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IN THE

Supreme Court of Virginia

RECORD NO. 180120

ERIE INSURANCE EXCHANGE,

Appellant,

v.

EPC MD 15, LLC,

Appellee.

REPLY BRIEF OF APPELLANT

George E. Reede, Jr., Esquire (VSB 78968)
Matthew J. Youssef, Esquire (VSB 85339)
NILES, BARTON & WILMER, LLP
111 South Calvert Street, Suite 1400
Baltimore, Maryland 21202
Telephone: (410) 783-6357
Facsimile: (410) 783-6452
gereede@nilesbarton.com
mjyoussef@nilesbarton.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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REPLY BRIEF OF APPELLANT

Appellant, Erie Insurance Exchange ("Erie"), through George E. Reede, Jr., Esq., Matthew J. Youssef, Esq., and Niles, Barton & Wilmer, LLP, respectfully states that it was aggrieved by a Final Decree entered in favor of EPC MD 15, LLC ("EPC"), in the Circuit Court for the City of Winchester on October 24, 2017, the Honorable Clifford L. Athey, Jr. presiding. Erie files this Reply Brief pursuant to Virginia Rule 5:29.

ARGUMENT

I. EPC's Preservation Arguments are Misplaced.

A. Erie Need Not File Exceptions with the Circuit Court.

EPC's first argument is that by failing to file exceptions to the Circuit Court's decision Erie has inadequately preserved this issue for appeal. EPC is mistaken; the Virginia General Assembly directly addressed the need for formal exceptions in 1950:

> Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the

> time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.

Va. Code Ann. § 8.01-384(A); *see also Johnson v. Commonwealth,* 20 Va. App. 547, 553 (1995) ("'the requirement for an exception [has been] eliminated.'" (quoting *Martinez v. Commonwealth*, 10 Va. App. 664, 668 (1990) ("For many years a defendant had to make both an objection and note an exception to the court's ruling in order to preserve a point for appeal. Unless both were made, the issue was waived…It was not until the 1950 Rules were formulated that the requirement for an exception was eliminated and now the only requirement is that a timely and specific objection be made.").

B. Erie's Arguments are Preserved.

EPC next asserts that Erie advances arguments in this Court not presented to the Circuit Court. However, the doctrine of preservation does not unreasonably restrain advocacy at the appellate level in the manner EPC suggests.

This Court's Rule 5:25 provides:

> No ruling of the trial court, disciplinary board, or commission before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with ***reasonable certainty*** at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.

Va. Sup. Ct. R. 5:25 (emphasis added); *compare Id. and* Va. Sup. Ct. R. 5A:18 ("reasonable certainly"); *with* Va. Sup. Ct. R. 5A:18 (2009) (Requiring "objection was stated . . . ***together with the grounds therefore***" (emphasis added)). Were EPC's conceptualization of preservation accurate, an appellant could do nothing more than cut-and-paste the materials presented to the lower court for

reconsideration.[1] Rather, the use of the term "reasonable certainty" in both Va. Sup. Ct. R. 5:25 and 5A:18 acknowledges the reality that although parties are prohibited from raising new issues on appeal, they are free to elaborate on the issues presented below. The U.S. Supreme Court has acknowledged the truism reflected in Va. Sup. Ct. R. 5:25 on several occasions. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below."); *see also Citizens United v. FEC,* 558 U.S. 310, 330-31 (2010) (same); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (same); *St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) ("It should not be surprising if petitioner's arguments in the District Court were much less detailed than the arguments it now makes in response to the decision of the Court of Appeals. That, however, does not imply that petitioner failed to preserve the issue raised in its petition for cert.").

[1] For example, EPC admonishes Erie for failing to simply quote the parties' agreed statement of facts – before taking liberties with the facts itself. *Compare EPC's Brief ("EB")* p. 5, l. 15, *with* JA 16; *EB* p. 6, l. 1-5, *with* JA 18; *EB* p. 6, l. 9-11, *with* JA 17; *EB* pp. 6-7, l. 12-1, *with* JA 17, 159.

With respect to preservation, the relevant inquiry is whether Judge Athey considered the issue raised by Erie's Assignment of Error – not whether the parties are now advancing, verbatim, the identical arguments regarding that issue before this Court. In a case involving cross-motions for summary judgment, with oral argument, and with a memorandum opinion on that basis, the issue has been thoroughly and demonstrably preserved.

II. EPC Fails to Address the Objective Intent of the Policy.

EPC makes no attempt to address what it means to "acquire" a building within the larger context of the policy, as Erie did at length in its Opening Brief. *See* Erie Brief, at pp. 10-14, 16-24. Instead, EPC remains focused on the dictionary definition of the singular term. EPC then goes a step further, asking the Court to rewrite the Newly Acquired Property coverage to require only acquisition of an insurable interest in the building – not a literal acquisition of the building itself.

EPC's approach is decidedly at odds with well-settled principles of contract interpretation. Furthermore, EPC's reading of case law from other jurisdictions that purportedly supports its view does not bear scrutiny.

A. The Policy Requires Acquisition of the Building by the Named Insured.

The actual, intended meaning of a word must be discerned within the larger context of the entire contract. *Turner v. Caplan,* 268 Va. 122, 125 (2004); *Gates, Hudson & Assocs. v. Fed. Ins. Co.*, 141 F.3d 500, 502 (4th Cir. 1997). EPC opts to focus on the word "acquire" in isolation; it makes no attempt to address the policy as a whole, or the problematic implications of using its preferred dictionary definition. However, the meaning of the word "acquire" cannot be "divined in isolation, but instead is informed by the surrounding context of the insurance policy." *Schwartz & Schwartz of Va., LLC v. Certain Underwriters at Lloyds,* 677 F. Supp. 2d 890, 905 (W.D. Va. 2009). In the present case, the word "acquire," as used in the Newly Acquired Property coverage, can only mean that EPC itself must purchase a building – not merely obtain an interest in another company that owns the building.

EPC would have this Court further dilute the language of the Newly Acquired Property coverage by requiring only acquisition *of an insurable interest* in the building – not acquisition of the building. This is, of course, not what the policy says; it speaks in terms of "acquired buildings." JA 78. The policy cannot be re-written to lower the bar. *Pilot*

Life Ins. Co. v. Crosswhite, 206 Va. 558, 561 (1965) ("It is the function of the court to construe the language of the contract as written…the court cannot make a new contract different from that plainly intended…").

The insurable interest doctrine is irrelevant to this dispute, its intent being to separate insurance contracts from wagering contracts. *Crismond's Adm'x v. Jones*, 117 Va. 34, 37 (1915) (a policy of insurance made without an insurable interest "is a mere speculative or wager contract and is void because contrary to public policy."). The doctrine is designed to reduce the "moral hazard" that a policyholder would desire—or worse, effectuate—the destruction of property to collect on insurance. *See New Brunswick Fire Ins. Co. v. Morris Plan Bank*, 136 Va. 402, 407 (1923). Insurable interest is thus a necessary condition – not a sufficient condition – for coverage to apply. EPC offers literally no support, textual or otherwise, for the proposition that it need only acquire an insurable interest in a building – and indeed there is none. The express language of the Newly Acquired Property coverage requires actual acquisition of the building by the insured, and nothing less.

B. EPC's Referenced Authority does not Support its Policy Interpretation.

EPC does not address, or even acknowledge, the Pennsylvania Superior Court's decision in *Budtel Assocs., LP v. Cont'l Cas. Co.,* although it is the only case that has squarely addresses the issue before this Court. 915 A.2d 640, 642 (Pa. Super. 2006)(a member of an LLC has no interest in the specific property of the LLC, and therefore a member cannot acquire the LLC's property by virtue of its interest in the LLC). Instead, EPC references authority that either supports Erie's view, or is otherwise readily distinguishable:

- *Auto Owners Ins. Co. v. Southwest Nut Co.*, 564 Fed. Appx. 1002 (11th Cir. 2014).

  Auto Owners, as insurer for a landlord, claimed to be an intended beneficiary of the tenant's policy with Travelers based upon the insurance provision of the lease. EPC relies upon the court's passing comment, in dicta, that coverage for newly acquired buildings "may occasionally provide coverage for property actually owned by another individual," but the court goes on to say that "the policy is intended to protect *the insured*…and not a third party." *Id.,* at 1005 (emphasis added).

- *S. Tr. Ins. Co. v. Dr. T's Nature Prod. Co.*, 584 S.E.2d 34 (Ga. App. 2003).

  In a dispute over applicability of an exclusion for "property off premises," and with coverage for business personal property at stake, the court held that the insured had "acquired" a warehouse because it "gained possession" of it for use as a storage facility. The court does not quote the relevant policy language, but regardless, EPC has never contended that it "gained possession" of the building in question. Also, the focus here is coverage for the building itself – not business personal property.

- *Amera-Seiki Corp. v. Cincinnati Ins. Co.*, 721 F.3d 582, 586 (8th Cir. 2013).

  In another business personal property case involving use of a storage facility, the court pointedly noted that Cincinnati never raised the critical issue before this Court – the fact that *the insured* must acquire the building itself – and did not address that issue because Cincinnati had waived the argument. *Amera-Seiki*, 721 F.3d at 586 n.3.

- *Berryland Trading, Inc. v. CAN Fin. Corp.*, No. 1:17-CV-2360, 2018 WL 343593 (N.D. Ohio Jan. 9, 2018).

  In another business personal property case, the question was not *whether* the insured had acquired the storage facility, but *when* it did so. Because the insured had acquired the facility "by purchase or lease at any premises" prior to the effective date of the policy, the newly acquired property coverage was inapplicable. *Id.* at *9.

- Va. Code § 13.1-1021.1. [2]

  This statute acknowledges the truism that an LLC may acquire property. However, it does not address the rights an LLC acquires when it purchases an interest in another LLC; only Va. Code § 13.1-1038 speaks to the interest a member of an LLC has in the LLC's property. Erie does not dispute that EPC could have acquired the property – the fact is, it did not do so.

[2] EPC cites Md. Code § 4A-203 of the Corporations and Associations Article for the same proposition. *Compare EB*, p. 11, with *EB*, pp. 33-34.

CONCLUSION

WHEREFORE, Erie Insurance Exchange respectfully prays that this Honorable Court REVERSE the decision of the Circuit Court for Winchester entering judgment in favor of EPC MD 15, LLC, and enter judgment in favor of Erie Insurance Exchange.

Respectfully submitted,

George E. Reede, Jr., Esquire /s/
George E. Reede, Jr., Esquire (VSB No.: 78968)
Matthew J. Youssef, Esquire (VSB No.: 85339)
NILES, BARTON & WILMER, LLP
111 S. Calvert Street, Suite 1400
Baltimore, Maryland 21202
(410) 783-6357
(410) 783-6452 *facsimile*
gereede@nilesbarton.com
mjyoussef@nilesbarton.com
Attorneys for Appellant,
Erie Insurance Exchange

CERTIFICATION

I, George E. Reede, Esq., counsel for the Petitioner, the Erie Insurance Exchange, hereby certify that:

1. This brief contains the signature of at least one counsel of record, his Virginia State Bar number, address, telephone number, facsimile number, and email address.

2. This brief consists of two thousand one hundred nineteen (2,119) words.

3. This certificate complies with Va. Sup. Ct. R. 5:26.

4. The brief was sent by email to all opposing counsel on this 14th day of August, 2018.

Respectfully submitted,

George E. Reede, Jr., Esquire /s/
George E. Reede, Jr., Esquire (VSB No.: 78968)
Matthew J. Youssef, Esquire (VSB No.: 85339)
NILES, BARTON & WILMER, LLP
111 S. Calvert Street, Suite 1400
Baltimore, Maryland 21202
(410) 783-6357
(410) 783-6452 *facsimile*
gereede@nilesbarton.com
mjyoussef@nilesbarton.com
Attorneys for Appellant,
Erie Insurance Exchange