IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-609

SCA EFiled: May 05 2025
02:04PM EDT
Transaction ID 76208487

BOHNERT INTERNATIONAL, INC.,
NORVIN RAQUE, and
DAVID GRAESER,
Plaintiffs below, Petitioners,

v.

MOTORISTS MUTUAL INSURANCE COMPANY,
Defendant below, Respondent.

Appeal from the Intermediate Court
of Appeals of West Virginia
(Case No. 23-ICA-194)

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Motorists Mutual's response attempts to side-step important issues while making notable concessions.

First, if this Court concludes that West Virginia law applies, Motorists Mutual has provided no explanation for denying a defense or providing indemnity.

Second, in conducting choice of law analysis, Motorists Mutual ignores the importance of considering the justified expectations of the parties and impact of this Court's holding in *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (1992).

Third, Motorists Mutual fails to address Petitioners' claim that the "Your Work" exception, as written, is nothing more than an illusory promise of coverage.

Fourth, Motorists Mutual provides no explanation or well-reasoned argument for its assertion that the actions of an independent contractor cannot be deemed an "accident" or "occurrence" under Kentucky law.

This Court should reverse the judgment of the Intermediate Court of Appeals and remand the case to the Circuit Court with directions to enter judgment in favor of Petitioners.

ARGUMENT

Petitioners are entitled to application of West Virginia law. But regardless of whether this court applies West Virginia or Kentucky law, Petitioners are entitled to a defense and indemnity in the underlying case.

I. Choice of law analysis requires application of West Virginia law.

Although the law of the state of formation (here Kentucky) will generally govern interpretation of an insurance policy, there are exceptions where, as here, (1) West Virginia has the most significant relationship to the transaction or the parties; *or* (2) the law of the state of formation (Kentucky) is contrary to the public policy of West Virginia.

A. West Virginia has the most significant relationship.

In its response, Motorists Mutual claims that Kentucky has the more significant relationship to the insurance transaction and the contracting parties. *See* Resp. pp. 8-15. In doing so, Motorists Mutual incorrectly claims (i) of the seven non-exhaustive elements set forth in *Triangle*, greater emphasis is placed on certainty, predictability, and uniformity; (ii) Petitioner conflates justified expectations with reasonable expectations; and (iii) the holding of *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 187 W. Va. 742, 421 S.E.2d 493 (1992), is irrelevant to the significant relationship test.

First, Motorists Mutual's contention that this Court places (and any other court should place) greater emphasis on uniformity and predictability is false. *See* Resp. p. 9. In fact, the precise case Motorists Mutual touts as "instructive" demonstrates the importance of multiple factors including "the protection of justified expectations." *Compare* Resp. p. 10, *with Scottsdale Ins. Co. v. Harleysville Ins. Co.*, Civil Action No. 1:11-cv-33, 2013 WL 6813905, *6 (N.D. W. Va. Dec. 24, 2013).

Second, Petitioners, like this Court, have explained that a party's expectations—whether phrased as "reasonable" or "justified"—are relevant in evaluating conflicts of law. *See* Opening Br. p. 11. In *Nadler v. Liberty Mut. Fire Ins. Co.*, this Court made clear that adoption (albeit modified) of the "modern approach to conflict of law analysis contained in the Restatement (Second) of Conflicts of Law" was "motivated, in part, by the fact that it vindicates the reasonable expectations of the parties to the insurance contract." *See* 188 W. Va. 329, 334, 424 S.E.2d 256, 262 (1992). "The reasonable expectations of the parties with respect to the terms of an insurance contract should not be lightly disregarded." *Howe v. Howe*, 218 W. Va. 638, 651, 625 S.E.2d 716, 729 (2005) (Davis, J., concurring).[1] Accordingly, Petitioners' reasonable expectations with respect to the policy—particularly the inclusion of coverage for work performed by a subcontractor—is relevant to a choice of law analysis. *See* Opening Br. at pp. 11-14.

Third, this Court's holding in *Joy Technologies, Inc.*, is relevant to the significant relationship test. To be sure, in *Joy* this Court reached its decision based upon the public policy exception. But importantly, the Court also evaluated the forum's significant relationship in conducting its choice of law analysis. *See Joy Technologies, Inc.,* 421 S.E.2d.at 497, 746. There, like here, the "injury occurred in West Virginia, the instrumentality of injury was located in West Virginia, and the

[1] While *Howe* involved motorcycle, homeowner, and personal liability umbrella insurance policies, this Court made clear that the rule adopted was intended to create consistency with existing conflict of law analysis, including that set forth in *Triangle* for evaluating CGL policies. *See Howe v. Howe*, 218 W. Va. 638, 645, 625 S.E.2d 716, 723 (2005).

forum selected to try the issues was West Virginia." *Id.* Thus, the factors suggest West Virginia has a very significant relationship to the transactions and the parties.

Additionally, Motorists Mutual's reliance on *Harleysville*, an unpublished opinion from the United States District Court for the Southern District of West Virginia, is misplaced. *Harleysville Ins. Co.*, 2013 WL 6813905, *1. For starters, that opinion does not provide binding precedent. But even if it plays into this Court's analysis, *Harleysville* supports Petitioner's reliance on *Joy:*

> The court [in *Joy*] *also found* that West Virginia's relationship with the parties and the transaction was significant enough to overcome the presumption that the law of Pennsylvania, the locus of the contract, applied.

Harleysville Ins. Co., 2013 WL 6813905, *9 (emphasis supplied).

Ultimately, *Harleysville*, (i) recognized that this Court in *Joy* found the forum state (West Virginia) to have a more significant relationship; but that (ii) the state's public interest was not implicated. In attempting to distinguish *Joy*, the court in *Harleysville* drew arbitrary lines effectively concluding that if West Virginia's public policy is at issue, or if the "far-reaching, long-lasting harm [is] to both the land and individual citizens of" West Virginia, then public policy dictates application of West Virginia law. *Id.* at *9. Yet, here we see implication of the state's public policy (as discussed below) *and* alleged far-reaching and long-lasting harm to both West Virginia property and citizens of West Virginia.

Finally, and of particular concern here, is the notion that a change in a single fact could provide a defense for an insured alleged to have caused damage in West Virginia. For example, if one of Bohnert's "two officers/directors/shareholders" had been a West Virginia resident, if the policy had been solicited through a West Virginia entity, or if the policy had simply been signed in West Virginia, then Motorists Mutual would have a duty to defend as this exact same policy would provide a duty to defend under West Virginia law.[2]

B. Public policy considerations require application of West Virginia law.

In arguing against the public policy exception, Motorists Mutual fails to address Petitioners' argument that inclusion of coverage which can never be utilized is an illusory promise. Nowhere within its Response (nor within the Amicus brief filed by the West Virginia Insurance Federation) does Motorists Mutual attempt to explain its illusory promise of insurance. To the contrary, Motorists Mutual itself explains and concedes that the language of the policy offers illusory promise of insurance:

> [t]he law in Kentucky is well-settled: faulty workmanship and claims flowing from it do not meet with the definition of "occurrence" so as to come within the coverage grant of a commercial general liability policy, regardless of whether that work was performed by the contractor/insured, or its subcontractor.

Resp. p. 1. *See also*, *id,* at p. 7, 19-20. Motorists Mutual fails to dispute that the same policy continues to be sold, purporting to offer the same illusory coverage. Nor does Motorists Mutual dispute the fact that all these issues could be addressed through an endorsement.

[2] Although this fact is not conceded by Motorists Mutual, it is relegated to a single footnote. *See* Resp. Br. p. 17 n. 5

Continuing to promise insurance that Motorists Mutual itself claims can never be triggered (insurance that is unquestionably *available* if Bohnert has an officer residing in West Virginia) is contrary to the pure morals of abstract justice.

Nor does Motorists Mutual attempt to refute the public policy recognizing a duty of good faith and fair dealing. As explained in Petitioners' opening brief, both West Virginia and Kentucky recognize an insurer's duty of good faith and fair dealing to its insured. *See Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990); *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 515 (Ky. 2006). Likewise, both states statutorily prohibit unfair actions by an insurer when inducing a potential client to consent to coverage. *See* Ky. Rev. Stat. Ann. § 304.12-230; W. Va. Code § 33-11-1, *et seq*. It is an unfair practice, and a material breach of the duty of good faith and fair dealing, for an insurer to "misrepresent[] pertinent facts or insurance policy provisions relating to coverage." *Knotts*, 197 S.W. 3d at 515 (citing Ky. Rev. Stat. Ann. § 304.12-230 (West 2008)).

This is precisely what Motorists Mutual has done by including the "Damage to Your Work" and "Damage to Property" exclusions, along with the subcontractor exception, while simultaneously disavowing coverage under the law Motorists Mutual seeks to invoke. Permitting Motorists Mutual to invoke Kentucky law as both a sword and shield permits Motorists Mutual to escape responsibility from its assurances and the plain language of its contractual obligations.

II. Under Kentucky law, Motorists Mutual remains obligated to provide Bohnert with a defense and indemnity.

Even if this Court concludes both that Kentucky has the most significant relationship *and* that public policy does not favor application of West Virginia law, Petitioners are still entitled to a defense and indemnity from Motorists Mutual in the underlying case.

A. For the exclusionary language of the Policy to have effect, coverage must be available as to faulty workmanship.

Motorists Mutual again side-steps Petitioners' plain-language argument, claiming that it is an attempt to argue for the grant of coverage through the Policy exclusions. *See* Resp. pp. 18-19. But Petitioners are not asking the Court to begin with an evaluation of the exclusion. Rather, Bohnert points out that the ICA's affirmance of the circuit court's definition of occurrence (1) renders the exclusion and exception surplusage; and (2) prevents the exception from serving its purpose in restoring coverage.

Petitioners argue that, to comply with precedent regarding contract interpretation, the Court must interpret the Policy language to give effect to each provision. *See* Opening Br. pp. 19-21. "A basic rule of contract interpretation requires that preference be given to the 'interpretation which gives a reasonable, lawful, and effective meaning to all the terms' over a reading 'which leaves a part unreasonable, unlawful, *or of no effect*.'" *Maze v. Bd. of Dirs. for Commonwealth Postsecondary Educ. Prepaid Tuition Trust Fund, et al*, 559 S.W.3d 354, 363 (Ky 2018) (emphasis supplied) (quoting *Comstock & Co., Inc. v. Becon Const. Co.*, 932 F. Supp. 948, 967 (E.D. Ky. 1994)).

The Policy clearly contemplates coverage for the insured "if the damaged work or the work out of which the damage arises was performed on [the insured's] behalf by a subcontractor." Accordingly, the four corners of the insurance Policy clearly provide that the "Damage to Your Work" "exclusion *does not apply* if the damaged work or the work out of which the damage arises was performed *on your behalf by a subcontractor*." Appx. at 689 (emphasis supplied). This provision would be rendered superfluous under Motorists Mutual's reading of the contract as Motorists Mutual claims that damage for work performed by a subcontractor cannot constitute an "occurrence" under Kentucky law, thus the exception can never apply. *See* Resp. pp. 1, 23.

Under well-settled law governing insurance contracts, words are read to have meaning. In interpreting a contract—just like reading a statute—no portion can be read to be without meaning or effect. For this reason alone, coverage is contemplated for the claims at issue in the underlying case.

B. Where, as here, the alleged damages are fortuitous, Kentucky continues to recognize a duty to defend.

Naturally, the Policy here provides Bohnert with coverage for property damage caused by an occurrence. Occurrence is defined by the Policy as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Appx. at 699. Thus, where the subcontractor's alleged defective workmanship is "thoroughly beyond [the insured's] control, the resultant damage . . . is properly characterized as a fortuitous event *and ultimately an 'accident.'*" *Arrowood Indem. Co. v. Drees Co.*, No. 14-169-DLB-CJS, 2015 WL 136107, at *5 (E.D.

Ky. Jan. 9, 2015) (citing *Westfield Ins. Co. v. B.H. Green & Son, Inc.*, No. 5:11-cv-00010-R, 2013 WL 5278243, at * 5 (W.D. Ky. Sept. 18, 2013)) (alteration in original) (emphasis supplied).

Here, the underlying case involves claims against Petitioners' subcontractors, as well as an *independent* contractor. In asserting that claims of shoddy workmanship based upon the acts of an independent contractor are within the insured's control, Motorists Mutual cites generally to *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.,* 306 S.W.3d 69 (Ky. 1986). *See* Resp. p. 23. However, a review of the *Cincinnati* opinion demonstrates that the term "independent contractor" does not appear *at all* and thus provides no law to support this proposition. In fact, Motorists Mutual offers no explanation (or law in support of the same) as to why Petitioners must be denied a defense where the complaint in the underlying case alleges liability based upon the acts of independent contractor, Eric Van Kleef. *See* Appx. at 406, 422-23. (Barrel claims that the actions of an independent contractor, Eric Van Kleef, caused damage).

Certainly, claims and damages concerning the acts of an *independent contractor* are fortuitous as the insured (Bohnert) could not "intend the event or result to occur*,"* and the event or result was beyond Bohnert's control. *See Martin/Elias Prop., LLC v. Acuity*, 544 S.W.3d 639, 643 (Ky. 2018).

III. As Motorists Mutual owes a duty to defend, a decision as to indemnity is premature.

As discussed above, the underlying case triggers Motorists Mutual's duty to defend. As "an insurer's duty to defend is broader than its duty to indemnify," it is premature for the court—including the circuit court—to conclude that Motorists

Mutual is not obligated to indemnify Petitioner. *Camden-Clark Memorial Hosp. Ass'n v. St. Paul Fire and Marine Ins.*, 224 W. Va. 228, 237, 682 S.E.2d 566, 575 (2009). Only the outcome of the underlying case can determine Motorists Mutual's indemnity obligation. And that case remains pending.

CONCLUSION

For these reasons, the judgment of the Intermediate Court of Appeals should be reversed, and the case remanded to the Circuit Court with directions to enter judgment in favor of Petitioners.

BOHNERT INTERNATIONAL, INC.,
NORVIN RAQUE, and
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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2025, *Petitioners' Reply Brief* was filed and served via File&ServeXpress on all counsel of record.

/s/ J. Zak Ritchie
J. Zak Ritchie (WVSB #11705)