STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2021-0376

CC 145 Main, LLC. v. Union Mutual Fire Insurance Company

RULE 7 APPEAL FROM MOTION FOR SUMMARY JUDGMENT ORDER OF THE ROCKINGHAM COUNTY SUPERIOR COURT
(Judge Martin P. Honigberg)

REPLY BRIEF OF APPELLANT UNION MUTUAL FIRE INSURANCE COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. Appellee cites in its brief case law that is wholly irrelevant and easily distinguishable.

The cases 145 Main relies on in support of the proposition that the Exclusion is ambiguous are irrelevant and wholly inapplicable. Appellee relies on *Pichel v. Dryden Mut. Ins. Co.*, 117 A.D.3d 1267 (N.Y. App. Div. 2014). As Union Mutual thoroughly explained in its Brief, *Pichel* involved a policy with a provision similar to the Exclusion that excluded coverage for "water that backs up through sewers or drains." *See* Brief of Appellant at 17. Importantly, however, the policy also contained an affirmative coverage provision for internal plumbing that directly conflicted with the Exclusion. *Pichel*, 117 A.D.3d at 1268. The New York Court reasoned that, as the Policy contained a conflicting provision that affirmatively provided coverage for overflow or discharge of liquids from a plumbing system, the Exclusion applied to external drains only. *Pichel*, 117 A.D.3d at 1269. The Policy at issue in this case does not contain any provision that conflicts with the Exclusion. Accordingly, *Pichel* is irrelevant and unpersuasive.

Appellee also relies on *Hix Brix LLC v. Amguard Insurance Company*, an unpublished slip opinion with no precedential value. *See Hix Brix LLC v. Amguard Insurance Company*, Index # 600249/18, (N.Y. Sup. Ct. June 5, 2018), slip opinion. The facts of *Hix Brix LLC* are easily distinguishable. In that case, the plaintiff "reported a claim to AmGuard for water that backed up and overflowed into the basement at the insured property. The basement flooded when a clogged pipe *broke*." *Hix Brix LLC*, slip op. at p. 1 (emphasis added). The policy at issue in *Hix Brix LLC* contained the same Exclusion as the Policy in the instant case. The court concluded that an ambiguity existed with respect to the Exclusion as it was "not specific and clear with respect to internal plumbing." *Id.*, slip op. at p. 4. The court further noted that "the leak may have been caused from an internal building pipe in which case it is not backup from a sewer, drain, sump pump or related equipment." *Id.*

In contrast to *Hix Brix LLC*, here, an internal plumbing pipe did not break or leak at the Property. The Property was damaged by water that backed up and overflowed from a toilet and shower drains on the Property's third floor. The damage in this case falls squarely within the Exclusion and is entirely different from the damage in *Hix Brix LLC* that was the result of broken or leaking plumbing. Thus, even if the Court were to consider *Hix Brix LLC*, the facts and circumstances are easily distinguishable.

145 Main also relies on *Old Dominion Ins. Co. v. Elysee, Inc.*, 601 So.2d 1243 (1992) for the proposition that the Exclusion is ambiguous. *Old Dominion* involved water that overflowed into the insured's store due to a blockage in a main drain pipe that was located off the insured's premises. 601 So.2d at 1244-45. The policy at issue contained an exclusion that precluded coverage for "water that backs up from a sewer or drain." *Id*. at 1244. The Florida court held that the exclusion unambiguously applied to a plumbing blockage that occurred off the premises. *Id*. at 1245. That conclusion, however, does not preclude the exclusion at issue from applying to water that backs up and/or overflows from an internal drain. The *Old Dominion* court was not presented with the issue of whether the exclusion would apply to internal drains, nor did it directly opine on that question. Accordingly, *Old Dominion* is wholly irrelevant.

Finally, Appellee cites to "*Cameron v. Scottsdale Ins. Co.*, 294 So.2d 362 (Fla Dist. Ct. App. 1974)." The name of the case, however, is not *Cameron v. Scottsdale Ins. Co.*, but *Hartford Acc. & Indem. Co. v. Phelps*. In that case, the relevant exclusion was completely different that the Exclusion at issue here. The exclusion in *Phelps* precluded coverage for damage from "water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through windows, driveways, foundations, walls, basement or other floors." 294 So.2d at 363. *Phelps* is therefore wholly irrelevant to this case.

As Union Mutual explained thoroughly in its Brief, the plain language of the Exclusion unambiguously applies to preclude coverage for the water damage in this case. Union Mutual set forth several decisions from our sister courts that have unequivocally ruled that the Exclusion is unambiguous. *See* Brief of Appellant at 14-17. The cases

relied upon by Appellee in support of the proposition that the Exclusion is ambiguous are entirely irrelevant and easily distinguishable.

II. In support of the proposition that the Exclusion is ambiguous, Appellee has relied upon inappropriate and wholly irrelevant extrinsic evidence

145 Main has relied on statements that insurance adjusters made while assessing this case in support of the proposition that the Exclusion is ambiguous. *See* Brief of Appellee at 16, 21-23. Appellee's efforts to rely on such extrinsic evidence is contrary to the well-established law in New Hampshire regarding insurance policy interpretation. This Court has repeatedly affirmed that the "[t]he interpretation of insurance policy language, like any contract language, is ultimately a question of law for the court to decide." *Peerless Ins. v. Vermont Mut. Ins. Co.*, 151 N.H. 71, 72 (2004). "The fundamental goal of interpreting an insurance policy is to carry out the intent of the contracting parties." *Great Am. Dining, Inc. v. Philadelphia Indem. Ins. Co.*, 164 N.H. 612, 616 (2013). In determining the parties' intent, the Court's "analysis begins with an examination of the insurance policy language." *Id*.

This Court has never suggested that statements made by insurance adjusters are to be relied upon to determine insurance policy coverage. "Policy terms are construed objectively, and where the terms of a policy are clear and unambiguous, we accord the language its natural and ordinary meaning." *Newell v. Markel Corp.*, 169 N.H. 193, 196 (2016). For the reasons explained in Union Mutual's Brief and herein, the plain language of the Exclusion unambiguously applies to backups and/or overflows stemming from interior drains. Coverage in this case can and should be resolved based upon the language of the policy without looking to extrinsic evidence. 145 Main's reliance on the subjective opinions and statements of Union Mutual's adjusters is therefore improper.

Additionally, in the "Statement of the Case and Statement of Facts" section of its Brief, Appellee has listed various definitions from building codes, town ordinances, statutes, and Environmental Protection Agency regulations and press releases. *See* Brief of Appellee at 10-13. Notably, however, Appellee has not made any specific argument

with respect to these definitions. In fact, Appellee did not even mention the definitions in the "Argument" section of its Brief. As 145 Main has not articulated any argument with respect to the definitions it listed in the "Statement of the Case and Statement of Facts" section of its Brief, the Court should disregard this list. To the extent the Court would consider the definitions, however, they are irrelevant and do not render the Exclusion ambiguous.

Appellee has not identified a single source that contains definitions of the terms "drain" or "sewer." Instead, 145 Main relies solely on sources that contain definitions of inapplicable variations of those terms. For example, the Newmarket Building Code and Ordinance Governing Wastewater into the Public Sewer System both contain definitions of the terms "Building Drain" and "Building Sewer." Similarly, the New Hampshire Public Health statute contains a definition of the term "public sewer." These terms are not contained in the Policy and are wholly inapplicable. Additionally, Appellee's reliance on an EPA press release is entirely irrelevant, as the press release does not contain definitions of the terms "sewer" or "drain," or any other term for that matter.

This Court has never suggested that building codes, ordinances, regulations, or press releases are to be used to define terms in an insurance policy. To the contrary, this Court has repeatedly stated that it will construe the terms in an insurance policy "as would a reasonable person in the position of the insured based on more than a casual reading of the policy as a whole." *Great Am. Dining*, 164 N.H. at 616.

The terms used in the Exclusion are unambiguous and should be defined in accordance with their commonly understood dictionary definitions. Unless otherwise defined in the policy, a term within a policy will be defined consistent with its commonly understood definition. *See Progressive Northern Ins. Co. v. Concord General Mut. Ins. Co.*, 151 N.H. 649, 653-54 (2005) (Utilizing the dictionary to interpret an undefined term contained in an insurance policy and noting that "[d]ictionary definitions may be used in the interpretive process and are of some value to the extent they inform us of the common understanding of terms.").

III. The trial court erred when it did not find the term "drain" inherently ambiguous, but rather relied on other terms in the Exclusion to force an ambiguity where none exists

Appellee argues that the trial court did not force an ambiguity because "[i]t was not only appropriate that the trial court sought to interpret the undefined term 'drain' in the context of the full exclusion, the trial court was obliged to do so under applicable New Hampshire law." Brief of Appellee at 20. Union Mutual agrees that "[w]here disputed terms are not defined in the policy, we construe them in context." *Mellin v. Northern Security Ins. Co., Inc.*, 167 N.H. 544, 547 (2015). Courts may not, however, "perform amazing feats of linguistic gymnastics to find a term ambiguous." *Catholic Med. Ctr. v. Exec. Risk Indem., Inc.*, 151 N.H. 699, 701 (2005). "'[W]hen a policy's meaning and intent are clear, it is not the prerogative of the courts to create ambiguities where none exist or to rewrite the contract in attempting to avoid harsh results.' The same prohibition applies to attempts to rewrite a policy to avoid a result claimed to be unreasonable." *Id*. at 703 (*quoting Harbor Insurance Co. v. United Services Automobile Ass'n*, 559 P.2d 178, 181 (Ariz. 1976)).

Though courts interpret undefined terms in context, the context in which the term "drain" appears in the Policy does not render the term ambiguous. The trial court forced an ambiguity when it concluded that the terms "sewer," "sump pump," and "sump" refer to external features and, therefore, the term "drain" is ambiguous. As Union Mutual explained in its Brief, a "sump pump" is an internal feature located within the basement of a property. Thus, the Exclusion encompasses both internal and external features.

Several courts have examined the language of the Exclusion and/or similar language and no other court has found that the terms "sewer," "sump pump," and "sump" render the term "drain" ambiguous. Courts from our sister states that have found the Exclusion ambiguous did so in an attempt to reconcile contradictory provisions which provide coverage for water damage arising from internal plumbing with the Exclusion.

Appellee also argues that another exclusion in the Policy that precludes coverage for "frozen plumbing" renders the Exclusion at issue ambiguous, as Union Mutual could

have included the term "plumbing" in the Exclusion. 145 Main did not raise this argument before the trial court and has not properly developed the argument before this Court. *See Halifax-American Energy Co., LLC v. Provider Power, LLC*, 170 N.H. 569, 574 (2018) (declining to address arguments not raised before the trial court)

CONCLUSION

For the foregoing reasons, this Court should reverse the Order and rule that 145 Main's claimed property damage is barred by the Exclusion in Union Mutual's policy.

Respectfully submitted,

UNION MUTUAL FIRE
INSURANCE COMPANY,

By Its Attorneys,

PRIMMER PIPER EGGLESTON
& CRAMER PC,

Date: February 15, 2022

By: /s/ Gary M. Burt

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

Union Mutual does not request oral argument. This Court can decide this matter based on the plain language of the Policy's Exclusion and New Hampshire law. In the event that this Court decides that oral argument is necessary, Union Mutual designates Gary M. Burt to represent its interests.

Date: February 15, 2022 /s/ Gary M. Burt
Gary M. Burt (N.H. Bar No. 5510)

CERTIFICATION OF WORD LIMIT

I hereby certify that the total words in this Reply Brief do not exceed 3,000 words.

Date: February 15, 2022 /s/ Gary M. Burt
Gary M. Burt (N.H. Bar No. 5510)

CERTIFICATION

It is hereby certified that a copy of the foregoing document was served through the court's electronic filing system upon Henry Stebbins, Esquire.

Date: February 15, 2022 /s/ Gary M. Burt
Gary M. Burt (N.H. Bar No. 5510)