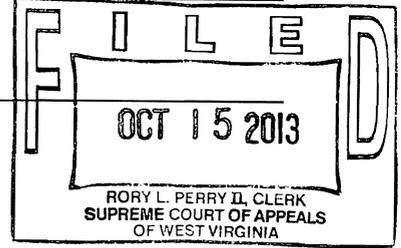


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 13-0692

AT CHARLESTON



West Virginia Mutual Insurance Company,

Defendant Below, Petitioner,

v.

Betty J. Adkins, Rayetta D. Baumgardner,
Diana L. Boerke, Latha A. Bolen, Charlotte L. Deal,
Constance L. Devore, Teresa D. Hager, Lorenna D.
Hankins, Tammy H. Clark, Pamela K. Hatfield,
Marcie J. Holton, Linda L. Jones, Patty S. Lewis,
Teresa Lovins, Martha J. Martin, Louella Perry,
Sherry L. Perry, Janice Pettit, Kimberly A. Roe,
Janice Roush, Rebecca Smith, Beulah Stephens,
and Debra L. Wise,

Plaintiffs Below, Respondents.

**BRIEF OF BRICKSTREET MUTUAL INSURANCE COMPANY AS
AMICUS CURIAE SUPPORTING PETITIONER**

Corey L. Palumbo, Esq. (SBID No. 7765)
James E. Scott, Esq. (SBID No. 11106)
Bowles Rice LLP
600 Quarrier Street, Post Office Box 1386
Charleston, West Virginia 25325-1386
Telephone: (304) 347-1100
Facsimile: (304) 347-1746
cpalumbo@bowlesrice.com
jscott@bowlesrice.com

*Counsel for Brickstreet Mutual Insurance
Company*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTEREST OF *AMICUS CURIAE*.....1

II. SUMMARY OF ARGUMENT2

III. Statement of facts.....3

IV. Argument4

 A. WEST VIRGINIA LAW RECOGNIZES THE DOCTRINE OF
 MUTUAL MISTAKE THE CONTEXT OF INSURANCE
 POLICIES.....4

 B. THE PETITIONER OFFERED CLEAR AND CONVINCING
 EVIDENCE THAT THE AGREED-UPON RETROACTIVE
 DATE FOR ITS SEPARATE LIMITS OF INSURANCE WAS
 JANUARY 1, 2008.....7

V. Conclusion9

TABLE OF AUTHORITIES

CASES

First Am. Title Ins. Co. v. Firriolo,
225 W. Va. 688, 695 S.E.2d 918 (2010)..... 6

Max Holtzman, Inc. v. K & T Co., Inc.,
375 A.2d 510, 513 (D.C. 1977) 4

Ohio Farmers Ins. Co. v. Video Bank, Inc.,
200 W. Va. 39, 488 S.E.2d 39 (1997)..... 4

Ribacoff v. Chubb Grp. of Ins. Companies,
2 A.D.3d 153, 770 N.Y.S.2d 1 (2003) 6

Samuels v. State Farm Mut. Auto. Ins. Co.,
2006-0034 (La. 10/17/06), 939 So. 2d 1235 4

Terra Firma Co. v. Morgan, 223 W. Va. 329, 674 S.E.2d 190 (2008) 5

Twin City Fire Ins. Co. v. Pittsburgh Corning Corp.,
813 F. Supp. 1147 (W.D. Pa. 1992)..... 6

West Virginia Mut. Ins. Co. v. Vargas,
No. 1:11-CV-32, 2013 WL 1164338 at *13-14 (N.D.W. Va. Mar. 20, 2013) 5

OTHER AUTHORITIES

2 Couch on Ins. § 27:1 (3d ed. 2012)..... 4

Black’s Law Dictionary (9th ed. 2009)..... 2

RULES

Rule 30 of the West Virginia Rules of Appellate Procedure 1, 3

Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure..... 1

I. INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, Brickstreet Mutual Insurance Company (hereinafter “Brickstreet”) respectfully submits this brief, as *amicus curiae*¹ in support of Petitioner.

Petitioner asks this Court to overturn a grant of summary judgment by the Circuit Court of Kanawha County regarding insurance coverage. That order concluded that Petitioner had *separate* insurance coverage for claims filed by the Respondents which relate to Mitchell Nutt, M.D., a former employee of the Petitioner. In affirming the summary judgment decision, this Court would significantly curtail the ability of the Petitioner, and other insurance companies like Brickstreet, to challenge and avoid the unbargained-for expansion of insurance coverage and liability occasioned by nothing more than the mistaken exclusion of a mutually agreed-upon retroactive date for an endorsement regarding shared or separate insurance limits. Specifically, the summary judgment order refused to consider the doctrine of mutual mistake whereby an insurance company and its insured can reform an insurance contract to avoid unintended results. Had it considered the doctrine, it could have concluded that the endorsement should have included a retroactive date of January 1, 2008, then reformed the policy to comport with the parties’ intent, and prevented a windfall expansion of coverage for the Respondents.

Brickstreet, as *amicus curiae*, has a strong interest in the outcome of this matter. Brickstreet and other insurers strive to draft policies and related documents that clearly express the agreement between them and their insureds. Mistakes in that process can occur. Yet, where the insureds and their insurance companies *both agree* that mistakes are embodied in an insurance policy, West Virginia law provides a method to reform the policy. The court below

¹ Pursuant to Rule 30(e)(5) of the Rules of Appellate Procedure, no counsel retained by any party to this appeal participated in the drafting of this brief. Counsel for Brickstreet are the sole authors of this brief. No monetary contributions were made from parties or persons other than Brickstreet for the preparation of this brief.

disregarded that method. Upholding the court’s summary judgment decision therefore cuts against the ability of insurers to avoid unintended and unbargained-for expansions of liability, and that issue prompted the filing of this *amicus curiae* brief.

II. SUMMARY OF ARGUMENT

Underlying the court’s decision to award \$6 million in additional coverage was its finding that the insured had separate limits of insurance for the Respondents’ claims retroactive to January 1, 2002. Assuming *arguendo* that the court below properly analyzed the subject insurance policy, found it unambiguous, and applied it as written, the court still should have considered the Petitioner’s claim that the failure to identify a specific retroactive date of January 1, 2008, was a *mutual* mistake. To be clear, Petitioner and its insured agreed to an amendatory endorsement that became “effective” as of January 1, 2008, but failed to note that it should have been “retroactive” to that same date.² That fact was certainly not “mooted” by entry of summary judgment for the Respondents as suggested by the circuit court. Indeed, even if the policy was unambiguous and could be applied as suggested by the Respondents, the Petitioner provided clear and convincing evidence that a January 1, 2002 retroactive date was correct for the shared limits of insurance, but incorrect for the separate limits of insurance. Critically, that evidence illustrated a mutuality of the mistake - *both* the insurer and the insured agreed that the retroactive date for “separate” liability limits should have been January 1, 2008.

² The phrase “effective date” denotes the date the endorsement became operative between Petitioner and its insured. *See* Black’s Law Dictionary (9th ed. 2009) (“The date on which a statute, contract, insurance policy, or other such instrument becomes enforceable or otherwise takes effect.”). On the other hand, a “retroactive” date determines the scope of the endorsement’s application. *Id.* (“extending in scope or effect to matters that have occurred in the past”). Thus, a claim filed after January 1, 2008, would be made during the effective period of the endorsement; however, the same claim might concern incidents that occurred *prior* to the endorsement’s retroactive date.

The court below should have considered Petitioner's evidence and determined whether the policy should be reformed to express the parties' intent – a retroactive date of January 1, 2008 for the insured's separate limits of liability. By failing to do so, the court ultimately provided a \$6 million windfall expansion of insurance for the Respondents, and effectively concluded that reformation of the policy was inappropriate even though the parties agreed that the policy did not accurately reflect their agreement. Brickstreet respectfully suggests that this result is unjust, unwarranted, and should not be upheld by this Court.

III. STATEMENT OF FACTS³

The declaratory judgment action between the parties below resulted from thirty-three (33) medical malpractice claims filed by the “Mesh Plaintiffs” (herein “Respondents”) against Mitchell Nutt, M.D. (“Nutt”) and United Health Professionals, Inc. (“UHP”). That declaratory judgment action concerned an insurance policy agreed to by UHP and the Petitioner, West Virginia Mutual Insurance Company. The incidents for which the Respondents sought insurance coverage occurred in 2006 and 2007, but claims against UHP were filed during the 2010 policy period.⁴

The Respondents reached a confidential settlement with Nutt and UHP whereby Petitioner would pay coverage limits of \$3 million under an “extended reporting endorsement” that covered Nutt after his separation from UHP. This sum was paid in exchange for a release of claims against Nutt and UHP, and the parties agreed to resolve an additional coverage dispute under the applicable policy for the 2010 UHP claims filed by the Respondents. This agreement

³ Brickstreet observes that Rule 30 of the West Virginia Rules of Appellate Procedure does not expressly provide that an *amicus curiae* brief shall include a statement of the facts. However, to provide clarity and ease for reviewing this brief, the lower court's statement of the underlying facts of this matter are summarized herein.

⁴ Notably, Respondents' claims against UHP proceeded upon a theory of *respondeat superior* and thus sought to hold UHP vicariously liable for Nutt's instances of alleged malpractice in 2006 and 2007.

led to the declaratory judgment action below in which Respondents sought an additional \$6 million in coverage for claims asserted against UHP.

Petitioner contended that no such additional coverage was warranted because UHP *shared* the \$3 million limit of insurance with Nutt. Respondents claimed that by virtue of an “Amendatory Endorsement” issued on January 30, 2008, UHP changed its insurance limits to *separate* rather than *shared* with a retroactive date of January 1, 2002. As this Court is aware, the Circuit Court of Kanawha County agreed with Respondents and awarded an additional \$6 million in coverage to the Respondents.

IV. ARGUMENT

A. WEST VIRGINIA LAW RECOGNIZES THE DOCTRINE OF MUTUAL MISTAKE THE CONTEXT OF INSURANCE POLICIES.

It is expected that Petitioner will argue that remand is appropriate for the court below to consider evidence that the retroactive date of January 1, 2002 for UHP’s separate insurance limits was the product of a mutual mistake. Brickstreet writes to support this argument because the court below refused to consider the doctrine of mutual mistake in the *exact* case where it should be applied.

The leading treatise on insurance law recognizes that the doctrine of mutual mistake obviously applies to contracts of insurance: “Equity will reform a contract which, by reason of mutual mistake, does not express the real agreement between the parties.” 2 Couch on Ins. § 27:1 (3d ed. 2012). The main requirement for application of the doctrine is that “there is in fact a mistake *which is mutual.*” *Id.* (emphasis added). Even if the policy language unambiguously sets forth an agreement contrary to that which the parties *actually* agreed, the doctrine nonetheless allows parties to reform the agreement to reflect the real agreement through presentation of parol evidence. *See e.g. Samuels v. State Farm Mut. Auto. Ins. Co.*, 2006-0034

(La. 10/17/06), 939 So. 2d 1235, 1240 (“Parol evidence is admissible to show mutual error even though the express terms of the policy are not ambiguous.”); *Max Holtzman, Inc. v. K & T Co., Inc.*, 375 A.2d 510, 513 (D.C. 1977).

West Virginia recognizes the doctrine of mutual mistake. In *Ohio Farmers Ins. Co. v. Video Bank, Inc.*, 200 W. Va. 39, 488 S.E.2d 39, 44 (1997), this Court observed that “an insurance policy is subject to reformation just as any other contract.” There, Linda McCourt approached a real estate agent to discuss insurance coverage for a business she purchased, Video Bank. *Id.* at 41. At the time of the discussion, Ms. McCourt identified “Home National Bank” as the “loss payee” under the insurance policy, and Ohio Mutual Farmers Insurance Company (“Ohio Mutual”) issued the policy in conformity with that request. Video Bank’s inventory was damaged, and Ms. McCourt thereafter claimed that she mistakenly listed the incorrect “loss payee” under the insurance policy. The circuit court concluded that her unilateral mistake afforded her the ability to reform the agreement with Ohio Mutual. This Court disagreed: “It is clear ... 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.* at 44.

This Court further examined the concept of mutual mistake in the insurance policy context, identifying “three basic prerequisites” for the doctrine to apply: “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.” *Id.* (internal quotations and citations omitted). These elements must be proven by “very strong, clear, and convincing evidence.” *Id.* (internal quotations and citations omitted).

The *Ohio Farmers* decision continues to be good law in West Virginia. Just this year, the United States District Court for the Northern District of West Virginia cited *Ohio Farmers* in another case involving the Petitioner. There, the district court reasoned that mutual mistake is a doctrine allowing reformation of an insurance contract under *Ohio Farmers*, but ultimately found a lack of evidence that the insurance policy was “the product of mutual mistake, fraud, or accident, or that it fails to conform to some clear, unwritten agreement. . . .” *West Virginia Mut. Ins. Co. v. Vargas*, No. 1:11-CV-32, 2013 WL 1164338 at *13-14 (N.D.W. Va. Mar. 20, 2013). See also *Terra Firma Co. v. Morgan*, 223 W. Va. 329, 674 S.E.2d 190 (2008) (recognizing use of “mutual mistake” to reform deeds); *First Am. Title Ins. Co. v. Firriolo*, 225 W. Va. 688, 695 S.E.2d 918 (2010) (recognizing use of “mutual mistake” to reform settlement agreements).

West Virginia is not the only jurisdiction recognizing that courts have the ability to reform insurance policies and other contracts where a party provides clear and convincing evidence of a mutual mistake. For instance, in *Ribacoff v. Chubb Grp. of Ins. Companies*, 2 A.D.3d 153, 770 N.Y.S.2d 1 (2003), the Supreme Court of New York allowed the parties to reform an insurance policy that both parties *agreed* did not cover “jewelry stock,” although the policy said the opposite. And in *Twin City Fire Ins. Co. v. Pittsburgh Corning Corp.*, 813 F. Supp. 1147, 1149 (W.D. Pa. 1992) *aff’d*, 6 F.3d 780 (3d Cir. 1993), the United States District Court for the Western District of Pennsylvania found that the insurer was entitled to reform two policies issued to a manufacturer of products that contained asbestos. There, although the policies did not exclude asbestos in the policies, the insurer presented sufficient evidence that the parties intended to exclude asbestos claims. *Id.* at 1150.

Given that the doctrine of mutual mistake is clearly available to the Petitioner, the court below should have considered it once the Petitioner raised it – even if it found the policy unambiguous.

B. THE PETITIONER OFFERED CLEAR AND CONVINCING EVIDENCE THAT THE AGREED-UPON RETROACTIVE DATE FOR ITS SEPARATE LIMITS OF INSURANCE WAS JANUARY 1, 2008.

The record below reflects that UHP and the Petitioner entered into an “Amendatory Endorsement” that changed UHP’s insurance limits from shared to separate: “In consideration of an additional premium of \$42,847.00, it is agreed and understood that the Policy Declarations has been amended to change [UHP’s] limits from Shared to Separate, effective 01/01/2008, at the request of [UHP].” Key to the court’s decision to extend insurance in the amount of an additional \$6 million was its finding that this Amendatory Endorsement “does not amend the retroactive date for UHP specified in the policy declarations of January 1, 2002.” Thus, under the circuit court’s analysis, the Amendatory Endorsement changed UHP’s limits of insurance for all medical incidents occurring on or after January 1, 2002 – including the Respondents’ medical incidents in 2006 and 2007. That was clearly not Petitioner’s and UHP’s intended agreement.

UHP and the Petitioner intended that the change to separate liability would be *retroactive* to January 1, 2008 – not January 1, 2002. The Amendatory Endorsement failed to recount this fact, which was a simple mistake with a drastic result. Under UHP’s and the Petitioner’s intended agreement, medical incidents occurring in policy periods *after* January 1, 2002 and *prior* to January 1, 2008 would be covered under a shared limit of insurance. Thus, UHP would share Nutt’s limit of liability for the Respondents’ medical incidents that occurred in the 2006 and 2007 policy periods.

The court below declined to consider any evidence illustrating Petitioner's and UHP's mutual mistake regarding the retroactive date of the Amendatory Endorsement. Most illustrative of the evidence provided by the Petitioner were two affidavits from principals of both UHP and the Petitioner. In the former, the President and CEO of UHP, Allen Chamberlain, M.D., unequivocally stated as follows:

It was my intention to change UHP's insurance coverage in 2008 from shared limits of liability to separate limits of liability. I further intended for this insurance coverage to only cover claims for medical incidents that occurred on or after January 1, 2008 and did not intend or desire to purchase insurance coverage with separate limits of liability for medical incidents that occurred prior to January 1, 2008.

In the latter affidavit, the Executive Vice President and COO of West Virginia Mutual Insurance Company, unequivocally stated as follows:

In January of 2008, UHP by and through its president and CEO, Alan Chamberlain, M.D., made written statements to the Mutual directly and/or through UHP's insurance agent, Terry Slusher of Wells Fargo Insurance Services that UHP desired to amend the policy with a policy period of January 1, 2008 to January 1, 2009, to provide UHP with a separate limit of liability with a retroactive date of January 1, 2008.

Based on these affidavits alone, Brickstreet submits to this Court that the Circuit Court of Kanawha County erred in failing to consider Petitioner's mutual mistake argument.

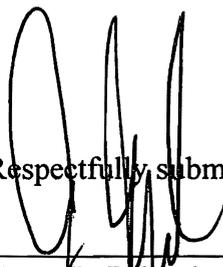
Returning to the *Ohio Farmers* factors cited by this Court, there is little question that Petitioner established a meritorious mutual mistake claim. First, UHP and the Petitioner bargained for a change in the policy regarding UHP's limits of insurance. Second, the Amendatory Endorsement supposedly embodied the parties' intended change of UHP's insurance limits. And finally, there was clearly a material variance in the written agreement from what the parties mutually intended: the Amendatory Endorsement failed to reflect a retroactive date of January 1, 2008. Though it is a simple error, this material variance resulted in

the court's expansion of UHP's insurance to the tune of a \$6 million liability for the Petitioner. That result was certainly not bargained for, and the Circuit Court of Kanawha County should have reformed the policy to reflect UHP's and the Petitioner's agreement.

V. CONCLUSION

Brickstreet submits this brief on what it feels is a critical issue for insurance companies in West Virginia. Where errors occur in the drafting of insurance policies and their related documents, the law is not so draconian as to reach the result stated by the Circuit Court of Kanawha County. This appeal provides an opportunity for this Court to affirm its prior jurisprudence regarding the doctrine of mutual mistake, and thereby provide a measure of security that where those mistakes occur, circuit courts must consider equitably reforming the agreements.

Respectfully submitted,



Corey L. Palumbo, Esq. (SBID No. 7765)
James E. Scott, Esq. (SBID No. 11106)
Bowles Rice LLP
600 Quarrier Street, Post Office Box 1386
Charleston, West Virginia 25325-1386
Telephone: (304) 347-1100
Facsimile: (304) 347-1746
cpalumbo@bowlesrice.com
jscott@bowlesrice.com

***Counsel for Brickstreet Mutual Insurance
Company***

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 13-0692

AT CHARLESTON

West Virginia Mutual Insurance Company,
Defendant Below, Petitioner,

v.

Betty J. Adkins, Rayetta D. Baumgardner,
Diana L. Boerke, Latha A. Bolen, Charlotte L. Deal,
Constance L. Devore, Teresa D. Hager, Lorena D.
Hankins, Tammy H. Clark, Pamela K. Hatfield,
Marcie J. Holton, Linda L. Jones, Patty S. Lewis,
Teresa Lovins, Martha J. Martin, Louella Perry,
Sherry L. Perry, Janice Pettit, Kimberly A. Roe,
Janice Roush, Rebecca Smith, Beulah Stephens,
and Debra L. Wise,

Plaintiffs Below, Respondent.

CERTIFICATE OF SERVICE

I, Corey Palumbo, hereby certify that on the 15th day of October, 2013, the
foregoing **BRIEF OF BRICKSTREET MUTUAL INSURANCE COMPANY AS AMICUS
CURIAE SUPPORTING PETITIONER**, was served via U.S. Mail:

D.C. Offutt, Jr. (WV # 273)
Matthew Mains (WV # 11854)
Offutt Nord Burchett, PLLC
Post Office Box 2868
Huntington, West Virginia 25728

Paul T. Farrel, Jr. (WV # 7448)
Green Ketchum
419 11th Street
Huntington, West Virginia 25701

Corey L. Palumbo (WV Bar #7765)
James E. Scott (WV Bar #11106)
Bowles Rice LLP
600 Quarrier Street
Charleston, West Virginia 25301
Phone: (304) 347-1100
Fax: (304) 347-1746
*Counsel for BrickStreet Mutual Insurance
Company*