

NO. 34725

SUPREME COURT OF APPEALS OF WEST VIRGINIA

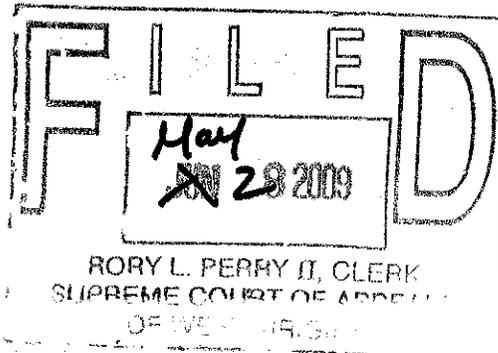
RICHARD BLAKE JR. and JOHN T.
PARKER

Plaintiffs/Appellees,

VS.

ROSALYN E. RHODES and STATE
FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendants/Appellants



BRIEF OF APPELLEES

On Appeal From the Circuit Court of Marshall County
Case No. 06-C-72M

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INTRODUCTION

In this insurance case, the plaintiff, Richard Blake, was using a trailer owned by his neighbor, John Parker, to move equipment. Blake unfortunately lost control of his truck, causing serious damage to both the truck and the trailer. Mr. Parker presented a liability claim to Mr. Blake's insurer, State Farm. Even though the State Farm policy specifically provides coverage for "trailers," State Farm refused to pay the claim. Originally, the only reason given by State Farm to support the refusal was that Mr. Blake did not carry collision coverage.¹

Judge Madden concluded that State Farm's policy language was ambiguous. Accordingly, he construed it in Blake's favor and determined that coverage existed for the trailer damage. Judge Madden found *Grimsrud vs. Hagel*, 328 Mont. 142, 119 P.3d 47 (2005) to be "highly persuasive" because the case involved State Farm as a party and the exact same policy language at issue in this litigation. As an alternative ground, Judge Madden determined that the policy did not provide liability coverage consistent with West Virginia's financial responsibility laws.

This case presents a simple, straightforward insurance coverage issue. Judge Madden followed well-settled law, wrote a thorough opinion, and, in the end, reached the right result. For these reasons, Judge Madden's order finding that coverage exists for the trailer should be AFFIRMED.

¹ Importantly, before Mr. Blake and Mr. Parker filed their complaint in this matter State Farm never stated orally, or in writing, what policy language it was relying upon to deny the claim.

STATEMENT OF FACTS

Before discussing the facts, it is necessary to deal with State Farm's gross misrepresentation of *Grimsrud*-the case cited by Judge Madden in his summary judgment order.

In concluding that State Farm's policy language was, in fact, ambiguous, Judge Madden cited *Grimsrud*. Because *Grimsrud* involved the same insurer, the same policy language and the same factual scenario (damage to a borrowed trailer), Judge Madden found it to be "highly persuasive":

Grimsrud vs. Hagel, 119 P.3d 47 (Mont. 2005) is highly persuasive upon the facts of this case. In *Grimsrud*, State Farm, under circumstances similar to those at hand, paid for the damages to a borrowed trailer under its insured \$50,000 property damage liability coverage based upon the application of trailer coverage policy language providing that "[t]railers designed to be pulled by a private passenger car or a utility vehicle...are covered while owned or used by an insured." *Grimsrud*, at 49.

6/30/08 ORDER, AT PARA. 26.

State Farm cites *Grimsrud* in its brief, but argues that Judge Madden's reliance on it was "misplaced." State Farm then makes the following representation: "The insured in [*Grimsrud*] also carried collision coverage which was *applicable* to the trailer loss." (emphasis added) However, the insured here, Mr. Blake, "declined to purchase collision coverage that would have provided compensation for the loss." APPELLANT'S BRIEF, AT 18.

In a footnote, State Farm acknowledges that "the *Grimsrud* opinion failed to reveal the existence of alternate, applicable coverage for the loss to the trailer."

However, State Farm did provide Judge Madden with "documentation," specifically, a declaration page allegedly issued in *Grimsrud* confirming the existence of collision coverage. ID., at 18.

Unfortunately, all of this is smoke and mirrors. The cold, hard truth of the matter is that State Farm paid the claim for trailer damage in *Grimsrud* under its liability coverage and represented to the Montana Supreme Court that the trailer was, in fact, covered under the precise language relied upon by the plaintiffs herein and by Judge Madden in reaching his decision.

This is obvious, first of all, from the *Grimsrud* opinion itself. In addressing the liability claim arising out of the trailer damage, Justice Warner, writing for the Montana Supreme Court, noted:

State Farm determined that damage to the trailer itself was specifically covered pursuant to a clause in the policy which stated that "[t]railers designed to be pulled by a private passenger car or a utility vehicle...are covered while owned or used by an insured." Accordingly, it paid Wentz's claims for the damage to the trailer as part of the \$50,000 property damage coverage. 328 Montana at 144, 111 P.3d at 49.

It's difficult to imagine language that could be any clearer. The liability claim of the trailer owner, Wantz, was paid under the driver's *liability* coverage--not his collision coverage.

Despite the crystal clarity of this language, State Farm asked Judge Madden (and now, by extension, asks this court) to assume that *Grimsrud* simply got it wrong. State Farm represented to Judge Madden that the trailer damage in *Grimsrud* was not paid under the liability coverage but, in actuality, was paid under the collision coverage.

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It makes the same representation here.

The problem is that the brief filed by State Farm in *Grimsrud*² flatly contradicts these representations. State Farm told the Montana Supreme Court repeatedly, on at least five different occasions, *that payment for the trailer damage was made under its liability coverage*. Consider the following quotes from State Farm's brief:

All covered property damage claims were settled by payment of the \$50,000 limits to the claimant through Attorney Lisa Speare.
INTERVENOR/RESPONDENT'S BRIEF, AT 4.

* * * * *

However, *the damages to the trailer itself are not excluded under the policy*. Section I, Liability, Coverage A provides:

Trailer Coverage

1. Trailers designed to be pulled by a private passenger car or utility vehicle...are covered while owned or used by an insured.

ID., AT 5.

* * * * *

Further, the exclusion at issue³ is not waived by payment to Wantz for his trailer, *because that payment was made under primary liability coverage*.
ID., AT 8.

* * * * *

²The plaintiffs have attached the brief filed by State Farm in the Grimsrud appeal. The brief has been certified by the Montana Supreme Court, bearing the court's seal at page 60. The brief is also accessible at the official website of the Montana Supreme Court at the following address: <http://fnweb1.isd.doa.state.mt.us/idmws/docContent.dll?Library=CISDOCSVR01^doaisd510&ID=003718182>

³The exclusion referred to here is the same one upon which State Farm is relying in this case.

The damages to the trailer itself are not excluded under Hagel's State Farm's policy. The policy provides: "Trailers designed to be pulled by a private passenger car or a utility vehicle...are covered while owned or used by an insured." ID., AT 31.

* * * * *

The trailer coverage has nothing whatsoever to do with the exclusion at issue,⁴ but rather, is a primary component of the liability coverage, in the same manner as is coverage for the use of non-owned cars or temporary substitute cars or newly acquired cars. There was clearly no "waiver" of the transported property exclusion involved in paying for the trailer damage; it was paid under the liability coverage as provided in the policy. ID., at 31-32.

To repeat, these quotes are taken directly from State Farm's brief in *Grimsrud*. There can be absolutely no doubt that in *Grimsrud* State Farm paid the claim for trailer damage under the insured's liability coverage and that State Farm recognized, at least in Montana, that the exclusion at issue in this case was inapplicable to trailers. State Farm's representation to the contrary in this action is a blatant rewriting of history.

The plaintiffs included these same damning quotes in their response to State Farm's petition for appeal. Here, however, State Farm largely ignores them, relegating its discussion of *Grimsrud* to pages 17-19 of its appeal brief. But try as it might, State Farm cannot avoid the implications of the conflicting representations it has made concerning this issue.

First, State Farm is not being forthright. It is unfortunate that State Farm would try to misrepresent the basis for the court's ruling in *Grimsrud*. Even now, State Farm

⁴ See footnote 2 concerning this exclusion.

still says that the trailer damage in *Grimsrud* was paid under the policy's collision coverage—as if saying it enough will somehow make it true. The arguments made by State Farm to the Montana Supreme Court show this to be completely false. Misrepresentations of this magnitude certainly warrant this court's attention and an appropriate response.

Second, it seems obvious that State Farm is not interested in consistency or fairness. In Montana, it says, its policy language provides coverage for trailers. In West Virginia, the same language does not. This is not happenstance. It is part of a calculated strategy. State Farm is determined to advance whatever interpretation of its policy will lead to a favorable outcome—even if it flatly contradicts what it has said before in other proceedings.

With State Farm's misrepresentation exposed, we may proceed to a full statement of the underlying facts.

On March 31, 2005 Richard Blake, Jr. borrowed a 1999 Hudson Trailer from his neighbor, John T. Parker.⁵ Mr. Blake borrowed the trailer in order to move certain equipment located on his property. He had been ordered to move the equipment by the West Virginia Department of Highways because the equipment was impeding the Department of Highways ability to complete a road-building project.⁶ Mr. Blake had never before borrowed or asked to borrow Mr. Parker's trailer. Mr. Blake attached the trailer to his 1987 Dodge Ram Charger pick-up truck via a tow

⁵ Complaint at ¶ 6.

⁶ Id.

hitch.⁷ Unfortunately, Mr. Blake lost control of his truck and crashed. Mr. Blake's truck and Mr. Parker's trailer were both totaled in the accident.⁸

At the time of the accident Mr. Blake was insured by a policy of motor-vehicle insurance issued by defendant, State Farm. Mr. Blake's policy contained \$25,000 in property damage liability coverage and his local State Farm agent was Defendant Rosalyn E. Rhodes.⁹ Mr. Blake paid all premiums due and his policy was in full force and effect on March 31, 2005.¹⁰

Mr. Blake immediately reported the accident to Defendant Rosalyn E. Rhodes¹¹ and advised her that he was at-fault for the destruction of Mr. Parker's trailer.¹² Ms. Rhodes advised Mr. Blake that State Farm would not pay for the damage to Mr. Parker's trailer because Mr. Blake's State Farm policy did not include collision coverage.¹³ Mr. Parker thereafter contacted a State Farm adjusting office by telephone. Mr. Parker was initially advised by an unnamed male State Farm employee that Mr. Parker would be reimbursed for his loss. After checking with a supervisor the State Farm employee informed Mr. Parker that State Farm would not reimburse him for the damage to his trailer. No reason was given for this denial.¹⁴

Mr. Parker was forced to file a lawsuit against his neighbor and friend, Mr. Blake, in the Magistrate Court of Marshall County West Virginia.¹⁵ Mr. Blake notified

⁷ Complaint at ¶ 6.

⁸ Complaint at ¶ 7, Answer at ¶ 7

⁹ Complaint at ¶¶ 8 and 10, Answer at ¶¶ 8 and 10.

¹⁰ Complaint at ¶ 9, Answer at ¶ 9.

¹¹ Complaint at ¶ 10, Answer at ¶ 10.

¹² Id.

¹³ Id.

¹⁴ Complaint at ¶ 11.

¹⁵ Civil Complaint, Case No. 05-C-219, filed April 27, 2005. The magistrate court complaint is

the Defendant Rosalyn Rhodes of the lawsuit and again asked that the claim be paid or the lawsuit be defended. Ms. Rhodes denied this request and Mr. Blake defended himself in Magistrate Court.¹⁶ Mr. Blake recognized that he was at fault for the damage to Mr. Parker's trailer and was unaware of any defenses he may have had to the claims against him. Consequently, Mr. Blake advised the Court he was unable to oppose the allegations of the complaint and a confessed judgment was entered against him on May 23, 2005 in the amount of \$3,000, plus costs and interest.¹⁷ Mr. Blake forwarded the judgment order to Defendant Rosalyn Rhodes and requested that State Farm pay the judgment pursuant to the terms of his State Farm motor vehicle insurance policy.¹⁸ State Farm refused.

ARGUMENT

For reasons it never bothers to explain, State Farm's brief actually reverses the order in which the issues were presented to Judge Madden and decided in his June 30th order. Judge Madden concluded that State Farm's policy was ambiguous and, thus, its exclusionary language was unenforceable. Alternatively, Judge Madden concluded that the exclusion violated the state's financial responsibility laws. For purposes of this brief, the plaintiffs will address the issues in the same order they were addressed by Judge Madden.

attached to the plaintiffs' summary judgment brief as Exhibit "A."

¹⁶ Complaint at ¶¶ 13-14.

¹⁷ Complaint at ¶ 16.

¹⁸ July 28, 2005 letter from Richard Blake, Jr. to Rosalyn E. Rhodes. The letter is attached to the plaintiffs' summary judgment brief as Exhibit "B."

I. State Farm's Exclusionary Policy Language is Ambiguous

The law to be applied in interpreting a West Virginia insurance policy is well-settled.

"The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination." Syl. Pt. 1 (in part), *Farmers and Mechanics Mut. Ins. v. Cook*, 210 W.Va. 394, 557 S.E.2d 443 (2001); Syl Pt. 2 (in part) *Riffe v. Home Finders Assoc., Inc.*, 205 W.Va. 216, 517 S.E.2d 313 (1999). Also, the "[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syl. Pt. 2, *Jenkins v. State Farm Mut. Auto*, 219 W.Va. 190, 632 S.E.2d 346 (2006); Syl. Pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002).

"[L]anguage in an insurance policy should be given its plain, ordinary meaning." Syl. Pt. 2, *Russell v. State Auto. Mut. Ins., Co.*, 188 W.Va. 81, 422 S.E.2d 803 (1992). "Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." *Glen Falls Ins. Co. v. Smith*, 217 W.Va. 213, 220, 617 S.E.2d 760, 767 (2005) (citing Syl. Pt. 3, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W.Va. 430, 345 S.E.2d 33 (1986)). In West Virginia, however, "an insurance policy is considered to be ambiguous if it can be reasonably understood in two different ways or if it is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." Syl. Pt. 5 *Hamric v. Doe*,

201 W.Va. 615, 499 S.E.2d 619 (1997); *Prete v. Merchants Property Ins. Co. of Indiana*, 159 W.Va. 508, 511, 223 S.E.2d 441, 443 (1976). When policy language under consideration is ambiguous, the language should be strictly construed against the insurer and in favor of the insured. *Edwards v. Bestway Trucking, Inc.*, 212 W.Va. 196, 569 S.E.2d 443 (2002); *West Virginia Fire & Cas. Co. v. Stanley*, 216 W.Va. 40, 46-47, 602 S.E.2d 483, 489-490 (2004) (both citing *National Mutual Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. U.S. Fidelity & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998)).

Furthermore, the doctrine of reasonable expectations is recognized in West Virginia. "Where the language in an insurance policy is ambiguous, this Court has recognized that the doctrine of 'reasonable expectations' applies. That doctrine holds that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even if a painstaking study of the policy terms would negate those expectations." *Edwards* at 200, 448 (citing *National Mutual Ins. Co. v. McMahon & Sons, Inc* and *State Bancorp, Inc. v. United States Fidelity and Guaranty Insurance Co.*, 199 W.Va. 99, 483 S.E.2d 226 (1997)).

The insurance policy issued to Mr. Blake by State Farm clearly provides property damage liability coverage.¹⁹ The policy extends that property damage

¹⁹ Under Section I – Liability – Coverage A, the policy provides that State Farm will:

1. pay damages which an insured becomes legally liable to pay because of:
 - a. bodily injury to others, and
 - b. damage to or destruction of property including loss of its use,

liability coverage to trailers "designed to be pulled by a private passenger car or a utility vehicle."²⁰ Pursuant to these policy provisions Mr. Blake has coverage for the damage he caused to property owned by Mr. Blake.

Prior to the filing of this lawsuit State Farm had not referenced any exclusionary language in support of its denial of coverage.²¹ Rather, State Farm and Rosalyn Rhodes both indicated to the Plaintiffs that coverage was denied because Mr. Blake did not have collision coverage at the time of the accident.²² Mr. Blake has never made a collision coverage claim in this case. Furthermore, the absence of collision coverage has no effect upon coverage otherwise provided for under property damage liability coverage provisions. Mr. Blake's policy provides coverage for the "damage to or destruction of property . . . caused by accident resulting from the ownership, maintenance or use of [his] car." Mr. Blake's claims are made pursuant to his property damage liability coverage and/or the trailer coverage provisions of his policy.

caused by accident resulting from the ownership, maintenance or use of your car; and

2. defend any suit against an insured for such damage with attorneys hired and paid by us. We will not defend any suit after we have paid the applicable limit of our liability for the accident which is the basis of the law suit.

A copy of State Farm's WV Policy Form 9848.3, Pages 6, 7, 8, 18, and 19, is attached to the plaintiffs' summary judgment brief as Exhibit "C."

²⁰ State Farm WV Policy Form 9848.3 at 18

Trailer Coverage

The liability coverage extends to the ownership, maintenance or use, by an insured, of:

1. Trailers designed to be pulled by a private passenger car or a utility vehicle, except those trailers in 2.a. below.

²¹ West Virginia Insurance regulation 114 C.S.R. 14 Subsection 6.5 provides that "[n]o insurer may deny a claim on the grounds of a specific policy provision, condition or exclusion unless reference to such provision, condition or exclusion is included in the denial. The denial must be given to the claimant in writing or as otherwise provided in subsection 6.6 of these rules."

²² Copy of April 11, 2005 letter to Mr. Parker from Kaye Wilkinson is attached to the plaintiffs' summary judgment brief as Exhibit "D"; Complaint at ¶ 10, Answer at ¶ 10.

After this litigation was initiated, State Farm for the first time cited obscure, ambiguous language found within the State Farm policy to support its coverage denial. The language relied on by State Farm to deny coverage after this suit was brought states that there is no coverage, "FOR ANY DAMAGES TO PROPERTY OWNED BY, RENTED TO, IN THE CHARGE OF OR TRANSPORTED BY AN INSURED." It is undisputed that Mr. Blake did not own or rent the trailer he destroyed. The trailer was owned by Mr. Parker and borrowed by Mr. Blake. Thus, these two provisions are not being relied on by State Farm to deny this claim. "Transported by" and "in the charge of" are ambiguous terms. Was Mr. Blake "in the charge of" the trailer merely because he had borrowed the trailer and intended to return it? Additionally, Mr. Blake was not transporting the trailer. He was using the trailer to transport other equipment.

These exclusionary terms are ambiguous on two levels. First, the terms themselves are ambiguous. No where in the policy are the terms "IN THE CHARGE OF" or "TRANSPORTED BY" defined. During the deposition of Doug Wilson, a State Farm claims representative, Mr. Wilson testified that the term "transported" would mean "being moved from one point to another by a person using a trailer."²³ Obviously, this would not apply to the circumstances of this case (where the damage was done to the trailer itself and not to anything which was being transported on the trailer). Mr. Wilson was also unsure as to the circumstances when a trailer could be in the charge of a State Farm insured. He indicated that he would need to know the

²³ Doug Wilson, Deposition pg. 20, lines 18-19. Relevant parts of Wilson's deposition are attached to the plaintiffs' summary judgment brief as Exhibit "E."

circumstances for which the trailer was used, how long the insured had the trailer, and whether it was in operation at the time the loss occurred.²⁴ Mr. Wilson also indicated that he did not know whether his interpretations of these policy terms were reduced to writing in any materials provided to him by State Farm.²⁵ The policy provides no guidance as to when non-owned trailers used by an insured would be "in the charge of" or "transported by an insured." These exclusionary terms are not defined in the policy, and Mr. Wilson, a State Farm claims representative trained to make decisions based upon such exclusionary language, did not know whether State Farm had memorialized interpretations of these terms.

Two hypothetical examples highlight the ambiguity of these terms. First, a State Farm insured borrows a trailer in order to move equipment. The insured detaches the trailer from his motor vehicle while loading the trailer. After loading the trailer, the insured maneuvers his vehicle to reattach the trailer and in doing so negligently drives into the trailer and causes damage to it. Would property damage liability coverage apply in this scenario? The insured negligently drove his vehicle into the property of another and caused damage. The trailer was not being "transported." Was the insured "in the charge of" the trailer? The exclusionary terms provide no guidance as to their application in this scenario. An insured would be left to speculate as to the available coverage in this situation.

A second example is a situation in which a State Farm insured is driving his vehicle with several passengers headed on a trip. Each passenger has their luggage

²⁴ *Id.* at pg. 19, lines 20-22.

²⁵ *Id.* at pg. 20, lines 10-15, pg. 21, lines 5-8.

in the vehicle. The insured negligently causes an accident in which the passengers' luggage is destroyed. Under State Farm's interpretation of the exclusionary language the damage to the passenger's luggage would not be recoverable under the insured's property damage liability coverage. The luggage was being transported by the insured and, under State Farm's interpretation, the insured was "in the charge of" the property because it was within the insured's motor vehicle. Such an interpretation of the language most certainly would not coincide with the reasonable expectations of the insured.

The second level of ambiguity regarding the terms "in the charge of" and "transported by" arises in connection with the policy language extending the general property damage liability coverage to the "ownership, maintenance or use, by an insured, of . . . trailers designed to be pulled by a private passenger car or utility vehicle." State Farm's interpretation of the exclusionary terms at issue in this case would negate any scenario in which property damage liability coverage for damage to a trailer used by an insured would be available. An insured would never have coverage for property damage done to a trailer he or she was using because the insured would always be transporting or in the charge of the trailer. The trailer coverage provision contained within the liability coverage section would be rendered meaningless if the exclusionary language relied upon by State Farm is applied as State Farm wishes it to be applied in this case.

Traditional contract principles reinforce the conclusion that State Farm's policy is ambiguous and must be interpreted in favor of coverage.

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First, the law recognizes that *specific* contract language controls over *general* language” “Where general and specific clauses conflict, the specific clause governs the meaning of the contract.” Williston on Contracts 32:10. Coverage here is specifically provided for “trailers.” State Farm seeks to avoid coverage by citing a general exclusion which applies to things being “transported” or things “in the charge of” the insured. The specific language, which brings all “trailers” within the policy coverage, is controlling.

Second, we are not dealing with a general coverage provision which would be subject to the policy’s exclusions. Instead, we are dealing with a policy “extension.” State Farm is extending the general coverage provided under its policy. To the extent a conflict may arise between the extended coverage and an exclusion, it is the extended coverage which controls. As one court put it, the coverage extension “trumps the general exclusion.” *Cincinnati Ins. Co. v. Recreation Centers of Sun City, Inc.*, 2008 WL 898725 (D. Ariz. 2008).

State Farm itself has recognized this ambiguity. As noted at the outset of this brief, State Farm, in *Grimsrud*, conceded that a borrowed trailer which was being used by an insured was within the scope of liability coverage. Consequently, State Farm recognizes, at least in Montana, that the exclusion at issue is inapplicable. See State Farm’s brief in *Grimsrud v. Hagel*, 328 Mont. 142, 119 P.3d 47 (2005) at the following pages: 4, 5, 8, 31-32.²⁶

In *Grimsrud*, a State Farm insured negligently caused a motor vehicle accident while towing a trailer owned by another individual. On that trailer were two

²⁶ As noted earlier, State Farm’s brief from *Grimsrud* is attached.

snowmobiles owned by other individuals. *Grimsrud*, at 49. In *Grimsrud*, "State Farm determined that damage to the trailer itself was specifically covered pursuant to a clause in the policy which stated that "[t]railers designed to be pulled by a private passenger car or a utility vehicle . . . are covered while owned or used by an insured." State Farm paid for the trailer damage as part of the policy's \$50,000 property damage coverage. *Id.*

The case at hand is substantially similar to *Grimsrud*. In both cases a State Farm insured, while driving his own insured vehicle, was towing a trailer owned by someone else. In both cases the insured was clearly at fault and admitted his negligence. In *Grimsrud*, however, State Farm extended liability coverage for the property damage to the trailer the insured was using. State Farm did so on the basis of the following language; "[t]railers designed to be pulled by a private passenger car or a utility vehicle . . . are covered while owned or used by an insured." The same clause is contained nearly verbatim in Mr. Blake's policy. The policy language is unquestionably ambiguous if State Farm, itself, can interpret identical policy language one way in Montana and exactly the opposite way in West Virginia. In *Grimsrud*, State Farm admitted coverage and paid the property damage claims related to the destruction of a trailer being used, but not owned, by an insured whose negligence caused an accident which resulted in the destruction of that trailer. In the case at hand, State Farm took the exact opposite position and denied coverage for property damage claims related to the destruction of a trailer being used, but not owned, by an insured who negligently caused an accident which

resulted in the destruction of that trailer.

Nevertheless, State Farm argues that its policy language is unambiguous and that the "plain meaning" of its exclusion applies. APPELLANT'S BRIEF, AT 11. State Farm cites two cases to support its position. Both cases are easily distinguishable because neither addresses the issue raised herein.

First, *State Farm Mut. Automobile Ins. Co. v. Dorough*, 277 Ala. 662, 174 So.2d 303 (1965) was actually a garnishment case. The plaintiff, Dorough, obtained a judgment against a truck driver who negligently caused damage to a boat and trailer he was hauling. Dorough then sued the driver's insurer, State Farm. The driver was not even a party to the proceedings. Furthermore, Dorough all but abandoned his appeal by failing to file a brief. Therefore, State Farm's statement of the facts was taken as true for purposes of the appeal. Most significantly, the policy at issue in *Dorough* did not contain the all-important language extending coverage to trailers—the language which State Farm itself, in *Grimsrud*, agreed provided property damage liability coverage for the wrecked, non-owned trailer.

The other case cited by State Farm is *Allstate Ins. Co. v. Reid*, 934 So.2d 56 (La. App. 2006). *Reid* was a 3-2 decision from an intermediate appellate court sitting in Louisiana. Unfortunately, even though State Farm was a party it failed to bring *Grimsrud* to the court's attention. Therefore, the court did not have the benefit of *Grimsrud* in addressing the coverage issues. More than that, *Reid* answers the wrong question. The parties in *Reid* were disputing whether coverage was provided for a boat which was being hauled—not for the trailer itself. To repeat: State Farm

has extended its liability coverage to specifically include "trailers." The right question is whether this language provides trailer coverage and it is *Grimsrud*, not *Reid*, which answers that question.

The harsh reality is that State Farm's policy interpretation in any given case is driven by its own self interest. This is readily seen in the arguments State Farm made in *Grimsrud* and in this case.

In *Grimsrud*, the plaintiff argued that State Farm had waived the transported property exclusion by paying for the trailer. The plaintiff argued that because State Farm paid for the trailer, it was also liable for the snowmobiles which were being hauled on the trailer. But, no, responded State Farm. The trailer was actually paid for under the *liability* coverage. Therefore, State Farm did not waive the exclusion and was not required to pay anything for the snowmobiles.

Here, State Farm is forced to do an about face. The plaintiff here is claiming damage to the trailer only. The only way State Farm can avoid paying the claim is by arguing that the trailer itself falls within the exclusion and by representing to this court that it paid for the trailer in *Grimsrud* pursuant to the terms of the collision coverage applicable to the policy at issue in that case.²⁷

Despite its best efforts, then, State Farm cannot avoid *Grimsrud*. It is recognized that "conflicting judicial decisions as to the proper construction of a clause in an insurance policy are evidence...that the clause is ambiguous." *Jones v. Ins. Co. of North America*, 264 Or. 276, 282, 504 P.2d 130 (1972). Thus, the fact that *Grimsrud* is directly contrary to State Farm's position being advanced in this

²⁷See the discussion of *Grimsrud* at pp. 2-6, *supra*.

court is evidence of ambiguity. But more than that, we have State Farm itself taking inconsistent positions. Certainly, *if State Farm can interpret its policy language in two different ways in two identical cases it is, by definition, ambiguous.*

This same conclusion is reinforced by the doctrine of reasonable expectations.²⁸ This doctrine requires that Mr. Blake's reasonable expectations regarding the terms of his insurance contract with State Farm be honored even if a painstaking study of the policy terms would negate those expectations. Mr. Blake knew that his insurance policy provided him with \$25,000 in property damage liability coverage. Mr. Blake reasonably believed that this coverage would pay for damage he caused the personal property of others. Mr. Blake negligently caused the accident in which Mr. Parker's trailer was destroyed. Mr. Blake, therefore, reasonably believed that because he was legally liable for the damage to Mr. Parker's personal property that the property damage liability coverage contained within his State Farm policy would cover those damages. As Judge Madden put it: "Because the exclusionary language relied upon by [State Farm] is ambiguous and inconsistent with other provisions of the policy, Mr. Blake's reasonable expectations concerning coverage must be applied." 6/30/08 ORDER, At PARA. 27.

In *Edwards v. Bestway Trucking, Inc.*, 212 W.Va. 196, 569 S.E.2d 443 (2002), language in an insurance contract was found to be ambiguous and the reasonable expectations of the insured were applied to provide coverage. In that case an employee was driving an employer owned vehicle to church when the employee negligently caused an accident which killed four of his passengers and severely

²⁸ Edwards, supra.

injured another. *Id.* at 198, 445. The employer was covered by a commercial umbrella/excess liability insurance policy which included as insureds individuals who are "employed by you or are acting on your behalf in the conduct of your business to which this insurance applies." *Id.* at 197-198, 444-445. The coverage was extended to "[a]ny person . . . using an "auto" which you own . . . providing the actual . . . use is by you or with your permission." *Id.* The phrase "conduct of your business" was not defined in the policy. *Id.* at 198, 445.

The trial court held that there was no coverage under the policy because the employee was not "on his way to sell or meet with a potential customer on the day of the accident." *Id.* The employee testified that "it was his understanding and expectation that any person who had permission to drive a vehicle owned by [the employer] was entitled to be protected by the full coverage of the policy." *Id.* 199, 446. The West Virginia Supreme Court of Appeals found that expectation to be a "reasonable and appropriate expectation for an individual with business knowledge who was aware of the existence of insurance and who undertook to drive a vehicle owned by another." *Id.* The Court therefore strictly construed the ambiguous policy language to cover the accident involved. *Id.*

The ambiguity in *Edwards* turned on the phrase the "conduct of your business." In the case at hand the ambiguity arises on two levels. First, the phrase "in the charge of or transported by an insured" is undefined and ambiguous. Second, the phrase is directly contradictory to and inconsistent with the policy language which extends the property damage liability coverage to non-owned

trailers. Thus, the policy must be strictly construed against State Farm and in favor of Mr. Blake. It has been and continues to be Mr. Blake's reasonable expectation that because he was legally liable for the damage to the personal property of Mr. Parker, his motor vehicle property damage liability policy would cover such damages. Even though State Farm denied coverage in this case, in Grimsrud it provided coverage for the property damage to a trailer in an identical situation. It is the height of ambiguity if identical policy language can be interpreted differently in two identical situations.

II. State Farm's Exclusionary Language is Void and Unenforceable Below the Mandatory Limits of Property Damage Coverage Required by W.Va. Code §17D-4-2.

Even if the exclusionary language relied upon by State Farm was clear and unambiguous, it would nevertheless be unenforceable to the extent that it eliminates property damage liability coverage below what is required under our state's financial responsibility laws.

West Virginia's financial responsibility law mandates liability insurance for accidents "arising out of the ownership, operation, maintenance or use of a motor vehicle . . . in the amount of ten thousand dollars because of injury to or destruction of property of others in any one accident." W.Va. Code §17D-4-2 (1979). The statute flatly requires \$10,000 in property damage liability coverage for the injury to or destruction of the property of another, and, in this case, Mr. Blake negligently caused the destruction of the personal property of Mr. Parker.

Chapter 17 of the West Virginia Code was intended "to provide a minimum

level of financial security to third-parties who might suffer bodily injury or property damage from negligent drivers." *Dairyland Ins. Co. v. East*, 188 W.Va. 581, 585, 425 S.E.2d 257, 261 (1992). The West Virginia Supreme Court of Appeals has made clear that "[t]he mandatory requirement of insurance coverage under W.Va. Code §17D-4-2 (1979), takes precedence over any contrary or restrictive language in an automobile liability insurance policy." *Sly, Pt. 2, Miller v. Lambert*, 195 W.Va. 63, 464 S.E.2d 582 (1995).

To that end, this court has frequently denied the application of exclusionary policy language which would have resulted in liability coverage that is less than the statutorily mandated minimum limit. *Jones v. Motorists Mut. Ins., Co.*, 177 W.Va. 763, 356 S.E.2d 634 (1987) ("Named driver exclusion" of no force or effect up to the limits of financial responsibility required by W.Va.Code, 17D-4-2 [1979]) *See also, Ward v. Baker*, 188 W.Va. 569, 425 S.E.2d 245 (1992) and *Dairyland Ins. Co. v. East*, 188 W.Va. 581, 425 S.E.2d 257 (1992); *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000) ("Owned but not insured" exclusion valid and enforceable above the mandatory limits of uninsured motorist coverage required by W.Va. Code §§ 17D-4-2 (1979) (Repl.Vol.1996) and 33-6-31(b) (1988) (Supp.1991)(To the extent that an exclusion attempts to preclude recovery of statutorily mandated minimum limits of uninsured motorist coverage, such exclusion is void and ineffective.) *See also Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997), *Bell v. State Farm Mut. Auto. Ins. Co.*, 157 W.Va. 623, 207 S.E.2d 147 (1974); *Dotts v. Taressa J.A.*, 182 W.Va. 586, 390 S.E.2d 568 (1990) (Intentional tort exclusion in a motor

vehicle liability insurance policy is precluded under our Safety Responsibility Law up to the minimum insurance coverage required therein. The policy exclusion will operate as to any amount above the statutory minimum.)

State Farm asserts that W.Va. Code §17D-4-12(e) specifically authorizes exclusions for liability coverage for damage to property in charge of or transported by the insured. W.Va. Code §17D-4-12(e), however, is directed toward employment related scenarios. The language contained within that subsection references workers' compensation law, employers, and employment. The language contained in the final clause of that subsection, "in charge of or transported by the insured," is inapplicable outside of those employment situations.

Other courts, considering the same or similar language in their own financial responsibility laws, have recognized that the language at issue applies only to situations involving employment. See, e.g., *Kramer v. Insurance Company of North America*, 54 S.W.3d 613, 616 (Mo. App. 2001)(referring to this as the "employee exception," the court held this language exempts an employer from "the onerous requirement of insuring his employees under his public liability insurance policy"); *Deffendaugh v. Hudson*, 791 P.2d 84 (Okla. 1990)(the language "relieve[s] insurers of any legal obligation to include...a provision for indemnity against employment-related harms"); *McMillian v. North Carolina Farm Bureau Mut. Ins. Co.*, 347 N.C. 560, 495 S.E.2d 352 (1998)(this language "specifically recognizes the interplay between workers compensation and third party liability"); S.D. Laws §32-35-73 (language nearly identical to W.Va. Code §17D-4-12(e) codified under the heading "workers

compensation coverage unnecessary").

Contrary, then, to the argument put forth by State Farm in its petition, W.Va. Code §17D-4-12(e) has no relevance here. Its sole purpose is to exempt insurers from having to insure employees in the course of employment who would otherwise be covered by workers compensation. Thus, the \$10,000 statutory minimum for property damage liability applies.

The property damage claim in the case at hand is less than the minimum amount of property damage liability required by statute. The judgment rendered against Mr. Blake in the Magistrate Court of Marshall County West Virginia on May 23, 2005 was \$3,000 plus costs and interest.²⁹ It is undisputed that Mr. Blake damaged the personal property of Mr. Parker and is legally liable for that damage. It is also undisputed that the amount of damage is less than the statutorily mandated \$10,000 minimum limit for property damage liability. The exclusionary language upon which State Farm relies to deny coverage in this case is, therefore, unenforceable to the extent that it is contrary to and more restrictive than the West Virginia financial responsibility law.

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²⁹ The magistrate court judgment is attached to the plaintiffs' summary judgment brief as Exhibit "F."

CONCLUSION

Judge Madden correctly determined that State Farm's exclusionary language was ambiguous. Applying settled law, he resolved the ambiguity in favor of coverage and entered judgment for the plaintiffs. State Farm can point to no legal error. Accordingly, Judge Madden's ruling should be AFFIRMED.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Service of foregoing **MEMORANDUM IN SUPPORT OF MOTION, PURSUANT TO RULE 10(D), FOR LEAVE TO EXCEED THE 50 PAGE LIMIT** was had upon the defendant herein by forwarding a true and correct copy of the same by United States Mail, postage prepaid, this 27th day of May, 2009, to its counsel, at their last known address, as follows:

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EXHIBITS

ON

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