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COURT OF APPEALS

STATE OF NEW YORK

34-06 73, LLC,

Respondent,

-against-

NO. 81

SENECA INSURANCE COMPANY,

Appellant.

20 Eagle Street
Albany, New York
September 7, 2022

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 No. 81, 34-06 73, LLC v. Seneca Insurance. Let's give
3 Counsel a moment to move away.

4 MR. CARROLL: Good afternoon.

5 ACTING CHIEF JUDGE CANNATARO: Good afternoon.

6 MR. CARROLL: I'd like to reserve two minutes for
7 rebuttal, if I could.

8 ACTING CHIEF JUDGE CANNATARO: Two minutes.

9 MR. CARROLL: Members of the court, may it please
10 the court.

11 Our case is premised on two basic points. Point
12 number one, pursuant to CPLR 3025(c), the trial court
13 wrongly allowed an amendment to a breach of contract claim
14 during trial to add a reformation claim.

15 The second point is, in any event, that claim was
16 untimely as a matter of law when it was made. And when I -
17 - - when I went through the 2,781 pages of materials, seven
18 volumes, I realized there's only two documents that we need
19 to consider what the right answer to this case is. The
20 original complaint and this court's decision in 1976 in
21 SCM.

22 JUDGE RIVERA: But didn't - - - weren't the
23 parties very clear from the beginning that the dispute all
24 turned on the interpretation of the PSE, and the dispute
25 was whether or not that PSE barred damages?



1 MR. CARROLL: I think that's absolutely right,
2 Your Honor. And that's the problem. It concerned the
3 application of the PSE, not whether the PSE was in the
4 policy. And this court's decision in SCM makes clear that
5 those are two distinct occurrences and transactions, and
6 they have to be.

7 JUDGE WILSON: And so SCM relates - - - I mean,
8 you said there's two points here.

9 MR. CARROLL: Yes, Your Honor.

10 JUDGE WILSON: SCM seems to me - - - correct me
11 if I'm wrong or misunderstanding you - - - to your second
12 point, having to do with relation back, it doesn't have
13 anything to do with your 3025 point; is that right?

14 MR. CARROLL: It doesn't other than to inform
15 what is prejudicial.

16 JUDGE WILSON: So let me understand what your
17 3025 argument is because my understanding is leave to amend
18 can be freely granted, should be freely granted, can be
19 granted even - - - you can conform the proof to the plead -
20 - - pleadings to proof, even after trial's over. So I'm
21 not sure - - - you have an uphill battle there, I think.

22 MR. CARROLL: That's correct. But it is not
23 unbridled.

24 JUDGE WILSON: Right.

25 MR. CARROLL: And in this instance, that's



1 exactly what happened. And - - - and again, it's informed
2 by SCM. And I understand SCM's a 2 or 3(f) case and I'll -
3 - - and I'll address that when I talk about relationship
4 back. But if one starts with the presumption that the
5 factual predicate necessary for a reformation case is
6 entirely different than the factual predicate necessary for
7 a breach of contract case, which is what SCM says - - -

8 JUDGE WILSON: Well, what do you mean by factual
9 predicate?

10 MR. CARROLL: Sure. The only facts that are
11 important and necessary for a reformation case are
12 everything that took place prior to the contract. Once
13 that contract is entered into - - -

14 JUDGE WILSON: Well, there could be evidence that
15 relates to that issue that wasn't create until after the
16 formation of the contract, no?

17 MR. CARROLL: Not - - - Your Honor, not unless it
18 pertains to discussions and events that took place before
19 the reformation, right?

20 JUDGE WILSON: But those - - - but those could
21 have been memorialized after?

22 MR. CARROLL: Fair enough, but we're still
23 talking about events that took place prior to the contract
24 being formed.

25 JUDGE WILSON: Just want to be clear.



1 MR. CARROLL: Anything prior to the contract
2 being formed is relevant when it comes to reformation.

3 JUDGE TROUTMAN: And is that why it matters here
4 what was in the original complaint?

5 MR. CARROLL: It does, Your Honor. Because the
6 only thing in the original complaint - - - and I could
7 recite it to you paragraph by paragraph, there are only
8 eleven paragraphs - - - we breached the contract because we
9 didn't pay them. That's it. It talked about the property,
10 it talked about the fire, it talked about the policy, it
11 said they - - - they satisfied the conditions, the amount
12 of money at issues, and we breached.

13 JUDGE TROUTMAN: But it does not discuss what
14 happened before?

15 MR. CARROLL: Not at all. And that's the
16 important point here. In fact - - -

17 JUDGE GARCIA: But is it, Counsel, is that really
18 the important point under 203(f)?

19 MR. CARROLL: It absolutely - - -

20 JUDGE GARCIA: It seems to me under 203(d), which
21 is counterclaim statute, you're looking at whether or not,
22 on an equitable kind of reduction of plaintiff's damages
23 theory, whether or not it arose from the same transaction.
24 And that's a very tight test, right? And that gets you
25 even beyond a barred claim, you can still use almost as an



1 offset but really as recoupment.

2 Under 203(f), you don't have a test that it
3 arises from the same transaction or series of transactions
4 in the complaint. It's whether or not the complaint as a
5 whole, I believe, gives notice of the transactions or
6 series of transactions you want to now add.

7 MR. CARROLL: Well - - -

8 JUDGE GARCIA: And that's a very different
9 standard because those statutes do very different work.

10 MR. CARROLL: Well, Your - - - Your Honor, I - -
11 - I think what 203(f) is intended to do is to say, if you
12 want to take a transaction, and amended issue, a claim,
13 after the fact, you have to show that that amended claim
14 arose from the same occurrence and transaction as the
15 original claim. That's the first point. And that we were
16 on notice of it in the original complaint.

17 JUDGE GARCIA: No, that's not what the statute
18 says. The statute says that the original pleading gives
19 notice of the transaction's occurrence or series of
20 transactions that you want to now prove in your amended
21 pleading.

22 MR. CARROLL: That's - - -

23 JUDGE GARCIA: That's very different than arises
24 from the transactions or series of transactions that are
25 already in the complaint.



1 MR. CARROLL: I'm not so sure I see that a
2 significant distinction, Your Honor, if I could.

3 JUDGE GARCIA: So for - - - for (d), which is
4 counterclaim, that provision we're talking about only
5 applies if the claim you wanted to pose, the counterclaim
6 was time barred at the time you sued me, right? And it's
7 only for the equitable purpose of me reducing your damages.
8 So this test is very tight. It's whether or not that claim
9 arises from the transaction you sued me over, or series of
10 transactions. And I can use it to reduce even though my
11 claim is out of time.

12 Under (f), I'm amending - - - you're amending
13 your own complaint, so it's notice to me. But it's notice
14 from your entire complaint of the transactions you now want
15 to add.

16 MR. CARROLL: And - - - and - - -

17 JUDGE GARCIA: And that's very different.

18 MR. CARROLL: Well, and I submit that's exactly
19 what happened here and why it's wrong.

20 JUDGE GARCIA: Well, and I agree, that's the
21 question here.

22 MR. CARROLL: But it - - - but it - - -

23 JUDGE GARCIA: But it's not SCH.

24 MR. CARROLL: Well, and it - - - in this - - -
25 it's SCM. It is SCM because - - - SCM, SCH, whatever the



1 verbs - - - it is SCM. And let me - - - and let me, if I
2 could, articulate why.

3 What we had happen here was a case for eight
4 years of breach of contract. And if you look at every step
5 along the way, whether it be the pleading, whether it be
6 discovery, whether it be motions for summary judgment,
7 including the order on the motion for summary judgment
8 where the judge said two things go to trial. Was the PSE
9 complied with, and was there waiver, post-policy waiver,
10 our behavior that allows one to conclude that we waived the
11 PSE. Those are the two things that went to trial.

12 JUDGE GARCIA: But isn't it the complaint we're
13 looking at - - -

14 MR. CARROLL: Sure.

15 JUDGE GARCIA: - - - in terms of notice. Not in
16 terms of prejudice, I agree.

17 MR. CARROLL: So let me walk through the
18 complaint. Paragraphs 1 through 3, the parties. Paragraph
19 4, the property. Paragraph 5, the policy. Paragraph 6 was
20 just the fire. Paragraph 7 was our involvement and - - -
21 and basically that we - - - we were advised of the claim,
22 we didn't play the claim.

23 JUDGE GARCIA: But isn't the - - - and I agree
24 with you as you are describing the complaint, and - - -

25 MR. CARROLL: Yeah.



1 JUDGE GARCIA: - - - but the issue, and I'm not
2 saying which way it comes out, but the issue then is do
3 those paragraphs give notice of the transaction which is
4 the pre-signing conduct.

5 MR. CARROLL: Right. And SCM speaks to that.
6 Because what - - - what the complaint had was a breach of
7 contract claim only. And what SCM says is when you want to
8 add an amended complaint for reformation - - -

9 JUDGE GARCIA: No, you want to add a - - - you
10 want to counterclaim. You want to add - - - SCM is a
11 counterclaim.

12 MR. CARROLL: It's - - - there's no distinction
13 here, Your Honor, because - - -

14 JUDGE GARCIA: The language - - -

15 MR. CARROLL: - - - in a counterclaim - - -

16 JUDGE GARCIA: - - - is completely different.
17 The language of the two provisions is completely different.

18 MR. CARROLL: Your Honor, if one starts with when
19 - - - what is the statute of limitations for a reformation
20 claim. It starts at April 1st, 2009, in our case, right,
21 which is when the policy was issued. That's when the stake
22 should have been known or was known, 2009. Six years
23 later, 213(6) - - - CPLR 213(6), it expires, April 1st,
24 2015. The only way that case or claim is revived in 2019,
25 when it's amended, is through 203(f). The only way. And



1 the only way that happens is if that claim, that
2 reformation claim, we had notice of that occurrence or
3 transaction in the original complaint.

4 JUDGE WILSON: Not notice of the claim, right?

5 MR. CARROLL: Of the occurrence and transaction,
6 the factual predicate.

7 JUDGE GARCIA: You had notice of the transactions
8 they were going to base the claim on - - -

9 MR. CARROLL: Which - - -

10 JUDGE GARCIA: - - - that's 203(f).

11 MR. CARROLL: - - - which was the breach of
12 contract.

13 JUDGE GARCIA: 203(d) is it arises, the
14 counterclaim arises from the transactions you put in the
15 complaint. So it's different.

16 MR. CARROLL: They put in the complaint. But
17 we're the defendant.

18 But 203(f) is what governs here because the only
19 way you make this claim proper, timely - - -

20 JUDGE GARCIA: Agree. I agree with you. I'm
21 just saying that 203(d) is a very different test. And the
22 case that I keep mislabeling is concerned with 203(d) on -
23 - - as an equitable reduction of plaintiff's damages under
24 the specific language of 203(d). And I'm not saying that's
25 a win or lose issue. I'm just saying that I think the



1 approach under 203(f) is very different.

2 MR. CARROLL: I - - - I - - - I think, Your
3 Honor, it's - - - the outcome is the same. The outcome is
4 - - -

5 JUDGE GARCIA: No, I understand that - - -

6 MR. CARROLL: - - - the same - - -

7 JUDGE GARCIA: - - - your position.

8 MR. CARROLL: - - - from - - - from - - - I mean,
9 because - - -

10 JUDGE GARCIA: But I think your analysis has to
11 be different.

12 MR. CARROLL: - - - because if we don't have this
13 outcome, if this outcome is remaining as it is, every
14 contract, every case, where someone asserts breach of
15 contract, and only breach of contract, every attorney in
16 every court has to prepare a case that they're not told is
17 relevant.

18 JUDGE GARCIA: Doesn't that depend on the
19 complaint and how much information they put in it?

20 MR. CARROLL: It presupposes that they have been
21 - - -

22 JUDGE GARCIA: Or they may have - - -

23 MR. CARROLL: - - - told it's relevant.

24 JUDGE GARCIA: - - - or they may not have.

25 MR. CARROLL: That's exactly right. But here,



1 that's not at issue because it wasn't - - -

2 ACTING CHIEF JUDGE CANNATARO: Thank you,
3 Counsel.

4 MR. CARROLL: - - - pled.

5 Thank you, Your Honor.

6 MR. D'ANTONIO: Your Honors, may it please the
7 court, my name is Dennis D'Antonio. I represented the
8 respondent at trial, and I'm also representing the
9 respondent today.

10 The case law that's emanated out of this court is
11 - - - there's a plethora of cases that speak very clearly
12 to the fact that leave is freely granted to amend the
13 pleading at any time during, before, or after a case has
14 been tried.

15 JUDGE RIVERA: But Counsel, isn't it really true
16 that you litigated the case as the PSE was part of the
17 contract, but they knew that you were out of - - - their
18 client, excuse me, not you, of course - - - was out of
19 compliance with the PSE and, therefore, you shouldn't be
20 bound by - - -

21 MR. D'ANTONIO: Well - - -

22 JUDGE RIVERA: - - - the PSE? That - - - that is
23 the way the case was litigated from day one. And so if you
24 want to amend, their argument is we're completely
25 prejudiced, this comes out of the blue, how can it be.



1 We've - - - we've been - - - well, what we've been arguing
2 is whether or not we waived it by the fact that, yes, we'd
3 had an inspection, we know the sprinklers are not working,
4 or weren't there, whatever it was, and that becomes the
5 debate. Not whether or not the parties had a meeting of
6 the minds on that PSE.

7 MR. D'ANTONIO: Your Honor, that's correct. I
8 would refer Your Honor to your decision in the Kimso
9 Apartment case versus Gandhi where you specifically - - -
10 and this is consistent with all of the other Court of
11 Appeals - - -

12 JUDGE RIVERA: Yeah.

13 MR. D'ANTONIO: - - - decisions except for the
14 one decision they rely upon which I think is
15 distinguishable for reasons I'll get to. But you wrote a
16 decision that's consistent with every other decision and
17 you said that leave is freely granted absent prejudice, and
18 this favorable treatment even applies in the event that the
19 amendment substantially alters the theory of the case.

20 In every one of these cases where there's a
21 motion made to - - -

22 JUDGE RIVERA: There is a difference between
23 altering the theory of the case and proceeding on a theory
24 that makes the alternate theory un - - - un - - -
25 implausible.



1 MR. D'ANTONIO: Well, Judge, then looks like at -
2 - -

3 JUDGE RIVERA: Implausible. Your whole position
4 was we had a contract, they waived the provision that
5 they're relying on. The position was never, yes, we have a
6 contract, they breached the contract, which I think could
7 be a reading of the complaint apropos of Judge Garcia's
8 questioning. But that's not how you ever litigated the
9 case.

10 MR. D'ANTONIO: Well, Your Honor, the cases are -
11 - - this issue that's before this court is to be decided
12 sui generis, it's in the Court of Appeals' decisions. And
13 there's broad latitude and discretion left to the trial
14 court and the Appellate Division to rule on whether or not
15 a pleading should be amended at trial. The fact - - -

16 ACTING CHIEF JUDGE CANNATARO: Doesn't that
17 discretion have to be subject to 203(f)?

18 MR. D'ANTONIO: Yes.

19 ACTING CHIEF JUDGE CANNATARO: And there has to
20 be notice of the transactions or occurrences that give
21 rise?

22 MR. D'ANTONIO: Well, look - - - look at the
23 facts of this case, Judge. They had an underwriting file
24 that they did not produce - - -

25 JUDGE GARCIA: But Counsel, let me ask Judge



1 Cannataro's question a different way.

2 What in your complaint gives them notice that
3 you're going to base a claim on precontract conduct?

4 MR. D'ANTONIO: I - - - I'm not basing it on
5 precontract conduct at the time I'm pleading because I
6 don't know what I - - -

7 JUDGE GARCIA: That's the problem.

8 MR. D'ANTONIO: - - - subsequently - - - well,
9 it's not really, Judge, because if they had produced the
10 underwriting file in 2011, which - - -

11 JUDGE GARCIA: But that's a different argument.
12 Let's stay with your complaint, as it's written - - - I
13 understand your arguments with respect to their conduct
14 later. But your complaint as written, what in that
15 complaint gives them notice that you may file a claim based
16 on conduct before the contract was signed?

17 MR. D'ANTONIO: The complaint does - - - the
18 complaint does not plead reformation. There was no basis
19 at that time.

20 JUDGE GARCIA: I understand. And it doesn't have
21 to. It just has to give them notice that you might add
22 that claim.

23 MR. D'ANTONIO: Judge - - -

24 JUDGE GARCIA: So - - - and that claim is based
25 on very different conduct. So what in the complaint, and



1 it can do this, but to your adversary's point, what in your
2 original complaint satisfies 203(f) and gives them notice
3 of the transactions that you're going to add?

4 MR. D'ANTONIO: The Appellate Division and Judge
5 Crane both concluded that the allegations in the complaint
6 alleging that there was coverage under the policy and that
7 there was a breach of contract was sufficient to have
8 initiated the lawsuit. They did not raise the protective
9 safeguard endorsement until the answer was served. And
10 that came up in a - - - the fourth affirmative defense. We
11 were free to litigate that issue at that point going
12 forward without relating back to the original pleadings or
13 the case - - -

14 JUDGE RIVERA: But sir, your whole - - - the - -
15 - and you'll correct me if I'm wrong. But the theory as I
16 understood it from the plaintiff is, there's a contract,
17 they were supposed to pay me for this fire damage, they
18 didn't, and no I never - - - right, they have to pay me.
19 Again, sort of on this line of questioning, how are they to
20 know that your real argument is, we had a contract, they
21 were supposed to pay me, and that one little provision that
22 allows you not to pay me, I never negotiated. I mean, of
23 course you knew that in advance- - - there's two - - -
24 there's meeting of the minds, and your client is one of the
25 minds.



1 MR. D'ANTONIO: Yeah, but Your Honor - - -

2 JUDGE RIVERA: You must - - - your client must
3 know, and admitted, well, I just didn't read it, I didn't
4 know, you know.

5 MR. D'ANTONIO: Judge, but under the facts of
6 this case, which are really relevant to - - - to the sui
7 generis analysis, the client didn't know anything. They
8 purchased the policy. They admitted they didn't read it
9 when they got it. All he said was he had never requested
10 sprinkler coverage - - -

11 JUDGE TROUTMAN: But wouldn't Malik - - - his
12 knowledge be imputed to the plaintiffs?

13 MR. D'ANTONIO: Well, the same way, Judge, that
14 the knowledge of Muller, the underwriter who testified that
15 the underwriting file doesn't have the documents necessary
16 for this to have been part of the policy - - -

17 JUDGE TROUTMAN: But Malik was there - - -

18 MR. D'ANTONIO: But he's - - -

19 JUDGE TROUTMAN: - - - and Malik is there and he
20 knows where or not it was his intent for the PSE to be
21 included - - -

22 MR. D'ANTONIO: That's not - - -

23 JUDGE TROUTMAN: - - - so that's information that
24 was available at the time the complaint was filed.

25 MR. D'ANTONIO: Judge, that's not mutual mistake.



1 That's just him not understanding that the policy was
2 written that way.

3 And don't forget what happened here. We asked
4 for the underwriting file. Had they produced it in 2011,
5 then I would have seen what I didn't see until 2016 and
6 '17, and that is that the file didn't support the - - -

7 JUDGE WILSON: So - - -

8 MR. D'ANTONIO: - - - inclusion of - - -

9 JUDGE WILSON: - - - so do you have a - - -

10 MR. D'ANTONIO: - - - of the PSE.

11 JUDGE WILSON: - - - do you have an equitable
12 estoppel argument here?

13 MR. D'ANTONIO: Sorry?

14 JUDGE WILSON: Do you have an equitable estoppel
15 argument - - -

16 MR. D'ANTONIO: Yes, I had a waiver argument that
17 since they knew there were no sprinkler systems that the
18 PSE requirement was waived, a voluntary relinquishment of a
19 known right, and that they should be estopped from relying
20 upon the PSE because they knew that the - - -there were no
21 sprinklers. They knew that when they bound coverage, they
22 knew that after they bound coverage, they never cancelled
23 the policy. And if you read Judge Crane's courtroom - - -
24 the motion was made to the court at trial, it was very
25 clear that she said - - -



1 JUDGE TROUTMAN: But with respect to equitable
2 estoppel, if plaintiff had that information at the time
3 that they formed their complaint, or they should have known
4 - - -

5 MR. D'ANTONIO: We didn't.

6 JUDGE TROUTMAN: - - -that they should
7 investigate - - -

8 MR. D'ANTONIO: But we didn't. We - - -

9 JUDGE TROUTMAN: Malik?

10 MR. D'ANTONIO: We didn't have that. That came
11 out of the insurance company file. They didn't produce
12 that until 2016. When I got that file, five years into - -
13 -

14 JUDGE RIVERA: Well, I think all your - - - all -
15 - - if I'm understanding this argument in response to the
16 judge, your - - - your basically saying, well, I didn't
17 have the smoking gun, I didn't have something in their file
18 that would assist me in my argument, but you certainly had
19 the argument.

20 MR. D'ANTONIO: Judge, this court should be
21 troubled by the fact that they didn't produce the file for
22 almost five years until the statute of limitations had - -
23 -

24 JUDGE RIVERA: We may very well - - -

25 JUDGE TROUTMAN: Counsel - - -



1 JUDGE RIVERA: - - - be troubled, but that's a
2 different question from this.

3 MR. D'ANTONIO: But - - - but Your Honor, that
4 being the case, if they've - - - I mean, there's case law
5 in - - - out of this court. They can't benefit by their
6 own misdeeds. If they've actively failed to produce the -
7 - -

8 JUDGE RIVERA: They - - -

9 MR. D'ANTONIO: - - - underwriting - - -

10 JUDGE RIVERA: - - - they - - - they - - -

11 MR. D'ANTONIO: - - - file - - -

12 JUDGE RIVERA: - - - they offered the document,
13 did they not? At some point, they offered the document
14 that you're talking about?

15 MR. D'ANTONIO: I didn't get it until 2- - -
16 2016. And when it as produced to us, they represented it
17 as a complete file. When I deposed Muller in 2017, it was
18 represented as a complete file. There was nothing in the
19 file that said it wasn't - - -

20 JUDGE RIVERA: That's out of the blue - - -

21 JUDGE TROUTMAN: Counsel?

22 JUDGE RIVERA: - - - to you, in the same - - -

23 MR. D'ANTONIO: Sorry?

24 JUDGE RIVERA: It's out of the blue to you in the
25 same way this argument to them is out of the blue, that



1 somehow the client never - - -

2 MR. D'ANTONIO: Well, Judge - - -

3 JUDGE RIVERA: - - - intended and understood that
4 there would be no such PSE requirement.

5 MR. D'ANTONIO: Judge, they knew it was issued in
6 error. That's what their underwriter said, that's what
7 their file showed.

8 JUDGE RIVERA: I don't know that that's what the
9 underwriter said.

10 MR. D'ANTONIO: Well, I think it is what she
11 said. She said in order for the PSE to have been part of
12 the policy, you needed two documents that were not in the
13 policy that was produced to me. So how when they produce
14 the underwriting file, representing it to be - - -

15 JUDGE RIVERA: But - - - but didn't you argue
16 that there was an oral contract?

17 MR. D'ANTONIO: No.

18 JUDGE SINGAS: Wasn't there a disclaimer letter
19 that you got in 2011?

20 MR. D'ANTONIO: Yeah, they denied liability based
21 on the PSE.

22 JUDGE SINGAS: So wouldn't - - - wouldn't that
23 give you a clue that you could plead then?

24 MR. D'ANTONIO: Reformation? I had no basis for
25 mutual mistake. I litigate insurance cases all the time



1 insureds have policies that have exclusions that we don't
2 feel should be applicable, but they're part of the
3 contract.

4 JUDGE SINGAS: But you're pleading as if the PSE
5 was valid.

6 MR. D'ANTONIO: We believed it was valid until we
7 got to the underwriter who admitted for the first time on
8 the witness stand that they falsely represented it was a
9 complete file. It wasn't.

10 JUDGE RIVERA: I guess this is my difficulty.
11 How could you - - - if the testimony of Malik is to be
12 credited, how could you believe it's valid? His whole
13 point is we - - - there was no meeting of the minds.

14 MR. D'ANTONIO: Well, Your Honor, Mr. Malik
15 testified that he didn't see the policy. He didn't know
16 what was in the policy. He didn't know anything about it
17 until afterwards. It's all done through a broker.

18 JUDGE RIVERA: Well, all right, so if I'm
19 understanding you then, the position is that at the time
20 the complaint was filed, the - - - there's - - - what was
21 understood to be the contract didn't have a PSE in it?

22 MR. D'ANTONIO: No. We - - - we saw the PSE. We
23 thought it was a valid part of the contract. It had been
24 there when the policy was issued - - -

25 ACTING CHIEF JUDGE CANNATARO: And Mr. Malik



1 didn't say at that point, I never - - - I never bought a
2 sprinkler policy, this was supposed to be a non-sprinkler
3 policy.

4 MR. D'ANTONIO: Well, the truth of the matter is
5 he didn't. But even if he had, it wouldn't made - - - have
6 made a difference. I've tried. If the carrier issues the
7 policy with that endorsement, and we don't say anything
8 about it until after a loss - - -

9 ACTING CHIEF JUDGE CANNATARO: It - - - it does
10 make a difference because that would have enabled you to
11 plead reformation right at the outset of the - - -

12 MR. D'ANTONIO: I - - -

13 ACTING CHIEF JUDGE CANNATARO: - - - of the
14 action.

15 MR. D'ANTONIO: - - - I had no facts to - - - for
16 reformation because I thought that the carrier, as is its
17 right, to put in a PSE clause, which they can do, whether
18 Malik wanted it or not, and the burden is on Malik to read
19 the policy and if it's in error, raise it. That never
20 happened. So I viewed it as being bound by the PSE, and
21 what we argued in our case, and what we litigated, and it's
22 basically the same facts, that there was a waiver because
23 they issued the policy with the PSE. They knew there was
24 no sprinkler. And they kept the premium and kept the
25 policy in effect.



1 At trial, there was an admission for the first
2 time that it shouldn't have been there. It then went to
3 the jury, and the jury concluded based on a clear and
4 convincing standard that it shouldn't have been there. And
5 I didn't know about it because they engaged in a dilatory
6 tactic withholding the evidence for four-and-a-half or five
7 years, and now they're claiming foul because it wasn't
8 raised until late in the game. But they knew all along
9 what was in their underwriting file and what wasn't in
10 their underwriting file.

11 I was the one who was surprised at trial and - -
12 - and to set this verdict aside, it would be a gross
13 miscarriage of justice. I mean, this was not intended to
14 be there. It's been admitted to. The jury found that by
15 clear and convincing evidence. And I think, Your Honor,
16 that if you're looking at it from a sui generis standpoint,
17 you have to give credit to the fact that they hid the
18 evidence from us. I litigate insurance coverage cases.
19 That underwriting file is what tells me what my case is
20 about. Five years went by, they didn't produce it. They
21 didn't - - - they waited until the statute of limitations
22 actually had already expired - - -

23 JUDGE WILSON: We've - - - we've got that - - -

24 MR. D'ANTONIO: - - - by the time I got that.

25 JUDGE WILSON: Your - - - if I understand your



1 point here correctly, it's that until you got the
2 discovery, at most, all you thought was this is a
3 unilateral mistake. It was when you got the discovery, you
4 realized this is a mutual mistake.

5 MR. D'ANTONIO: Not immediately, but yes, Your
6 Honor, that's the argument. A unilateral mistake, if my
7 client didn't expect it - - -

8 JUDGE WILSON: Except for the contract.

9 MR. D'ANTONIO: - - - gives me no relief, I argue
10 waiver and estoppel. I didn't know it was mutual until she
11 - - - and I was trying a waiver and estoppel case, that was
12 my opening statement. I didn't know they did it in error
13 until on the witness stand for the very first time, they
14 disclosed that there would miss - - - the documents that
15 needed to be in the underwriting file for the PSE to be
16 part of the policy, didn't exist. And - - - and there's an
17 implied confidential - - -

18 JUDGE RIVERA: But if I'm understanding your
19 argument now response to Judge Wilson - - -

20 MR. D'ANTONIO: I'm sorry, Judge.

21 JUDGE RIVERA: If I'm understanding what you're
22 saying now in response to Judge Wilson as you continue with
23 this, you realized it's a mutual mistake because there's a
24 document missing in the file?

25 MR. D'ANTONIO: I realized it was a mutual



1 mistake when the witness testified for the first time that
2 file that we gave you, that underwriting file, doesn't have
3 the documents in it.

4 JUDGE RIVERA: But that - - - that doesn't mean
5 that there was a mutual mistake.

6 MR. D'ANTONIO: That doesn't - - -

7 JUDGE RIVERA: That means there's a paper missing
8 from a file.

9 MR. D'ANTONIO: No. To the contrary, Judge. I
10 mean, they - - - she testified that for the PSE to have
11 existed in the policy, there had to be two documents, a
12 rate form and one other document I don't recall. They
13 produced that file, 805 pages; it didn't have either, they
14 were missing. They weren't there.

15 And I said to her, well, if they're not there,
16 and they're required in order for the PSE to be part of the
17 policy, is the PSE in the file - - - is the PSE made part
18 of the policy in error. And she said yes. It was never
19 bargained for, it was never negotiated, we paid a higher
20 premium because there were no sprinklers in this building.

21 ACTING CHIEF JUDGE CANNATARO: Thank you,
22 Counsel. Thank you.

23 MR. CARROLL: There was no admission at trial.
24 This underwriting file is not relevant to a breach of
25 contract case. That's part of the issue here. They were



1 not banging on our door in 2013 and '14 and '15 saying give
2 us the file, give us the file, at all. It wasn't relevant
3 in this case. And they had it in 2016. And they had that
4 same witness in a deposition chair in 2016. They never
5 asked her a question about reformation or what happened
6 with the contract or the PSE, at all.

7 This was a theory that was created at trial.

8 ACTING CHIEF JUDGE CANNATARO: Counsel, the
9 underwriter's testimony was kind of a bombshell at trial
10 when she admitted that this very well may not have supposed
11 to have been a sprinkler policy, right?

12 MR. CARROLL: So it was - - - we have to remember
13 she's not the underwriter. That's part of the problem.
14 She's a supervisor. The actual underwriter, he became
15 mentally incompetent in 2013. He couldn't testify. Also
16 part of the problem. If this was a reformation case in
17 2011, we talk to that underwriter. We take the deposition
18 of Mr. Malik very differently. We bring the brokers in.
19 We have a whole bunch of things that happen. But that's
20 not relevant because it's not relevant at the time.

21 ACTING CHIEF JUDGE CANNATARO: Well, to
22 plaintiff's complaint about the discovery process, if they
23 had had the underwriting file, which they did request, they
24 might have stumbled upon the mutual mistake that became
25 very apparent - - -



1 MR. CARROLL: But even if that's - - -

2 ACTING CHIEF JUDGE CANNATARO: - - - at trial.

3 MR. CARROLL: - - - even if that's right, first,
4 it still doesn't take away from the fact that for purposes
5 of this analysis, we look to what the allegations in the
6 complaint were for pleading purposes. But even if that's
7 right, they had the underwriting file in '16. They had
8 that witness on the stand in '16. They could have asked
9 her anything they wanted; they never did.

10 Mr. Malik - - - Your Honor, you made a great
11 point. He knew, if we take him for his word, the day they
12 filed this complaint that this PSE should not have been in
13 that - - - in that policy. That's his position. I
14 actually heard Counsel say, we presume, we took for - - -
15 we took it that that was a valid provision in the policy.
16 If that's the case when they filed that complaint, then
17 there is no mutual mistake here, there is no reformation
18 claim. It was simply something that good lawyers figure
19 out on the fly during trial. It's a violation of the rules,
20 it's not fair, and that is the exact reason why we have
21 these types of rules.

22 JUDGE GARCIA: But doesn't this part of your
23 argument, and maybe it goes back to a point you made very
24 early on, really go to the 3025 decision because that to me
25 seems like timing, when you should have made this, should



1 we allow this now to conform to proof that comes out at
2 trial, whereas once that's granted, we go off into 203(f)
3 land.

4 MR. CARROLL: I think - - - I think it can be
5 both, Your Honor. I mean, I think that there are both
6 issues here, right? How are we going to try a reformation
7 case that is premised on facts that are never before
8 anyone, no one has disclosed, there's no discovery on it,
9 no nothing, on the day of trial, wildly prejudicial.

10 Second point, if you're going to talk about
11 reformation, and you're going to talk about a breach of
12 contract, two entirely different occurrences and
13 transactions. They can't be treated similarly, they don't
14 relate to each other.

15 JUDGE GARCIA: Our review standard for a 3025
16 grant is abuse of discretion, right?

17 MR. CARROLL: That's correct, Your Honor.

18 ACTING CHIEF JUDGE CANNATARO: All right. Thank
19 you, Counsel.

20 MR. CARROLL: It was a privilege, thank you.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of 34-0673, LLC v. Seneca Insurance Company, No. 81 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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