such that the Circuit Court's rulings can be upheld entirely with landmark precedent that has protected West Virginia insureds for decades. Further, affirming the Circuit Court on appeal can be done in a way that has no effect on the Insurance Industry as a whole simply by

⁴There is no dispute that the Lees received and read the faxed seventeen (17) page Policy Forms in September, 2007. Likewise, there is no dispute that the Lees then received the Policy Forms in October, 2007 by regular mail, which they filed away without reading a second time. The Lees candidly admitted that they did not read the second Policy mailed in October, 2007 because they had just read the first Policy as faxed three (3) weeks earlier. It was reasonable to believe that the Insurer would not "bait and switch" additional Coverage Forms from those previously sent to induce purchase.

relying on the uncontroverted portion of the chronology of communications, thus eliminating the Petitioner's and Amicus' "Mailbox Rule" and public policy "parading of the horribles." Under the Revised Rules, such circumstance would properly permit decision by Memorandum Opinion.

Notwithstanding the Respondent's Statement, however, to the extent that Oral Argument is desired, then it should be held under Rule 19 of the Revised Rules because the Circuit Court's Order can be upheld with the application of settled law, as discussed *supra*.

SUMMARY OF ARGUMENT

The June 22, 2011 Circuit Court Order reaches the correct conclusions, and is based on long-standing West Virginia Insurance Law precedent. This Appeal is best discussed in two (2) substantive areas: (1) the Circuit Court's ruling that Coverage is proper for the Barge and Contents under the Doctrine of Reasonable Expectations and Equitable Estoppel (and not under the Doctrine of Reformation in the event of a unilateral mistake); and (2) the Circuit Court's ruling that the Wear/Tear Exclusion is inoperable as a matter of law.

With regard to the propriety of coverage for the Barge and Contents, the Circuit Court correctly discounted Petitioner's self-serving attempt to **unilaterally "reform" its Policy to a position of *excluded coverage***, after having compelled its Insured into "vexatious, time-consuming, expensive litigation." *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986). Specifically, the Circuit Court properly refused reformation because the contract doctrine is equitable in nature and unavailing, as a matter of law, in instances of ***unilateral mistake***. By prohibiting the Petitioner's attempted unilateral reformation, the Circuit Court correctly applied West Virginia law, upheld equitable principles and protected critical public policy for West Virginia insureds.

Having correctly rejected reformation as inapplicable under the circumstances, the Circuit Court was presented with other viable legal theories in order to protect the Insured's expectation of coverage for the Barge and Contents. In so doing, the Court recognized that the unique facts of this case present as compelling a case for the application of the Doctrine of Reasonable Expectations as ever has been found in the entire history of West Virginia jurisprudence. Here the existence of the Respondent Insured's expectations of coverage are corroborated by Petitioner's Agent and Producer. Likewise, the Agent's undisputed representations as to Barge and Contents coverage clearly invoked the Doctrine of Equitable Estoppel. The Circuit Court upheld decades of this very Court's precedent by applying these Doctrines to find coverage.

The Circuit Court then ruled by following clear West Virginia legal precedent, finding the Wear/Tear Exclusion inoperable, holding Petitioner to duties established nearly a quarter century ago. By preventing the unfair use of the exclusion *under this set of facts only*, the Circuit Court correctly prohibited the Petitioner from deriving benefit from its own mistake, estopping it from reliance on a specific exclusion whose non-existence had been initially suggested. Further, the Circuit Court held the Petitioner to its long-standing duties under West Virginia law with regard to: (1) the proper placement of exclusions in insurance policies; and (2) the requirement to bring such exclusions to the attention of insureds. The Circuit Court's rulings must, and did, actually protect the vital public policy considerations of landmark decisions in favor of West Virginia Insureds rather than posing any global threat to the Insurance Industry profiteering, as overstated by both Petitioner and Amicus.

Finally, Respondent respectfully makes a Cross Assignment of Error as to the Circuit Court's Finding of Fact that – twenty-eight (28) days before the Barge sank in 2009 – the 2008-09 Renewal Policy was ever mailed or ever received by the Respondent Insured. (Order at

A.R. 0007-9, 0012, ¶¶ 19, 21 33). Seemingly, the Circuit Court has misconstrued discussion of Respondent's receipt of the *2007-08 Prior Policy* by mail in October, 2007, a few weeks after the Respondent reviewed the initially requested and faxed seventeen (17) page Policy in September, 2007. The Petitioner and Amicus use this erroneous Finding of Fact as the basis to overstate the fact-driven, limited legal argument herein to one that a "Mailbox Rule" should be adopted – exonerating an Insurance Company from its duty to "bring exclusions to the attention of its Insureds" under West Virginia law once a policy is placed in the mailbox. Respectfully, however, this case demonstrates precisely the dangers of such a rule, the adoption of which is absolutely unnecessary and unwarranted under the particular facts of this case, especially when there is no evidence that the 2008-09 Renewal Policy was ever received or even mailed.

ARGUMENT

Discussion is facilitated in this Response by focusing on the two (2) general areas advanced in the Petitioner's Brief: (1) the propriety of the method of the Circuit Court's finding that the Barge and Contents were properly Covered Property; and (2) the propriety of the Circuit Court's ruling that the subject Wear/Tear Exclusion was invalid as a matter of law.

In its Brief, Petitioner raises six (6) Assignments of Error from the Circuit Court's June 22, 2011 Order, two (2) of which focus on the Court's rejection of Reformation and, instead, the application of the Doctrine of Reasonable Expectations⁵ to find coverage for the Barge and Contents and four (4) of which focus on the Court's invalidation of the proffered Wear/Tear Exclusion.

⁵Presumably, Petitioner has the same objection that the Circuit Court's reached the same result under the equally applicable Doctrine of Equitable Estoppel, although omitted from Petitioner's Brief.

I. THE CIRCUIT COURT PROPERLY REJECTED THE PETITIONER'S UNILATERAL ATTEMPT AT REFORMATION AND INSTEAD CORRECTLY APPLIED THE DOCTRINES OF REASONABLE EXPECTATION AND EQUITABLE ESTOPPEL TO FIND COVERAGE FOR THE BARGE AND ITS CONTENTS

Petitioner argues in Assignments of Error 1, 3 and 6 that the Circuit Court misapplied the Doctrine of Reasonable Expectations: (1) unnecessarily because the Insurer's proffered Doctrine of Reformation made the question moot; and (2) in a fashion contrary to public policy.

The gravamen of Petitioner's arguments is that the Insured and Circuit Court had to accept its unilateral *post-litigation* pleading that it would "reform" its policy to add the Barge and Contents as covered property, but that it would strategically do so by adding back the omitted property, choosing to place it into a section of the Policy that would allow the continued denial of coverage by exclusion. The Petitioner then argues that the Circuit Court's use of the clearly applicable Doctrine of Reasonable Expectation (and presumably the Doctrine of Equitable Estoppel also relied upon by the Circuit Court) was unnecessary because the Insurer's unilateral attempt at reformation ended the inquiry: no coverage.

A. PETITIONER'S UNILATERAL ATTEMPT AT REFORMATION IS UNAVAILING IN THE EVENT OF UNILATERAL MISTAKE, FROM WHICH IT CANNOT INEQUITABLY DERIVE BENEFIT

Petitioner's reliance on its attempts to unilaterally reform its policy to result in continued claim denial fails for a simple, but critical, reason – reformation is an equitable doctrine that is unavailing in the event of a unilateral mistake. This Court has long guarded this fundamental fairness concern with equitable relief, describing the "axiomatic principle of equity" as "[h]e who comes into equity must come with clean hands." *Chicago Towel Co. v. Reynolds*, 108 W. Va. 615, 152 S.E. 200 (1930) (describing the goal of equity as "endeavor[ing] to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness . . .").

The Court's "axiomatic principle" and goals are clearly engendered by its limitations on the use of the Doctrine of Reformation. While Petitioner takes great pains to repeat that its unilateral attempt to reform the policy, *after compelling its Insured into vexatious litigation*, was proper in the event of a "mutual mistake," there was **nothing mutual** about the Petitioner's repeated, mistaken omission of the Barge and Contents as Covered Property or the initially omitted exclusionary language. Rather, the Respondent Insured clearly intended to purchase a policy of insurance that included property coverage for the Barge and Contents, as corroborated by the Agent and Producer. The Petitioner intended to issue (as evidenced by the Policy as issued) a policy of insurance that did not include coverage for the Barge and Contents. The Respondent Insured family intended to purchase a policy of insurance that contained the Coverage Forms, with only the exclusions (inapplicable to a Barge) received with the seventeen (17) page faxed Policy in September, 2007. That the Insurer later made a unilateral mistake in issuing a policy that failed to cover the Barge and Contents does not make its mistake mutual.

The Petitioner, after foisting "vexatious litigation" upon its Insured, theorizes that it really meant to issue a policy that contained a Wear/Tear Exclusion, even though it had previously suggested that Exclusion's non-existence by omitting it from the initial seventeen (17) page faxed Policy Forms. Simply put, only one of the two (2) parties had the power to "get it right" – send the actual Policy Forms with all exclusions that the Insurance Company intended to apply when requested by the prospective Insured considering whether to purchase that particular insurance product. When the sole entity with such power to correctly send the requested Policy Forms for review fails to do so, its error is, unequivocally, unilateral in nature and not mutual.

In discussing the doctrine of reformation, the Petitioner properly notes the Court's decision in *Ohio Farmers Ins. Co. v. Video Bank, Inc.*, 200 W.Va. 39, 488 S.E.2d 39 (1997),

which addressed the Circuit Court's use of reformation, as Petitioner prays for herein, of a fire insurance policy to add the individual owner of inventory being stored in an insured building as a loss payee. In reaching its decision under those facts, the *Video Bank* Court provided a thorough discussion of the application of equitable reformation, which may be properly applied in the limited instance of *mutual mistake*. The Court began by noting that "an insurance policy is subject to reformation just as is any other contract." *Video Bank*, 200 W.Va. at 43, 488 S.E.2d at 43. The *Video Bank* Court noted, with approval:

The general rules applying to the reformation of other written contracts apply to contracts of insurance, the courts will reform an insurance policy, like any other instrument, to effectuate the intention of the parties, and make it set forth correctly the contract upon which the minds of the parties met, and **equity jurisdiction** applies to insurance policies as well as to other agreements. And, like other contracts, fraud, mutual mistake, or accident may give good ground for reformation.

Id. (citing *American Employers Ins. Co. v. St. Paul Fire and Marine Ins. Co., Ltd.*, 594 F.2d 973 (4th Cir. 1979) (quoting 13A Appleman, Insurance Law and Practice § 7607 (1976)).

The *Video Bank* Court further explained the necessity of a *mutual* mistake in order to permit equitable reformation, as well as defined the required "identical intentions" of the parties:

For reformation to be allowed on the basis of mutual mistake, the same commentary goes on to say, § 7608 at 309:

The law requires that the alleged mistake must have occurred through the reduction of the understanding and agreed intent of the parties to writing, so that the written instrument does not represent the real agreement.

The Restatement of Contracts, § 504 (1932), sets forth the critical test of "identical intention":

where 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.

Video Bank, 200 W.Va. at 43-44, 488 S.E.2d at 43-44 (quoting 13A Appleman, Insurance Law and Practice § 7608 (1976) and Restatement of Contracts, § 504 (1932)). The Court concluded by setting forth clear requirements to be shown by “clear, strong and convincing evidence” in order to allow reformation *even in the event of mutual mistake*:

There are thus 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.

Video Bank, 200 W.Va. at 44, 488 S.E.2d at 44.

Finally, highlighting why the Petitioner’s attempt to unilaterally reform its policy in the present case is wholly inappropriate and inapplicable, the *Video Bank* Court clearly limited its application, tacitly upholding the Doctrine’s nature in equity when an allegation is made to disguise a unilateral mistake as a mutual mistake:

It is clear from the foregoing that ***reformation is appropriate only where there is a mutual mistake, rather than in a unilateral mistake*** situation such as the one involved in the case presently under consideration.

Id. (emphasis added). For this very reason, and critical to defeating Petitioner’s arguments in this Appeal, the Court in *Video Bank* actually reversed the Circuit Court’s improper decision to reform the insurance policy because of a unilateral, as opposed to a mutual, mistake. That same result of reversal would have been warranted had the Circuit Court adopted Petitioner’s unilateral, improper reformation below.

Because the equitable Doctrine of Reformation is simply not a conduit of self-serving correction in instances of unilateral mistake, the Petitioner’s unilateral attempt to reform its policy was unavailing to unilaterally correct its own error and, not surprisingly, to its benefit. Certainly, permitting a party to use an equitable doctrine to derive benefit from its own error

would be contrary to the axiomatic principle of equity. Rather, under the particular circumstances of this case, the Circuit Court had to reach the proper result of coverage for the Barge and Contents through applicable legal theories (as opposed to the patently inapplicable Doctrine of Reformation) – here the well-established Doctrines of Reasonable Expectations and Equitable Estoppel.

B. THE CIRCUIT COURT CORRECTLY APPLIED THE DOCTRINE OF REASONABLE EXPECTATIONS AS AN APPROPRIATE AVENUE TO FIND COVERAGE FOR THE BARGE AND CONTENTS

Once satisfied that the Petitioner’s proffered legal theory of Reformation was unavailing under the circumstances of this case, the Circuit Court was required to consider appropriate and applicable legal theories. Fortunately, West Virginia has long recognized the Doctrine of Reasonable Expectations:

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

Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987); *overruled on other grounds by Potesta v. United States Fid. & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998) (*quoting* Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961 (1970)). This Doctrine has protected West Virginia individual and corporate Insureds for nearly a quarter of a century.

Initially, the Doctrine of Reasonable Expectations was applied only in the context of ambiguous policy language. West Virginia law then expanded the Doctrine to include certain cases when an ambiguity is not required. Federal Judge Keeley aptly summarized as follows:

Initially, the doctrine of reasonable expectations was considered a canon of construction and thus applied only to ambiguous insurance contracts. The language of an insurance policy provision is considered ambiguous when it is reasonably susceptible to two different meanings, or reasonable minds might be uncertain or disagree as to its meaning

Despite that, the doctrine of reasonable expectations may apply to this case due to a line of cases in West Virginia extending the doctrine beyond circumstances involving ambiguous policy language. In *Romano v. New England Mut. Life Ins. Co.*, West Virginia's highest court refused to apply a policy exclusion when promotional materials provided to the insured did not alert him to the exclusion and, on the contrary, led him to a reasonable belief that he was covered under the policy.

The court has also applied the doctrine to situations involving misconceptions about the coverage that had been sold. In the seminal case of *Keller v. First Nat'l Bank*, the court held that, after a bank's offer to insure had been accepted with consideration, the bank had created an expectation of credit life insurance in the insured even though the bank's offer to insure had been made by mistake. As a result, the bank could not deny coverage after it failed to adequately notify the insured that its offer of insurance was erroneous. When discussing the holding in *Keller* in a subsequent opinion, the court stated that "procedures which foster a misconception about the insurance to be purchased may be considered with regard to the doctrine of reasonable expectation of insurance." *Costello v. Costello*, (finding that an insurance agent's conduct may have created a reasonable expectation of insurance, and noting that *Keller* expanded the doctrine of reasonable expectations beyond circumstances involving ambiguous policy language).

In *Burlington Ins. Co. v. Shipp*, a panel of the Fourth Circuit considered an insurance dispute arising in West Virginia. After review of both *Romano* and *Keller*, the panel concluded that, in West Virginia, "an insured may have a reasonable expectation of insurance coverage when the policy provision on which a denial of coverage is based, although clear and unambiguous, was never communicated to the insured." The district court had found that the insurer had relied on a clear and unambiguous exclusion when denying coverage. The panel however, concluded that the insured could rely on the doctrine of reasonable expectations to establish coverage where she had been assured of coverage and the exclusion had not been brought to her attention. In particular, it concluded that "[the insured's] reasonable expectation of coverage could not be negated as a matter of law by a clear and unambiguous policy exclusion that was never communicated to her."

Am. Equity Ins. Co. v. Lignetics, Inc., 284 F. Supp. 2d 399, 405 (N.D. W. Va. 2003) (citing

Romano v. New England Mut. Life Ins. Co., 178 W.Va. 573, 362 S.E.2d 334 (1987), *Keller v. First Nat'l Bank*, 184 W. Va. 681, 685, 403 S.E.2d 424 (1991); *Costello v. Costello*, 195 W. Va. 349, 465 S.E.2d 620 (1995); *Burlington Ins. Co. v. Shipp*, 2000 U.S. App. LEXIS 10609 (4th Cir. W. Va. May 15, 2000)).

In the case at hand, the Respondent argued that the Reasonable Expectations Doctrine was appropriately applied under both the context of: (1) ambiguity and (2) mistake, either of which would properly prohibit the Petitioner from stripping Barge and Contents coverage from its first party Insureds who had paid premiums for sixteen (16) months under an expectation of coverage that was corroborated by the Petitioner's Agent and Producer. First, Respondent submits that an inherent ambiguity is created by the employment of exclusionary language to strip away coverage for a Barge in a Policy that the Petitioner contends was never intended to insure a Barge. This is amplified when considered from the perspective of a reasonably prudent insured who had asked to review Policy Forms, which must have policy exclusions placed contextually near the property to be excluded so that the exclusion can be contextually understood. Our law requires that such ambiguity must be strictly construed against the Insurer and in favor of the Insured's objectively reasonable expectations of coverage. This Court has held that "where ambiguous policy provisions would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted." Syl. Pt. 9, *McMahon*, 177 W.Va. at 746, 356 S.E.2d at 496.

Second, and without need of finding ambiguity, the Reasonable Expectations Doctrine has been applied to clearly recognize coverage in the event of "Mistake or Failed Procedures" by the Insurer or its Agents. In *Keller v. First Nat'l Bank*, 184 W. Va. 681, 685, 403 S.E.2d 424 (1991), this Court determined that after a Bank's offer to insure had been accepted with

consideration, an expectation of credit life insurance had been created, despite the offer to insure being made by mistake. The Court thus expanded the Reasonable Expectations Doctrine beyond ambiguous policy language and held that coverage could not be denied after failure to adequately notify the insured that the offer of insurance was in error. *Id.* In so doing, the Court applied the Doctrine to find coverage, prohibiting the Insurer from benefitting from its agent's failures:

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

Keller, 184 W.Va. at 687, 403 S.E.2d at 430 (*internal citations omitted*).

The Doctrine's application in the event of a mistake or the failed procedures of the Insurer or its Agents was upheld shortly after the *Keller* decision in *Costello v. Costello*, 195 W.Va. 349, 465 S.E.2d 420 (1995). There, the Court affirmed the applicability of the Doctrine to enforce the Insured's reasonable expectations in instances of mistake by the Insurer or its Agents:

[m]oreover, we indicated, in *Keller*, that procedures which foster a misconception about the insurance to be purchased may be considered with regard to the doctrine of reasonable expectation of insurance.

Costello, 195 W.Va. at 352, 465 S.E.2d at 623.

The undisputed chronology in the present case contains omitted exclusions from faxed Policy Forms as an inducement to purchase, as well as repeated, concealed failures to list

property that everyone, other than Petitioner, concedes was expected by the Insured. It is clear that the Petitioner Insurer's mistakes/failed procedures fostered a misconception about the insurance to be purchased.

There is no dispute that the Respondent Insured had a clear, reasonable expectation that the policy issued by Petitioner would provide coverage for the Barge and Contents, as had been represented by the Petitioner's Agent. The existence and reasonableness of the Respondent Insured's expectation that the Barge and Contents would be Covered Property was corroborated by the Petitioner's Agent and Producer. If unilateral mistakes were made by the Petitioner "up the chain" from the Respondent Insured that resulted in a failure to issue the expected coverage, then the Doctrine of Reasonable Expectations would clearly apply to protect the Insured's expectations. The Respondent presented a case for application of the Doctrine even stronger than the Plaintiffs in *Keller* and *Costello*, neither of whom had the sworn testimony of the Agent corroborating the existence and reasonableness of the Insured's expectation. These particular circumstances clearly justified the use of the Doctrine of Reasonable Expectations in the event of "mistake or failed procedures" to find coverage for the Barge and Contents.

C. THE CIRCUIT COURT CORRECTLY APPLIED THE DOCTRINE OF EQUITABLE ESTOPPEL AS AN APPROPRIATE AVENUE TO UPHOLD EXPECTED COVERAGE FOR THE BARGE AND CONTENTS

Additionally (and also entirely omitted from discussion in Petitioner's Brief), the Circuit Court properly found coverage for the Barge and Contents under the related Doctrine of Equitable Estoppel. This Doctrine was thoroughly explained in the strikingly similar decision of the Supreme Court of Appeals of West Virginia in *Marlin v. Wetzel County Bd. of Educ., et al.*, 212 W.Va. 215, 569 S.E.2d 462 (2002). In *Marlin*, an insurance agent represented to a putative

insured that certain coverage would exist under a policy – namely that property owner Wetzel County Board of Education would be an additional insured under two (2) liability policies issued by Commercial Insurance Company to Bill Rich Construction Company. Despite the agent’s representation of coverage (which even included the agent issuing of a Certificate of Insurance), the agent failed to properly communicate the policy change to the issuing Insurer. *Id.*

Upon later presentation of a claim against property owner Wetzel County Board of Education, the Insurer refused to provide coverage, “contending that it was only obligated to provide coverage to [Named Insured].” *Id.* As in the present case, as set forth in the Petitioner’s Answer and Cross-Claims against its Agent, the *Marlin* Insurer contended that the Soliciting Agent failed to properly notify it of the need to add any additional insured. *Id.* Specifically, the Insurer contended that “it never received either the Certificate of Insurance or any other document suggesting the insurance policies needed to be amended.” *Id.* at 219-220. Like in the present case, the *Marlin* Insurer felt that the literal terms of the issued policy dictated that no coverage be provided for the putative insured, notwithstanding any “communication errors” between the insurance professionals. *Id.*

Analyzing the dispute under the Doctrine of Equitable Estoppel, as opposed to relying whatsoever on the Doctrine of Reasonable Expectations, the *Marlin* Court precluded the Insurer from unfairly denying coverage to the insured property owner. The Court noted a litany of possible causes of the inequitable result that its ruling against the Insurer ultimately prevented:

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

Marlin, 212 W.Va. at 224, 569 S.E.2d at 471 (quoting Donald S. Malecki, et al., *The Additional Insured Book* 341 (4th Ed. 2000)). The *Marlin* Court then used the Doctrine of Equitable Estoppel in order to affirm the existence of coverage as a matter of law, notwithstanding the literal terms of the policy:

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

Marlin, 212 W.Va. at 225, 569 S.E.2d at 472 (citing *Potesta v. United States Fid. & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998)).

Identical to *Marlin*, in this case, the "legal agent" of the Petitioner Insurer represented to the Respondent family business, "RRK," that the Barge and Contents were covered property. However, like in *Marlin*, the Petitioner would now characterize the Soliciting Agent's representation of coverage as a "misrepresentation" of the Policy's literal terms. Regardless of any "problems in communication" occurring "up the chain" from the Respondent Insured, it is impeachable that the representation of coverage for the Barge and Contents was made by the Agent to the Respondent Insureds. Going so far as to have an in-person meeting with Respondent at the Barge site for the purpose of discussing the 2008-09 Renewal Policy, and issuing a written Binder memorializing the expected coverage (again, without the Wear/Tear Exclusion being discussed with, or shown to, the Insured), the Agent concedes that he left the meeting "charged with the duty" of securing coverage for the Barge and Contents.

As the *Marlin* Court correctly applied the Doctrine of Equitable Estoppel, likewise, the Cabell County Circuit Court, so too, correctly applied the Doctrine as an appropriate avenue to

recognize coverage for the Barge and Contents. Despite the Petitioner's error to issue a Policy that complied with the undisputed representations of Petitioner's Soliciting Agent, the Doctrine protects West Virginia Insureds by using equity to properly extend coverage beyond the (erroneously issued) literal terms of the Policy. The Circuit Court's rulings were correct and should be upheld.

II. THE CIRCUIT COURT PROPERLY HELD PETITIONER TO ITS WELL-ESTABLISHED LEGAL BURDENS REGARDING WEAR/TEAR EXCLUSION

Petitioner argues in Assignments of Error 1, 2, 4 and 5 that the Circuit Court erroneously found as a matter of law that the proffered Wear/Tear Exclusion was invalid.⁶ In so arguing, Petitioner again fails to cite to the record; instead the Insurer (and its Industry by amicus) engages in a "parading of the horribles" that overextends the very specific circumstances that were before the Circuit Court. Both unfairly suggest that the Insurance Industry in West Virginia faces an existential threat by Circuit Court's application of West Virginia insurance law. To the contrary, the Circuit Court merely applied thirty (30) year old precedent to correctly analyze the Petitioner's conduct, and found in this particular circumstance, that the Insurer failed to meet its evidentiary burden. The Circuit Court's decision was correct, wholly supported by the law and facts presented, and poses no threat whatsoever to the continued sale of insurance.

⁶Petitioner speciously insinuates a justified reliance on the omitted Wear/Tear Exclusion by suggesting that the Barge's "outer hull skin" contained "large holes ranging from 2 inches in diameter" to sections that were missing. *Petitioner's Brief* at 3. The divers referenced were commissioned by the then-insurer AIG/New Hampshire and did an underwater inspection only nineteen (19) days after the Barge sank. Petitioner omits that its divers then found an *inner hull*, that they called the "real hull," which had no breaks, holes or collapse, as the divers noted seventeen (17) different times on the videotaped inspection. *See Complaint* at A.R. 0425, ¶ 64. Petitioner's self-serving assertions are, like this footnote, irrelevant to the legal analysis of the Circuit Court's decision, but warrant reply.

Additionally, Petitioner omits that, just like their review of the Coverage Forms prior to purchasing the Policy, Respondent also reviewed a 2005 Marine Survey on the Barge advising that it was then in safe condition for use prior to its purchase. *See Complaint* at A.R. 0411, ¶ 7.

Rather than raise to this Honorable Court its own failure in September, 2007 to include the subject Wear/Tear Exclusion in the initially faxed seventeen (17) page Policy Forms, Petitioner's Brief roars a deafening silence on this dispositive issue. Likewise, knowing that the Respondent Insured vehemently denies having received the 2008-09 Renewal Policy any time before the Barge sank, or that it was even mailed to them, Petitioner attempts to use the Circuit Court's misunderstanding as to which Policy was mailed and received (2007-08 Prior Policy vs. 2008-09 Renewal Policy) as the basis to urge that this Court unnecessarily adopt a "Mailbox Rule" to eviscerate the duty to bring exclusions to the attention of West Virginia Insureds. For these reasons, the Circuit Court's rulings on the Wear/Tear Exclusion are proper.

A. THE CIRCUIT COURT CORRECTLY PROHIBITED THE PETITIONER INSURER FROM RELYING UPON AN EXCLUSION THAT IT PREVIOUSLY SUGGESTED TO BE NON-EXISTENT PER *ROMANO*

In *Romano v. New England Mut. Life Ins. Co.*, 178 W.Va. 573, 362 S.E.2d 334 (1987), this Court faced an Insurer who had also provided written material to a prospective Insured prior to issuing a policy. The written promotional material omitted certain eligibility requirements that were contained in a Master Plan for the policy ultimately issued. The Insured reviewed and relied upon the written promotional material and purchased the policy. After the Insured died, the Insurer denied the claim. The Insurer cited language that it had omitted from the earlier written promotional material, but later located in the Master Plan – specifically an eligibility requirement that the Insured be “actively at work” at the time of death. The Insured's Estate brought suit against the Insurer for wrongfully denying the claim and sought to invalidate the earlier omitted eligibility requirement.

Relying on principles of fundamental fairness and equity and having surveyed many national decisions that prohibited operation of policy language in similar circumstances, the

Romano Court recognized:

New England prepared and distributed to prospective insureds materials which explained the basic insurance coverage available under its group life plan. Obviously, the very purpose of the materials was to induce Creasey customers to participate in the plan and their employees to enroll as insureds. Where advertisements, sales brochures, or similar materials are provided as an inducement to insureds, cases uniformly hold that insurers are bound by the provisions contained.

Romano, 178 W. Va. at 528, 362 S.E.2d at 339 (*internal citations omitted*). Recognizing equitable principles, the Court held:

We, therefore, conclude that where an insurer provides sales or promotional materials to an insured under a group insurance policy, which 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.

Applying our rule to the case at hand, we are of the opinion that New England cannot assert the actively-at-work condition to avoid liability under the policy. The plain import of the materials provided to Mr. Romano on June 1, 1978, was that he had complied with all conditions required for coverage. The only eligibility requirement to which Mr. Romano was specifically alerted by the materials was full-time employment status. We believe the materials issued by New England were such as to lead Mr. Romano to a reasonable and honest belief that he was covered under the policy. **It would, we believe, be inequitable to permit New England to enforce the more onerous policy condition where previous communications with the insured suggested its nonexistence.**

Romano, 178 W. Va. at 529, 362 S.E.2d at 340 (*emphasis added*).

This Appeal presents a far more compelling reason for the application of the principles underlying the *Romano* decision. Rather than a generic promotional brochure distributed to the public for prospective sales that omitted relevant limitations, Rudy and Kelly Lee specifically asked for Policy Forms for the proposed Policy while deciding whether to purchase the Petitioner's product (or, perhaps, another Insurer's product) to cover their Barge and Contents. In so doing, the Petitioner, through its Soliciting Agent, answered this family's request by faxing the seventeen (17) page Policy Forms, but wholly omitting the relevant Wear/Tear limitation.

Again, it is agreed by all parties that the Policy Forms faxed in response to Rudy and Kelly Lee's pre-purchase request did not contain a Wear/Tear Exclusion for the Barge. After asking for, receiving and reviewing the Coverage Forms sent by Petitioner's Soliciting Agent (who was engaged in the business of soliciting insurance sales for profit), the Lees were induced to purchase the Petitioner's insurance product for their needs. The faxed "Here are your Coverage Forms" representation by Petitioner's Agent that induced the sale was followed by the Lees' reasonable reliance on the Insurer's documents.

In *Riffe v. Home Finders Associates, Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999), the Court explained the import of *Romano* as recognizing that "[a]n additional safeguard afforded a purchaser of insurance in West Virginia is protection from conflicts between promotional materials and an insurance policy." In applying the additional safeguard of *Romano* to the specific facts in *Riffe*, the Court held:

We feel this principal is applicable to the case at hand, and hold that, where an insurer provides sales or promotional materials to an insured as an inducement to enter into an insurance policy, which the insurer knows or should know will be relied upon by the insured, any conflict between such materials and the insurance policy will be resolved in the insured's favor.

Riffe, 205 W. Va. at 223, 517 S.E.2d at 320.

Like the Insurers in *Romano* and *Riffe*, the Petitioner here should be prohibited from inequitably relying on a "more onerous policy condition where previous communications with the insured **suggested its nonexistence.**" *Romano*, 178 W. Va. at 529, 362 S.E.2d at 340.

Likewise, once the Petitioner affirmatively responded with written Policy Forms to the Lees' request to review the Policy Forms as an inducement to enter into a policy, **any conflict between those materials and the policy should be resolved in the Respondent's favor.** *Riffe*, 205 W. Va. at 223, 517 S.E.2d at 320. In this regard, the Circuit Court's invalidation of the use of the

previously omitted Wear/Tear Exclusion *in this particular claim* poses no threat to the Insurance Industry beyond the limited facts of this case, but instead affirms that the “additional safeguard” for West Virginia Insureds still stands.

Finally, the presence of the undisputed fact that the Petitioner provided Policy Forms prior to purchase without the Wear/Tear Exclusion at the specific request of the Insureds allows this Court to uphold the Circuit Court’s decision without any impact whatsoever on the insurance industry as a whole. So holding would merely apply precedent that is nearly a quarter-century in tenure and protect interests of fairness and equity just as much for Rudy and Kelly Lee as was done for Mr. Romano’s Estate and Mr. Riffe.

B. THE CIRCUIT COURT CORRECTLY FOUND THAT PETITIONER FAILED TO MEET BOTH PREDICATE LEGAL BURDENS NECESSARY TO RENDER PURPORTED WEAR/TEAR EXCLUSION OPERABLE

West Virginia has long held that “[w]here the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.” *McMahon*, 177 W.Va. at 742, 356 S.E.2d at 496. Further, in order for an Insurer to escape its obligations to provide coverage on the basis of exclusionary language, the insurer must meet several rigorous burdens, described as follows:

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

McMahon, 177 W.Va. at 742, 356 S.E.2d at 496 (*internal citations omitted*) (emphasis added).

Thus, there are two (2) separate, independent affirmative duties on the Insurance Company: (1) to appropriately place any exclusions in sufficient proximity to the Covered

Property so as to allow the Insured to appreciate and understand the exclusion's effect on coverage; and (2) to bring any exclusions to the attention of the insured.

1. The Circuit Court Correctly Found the Wear/Tear Exclusion Inoperable Because the Petitioner's Error Resulted in to a Failure to Place the Exclusion in a Manner as to Make Obvious the Relationship Between the Exclusion and Covered Property

As a matter of logic and fundamental fairness, *McMahon* requires the Insurance Company seeking to rely on exclusionary language to place such language in a manner that makes clear its application to the coverage being excluded. Simply put, the Insured should be able to compare that which is covered to that which is excluded in order to allow a clear, cogent understanding of the scope of the coverage for which the Insured is paying premiums. In the case at hand, however, the Petitioner completely omitted the Barge from the Policy, such that it would be a factual and legal impossibility for any Insured to discern the covered property's "relationship with other policy terms," (i.e., to understand) as required by West Virginia law. By definition, a relationship between two (2) elements of the Policy (the Covered Property and Exclusions to be applied) cannot be made obvious when one element (the Covered Property) is wholly omitted from the Policy as issued by the only entity that could have done more to "get it right."

As a result of its failure to list the Barge and Contents as Covered Property on the Policy, the Petitioner's argument that its Policy makes obvious the effect of any exclusionary language on omitted property – here, the Barge and Contents – likewise fails. To allow otherwise would be to permit the Petitioner to benefit from its own mistake(s). Such permission would circumvent public policy mandating that exclusions be placed in close proximity to the property to which the exclusions apply. Such permission would increase, not decrease, litigation.

2. The Circuit Court Correctly Found the Wear/Tear Exclusion Invalid Because the Petitioner Failed to Sufficiently Make it Known to the Respondent Insured as Required

An Insurer seeking to avoid payment on a claim through an exclusion has a second, independent duty to prove that it brought any proffered exclusionary language “to the attention of the insured.” Syl. pt. 10, *McMahon*, 177 W.Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. United States Fid. & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998). In so holding, this Court loudly proclaimed that an Insurer must prove that it properly disclosed exclusionary language to its insured, to avoid “hidden pitfalls or technical encumbrances.”⁷ This requirement has been explained as follows:

Our Legislature has established by law a similar rule as the public policy of this State. Our insurance laws state that an insurance carrier may not issue an insurance policy which contains "exceptions or conditions which deceptively affect the risk⁸ purported to be assumed in the general coverage of the contract." In sum, before an insurance carrier may rely on an exclusion to avoid liability on an insurance contract, it must demonstrate that the "exceptions or conditions" were not deceptive, and were communicated to the insured in a manner calculated to advise the insured of the adverse effect that the exclusionary language would have on the general insurance coverage provided by the policy.

Mitchell v. Broadnax, 208 W.Va. 36, 537 S.E.2d 882 (2000) (Starcher, J., concurring), *superseded by statute as recognized in* Syl. pt. 7, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002).

⁷A strong argument presents that this Appeal provides the quintessential case of “hidden pitfalls” and “technical encumbrances” given: (1) the faxed Policy Forms omitting the subject Wear/Tear Exclusion; and (2) the repeated failure to list the Barge and Contents as Covered Property despite promises to do so and corroborated expectations of coverage.

⁸Another strong argument presents that by completely omitting the Wear/Tear Exclusion in the faxed Policy Forms – the first time that the Lees received any written material and inducing them to purchase the Policy – the Insurer did “deceptively affect the risk.”

The Court further provided several examples of how Insurers may meet this burden:

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

Id. at 49, n.24 (*internal citations omitted*). It is undisputed that none of these methods were proven, or even argued, by the Petitioner.

In *Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W.Va. 748, 613 S.E.2d 896 (2005), this Court discussed the Insurer's "duty to explain" and reiterated *McMahon's* requirement that in order for exclusionary language to apply, an insurer "must bring such provisions to the attention of the insured." Before validating the proffered exclusions therein, the *Luikart* Court required testimony that the Insured had received, read and understood the Policy's exclusions. *Id.* at 754, 902 (citing Insured's testimony that "he read and understood the terms and conditions of coverage").⁹

The "duty to explain" requirement in *Luikart* was later applied by the Eastern District of Pennsylvania in deciding an insurance coverage dispute under West Virginia law. *Canal Ins. Co. v. Sherman*, 430 F. Supp.2d 478 (E.D. Pa. 2006). Like herein, the Plaintiff Insured in *Canal* sought Partial Summary Judgment that the Insurance Company failed to explain the exclusions later proffered to avoid coverage. *Id.* After citing the above-referenced principles in *Luikart* and *McMahon*, the Court granted Partial Summary Judgment that the exclusions were legally invalid:

⁹Recall also the Fourth Circuit's holding in the unpublished opinion of *Burlington Ins. Co. v. Shipp*, 2000 U.S. App. LEXIS 10609 (4th Cir. May 15, 2000) cited by Judge Keeley in *Lignetics*, "[the insured's] reasonable expectation of coverage could not be negated as a matter of law by a clear and unambiguous policy exclusion that was never communicated to her." *Lignetics*, 284 F. Supp.2d 399, 405 (N.D. W. Va. 2003).

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

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

Likewise, in the case at hand, there is no evidence whatsoever that the exclusions being proffered by the Insurance Company were ever made known to the Respondent Insureds. Even stronger than the Plaintiff in *Canal*, here the Petitioner's Soliciting Agent testified that he never discussed the exclusions with the Respondent Insured at the time of the Fall, 2008 meeting, where coverage for the Barge and Contents was explicitly represented and promised by the Petitioner's Agent. (Depo. Tr., p.147, ll.6-23 at A.R. 0119-20). Moreover, it is **undisputed** that the Petitioner **never**, from the initial 17 page faxed Policy in September, 2007 until the Barge sank in February, 2009, issued a written policy that **contained both**: (1) Coverage for the Barge and Contents and; (2) the Wear/Tear Exclusion now proffered to strip away Coverage for the Barge and Contents.

III. THE CIRCUIT COURT ERRED IN FINDING THAT THE PARTIES AGREED THAT THE 2008-09 RENEWAL POLICY WAS MAILED TO, AND RECEIVED BY, THE RESPONDENT

While *Luikart* required proof that an Insured received, read and understood Policy exclusions, Petitioner provided no such evidence for the 2008-09 Renewal Policy. In fact, Petitioner failed to respond in Summary Judgment with any evidence that the subject Policy was ever even mailed to the Respondent Insureds in the weeks before the Barge sank (a logical predicate to even begin to be able to subsequently read and understand the Policy exclusions).

Respondent presented undisputed testimony that, despite the Renewal Policy being effected in September, 2008, the actual Policy (*sans* Barge and Contents Coverage) was only forwarded by the Producer to the Soliciting Agent in *January, 2009* – just weeks before the February 23, 2009 sinking. Once the 2008-09 Renewal Policy was received by the Soliciting Agent, its Customer Service Representative was assigned to review the 2008-09 Renewal Policy to confirm that the Policy as issued had all the correct coverages and amounts. In the course of this review in January, 2009, the Soliciting Agent discovered that the Petitioner had issued the Policy **again** without the promised re-apportionment to include coverage for the Barge and Contents as promised (now some 16 months after the initial faxed Policy). Conceding actual knowledge of the Petitioner's error, the Petitioner's Soliciting Agent then shockingly failed to disclose the error to the Respondent Insureds. In fact, the Soliciting Agent took no action to correct the Petitioner's repeated failure to provide the correct coverage prior to the February 23, 2009 sinking – no phone call, no letter, no e-mail, no fax, nothing. Instead, the Soliciting Agent merely made an entry in an internal computer log that “**Follow Up**” was required, which it conceded never occurred.

Respondent charged that they were never mailed the admittedly erroneous 2008-09 Renewal Policy in January or February, 2009. In response, Petitioner **brought no evidence whatsoever** through any witness with personal knowledge that the subject Policy **was mailed or received**. Respondent documented before the Circuit Court that neither the Agent's Customer Service Representative nor her assistant could recall mailing the 2008-09 Renewal Policy after discovering that it was erroneously issued.¹⁰ The Lees are certain that they never received any Policy in the weeks from January to February, 2009, just prior to the sinking of the Barge. Rather, the only Policies ever received by the Respondent were: (1) the faxed Policy Forms reviewed in September, 2007 as an inducement to purchase coverage which completely omitted the Wear/Tear Exclusion; and (2) the 2007-08 Prior Policy, which was apparently mailed in late 2007, just weeks after the Lees had requested, received and reviewed the faxed Policy Forms.

The Petitioner is critical that the Lees did not read the 2007-08 Prior Policy when received in October, 2007, despite having just reviewed the initial Policy Forms faxed three (3) weeks earlier. However, under these circumstances, the decision not to re-read an entire insurance policy for a second time is entirely logical. Indeed, it is eminently reasonable to assume that the Policy Forms sent by an Insurer to induce the purchase of a product will not then be switched after purchase. Again, the Petitioner seeks to take advantage of peril it has created by representing that the Policy Forms faxed in September, 2007 are "the Coverage Forms [Rudy Lee] requested" as an inducement to purchase insurance and then mailing different forms (i.e., without the Wear/Tear Exclusion) after the purchase.

¹⁰The Agent's Account Representative was certain that she never personally mailed the 2008-09 Renewal Policy to the Insureds. (Depo. Tr., p.21, ll.3-6 at A.R. 0095). Her Administrative Assistant also conceded that she could not testify with personal knowledge that this incorrect 2008-09 Renewal Policy was ever mailed to the Insured. (Depo. Tr., p.31, l.24 – p.32, l.12 at A.R. 0119-120). This completely distinguishes Petitioner's reliance on *Family Harm Mut. Ins. Co. v. Bobo*, 100 W.Va. 598, 486 S.E.2d 582 (1997), in which an Agent submitted an Affidavit that he, in fact, mailed the Policy to the Insured.

Beyond the common sense of an Insured being satisfied with having just reviewed Policy Forms prior to purchase, West Virginia law formally relieves an Insured from the duty to read, and certainly to read a second time:

In applying the doctrine of reasonable expectations to standardized insurance contracts, **we must reject that portion of the reasoning in [*Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 33 (1986)] which is based on the general rule that a party to a contract has a duty to read the instrument.** While this rule may equitably be enforced with regard to a contract negotiated at arm's length between parties of reasonably equivalent bargaining power and signed by each, it would be unfair to apply the general rule in the case of the modern insurance contract. These policies are contracts of adhesion, offered on a take-it-or-leave-it basis, often sight unseen until the premium is paid and accepted, full of complicated, almost mystical, language. "It is generally recognized the insured will not read the detailed, cross-referenced, standardized, mass-produced insurance form, nor understand it if he does." *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*, 227 N.W. 2d 169, 174 (1975); *accord*, 3 Corbin on Contracts § 559 (1960); Keeton, 83 Harv. L. Rev. at 968. The majority rule is that the insured is not presumed to know the contents of an adhesion-type insurance policy delivered to him, 7 Williston on Contracts § 906 B (1963), and we hereby adopt the majority view.

n.6, *McMahon*, 177 W. Va. at 741, 356 S.E.2d at 495.

Moreover, assuming *arguendo* that the Petitioner had not failed to meet its Summary Judgment burden to respond with a mere scintilla of admissible evidence that the 2008-09 Renewal Policy *was ever mailed* to the Respondent Insureds in the 28 days preceding the 2009 loss, it is undisputed that the incorrect Policy, were it to have been mailed, did not list both: (1) the Barge and Contents as Covered Property, and (2) the Wear/Tear Exclusion sought to now be applied to the Barge and Contents, as required. Further, the Petitioner, through the conduct of its Agents, is in a precarious position of vicarious liability for having either: (1) failed to send any Policy whatsoever in January, 2009; or (2) sent the wrong Policy, with actual knowledge that that Policy failed, **again**, to provide coverage for the Barge and Contents, then knowingly concealed that failure from the Respondent Insureds by its deafening, nearly fraudulent, silence. For this, it

must not be rewarded while crushing the Insured family business that faithfully paid its premiums to the Insurance Company.

The Circuit Court's confusion in finding that the "parties agreed" that the 2008-09 Renewal Policy was mailed and received by the Insured (A.R. 0007-12; ¶¶ 19, 21, 33) is therefore erroneous and contrary to the evidence presented by the Respondent below.¹¹ By extension, all of the arguments of the Petitioner and Amicus that are based, in whole or in part, on this error are likewise without merit.

CONCLUSION

This case presents very specific and particular circumstances that allow the Circuit Court's rulings to be upheld under long-standing landmark West Virginia precedent without any threat whatsoever to the Insurance Industry. These circumstances include: (1) expectations of coverage by an Insured that are corroborated by the Agent and Producer; (2) undisputed representations of coverage by the Agent; (3) repeated unilateral mistakes by the Insurer to issue the Policy so as to provide coverage; and (4) a predicate history of communications with the Insured that includes Policy Forms that omit the subject exclusion. It is often said that "bad facts make bad law," and this is certainly true when all legal questions can be answered by twenty-five (25) year old case law, as wisely applied by the Circuit Court.

This case amply demonstrates that the Insurer "dropped the ball" throughout the process and those errors were compounded by its reluctance to "make it right" at every opportunity to do so. The Insurer could have sent ALL of the Coverage Forms as asked by the prospective

¹¹The Circuit Court's error may have sprung from a discussion at the Hearing in which the parties were in agreement that the Insured's received the mailed 2007-08 Prior Policy in October, 2007, just weeks after having read the faxed Policy Forms in September, 2007. (Transcript at A.R. 0288-0289). That there was no "agreement" is clear when the Court directly asked if the Lees received the Renewal Policy in 2009 and the response was "**Absolutely not.**" (Hearing Transcript at A.R. 00285, ll.12-16).

Insureds in deciding whether to purchase the product. The Insurer could have initially issued a Policy that was consistent with the Coverage Forms that it sent as an inducement to purchase. The Insurer could have initially issued a Policy that met the corroborated, reasonable expectations of the Insureds that their primary piece of property had property coverage. The Insurer could have initially issued a Policy that contained, on its face, both the property to be covered and any exclusions intended to apply to that property.

Throughout 2008, the Insurer could have corrected its mistake of omitting the Barge and Contents through re-apportionment of the property coverage when challenged by its Agent in April. The Insurer could have corrected its mistake to meet the undisputed representations of coverage made by its Agent in Fall, 2008. At the very least, the Insurer could have informed the Insured that it was not re-apportioning the coverage or otherwise meeting the representations of its Agent instead of continued, undisclosed inaction. The Insurer could have issued a Renewal Policy in September, 2008 that met the Insured's expectations and Agent's representations.

In 2009, the Insurer could have disclosed to the Insured that its Renewal Policy, as issued, again provided no coverage for the Barge and Contents. Its Agent could have disclosed its actual knowledge that the Insurer had again failed, and that the property that literally kept afloat the family business was naked of coverage, despite the expectations and representations.

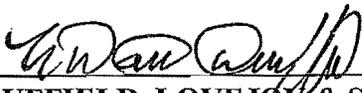
The mistakes made throughout the process by the Insurer have had catastrophic consequences on the Lees – losing their marina business, vacation rental business and even forced out of their repossessed home in California because of cross-collateralization to purchase the “uncovered” Barge and Contents. Adding insult to injury, the Insurer who caused the harm now argues that it should benefit from its mistakes through wrongfully urging application of the equitable doctrine of reformation as to coverage and evisceration of the landmark protections in

McMahon, Romano and Riffe as to the Wear/Tear Exclusion. Despite one point of error from confusion, the Circuit Court carefully and properly applied the law to reach the only result that is fair, equitable and right. Upholding the Circuit Court’s award does not unleash the “parade of horrors” that the Petitioner and its industry use as a scare tactic to urge reversal. Rather, it sends the strong message that the decades old protections of our Law still stand and that these protections are clear, predictable and fair. Under this particular set of facts, which are unusual to say the least, the Circuit Court “got it right.”

As such, Respondent respectfully prays that the Circuit Court’s June 22, 2010 Order be affirmed, with the slight exception of the specific Finding of Fact that constitutes the Cross-Assignment of Error. However, this Court can also affirm the Circuit Court on the issue of the Wear/Tear Exclusion without even reaching the question of whether the 2008-09 Renewal Policy was ever mailed and received because of the undisputed finding that the previous communications suggested its non-existence *a la Romano*.

RESPONDENT,

By Counsel



DUFFIELD, LOVEJOY & STEMPLE, PLLC

L. David Duffield (WV 4585)

Chad S. Lovejoy (WV 7478)

Thomas P. Boggs (WV 10681)

P.O. Box 608

Huntington, WV 25710-0608

(304) 522-3038 (Telephone)

(304) 522-0088 (Facsimile)

No. 11-1099

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NEW HAMPSHIRE INSURANCE COMPANY,

Defendant Below, Petitioner,

v.

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

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel for Respondent RRK, Inc., d/b/a Showboat Marina, hereby certifies that service of the foregoing **“RESPONDENT’S BRIEF WITH CROSS-ASSIGNMENT OF ERROR,”** has been completed by depositing a full and complete copy thereof in the U.S. Mail, first-class postage prepaid, addressed as follows:

Don C. A. Parker, Esq. (WV 7766)
Neva G. Lusk, Esq. (WV 2274)
Glen A. Murphy, Esq. (WV 5587)
Spilman Thomas & Battle, PLLC
Post Office Box 273
Charleston, WV 25301
(Co-counsel for Petitioner)

David M. Spotts, Esq. *(pro hac vice)*
Proctor of Admiralty
Attorney-At-Law
6847 Lake Road West
Ashtabula, OH 44005
(Co-counsel for Petitioner)

Jill Cranston Bentz, Esq. (WV 7421)
Mychal Sommer Schultz, Esq. (WV 6092)
DINSMORE & SHOHL, LLP
900 Lee Street, Suite 600
Charleston, WV 25301
(Counsel for Amicus Curiae, WV Insurance Federation)

this the 8th day of **December, 2011.**



DUFFIELD, LOVEJOY & STEMPLE, PLLC

L. David Duffield (WV 4585)
Chad S. Lovejoy (WV 7478)
Thomas P. Boggs (WV 10681)
P.O. Box 608
Huntington, WV 25710-0608
(304) 522-3038 (Telephone)
(304) 522-0088 (Facsimile)