STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: March 12, 2012)

NAYSHA BERRIOS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF CASSANDRA BERRIOS	:	
v.	:	**C.A. No. PC 2004-2390**
JEVIC TRANSPORTATION, INC.; CRAIG G. BENFIELD; FIRST STUDENT, INC.; ILBA BERRIOS, ALIAS; SAIA, INC.; SAIA MOTOR FREIGHT LINE, L.L.C., ALIAS; AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA	:	

DECISION

Gibney, P.J. In this wrongful death action, Plaintiff Naysha Berrios ("Plaintiff") has filed a Motion for Summary Judgment on her declaratory judgment count against Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union"). Plaintiff's wrongful death claim arises from an automobile accident between Plaintiff, Defendant First Student, Inc. ("First Student"), and various other parties. The instant Motion pertains to a dispute over the effective date of an increase in the liability limit of a National Union insurance policy issued to First Student. Plaintiff asks this Court to declare that the policy set coverage at $2 million at the time of the automobile accident. Jurisdiction is pursuant to Super. R. Civ. P. 56. For the reasons stated herein, Plaintiff's Motion for Summary Judgment is denied.

I

Facts & Travel

On the morning of September 5, 2001, a school bus owned by First Student collided with an eighteen wheel tractor-trailer. Plaintiff and Plaintiff's infant daughter, Cassandra Berrios, were passengers on the First Student bus and were injured in the collision. The infant ultimately died from her injuries.[1] Plaintiff subsequently filed the instant wrongful death action against First Student and various other parties. In July 2011, Plaintiff received this Court's permission to amend her Complaint to add a declaratory judgment count against National Union, First Student's primary insurer. Berrios v. Jevic Transp., Inc., PC-2004-2390, 3-7 (R.I. Super. July 15, 2011). Plaintiff seeks a declaration regarding the liability limit in First Student's National Union insurance policy.

National Union issued Commercial Auto Insurance Policy No. CA 527-33-55 ("the Policy") to First Student for the policy period November 12, 2000 to April 1, 2002. Nat'l Union's Jan. 11, 2012 Mem. in Opp'n to Pl.'s Mot. for Summ. J., Ex. A, Aff. of Paul Santos ¶ 3 ("Santos Aff.").[2] The Policy declaration limited liability to $1 million per accident. Santos Aff., Ex. 1, Policy Declaration at 1. Chartis, Inc. ("Chartis") and the American International Group ("AIG") respectively underwrote and administered the Policy.

The Policy contained two amendatory endorsements relevant to the instant Motion: Endorsement for Motor Carrier Policies of Insurance for Public Liability under

[1] For a more detailed description of the accident, see Berrios v. Jevic Transportation, Inc., PC-2004-2390, 2012 WL254974, 2 (R.I. Super. Jan. 23, 2012).
[2] The policy period originally lasted until November 12, 2001, but was extended to April 1, 2002.

Sections 29 and 30 of the Motor Carrier Act of 1980 ("Motor Carrier Act Endorsement") and Endorsement # 001 ("Endorsement 001"). National Union issued the Motor Carrier Act Endorsement to First Student on November 7, 2001. The Motor Carrier Act Endorsement provided that effective November 12, 2000, National Union "shall not be liable for amounts in excess of $1,000,000 for each accident." Santos Aff., Ex. 3, Motor Carrier Act Endorsement at 1. Conversely, Endorsement 001 did not include a date of issuance on its face. Endorsement 001 stated that "effective 11/12/2000 . . . the policy limit is amended to read $2,000,000 in lieu of $1,000,000." Santos Aff., Ex. 2, Endorsement 001 at 1.

Various other documents related to the Policy, but extrinsic to its terms, are also before this Court. These include insurance binders, e-mails, and an entry in Chartis' computer system. On November 9, 2000, First Student's insurance broker, Marsh USA, Inc. ("Marsh"), sent First Student a Business Automobile Liability Binder of Insurance ("2000 Binder") signed by Randy Hedlund, the Policy's underwriter at that time. Santos Aff., Ex. 4, 2000 Binder at 1. The 2000 Binder identified the Policy's limit as $1 million, effective November 12, 2000. The following year, on November 9, 2001, Marsh sent First Student a second Business Automobile Liability Binder ("2001 Binder"). The 2001 Binder indicated that "effective November 12, 2001 12:01 a.m. and expiring April 1, 2002 12:01 a.m. . . . Combined Single Limit of Liability increased to $2,000,000 per accident." Santos Aff., Ex. 5, 2001 Binder at 1. The 2001 Binder additionally stated that First Student must make an extra premium payment of $100,000. Also on November 9, 2001, Daniel Rivera, a Marsh employee, sent the 2001 Binder via e-mail attachment to Trevor Gallagher, an AIG employee. Nat'l Union's Jan. 11, 2012 Mem., Ex. C, E-mail

from Daniel Rivera to Trevor Gallagher at 1 ("Rivera E-mail"). The text of Rivera's e-mail stated in relevant part: "Attached please find an endorsement binder of confirmation for the increase of the AL CSL to $2MM as per the noted terms and conditions." Rivera E-mail at 1.

On November 15, 2001, Paul Santos, a Chartis employee, sent an e-mail to Kathy Timmons, an AIG employee, to explain changes to the Policy.[3] He informed her that the "policy was amended as of 11/12/01 to include $2,000,000 in limits . . . ." Santos Aff., Ex. 7, E-mail from Paul Santos to Kathy Timmons at 1 ("Santos E-mail"). Later that same day, Santos sent another e-mail to Timmons reiterating that the "limit for Auto is now $2,000,000 as of 11/12/01. Before 11/12/01 . . . the limit was $1,000,000." Santos E-mail at 1.

On November 20, 2001, Shirley Popowniak, another Chartis employee, circulated an e-mail regarding the Policy's liability limits. Nat'l Union's Jan. 11, 2012 Mem., Ex. B, Aff. of Shirley Popowniak ¶ 4 ("Popowniak Aff."). Popowniak stated that "losses occurring from 11/12/00-11/12/01 are subject to $1m limit, $1m deductible. Losses occurring from 11/12/01 through expiration (4/1/02) are subject to $2m limit, $2m deductible." Popowniak Aff., Ex. 1, Popowniak E-mail at 1 ("Popowniak E-mail"). Also on November 20, 2001, Chartis—in response to receipt of the 2001 Binder—made an entry in its electronic transaction log for First Student's account denoting a "change [in] limits" to the Policy. Santos Aff., ¶ 11 & Ex. 6, Chartis Computer Entry at 1 ("Chartis Computer Entry").

[3] Santos aided in servicing the Policy in 2001 and underwrote the Policy during subsequent policy periods. Santos Aff. ¶ 4.

During the course of discovery, other information regarding the Policy came to light. In response to Plaintiff's request for production of documents regarding the Policy, First Student indicated: "It has been represented to defense counsel that insurance coverage effective at the time of the collision mentioned in the complaint is as follows: National Union Fire Insurance Company of Pittsburgh, PA., policy No. CA 527-33-55. Policy limit of Two Million Dollars, deductible of One Million Dollars." Pl.'s Nov. 8, 2011 Mem. in Supp. of Mot. for Summ. J., App. of Exs. at 40 ("Pl's App."). Plaintiff also obtained the affidavit of James Corej, the Arthur J. Gallagher Risk Management senior account executive for First Student's insurance program.[4] Corej testified: "To my knowledge, there have been no revocations, rescissions, or cancellations of Endorsement #001 of the National Union Fire Insurance Company of Pittsburgh, PA, policy # CA 527-33-55. Endorsement #001 increased the limits of the insurance coverage from $1 million to $2 million." Pl.'s App. at 3.

Plaintiff filed the instant Motion for Summary Judgment on her declaratory judgment count against National Union on November 8, 2011. She seeks a declaration regarding the Policy's liability limits at the time of the September 5, 2001 accident.

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[4] Corej was also First Student's Super R. Civ. P. 30(b)(6) witness in connection to Plaintiff's inquiry regarding First Student's insurance coverage. Pl's App. at 3.

II

Standard of Review

When a hearing justice is ruling on a motion for summary judgment, the preliminary question before the court is whether there is a genuine issue as to any material fact which must be resolved. Haffenreffer v. Haffenreffer, 994 A.2d 1226, 1231 (R.I. 2010). The party seeking summary judgment has the initial burden to show the absence of a material fact. Santiago ex rel. Martinez v. First Student, 839 A.2d 550, 552 (R.I. 2004). If an examination of the pleadings, affidavits, admissions, answers to interrogatories, and other similar materials, viewed in the light most favorable to the opposing party, reveals no such issue, then the suit is ripe for summary judgment. Capital Props. Inc. v. State, 749 A.2d 1069, 1080 (R.I. 1999).

In the face of a motion for summary judgment, the opposing party "carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996); see McAdam v. Grzelczyk, 911 A.2d 255, 259 (R.I. 2006). It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, Rule 56 "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Although inferences may be drawn from underlying facts contained in material before the trial court, neither vague allegations, nor conclusory

statements, nor assertions of inferences not based on underlying facts will suffice. First Nat'l Bank of Boston v. Slade, 399 N.E.2d 1047, 1050 (Mass. 1979).

Here, National Union must set forth specific facts showing that there is a genuine issue of material fact for trial. Mulvihill v. Top-Flite Golf Co., 335 F.3d 15, 19 (1st Cir. 2003).[5] Rule 56 mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 323. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Id. at 322-23.

III

Analysis

The instant Motion requires this Court to interpret an insurance policy. Plaintiff contends that the Policy, pursuant to Endorsement 001, unambiguously set liability limits at $2 million effective November 12, 2000. As such, she maintains that, as a matter of law, she is entitled to a declaration that the Policy's liability limit was $2 million at the time of the September 5, 2001 accident. National Union alleges that National Union and First Student intended the increase in the Policy's liability limit to take effect November 12, 2001, and argues that a scrivener's error in Endorsement 001 caused November 12, 2000 to appear as the effective date of the increase instead. National Union posits that the possible existence of a scrivener's error in Endorsement 001, which could necessitate

[5] An issue is "genuine" if the pertinent evidence is such that a rational fact finder could resolve the issue in favor of either party, and a fact is "material" if it has the capacity to sway the outcome of the litigation under the applicable law. Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995).

reformation of the Policy, presents a genuine issue of material fact. National Union thus asks this Court to deny Plaintiff's Motion.

A

Insurance Contract Interpretation

An insurance policy "is essentially a contract between the insurance company and its insured . . . ." Mullins v. Fed. Dairy Co., 568 A.2d 759, 762 (R.I. 1990). Thus, "[t]he terms of an insurance policy are construed in accordance with the rules of construction applicable to contracts." Merrimack Mut. Fire Ins. Co. v. Dufault, 958 A.2d 620, 624 (R.I. 2008) (citing Children's Friend & Serv. v. St. Paul Fire & Marine Ins. Co., 893 A.2d 222, 229 (R.I. 2006)). "[C]lear and unambiguous language set out in a contract is controlling in regard to the intent of the parties to such contract and governs the legal consequences of its provisions." East Greenwich Fire Dist. v. Henriksen, 632 A.2d 641, 642 (R.I. 1993) (quoting Elias v. Youngken, 493 A.2d 158, 163 (R.I. 1985)). As such, in the event an insurance policy is unambiguous, "judicial construction is eclipsed and the contract must be applied as written." Aetna Cas. & Sur. Co. v. Sullivan, 633 A.2d 684, 686 (R.I. 1993). Departure from the literal language of the policy is justified only upon a finding that the policy, when read in its entirety, is ambiguous or capable of more than one reasonable meaning. Id. Ambiguous terms are construed strictly against the insurer. Mullins, 568 A.2d at 762.

B

Reformation of Insurance Policies on Account of Scrivener's Errors

This Court's equitable authority extends to the reformation of written agreements, including insurance policies. Merrimack, 958 A.2d at 624 ("[A]s with other written

agreements, an insurance policy may be equitably reformed." (citing Hopkins v. Equitable Life Assurance Soc. of the U.S., 107 R.I. 679, 684, 270 A.2d 915, 918 (1970))). National Union contends that a scrivener's error in Endorsement 001 as to the effective date of the liability limit increase requires reformation of the Policy. Rhode Island decisional law addressing scrivener's errors in any context is virtually non-existent. Emhart Indus., Inc. v. Home Ins. Co., 515 F. Supp. 2d 228, 247 (D.R.I. 2007) (commenting on the dearth of Rhode Island case law regarding scrivener's errors).

Although Rhode Island courts nearly broached the topic of reformation due to scrivener's errors in the nineteenth century, these courts ultimately sidestepped the issue. See Patterson v. Atkinson, 20 R.I. 102, 104-05, 37 A. 532, 532-33 (1897) (suggesting that a mortgage was valid even though, on account of a scrivener's error, it purported to convey the entire property, when in fact the mortgagor maintained only a half interest in the property and the parties had intended to convey only that half interest); Cannon v. Beaty, 19 R.I. 524, 525-27, 34 A. 1111, 1111-1112 (1896) (refusing to reform a deed that contained a scrivener's error because a statute precluded the execution of the deed in the first place); Almy v. Daniels, 15 R.I. 312, 313-317, 4 A. 753, 755-57 (1886) (declining to consider reformation argument based on a scrivener's error because the matter was not properly before the court). Our Supreme Court most closely addressed scrivener's errors in Patterson, where it implied that reformation of a mortgage due to a scrivener's error was possible and remanded for trial on the intent of the mortgagor. See 20 R.I. at 104-05, 37 A. at 532-33.

Other jurisdictions and commentators have likened scrivener's errors to mutual mistakes of fact. See, e.g., OneBeacon Am. Ins. Co. v. Travelers Indem. Co. of Ill., 465

F.3d 38, 41 (1st Cir. 2006) ("'[T]he classic case for reformation' is when the mutual mistake can be traced to a typo or transcription error" (quoting E. Allan Farnsworth, Farnsworth on Contracts § 7.5 (2001))); Fid. & Guar. Ins. Co. v. Global Techs., Ltd., 117 F. Supp. 2d 911, 918 (D. Minn. 2000) ("[A] mistake in the writing of the policy may be considered a mutual one, even if one of the parties is at fault."). Their rationale for such treatment is that a scrivener's error is a mutual mistake in the sense that the scrivener did not properly memorialize or transcribe what either party actually intended. See Nash Finch Co. v. Rubloff Hastings, L.L.C., 341 F.3d 846, 849-50 (8th Cir. 2003) (construing Nebraska law); see also 2 Couch on Insurance § 27:28 (Steven Plitt, et al. eds., 3d ed. 2010) ("[I]n essence, the justification for allowing reformation [of a scrivener's error] is that the mistake is, in fact, mutual in the sense that the result is not what either party intended."). These jurisdictions' bases for handling scrivener's error cases as if they were mutual mistake of fact cases is not out of sync with Patterson's suggestion that reformation of a scrivener's error in a mortgage might be appropriate if the mortgage did not correctly reflect the parties' intent. See 20 R.I. at 104-05, 37 A. at 532-33.

Of more practical significance however, our Supreme Court's mutual mistake of fact jurisprudence—unlike its scrivener's error decisional law—is substantial. See, e.g., Merrimack, 958 A.2d at 624-26; McEntee v. Davis, 861 A.2d 459, 463-65 (R.I. 2004); Marr Scaffolding Co., Inc. v. Fairground Forms, Inc., 682 A.2d 455, 458-59 (R.I. 1996); Hopkins, 107 R.I. at 684-85, 270 A.2d at 918-19. Accordingly, this Court concludes that characterization of scrivener's errors as a form of mutual mistake represents a sensible approach and is also consistent with our Supreme Court's extremely limited treatment of

scrivener's errors. This Court shall analyze the Policy therefore through the lens of mutual mistake of fact.[6]

C

Mutual Mistake of Fact

Before an insurance policy may be judicially reformed, "the court must first find a mutual mistake." Merrimack, 958 A.2d at 624. Our Supreme Court has defined mutual mistake as one that is "common to both parties wherein each labors under a misconception respecting the same terms of the written agreement sought to be [reformed]." McEntee, 861 A.2d at 463 (quoting Rivera v. Gagnon, 847 A.2d 280, 284 (R.I. 2004)). When a mutual mistake is manifest in the agreement at the time it is entered into, the agreement fails in a material respect to reflect correctly the understanding of both parties. Merrimack, 958 A.2d at 624. A mutual mistake is not merely the existence of a common error, but rather involves a shared misconception relating to the parties intent. Id. (citing McEntee, 861 A.2d at 463). To warrant reformation, "the parties to the

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[6] Plaintiff cites cases from other jurisdictions that have established special rules for reformation of scrivener's errors. See, e.g., Tiger Fibers, LLC v. Aspen Specialty Ins. Co., 594 F. Supp. 2d 630, 641-43 (E.D. Va. 2009) (noting that "scrivener's errors are those which are demonstrably contradicted by all other documents" and are "such errors as those evidenced in the writing that can be proven without parol evidence" (citations omitted) (internal quotation marks omitted)); Estate of Blakely v. Fed. Kemper Life Assurance Co., 640 N.E.2d 961, 967 (Ill. App. Ct. 1994) (requiring scrivener's error to be "manifestly incongruous" on the face of the contract before allowing reformation). Such strict treatment of scrivener's errors promotes attention to detail in drafting insurance contracts and, in theory, would reduce disputes like the one before this Court. See Tiger Fibers, 594 F. Supp. 2d at 642 (citing Westgage at Williamsburg Condo. Ass'n, Inc. v. Philip Richardson Co., 621 S.E.2d 114, 120 (Va. 2005)) (noting that, where an error occurs in a party's review of the contract, courts should not reform the contract to compensate for the party's inattention to detail). At present however, this Court concludes that analysis of scrivener's errors fits best within our Supreme Court's mutual mistake of fact jurisprudence. As such, this Court declines to adopt rules unique to scrivener's errors. Whether a special "scrivener's error" doctrine is warranted is a matter best left to our Supreme Court.

contract must both be laboring under the same mutual mistake of fact at the time the agreement was made." Id. at 626. The existence of a mutual mistake pertaining to a material term of an agreement is a question of fact. See id. at 624; Hopkins, 107 R.I. at 685, 270 A.2d at 919; see also Perkins v. Kirby, 39 R.I. 343, 355, 97 A. 884, 888-89 (1916) (treating a trial justice's finding of mutual mistake as a factual determination). A party seeking reformation of an agreement must prove the mutual mistake "by clear and convincing evidence." Merrimack, 958 A.2d at 624; see Emhart, 515 F. Supp. 2d. at 247 ("Because contract law attaches great weight to the written expression of an agreement, mutuality of mistake must be proved by clear and convincing evidence." (citations omitted)).

1

Extrinsic Evidence

In opposing Plaintiff's Motion for Summary Judgment, National Union proffers extrinsic evidence that it contends demonstrates a genuine issue of material fact as to the presence of a mutual mistake regarding the effective date of Endorsement 001. As a general proposition, the "parol-evidence rule 'prohibits introduction of extrinsic evidence to change, vary, or alter the written terms of an agreement,'" including an insurance policy. East Greenwich Fire Dist., 632 A.2d at 642 (quoting Lisi v. Marra, 424 A.2d 1052, 1055 (R.I.1981)). Notwithstanding the parol-evidence rule, reference to extrinsic evidence is appropriate where an insurance policy is ambiguous. Merrimack, 958 A.2d at 624-25. After reading the Policy in its entirety however, this Court concludes that the Policy is unambiguous. Endorsement 001 clearly states that, effective November 12, 2000, the Policy's liability limit "is amended to read $2,000,000 in lieu of $1,000,000."

Endorsement 001 at 1. Thus, the ambiguity exception to the parol-evidence rule is inapplicable.[7]

Nevertheless, our Supreme Court has held:

> "The rule that bars the introduction of facts dehors the contract when its language is clear and complete on its face [i.e. the parol-evidence rule] does not prevent a court from considering such extrinsic evidence if, by reason of a mutual mistake common to both sides of the contract, the written document 'fails in some material respect correctly to reflect their prior completed understanding.'" Marr, 682 A.2d at 458-59 (emphasis in original) (quoting Hopkins, 107 R.I. at 685, 270 A.2d at 918).

In such instances, "extrinsic or parol evidence should be admitted for the purpose of reforming the contract to mirror the true intent of the parties." Id.; see OneBeacon, 465 F.3d at 41 ("In a reformation case, it does not matter that a contract unambiguously says one thing. A court still will accept extrinsic evidence in evaluating a claim that both parties to the contract intended it to say something else."). Therefore, Marr authorizes this Court to refer to extrinsic evidence in evaluating National Union's mutual mistake of fact argument, even in the absence of ambiguity. 682 A.2d at 458-59.

Although Plaintiff does not address Marr directly, her interpretation of Merrimack challenges Marr's continued viability as an exception to the parol-evidence rule. Plaintiff argues that Merrimack requires courts to find ambiguity in a contract's terms before turning to extrinsic evidence in all cases. Pl.'s Feb. 8, 2012 Mem. in Resp. to Nat'l Union's Jan. 11, 2012 Mem. at 3-7. If interpreted in such a fashion, Merrimack would effectively undo Marr's liberal allowance of extrinsic evidence in mutual mistake of fact cases. A detailed review of Merrimack is therefore warranted.

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[7] As National Union does not dispute that Endorsement 001 is unambiguous, this Court shall not address the subject further. Nat'l Union's Jan. 11, 2012 Mem. at 10.

In Merrimack, the plaintiff insurance company and the defendant insured disputed whether an insurance policy covered the defendant's son. 958 A.2d at 622-23. The insurance policy extended coverage to relatives of the defendant who lived in the defendant's household. Id. at 622. The defendant's son lived in the defendant's home. Id. On its face, therefore, the insurance contract clearly covered the son. Id. at 625. Nonetheless, the insurance company contended that a mutual mistake of fact existed as to whether the parties intended to include the son under the insurance contract and argued for the contract's reformation. Id. at 622-23. The insurance company submitted insurance renewal questionnaires completed by the defendant that did not list the defendant's son as a member of the defendant's household and argued that these questionnaires were indicative of the parties' intent to exclude the son from coverage. Id. Notably, the questionnaires were not incorporated by the policy's terms and were submitted subsequent to the policy's issuance. Merrimack, 958 A.2d at 624. The trial justice referred to the renewal questionnaires and reformed the insurance policy to exclude the defendant's son from coverage on the basis of mutual mistake of fact. Id. at 623.

Our Supreme Court reversed. The Court held that the trial justice erred in referring to the renewal questionnaires because the insurance policy's terms unambiguously extended coverage to the defendant's son and did not incorporate the questionnaires. Id. at 624-25. The Court explained that "before the trial justice may look to extrinsic evidence an ambiguity must be found in the terms of the contract." Id.

Notwithstanding its conclusion that "the contract [was] clear on its face and that the trial justice erred when she considered the renewal questionnaire," the Court

addressed the trial justice's finding of a mutual mistake of fact and held it in error. Id. at 625-26. To attain reformation on ground of mutual mistake, the Court stated, "the parties to the contract must both be laboring under the same mutual mistake of fact at the time the agreement was made." Id. at 626. The trial justice, the Court explained, "incorrectly analyzed mutual mistake based on the time the renewal questionnaire was answered." Merrimack, 958 A.2d at 626 n.6. The Court reiterated that the insurance policy was clear and observed that "the evidence of [the insurance company's] original understanding when it sold the insurance is confined to the actual policy that clearly extends coverage to [defendant's] relatives who reside in the household." Id. at 626 (emphasis added). Reference to renewal questionnaires produced subsequent to and apart from the policy, therefore, was inappropriate. Id.

Plaintiff contends that Merrimack requires courts to always determine that a contract is ambiguous before looking outside its terms. However, Merrimack's effect on a court's freedom to refer to extrinsic evidence in mutual mistake of fact cases is not nearly as clear as Plaintiff suggests. This Court is hesitant to adopt Plaintiff's position—which is essentially that Merrimack overrules Marr—when Merrimack does not mention Marr in any fashion. Indeed, the Merrimack Court's failure to recognize Marr suggests that Merrimack leaves the Marr exception to the parol-evidence rule unaffected.

Close scrutiny of Merrimack confirms Marr's continued viability. In Merrimack, our Supreme Court held that the trial justice erroneously referred to extrinsic evidence—the renewal questionnaires—on two separate grounds. First, the Court held that the trial justice's reliance on the renewal questionnaires violated the parol-evidence rule because the insurance contract was unambiguous on its face and did not incorporate the

questionnaires in its terms. Id. at 624-25. This portion of the Court's analysis, notably, took place completely separate from the Court's discussion of mutual mistake of fact. See id. As such, this part of Merrimack's holding merely provides that—outside the mutual mistake context—a trial justice's reference to extrinsic evidence is inappropriate absent a finding of ambiguity. See id.

Second, the Court turned to mutual mistake of fact and held that the trial justice's reference to the renewal questionnaires was erroneous because the questionnaires were not evidence of the parties' intent at the making of the contract. See Merrimack, 958 A.2d at 625-26, 626 n.6. "The parties to the contract," the Court explained, "must both be laboring under the same mutual mistake of fact at the time the agreement was made." Id. at 626 (emphasis added). Reference to the renewal questionnaires, therefore, was inappropriate in the mutual mistake context because they existed subsequent to and separate from the insurance contract; not because the insurance policy was unambiguous. See id. at 626 & n.6. Extrinsic evidence of either party's intent from the time the policy was issued would have been admissible to prove mutual mistake of fact. See id. at 626; Marr, 682 A.2d at 458-59.[8]

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[8] During its discussion of mutual mistake, the Merrimack Court observed that "[t]he evidence of [the insurance company's] original understanding when it sold the insurance is confined to the actual policy that clearly extends coverage to the named insured's relatives who reside in the household." See 958 A.2d at 626. This statement does not contradict this Court's interpretation of Merrimack. This sentence, rather, is nothing more than the Merrimack Court's comment that the record contained no evidence of the insurance company's intent at the time it issued the insurance policy other than the policy itself. See id. Had the insurance company offered extrinsic evidence of either party's intent from the time that the insurance policy was issued, that evidence would have been admissible under Marr to prove mutual mistake of fact. See 682 A.2d at 458-59.

Merrimack does nothing to upend the Marr rule. Therefore, this Court may refer to extrinsic evidence in evaluating National Union's mutual mistake of fact argument, even if the Policy is unambiguous. See Marr, 682 A.2d at 458-59.[9]

2

Review of Extrinsic Evidence

Endorsement 001 states that "effective 12:01 A.M. 11/12/2000 . . . the policy limit is amended to read $2,000,000 in lieu of $1,000,000." Endorsement 001 at 1. National Union proffers extrinsic evidence that it contends creates a genuine issue of material fact as to the presence of a mutual mistake regarding the effective date of the liability limit increase. This evidence includes the Motor Carrier Act Endorsement, the 2001 Binder, e-mails from Chartis and AIG officials, and a Chartis computer entry. According to National Union, "the totality of this evidence shows that a scrivener's error occurred with respect to Endorsement 001, and that the endorsement does not reflect the intent of the parties as to the effective date." Nat'l Union's Jan. 11, 2012 Mem. at 7.

Within the Policy itself, the Motor Carrier Act Endorsement, dated November 7, 2001, provides that "[t]his insurance is primary and the company [National Union] shall not be liable for amounts in excess of $1,000,000 for each accident." Motor Carrier Act Endorsement at 1. The Motor Carrier Act Endorsement suggests that, as of November 7,

[9] Plaintiff also cites Greenwald v. Selya & Iannuccillo, Inc., 491 A.2d 988, 989 (R.I. 1985), and Mallane v. Holyoke Mutual Insurance Co. in Salem, 658 A.2d 18, 20 (R.I. 1995), for the proposition that courts must first determine that a contract is ambiguous before referring to extrinsic evidence. Greenwald and Mallane, however, did not involve an alleged case of mutual mistake of fact. See Mallane, 658 A.2d at 19-21; Greenwald, 491 A.2d at 989-90. As such, neither of these cases implicated the Marr exception to the parol-evidence rule. A finding of ambiguity was the only way for extrinsic evidence to enter in Greenwald and Mallane. That is not the case here.

2001, National Union and First Student understood that the Policy's limit remained at $1 million.[10]

Apart from the Policy's terms, National Union offers extrinsic evidence allegedly indicative of First Student's intent regarding the effective date of Endorsement 001. This evidence consists primarily of two documents dated November 9, 2001: the 2001 Binder sent by Marsh, First Student's insurance broker, to the Policy's underwriter and an e-mail sent by a Marsh employee to an AIG employee.[11] The 2001 Binder states that "effective November 12, 2001 12:01 a.m. and expiring April 1, 2002 12:01 a.m. . . . Combined Single Limit of Liability increased to $2,000,000 per accident." 2001 Binder at 1. The 2001 Binder also provides that First Student must make an additional premium payment of $100,000. The e-mail from Daniel Rivera, a Marsh employee, to Trevor Gallagher, an AIG employee, relates to the 2001 Binder. The text of the e-mail states in relevant part: "Attached please find an endorsement binder of confirmation for the increase of the AL CSL to $2MM as per the noted terms and conditions." Rivera E-mail at 1. These

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[10] Plaintiff notes that the Motor Carrier Act Endorsement states: "[A]ll terms, conditions and limitations in the policy to which the [Motor Carrier Act] endorsement is attached shall remain in full force and effect as binding between the insured and the company." Motor Carrier Act Endorsement at 1. Plaintiff argues that this provision prevents the Motor Carrier Act Endorsement from altering the amount of coverage that is available to First Student and posits that the Motor Carrier Act Endorsement cannot be used to find the Policy ambiguous. Pl.'s Mar. 6, 2012 Sur-Resp. to Nat'l Union's Feb. 28, 2012 Sur-Reply at 2. As this Court has already determined that the Policy is unambiguous, it declines to address this matter further.

[11] Under Rhode Island law, the insurance broker is considered the agent of the insured. See Gen. Accident Ins. Co. of Am. v. Am. Nat'l Fireproofing, Inc., 716 A.2d 751, 756 (R.I. 1998) ("[I]n instances in which an insurance agent represents several companies and has the freedom to choose the company with which he would place an insurance policy, the individual was the agent of the insured and not the insurer."); Monast v. Manhattan Life Ins. Co., 32 R.I. 557, 570, 79 A. 932, 937 (1911) (holding that an insurance broker is "the agent of the assured" and not the insurer). Accordingly, Marsh is First Student's agent and Marsh's actions regarding the Policy are attributable to First Student. See Gen. Accident Ins. Co. of Am., 716 A.2d at 756.

documents suggest that both First Student and National Union anticipated the liability limit increase to occur on November 12, 2001, not November 12, 2000 as provided in Endorsement 001. See Pac. Ins. Co. v. Quarles Drilling Corp., 850 F.2d 1087, 1089 (5th Cir. 1988) (considering difference between insurance binders and insurance policy as relevant in court's determination to reform the policy because neither party intended for the policy to extend coverage to employee injuries).

National Union also submits extrinsic evidence purportedly representative of its own intent regarding the effective date of Endorsement 001. This evidence includes two e-mails from Paul Santos, a Chartis employee, to Kathy Timmons, an AIG employee; an e-mail from Shirley Popowniak, a Chartis employee, to various Chartis employees; and a Chartis computer system image of the transaction log for First Student's Chartis account. This extrinsic evidence originated days after November 12, 2001—the date that National Union asserts that National Union and First Student intended as the effective date of Endorsement 001. Each piece of evidence allegedly pertains to Endorsement 001's increase in the Policy's limits. The e-mails from Santos to Timmons—dated November 15, 2001—explain that the "policy was amended as of 11/12/01 to include $2,000,000 in limits" and "[b]efore 11/12/01 . . . the limit was $1,000,000." Santos E-mail at 1. Popowniak's e-mail from November 20, 2001 states that "losses occurring from 11/12/00-11/12/01 are subject to $1m limit, $1m deductible. Losses occurring from 11/12/01 through expiration (4/1/02) are subject to $2m limit, $2m deductible." Popowniak E-mail at 1. The Chartis computer system image contains a November 20, 2001 entry in the transaction log for First Student's account which states "change limits." Chartis Computer Entry at 1. Santos testified that this entry occurred "[f]ollowing the

receipt of the 2001 Binder." Santos Aff. ¶ 11. These documents seemingly indicate that National Union intended November 12, 2001 as the effective date of the Policy's limit increase.

After review of the pleadings, affidavits, and exhibits in the light most favorable to the nonmoving party, this Court concludes that a genuine issue of material fact exists regarding whether Endorsement 001's effective date is a product of a scrivener's error that may be reformed on grounds of mutual mistake. Taken in its totality, the record evidence indicates that, at the time First Student and National Union entered Endorsement 001, they may not have intended that Endorsement 001 increase the Policy's limit to $2 million effective November 12, 2000. As such, trial is necessary to gauge whether reformation of the Policy is warranted due to a mutual mistake of fact.

Plaintiff argues that no genuine issues of material fact exist with respect to Endorsement 001. In support of her contention, she submits Endorsement 001, a portion of First Student's Response to Plaintiff's Request for Production of Documents, and the affidavit of James Corej, the senior account executive for First Student's insurance program. Plaintiff's extrinsic evidence, however, is irrelevant to the issue of whether Endorsement 001 correctly represents First Student's and National Union's intent or is the product of a mutual mistake of fact.

A mutual mistake of fact involves a shared misconception relating to the parties intent at the time they entered the agreement. Merrimack, 958 A.2d at 624 (citing McEntee, 861 A.2d at 463). Plaintiff offers no evidence beyond the Policy's terms concerning the intent of First Student and National Union. See OneBeacon, 465 F.3d at 42 (suggesting that defendant's reliance on policy language as sole evidence of the

insured's and insurer's intent was insufficient in the face of plaintiff's substantial extrinsic evidence of mutual mistake of fact). National Union does not dispute that Endorsement 001 unambiguously provides for an increase of the Policy's liability limit to $2 million, effective November 12, 2000. Rather, National Union contends that Endorsement 001 does not properly reflect First Student's and National Union's intent as to the effective date of the limit increase and seeks reformation due to a mutual mistake of fact.

Our Supreme Court has held that the parol-evidence rule does not bar admission of extrinsic evidence relating to an unambiguous contract where,

> "by reason of a mutual mistake common to both sides of the contract, the written document fails in some material respect correctly to reflect their prior completed understanding. In such instances, extrinsic or parol evidence should be admitted for the purpose of reforming the contract to mirror the true intent of the parties." Marr, 682 A.2d at 458-59 (emphases added) (internal quotation marks and citations omitted).

Plaintiff's extrinsic evidence does not address First Student's or National Union's intent at the time of the agreement and thus fails to reach the very heart of the mutual mistake of fact inquiry. See id. First Student's Response to Plaintiff's Request for Production of Documents states that "[i]t has been represented to defense counsel that insurance coverage effective at the time of the collision mentioned in the complaint is as follows: National Union Fire Insurance Company of Pittsburgh, PA., policy No. CA 527-33-55. Policy limit of Two Million Dollars, deductible of One Million Dollars." Pl.'s App. at 40. Similarly, Corej testified: "To my knowledge, there have been no revocations, rescissions, or cancellations of Endorsement #001 of the National Union Fire Insurance Company of Pittsburgh, PA, policy # CA 527-33-55. Endorsement #001 increased the

limits of the insurance coverage from $1 million to $2 million." Pl.'s App. at 3. Both pieces of evidence simply parrot the terms of the Policy and do not separately address either First Student's or National Union's intent as to the effective date of Endorsement 001 at the time they entered the agreement. See Merrimack, 958 A.2d at 626 & n.6; Marr, 682 A.2d at 458-59. They do not directly address the mutual mistake of fact issue. See id.; see also OneBeacon, 465 F.3d at 42.

Plaintiff also contends that National Union "has not proffered any extrinsic evidence of mutual mistake" because National Union's extrinsic evidence speaks solely to National Union's intent. Pl.'s Mar. 6, 2012 Sur-Resp. to Nat'l Union's Feb. 28, 2012 Sur-Reply at 2 (emphasis removed). A review of the record indicates that National Union has offered evidence of First Student's intent in the form of the Motor Carrier Act Endorsement and two documents prepared by First Student's insurance broker: the 2001 Binder and the Rivera E-mail. Supra at 18-19; see Gen. Accident Ins. Co. of Am. v. Am. Nat'l Fireproofing, Inc., 716 A.2d 751, 756 (R.I. 1998) (holding that the insurance broker is considered the agent of the insured); Monast v. Manhattan Life Ins. Co., 32 R.I. 557, 570, 79 A. 932, 937 (1911) (same).

Nonetheless, Plaintiff argues that Counsel for First Student, National Union's insured, "has maintained in open Court that there is no extrinsic evidence—let alone clear and convincing evidence—that First Student intended the $2,000,000 in coverage not to commence until November 12, 2001." Pl.'s Mar. 6, 2012 Sur-Resp. at 2 (emphasis removed). In support of her argument, Plaintiff refers this Court to a statement by Counsel for First Student at a hearing on December 6, 2011. On that day, Counsel for First Student addressed the Policy's liability limit:

> "According to our client its two million dollars. If there was a scrivener's error, we haven't seen any evidence that this was actually transmitted to our client. We've not been able to find any e-mail, any correspondence to say there was a scrivener's error or to talk about what the binder said."

Counsel for First Student's statements arguably contradict the 2001 Binder and the Rivera E-mail, both of which suggest that First Student may have intended the liability limit increase to occur on November 12, 2001. Statements of First Student's counsel, however, do not entitle Plaintiff to summary judgment. Rather, they strengthen this Court's conclusion that there is a genuine issue of material fact regarding the Policy's terms that must be resolved through trial.

Today's ruling simply concludes that a genuine issue of material fact exists as to the presence of a mutual mistake of fact regarding the Policy's terms. This Court does not pass judgment on the credibility, accuracy, or ultimate truth of the evidence submitted for the purposes of this Motion and nothing in this Decision should be interpreted as doing so. National Union must prove at trial that reformation on account of mutual mistake is, in fact, warranted. This burden is substantial. National Union must not simply show that Endorsement 001 differed from its expectations, but that Endorsement 001's language did not reflect the agreement as National Union and First Student intended. OneBeacon, 465 F.3d at 42 ("The mistake that [the insurance company] must demonstrate—to a high degree of certainty—is not that the outcome of its agreement differed from its expectations, but rather that the contract language did not express the agreement as originally intended."). There "can be no reformation unless the variance between what is written and what was originally intended, as well as the mutual mistake,

are demonstrated by clear and convincing evidence." Hopkins, 107 R.I. at 685, 270 A.2d at 918 (emphasis added) (citations omitted).[12]

Nonetheless, after review of the evidence, this Court concludes that National Union has satisfied its burden at the summary judgment stage. A genuine issue of material fact exists as to the presence of a scrivener's error in Endorsement 001 that could necessitate reformation of the Policy due to mutual mistake. As such, National Union is entitled to an opportunity to demonstrate at trial by clear and convincing evidence that such a mutual mistake exists.[13]

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[12] Plaintiff argues that "whether or not there is a scrivener's error, there still must be clear and convincing evidence that each party to the insurance contract—namely, both the insurer and the insured—intended the contract to state something else." Pl.'s Mar. 6, 2012 Sur-Resp. at 5. Plaintiff is correct. National Union must ultimately present clear and convincing evidence of a mutual mistake before this Court will reform the Policy. Hopkins, 107 R.I. at 685, 270 A.2d at 918. National Union, however, bears this burden at trial. Id. On summary judgment, National Union need only show that there is a genuine issue of material fact as to the existence of a mutual mistake. Accent Store Design, 674 A.2d at 1225. National Union has met this threshold.

[13] Plaintiff also contends that "the language of the National Union policy provides First Student . . . insurance coverage because the 'Deductible Coverage Endorsement – Form A' to that policy requires National Union, itself, to 'pay all sums…up to… [the] limit of insurance under the policy.'" Pl.'s Nov. 8, 2011 Mem. at 8-16 (emphasis and brackets in original). National Union, however, does not disavow its responsibility to pay up to the limit of liability on the Policy (whatever that may ultimately be) if First Student is found liable. Thus, Plaintiff's argument raises a non-issue that this Court declines to address.

IV

Conclusion

After due consideration of the pleadings, affidavits, and exhibits submitted by the parties in the light most favorable to the nonmoving party, Defendant National Union Fire Insurance Company of Pittsburgh, PA, this Court concludes that a genuine issue of material fact exists as to the presence of a scrivener's error in Endorsement 001 that may warrant reformation of the endorsement on account of a mutual mistake of fact. Thus, Plaintiff Naysha Berrios' Motion for Summary Judgment is denied. Counsel shall submit an appropriate Order for entry.