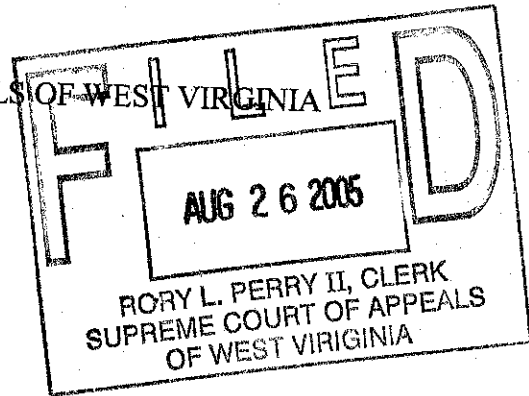


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



THOMAS J. ALUISE and
JACQUELINE B. ALUISE,

Appellants,

v.

NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY,
BETSY A. ROSS and
TERRY RIDENOUR,

Appellees.

DOCKET NOS.: 32723 & 32724

APPELLANTS' REPLY

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY
C.A. NO. 03-C-1758

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Only four additional points need to be made by way of reply:

I. JUDICIAL ESTOPPEL DOES NOT APPLY

**II. APPELLATE SUPPOSITION AS TO JUSTIFICATION FOR
POLICY DISCREPANCY IS INSUFFICIENT**

**III. NEW ASSERTION OF WARRANTY WAS NOT
THE BASIS OF THE RULING BELOW**

**IV. APPELLANTS DO ASSERT SPECIFIC ERROR
REGARDING THE FINDINGS OF THE COMMISSIONER**

Appellants address them each below.

I. JUDICIAL ESTOPPEL DOES NOT APPLY

Appellees contend that their reliance on matters outside the scope of Rule 56, as well as their failure to establish any intentional wrong by the insured, is somehow forgiven "by operation of judicial admission". The theory is flawed for several reasons.

First, it should be remembered that this case is, in the first instance, about the duty to defend. That claim is brought by virtue of an assignment of rights by the insureds, Mr. and Mrs. Forssenius. Mr. and Mrs. Forssenius never made any judicial admission of wrongdoing, intentional or otherwise, and indeed were so adamant in their defense that they asserted a counterclaim against Mr. and Mrs. Aluise for abuse of process, intentional infliction of emotional distress, etc.¹ Moreover, despite Appellees' assertions to the contrary, Mr. and Mrs. Aluise never alleged "misrepresentation", even in the underlying complaint. The

¹In determining whether under a liability insurance policy an occurrence was or was not an "accident" - or was or was not deliberate, intentional, expected, desired or foreseen - primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue. *Columbia Casualty Company v. Westfield Insurance Company*, _____ W.Va. _____, _____ S.E.2d _____ (2005).

underlying allegations were limited to negligent failure to disclose and negligent repair. In other words, the Aluises simply asserted that Mr. and Mrs. Forssenius, knowing of the prior damage and repairs, should have disclosed the same so that Mr. and Mrs. Aluise individually, or through informed discussion with their home inspector, could have made independent determination of whether the repairs were successful. Ultimately, it was learned years later, that they were not but it was never asserted by anyone that the insufficiency of the repairs had manifested itself as of the date of disclosure. In short, it was negligence but not misrepresentation.

Appellees recognize that this Court did recently adopt the Doctrine of Judicial Estoppel, *West Virginia Department of Transportation, Division of Highways, a State agency, v. Joyce L. Robertson*, ___ W.Va. ___, ___ S.E.2d ___ (2005), and established the following elements:

- (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;
- (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 positions; and
- (4) the original position misled the adverse parties so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.

Id. at Syl. Pt. 2.

Appellants need not debate satisfaction of elements 1 and 3 as to which reasonable minds might differ. Appellees' argument fails because elements 2 and 4 clearly are not met. Not only was Nationwide not a party to the underlying litigation in which the allegations were ostensibly made against Mr. and Mrs. Forssenius, but Nationwide did not rely upon any such allegations. Indeed, the suit in which the allegations

were made, was not received by Nationwide until after the initial denial as evidenced by the fact that it instructed Mr. and Mrs. Forssenius to forward any suit papers which were later received. At least two out of four elements not having been met, Judicial Estoppel simply does not apply.

II. APPELLATE SUPPOSITION AS TO JUSTIFICATION FOR POLICY DISCREPANCY IS INSUFFICIENT

Recall that the subject declarations reflect incorporation of endorsement 3199 but Nationwide relies upon, and produced only, endorsement 3199-92 instead. Even assuming that Nationwide does business in all 50 states, designation of West Virginia as 92, as now asserted by the Appellees² seems to be a *non-sequitur*. Certainly there is nothing in the record below to so indicate. More troubling is the same Appellees' earlier representation to this Court that the designation 92 "reflects only that the form endorsement 3199 was produced in the year 1992"³. Neither explanation would answer why there is a record of approval of Form 3199-D (replacing 3199-C) but no record of approval of Form 3199-92 at the West Virginia Insurance Commission⁴. Curiously, even now, Nationwide does not provide the 3199 endorsement but, rather, gratuitously states "the language is identical"⁵. Appellants contend that attachment of endorsement 3199-92 had to be established below before the Circuit Court could properly grant summary judgment predicated on a definition ostensibly contained therein.

²Appellees' Brief at p. 15.

³Response in Opposition to Petition for Appeal at p. 18.

⁴Deposition of Mia Rowa at p. 36 - designated but not forwarded.

⁵Appellees' Brief at p. 15.

III. NEW ASSERTION OF WARRANTY WAS NOT THE BASIS OF THE RULING BELOW

Appellees now assert that Appellants' damages sounded in warranty for which there is no coverage. That, despite the lack of any such allegation in the underlying complaint. Moreover, Appellees draw this Court's attention to a putative exclusion for losses resulting from defective workmanship, construction and materials.⁶ Nationwide then goes on "stressing that the intentional act exclusion was neither its sole nor primary justification for denying coverage".⁷ Despite distance from that position here, the theory Nationwide asserted to the Circuit Court, and upon which the Court below relied, was that "a seller's misrepresentation during the sale of real estate is not an 'occurrence' under the terms of the Nationwide homeowner policy". As Nationwide now apparently recognizes, such allegation is a question of fact on which it produced no evidence let alone evidence giving rise to summary judgment.

IV. APPELLANTS DO ASSERT SPECIFIC ERROR REGARDING THE FINDINGS OF THE COMMISSIONER

Appellees argue to this Court that Appellants' assertion of error with respect to the Commissioner's report, and the lack of hearing in particular, is moot and that their appeal is devoid of any specific allegations of error. On the contrary, the multiple objections are set forth in Plaintiffs' Objections to Commissioner's Report and include, but are not limited to, the lack of findings and conclusions, entry of

⁶Appellees' Brief at pp. 12 and 34-35.

⁷What isn't cited, because it wasn't in the subject policy, is the ISO standard exclusion for "property damage to: (2) premises you sell, give away, or abandon, if the 'property damage' arises out of any part of those premises". If Nationwide has incorporated the exclusion, it would be correct in its assertion of no coverage.


a protective order without finding of protected material, failure to order production of post-litigation claims materials, application of attorney/client privilege to claims staff counsel as well as communications with a non-lawyer/non-manager adjuster, etc. Appellants have asked this Court to address the same, if possible, but also recognize that, absent a hearing in record below, the record may be insufficient for this Court to do so.⁸ To assert that there were no specific objections, however, is simply wrong. Curiously, Nationwide also filed objections of its own⁹ but now having prevailed generally, seeks to enforce the Commissioner's rulings and avoid appeal. It should not be permitted to do so.

V. PRAYER

For all the reasons set forth in Appellants' Brief, as well as the foregoing replies to Appellees' additional arguments in opposition, Appellants reiterate their request that the three orders complained of be reversed.

Respectfully Submitted,

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⁸Appellants' Brief at pp. 42-43.

⁹Not contained in Designation of Record.

CERTIFICATE OF SERVICE

I, Vincent J. King, hereby certify that a true and accurate copy of "Appellants' Reply" was provided to the following counsel for all defendants by depositing the same in the United States First Class

Mail this 26th day of August, 2005, to-wit:

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