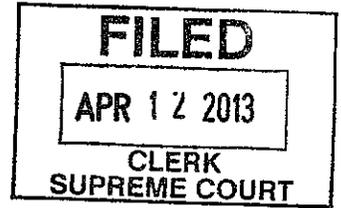


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-317-D



JAMES D. NICHOLS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 05-CI-008961

v.

ZURICH AMERICAN INSURANCE
COMPANY

APPELLEE

* * * * *

BRIEF FOR APPELLEE, ZURICH AMERICAN INSURANCE COMPANY

Submitted by:

A handwritten signature in black ink, appearing to read "Robert E. Stopher", written over a horizontal line.

Robert E. Stopher
Robert D. Bobrow
BOEHL STOPHER & GRAVES, LLP
400 West Market Street, Suite 2300
Louisville, KY 40202
Phone: (502) 589-5980
Fax: (502) 561-9400
COUNSEL FOR APPELLEE, ZURICH
AMERICAN INSURANCE COMPANY

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of this Brief for Appellee was this 12th day of April, 2013 mailed to the following: Honorable Irv Maze, Judge, Jefferson Circuit Court, Division 10, 700 W. Jefferson Street, Louisville, KY 40202; Mr. Udell B. Levy, UDELL B. LEVY, P.S.C., 455 S. 4th Street, Ste. 1450, Starks Building, Louisville, KY 40202; Mr. Kevin C. Burke, 125 S. 7th Street, Louisville, KY 40202; Mr. David G. Richardson, MARKESBERY & RICHARDSON CO., L.P.A., 110 E. Third Street, Lexington, KY 40508, Mr. Samuel Givens, Jr., Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. It is further certified, pursuant to CR 76.12(6), that the record on appeal was not withdrawn from the Clerk of the Jefferson Circuit Court by the appellee.

A handwritten signature in black ink, appearing to read "Robert E. Stopher", written over a horizontal line.

COUNSEL FOR APPELLEE, ZURICH
AMERICAN INSURANCE COMPANY

I. STATEMENT CONCERNING ORAL ARGUMENT

We believe that oral argument might assist the Court in deciding the issues presented, in part because oral argument offers the opportunity for the Court to ask questions of counsel to streamline and clarify the arguments presented in the briefs.

II. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

III. COUNTERSTATEMENT OF THE CASE 1 - 7

A. INTRODUCTION 1

B. THE UIM-COVERAGE ISSUE 1 - 2

C. THE EVIDENCE OF MUTUAL MISTAKE..... 2 - 6

D. THE LOWER COURTS’ DECISIONS 6 - 7

E. THE ISSUES ON APPEAL7

IV. ARGUMENT.....8 - 39

A. KENTUCKY COURTS WILL REFORM AN INSURANCE POLICY WHEN THERE IS CLEAR-AND-CONVINCING EVIDENCE THAT THE POLICY FAILS TO REFLECT THE PARTIES’ COVERAGE AGREEMENT. IN THIS CASE, IT IS UNDISPUTED THAT MILLER PIPELINE DID NOT WANT KENTUCKY UIM COVERAGE, THAT ZURICH INCLUDED KENTUCKY UIM COVERAGE IN THE ORIGINAL VERSION OF BAP 3473032-00, AND THAT MILLER PIPELINE ACCEPTED THE ORIGINAL VERSION OF BAP 3473032-00 WITH THE UNWANTED COVERAGE IN IT. DID THE CIRCUIT COURT ERR WHEN IT REFORMED BAP 3473032-00 TO REFLECT THE PARTIES’ INTENT THAT THE POLICY NOT INCLUDE KENTUCKY UIM COVERAGE?8 - 20

Phillips v. Akers, 103 S.W.3d 705, 709 (Ky. App. 2002).....8

Vinson v. Sorrell, 136 S.W.3d 465, 470 (Ky. 1934)8

CR 52.01.....8

(1) The evidence of mutual mistake in this case is more than clear and convincing: it is undisputed. 8 - 17

<i>U.S. Fidelity & Guaranty Co. v. Hunt</i> , 336 S.W.2d 559, 560 (Ky. 1960)	8,10-13, 15
<i>Flimin's Adm'x v. Metro Life. Ins. Co.</i> , 75 S.W.2d 207, 209 (Ky. 1934)	8, 10,11,14, 15
Restatement (Second) of Contracts § 155	9
<i>Campbellsville Lumber Co. v. Winfrey</i> , 303 S.W.2d 284, 285-86 (Ky. 1957)	9
<i>Columbian Nat. Life Ins. Co. v. Black</i> , 35 F.2d 571 (10th Cir. 1929)	10
<i>Johnson v. Holbrook</i> , 302 S.W.2d 608, 611 (Ky. 1957)	10
<i>Girard Fire & Marine Ins. Co. v. Anglo-American Mill Co.</i> , 294 S.W. 1035 (Ky. 1927)	11, 12, 14, 15
<i>Home Ins. Co. of New York v. Evans</i> , 257 S.W. 22 (Ky. 1923)	12, 14, 15
<i>Hemphill v. New York Life Ins. Co.</i> , 243 S.W.2d 1040, 1042 (Ky. 1926)	15, 16
<u>(2) Zurich did not have to prove that it knew that Miller Pipeline didn't want Kentucky UIM coverage and issued the coverage anyway.</u>	17, 18
<i>Girard Fire & Marine Ins. Co. v. Anglo-American Mill Co.</i> , 294 S.W. 1035 (Ky. 1927)	17
<i>Home Ins. Co. of New York v. Evans</i> , 257 S.W. 22 (Ky. 1923)	17
<i>U.S. Fidelity & Guaranty Co. v. Hunt</i> , 336 S.W.2d 559, 560 (Ky. 1960)	.. 17
<i>Flimin's Adm'x v. Metro Life. Ins. Co.</i> , 75 S.W.2d 207, 209 (Ky. 1934) 17
<i>Hemphill v. New York Life Ins. Co.</i> , 243 S.W.2d 1040, 1042 (Ky. 1926)	.. 17
<u>(3) Zurich produced undisputed evidence that it "issued UIM coverage knowing Miller Pipeline did not want it."</u>	18
<i>Pan-American Life Ins. Co. v. Roethke</i> , 30 S.W.3d 128, 131 (Ky. 2000)	... 18
KRS 304.9-035	18
<u>(4) Whether Zurich refunded premium when it issued Form U-GU-D-321-A is irrelevant to to the mutual-mistake issue in this case.</u>	19 -20

Girard Fire & Marine Ins. Co. v. Anglo-American Mill Co., 294 S.W. 1035 (Ky. 1927).....20

Home Ins. Co. of New York v. Evans, 257 S.W. 22 (Ky. 1923)20

U.S. Fidelity & Guaranty Co. v. Hunt, 336 S.W.2d 559, 560 (Ky. 1960) ..20

Flimin's Adm'x v. Metro Life. Ins. Co., 75 S.W.2d 207, 209 (Ky. 1934).....20

Hemphill v. New York Life Ins. Co., 243 S.W.2d 1040, 1042 (Ky. 1926) ..20

B. NICHOLS DID NOT ARGUE THAT ZURICH WAIVED ITS MUTUAL-MISTAKE DEFENSE IN THE COURT OF APPEALS. THEREFORE, HE DID NOT PRESERVE THE WAIVER ARGUMENT HE IS MAKING TO THIS COURT. SUBSTANTIVELY, A WAIVER IS A VOLUNTARY RELINQUISHMENT OF A KNOWN RIGHT. THUS, THE QUESTION WHEN IT COMES TO WAIVER IS WHETHER ZURICH VOLUNTARILY RELINQUISHED ITS MUTUAL-MISTAKE DEFENSE BY ASSERTING THE DEFENSE IN ITS AMENDED ANSWER. 21 - 25

Skaggs v. Assad, By and Through Assad, 712 S.W.2d 947 (Ky. 1986) 21, 22

Pierson v. Coffey, 706 S.W.2d 409 (Ky. App. 1985) 21, 22

CR 76.12 (4)(c)(v) 21

Howard v. Motorists Mutual Ins. Co., 955 S.W.2d 525, 526 (Ky. 1997) . .22

Edmondson Penn v. Nat'l Mut. Cas. Ins. Co., 781 S.W.2d 753, 756 (Ky. 1989) 22

Kenney v. Hanger Prosthetics & Orthotics, Inc., 269 S.W.3d 869, 870 (Ky. App. 2007) 23

C. WHEN A COURT REFORMS A WRITTEN CONTRACT, IT FIXES THE INCORRECT WRITTEN EXPRESSION OF THE CONTRACT TO MAKE IT CONFORM TO THE PARTIES' ORAL AGREEMENT. HERE, THE CIRCUIT COURT REFORMED THE ORIGINAL VERSION OF BAP 3473032-00 SO THAT IT CONFORMED WITH THE PARTIES' AGREEMENT THAT THE POLICY NOT INCLUDE KENTUCKY UIM COVERAGE. DID THE CIRCUIT COURT'S REFORMATION RETROACTIVELY CANCEL KENTUCKY UIM COVERAGE IN VIOLATION OF KENTUCKY STATUTES? 26 - 35

KRS 304.14-180	26
KRS 304.14-110	26
KRS 304.20-30.....	26
KRS 304.20-020	26
KRS 304.39-020	26
<u>(1) KRS 304.14-180 does not apply here</u>	26 - 28
KRS 304.14-180	26 - 28
<i>Westchester Fire Ins. Co. v. Wilson</i> , 294 S.W. 1059 (Ky. 1927)	27
<u>(2) KRS 304.14-110 does not apply here</u>	28
KRS 304.14-110	28
<u>(3) KRS 304.20-030 does not apply here.</u>	28 - 32
KRS 304.20-030	28, 29
<i>Argonaut Great Central Ins. Co. v. Audrain County</i> , 2012 U.S. Dist. LEXIS 87547 (E.D. Mo.)	29
<i>Schools Excess Liability Fund v. Westchester Fire Ins. Co.</i> , 2010 Cal. App. Unpub. LEXIS 9222 (2010)	30, 31
<u>(4) KRS 304.20-020(1) does not apply here</u>	32 - 33
KRS 304.20-020	32, 33
KRS 304.39-020	32, 33
<u>(5) KRS 304.39-320 does not apply here</u>	33 - 35
KRS 304.39-020	33, 34
<i>Whitson v. Parks</i> , 163 S.W.2d 298 (Ky. 1942)	34, 35
Restatement (Second) of Contracts § 155	35
D. NICHOLS IS NOT ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE UIM-COVERAGE ISSUE.	36

E. UNDER CR 15, THE CIRCUIT COURT HAD THE DISCRETION TO DENY NICHOLS’S MOTION TO AMEND HIS COMPLAINT TO ADD A BAD-FAITH CLAIM. NICHOLS MADE HIS MOTION SEVEN DAYS AFTER THE CIRCUIT COURT ENTERED SUMMARY JUDGMENT FOR ZURICH, MORE THAN FOUR YEARS AFTER HE HAD FILED SUIT, AND EIGHT YEARS AFTER THE SUBJECT AUTO ACCIDENT. IN LIGHT OF THESE FACTS, DID THE CIRCUIT COURT ABUSE ITS DISCRETION IN DENYING NICHOLS’S MOTION TO AMEND? ... 36 - 39

Kenney v. Hanger Prosthetics & Orthotics, Inc., 269 S.W.3d 869, 870 (Ky. App. 2007)36

Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993) 37, 38

Knotts v. Zurich Ins. Co., 197 S.W.3d 512, 522-23 (Ky. 2006)38, 39

V. CONCLUSION 39

VI. INDEX TO APPENDIX..... A1

III. COUNTERSTATEMENT OF THE CASE

A. INTRODUCTION

This is an underinsured-motorist-coverage case. It arises out of a June 2002 accident. Plaintiff/appellant James Nichols was injured in that accident.

Nichols brought a personal-injury claim against Michael Murphy—the driver who caused Nichols’s accident. Murphy’s insurer paid to settle the claim.

As Nichols was on the job with Miller Pipeline Corporation at the time of his accident, he also brought a workers’-compensation claim against Miller Pipeline. Miller Pipeline’s workers’-compensation insurer paid to settle that claim.

In addition to his tort and workers’-compensation claims, Nichols brought UIM claims against defendant/appellee Zurich American Insurance Company and Founders Insurance Company. Zurich insured the Miller Pipeline truck Nichols was driving at the time of his accident.¹ Founders is a defendant because it provided UIM coverage for Nichols’s personal vehicles.

Although Nichols sued both Zurich and Founders in this action, Zurich is the only appellee here. Nichols’s UIM claim against Founders remains in the circuit court. Founders hasn’t disputed that it has UIM coverage in this case.

B. THE UIM-COVERAGE ISSUE

The ultimate issue in this case is whether Zurich had UIM coverage on the Miller Pipeline truck that Nichols was driving at the time of his accident. Ordinarily, this issue would pose a question the Court could answer on the face of the subject policy—

¹ Policy Number BAP 3473032-00 (Appendix Item 1).

BAP 3473032-00. But this isn't an ordinary coverage case. The coverage question here is complicated by two conflicting but undisputed facts. The first of these two undisputed facts is that, as originally issued, BAP 3473032-00 showed that Miller Pipeline had \$1,000,000 in Kentucky UIM coverage. The second undisputed fact is that Miller Pipeline rejected Kentucky UIM coverage prior to Zurich issuing BAP 3473032-00.²

Another undisputed fact that's material here is that, when Miller Pipeline advised Zurich that it had mistakenly included UIM coverage in BAP 3473032-00, Zurich issued Common Policy Change Endorsement 002 (Form U-GU-D-321-A) to BAP 3473032-00.³ The endorsement "cancelled" the Kentucky UIM coverage that Zurich had mistakenly included in the original version of BAP 3473032-00.⁴ To show that the Kentucky UIM coverage was a mistake and was never part of BAP 3473032-00, Zurich made Form U-GU-D-321-A effective April 01, 2002—BAP 3473032-00's effective date.

C. THE EVIDENCE OF MUTUAL MISTAKE

Zurich moved for summary judgment twice in this case. Zurich's first motion was very simple. Zurich argued that it was entitled to summary judgment because Common Policy Change Endorsement 002 (Form U-GU-D-321-A) provides that Miller Pipeline rejected Kentucky UIM coverage prior to April 1, 2002—BAP 3473032-00's effective date.⁵ The circuit court rejected this argument. The court held that Form

² Deposition of Jeanne Fuqua, pp. 9-10 (Appendix Item 2); Deposition of Kathy Kebo, p. 13 (Appendix Item 3).

³ Form U-GU-D-321-A (Appendix Item 4).

⁴ *Id.*

⁵ Memorandum in Support of Motion for Summary Judgment (Appendix Item 5).

U-GU-D-321-A created an ambiguity because, on its face, the original version of BAP 3473032-00 included Kentucky UIM coverage while Form U-GU-D-321-A provided that the UIM coverage was never there.⁶

After the circuit court denied Zurich's initial summary-judgment motion, Zurich took discovery on BAP 3473032-00's formation. The discovery included deposing Jeanne Fuqua of Miller Pipeline and Kathy Kebo of M.J. Insurance. Fuqua and Kebo explained why the original version of BAP 3473032-00 provided that Miller Pipeline had Kentucky UIM coverage while Form U-GU-D-321-A provided that Miller Pipeline had rejected the coverage prior to Zurich issuing BAP 3473032-00. Fuqua and Kebo testified that the inconsistency between Form U-GU-D-321-A and the original version of BAP 3473032-00 was due to the fact that Zurich mistakenly issued BAP 3473032-00 with Kentucky UIM coverage in it.⁷ Because of Zurich's mistake, it had to issue Form U-GU-D-321-A to correct the mistake. Zurich made Form U-GU-D-321-A effective April 1, 2002 to show that Miller Pipeline rejected Kentucky UIM coverage before Zurich issued BAP 3473032-00.

Fuqua and Kebo also testified that BAP 3473032-00 was the first commercial-auto policy that Zurich had issued to Miller Pipeline. Accordingly, Miller Pipeline and Zurich had to design and build the policy from scratch. As Miller Pipeline's Director of Risk Management, Fuqua was directly involved in that process and had

⁶ Order Denying (ROA 262-65).

⁷ Fuqua, pp. 9-10; Kebo, p. 13.

personal knowledge of Miller Pipeline's position on Kentucky UIM coverage.⁸ Fuqua testified:

Q. [C]an you tell us what the business custom . . . of Miller Pipeline was in the spring of '02 . . . with regard to optional coverages such as underinsured motorists coverage?

A. [I]t was the custom of Miller Pipeline . . . to only carry coverages that were the minimum coverages that were required. In other words, Miller Pipeline was not accustomed to taking any optional or enhanced coverages.⁹

Q. Now given that this commercial auto policy as initially issued, effective April 1, 2002, included an optional coverage, specifically underinsured motorists coverage in Kentucky, would you say that that was a mistake?

A. Yes.

Q. Was it ever the intention of Miller Pipeline . . . to purchase . . . underinsured motorists coverage in Kentucky?

A. No.¹⁰

Q. Ms. Kebo testified . . . that the proposal that was written up by M.J. contained . . . mistakes . . . specifically with regard to underinsured motorists coverage in Kentucky.

Q. Do you agree with her testimony in that regard?

A. Yes. . . .

Q. Was that communicated to the representatives of M.J. Insurance at the . . . presentation meeting?

A. Yes, it was.¹¹

Q. And the [2002] proposal included . . . underinsured coverage.

⁸ Fuqua, pp. 6, 9-10.

⁹ *Id.* at 9-10.

¹⁰ *Id.* at 10.

¹¹ *Id.* at 17-18.

A. On the proposal it shows underinsured/uninsured motorists limit as one million dollars. . . .

Q. Do you recall . . . specific discussions with any person . . . at M.J. Insurance regarding that proposal?

A. Yes. . . . There would have been discussions at the time it was proposed that the coverages as presented were not what we had requested. . . .

Q. Okay. . . .

A. There were three people from M.J. sitting in the meeting when it was proposed. . . .

Q. All right.

A. Dale Miller, myself, Doug Banning and Dan Waters (all from Miller Pipeline) were also in the proposal presentation. It was commented immediately that the underinsured motorists coverage . . . be removed.

Q. All right.

A. At that time. This would have been before April the 1st, because this proposal would have taken place anywhere from after 3/24 of 2002 prior to the date the coverages would have be[come effective].¹²

Fuqua's testimony is unequivocal. Miller Pipeline didn't want Kentucky UIM coverage. The Kentucky UIM coverage in the original version of BAP 3473032-00 was a mistake. According to Fuqua:

[Miller Pipeline] never purchased underinsured . . . coverage. Whether it shows it in a proposal which is not the actual policy itself, [Miller Pipeline] would not have been concerned with underinsured . . . coverage, which is a . . . coverage we never wanted. . . . The [Kentucky UIM] coverage was never there.¹³

¹² *Id.* at 47-49.

¹³ *Id.* at 62, 64.

Kathy Kebo worked for M.J. Insurance—the broker that helped design BAP 3473032-00.¹⁴ Kebo testified that she knew that Miller Pipeline didn't want Kentucky UIM coverage.¹⁵ Kebo testified that Zurich was mistaken to include the coverage in BAP 3473032-00.¹⁶

I'm very clear that [the Kentucky UIM coverage was a mistake], because this was discussed before we wrote the policy. . . . [Miller Pipeline's] intention was to not carry [Kentucky UIM] coverage. And that was discussed with us prior to our writing that policy, that categorically they do not want to carry [Kentucky UIM] coverage.¹⁷

Kebo's testimony is unequivocal and consistent with Fuqua's. Both testified that Miller Pipeline didn't want Kentucky UIM coverage. Both testified that Zurich made a mistake when it included Kentucky UIM coverage in the original version of BAP 3473032-00. According to Fuqua, "[t]he [UIM] coverage was never there."¹⁸

D. THE LOWER COURTS' DECISIONS

After deposing Fuqua and Kebo, Zurich moved for summary judgment a second time. This time, Zurich argued that the Kentucky UIM coverage in the original version of BAP 3473032-00 was the result of a mutual mistake. The Jefferson Circuit Court agreed. Zurich's mistake was including Kentucky UIM coverage in BAP 3473032-00 when Miller Pipeline didn't want it. Miller Pipeline's mistake was accepting BAP

¹⁴ Kebo, pp. 6-7.

¹⁵ *Id.* at 9-10.

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 13-14, 57-58.

¹⁸ Fuqua, p. 64.

3473032-00 although it contained coverage that Miller Pipeline didn't want. The circuit court reformed BAP 3473032-00 to reflect the parties' intent that BAP 3473032-00 not include Kentucky UIM coverage. The Kentucky Court of Appeals affirmed.

E. THE ISSUES ON APPEAL

Nichols's brief in this Court contains five numbered arguments and numerous sub-arguments. First, Nichols argues that the lower courts erred by finding that there's clear-and-convincing proof of mutual mistake.¹⁹ Second, he argues that Zurich waived its mutual-mistake defense by failing to plead it affirmatively and with particularity.²⁰ Third, Nichols contends that, even if there was a mutual mistake, the circuit court erred in reforming BAP 3473032-00 because, as reformed, the policy violates Kentucky insurance statutes.²¹ Fourth, Nichols argues that, in the absence of mutual mistake, he was entitled to summary judgment on the UIM-coverage issue.²² Fifth, Nichols argues that, on remand, he should be allowed to add a bad-faith claim to his lawsuit.²³

¹⁹ Brief of Appellant, pp. 10-15.

²⁰ *Id.* at 15-17.

²¹ *Id.* at 17-23.

²² *Id.* at 23-25.

²³ *Id.* at 25-28.

IV. ARGUMENT

A. KENTUCKY COURTS WILL REFORM AN INSURANCE POLICY WHEN THERE IS CLEAR-AND-CONVINCING EVIDENCE THAT THE POLICY FAILS TO REFLECT THE PARTIES' COVERAGE AGREEMENT. IN THIS CASE, IT IS UNDISPUTED THAT MILLER PIPELINE DID NOT WANT KENTUCKY UIM COVERAGE, THAT ZURICH INCLUDED KENTUCKY UIM COVERAGE IN THE ORIGINAL VERSION OF BAP 3473032-00, AND THAT MILLER PIPELINE ACCEPTED THE ORIGINAL VERSION OF BAP 3473032-00 WITH THE UNWANTED COVERAGE IN IT. DID THE CIRCUIT COURT ERR WHEN IT REFORMED BAP 3473032-00 TO REFLECT THE PARTIES' INTENT THAT THE POLICY NOT INCLUDE KENTUCKY UIM COVERAGE?²⁴

Nichols's first argument is that the circuit court erred by reforming BAP 3473032-00 because "there is no proof that Zurich mistakenly issued UIM coverage."²⁵ As we'll show, the circuit didn't err. The evidence of mutual mistake in this case is not only clear and convincing as required, it is undisputed.

(1) The evidence of mutual mistake in this case is more than clear and convincing: it is undisputed.

The circuit court reformed BAP 3473032-00 because of a mutual mistake. Reformation is an equitable remedy that a court can use when a written contract fails to express the contracting parties' intent.²⁶ As the Restatement (Second) of Contracts explains:

²⁴ Ordinarily, the Court's review of a summary judgment would be *de novo*. But here, the circuit court's reformation of BAP 3473032-00 was an equitable decision based on a finding of mutual mistake. The circuit court's finding should "not be set aside unless [it] is clearly erroneous, that is not supported by substantial evidence." *Phillips v. Akers*, 103 S.W.3d 705, 709 (Ky. App. 2002); *Vinson v. Sorrell*, 136 S.W.3d 465, 470 (Ky. App. 2004); also CR 52.01.

²⁵ Brief of Appellant, pp. 10-15.

²⁶ *U.S. Fidelity & Guaranty Co. v. Hunt*, 336 S.W.2d 559, 560 (Ky. 1960); *Flimin's Adm'x v. Metro. Life Ins. Co.*, 75 S.W.2d 207, 209 (Ky. 1934).

Where a writing that evidences . . . an agreement . . . fails to express the agreement because of a mistake of both parties as to the contents . . . of the writing, [a] court may . . . reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.²⁷

Contract reformation is distinct from contract interpretation. Therefore, the familiar rules of contract-interpretation do not apply in reformation cases.²⁸ A good example is the parol-evidence rule. Under the rule, parol evidence is generally not used in contract-interpretation cases. However, in reformation cases, courts use parol evidence to alter contracts' written terms to reflect the contracting parties' original intent. As this Court explained, "[t]hat is the whole purpose of [reformation]," to alter the written terms of a contract so that it reflects the parties' bargain.²⁹

Although courts use parol evidence in reformation cases to alter the written terms of contracts, "[r]eformation does not amount to rewriting the agreement or making a new agreement. Instead, reformation modifies the written—and incorrect—expression of the agreement to make it conform to the terms of the actual, prior agreement."³⁰ "Mutual mistake pertaining to the reformation of contracts means that the parties had a common understanding in a prior agreement, but the written document failed to express one or more aspects of the agreement."³¹

²⁷ Restatement (Second) of Contracts, § 155.

²⁸ *Campbellsville Lumber Co. v. Winfrey*, 303 S.W.2d 284, 285-86 (Ky. 1957).

²⁹ *Id.* at 286.

³⁰ 1-3 Appleman on Insurance 3.01.

³¹ *Id.*

Narrowing our focus to insurance contracts, policies like BAP 3473032-00 are contracts subject to reformation.³² And “[w]ith the volume of insurance policies issued each year around the country, some mistakes inevitably occur, especially in the language used in the policy or the nature of the coverage afforded an insured.”³³ Consequently, courts regularly reform insurance policies.³⁴ As this Court explained, “[i]t is a well-established rule in this as well as practically all other jurisdictions that a contract of insurance, like any other contract, may be reformed for mutual mistake of the parties.”³⁵

Under Kentucky law, “[a] mutual mistake in respect to [contract] formation is one in which both parties participate, each laboring under the same misconception.”³⁶ In insurance-coverage cases, mutual mistakes often occur when the insurer reduces an oral coverage agreement to writing. The initial mistake in this situation is the insurer’s failure to accurately record the parties’ oral agreement in the written policy. The second mistake occurs when the insured accepts the written policy believing that it conforms to the parties’ oral agreement.³⁷ No matter how a mutual

³² *Hunt*, 336 S.W.2d at 560; *Flimin's Adm'x*, 75 S.W.2d at 209; see also *Columbian Nat. Life Ins. Co. v. Black*, 35 F.2d 571 (10th Cir. 1929).

³³ 1-3 Appleman on Insurance 3.08.

³⁴ *Hunt*, 336 S.W.2d at 560; *Flimin's Adm'x*, 75 S.W.2d at 209; *Columbian Nat. Life Ins. Co.*, 35 F.2d at 571.

³⁵ *Flimin's Adm'x*, 75 S.W.2d at 209.

³⁶ *Johnson v. Holbrook*, 302 S.W.2d 608, 611 (Ky. 1957); *Hunt*, 336 S.W.2d at 560; *Flimin's Adm'x*, 75 S.W.2d at 209.

³⁷ *Flimin's Adm'x*, 75 S.W.2d at 209.

mistake occurs; for a court to reform an insurance policy for mutual mistake, the moving party must prove the mistake with clear-and-convincing evidence.³⁸

Now that we have reviewed the basics, we will look at some case law. We will start with *Girard Fire & Marine Ins. Co. v. Anglo-American Mill Co.*³⁹ In that case, after fire destroyed Anglo-American Mill's grain elevator, Anglo-American sought indemnity from Girard Fire. Girard Fire denied indemnity because, on its face, Anglo-American's Girard policy didn't cover the elevator.⁴⁰

Anglo-American sued to reform its Girard policy. Anglo-American argued that Girard's agent and Anglo-American had agreed that Anglo-American's policy would cover the elevator and that Girard mistakenly omitted the coverage from the written policy.⁴¹ This Court agreed. The Court held that the policy's lack of elevator coverage was a mutual mistake that should be reformed. In the Court's words:

The destroyed elevator was not covered by the original policy, and unless it was the intention of the parties at the time it was written for it to be so covered, no recovery can be had thereon. On the other hand, if it was their intention to include it, and by mutual mistake and inadvertence of the draftsman it was improperly described, the policy could be reformed in a court of equity We have seen that Mr. Little requested Miss Otis to carry \$ 6,000.00 on the mill property and that she intended to do this. . . . The minds of the parties met on this proposition and under such circumstances a mistake in the description of the elevator in the policy may be corrected and that instrument reformed to conform to the intention of the parties.⁴²

³⁸ *Hunt*, 336 S.W.2d at 560; *Flimin's Adm'x*, 75 S.W.2d at 209.

³⁹ 294 S.W. 1035 (Ky. 1927).

⁴⁰ *Id.* at 1039.

⁴¹ *Id.*

⁴² *Id.*

Girard Fire is an archetypical mutual-mistake case. The *Girard Fire* Court found that Anglo-American's policy did not express the parties' coverage agreement so the court reformed the policy. Girard's mistake was issuing the policy without elevator coverage. Anglo-American's mistake was accepting the policy without the coverage.

The next case we'll look at is *Home Ins. Co. of New York v. Evans*.⁴³ In *Evans*, J. L. Evans bought fire insurance for his stock barn from Home Insurance. When the barn burned, Home Insurance denied coverage based on an exclusion. Evans admitted that the exclusion defeated coverage for his stock barn. But Evans argued that Home Insurance had orally agreed to omit the exclusion from his policy.⁴⁴ The trial court agreed with Evans and reformed the policy. The court explained that, with the exclusion in the policy, "it d[id] not conform to the parties' real agreement."⁴⁵ Home Insurance appealed, but this Court affirmed.

The simple point in *Evans* is the same as in *Girard Fire*. Evans's Home Insurance policy did not express the parties' oral coverage agreement so reformation was appropriate. The two mistakes in *Evans* were Home Insurance's mistake of including the unwanted exclusion in Evans's policy and Evans's mistake in accepting the policy with the exclusion in it.

The next case is *U.S. Fidelity & Guaranty Co. v. Hunt*.⁴⁶ In *Hunt*, Edgar Hunt owned two houses in Floyd County. The houses sat across the street from each

⁴³ 257 S.W. 22 (Ky. 1923).

⁴⁴ *Id.* at 23.

⁴⁵ *Id.*

⁴⁶ 336 S.W.2d 559, 560 (Ky. 1960).

other. Hunt bought two fire policies on one of the houses. But he maintained no coverage on the other house.⁴⁷ Unfortunately, both of Hunt's fire policies listed the wrong house as the insured house. Even more unfortunate, that house burned and Hunt asserted claims under his two policies. When he did, both insurers denied coverage and sought to reform their policies based on mutual mistake. The insurers argued that they had mistakenly listed the wrong house in their policies.⁴⁸

The *Hunt* circuit court gave the mutual-mistake issue to a jury. The jury found that the insurers' mutual-mistake evidence was not clear and convincing. Therefore, the circuit court refused to reform the policies and entered judgment for Hunt.⁴⁹ The insurers appealed.

On appeal, this Court reviewed the insurers' evidence, reversed, and remanded. The Court's remand order directed the circuit court to reform the two policies. In the Court's words:

In light of the appellee's own testimony, it must be concluded that it was his intention to insure the Byrd Hill dwelling, and that this was the property meant to be insured under the policies written by Hall. Therefore, court of equity will reform such contracts so as to make them accord with the intentions and agreement of the parties.

The judgment is reversed with directions to enter judgment for the appellants reforming the contract to cover the Byrd Hill house in the future as prayed.⁵⁰

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 560-61.

As in *Girard Fire* and *Evans*, one might argue that there was only one mistake in *Hunt*—the insurers’ mistake in listing the wrong house as the insured house. But as in *Girard Fire* and *Evans*, the insured made a mistake too. Mr. Hunt accepted his two policies despite the fact that they listed the wrong house as the insured house.

The next case we’ll review is *Flimin’s Adm’x v. Metro. Life Ins. Co.*⁵¹ In *Flimin’s Adm’x*, Harry Flimin bought an insurance policy from Metropolitan Life through an agent.⁵² Flimin and the agent orally agreed on the policy’s terms.⁵³ But when Metropolitan reduced the agreement to writing, it mistakenly included a double-indemnity benefit.⁵⁴

After Flimin drowned, his estate sought the double-indemnity benefit.⁵⁵ Metropolitan sued to reform the policy pleading mutual mistake.⁵⁶ The circuit court reformed the policy, and Flimin’s estate appealed.

On appeal, the estate argued that, if there was a mistake in issuing Flimin’s policy, it was Metropolitan’s unilateral mistake of including the double-indemnity benefit. The *Flimin’s Adm’x* Court disagreed. It held that Flimin also made a mistake. Flimin’s mistake was that he accepted the policy “under the belief that it was in conformity with his agreement with the company.”⁵⁷

⁵¹ 75 S.W.2d at 207.

⁵² *Id.* at 207-08.

⁵³ *Id.* at 207.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 208.

⁵⁷ *Id.*

It is established by such clear and convincing proof as to preclude all doubt that a mistake was made by [Metropolitan] in issuing the policy. . . . [And f]rom all the proven facts and circumstances, the conclusion is inevitable that [Flimin] received and retained the policy under the mistaken belief that it was in conformity with his agreement with the company as embodied in his application.⁵⁸

Flimin's Adm'x is consistent with *Girard Fire, Evans, and Hunt*. And like those three cases, *Flimin's Adm'x* supports the circuit court's reformation of BAP 3473032-00 in this case. Under *Flimin's Adm'x*, Zurich made a mistake when it included Kentucky UIM coverage in BAP 3473032-00 and Miller Pipeline made a mistake when it "received and retained the policy under the mistaken belief that it was in conformity with [its] agreement with [Zurich]."⁵⁹

The last case we'll look at is *Hemphill v. New York Life Ins. Co.*⁶⁰ In *Hemphill*, James Hemphill had a New York Life policy worth \$225. When Hemphill asked about cashing the policy, a New York Life agent offered him a new policy worth \$1,269. Hemphill, not realizing that the agent had made a \$1,044 mistake, accepted. When New York Life discovered its mistake, it sought to reform Hemphill's policy and Hemphill resisted. Hemphill argued that New York Life's mistake was unilateral. This Court disagreed. It wrote:

At the time they received the letter from the company proposing to give them paid-up insurance to the amount of \$1,269 . . . , they did not realize nor understand how such conclusion was arrived at nor the mathematics of the proposition; but as they expected only to receive that which the rules of the company ordinarily granted, and the

⁵⁸ *Id.* at 209.

⁵⁹ *Id.*

⁶⁰ 243 S. W. 1040, 1042 (Ky. 1926).

company intended to grant them only such privileges and benefits, there was a mutual mistake. . . . The mistake is acknowledged by both parties. Hemphill does not deny that he obtained . . . a policy . . . for a much greater amount than . . . he was entitled. . . . Why let such a gross . . . mistake resulting in great wrong . . . go uncorrected?⁶¹

Hemphill's holding is plain. A circuit court is obligated to reform an insurance contract when there is a coverage mistake “acknowledged by both parties.” There’s no reason to “let such a . . . mistake . . . go uncorrected[.]”⁶²

In this case, *Hemphill's* holding required the circuit court to reform BAP 3473032-00. There was no choice. It is undisputed that Miller Pipeline rejected Kentucky UIM coverage. It is undisputed that Zurich initially included the coverage in BAP 3473032-00. It is undisputed that Miller Pipeline accepted BAP 3473032-00 with the unwanted UIM coverage in it. And it is undisputed that Miller Pipeline and Zurich acknowledged their mutual mistake by having Zurich issue Form U-CU-D-321-A to correct the mistake. Thus, as the *Hemphill* Court held, there was no reason for the circuit court in this case to “let such a . . . mistake . . . go uncorrected.”⁶³

Summing up, all of the cases that we have examined thus far support the circuit court’s reformation of BAP 3473032-00. It is undisputed that Miller Pipeline did not want Kentucky UIM coverage. Therefore, Zurich was mistaken to include the coverage in the original version of BAP 3473032-00 and Miller Pipeline was mistaken to accept BAP 3473032-00 with the coverage in it. It’s that simple. The evidence of mutual

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

mistake in this case is not only clear and convincing, it is undisputed. The Court should affirm the reformation of BAP 3473032-00.

(2) Zurich did not have to prove that it knew that Miller Pipeline didn't want Kentucky UIM coverage and issued the coverage anyway.

Nichols's primary response to Zurich's mutual-mistake argument is that Zurich failed to produce clear-and-convincing evidence of mutual mistake.⁶⁴ On the surface, that sounds like a fairly ordinary argument. But Nichols's mutual-mistake argument isn't ordinary because he doesn't simply argue that Zurich's evidence was insufficient. Nichols argues that, to prove mutual mistake, Zurich had to prove that it "knew that Miller Pipeline did not want UIM coverage and . . . included it anyway."⁶⁵ There is no authority for that argument and Nichols does not cite any. Zurich did not have to prove that it "issued UIM coverage knowing Miller Pipeline did not want it."

What Zurich had to prove in this case is in the cases we just discussed above. Under *Girard Fire, Evans, Hunt, Flimin's Adm'x, and Hemphill*, Zurich had to prove three facts: (1) that Miller Pipeline did not want Kentucky UIM coverage; (2) that Zurich included Kentucky UIM coverage in the original version of BAP 3473032-00; and (3) that Miller Pipeline accepted the original version of BAP 3473032-00 with the UIM coverage in it. Zurich proved all three facts with undisputed evidence. The facts add up to a mutual mistake. Zurich's mistake was including Kentucky UIM coverage in BAP 3473032-00 when Miller Pipeline did not want the coverage. Miller Pipeline's mistake was accepting BAP 3473032-00 believing that it only included the coverage that

⁶⁴ Appellant's Brief, pp. 10-15.

⁶⁵ *Id.* at 11.

Miller Pipeline wanted. Nichols is mistaken to argue that Zurich had to prove that it “issued UIM coverage knowing Miller Pipeline did not want it.”

(3) Zurich produced undisputed evidence that it “issued UIM coverage knowing Miller Pipeline did not want it.”

Nichols’s argument that Zurich had to prove that it “issued UIM coverage knowing Miller Pipeline did not want it” is a legal argument. But it comes with a complementary evidentiary argument. The evidentiary argument is that Zurich failed to produce evidence to show that it “issued UIM coverage knowing Miller Pipeline did not want it.” Nichols is mistaken about this too. Jeanne Fuqua and Kathy Kebo both testified that, before Zurich issued BAP 3473032-00, it had been told that Miller Pipeline didn’t want the policy to include Kentucky UIM coverage.⁶⁶ Kebo further testified that her employer, M.J. Insurance, had an agency contract with Zurich and so could bind coverage for Zurich.⁶⁷ By law, Kebo’s knowledge that Miller Pipeline did not want Kentucky UIM coverage, which is undisputed, was imputed to Zurich.⁶⁸ Fuqua and Kebo’s testimony on these points is undisputed evidence that Zurich “issued UIM coverage knowing Miller Pipeline did not want it.”

⁶⁶ Fuqua, p. 62-63; Kebo, pp. 72-74.

⁶⁷ Kebo, pp. 101-02.

⁶⁸ See, e.g., *Pan-American Life Ins. Co. v. Roethke*, 30 S.W.3d 128, 131 (Ky. 2000); KRS 304.9-035.

(4) Whether Zurich refunded premium when it issued Form U-GU-D-321-A is irrelevant to the mutual-mistake issue in this case.

Near the end of his no-proof-of-mutual-mistake argument, Nichols writes that “Zurich refunded no portion of the premium charged to Miller Pipeline—even after cancellation of UM and UIM coverage.”⁶⁹ Nichols bases this statement on the fact that Form U-GU-D-321-A provides that there was “no change in premium.” We have two responses.

First, assuming for the sake of argument that “Zurich refunded no portion of the premium charged to Miller Pipeline—even after cancellation of UM and UIM coverage,” we are at a loss as to why this would matter here. Nichols does not explain the relevance. He simply claims that “Zurich refunded no portion of the premium charged to Miller Pipeline—even after cancellation of UM and UIM coverage.”⁷⁰ Our response is that, if true, this “fact” has no bearing on whether there was a mutual mistake in this case.

Second, Nichols’s no-refund assertion oversimplifies the record evidence when it comes to whether Zurich refunded premium. Jeanne Fuqua provided two explanations for why Form U-GU-D-321-A provides “no change in premium.” Fuqua testified that one possibility was that Miller Pipeline’s premium didn’t change when Zurich issued Form U-GU-D-321-A because Zurich didn’t charge Miller Pipeline for Kentucky UIM coverage in the first place.⁷¹ Fuqua’s second explanation was that Miller Pipeline’s premium didn’t change when Zurich issued Form U-GU-D-321-A because

⁶⁹ Appellant’s Brief, p. 14.

⁷⁰ *Id.*

⁷¹ Fuqua, p. 21.

premium adjustments on composite-rated policies like BAP 3473032-00 are made at the end of the policy's coverage period.⁷² Both theories explain why Form U-GU-D-321-A provides "no change in premium."

In the end, Nichols's no-mutual-mistake argument is empty. Under *Girard Fire, Evans, Hunt, Flimin's Adm'x, and Hemphill*, Zurich did not have to prove that it "issued UIM coverage knowing Miller Pipeline did not want it." What Zurich had to prove was that (1) Miller Pipeline did not want Kentucky UIM coverage, (2) Zurich included the coverage in BAP 3473032-00, and (3) Miller Pipeline accepted BAP 3473032-00 with the coverage in it. Zurich proved those three facts with undisputed evidence. The facts add up to two mistakes—Zurich mistakenly included Kentucky UIM coverage in BAP 3473032-00 and Miller Pipeline mistakenly accepted BAP 3473032-00 with the coverage in it. That's all there is to this case. The Court should affirm the reformation of BAP 3473032-00.

⁷² *Id.*; Composite Rate Endorsement (Appendix Item 6).

B. NICHOLS DID NOT ARGUE THAT ZURICH WAIVED ITS MUTUAL-MISTAKE DEFENSE IN THE COURT OF APPEALS. THEREFORE, HE DID NOT PRESERVE THE WAIVER ARGUMENT HE IS MAKING TO THIS COURT. SUBSTANTIVELY, A WAIVER IS A VOLUNTARY RELINQUISHMENT OF A KNOWN RIGHT. THUS, THE QUESTION WHEN IT COMES TO WAIVER IS WHETHER ZURICH VOLUNTARILY RELINQUISHED ITS MUTUAL-MISTAKE DEFENSE BY ASSERTING THE DEFENSE IN ITS AMENDED ANSWER.⁷³

Nichols's second argument is that "Zurich waived the defense of mutual mistake by failing to plead affirmatively and with particularity."⁷⁴ In support of the argument, Nichols points out that CR 8.03 makes mutual mistake an affirmative defense and that CR 9.02 required Zurich to plead mutual mistake with particularity.⁷⁵ We agree with these two points. We also agree that Zurich did not plead mutual mistake in its initial answer. But that's where our agreement with Nichols ends. In making his waiver argument, Nichols ignores the fact that the circuit court allowed Zurich to amend its answer to assert a mutual-mistake defense. Nichols also ignores the fact that Zurich pleaded the defense with particularity by incorporating its summary-judgment argument on mutual mistake into its amended answer.

Our first response to Nichols's waiver argument is that he did not make the argument in the Court of Appeals and so cannot make it now.⁷⁶ Under CR 76.12(4)(c)(v), Nichols was required to state at the beginning of each of his arguments whether he preserved the argument and how. In footnote 61 of his brief, Nichols claims

⁷³ Nichols doesn't provide the standard of review for this issue. As Nichols didn't make the argument below, Zurich's position is that the Court shouldn't review the issue at all. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986); *Pierson v. Coffey*, 706 S.W.2d 409 (Ky. App. 1985).

⁷⁴ Appellant's Brief, pp. 15-17.

⁷⁵ *Id.* at 15.

⁷⁶ *Skaggs*, 712 S.W.2d at 947; *Pierson*, 706 S.W.2d at 409.

that he preserved his waiver argument “in his briefs to the Court of Appeals.”⁷⁷ But Nichols does not say how or where in his Court of Appeals’ briefs he preserved the argument. We cannot find it. Nichols failed to preserve the argument for review.⁷⁸

Although Nichols failed to preserve his waiver argument, we will address it out of an abundance of caution. Waiver is the voluntary and intentional relinquishment of a known, existing right or power.⁷⁹ “It’s textbook law that a waiver must be intentional.”⁸⁰ It’s also textbook law that a waiver must be knowing.⁸¹ As this Court has held, “both intent and knowledge are essential elements of waiver.”⁸²

Nichols argues that Zurich waived its mutual-mistake defense by not pleading mutual mistake in its initial answer. But it is undisputed that Zurich amended its answer to assert the defense. Zurich’s assertion of a mutual-mistake defense in its amended answer undermines Nichols’s waiver argument. Simply put, asserting the defense was the opposite of waiving the defense. As a result, Nichols’s waiver argument lacks merit.

Further, Nichols did not argue that Zurich waived its mutual-mistake defense when this case was in the Court of Appeals. He did, however, argue that the circuit court abused its discretion by allowing Zurich to amend its answer to assert a

⁷⁷ Appellant’s Brief, p. 17 n. 61.

⁷⁸ *Skaggs*, 712 S.W.2d at 947; *Pierson*, 706 S.W.2d at 409.

⁷⁹ *Howard v. Motorists Mutual Ins. Co.*, 955 S.W.2d 525, 526 (Ky. 1997).

⁸⁰ *Edmonson Penn. v. Nat’l Mut. Cas. Ins. Co.*, 781 S.W.2d 753, 756 (Ky. 1989).

⁸¹ *Id.* at 755.

⁸² *Id.*

mutual-mistake defense.⁸³ For some reason, Nichols chose not to make that argument to this Court. Thus, he has waived it. Nevertheless, out of an abundance of caution, we will address the abuse-of-discretion argument Nichols made below.⁸⁴

CR 15 instructs Kentucky courts to allow pleading amendments “when justice so requires.”⁸⁵ Under CR 15, “[w]hether a party may amend his [pleading] is discretionary with the circuit court, and [an appellate court] will not disturb its ruling unless it has abused its discretion.”⁸⁶

Zurich moved to amend its answer to add a mutual-mistake defense on September 21, 2009. The circuit court granted the motion on October 5, 2009.⁸⁷ In the court of appeals, Nichols argued that the circuit court “abused its discretion by allowing [Zurich] . . . to amend its answer . . . *four months after the Court had ended discovery on the coverage issue and after the parties had filed Motions for Summary Judgment with the Court.*”⁸⁸ Nichols argued that this timing deprived him of the ability to conduct discovery on Zurich’s mutual-mistake defense. That isn’t so.

To fully respond to Nichols’s abuse-of-discretion argument, we have to go back to 2005. When Nichols filed this action in 2005, Zurich had already denied him UIM coverage. Zurich had stated its position that it did not owe Nichols UIM coverage

⁸³ See Brief of Appellant, pp. 14-17 (Appendix Item 7).

⁸⁴ Obviously, the Court’s standard of review of this issue would be for an abuse of discretion. *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 869, 870 (Ky. App. 2007).

⁸⁵ CR 15.

⁸⁶ *Kenney*, 269 S.W.3d at 870.

⁸⁷ ROA 694-98; ROA 699-701.

⁸⁸ Appendix Item 7, p. 14 (emphasis in original).

because Miller Pipeline had rejected the coverage.⁸⁹ Zurich affirmed this position when it moved for summary judgment in August 2006 and relied on Form U-GU-D-321-A. Although Zurich did not assert its mutual-mistake defense in its initial answer, Nichols certainly knew in 2005 that Zurich was relying on Form U-GU-D-321-A to deny him UIM coverage. Nevertheless, Nichols never sought to depose anyone about BAP 3473032-00, Form U-GU-D-321-A, or Zurich's coverage denial.

Furthermore, when Zurich deposed Jeanne Fuqua and Kathy Kebo in June 2009, their testimony gave Nichols actual notice of Zurich's mutual-mistake defense. Nevertheless, Nichols sought no further discovery.

In July 2009, Zurich moved for summary judgment arguing mutual mistake. Zurich's supporting memorandum provided Nichols the details of Zurich's mutual-mistake defense.⁹⁰ Nichols clearly understood that because his response to Zurich's motion pointed out that Zurich had not pleaded mutual mistake in its initial answer.⁹¹ Zurich, of course, moved to amend its answer. The circuit court granted the motion on October 5, 2009.⁹² Despite all of this, Nichols never sought further discovery.

Nichols's excuse for not seeking further discovery regarding Zurich's mutual-mistake defense is that the circuit court allowed Zurich to add its mutual-mistake defense *"four months after the Court had ended discovery on the coverage*

⁸⁹ Letter from David Gusman to Udell Levy (Appendix Item 8).

⁹⁰ ROA 530-58.

⁹¹ ROA 657-80.

⁹² ROA 694-98; ROA 699-701.

issue.”⁹³ That does not explain why Nichols failed to seek any discovery on Zurich’s coverage denial despite the fact that he knew of the denial as early as 2005.

Furthermore, the circuit court never set a trial date in this case and so never set a discovery deadline. That undermines Nichols’s argument that he was denied discovery on Zurich’s mutual-mistake defense by a discovery deadline. Moreover, Nichols never asked for further discovery. He chose to stand pat.

These facts undermine Nichols’s argument that the circuit court “effectively denied [him] any reasonable opportunity to rebut [the mutual-mistake] defense.”⁹⁴ The truth is that Nichols had ample opportunity to take discovery on Zurich’s mutual-mistake defense, but he chose not to do so. The circuit court well knew this and was within its discretion to allow Zurich to amend its answer to plead mutual mistake.

In sum, Nichols failed to preserve his argument that Zurich waived its mutual-mistake defense. Furthermore, the argument fails on its merits because Zurich asserted a mutual-mistake defense in the circuit court. As for Nichols’s argument that the circuit court abused its discretion by allowing Zurich to amend its answer, Nichols raised the issue below but did not raise it here. Thus, the Court shouldn’t review that issue either. However, out of an abundance of caution, we have shown that the circuit court didn’t abuse its discretion by allowing Zurich to amend its answer.

⁹³ Appendix Item 7, p. 14 (emphasis in original).

⁹⁴ *Id.*

C. WHEN A COURT REFORMS A WRITTEN CONTRACT, IT FIXES THE INCORRECT WRITTEN EXPRESSION OF THE CONTRACT TO MAKE IT CONFORM TO THE PARTIES' ORAL AGREEMENT. HERE, THE CIRCUIT COURT REFORMED THE ORIGINAL WRITTEN VERSION OF BAP 3473032-00 SO THAT IT CONFORMED WITH THE PARTIES' AGREEMENT THAT THE POLICY NOT INCLUDE KENTUCKY UIM COVERAGE. DID THE CIRCUIT COURT'S REFORMATION RETROACTIVELY CANCEL KENTUCKY UIM COVERAGE IN VIOLATION OF KENTUCKY STATUTES?⁹⁵

Nichols's third argument is that the circuit court retroactively cancelled Kentucky UIM coverage in violation of Kentucky insurance statutes when it reformed BAP 3473032-00.⁹⁶ The statutes Nichols cites are KRS 304.14-180, KRS 304.14-110, KRS 304.20-30, KRS 304.20-020, and KRS 304.39.320. We will address Nichols's arguments under these statutes in the order that he presents them. But before we do, we will address all the arguments at once by pointing out that the circuit court's reformation of BAP 3473032-00 did not retroactively cancel any coverage. The reformation corrected BAP 3473032-00 to reflect the fact that Miller Pipeline rejected Kentucky UIM coverage. The UIM coverage was never there.

(1) KRS 304.14-180 does not apply here.

KRS 304.14-180 provides that “[n]o agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.”⁹⁷ Nichols argues that KRS 304.14-180 prohibited the circuit court from

⁹⁵ Nichols fails to provide the standard of review for this issue. Generally speaking, the issue presents a question of law that the Court can review *de novo*. But Nichols failed to preserve some of his statutory arguments. We'll point out which ones below.

⁹⁶ Brief of Appellant, pp. 17-23.

⁹⁷ See KRS 304.14-180(1).

reforming BAP 3473032-00 because (1) the original version of BAP 3473032-00 included Kentucky UIM coverage, (2) KRS 304.14-180 required Zurich to cancel the coverage in writing, and (3) Zurich did not cancel the coverage in writing until it issued Form U-GU-D-321-A in June 2002.⁹⁸

Nichols misunderstands reformation. His premise that BAP 3473032-00 included Kentucky UIM coverage until Zurich deleted the coverage by issuing Form U-GU-D-321-A is flawed. BAP 3473032-00 never included Kentucky UIM coverage. The Kentucky UIM coverage in the original version of BAP 3473032-00 was a mistake. Zurich issued Form U-GU-D-321-A to correct the mistake. Form U-GU-D-321-A conformed to BAP 3473032-00's effective date to show that the UIM coverage was never there. Nichols's argument under KRS 304.14-180 that BAP 3473032-00 included Kentucky UIM coverage until Form U-GU-D-321-A cancelled it is simply wrong. KRS 304.14-180 is irrelevant in this case because Form U-GU-D-321-A did not "conflict with, modify[], or extend[] any contract of insurance."⁹⁹ Form U-GU-D-321-A corrected a mistake in BAP 3473032-00. It did nothing more.

Interestingly, there is a Kentucky case on point. *Westchester Fire Ins. Co. v. Wilson* holds that KRS 314.14-180(1)'s written-change requirement does not apply in mutual-mistake cases.¹⁰⁰ The *Wilson* court explained that KRS 314.14-180(1) doesn't "prevent a court of equity . . . from reforming an insurance contract in a case where by mutual mistake it did not express the true contract entered into by insurer and

⁹⁸ Brief of Appellant, pp. 18-19.

⁹⁹ KRS 304.14-180(1).

¹⁰⁰ 294 S.W. 1059 (Ky. 1927).

insured.”¹⁰¹ That’s our point. KRS 314.14-180(1) is irrelevant here because Form U-GU-D-321-A did not cancel Kentucky UIM coverage. The Form corrected a mistake.

(2) KRS 304.14-110 does not apply here.

Under KRS 304.14-110, an insurer cannot deny coverage based on misstatements in a policy application unless the misstatements were material to the insurer issuing the coverage. Nichols argues that KRS 304.14-110 applies here. He’s mistaken. Zurich didn’t deny Nichols UIM coverage in this case because Miller Pipeline submitted a fraudulent policy application. Miller Pipeline’s policy application is not at issue here. Thus, KRS 304.14-110 doesn’t apply.

Furthermore, as far as we can tell, Nichols didn’t rely on KRS 304.14-110 in the Court of Appeals. Thus, he failed to preserve his argument under the statute for review.

(3) KRS 304.20-030 does not apply here.

KRS 304.20-030 prevents an insurer from “retroactively annul[ing]” insurance coverage “after the occurrence of any injury . . . for which the insured may be liable.”¹⁰² Nichols argues that the statute applies here because the circuit court’s reformation of BAP 3473032-00 retroactively annulled Kentucky UIM coverage. Nichols is mistaken. As we have already explained, the circuit court’s reformation of BAP 3473032-00 did not retroactively annul Kentucky UIM coverage. The reformation

¹⁰¹ *Id.* (Wilson wrote this about KRS 314.14-180(1)’s predecessor, KRS Section 762a18. The statutes are materially the same).

¹⁰² KRS 304.20-030.

corrected the original written version of the policy so that it reflected the parties' intent that BAP 3473032-00 not contain Kentucky UIM coverage.

We did not find a Kentucky case that applies KRS 304.20-030 in the reformation context, but we did find a couple of very persuasive cases. We'll start with *Argonaut Great Central Ins. Co. v. Audrain County*.¹⁰³ In *Argonaut*, the court was faced with a Missouri statute that, like KRS 304.20-030, prohibited the retroactive annulment of insurance coverage. The insurer in *Argonaut* argued that the statute prohibited the court from reforming its policy because the reformation would retroactively change the policy's coverage.¹⁰⁴ The *Argonaut* court disagreed. The court explained that reforming the policy would not retroactively change its coverage but would merely alter the written policy to reflect the parties' original coverage agreement.¹⁰⁵ In the court's words, "the reformation would be the result of a court order reforming the policy to conform to the parties' original agreement, reached before any loss was incurred."¹⁰⁶

Argonaut is persuasive here because it shows that the circuit court's reformation of BAP 3473032-00 did not retroactively annul Kentucky UIM coverage as prohibited by KRS 304.20-030. *Argonaut* shows that the reformation "reform[ed] [BAP 3473032-00] to conform to the parties' original agreement, reached before any loss was

¹⁰³ 2012 U.S. Dist. LEXIS 87547 (E.D. Mo.) (Appendix Item 9).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *9-10.

¹⁰⁶ *Id.* at *10.

incurred.”¹⁰⁷ The reformation didn’t retroactively remove Kentucky UIM coverage from BAP 3473032-00. The coverage was never there.

Another persuasive case is *Schools Excess Liability Fund v. Westchester Fire Ins. Co.*¹⁰⁸ *Schools Excess Liability Fund* is an insurance-coverage case that arises out of a bus crash. Richard Houghton was injured in the bus crash. He sued the bus’s owner, Santa Barbara Transportation. Westchester Fire and Schools Excess Liability Fund both insured Santa Barbara Transportation. Both insurers contributed to settle Houghton’s action.¹⁰⁹

After the two insurers settled Houghton’s action, they sought indemnity from each other. Westchester Fire defended Schools Excess Liability Fund’s indemnity claim by arguing that it did not provide coverage for Santa Barbara Transportation’s bus. Westchester Fire argued that the coverage it issued for the bus in 1994 was the result of a mutual mistake.¹¹⁰ Westchester Fire asked the trial court to reform its 1994 policy.¹¹¹

Part of the evidence that Westchester Fire used to prove mutual mistake was an endorsement to its 1994 policy. The endorsement, which Westchester Fire issued in 2001, was entitled “Retroactive Endorsement.” The endorsement provided that “the parties did not intend that the Westchester policy cover the [subject] bus[.]”¹¹²

¹⁰⁷ *Id.* at *10.

¹⁰⁸ 2010 Cal. App. Unpub. LEXIS 9222 (2010) (Appendix Item 10).

¹⁰⁹ *Id.* at *3.

¹¹⁰ *Id.* at *7.

¹¹¹ *Id.*

¹¹² *Id.* at *6.

Schools Excess Liability Fund argued that the Retroactive Endorsement was a fraud and an ineffective backdated document.¹¹³ The trial court disagreed. The court explained that the Retroactive Endorsement was evidence that Santa Barbara Transportation didn't intend to insure the subject bus with Westchester Fire and evidence that Westchester Fire mistakenly issued coverage for the bus. The court weighed the endorsement along with the other evidence in the case and found that the bus coverage in Westchester Fire's 1994 policy was the result of a mutual mistake.¹¹⁴ Relying on this finding, the trial court reformed the policy "to reflect the true, original intent of Westchester and Santa Barbara Transportation that the bus[] [was] specifically excluded from coverage under the Westchester excess insurance policy."¹¹⁵ The California Court of Appeals affirmed.

Schools Excess Liability Fund is persuasive here for a couple of reasons. First, it shows that reforming an insurance policy post-accident to "delete" coverage that ostensibly applied to the accident isn't the retroactive annulment of coverage as prohibited by statutes like KRS 304.20-030. Such a reformation merely corrects a mistake in the written policy to show that the "deleted" coverage never existed.

Second, *Schools Excess Liability Fund* is persuasive because the Retroactive Endorsement in *Schools Excess Liability Fund* is comparable to Form U-GU-D-321-A in this case. The two documents are comparable because both were issued after an accident to show that a policy didn't cover the accident. Neither the Retroactive

¹¹³ *Id.* at *8.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Endorsement nor Form U-GU-D-321-A was issued to annul coverage that existed at the time of an accident. Both endorsements were issued to correct mistakes made in reducing oral coverage agreements to writing. The Retroactive Endorsement corrected Westchester Fire's mistake in reducing its coverage agreement with Santa Barbara Transportation to writing. Form U-GU-D-321-A corrected Zurich's mistake in reducing its coverage agreement with Miller Pipeline to writing. Form U-GU-D-321-A is evidence that Miller Pipeline and Zurich never intended BAP 3473032-00 to include Kentucky UIM coverage.

In sum, KRS 304.20-030 doesn't apply here because neither Form U-GU-D-321-A nor the circuit court's reformation of BAP 3473032-00 retroactively annulled Kentucky UIM coverage. Both Form U-GU-D-321-A and the circuit court's reformation corrected Zurich's mistake in reducing its coverage agreement with Miller Pipeline to writing. The Kentucky UIM coverage that Nichols argues was annulled was never there.

(4) KRS 304.20-020 does not apply here.

The fourth statute Nichols relies on is KRS 304.20-020. KRS 304.20-020 requires Kentucky insureds to reject UM (uninsured-motorist) coverage in writing. Nichols argues that the statute required Miller Pipeline to reject Kentucky UIM coverage in writing. Nichols further argues that, until Miller Pipeline did so, Zurich was required to provide Miller Pipeline UIM coverage. Nichols is mistaken. On its face, KRS 304.20-020 does not apply to UIM coverage. UIM coverage is governed by KRS 304.39-320,

and KRS 304.39-320 doesn't require insureds to reject UIM coverage in writing.¹¹⁶ It's that simple.

Nichols, however, argues that KRS 304.20-020's written-rejection requirement for UM coverage applied to Miller Pipeline's UIM coverage because Zurich marketed UM and UIM coverage to Miller Pipeline as a package deal. Nichols argues that, by bundling UM and UIM coverage, Zurich caused KRS 304.20-020's UM-written-rejection requirement to apply to Miller Pipeline's UIM coverage. Simply stated, Nichols has no authority to support this argument. KRS 304.20-20 only required Miller Pipeline to reject UM coverage in writing, not UIM coverage.

KRS 304.20-020 only required Miller Pipeline to reject UM coverage in writing. And Kentucky's UIM statute, KRS 304.39-320, doesn't have a written-rejection requirement. Accordingly, Nichols's written-rejection argument is empty.

(5) KRS 304.39-320 does not apply here.

The fifth statute Nichols relies on is KRS 304.39-320. Nichols argues that, under KRS 304.39-320's *Coots* procedure, he detrimentally relied on Miller Pipeline having Kentucky UIM coverage when he released Michael Murphy and, therefore, Zurich was estopped from seeking reformation of BAP 3473032-00. This argument is flawed on several levels.

First, under KRS 304.39-320's *Coots* procedure, the decision to permit the release of Michael Murphy was Zurich's decision, not Nichols's. Zurich could have prevented Murphy's release by paying (fronting) Murphy's liability limits to Nichols.

¹¹⁶ KRS 304.39-320.

Zurich chose not to front Murphy's limits so Nichols was free to release Murphy. The release destroyed Zurich subrogation rights against Murphy, which is why the decision to release was Zurich's. As *Coots* gave Zurich the option to release Murphy, Nichols's detrimental-reliance argument under *Coots* is misplaced.

Moreover, it is clear that Nichols did not rely on Zurich having UIM coverage when he released Murphy. In 2003, Nichols's lawyer wrote a *Coots* letter to Zurich. Obviously, as a matter of logic, Nichols had already decided it was not worth pursuing Murphy personally. Murphy's liability insurance was his only "asset". In 2005, Nichols's law firm wrote another letter to Zurich, this time requesting a certified copy of the Zurich/Miller Pipeline policy. As a matter of logic, in 2003 Nichols (in releasing Murphy) could not have relied on a policy he did not have.

At the end of his argument under KRS 304.39-320, Nichols makes a related third-party-beneficiary argument. Nichols argues that the circuit court's reformation of BAP 3473032-00 was improper because it deprived him of third-party benefits he reasonably expected to receive under the policy.¹¹⁷ The argument is misplaced.

First, although Nichols made a third-party-beneficiary argument (or something similar) to the Court of Appeals, he did not make the argument in the circuit court. Thus, he failed to preserve it. Second, the *Whitson v. Parks* case that Nichols relies on to make the argument is off point.¹¹⁸ In *Whitson*, the Court reversed the reformation of a deed because the reformation prejudiced a good-faith purchaser for

¹¹⁷ Brief of Appellant, pp. 22-23.

¹¹⁸ 163 S.W.2d 298 (Ky. 1942).

value under the deed. Those are not the facts here. Nichols is not a good-faith purchaser for value under BAP 3473032-00. In fact, as we have explained, Nichols has no evidence that he relied on the original (incorrect) version of BAP 3473032-00 for anything at all. *Whitson* is, therefore, off point.

Unfortunately, the *Whitson* opinion does not contain much analysis. The good news is that the *Whitson* Court applied a well-established rule in reaching its decision. The rule is restated in Restatement (Second) of Contracts Section 155:

Where a writing that . . . embodies an agreement . . . fails to express the agreement because of a mistake of both parties . . . the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.¹¹⁹

The critical part of Section 155 comes after the last comma.¹²⁰ Under the language there, reformation is allowed “except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.”¹²¹ Nichols isn’t a good-faith purchaser for value. He doesn’t even argue that he is. Therefore, his third-party-beneficiary argument under *Whitson* fails.

In the end, Nichols’s statutory arguments against reformation all fail because the reformation of BAP 3473032-00 didn’t retroactively annul Kentucky UIM coverage and because Nichols didn’t detrimentally rely on the original version of BAP 3473032-00 to make a good-faith purchase for value or for any other reason. The reformation of BAP 3473032-00 should be affirmed.

¹¹⁹ Restatement (Second) of Contracts Section 155.

¹²⁰ *Id.*

¹²¹ *Id.*

D. NICHOLS IS NOT ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE UIM-COVERAGE ISSUE.

Nichols's fourth argument is that, "in the absence of mutual mistake, [he] is entitled to partial summary judgment on the issue of UIM coverage."¹²² Of course there was a mutual mistake here. Nichols is not entitled to partial summary judgment on the UIM-coverage issue.

E. UNDER CR 15, THE CIRCUIT COURT HAD THE DISCRETION TO DENY NICHOLS'S MOTION TO AMEND HIS COMPLAINT TO ADD A BAD-FAITH CLAIM. NICHOLS MADE HIS MOTION SEVEN DAYS AFTER THE CIRCUIT COURT ENTERED SUMMARY JUDGMENT FOR ZURICH, MORE THAN FOUR YEARS AFTER HE FILED SUIT, AND EIGHT YEARS AFTER THE SUBJECT AUTO ACCIDENT. IN LIGHT OF THESE FACTS, DID THE CIRCUIT COURT ABUSE ITS DISCRETION IN DENYING NICHOLS'S MOTION TO AMEND?¹²³

Seven days after the circuit court entered summary judgment for Zurich, more than four years after Nichols filed suit, and eight years after the subject auto accident, Nichols moved to amend his complaint to add an Unfair Claims Settlement Practices Act claim against Zurich. The circuit court denied the motion. Nichols argues that the circuit court erred.

"In determining whether to grant a motion to amend a party's complaint, a circuit court 'may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself.'"¹²⁴ "Other factors include whether

¹²² Brief of Appellant, pp. 23-25.

¹²³ As with the rest of his arguments, Nichols fails to provide the standard of review for this issue. The Court's review is for abuse of discretion. *Kenney*, 269 S.W.3d at 869.

¹²⁴ *Kenney*, 269 S.W.3d at 869.

amendment would prejudice the opposing party or would work an injustice.”¹²⁵ And, “[u]ltimately, whether a party may amend his complaint is discretionary with the circuit court, and [an appellate court] will not disturb its ruling” absent abuse of discretion.¹²⁶

Nichols’s amended claim against Zurich was an UCSPA claim—a statutory bad-faith claim. *Wittmer v. Jones* sets forth the three elements of such a claim: “(1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.”¹²⁷

Under *Wittmer*’s first element, Nichols would have had to prove that Zurich was obligated to pay his UIM claim under the terms of BAP 3473032-00. Prior to Nichols moving to add his UCSPA claim, the circuit court had granted Zurich summary judgment on his UIM claim. That defeated Nichols’s proposed UCSPA claim as a matter of law, because “absent [a coverage] . . . obligation, there is no bad faith cause of action, either at common law or by statute.”¹²⁸

Furthermore, even if Nichols could have satisfied *Wittmer*’s obligated-to-pay-the-claim element, he could not have met *Wittmer*’s second element, which would have required him to prove that Zurich lacked a fairly-debatable basis for denying him UIM coverage. The critical fact on this point is again the circuit court’s summary-

¹²⁵ *Id.* at 869-70.

¹²⁶ *Id.*

¹²⁷ 864 S.W.2d 885, 890 (Ky. 1993).

¹²⁸ *Id.*

judgment decision. The court's decision certainly proved that Zurich had at least a fairly-debatable basis for denying Nichols UIM coverage. Thus, Nichols could never have met *Wittmer's* second element.

Wittmer's third element is malice. Under the malice element, Nichols would have had to prove that Zurich wrongly and maliciously denied him UIM coverage. The circuit court's summary judgment in favor of Zurich on the UIM coverage issue made it impossible for Nichols to do this.

In short, Nichols's UCSPA claim was futile. And the circuit court was within its discretion to deny him leave to add the claim to his complaint.

Before we finish, we will briefly address Nichols's argument that Zurich committed bad faith while litigating this action. In *Knotts v. Zurich Ins. Co.*, this Court held that litigation conduct cannot be the basis of a bad-faith claim.¹²⁹ Here's why:

[G]iven the chilling effect that allowing introduction of evidence of litigation conduct would have on the exercise of an insurance company's legitimate litigation rights, any exception threatens to turn our adversarial system on its head. We are confident that the remedies provided by the Rules of Civil Procedure for any wrongdoing that may occur within the context of the litigation itself render unnecessary the introduction of evidence of litigation conduct. . . . Thus, we think the better approach is an absolute prohibition on the introduction of such evidence in actions brought under KRS 304.12-230. . . .

To permit the jury to pass judgment on the defense counsel's trial tactics and to premise a finding of bad faith on counsel's conduct places an unfair burden on the insurer's counsel, potentially inhibiting the defense of the insurer.¹³⁰

¹²⁹ 197 S.W.3d 512, 522-23 (Ky. 2006)

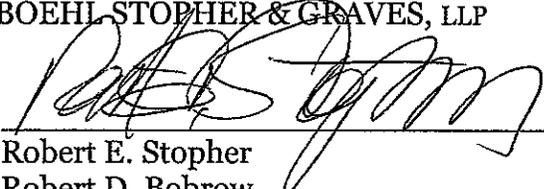
¹³⁰ *Id.*

Knotts defeats Nichols's argument that Zurich has committed bad faith in litigating this case. While we acknowledge that *Knotts* held that an insurer has a duty to continue to negotiate in good faith during litigation, Nichols's argument to this Court is different. Nichols doesn't allege that Zurich failed to negotiate in good faith during litigation. He argues—or at least implies—that Zurich has committed bad faith by asserting a mutual-mistake defense. *Knotts* defeats that argument as a matter of law. Litigation conduct (attorney conduct) cannot be the basis of a bad-faith claim.

V. CONCLUSION

The evidence in this case undisputedly shows that Miller Pipeline rejected UIM coverage in Kentucky. Therefore, the circuit court was right to reform BAP 3473032-00 to show that the policy never provided Kentucky UIM coverage. And as BAP 3473032-00 never provided Kentucky UIM coverage, Nichols's UIM claim against Zurich fails on the law. The circuit court was right to grant Zurich summary judgment, and the Court of Appeals was right to affirm. We ask this Court to affirm.

BOEHL STOPHER & GRAVES, LLP



Robert E. Stopher
Robert D. Bobrow
400 West Market Street, Suite 2300
Louisville, KY 40202
Phone: (502) 589-5980
Fax: (502) 561-9400
COUNSEL FOR APPELLEE,
ZURICH AMERICAN INSURANCE COMPANY

INDEX TO APPENDIX

Item	Description
1	Policy Number BAP 3473032-00
2	Deposition of Jeanne Fuqua
3	Deposition of Kathy Kebo
4	Form U-GU-D-321-A
5	Plaintiff's (Nichols's) Memorandum In Support of Motion for Summary Judgment in Jefferson Circuit Court, July 10, 2009
6	Composite Rate Endorsement
7	Brief of Appellant (Nichols) in Kentucky Court of Appeals, pp. 14-17, November 18, 2010
8	Letter from David Gusman to Udell Levy
9	<i>Argonaut Great Central Ins. Co. v. Audrain County</i> , 2012 U.S. Dist. LEXIS 87547 (E.D. Mo.)
10	<i>Schools Excess Liability Fund v. Westchester Fire Ins. Co.</i> , 2010 Cal. App. Unpub. LEXIS 9222 (2010)