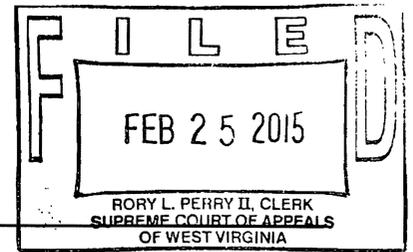


No. 14-0967



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

**Farmers & Mechanics Mutual Insurance Company,
Intervenor Below, and Michael O'Connor,
Counter-Plaintiff Below,**

Petitioners,

v.

**Marlon Allen, Sr., individually and as Administrator of
the Estate of Marcus Allen, Counter-Defendant Below,**

Respondents.

**From the Circuit Court of
Mineral County, West Virginia
Civil Action No. 12-C-43**

**PETITIONER FARMERS & MECHANICS MUTUAL
INSURANCE COMPANY'S REPLY BRIEF**

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I. STATEMENT OF THE CASE.

A. Response to Respondent's Factual Allegations.

Petitioner, Farmers & Mechanics Mutual Insurance Company (hereinafter "F&M"), respectfully disagrees with the representations of the Respondent herein as contained in their Response Brief, beginning on page 1 in their statement of the case. Specifically, the Petitioner would note to the Court that the Plaintiffs in their original Complaint of Civil Action 12-C-43, filed on April 5, 2012, specifically state that:

5. The decedent, Marcus Allen, rented property located at 175 Key Street in Keyser, West Virginia from owner and Landlord Michael O'Connor.

10. Defendant, Michael O'Connor was negligent in failing to have smoke detectors available in the rental property in question in conformance with State and Local laws.

11. Defendant O'Connor by renting the dwelling in question to the decedent assured him that the dwelling was safe, secure and inhabitable.

Joint Appendix (hereinafter "JA") 0015-0016.

In the Complaint which initiated this civil action, the Plaintiffs' wrongful death suit is premised on that fact that Marcus Allen was a tenant to whom a duty was owed by Defendant Michael O'Connor. JA 0016. This position is confirmed in their Answer to the Counterclaim when the Respondent, Marlon Allen, admitted the allegations of Paragraph 3 of the Counterclaim. JA 0027. Paragraph 3 of the Counterclaim in question specifically alleged that at all time pertinent hereto Marcus Allen leased the aforementioned parcel of real estate:

3. At all times pertinent hereto, Marcus Allen leased the aforementioned parcel of real estate.

JA 0023.

In their counter to Petitioner's factual allegations, the Respondent in their Brief take an inconsistent position and argue that the residence at issue belonged to Marcus Allen. (See Respondent's Brief at p. 5.) This is an inconsistent position taken by Respondent with regard to the documents filed by them to initiate the proceedings.

II. ARGUMENT.

A. Title To The Property Was Vested In F&M's Named Insured O'Connor, And It Was O'Connor Who Had An Interest.

As previously noted, the Circuit Court never found that Allen had equitable title to the property. The Court specifically found that he had an interest in the "policy" but not in the real estate. JA 0401. It is basic law that a deed is the written document which effectuates a transfer of title or an interest in real property to another person. As this Court has recently noted in the case of *State ex rel. U.S. Bank National Assoc., v. McGraw*, 2015 W.Va. LEXIS 108 (Feb. 5, 2015):

Pursuant to Art. IX, § 11, of the *Constitution of West Virginia*, the clerk of the county commission has a duty to record and preserve "deeds and other papers presented for record." Derivative of that provision are a number of statutes relating to the public recording of deeds, trust deeds and other documents concerning land transactions. *W.Va. Code*, 39-1-2 [1933], for example, addresses specific requirements for recording deeds, trust deeds and other documents in the office of the clerk of the county commission. Moreover, *W.Va. Code*, 39-1-11 [1963], provides for the placement of writings, authorized by law to be recorded, "in a well-bound book, carefully to be preserved," with a grantor and grantee index. See also *W.Va. Code*, 38-12-9 [1923], specifically providing for the recording and indexing of assignments "admitted to record" in the office of the clerk of the county commission. *Nothing in those statutes mandates the public recording of deeds, trust deeds or trust deed assignments.*

Id. at *13 (emphasis in original).

In the instant case, the owner for recordation, public document purposes was Michael O'Connor. A deed had not been prepared and under the terms of the agreement was not to be

provided to Marcus Allen until the last payment was made. JA 0036, 0039. Specifically, the testimony of Shelly O'Connor was that "[w]hen the mortgage payments are made in full at First United Bank, Shelly O'Connor will receive all further payments until the house is paid in full, which is \$105,300. At that time only the deed will be given to Marcus Troy Allen, as well as changing homeowner name." JA 0039. Shelly O'Connor reiterated this position several times throughout her deposition. JA 0040, 0041. Ms. O'Connor testified:

Q. All right. And you did not give Marcus Allen a deed that said that he was the owner of the property at 175 Keys Street on the day that this agreement was signed; correct?

A. Correct, no, ma'am, I didn't.

JA 0041. Additionally, Michael O'Connor testified that the property was his daughter's but that his name was on the deed because he co-signed for the note at the bank. JA 0075.

With regard to ownership, it is important to note that as to notification to F&M of equitable and/or insurable interest in the premises, it is clear that the deed that was in effect vested ownership only in Michael and Shelly O'Connor. Thus, to a *bona fide* purchaser or anyone searching the land records, the recorded deed was the only document that indicated ownership of the property in question. However, the record is clear that F&M has no notice of any other potential party to the contract of insurance. JA 0142-0147.

B. Based Upon The Theory Of The Plaintiffs' Complaint, Marcus Allen Was A Lessee And, Therefore, The Court Erred In Barring F&M From A Subrogation Claim.

It was the Plaintiffs' position in their Complaint that the decedent, Marcus Allen, rented the property located at 175 Keys Street in Keyser, West Virginia from owner and landlord Michael O'Connor. JA 0016. Plaintiffs agreed to that language and admitted that paragraph of

the Counterclaim. JA 0027. The importance of this is the theory of recovery in the filing of the lawsuit by Marcus Allen, Sr., individually and as the Administrator of the Estate of Marcus Allen, i.e., that as the landlord, the O'Connor's owed a duty to their tenant, the deceased Marcus Allen. JA 0039. The smoke detectors, which are the basis of the Plaintiffs' Complaint for wrongful death, were to be provided by the O'Connor's to Marcus Allen. JA 0049-0050. Under direct examination, Shelly O'Connor was asked "[s]o you didn't understand that it was the landlord's obligation to install the smoke detectors?" To which she answered, "I know I needed to, yes, and I tried, but he wouldn't let me." JA 0050.

As stated in the factual portion of this Reply, Respondent took the position in their Complaint that Allen was a tenant. Respondent then took the position in their Brief on the Counterclaim issue that Allen was in control of the property and was an "owner". Respondent's Brief at p. 10. Certainly, such an inconsistent position on the side of one party is not allowed in West Virginia law and this trial/appellate tactic is precluded by the doctrine of judicial estoppel.

As this court is aware, the doctrine of judicial estoppel precludes a party from arguing a position in a legal proceeding that is inconsistent with a position asserted by that party in a prior legal proceeding. Concerning this doctrine this Court stated in *West Virginia Dept. of Transp., Div. of Highways v. Robertson*, 217 W.Va. 497, 504, 618 S.E.2d 506, 513 (2005), that:

The doctrine of "judicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation." *In re C.Z.B.*, 151 S.W.3d 627, 633 (Tex. Ct. App. 2004). Under the doctrine, a party is "generally prevented ... from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8, 120 S.Ct. 2143, 2154, n. 8, 147 L.Ed.2d 164, 180 n. 8 (2000). This Court recognized long ago that "there are limits beyond which a party may not shift his position in the course of litigation[.]" *Watkins v. Norfolk & Western Ry. Co.*, 125 W.Va. 159, 163, 23 S.E.2d 621, 623 (1942).

Robertson, 217 W.Va. at 504, 618 S.E.2d at 513. Similarly, this Court in Syl. Pt. 2 of *Dillon v. Board of Educ. of Mingo County*, 171 W.Va. 631, 301 S.E.2d 588 (1983), held that “[p]arties will not be permitted to assume successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts.” See also *Quicken Loans, Inc. v. Brown*, 2014 W. Va. LEXIS 1307 (Nov. 25, 2014).

Judicial estoppel is applicable when the following factors are satisfied: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process. Syl. Pt. 2, *Robertson*, 217 W.Va. 497. See also *Quicken Loans, Inc. v. Brown, supra*.

In the instant case, the Respondent has taken inconsistent positions on the control and “ownership” of the subject property within the context of the same lawsuit. The position on duties owed in the Complaint was abrogated when it was advantageous to do so in the response to the coverage issue in the context of the subrogation counterclaim. Such theories are totally inconsistent. This type of a legal strategy is not permissible pursuant to the doctrine of judicial estoppel as enunciated by this Court. Regardless of the fact that the Respondent has separate counsel to prosecute the wrongful death complaint and defend the counterclaim, counsel should be required to have a consistent position on key issues. If indeed counsel for the Respondent are not clear on these critical facts of ownership and control, then at the very least there were

genuine issues of material fact that would have precluded a finding on this issue. Genuine issues of material fact would have prevented the entry of summary judgment. Therefore, it was error for the trial Court to have entered summary judgment in favor of Respondent on the subrogation issue.

C. The Owner Of The Property Was Entitled To Recover From The Respondent Who Caused The Fire Loss And, As Such, Subrogation By F&M Was Proper.

As noted in Petitioner's Brief, the Circuit Court found that the Respondent was not, as a matter of equity, allowed to bring a claim for subrogation recovery. By granting summary judgment to the Estate of Marcus Allen, the court effectively ruled that Marcus Allen was an equitable insured under the policy of insurance issued by F&M.

The Circuit Court created an exception to controlling law when it determined that F&M was precluded from prosecuting a subrogation action against the Estate. Petitioner believes that this was a matter of first impression of the law. Petitioner maintains that when the Circuit Court held that an insurer was precluded from exercising its lawful right of subrogation against a lessee if portions of the rent paid by the lessee are allocated by the insured for maintaining "insurance," it erred in then ruling that the ownership of a policy of insurance was also vested in Allen.

It is undisputed that when F&M issued a homeowner policy of insurance to Shelly O'Connor in 2010, she was the named insured and her father, Michael O'Connor, was named as an additional insured to the policy. JA 0176-0226. It is further undisputed that neither F&M, nor its agent, were aware that Shelly O'Connor had entered into an agreement with Allen in December 2009, nor did it know that Allen was a tenant at the subject property. JA 0142-0147, 0170-0171. Seven months after the fire was the first time F&M was made aware of the existence

of the lease agreement. JA 0288. Marcus Allen was never identified as an additional insured or a purported tenant of the subject property until that time. JA 0176-0226. The provisions of the policy of insurance, cited at page 7 of the Petitioner's Brief, clearly show that Marcus Allen was not a definitional insured. JA 0201, 0211, 0217.

In the instant case, Respondent relies upon the case of *Mazon v. Camden Fire Ins. Ass'n*, 182 W.Va. 532, 389 S.E.2d 743 (1990) to support their position. Respondent has misconstrued this Court's ruling in *Mazon* concerning payment of a policy of insurance. In *Mazon*, Camden Fire Insurance Association paid for a fire loss to Darlene Mazon. Mr. and Mrs. Watts were a married couple who had received from their grandparents a deeded one-half acre tract of land as a gift in 1975. The couple subsequently divorced in 1979 with Mr. Watts remaining in the marital home which had been constructed on the subject property and the final order of divorce did not make any distribution of that property. In 1981, Mr. Watts applied for and obtained an insurance policy from Camden Fire Insurance Association on that property and the formal marital home. A fire occurred subsequently in 1984 and Camden Fire Insurance Association paid the insurance proceeds to Mr. Watts for the full amount of the claim. Subsequently, Mrs. Watts initiated a lawsuit claiming that she had an interest in the proceeds of the insurance policy. 389 S.E.2d at 743. This Court in headnote 1 stated as follows:

Under W. Va. Code § 33-17-12, Whenever the proceeds of or payment under a policy of fire insurance covering property located in West Virginia heretofore or hereafter issued becomes payable, and the insurer makes payment thereof to the person or persons designated in the policy or contract or if the proceeds have been assigned and written notice of such assignment given to the insurer, to the person or persons being entitled thereto by virtue of such assignment, such payment shall fully discharge the insurer from all claims under the policy or contract.

Id. at 744.

Camden Fire Insurance Association had argued that the Respondent was not entitled to “any of the insurance proceeds because she was a party to the insurance contract nor was the contract written for her benefit.” *Id.* This Court has previously held in circumstances such as the instant case that where parties have made claim to proceeds under an insurance policy where they may have had some interest in the real property that “an insurance policy and all rights arising from the policy are controlled by principles of contract, rather than property law.” *Id.* In *Mazon* this Court specifically held that:

It is well established that a contract of insurance is a personal contract between the insurer and insured named in the policy. It is also axiomatic that an insurance policy is a contract of indemnity which pertains to the parties to the contract opposed to the property being insured. Accordingly, an individual who is not a party to the insurance contract cannot maintain a suit on the policy.

Id., at 534, 389 S.E.2d at 745 (internal citations omitted).

Nothing in the statute nor in case law indicates that an interest in insurance proceeds is created by the source of the funds by which the policy is paid. The Respondent extrapolates the ruling in *Mazon* to state that “those who are not the named insured must only establish that the named insured intended to cover an interest other than his or her own insurable interest in order to establish him or herself as an additional insured and to share in the proceeds.” *See* Respondent’s Brief at p. 13. Clearly, *Mazon* does not stand for this proposition and it is disputed that the purpose of the policy was for the sole benefit of Marcus Allen.

It is the O’Connor’s who made a claim for the loss at issue and who were paid under the policy. Ms. O’Connor stated that she took it upon herself to obtain insurance to protect the property. JA 0163. Shelly O’Connor testified that she carried homeowner’s insurance as the owner of the property and listed her father as the additional insured. JA 0047. She further

testified she knew Marcus Allen had renter's insurance. JA 0057. Michael O'Connor testified Marcus Allen would not have had homeowner's insurance on the subject property because he did not own the property. JA 0092. Mr. O'Connor acknowledged he and his daughter received \$85,000.00 of insurance proceeds as a result of the fire at the subject property as the homeowner. JA 0095. He further testified he and his daughter made the decision to then have the property rebuilt. JA 0096. It was clear in the discourse during the depositions of both Shelly and Michael O'Connor that they believed they were entitled to the insurance proceeds from F&M from the policy which had been originally obtained by Michael O'Connor and subsequently listed Michael O'Connor as an additional named insured, with Shelly O'Connor as the primary named insured. In light of existing law as applied to the facts, the trial Court erred in ruling against F&M on its subrogation action.

III. CONCLUSION.

For the reasons stated above, Petitioner Farmers & Mechanics Mutual Insurance Company respectfully requests that this Court find as follows:

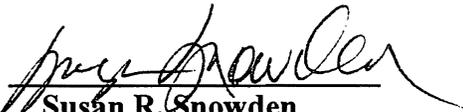
(1) That a lease to own agreement does not create equitable insured status for a tenant; or, in the alternative,

(2) That the Respondent's assertion of equitable preclusion of subrogation based upon inconsistent legal theories within the same suit is precluded by the theory of judicial estoppel. As such, based upon the facts of this matter, the Circuit Court erred in ruling that equity barred the subrogation action by F&M; or, in the alternative,

(3) That the determination of equitable insured status should be determined on a case-by-case basis and that in the case at bar there existed genuine issues of material fact which require further development of the facts related to the understanding of the parties, the knowledge of the insurance company and agent at the time of issuance of the policy.

**FARMERS & MECHANICS MUTUAL
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IV. CERTIFICATE OF SERVICE.

I, Susan R. Snowden, counsel for Petitioner, Farmers & Mechanics Mutual Insurance Company, do hereby certify that I served the foregoing Petitioner Farmers & Mechanics Mutual Insurance Company's Reply Brief, upon the following counsel, by first class mail, postage pre-paid, on this the 24th day of February, 2015.

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