In the

Supreme Court of Virginia

At Richmond

Record No. 180120

ERIE INSURANCE EXCHANGE,

Appellant,

– v. –

EPC MD 15, LLC,

Appellee.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

A. EPC Disagrees With Erie's Statement of Facts 3

B. EPC'S Counterstatement of Facts 5

STANDARD OF REVIEW 10

ARGUMENT 11

I. PRINCIPLES OF LAW AND THE AUTHORITIES APPLICABLE TO THIS MATTER 11

II. ERIE FAILED TO PRESERVE ITS RIGHTS AS REQUIRED BY VIRGINIA SUPREME COURT RULE 5:25 WHEN IT FAILED TO COMPLY WITH THE ORDER OF THE COURT REQUIRING IT TO FILE EXCEPTIONS TO THE ORDER OF APRIL 20, 2017 GRANTING SUMMARY JUDGMENT TO EPC AND DENYING SUMMARY JUDGMENT TO ERIE 14

III. ERIE MAKES NEW ARGUMENTS FOR THE FIRST TIME ON APPEAL 17

IV. THE TRIAL COURT CORRECTLY HELD THAT EPC'S "NEWLY ACQUIRED" PROPERTY WAS INSURED UNDER THE POLICY 21

A. THE TRIAL COURT CORRECTLY HELD THAT EPC "ACQUIRED" THE SUBJECT PROPERTY WITHIN THE MEANING OF THE POLICY'S NEWLY ACQUIRED PROPERTY PROVISION THEREBY TRIGGERING COVERAGE SINCE THE TERM "ACQUIRE" IS UNDEFINED AND UNDER A COMMON SENSE DICTIONARY DEFINITION, IS TRIGGERED WHEN PROPERTY IS EITHER ACQUIRED THROUGH ACQUISITION OR BY ASSUMPTION OF CONTROL OVER THE PROPERTY 23

B. CASE LAW SUPPORTS AN ARGUMENT THAT COVERAGE EXISTS 27

C. STATUTORY ANALYSIS ALSO SUPPORTS AN ARGUMENT THAT COVERAGE EXISTS 33

D. OTHER PROVISIONS OF THE POLICY MAKE CLEAR THAT VARIOUS INTERESTS, OTHER THAN OWNERSHIP INTERESTS, ARE COVERED BY THE POLICY, AND THAT ONE MAY ACQUIRE AN INSURABLE INTEREST WITHOUT ACQUIRING OWNERSHIP 35

CONCLUSION 40

TABLE OF AUTHORITIES

Page(s)

Cases:

3109 Props, L.L.C. v. Truck Ins. Exch.,
No. 03-13-00350-CV, 2015 WL 3827580 (Tex. App. June 18, 2015) 31

Amera-Seiki Corp. v. Cincinnati Ins. Co.,
721 F.3d 582 (8th Cir. 2013) 29, 30, 31

Appalachian Voices v. State Corp. Comm'n,
277 Va. 509, 675 S.E.2d 458 (2009) 18

Arogas, Inc. v. Frederick Cty. Bd. of Zoning Appeals,
280 Va. 221, 698 S.E.2d 908 (2010) 18

Auto Owners Ins. Co. v. Sw. Nut Co.,
564 F. App'x 1002 (11th Cir. 2014) 27

Berrylane Trading, Inc. v. CNA Fin. Corp.,
No. 1:17-CV-2360, 2018 WL 343593 (N.D. Ohio Jan. 9, 2018).....31

Blue Cross of Southwestern Va. and Blue Shield of Southwestern Va. v. McDevitt & Street Co.,
234 Va. 191, 360 S.E.2d 825 (1987) 39

Builders Mut. Ins. Co. v. Parallel Design & Dev. LLC,
785 F. Supp. 2d 535 (E.D. Va. 2011) 24

Castle Cars, Inc. v. U.S. Fire Ins. Co.,
221 Va. 773, 273 S.E.2d 793 (1981) 39

Christopher Associates, L.P. v. Sessoms,
425 S.E.2d 795 (1993) 24

City of Chesapeake v. States Self–Insurers Risk Retention Group, Inc.,
271 Va. 574, 578, 628 S.E.2d 539 (2006) 11-12

Craig v. Dye,
259 Va. 533, 526 S.E.2d 9 (2000) 24

Curley v. Dahlgren Chrysler-Plymouth, Dodge, Inc.,
245 Va. 429, 429 S.E.2d 221 (1993) 26

D.C. McClain, Inc. v. Arlington County,
249 Va. 131, 452 S.E.2d 659 (1995) 12

Doctors Co. v. Women's Healthcare Assocs., Inc.,
285 Va. 566, 740 S.E.2d 523 (2013) 11

Gates, Hudson & Assoc., Inc., v. Fed. Ins. Co.,
141 F.3d 500 (4th Cir. 1997) 12

Granite State Ins. Co. v. Bottoms,
243 Va. 228, 415 S.E.2d 131 (1992) 22, 23

Home Ins. Co. of N.Y. v. Dalis,
206 Va. 71, 141 S.E.2d 721 (1965) 39, 40

Johnson v. Raviotta,
264 Va. 27, 563 S.E.2d 727 (2002) 16

Liverpool and London and Globe Insurance Company, Ltd. v. Bolling,
176 Va. 182, 10 S.E.2d 518 (1940) 38, 39

Lower Chesapeake Assocs. v. Valley Forge Ins. Co.,
260 Va. 77, 532 S.E.2d 325 (2000) 23-24

Lumbermen's Mut. Cas. Co. v. Keller,
249 Va. 458, 456 S.E.2d 525 (1995) 24

Martin v. Ziherl,
269 Va. 35, 607 S.E.2d 367 (2005) 18

McLaughlin v. Gholson,
210 Va. 498, 171 S.E.2d 816 (1970) 3

Nationwide Mut. Ins. Co. v. Wenger,
222 Va. 263, 278 S.E.2d 874 (1981) 25

Palmer & Palmer Co., LLC v. Waterfront Marine Constr., Inc.,
276 Va. 285, 662 S.E.2d 77 (2008) 23, 24

Ross v. Schneider,
181 Va. 931, 27 S.E.2d 154 (1943) 18

Rust v. Indiana Flooring Co.,
151 Va. 845, 145 S.E. 321 (Va. 1928) 18

S. Tr. Ins. Co. v. Dr. T's Nature Prod. Co.,
261 Ga. App. 806, 584 S.E.2d 34 (2003) 27, 29

Salzi v. Virginia Farm Bureau Mut. Ins. Co.,
263 Va. 52, 556 S.E.2d 758 (2002) 12

Schwartz & Schwartz of Va., LLC v. Certain Underwriters at Lloyd's,
677 F. Supp. 2d 890 (W.D. Va. 2009).....23

Scialdone v. Com.,
279 Va. 422, 689 S.E.2d 716 (2010).....16

Smith v. Allstate Ins. Co.,
241 Va. 477, 403 S.E.2d 696 (1991).....24

St. Paul Fire & Marine Ins. Co. v. S.L. Nusbaum & Co.,
227 Va. 407, 316 S.E.2d 734 (1984).....12

State Farm Fire and Cas. Co. v. Walton,
244 Va. 498, 423 S.E.2d 188 (1992).....12

Teleguz v. Com.,
273 Va. 458, 643 S.E.2d 708 (2007).....21

Tilley v. Connecticut Fire Ins. Co.,
86 Va. 811, 11 S.E. 120 (1890).....38, 39

Virginia Farm Bureau Mut. Ins. Co. v. Williams,
278 Va. 75, 677 S.E.2d 299 (2009).....11

Weidman v. Babcock,
241 Va. 40,400 S.E.2d 164 (1991).....16

Williams v. Swenson,
No. 170538, 2018 WL 1633490 (Va. Apr. 5, 2018).....16

Statutes & Other Authorities:

Rule 5:25.....16, 17, 18, 20

Va. Code § 13.1-1009.....34

Va. Code § 13.1-1021.1.....34, 35

Va. Code § 13.1-1038.....33

Va. Code § 38.2–303(B).....37

BRIEF OF APPELLEE

COMES NOW the Appellee, EPC MD 15, LLC ("EPC," "Appellee," or "Insured"), by counsel, and files this Brief of the Appellee pursuant to the provisions of Rule 5:28 of the Rules of the Virginia Supreme Court.

STATEMENT OF THE CASE

On August 28, 2015, EPC filed a breach of contract action against Erie Insurance Exchange seeking relief for its failure to pay for a covered insurance loss sustained on May 30, 2014 when a fire broke out and destroyed EPC's property located in Winchester, Virginia. Following discovery, the parties filed with the Court an *Agreed Statement of* Facts by which they stipulated to all material facts.[1] The Parties both agreed the matter was ripe for resolution and filed cross-motions for summary judgment.[2]

On March 23, 2017, the Honorable Judge Clifford L. Athey, Jr. heard argument on the parties cross-motions for summary judgment and on April 20, 2017, the Court issued its Order Granting EPC's Motion for Partial

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[1] Found at the Joint Appendix (hereinafter "JA") pages 15-165 (hereinafter the "Stipulation").

[2] Erie's Motion for Summary Judgment is found at JA 166-172, and its Opposition to the Appellee's Motion for Summary Judgment is found at JA 240-244.

Summary Judgment and Denying Erie's Motion for Summary Judgment.[3] The Order ruling on Summary Judgment provided in pertinent part that:

> The Clerk is directed to send copies of this Order to Counsel for the parties **who shall file** their exceptions within 10 days of entry of this Order. JA 265 (emphasis supplied).

Notwithstanding the express directive of the Court, and notwithstanding the Court having provided Erie with an opportunity to be make the same arguments it makes to this Court, Erie failed to preserve its objections by filing exceptions to the Trial Court's Order. By failing to file any exceptions, Erie informed the Trial Court, and this Court, that it had no objections to the Order ruling on cross motions for summary judgment.

Thereafter, damages were determined by appraisal as provided for by the insurance policy.[4] After the appraisal award was determined on October 24, 2017, the Court entered its Final Order incorporating the Appraisal Award and granting EPC a judgment in the sum of $438,050.58.[5] At no time from the date that the parties were ordered to file exceptions to the Court's Order ruling on summary judgment on April 20, 2017 until the final order in this case was entered on October 24, 2017, did Erie file any exceptions

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[3] JA 245-265.

[4] The Appraisal clause is found at JA 80 which provision is required at Va. Code § 38.2-2105, lines 127-147.

[5] JA 266-271.

despite the Trial Court's order directing it to do so.

STATEMENT OF FACTS

The parties in this case stipulated to the facts. This Court has held that a party "will not be permitted to change his position to the prejudice of his adversaries in contravention of [a] stipulation freely entered into." McLaughlin v. Gholson, 210 Va. 498, 501, 171 S.E.2d 816, 817 (1970). In its appeal, Erie has attempted to restate the stipulations and in doing so has modified the verbiage for its benefit, and interjected argument into the same. Given that these facts were not only undisputed for the purpose of the cross motions for summary judgment, but expressly stipulated to for all purposes, this Court should resist any attempt to revisit, supplement, modify or add to the stipulated facts.[6]

A. EPC Disagrees With Erie's Statement of Facts

The pertinent facts in this case were stipulated to and there is no disagreement as to what the facts are. However, EPC disagrees with certain aspects of Erie's Statement of Facts in its appeal to the extent that Erie has altered the stipulations to support its arguments, many of which were not raised in the trial court. For example, Erie states that it denied EPC's claim

[6] Not only were the facts stipulated to, but the documents appended to the Stipulations were stipulated to be authentic and true copies and it was further stipulated that they could be admitted into evidence without objection. See Stipulation ¶ 29 at JA 18

"because EPC had not applied for and obtained coverage for the Property" citing Stipulation ¶ 26. However Stipulation ¶ 26 does not provide this explanation but states only that "Erie denied the claim and has taken the position that the Property is not covered." JA 18. Erie, later in its Opening Brief, exacerbates its mischaracterization of the stipulated facts by making an argument, not previously articulated, using this mischaracterization as the predicate basis for its newly minted argument discussing Erie's risk assessment at the time that EPC applied for the policy. This argument cannot be found anywhere in the record before this Court and was not presented to the Trial Court. Similarly, on pages 4-5 of the Opening Brief, Erie relies on the Stipulations for its assertion that EPC "purchased" 100% of Cyrus Square. However Stipulation ¶ 18 does not state that. Rather, the Stipulation ¶ 18 provides that "… Cyrus Square along with its only asset, were [sic] was transferred to EPC."[7] Finally, Erie cites to Stipulation ¶ 28 for its erroneous assertion that "Erie had no opportunity to charge a premium for the Property." However Stipulation ¶28 only states "Erie has not billed for, and has not provided EPC with a statement identifying any additional premiums for the Property."[8] Erie's Statement of Facts on this appeal is significantly different from the Stipulated facts agreed to in the Record and alters the

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[7] See JA 17.

[8] See JA 18.

argument that the Property was not covered."[9] As the Trial Court found, Erie was given notice of the claim, and given notice of the newly acquired property on June 5, 2014 (Stipulation ¶ 25 at JA 18) and that the policy did not contain any time period for EPC to give notice of newly acquired property. It is also noted that arguments related to the payment of premium and notice of the newly acquired property, are outside of the Assignments of Error and are not part of this appeal.

B. EPC'S Counterstatement of Facts

The stipulated facts in this case were provided to the Trial Court .[10] Those stipulations together with exhibits attached thereto, established that EPC MD 15, LLC ("EPC"), was a Maryland limited liability company organized on April 25, 2006 for the purpose of owning and operating real property.[11] Beginning on July 13, 2006 EPC had been the record fee owner of real property located at 751 E. Gude Drive, Rockville, Maryland.[12] Maryam Hashemian was the Manager and sole Member of EPC, as well as the owner of ABKA Marble & Granite, Inc., which operated a marble and granite

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[9] Stipulation ¶ 26 at JA 18.

[10] JA 15-165.

[11] Stipulation ¶ 1 at JA 15, and Articles of Organization at JA 21. The Exhibits attached to the Stipulations were stipulated to, with all parties agreeing that they may be received in evidence. See Stipulation ¶ 29 at JA 18.

[12] Stipulation ¶7 at JA 16. Ex. F and G at JA 34 and 36 respectively.

business at that address.[13] On December 16, 2013 Maryam Hashemian organized a third company, Cyrus Square, LLC, a Virginia limited liability company, for the purpose of purchasing a building in Winchester Virginia from which it intended, by and through EPC, to operate a marble and granite store.[14] Two days later, on December 18, 2013, Cyrus Square LLC completed its purchase of the property[15] located in Winchester Virginia[16] (the "Property").[17] On March 1, 2014 Cyrus Square LLC entered into an agreement with contractor to begin restoration of one of the buildings located at the Property.[18] Because Cyrus Square lacked the funds to pay for the work it decided to consolidate operations and transferred its only asset, i.e. the Property, to EPC.[19] Upon the transfer, EPC acquired Cyrus Square's interest in the Property. On March 3, 2014, Cyrus Square LLC amended its operating agreement to reflect that EPC as its sole Member thereby succeeding to the

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13 Stipulation ¶ 10 at JA 16.

14 Stipulation ¶ 12 at JA 18.

15 Exhibits J and K and L to Stipulations at JA 149, 152 and 155 respectively.

16 See Stipulation ¶¶ 13-16 at JA 17. The property is described as 536 & 598 N. Cameron Street, Winchester Virginia, along with 563 and 537 North Cameron Street and Nos. 15 and 17 Givvens Street, Winchester Virginia, including but not limited to D-11 Zeropak 1, D-12 Aeropak 2 and D-13 Zeropak 3 (hereinafter the "Property"). Ex. "I" to Stipulations at JA 130.

17 Stipulation ¶¶ 11 and 12 at JA 16 and 17.

18 Stipulation ¶ 17 at JA 17.

19 Stipulation at ¶ 18 at JA 17.

ownership of all of its assets that had been transferred to EPC.[20] As of March 3, 2014 Cyrus Square was solely owned and controlled by its sole member EPC.[21]

Less than ninety (90) days following the transfer, on May 30, 2014, the Property suffered damage by fire .[22] Following the fire, EPC submitted its claim to Erie under the insurance policy that covered the peril of fire.[23] Erie denied the claim and took the position that the Property was not covered under the policy.[24] Because Erie had denied coverage for the claim, denying that the Property was covered by the Policy, Erie did not determine a premium for the Property and did not bill EPC for the premium to cover its newly acquired Property.[25] The fire took place 88 days after EPC acquired the Property on March 3, 2014 when "Cyrus Square, along with its only asset, was transferred to EPC."[26] On June 5, 2014, EPC notified Erie of the loss that it

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20 Stipulation at ¶ 19 at JA 17. See Ex. M. to Stipulations at JA 159.
21 Stipulation at ¶ 20 at JA 18.
22 Stipulation at ¶ 22 at JA 18. Ex. N. at JA 161.
23 Stipulation at ¶¶ 23 and 24 at JA 18.
24 Stipulation at ¶ 26 at JA 18.
25 Stipulation at ¶ 28 ("Erie has not billed for, and has not provided EPC with a statement identifying any additional premiums for the Property.") at JA 18.
26 Stipulation ¶¶ 18, 19 and 25 JA 17-18.

contended was covered by the extension of coverage agreement contained in the insurance policy issued to it by Erie.[27]

The Erie Insurance Policy contained various "Extensions of Coverage" including an extension of coverage for newly acquired buildings, personal property or business income loss, sustained at locations other than the locations listed in the declarations page. The extension of coverage addressing "Newly Acquired or Constructed Property" provided that:

> **21. Newly Acquired or Constructed Property.**[28]
>
> **a.** If this policy covers Building(s), you may extend that insurance to apply to 50% of the limit for Coverage for $500,000, whichever is less, on:
>
> **1.** Newly acquired buildings at other than the location(s) described in the "Declarations";
>
> ***
>
> **b.** If this policy covers your Business Personal Property and Personal Property of Others, you may extend that insurance to apply to 25% of the limit for Coverage or $250,000, whichever is less, on newly acquired Business Personal Property and Personal Property of Others in a newly acquired or leased building other than the location(s) described in the "Declarations"
>
> ***
>
> **This extension shall apply for 90 days after the acquisition** or start of construction, provided the policy remains in force or is renewed.

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27 Stipulation at ¶ 25 at JA 18. Ex. O to stipulations at JA 164.

28 Stipulation at ¶ 8 at JA 16. Ex. H at JA 38, with newly acquired property coverage found at JA 78.

> You shall report values involved and pay any additional premium.

(hereinafter the "Newly Acquired Property" coverage, clause or provision). See JA at 78. (Emphasis Supplied). The Newly Acquired Property clause is one of 30 "Extensions of Coverage"[29] and is triggered by "newly acquired buildings" or "newly acquired business personal property or property of others." These "Extensions of Coverage" often time deal with losses concerning property which is not owned by the Insured.[30]

Erie argues that one may acquire a property only by acquiring ownership. Despite this argument, the policy does not require ownership of property and Erie's argument that "acquire" means only "acquire by ownership" is simply wrong. While the Erie policy, which Erie alone wrote, includes defined terms,[31] there is no definition of the term "acquire" or "newly

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[29] The Extensions of Coverage start at JA 68 and continue through JA 79.

[30] See Extensions of Coverage which are found in the policy at JA 68 through JA 79 and include extension such as Extension of Coverage No. 5 (JA 72) for "Contingent Business Interruption" triggered by loss to "Dependent Properties" not owned by the insured; Extension of Coverage No. 18 (JA 76) for "Leasehold Interest" for cancellations of leases by others; Extension of Coverage No. 22 (JA 78) for "Non-Owned Detached Trailers, Business Personal Property and Personal Property of Others"; Extension of Coverage No. 23 (JA 78) for "Personal Articles, Business Personal Property of Others"; Extension of Coverage No. 27 (JA 79) for "Temporary Off-Premises - Business Personal Property and Personal Property of Others."

[31] JA 83. See also JA 126.

acquired" and certainly no definition equating "acquired" with "acquired by ownership."

By letter dated December 5, 2014[32] Erie rejected EPC's claim because Erie interpreted the contractual term – "acquire" – as requiring EPC to "own" the property in fee in order to trigger coverage under the Newly Acquired Property clause.[33] While Erie chose not to define the term in its policy, the term is defined by dictionaries. Merriam Webster Dictionary defines "acquire", in part, as

> 1: to get as one's own:
> a.: to come into possession or control of often by unspecified means.[34]

Similarly, Black's Law Dictionary (10th Ed. 2014) similarly defines acquire as follows: "1. To gain possession or control of; to get or obtain."[35] These definitions do not require ownership.

STANDARD OF REVIEW

The material facts before the Court are stipulated to and are undisputed. The issues before the Court concern the interpretation and application of terms of the insurance contract to those undisputed facts. The

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[32] JA at 202

[33] JA 203.

[36] It does not appear that Erie challenges on appeal that Virginia law applies.

[36] It does not appear that Erie challenges on appeal that Virginia law applies.

ruling of the Trial Court is reviewed *de novo*. Virginia Farm Bureau Mut. Ins. Co. v. Williams, 278 Va. 75, 80, 677 S.E.2d 299, 302 (2009). Doctors Co. v. Women's Healthcare Assocs., Inc., 285 Va. 566, 571, 740 S.E.2d 523, 525 (2013). Here the matter below was presented on cross motions for summary judgment based upon a comprehensive stipulation of facts to which both parties informed the Trial Court there were no issues of material fact genuinely in dispute.

ARGUMENT

I. PRINCIPLES OF LAW AND THE AUTHORITIES APPLICABLE TO THIS MATTER[36]

In Virginia, an insurance contract "on or with respect to the ownership, maintenance or use of property in this Commonwealth shall be deemed to have been made in and shall be construed in accordance with the laws of this Commonwealth." Va.Code Ann. § 38.2–313.1 This dispute concerns the "ownership, maintenance or use" of the Subject Property located in Winchester Virginia, and therefore, the court should apply Virginia law to the interpretation of the insurance policies at issue in this case.

The interpretation of an insurance contract is a question of law. City of Chesapeake v. States Self–Insurers Risk Retention Group, Inc., 271 Va. 574,

[36] It does not appear that Erie challenges on appeal that Virginia law applies.

578, 628 S.E.2d 539, 541 (2006). Words should be "given their usual, ordinary, and popular meaning. D.C. McClain, Inc. v. Arlington County, 249 Va. 131, 135–36, 452 S.E.2d 659, 662 (1995). If the policy language is unambiguous, the court simply applies the terms as written. State Farm Fire and Cas. Co. v. Walton, 244 Va. 498, 502, 423 S.E.2d 188, 191 (1992). However, where there is an ambiguity, Virginia law follows the rule of *contra proferentem* and construes such language in favor of the interpretation that grants or maximizes coverage, rather than withholds or narrows coverage. St. Paul Fire & Marine Ins. Co. v. S.L. Nusbaum & Co., 227 Va. 407, 411, 316 S.E.2d 734, 736 (1984) ("Insurance policies are contracts whose language is ordinarily selected by insurers rather than by policyholders. The courts, accordingly, have been consistent in construing the language of such policies, where there is doubt as to their meaning, in favor of that interpretation which grants coverage, rather than that which withholds it."). "Language is ambiguous when it may be understood in more than one way or when such language refers to two or more things at the same time." Salzi v. Virginia Farm Bureau Mut. Ins. Co., 263 Va. 52, 55–56, 556 S.E.2d 758, 760 (2002). "A term is unambiguous only if, within its context, it is not susceptible to more than one meaning." Gates, Hudson & Assoc., Inc., v. Fed. Ins. Co., 141 F.3d 500, 502 (4th Cir.1997) (applying Virginia law).

In the present case, the word "acquire" "may be understood in more than one way,"[37] which supports a finding of ambiguity. Following the rule of *contra proferentem,* the definition of "acquire" through control which grants coverage, rather than "acquire" through ownership which withholds coverage, must be adopted.

Erie seeks to have this Court reverse the trial court's decision and have this Court disregard the favored principles of law based on its interpretation of whether the property in issue falls within the parameters of the Newly Acquired Property coverage extension in the policy which Erie is solely responsible for writing. While Erie defined many of the words utilized in the policy, it chose not to define the term "Acquired". As the Trial Court correctly noted, in reaching a decision as to what was meant by a term in a policy, the Courts often look to how the term is defined by dictionaries. *Merriam Webster Dictionary* defines "acquire," in part, as "to get as one's own" and is further defined as, "to come into possession or control of often by unspecified means"[38] Similarly, *Black's Law Dictionary* (10th Ed. 2014)

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[37] Erie contends one must obtain "ownership" to acquire a property, while EPC contends one may acquire a property in accordance with the dictionary definition which provides that acquire means "to come into possession or control of" the Property.

[38] JA 206.

defines acquire as: "1. To gain possession or control of; to get or obtain."[39]

Here, there can be no question that EPC acquired both possession and control of the Property and that the fire occurred within ninety (90) days of the time when it acquired possession and/or control. Assuming *arguendo* that there is an ambiguity, under the Newly Acquired Property clause, EPC was entitled to coverage for the fire loss. Assuming that there was no ambiguity and acquire included acquisition by control, the stipulations of fact as considered by the Court would also lead to the same result, i.e. under the unambiguous terms of the Newly Acquired Property Provision, the Property was acquired by EPC within the ninety (90) day period and was covered for the fire loss.

II. ERIE FAILED TO PRESERVE ITS RIGHTS AS REQUIRED BY VIRGINIA SUPREME COURT RULE 5:25 WHEN IT FAILED TO COMPLY WITH THE ORDER OF THE COURT REQUIRING IT TO FILE EXCEPTIONS TO THE ORDER OF APRIL 20, 2017 GRANTING SUMMARY JUDGMENT TO EPC AND DENYING SUMMARY JUDGMENT TO ERIE.

The Order granting summary judgment to EPC and denying summary judgment to Erie specifically required the aggrieved party to file its exceptions to the Court's rulings within 10 days. JA 265 Erie failed to do so. The consequences of Erie's act or omission are two-fold. First, it prevented the

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[39] JA 207.

Court from considering and/or remedying any error that Erie found in the Court's decision. Second, it signaled that Erie had no objection to the Trial Court's order and was waiving any exceptions to the ruling.

These issues are governed by Rule 5:25 of the Rules of this Court requiring the appealing party to properly preserve those issues it intends to raise on appeal. Likewise applicable case law requires an aggrieved party to voice its objections at the time a ruling by a Trial Court is made, to give the Court the opportunity to review and remedy its decision based on the objections raised. Here, the Order ruling on the cross motions for summary judgment specifically provided that "The Clerk is directed to send copies of this Order to Counsel for the parties **who shall file their exceptions within 10 days of entry of this Order**." (Emphasis supplied). JA 265. Erie filed no objections at any time between the entry of the Order ruling on Summary Judgment entered on April 20, 2017, and the date of the final order entered in this case on October 24, 2017. Instead Erie did not respond to the Courts order requiring that it "shall" file exceptions within 10 days, informing the Trial Court that it had no objections. Erie's failure to raise objections in the Trial Court's order prevent it from raising any exceptions to that Order on appeal.

"The contemporaneous objection rule states, in relevant part: 'No ruling of the trial court ... will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling.'" Rule 5:25; as cited in Williams v. Swenson, No. 170538, 2018 WL 1633490, at *3 (Va. Apr. 5, 2018). "The rule "afford[s] the trial court an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals." Id. at 3, citing Weidman v. Babcock, 241 Va. 40, 44,400 S.E.2d 164, 167 (1991). "Accordingly, to satisfy the rule, 'an objection must be made ... at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error.'" Id at 3, citing Johnson v. Raviotta, 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002). The reasons for Rule 5:25 were explained by the Court in Scialdone v. Com., 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010):

> Thus, the provisions of Rule 5:25 "protect the trial court from appeals based upon undisclosed grounds." *Fisher v. Commonwealth,* 236 Va. 403, 414, 374 S.E.2d 46, 52 (1988). To satisfy the rule, "an objection must be made ... at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error." *Johnson v. Raviotta,* 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002). In addition, "a specific, contemporaneous objection gives the opposing party the opportunity to meet the objection at that stage of the proceeding." *Weidman,* 241 Va. at 44, 400 S.E.2d at 167. The rule is not intended, however, "to obstruct petitioners in their efforts to secure writs of error, or appeals, but ... to put the record in such shape that the case may be heard in this [C]ourt upon the same record upon which it was heard in the trial court."

> *Kercher v. Richmond, Fredericksburg & Potomac R.R. Co.,* 150 Va. 108, 115, 142 S.E. 393, 395 (1928).

Here, Erie was ordered by the Trial Judge to identify any exceptions to its ruling within 10 days. This gave Erie the opportunity to make its objections known and would also have provided the trial Court with the opportunity to consider those arguments and rule intelligently on them. Erie chose to file no exceptions, and could have, but did not, advance the arguments it now makes for the first time on appeal. Erie did not give the Trial Court the opportunity to consider the arguments now made, nor did it give EPC the opportunity to meet the arguments. Erie's failure to respond to the requirements of the Order told the Court it had no exceptions to the ruling on summary judgment and effectively deprived the trial court of its opportunity to consider and rule on Erie's objections. By filing no exceptions, Erie informed the Trial Court, and this Court, that it had no objections to the Court's Order ruling on summary judgment. Having failed to preserve its rights as required by the Rules and by precedent, Supreme Court Rule 5:25 mandates that Erie's Appeal be summarily dismissed.

III. ERIE MAKES NEW ARGUMENTS FOR THE FIRST TIME ON APPEAL

"A basic principle of appellate review is that, with few exceptions not relevant here, arguments made for the first time on appeal will not be

considered." Martin v. Ziherl, 269 Va. 35, 39, 607 S.E.2d 367, 368 (2005). Arogas, Inc. v. Frederick Cty. Bd. of Zoning Appeals, 280 Va. 221, 224, 698 S.E.2d 908, 910 (2010)("This Court will not consider the petitioners' argument that Frederick County should have filed a plea in bar instead of a demurrer because Arogas raises this argument for the first time on appeal.") citing, Rule 5:25; and citing, Appalachian Voices v. State Corp. Comm'n, 277 Va. 509, 515, 675 S.E.2d 458, 460 (2009). See also Rust v. Indiana Flooring Co., 151 Va. 845, 845, 145 S.E. 321 (Va. 1928)("It is an axiom of appellate practice, that only questions raised in the trial courts can be reviewed in the appellate court by writ of error or appeal...)

In this case, Erie, for the first time, makes arguments it never made in the Trial Court. By so doing, Erie failed to inform the Trial Court of "the precise points of objection in the minds of counsel so that it [the Trial Court] may be advised and rule intelligently." Ross v. Schneider, 181 Va. 931, 941, 27 S.E.2d 154, 158 (1943). In its initial motion for summary judgment before the Trial Court, and in its Assignments of Error, Erie's arguments were limited to its assertion that the Property did not belong to the Insured EPC, since "in a Virginia limited liability company members have no direct

interest in the company's property. . ."[40] In its opposition to Appellee's motion for summary judgment before the Trial Court, Erie's arguments were limited to (1) "the policy should be interpreted under Maryland law;[41] and (2) EPC did not acquire ownership of the damaged property but only became a member of the LLC which owned the property.[42] While the Trial Court gave Erie the opportunity to identify new arguments in filing exceptions to the ruling, Erie did not do so. Now, however, Erie advances a plethora of newly minted legal theories. For example, Erie argues for the first time that:

> Thus, extending the Circuit Court's analysis to its logical conclusion, by the time of the fire the newly acquired property coverage had expired; the fire occurred 163 days after Ms. Hashemian's acquisition of the Property. Supra, at 4 (coverage applies for 90 days after acquisition).[43]

While the issue of the meaning of "acquired" was raised, argued, and decided by the Trial Court, at no time did Erie ever argue that there was a policy defense based on the timing being outside of the 90 day period.[44] This argument appears for the first time in this appeal. Erie further argues also for

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40 JA 170-171.

41 JA at 241.

42 JA 242.

43 See Page "24" of Erie's Opening Brief

44 To the extent, however, that Erie is permitted to argue that the Fire occurred more than 90 days after the Insured EPC "acquired" the Property, the argument is faulty as it ignores the fact that EPC had no connection with the Property before it became the sole member of Cyrus Square LLC, which occurred less than 90 days before the Fire.

the first time that: (i) "The word 'acquired' cannot mean the mere exercise of 'control' of a building in a commercial property insurance policy providing coverage for 'newly acquired property."[45] (ii) "Alternative dictionary definitions of contract terms are not dispositive;"[46] (iii) "the objective intent of the parties was to provide coverage only to the named insured for the buildings it acquired – not buildings owned by others;"[47] (iv) "the newly acquired property coverage was designed to automatically protect the insured – a known risk – not the additional risk of a stranger to the contract;"[48] and (v) the rights and interest of distinct corporate entities cannot be ignored for the sole purpose of finding insurance coverage.[49] While Erie waived **all rights** on appeal by failing to file any exceptions to the Trial Court's rulings, Erie has also independently waived the right to advance these new arguments to this Court by failing to raise these arguments at any time prior to appeal.

Supreme Court Rule 5:25 and established case law requires that the Appellant not be permitted to advance these new positions and arguments to this Court without having preserved the right to do so by first making the

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45 Opening Brief of Appellant at 7.
46 Opening Brief of Appellant at 8.
47 Opening Brief of Appellant at 10.
48 Opening Brief of Appellant at 14.
49 Opening Brief of Appellant at 20.

arguments to the Trial Court. See Teleguz v. Com., 273 Va. 458, 470, 643 S.E.2d 708, 716 (2007)

IV. THE TRIAL COURT CORRECTLY HELD THAT EPC'S "NEWLY ACQUIRED" PROPERTY WAS INSURED UNDER THE POLICY

The Trial Court correctly held that EPC's "newly acquired" Property was insured under the Policy. Application of the extension of coverage for Newly Acquired Property, when applied to this case, required the Court to determine whether:

1. EPC "newly acquired" the Property[50]; and if so;
2. Whether the fire loss on May 3, 2014 occurred within 90 days after the acquisition by EPC of the Property;

JA 206. The Trial Court correctly answered those questions in the affirmative. These questions revolve around the inquiry of what "acquired" means as applied to these facts. More specifically, the Trial Court had to address, whether the fire damaged property was "newly acquired" by EPC when it became the sole owner of, the sole member of, and when EPC alone controlled, Cyrus Square LLC in whose name the property was titled.

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[50] Erie has stipulated that Cyrus Square "along with its only asset" was transferred to EPC, which stipulation alone is adequate to trigger the Newly Acquired Property coverage under EPC's policy. See Stipulation 18 at JA 17.

In its analysis, the Court properly found that Erie was solely responsible for drafting the insurance policy in issue and that it included in the extension of coverage at issue the undefined term "acquired" which, as applied to this case, was susceptible to more than one interpretation. In so finding, the Court correctly observed that under Virginia insurance law, ambiguities in insurance contracts are construed against the draftsman and in favor of coverage. The Court in granting summary judgment to EPC in this case correctly followed the applicable legal tenets and its decision should stand.

In Granite State Ins. Co. v. Bottoms, 243 Va. 228, 415 S.E.2d 131 (1992), this Court summarized principles of insurance law that are also applicable here all of which support the conclusions reached by the trial court in granting summary judgment to EPC and denying it to Erie. Those principles are as follows:

> "… An ambiguity, if one exists, must be found on the face of the policy. Nationwide Mutual Ins. Co. v. Wenger, 222 Va. 263, 268, 278 S.E.2d 874, 877 (1981). And, language is ambiguous when it may be understood in more than one way or when it refers to two or more things at the same time. Lincoln National Life Ins. Co. v. Commonwealth Container Corp., 229 Va. 132, 136-37, 327 S.E.2d 98, 101 (1985). Finally, doubtful, ambiguous language in an insurance policy will be given an interpretation which grants coverage, rather than one which withholds it. St. Paul Ins. v. Nusbaum & Co., 227 Va. 407, 411, 316 S.E.2d 734, (1984)."

Id at 547. Granite State Ins. Co. v. Bottoms, 415 S.E.2d 131, 134 (1992). Based on these legal tenants, the Trial Court correctly held that the word "Acquired" was ambiguous as applied to this clause in the Policy and interpreted it in favor of coverage in this case.

A. THE TRIAL COURT CORRECTLY HELD THAT EPC "ACQUIRED" THE SUBJECT PROPERTY WITHIN THE MEANING OF THE POLICY'S NEWLY ACQUIRED PROPERTY PROVISION THEREBY TRIGGERING COVERAGE SINCE THE TERM "ACQUIRE" IS UNDEFINED AND UNDER A COMMON SENSE DICTIONARY DEFINITION, IS TRIGGERED WHEN PROPERTY IS EITHER ACQUIRED THROUGH ACQUISITION OR BY ASSUMPTION OF CONTROL OVER THE PROPERTY.

Since Erie could have, but did not define the terms "acquire" nor "acquisition" in the policy, the question is whether the policy is ambiguous as to the meaning of "acquire" or "acquisition" and if so, whether there is any definition, that would support coverage. While typically an insurer provides a definition in its policy that the Court can utilize to assess whether the term is ambiguous, when no definition is present, "[a] contractual term ... is construed according to its usual, ordinary, and popular meaning." Palmer & Palmer Co., LLC v. Waterfront Marine Constr., Inc., 276 Va. 285, 290, 662 S.E.2d 77 (2008); Schwartz & Schwartz of Va., LLC v. Certain Underwriters at Lloyd's, 677 F.Supp.2d 890, 905 (W.D.Va.2009) (citing Lower Chesapeake Assocs. v. Valley Forge Ins. Co., 260 Va. 77, 86, 532 S.E.2d 325

(2000)). In reaching a decision as to interpretation of undefined terms, Courts often utilize dictionary definitions in ascertaining a terms usual, ordinary and popular meanings. See Builders Mut. Ins. Co. v. Parallel Design & Dev. LLC, 785 F. Supp. 2d 535, 545–46 (E.D. Va. 2011); See also Craig v. Dye, 259 Va. 533, 538, 526 S.E.2d 9, 11-12 (2000); Lumbermen's Mut. Cas. Co. v. Keller, 249 Va. 458, 460-61, 456 S.E.2d 525, 526 (1995).. In Builders Mut. Ins., supra, as well as in Christopher Associates, L.P. v. Sessoms, 425 S.E.2d 795, 797–98 (1993) and in Palmer & Palmer Co., LLC v. Waterfront Marine Constr., Inc., supra, the Court, as did the Court in this case, looked to both the Merriam–Webster's dictionary and Blacks Law Dictionary since in that case the term "pollutant" was undefined in a policy. The inquiry, in this case, is whether the words "acquire" and "acquisition" as used in the Newly Acquired coverage extension are ambiguous, and if so, whether there is a reasonable meaning of "acquire" or "acquisition" that grants coverage. If there is, then there is coverage as the trial Court correctly held in deciding that EPC was entitled to summary judgment as to liability. Here, because Erie used the terms "acquire" or "acquisition" in its policy language but failed to define them, the Court properly looked to the dictionary definitions of "acquire" and "acquisition". Those definitions are set out below:

- Black's Law Dictionary 26 (9th ed.2009) defines "acquire" as meaning *[t]o gain possession or control of; to get or obtain."*

- Merriam Webster Online defines "acquire" as a verb meaning:

  To get as one's own:

  to come into possession or control of, often by unspecified means <acquire property> <the team acquired three new players this year>

JA 206-207. Here, the Trial Court properly found, as should this Court, that patent ambiguity is determined from "the face of the policy" and exists if the language used "may be understood in more than one way or when it refers to two or more things at the same time." Smith v. Allstate Ins. Co., 241 Va. 477, 403 S.E.2d 696, 697 (1991); see also Nationwide Mut. Ins. Co. v. Wenger, 222 Va. 263, 278 S.E.2d 874, 877 (1981). Here the term "acquire" in this context may mean either to "come to own" as was argued by Erie, but may also mean "to gain possession or control of" as was argued by EPC. This ambiguity could have been resolved by Erie in supplying a definition; however, in failing to do so, coverage is measured by the definition of "acquire" which provides the greatest coverage. Under Virginia law, EPC as the sole owner, member and manager of Cyrus Square LLC, had sole control over the property of Cyrus Square, which included the Winchester property

in issue. Significantly, the parties have stipulated that "on March 3, 2014 Cyrus Square LLC amended its operating agreement"[51] which amendment named EPC as the sole member, and that "as of March 3, 2014 Cyrus Square was solely owned and controlled by its sole member EPC."[52] Thus, because EPC acquired the exclusive control of Cyrus Square LLC and its property 88 days before the fire, the Newly Acquired Property Clause extends coverage in this matter as the trial court correctly found. This holding is consistent with Virginia Supreme Court precedent holding that a small closely held business may not follow "every statutory requirement," but it may also create a situation where "the defendant shareholders effectively were the corporation." Curley v. Dahlgren Chrysler-Plymouth, Dodge, Inc., 245 Va. 429, 433, 429 S.E.2d 221, 224 (1993). Here, where the undisputed facts stipulated to by the parties and relied upon by the Court in ruling on the cross motions for summary judgment showed that these single member LLCs were vehicles for acquisition of real property, it was appropriate to find that acquisition fell within a reasonable definition of "acquisition" or "acquire" under the policy. It is respectfully prayed that this Court find likewise and deny Erie's Appeal and affirm the ruling of the Trial Court.

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51 Stipulation ¶ 19 at JA 17, and Ex. M thereto at JA 159.

52 Stipulation ¶ 20 at JA 18.

B. CASE LAW SUPPORTS AN ARGUMENT THAT COVERAGE EXISTS.

Case law also supports the argument that the Newly Acquired Property Clause is not limited to instances of ownership by a named insured. See Auto Owners Ins. Co. v. Sw. Nut Co., 564 F. App'x 1002, 1005 (11th Cir. 2014)("The focus of the Travelers policy is to provide insurance protection for "[buildings] newly acquired by the *insured*." . . . Although this provision may occasionally provide coverage for property actually owned by another individual, the policy is intended to protect the insured—Southwest Nut—and not a third party.") Here the interests of EPC include its interest in the Subject Property over which it acquired complete and sole control through its ownership and control of Cyrus Square. As such, this was an "acquisition" of the Subject Property under the insurance policy in issue.

This issue was addressed by the Court in S. Tr. Ins. Co. v. Dr. T's Nature Prod. Co., 261 Ga. App. 806, 584 S.E.2d 34 (2003). In. Dr. T's Nature Prod. a manufacturer sued its property insurer for losses it suffered when warehouse it was temporarily using to store its product was destroyed in a fire. The insured submitted a claim but the insurer denied the claim on

grounds that the loss to the warehouse was excluded under another provision of the policy,[53] and on grounds that the

- newly acquired property clause did not apply since the new location had not been "acquired" since it was temporary,
- since there was no lease for the space, and
- since there was no ownership of the warehouse.

Holding that the undefined term "acquired" means to "gain possession" the court granted the insured summary judgment holding that:

> Here, section five of the policy relates to coverage extensions and includes five subsections that apparently address separate and distinct areas of extended coverage. Two of the subsections could apply to this loss: "Newly Acquired or Constructed Property" and "Property Off Premises." Southern Trust contends that this loss comes within the "property off premises" subsection, which specifically excludes coverage for stock. But the trial court held that the loss comes within the "newly acquired" subsection. The policy does not define "acquire," but considering the commonly accepted meaning of "acquire" as "to gain possession of,"[1] the policy provides coverage for stock located at property of which Dr. T's takes possession, other than "fairs or exhibitions." Clearly, Dr. T's gained possession of the warehouse when the lessor gave the company permission to use the space and the company transferred its stock to the warehouse. While both parties understood that the arrangement was temporary, the policy does not address whether the newly acquired property may be temporary or must be permanent to fall within the policy extension.

[53] The policy contained a newly acquired property clause virtually identical to that issued by Erie, but also excluded loss to "property off premises" on which ground the insurer denied the claim.

Just as in Dr. T's Natural Prod., (1) here the Newly Acquired Property provision is found among a number of extensions of coverage in the policy; and (2) here the term "acquired" is not defined in the policy. The result here is the same. The "commonly accepted meaning" of "acquire" is to "to gain possession of." Here there it is stipulated that EPC controlled the Property, and under applicable Maryland law could have sold, transferred, hypothecated or taken any action it desired with regard to the property. Other cases also make clear that the Newly Acquired Property clause is triggered.

Persuasively, the Eighth Circuit recently decided a case interpreting the word "acquire" in an analogous section of a property insurance policy. In Amera-Seiki Corp. v. Cincinnati Ins. Co., 721 F.3d 582, 585 (8th Cir. 2013), the primary issue on appeal was "whether the terminal where the lathe fell constitutes **a location that [the insured] "acquired" within the meaning of the newly acquired property coverage extension."** (Emphasis supplied). In that case, Amera–Seiki (the "Insured") purchased a commercial property policy from Cincinnati (the "Insurer") that extended coverage to "Newly Acquired or Constructed Property" as follows:

> (2) Business Personal Property
>
> (a) If this policy provides coverage under SECTION A. COVERAGE, 1. Covered Property, d. Business Personal Property, you may extend that insurance to apply to "loss" to:

> 1) Business personal property, including such property that you newly acquire, at any location you acquire other than at fairs, trade shows or exhibitions.

Amera-Seiki Corp. v. Cincinnati Ins. Co., 721 F.3d 582, 585 (8th Cir. 2013). The operative language interpreted by the Court in Amera-Seiki Corp., was identical in all relevant respects to the language in this case. Id. In Amera-Seiki, during the policy period, Insured purchased a vertical lathe from a manufacturer in Taiwan for delivery to a customer in Illinois. Id. Insured retained Leader International Express Corporation to arrange to transport the lathe by ship to Los Angeles, California, and to store the lathe until a flatbed truck could transport it to Illinois. Id. Notably, Amera-Seiki had absolutely no direct ownership or possessory interest in the terminal where the lathe was damaged. Id. Instead, the terminal was owned by the Port of Los Angeles and operated by Eagle Marine Services, Ltd. (Eagle) under an exclusive lease. Id. The terminal was a secure, fenced facility, and access is prohibited without proper identification, a legitimate business purpose, and an escort from Eagle. Id. The only "acquisition" done by the Insured was that it paid to store the lathe at the terminal while it was being transported. Id.

When the lathe fell and was damaged, the Insured filed a claim with Insurer for the loss of the lathe as being at property which it had newly acquired. Id. The Insurer denied most of Insured's claim on the ground that

the coverage extension for newly acquired property did not apply because the Insured "did not 'acquire' the [terminal] under the plain and ordinary definition of 'acquire' as the Insured did not own, lease, possess, or exercise "any element of control, authority, or decision-making ability for the terminal." Id. The Eighth Circuit rejected this narrow interpretation of the word "acquire." and noted that the term "acquire" generally "has a broad meaning .... defined in the dictionary, for example, as 'to come into possession, control, or power of disposal of often by some uncertain or unspecified means,' including finding abandoned property." Id. The Court further stated "ambiguity exists if, after the application of pertinent rules of interpretation to the policy, a genuine uncertainty results as to which one of two or more meanings is the proper one." Id. The Court thus ruled the term "acquired" as used in the "Newly Acquired or Constructed Property" clause of the insurance policy to be ambiguous because the policy did not define the term "acquire" and because the parties did not agree as to its meaning. The Court held that because the law "requires [the Court] to construe that ambiguity in [Plaintiffs] Amera–Seiki's favor," the Court was required to find that the Insured had "acquired" the terminal location for purposes of the Newly Acquired or Constructed Property coverage extension clause despite the fact that the Insured's storage arrangements were temporary, that the

terminal was owned by a third party, that the terminal was leased to yet another third party, and that the Insured lacked even free use and access of the terminal. Id.

Here, the term "acquired" must be construed according to its commonly understood meaning, to mean "to come into possession, control, or power of disposal of often by some uncertain or unspecified means."

More recently in Berrylane Trading, Inc. v. CNA Fin. Corp., No. 1:17-CV-2360, 2018 WL 343593, at *4 (N.D. Ohio Jan. 9, 2018) the Court was presented with a case under a "newly acquired property" extension of coverage. Significantly the Court consulted the dictionary definition of "acquire" to determine the meaning of the clause, and stated:

> Here, the phrase "at a building you acquire by purchase or lease at any premises" is written in present tense. The Merriam-Webster dictionary defines "acquire" to mean "to come into possession or control of." [54]

Other courts have also consulted dictionary definitions of "acquire" in applying the newly acquired property extension. See 3109 Props, L.L.C. v. Truck Ins. Exch., No. 03-13-00350-CV, 2015 WL 3827580, at *5 (Tex. App. June 18, 2015)("Acquire" means "to gain possession or control of something; to get or to obtain." Black's Law Dictionary 26 (9th ed.2009)"). Here the

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[54] For reasons unrelated to this case, the Court found the provision inapplicable.

Trial Court appropriately consulted both the Merriam-Webster and the Black's law dictionary definitions and appropriately held that EPC had acquired the Property. Here the Trial Court referenced the exact same definitions to find there was coverage.

Here Erie could have, but did not, restrict operation of the Newly Acquired clause the property which had been acquired by an ownership interest.

C. STATUTORY ANALYSIS ALSO SUPPORTS AN ARGUMENT THAT COVERAGE EXISTS.

Erie argues that EPC did not acquire Cyrus Square's real property when it purchased a membership interest in Cyrus Square. Va. Code § 13.1-1038. This argument however assumes that the policy only covers newly acquired "ownership" interests in Property. While certainly Erie could have restricted the Newly Acquired Property provision to be triggered only when one acquires an ownership interest, it did not do this. Other provisions of the applicable Limited Liability Company Acts make clear that EPC could acquire an interest in the Property when "Cyrus Square, along with its only asset [the Property] were transferred to EPC."[55] EPC is a Maryland Limited Liability Company.[56] Pursuant to Maryland Corporations and Associations,

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55 Stipulation ¶ 18 at JA 17.

56 Stipulation at ¶ 1 at JA 15 and Ex. A thereto at JA 19.

Code § 4A-203, EPC has "the general powers, whether or not set forth in its articles of organization or operating agreement to . . . (6) ***Acquire by purchase or in any other manner*** . . . any interest in real or personal property, wherever located."[57] This provision makes clear that EPC could acquire by ownership ***or*** *any other manner*, the Property in this case. That is, acquisition is not limited to ownership alone, as Erie argues to this Court.[58]

Erie also argues for the first time to this Court that EPC did not have control over the Property since it could not in its own name sell the Property, but would have to cause Cyrus Square to sell the property. Again this argument misses the point. The Trial Court was correct that EPC as the sole manager, owner and member of Cyrus Square, "could sell the property, encumber the property, build on the property or tear down the Zeropak Building located on the real property." This right is clearly provided for in Va. Code § 13.1-1021.1 which provides, in part that:

> any manager … [EPC], may sign and deliver any instrument transferring or affecting the limited liability company's interest

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[57] Virginia has an analogous code provision at Va. Code § 13.1-1009 which allows the LLC to "purchase, *receive*, lease or *otherwise acquire*, and own, hold, improve, *use and otherwise deal with* . . . " property.

[58] See also the Operating Agreement of EPC which provides in part that "The Member may execute the Articles of Organization, leases, mortgages or deeds of trust, and other financing and construction contracts, sell, exchange, convey or otherwise dispose of all or any portion of the Company property, or retain any third party consultants or advisors with respect to the Company property." JA 24.

> in real property, which instrument shall be conclusive in favor of a person who gives value without knowledge of the lack of authority of the person signing and delivering the instrument.

Va. Code Ann. § 13.1-1021.1. Here EPC as the sole member, manager and owner of Cyrus square had full control over the Property. Moreover, Erie has stipulated that "as of March 3, 2014 Cyrus Square LLC was solely owned and controlled by its sole member EPC."[59]

D. OTHER PROVISIONS OF THE POLICY MAKE CLEAR THAT VARIOUS INTERESTS, OTHER THAN OWNERSHIP INTERESTS, ARE COVERED BY THE POLICY, AND THAT ONE MAY ACQUIRE AN INSURABLE INTEREST WITHOUT ACQUIRING OWNERSHIP.

The Trial Court correctly noted that "[i]n addition, a review of other provisions of the policy is proper in ascertaining coverage " and that "in this case, other policy provisions demonstrate that ownership of property "acquired" is not required to trigger coverage. For example, Erie did not make ownership a predicate requirement for triggering coverage under the Newly Acquired Property Clause, but did limit other coverages to ownership, or address ownership in terms of coverage of other types of losses." JA at 263.

Other than in Newly Acquired coverage extensions at issue, Erie has used the term "acquire" in only one other provision of the policy. In that provision Erie used "acquire" in connection with property not acquired by

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[59] Stipulation ¶ 20 at 18.

ownership but by control and use. That provision provides that:

> Business Personal property and Property of Others means . . . (4) Your *use interest as a tenant* in Improvements and betterments. Improvements and betterments are fixtures, alterations, installations, or additions . . . (b) *you acquired* or made at your expense but cannot legally remove.[60]

Just as in the Newly Acquired Property clause, in the above provision Erie did not restrict the term "acquired" to acquisition of an ownership interest and acquisition by "ownership" would make no sense. Instead a "use interest" was all that was required to trigger coverage. Erie's argument that "acquire" must mean acquisition of an "ownership interest" is not supported by the very contract it wrote and in which it used the very term to signify acquisition of something other than ownership interest.

Although the Erie policy at times requires an "ownership" interest as a requirement of coverage, it does not do so with respect to Newly Acquired Property. Its failure to do so in connection with the Newly Acquired Property clause makes clear that ownership interest is not required. This is wholly consistent with other policy provisions that provide coverage without an ownership interest for "indemnitee" interests,[61] "ownership" or "majority

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[60] See Stipulation 8 (JA 16), and policy at Exhibit H at JA 57.

[61] See Stipulation 8 (JA 16), and policy at Exhibit H at JA 100.

interest,"[62] mortgagee interest,"[63] "use interest,"[64] "Leasehold interest,"[65] and the "net leasehold interest;"[66] or the "ownership, maintenance, use or entrustment" of property.[67] In fact Erie expressly provided for the instance in which Erie may be "called upon to pay a "loss" for property of others. . .If we pay the owner . . ."[68] The inescapable conclusion is that the only real question under the policy language is whether or not the Plaintiff has an insurable interest, which it clearly does. Stated otherwise, if EPC acquired an insurable interest in the property then the policy provides coverage. Under Virginia law, an insurable interest is a defined term:

> "insurable interest" means **any** lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary damage."

Va.Code § 38.2–303(B) (emphasis in bold supplied). Here there is no question that EPC as the sole member and owner of Cyrus Square LLC had a lawful and substantial economic interest in the safety or preservation of the Property free from loss, destruction or pecuniary damage.

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[62] See Stipulation 8 (JA 16), and policy at Exhibit H at JA 101.
[63] See Stipulation 8 (JA 16), and policy at Exhibit H at JA 81.
[64] See Stipulation 8 (JA 16), and policy at Exhibit H at JA 57.
[65] See Stipulation 8 (JA 16), and policy at Exhibit H at JA 76.
[66] See Stipulation 8 (JA 16), and policy at Exhibit H at JA 76.
[67] See Stipulation 8 (JA 16), and policy at Exhibit H at JA 126.
[68] See Stipulation 8 (JA 16), and policy at Exhibit H at JA 81.

Moreover, it takes little in Virginia to support an insurable interest, and certainly no ownership interest is required. In Tilley v. Connecticut Fire Ins. Co., 86 Va. 811, 11 S.E. 120, 120 (1890), the Supreme Court explained that "[a]ny person who has an interest in the property, legal or equitable, or who stands in such a relation thereto that its destruction would entail pecuniary loss upon him, has an insurable interest to the extent of his interest therein, or of the loss to which he is subjected by the casualty." Tilley v. Connecticut Fire Ins. Co., supra. In Tilley the property was titled in the name of Sarah Laforme and Tilley had a deed of trust on the property. The policy did not name Tilley. The policy was in the name of Laforme, but Tilley, given his lien interest in the property sued in his own name as a beneficiary of the policy. The Court held that Tilley could enforce the contract, even though not a party to it, since he had an insurable interest in the property noting that "any interest, however slight, may be insured..." Id. at 120. Tilley was therefore insured, even though he did not own the property and was not on the policy. In Liverpool and London and Globe Insurance Company, Ltd. v. Bolling, 176 Va. 182, 187, 10 S.E.2d 518, 520 (1940), the Supreme Court of Appeals noted that "[e]verywhere there is a tendency to broaden the definition of an 'insurable interest;' neither legal nor equitable title is necessary." Id. at 187. The Court in Bolling also reaffirmed the above-cited

language in Tilley, supra, and further cited with approval the above quoted language. Id. In Liverpool Ms. Bolling was entitled to collect under an insurance policy despite the fact that she did not own the property. In Blue Cross of Southwestern Va. and Blue Shield of Southwestern Va. v. McDevitt & Street Co., 234 Va. 191, 360 S.E.2d 825 (1987), the Supreme Court of Virginia held that a contractor and architect had insurable interests in property where "until final payment was made, the property constituted inchoate security for the payment of contract debts due the contractor and the architect." Id. at 196. No ownership interest was required. In Castle Cars, Inc. v. U.S. Fire Ins. Co., the Court held that a plaintiff that acquired a stolen car in good faith and without notice of the invalidity of the transferor's title had an insurable interest despite having no ownership interest. Castle Cars, Inc. v. U.S. Fire Ins. Co., 221 Va. 773, 777–78, 273 S.E.2d 793, 795–96 (1981) (such an interest need not be legal or equitable title; "a 'substantial economic interest' is an insurable interest if it is 'lawful'"). In Home Ins. Co. of N.Y. v. Dalis, 206 Va. 71, 76, 141 S.E.2d 721, 724 (1965). In that case, the Court held that the plaintiffs continued to have an insurable interest in a barn, at the time of loss, even though they no longer held legal title to the property on the day of loss, title having already passed to the State Highway Commissioner through a condemnation proceeding. The Court held that

because the time had not yet expired for the condemnation to be abandoned, and there was still the possibility that title would revert back to the plaintiffs in the event of an abandonment of the condemnation. Id.

Here, EPC's ownership of Cyrus Square and its control of the subject Property meets the statutory requirement that EPC have a "lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary damage" and therefore that EPC has an insurable interest in the Property. There is no question that "with economic realities prevailing over legalisms" EPC was damaged when the sole asset of Cyrus Square was severely damaged by the fire.

CONCLUSION

It is respectfully submitted that the result in this case should be affirmed for three reasons. First, Erie failed to properly preserve its rights on appeal as was directed by the Trial Court in its Order granting summary judgment to EPC and denying summary judgment to Erie. Second Erie improperly sought to raise new arguments never articulated before the Trial Court. Finally, the trial court correctly found by applying the stipulated facts to applicable law that EPC was entitled to judgment as a matter of fact and as a matter of fact and that Erie was not entitled to judgment. There being no reversible error, it is prayed that the decision of the Trial Court be affirmed.

Respectfully submitted,

EPC MD 15, LLC
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 1, 2018, the Brief of Appellee was filed electronically via the VACES system with the Supreme Court of Virginia and that 3 copies of the same were hand delivered to the clerk's office. This same date, a copy of the Brief of Appellee was sent via email to all counsel of record, at the email addresses below:

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Counsel for the Appellee does not waive oral argument.

The foregoing complies with the page limit.

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