To be argued by
Patrick Michael Megaro
(15 Minutes)

NEW YORK SUPREME COURT

APPELLATE DIVISION – SECOND DEPARTMENT

DR. MARIA ANGHEL,

Plaintiff-Appellant,

-against-

Nassau County
Index #3157/11

UTICA MUTUAL INSURANCE COMPANY,

Defendant-Respondent.

Appellate Division
Docket # 2013-07415

BRIEF FOR PLAINTIFF-APPELLANT

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

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DR. MARIA ANGHEL,

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-against-

UTICA MUTUAL INSURANCE COMPANY,

Defendant-Respondent.

----------X

Nassau County
Index # 2011/003157

STATEMENT PURSUANT TO CPLR § 5531

Appellate Division
Docket # 2013-07415

1. The index number in the court below was 2011/003157.

2. The full names of the original parties were Dr. Maria Anghel against Utica Mutual Insurance Company.

3. This breach of contract action was commenced on March 2, 2011, in the Supreme Court of Nassau County, by filing a Summons and Complaint. Issue was joined on April 7, 2011 with the filing of the Verified Answer. An Amended Verified Complaint was filed and served upon Defendant-Respondent on April 27, 2011.

4. This is an appeal from a judgment, entered on May 24, 2013, before Honorable Thomas Feinman, Justice of the Supreme Court, Nassau County, upon a verdict after a jury trial, as well as an Order dated February 29, 2012, before the Honorable Thomas A. Adams, Justice of the Supreme Court, Nassau County, denying the Plaintiff-Appellant's motion for summary judgment, and an Order dated June 4, 2012, before Honorable

Thomas A. Adams, Justice of the Supreme Court, Nassau County, denying Plaintiff-Appellant's motion to renew/reargue the motion for summary judgment.

5. Plaintiff-Appellant is appealing on the original record.

Dated: Winter Park, Florida
December 6, 2013

PATRICK MICHAEL MEGARO

TABLE OF AUTHORITIES

Cases

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PRELIMINARY STATEMENT

This is an appeal from a Judgment in favor of the Defendant-Respondent, entered on May 24, 2013, upon a verdict after a jury trial (Honorable Thomas Feinman, J.S.C. at trial), as well as an Order dated February 29, 2012, denying the Plaintiff-Appellant's motion for summary judgment (Honorable Thomas A. Adams, J.S.C. on the motion), and an Order dated June 4, 2012, denying Plaintiff-Appellant's motion to renew/reargue the motion for summary judgment (Honorable Thomas A. Adams, J.S.C. on the motion).

This is an appeal as of right. Plaintiff-Appellant is appealing on the original record and is represented by Patrick Michael Megaro, Esq., and Brownstone, P.A.

QUESTIONS PRESENTED

1. Whether the Denial Of Plaintiff-Appellant's Motion For Summary Judgment Was Erroneous Where The Material Facts Were Undisputed And The Ambiguous Insurance Policy Should Have Been Construed In Favor Of Plaintiff-Appellant.

2. Whether the Plaintiff-Appellant's Fundamental Right Of Due Process And A Fair Trial Were Violated When The Lower Court Erroneously Permitted Collateral Evidence To Attack Plaintiff-Appellant's Credibility; The Magistrate Assumed An Active Role As A Participant Advocate And An Unsworn Witness; And The Application To Conform The Pleadings To The Facts Was Denied.

STATEMENT OF FACTS

Background

The Plaintiff-Appellant owns a two-story commercial building ("Premises") located at 2410 Hempstead Turnpike in East Meadow, which was insured on January 31, 2010 by Defendant-Respondent. (R1-228). On January 31, 2010, a fire sprinkler system pipe fitting situated above the ceiling of the second floor broke due to freezing, which caused a flood to the Premises and damages in excess of $200,000.00. (R2-437, R2-438).

Thereafter, Plaintiff-Appellant filed a claim with Defendant-Respondent which disclaimed coverage on August 3, 2010 based on a policy coverage exclusion which states:

> Water, other liquids, power or molten material that leaks or follows from plumbing, heating, air conditioning or other equipment (**except for fire protective systems**) caused by or resulting from freezing, unless:
> 1. You do your **best to maintain heat** in the building or structure; or
> 2. You drain the equipment and shut off the supply if the heat is not maintained.

(R1-382, R1-383, R2-438, R3-458, R4-555) (emphasis added). Defendant-Respondent determined Plaintiff-Appellant did not maintain heat in the Premises which allowed the pipes to freeze and cause the damage. (R1-383). However, Plaintiff-Appellant personally set the thermostat at 50 degrees Fahrenheit to maintain heat in the building. (R2-438). Per the policy indemnity provisions

Plaintiff-Appellant was entitled to coverage, but Defendant-Respondent refused to pay. (R2-439).

Commencement of Action

On March 2, 2011, Plaintiff-Appellant filed a breach of contract action, in the Supreme Court of Nassau County, by filing a Summons and Complaint. Issue was joined on April 7, 2011 with the filing of the Verified Answer. (R2-441, R2-455). An Amended Verified Complaint was filed and served upon Defendant-Respondent on April 28, 2011. (R2-447). The parties stipulated to withdraw the Initial Discovery Motion on August 17, 2011 and conducted a preliminary conference on September 13, 2011. (R2-448, R2-451).

Motion for Summary Judgment

Prior to trial, Plaintiff-Appellant filed a motion for summary judgment on the issue of liability and a declaratory judgment enforcing coverage of the damages under the insurance policy provided by Defendant-Respondent. (R2-452). This was based upon satisfaction of all conditions precedent to establish coverage, upon her compliance with a policy provision which provided "you must do your best to maintain heat," and upon the exclusion of fire protection devices from the frozen plumbing policy exclusion. (R2-454). Plaintiff-Appellant affirmed she always maintained heat in the Premises, and before the second floor flood occurred, she had

personally set the downstairs thermostat at forty-eight degrees Fahrenheit and the upstairs thermostat at fifty degrees Fahrenheit. (R2-456).

As stated above, the insurance policy at issue contained an exclusion which provided "do your best to maintain heat in the building or structure". (R1-382, R1-383, R2-438). However, the exclusion did not define to what degree the Premises must be heated to be considered "maintaining heat." (R2-457, R2-555). The policy exclusion specifically excluded coverage for damage resulting from frozen pipes "**except for fire protective systems**." (R2-458, R2-555) (emphasis added). Therefore, the Defendant-Respondent's disclaimer of coverage based upon failure to maintain heat and despite the frozen pipe fitting being part of the fire sprinkler system should be rejected as a matter of law. (R2-455--459).

It was undisputed that the pipe fitting was part of the fire sprinkler system. (R2-595). Defendant-Respondent filed an Affirmation in Opposition on December 23, 2011 contending Plaintiff-Appellant failed to meet her prima facie burden to establish entitlement to summary judgment. (R2-621). This contention was based on whether Plaintiff-Appellant did her "best to maintain heat in the building or structure" and a wholly new assertion that Plaintiff-Appellant failed to address the Protective Safeguard Endorsement of the policy that requires the fire protection system to be maintained. (R2-621, R2-625).

On January 4, 2012, Plaintiff-Appellant filed a Reply in Support of Plaintiff's Motion for Summary Judgment. (R2-720). Defendant-Respondent admitted in their opposition to summary judgment the flood was caused by a broken pipe that was connected to the sprinkler system, which was covered under the insurance policy. (R2-713). Defendant-Respondent's expert statement that Plaintiff-Appellant did not maintain heat to either forty-eight or fifty degrees was mere speculation negated through Plaintiff-Appellants reply affidavit, which explains the lower gas usage between July 2009 and January 2010, was due to a change in the Premises use. (R2-713, R2-714). The Premises had been previously used for physical therapy. (R2-713). Once patients were no longer being treated the Premises no longer required such high heating. (R2-713). Although, Plaintiff-Appellant set the Premises thermostats to forty-eight and fifty degrees prior to the flood there was an extreme three day cold spell while she was away. (R2-714). During these three days the temperature was below freezing to a low of twelve degrees. (R2-714).

The reply also addressed the wholly new assertion by the Defendant-Respondent that Plaintiff-Appellant failed to address the Protective Safeguard Endorsement of the policy that requires the fire protection system to be maintained. (R2-714). The Protective Safeguard Endorsement states:

We will not pay for loss or <u>damage caused by or resulting from fire if, prior to the fire</u>, you:

1. Knew of any suspension or impairment in any protective safeguard listed in the Schedule above failed to notify us of the fact; or
2. Failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.

(R2-718) (original emphasis). This provision is clear and unambiguous as it relates to exclusion of coverage from fire damage. (R2-718, R2-719).

<u>The Order Denying Summary Judgment</u>

On February 29, 2012, an order was entered denying Plaintiff-Appellant's motion for summary judgment. The denial was based on Defendant-Respondent's expert's affidavit, who opined that Plaintiff-Appellant did not maintain heat in the property to forty-eight degrees or fifty degrees based on a review of the gas heat invoices from April 2009 through February 2010. (R2-429). This was despite the Plaintiff-Appellant's re-assertion the pipe fitting that broke was part of the fire sprinkler system, which was specifically excepted from the policy exclusion. (R2-713). Additionally, the Defendant-Respondent's expert opined that the heating costs were higher in March 2009, April 2009, and February 2010 than from June 2009 through January 2010 reflects use of the Premises as a physical therapy center during March and April of 2009. (R2-429). For these reasons the lower court found there was a triable issue of fact as to whether Plaintiff-Appellant "appropriately heated the premises pursuant to the terms of the policy." (R2-429).

Motion to Reargue Summary Judgment

Plaintiff-Appellant sought leave to reargue the motion for summary judgment dated October 14, 2011. (R2-742). She asserted that the lower court "overlooked the undisputed fact that the frozen pipe that caused the flood was part of the Property's fire sprinkler system and the provisions requiring plaintiff to 'use best efforts to maintain heat' do not apply to parts of the fire sprinkler system." (R2-745).

Defendant-Respondent filed an Affirmation in Opposition of Re-Argument on June 14, 2012, contending the lower court did not overlook relevant facts, the lower court properly ruled that the frozen plumbing exclusion was not applicable in the matter, and that the protective safeguard endorsement applying only to fire was incorrect. (R3-750--753, R3-789).

On May 15, 2012, Plaintiff-Appellant filed a Reply In Support of Plaintiff's Motion to Reargue, which reiterated the denial of summary judgment was based on alleged issues of fact as to whether Plaintiff-Appellant appropriately heated the Premises and whether the frozen pipe that caused the flood was part of the fire sprinkler system (R3-790, R3-791).

It was an undisputed fact that the frozen pipe fitting was part of the building's fire sprinkler system and that the exclusionary provision for frozen plumbing did not apply the fire sprinkler system. (R3-791). The Defendant-

Respondent's own expert found the pipe fitting that broke was part of the fire sprinkler system. (R3-791). The lower court overlooked the exclusionary portion of the insurance policy that protective systems are not included under frozen plumbing. (R3-792). Nor does the Protective Safeguard Endorsement exclude coverage due to flooding but "damage caused by or resulting from fire." (R3-793). Finally, Plaintiff-Appellant asserted that New York case law has made it clear that when "an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language." (R3-794).

On June 4, 2012, the lower court denied Plaintiff-Appellant's motion to reargue. (R3-865). The lower court held that Plaintiff-Appellant "failed to demonstrate that the Court either overlooked or misapprehended any material fact or controlling principle of law in determining the prior motion." (R3-865).

Motion in Limine

On April 19, 2013, Plaintiff-Appellant moved in limine to preclude Defendant-Respondent from referring to or submitting to the jury anything that referenced Plaintiff-Appellant's revocation of license to practice medicine, the findings of the Department of Health State Board of Professional Conduct or Appellate Division, and an order denying Plaintiff-Appellant's Article 78 petition seeking reinstatement of her license by the Appellate Division, Third Department. (R3-882, R3-884). The Defendant-Respondent had proposed use of this evidence

for impeachment purposes. (R3-884). Plaintiff-Appellant asserted the use of this evidence for impeachment purposes would be unduly prejudicial and confuse the jury. (R3-885).

The Plaintiff-Appellant's license to practice medicine was revoked for allegedly violating insurance billing regulations and procedures. (R3-887). Plaintiff-Appellant argued the medical insurance billing regulations and procedures are extremely complex as shown by several university hospitals also being found to have billed incorrectly, therefore the decision and affirmance should not be considered acts involving moral turpitude, which would justify use for cross-examination. (R3-887, R3-888). Furthermore, Plaintiff-Appellant maintained (and still does) the decision and affirmance was erroneous. (R3-888). Plaintiff-Appellant is currently litigating that issue in federal court. (R3-888). The alleged acts occurred nearly ten years ago thus should have no bearing on credibility, and if the Defendant-Respondent was allowed to use this evidence during cross-examination, Plaintiff-Appellant would be compelled to explain why the decision was erroneous, essentially creating a trial within a trial. (R3-888, R3-889).

The Trial

A jury trial was held from April 25, 2013 through April 29, 2013. (R1-25, R1-62, R1-167). The lower court started the proceeding by hearing arguments for and against the Plaintiff-Appellant's motion in limine. (R1-26). Plaintiff-

Appellant argued the prejudicial value of allowing Defendant-Respondent to use her revocation of medical license to impeach her credibility outweighed its probative value. (R1-26, R1-27). The lower court denied the motion in limine and allowed Defendant-Respondent to use her medical licenses revocation "to explore the issue of credibility as fully as he wants to." (R1-27). This decision was based on determining whether Plaintiff-Appellant did her best to maintain heat. (R1-27). After this detrimental ruling, Plaintiff-Appellant requested that the lower court at least withhold the documents from being entered into evidence. (R1-28). The lower court agreed that the decision and the affirmance documents would not be allowed to be introduced. (R1-28).

Plaintiff-Appellant further argued that if the motion in limine was going to be denied she should at least be able to testify that she is currently involved in an appeal contesting the findings. (R1-28). The lower court disagreed and the following transpired:

> MR. LEDERMAN: Judge, I believe it is completely relevant for her to be able to.
> THE COURT: Absolutely not. If you're going to let her contest it I am going to let the documents in. It doesn't work one way and not the other. I am giving her tremendous leeway by not letting those documents in. **I don't think they are relevant, probative or conclusive**, so I am not going to let them in, but if she opens the door, then they are coming in.

(R1-29) (emphasis added).

Opening Statements

During opening statements Plaintiff-Appellant's counsel attempted to explain to the jury how her medical license revocation should be treated by stating:

> MR. LEDERMAN: The issue that you will be considering is whether or not the fact that her license is revoked leads you to believe that she's not telling the truth that she set the thermostats at 50.
> THE COURT: Members of the jury, it's not whether or not the fact that her license has been revoked which determines whether or not she's telling the truth. You will have to determine based on the actions of what she purportedly did and questions that are asked whether or not she's worthy of credibility. Not—it has nothing to do with whether or not her license was revoked. It has to do with credibility, okay.

(R1-51). Defendant-Respondent's counsel followed up in his opening statement with "her license was revoked for fraud, for fraud, for willful conduct, and her premises was shut down by the State of New York." (R1-53).

At the close of opening statements, the lower court again addressed the jury on the revocation of Plaintiff-Appellant's medical license by reiterating the following:

> THE COURT: Members of the jury I want to make it clear to you that the mere fact that Mrs. Anghel's license is revoked is not dispositive of the case. The fact that it is revoked you only are going to look at and hear questions as to why it was revoked, and then you are going to determine if that reflects on the credibility of her to reflect the facts here. So the issue of, if you will, her conduct, only goes to credibility, okay, and that's the only reason you are to consider it. In other words, after hearing these things you are going to say is she now worthy of credibility or not, so it doesn't matter that her license was revoked…"

(R1-57).

Plaintiff-Appellant's Case

The following day, April 26, 2013, MARIA ANGHEL, the Plaintiff-Appellant, was the first witness to testify. (R1-64). She testified that in 1999, she purchased the property located at 2410 Hempstead Turnpike, East Meadow, New York. (R1-66, R1-67). During renovations in 2003, she installed new plumbing, heating, and electric. (R1-68, R1-69). From 2003 through 2009 the Premises never had any problems with the sprinkler system, heating, or plumbing. (R1-69). The heating system has three units on the roof. "One unit services the second floor and two units service the first floor." (R1-70). The heating systems thermostats operate from forty to ninety degrees. (R1-72).

Since purchasing the Premises the Plaintiff-Appellant has always maintained insurance through Defendant-Respondent. (R1-72). Prior to the claim subject of this litigation, Plaintiff-Appellant had made only one other prior claim for vandalism to the Premises. (R1-73, R1-74). Plaintiff-Appellant testified she did not read the policy word for word, nor did anyone from the insurance company give her instructions on what specific temperature the building thermostats needed to be set. (R1-74).

On January 24, 2010, Plaintiff-Appellant went on vacation, and on February 1, 2010 she received an email that a flood had occurred in her Premises. (R1-75—R1-77). That same day she went to her Premises and discovered the ceilings on

both floors were ripped and torn out. (R1-77). Subsequently she learned from the sprinkler system repair company that the damage to the Premises was caused by a cracked sprinkler fitting attached to and part of the fire sprinkler system. (R1-54, R1-81). Prior to leaving for vacation the heating system was working and Plaintiff-Appellant had personally set the heating system thermostats at fifty degrees upstairs and forty-eight degrees downstairs. (R1-81, R1-82).

Immediately after she discovered the Premises damage, Plaintiff-Appellant reported the flood to Defendant-Respondent. (R1-82, R1-83). Thereafter, Plaintiff-Appellant received a disclaimer letter stating:

> We will not pay for loss or damage directly caused or indirectly by any of the following: We will not pay. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusion—exclusions apply whether or not the loss event results in widespread damage or affects a substantial area. Frozen Plumbing. Water, other liquids, power or molten material that leaks or flows from plumbing, heating, or conditioning or other equipment. **In parenthesis except for protective systems** caused by or resulting from freezing unless you do your best to maintain heat in the building or structure or you drain the equipment and shut off the supply if the heat is not maintained.

(R1-84, R1-85) (emphasis added). This exception, which provided the policyholder maintain heat, applied to frozen plumbing, and specifically exempted the fire sprinkler system. (R1-87).

Plaintiff-Appellant then reviewed Exhibit 6, which was the Protective Safety Endorsement to the policy (R1-88). Plaintiff-Appellant received the Protective

Safety Endorsement from Defendant-Respondent's counsel in connection with the denial of her claim. (R1-88). The endorsement did not require the policyholder to maintain heat for the plumbing system, nor did the policy limit coverage for a flood in the building. (R1-88, R1-89). This portion of the policy applied exclusively to fire damage. (R1-89). Plaintiff-Appellant further testified she did her best to maintain heat while she was on vacation. (R1-89).

Upon cross-examination, Defendant-Respondent's counsel questioned Plaintiff-Appellant in regards to the revocation of her medical license. (R1-89). Plaintiff-Appellant responded that she disagreed with his characterization. (R1-90). This line of questioning continued including who revoked her license, whether witnesses and experts were presented, and if the conclusion was she had operated a fraudulent medical practice. (R1-90—R1-92). The following occurred:

> THE COURT: Excuse me. Excuse me. I'm going to allowed him to introduce that into evidence if she doesn't testify.
> MR. LEDERMAN: Okay.
> THE COURT: Now answer the question. Did they come to a determination that you were operating a fraudulent practice out of that location? Yes?
> THE WITNESS: Invalidly so; yes.
> THE COURT: In what?
> THE WITNESS: Invalidly so; yes.
>
> Q: Doctor, in coming to that conclusion, finding you were operating a fraudulent medical practice, they revoked your license and they even went a step further; isn't that correct? That is they recommended that you never, ever be allowed to practice medicine in the State of New York ever again, isn't that correct?
> A: Yes, it was wrongfully so.

> Q: And they also recommended that in order to protect the very people that sit on this jury and in the State of New York that you never be allowed to practice again; isn't that correct?

(R1-92, R1-93). Not until Plaintiff-Appellant's counsel finally objected did the lower court step in and remind the jury again this line of questioning was only "whether she is a believable person." (R1-93). "[W]hether or not she's a person worthy to be believed..." (R1-93).

After the lower court addressed the jury, Defendant-Respondent's counsel continued to badger Plaintiff-Appellant with this line of questioning accusing her as if the findings indicated she had committed a crime. (R1-93—R1-95). When she denied that the findings indicated she had committed a crime Defendant-Respondent's counsel tried to refresh her recollection with the Appellate Affirmation. (R1-95). Plaintiff-Appellant did not want to answer yes to a finding when it was not a finding she believed to be true. (R1-96).

The lower court excused the jury and allowed Plaintiff-Appellant's counsel to explain to her that she doesn't have to agree with the finding, but does have to answer if that is what the appellate affirmation found. (R1-96—R1-98). Before the jury returned, Defendant-Respondent's counsel reiterated to Plaintiff-Appellant that he was going to continue to ask a series of questions about the appellate affirmation findings. (R1-98). The lower court responded "And then let's move

on after you've attacked her credibility. Then please let's move on to the facts." (R1-98).

The lower court then addressed Plaintiff-Appellant and stated the entire document would be let into evidence if she did not respond to the lower court's satisfaction. (R1-99). After the jury returned, Defendant-Respondent's counsel continued to attack Plaintiff-Appellant asking for her to agree to each finding. (R1-101). When Plaintiff-Appellant responded yes, but she was disputing one of the findings, the lower court allowed the entire decision to be entered into evidence and nine paragraphs of the findings to be read to the jury. (R1-101—R1-104). At times the lower court asked Defendant-Respondent's counsel to repeat paragraphs of the document being read to the jury. (R1-103).

When questioning re-commenced, Plaintiff-Appellant testified she only used the Premises as a personal office from July 2009 until the water damage had occurred. (R1-105). During the summer and fall months Plaintiff-Appellant kept the heating system off as it was unnecessary. (R1-107). When the temperatures dictated use of heat, Plaintiff-Appellant turned the system on for the winter. (R1-108). Prior to leaving for vacation, Plaintiff-Appellant testified she was heating the building with an electrical heater. (R1-110). After this response the Court engaged in the following:

THE COURT: Hold it. You were heating it with electrical heat?
THE WITNESS: Yes.
THE COURT: So are you telling us that the heat was still off in the building at that time?
THE WITNESS: I don't remember. I really don't remember.
THE COURT: Then why were you using the electrical heat?
THE WITNESS: Say that again?
THE COURT: Why were you using the electrical heat?
THE WITNESS: I was going there and I was sitting most of the time in my office.
THE COURT: Why didn't you turn the heat on in the office?
THE WITNESS: I don't remember if I did turn the heat on or not, but I do remember what I was using, the electric heater.
THE COURT: Okay.

(R1-110, R1-111).

Plaintiff-Appellant admitted the gas bills ranged from twenty to twenty-five dollars from July 2009 until the pipe fitting broke. (R1-112). Plaintiff-Appellant testified she has not drained the plumbing or heating system in the building and had the sprinkler system serviced as required. (R1-114—R1-116).

The Defendant-Respondent's Case

KATICA LEHMAN, property claims supervisor of Utica National, testified she was employed by the Defendant-Respondent on, January 31, 2010, the date the damage occurred to Plaintiff-Appellant's Premises. (R1-128). Lehman managed a team of property adjusters, who received the first reports of loss. (R1-126). When the report was received by the adjuster, they reviewed the policy to determine whether the loss was covered. (R1-127). When an adjuster decided there was no coverage under the policy, the claim was referred to Lehman for review. (R1-128).

If her review dictated denial she referred the claim to Defendant-Respondent's property examiner to make the final decision. (R1-128). **"If there is any possibility there is coverage in gray area,...it['s] give[n] to the policyholder."** (R1-128) (emphasis added). However, if the property examiner agreed there was no coverage, it went to a manager. (R1-128). If the manager determined there was no coverage, a disclaimer letter was sent. (R1-128).

An independent adjuster was assigned to Plaintiff-Appellant's claim, who felt there was a question regarding heat and recommended Defendant-Respondent retain heating expert Dan Karl. (R1-129, R1-130). Lehman testified after reviewing Karl's reports there was a question of coverage and referred the file to attorneys Faust, Goetz, Schenker and Blee. (R1-130). Faust, Goetz, Schenker and Blee determined there was no coverage for Plaintiff-Appellant. (R1-130).

Plaintiff-Appellant's insurance policy included an endorsement that the "policyholder must maintain sprinkler system and devices in good working order" to mitigate fire damages. (R1-132, R1-134). The frozen plumbing exclusion, stated in the denial letter, does not include the fire protective system. (R1-135). Lehman then testified the policyholder must maintain heat, even though when questioned by the lower court she admitted the policy does not state this. (R1-135). The final determination was Plaintiff-Appellant violated the protective safeguard endorsement, which resulted in the denial of the claim. (R1-136).

On cross-examination Lehman again testified if there is any gray the claim always favors the policyholder, which is the law of New York. (R1-137, R1-138). According to the endorsement:

> We will not pay for loss or damage caused by or resulting from fire if prior to the fire you knew of any suspension in or impairment in any protective safeguard listed in the schedule above and failed to notify us of the fact, or two, failed to maintain any protective safeguard listed in the schedule above.

(R1-141, R1-142). The language of the endorsement does not included exclusions for flood. (R1-142). Lehman opined "**[t]he sprinkler system—this exclusion or conditions does not apply to the sprinkler system.**" (R1-144) (emphasis added).

DANIEL J. KARL, the Defendant-Respondent's expert witness, testified he was retained by Defendant-Respondent to investigate the loss at Plaintiff-Appellant's Premises. (R1-148). Karl testified he does not decide if payment on loss is warranted, make recommendations a claim is paid, or have policy information. (R1-149). His report only includes facts from his investigation. (R1-149). Karl's investigation of Plaintiff-Appellant's damage relied exclusively on gas consumption records. (R1-150—R1-152).

The gas consumption bill from December 10, 2009 through January 12, 2012 had increased from three therms to four therms. (R1-156). However, even

with this increase Karl determined the heating system had not been turned on. (R1-156). He opined the pipe freeze rupture was due to lack of heat. (R1-160).

On cross-examination Plaintiff-Appellant's counsel started to question Karl but was interrupted almost immediately by the lower court, in which the following occurred:

> THE COURT: Let me ask a simple question: Does a pipe burst immediately upon freezing or does it freeze first then burst? Is there a delay? Is there a gap?
> THE WITNESS: It depends on temperature. If a pipe freezes in a void space anywhere, even a ceiling—this was above a ceiling, this particular pipe, is a pipe freezes and the temperature stays below freezing in the building, it can stay frozen like that, so it depends on what you define as a burst. A pipe can freeze and break, remain cracked with ice in the pipe for weeks, months. I mean, if you maintain below 32 degrees, you will not have any water leaking out of that pipe. What happens is when it thaws.
> THE COURT: Mr. Karl, were you able to determine upon examination of the pipe when the burst occurred?
> THE WITNESS: I was not. I can't. It's impossible to determine that.
>
> Q: Now if I may proceed with the hypothetical question.
>
> THE COURT: Hypothetical assuming—members of the jury, hypothetical question means that he asks them to assume certain facts. You can accept those hypothetical facts or reject them. Go ahead.

(R1-161, R1-162). In Plaintiff-Appellant's counsel's hypothetical he asked Karl to assume the pipe fitting broke while Plaintiff-Appellant was on vacation, and if it had what the gas usage was during that period. (R1-162). Karl was unable to form an opinion because the gas usage bill was for the entire month, which was 95 therms. (R1-158, R1-166). He agreed it was possible the thermostat had been set

at fifty degrees and the severe drop in temperature on January 31, 2010 caused the pipe fitting to break. (R1-166). After Karl's testimony both sides rested and the case was adjourned until the following Monday. (R1-168).

Application to Conform Pleadings to the Facts

On April 29, 2013, Plaintiff-Appellant's counsel made an application to conform the pleadings to the facts. To add a cause of action for bad faith based upon Lehman's testimony that coverage was denied pursuant to an exclusion for frozen pipes. (R1-168). Defendant-Respondent's witness Katica Lehman admitted under oath this exclusion did not apply, and that the coverage denial was based on the protective safeguard endorsement, which had not been previously plead. (R1-170). Furthermore, the jury should be charged "that if they answer the question yes that plaintiff maintained her system as required by the protective endorsement, that the jury be asked a further question, do you find the denial of coverage under the protective safeguard endorsement was in bad faith." (R1-170).

Defendant-Respondent's counsel argued their filed answer "reserved all the rights and defenses under the insurance policy," the endorsement was included in the motion for summary judgment, and discovery. (R1-171). The lower court denied the application. (R1-171).

Closing Arguments

During summations Defendant-Respondent's counsel repeatedly encouraged the jury to pay close attention to the twenty-five pages of findings in the decision to revoke Plaintiff-Appellant's medical license when deciding whether coverage should apply or not. (R1-174).

The Verdict

Five of the six jurors found the Plaintiff-Appellant did not maintain the sprinkler systems required under the Protective Safeguard Endorsement. (R1-219). At this point, Plaintiff-Appellant's counsel moved for a judgment notwithstanding the verdict. (R1-222). He argued the case should have been decided on a pure issue of law, arguing that the term "maintain" is ambiguous, therefore the lower court should have determined whether or not Plaintiff-Appellant maintained heat in the Premises. (R1-222). The lower court denied the application. (R1-222).

On June 17, 2013, Plaintiff-Appellant filed a Notice of Appeal in the Nassau County Supreme Court. This appeal follows.

ARGUMENT

POINT I-THE DENIAL OF PLAINTIFF-APPELLANT'S MOTION FOR SUMMARY JUDGMENT WAS ERRONEOUS WHERE THE MATERIAL FACTS WERE UNDISPUTED AND WHERE THE AMBIGUOUS INSURANCE POLICY SHOULD HAVE BEEN CONSTRUED IN FAVOR OF PLAINTIFF-APPELLANT

The court below improperly found that Plaintiff-Appellant failed to meet her initial burden of showing prima facie entitlement to summary judgment as a matter of law. The court below improperly determined that Plaintiff-Appellant failed to do her best to maintain heat on the property, when Plaintiff-Appellant did maintain heat between forty-eight and fifty degrees, the insurance policy did not specify what temperature was required to "maintain heat," and the insurance policy exclusion did not apply to frozen pipes connected to the fire sprinkler system. Accordingly, denial of summary judgment was improper.

A. Plaintiff-Appellant Met Her Initial Burden

Summary judgment must be granted when the moving party has met the burden of showing the absence of a genuine issue as to any material fact with all evidence being viewed in the light most favorable to the non-moving party. GTF Mktg v. Colonial Aluminum Sales, 66 N.Y.2d 965 (1985); Cox v. Kingsboro Med. Grp., 214 A.D.2d 150, 158, 632 N.Y.S.2d 139, 144 (1995) aff'd, 88 N.Y.2d 904, 669 N.E.2d 817 (1996); World Trade Knitting Mills, Inc. v. Lido Knitting Mills, Inc., 154 A.D.2d 99 (1990); Alter v. Advance Alarm Co., 131 A.D.2d 406 (2d

Dep't 1987); Colonresto v. Good Samaritan Hosp., 128 A.D.2d 825 (2d Dep't 1987). When the moving party has offered sufficient evidence to demonstrate there is an absence of any material issue of fact, the burden shifts to the party opposing summary judgment to produce evidentiary proof in admissible form that is sufficient to establish material issues of fact which require a trial of the action. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Prince v. DiBenedetto, 189 A.D.2D 757 (2d Dep't 1993); Universal Broadcasting Corp. v. Incorporated Village of Mineola, 192 A.D.2d 518 (2d Dep't 1993).

The law is well-settled that where the moving party conclusively demonstrates a prima facie showing of entitlement to judgment as a matter of law, a motion for summary judgment must be granted, regardless of the sufficiency of the opposing papers. Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Weiss v. Feldbrand, 50 A.D.3d 673 (2d Dep't 2008); Leo v. Gugliotta, 212 A.D.2d 761 (2d Dep't 1995); Rebecchi v. Whitmore, 172 A.D.2d 600 (2d Dep't 1991); La Touraine Coffee Co., Inc. v. Al Deppe's Diner, Inc., 109 A.D.2d 824 (2d Dep't 1985).

In this case, there was no genuine issue of material fact disputing that Plaintiff-Appellant's insurance policy covered the damages sustained to her Premises from the broken pipe fitting. The insurance policy coverage for floods contained an express exception for the fire protective systems. Even if the

exclusion included the plumbing connected to the fire sprinkler system the requirement to use best efforts to maintain heat was established in Plaintiff-Appellant's affidavit that she personally set the building thermostats at forty-eight and fifty degrees prior to the pipe fitting break. Furthermore, the insurance policy exclusion did not indicate what is considered to be maintaining heat.

It is an undisputed fact that the frozen plumbing exclusion did not apply to the fire protective system. (R2-428, R2-752). If this fact had been disputed, the lower court would have to determine if the fact was genuine or unsubstantiated. Hirsch v. S. Berger Import & Mfg. Corp. 67 A.D.2d 30 (1st Dept. 1979). When the issue is feigned, summary judgment is proper. Id. Furthermore, New York law requires summary judgment when contract language is ambiguous. Lee v. Marvel Enterprises, Inc., 386 F.Supp.2d 235 (2005). If the extrinsic evidence creates no genuine issue of material fact, then it is the Court that interprets the language as a matter of law. Id.

Here, Defendant-Respondent inserted the Protective Safeguard Endorsement that required the fire protective system to be maintained, which the lower court held required the entire premises to be appropriately heated. (R2-429). However, reliance upon this was improper. Here, the protective safeguard endorsement's requirement that the fire protective system was to be maintained applied exclusively to fire damage, not damage caused by other means. Because the

requirement of "maintain" was ambiguous, which operates against the drafter of the policy, summary judgment should have been granted in favor of Plaintiff-Appellant.

B. There Were No Genuine Issues of Material Fact that Precluded Summary Judgment, and Defendant-Respondent Failed to Rebut Plaintiff-Appellant's Prima Facie Showing of Entitlement to Summary Judgment

Defendant-Respondent's position that Plaintiff-Appellant failed to meet her prima facie case showing entitlement to summary judgment fails to point to a genuine issue of material fact. In the court below, Defendant-Respondents argued that because Plaintiff-Appellant did not do her "best to maintain heat in the building or structure" and failed to consider the Protective Safeguard Endorsement of the policy, she did not meet the requirements for coverage under the policy. This argument is meritless.

When a written agreement is ambiguous and requires interpretation, the party opposing summary judgment must set forth extrinsic evidence, in evidentiary form, to support their interpretation. See Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn., 32 N.Y.2d 285, 291 (1973); see also Penguin 3rd Ave. Food Corp. v. Brook-Rock Asscs., 174 A.D.2d 714 (2d Dep't 1991); Posh Pillows v. Hawes, 138 A.D.2d 472 (2d Dep't 1988).

Here, Defendant-Respondent failed to tender any evidentiary proof in admissible form that there was a genuine issue of material fact disputing Plaintiff-

Appellant's insurance policy covered the damages sustained to her Premises from the broken pipe fitting. Rather, they asked the lower court to engage in unsupported speculation that a Protective Safeguard Endorsement that clearly and unambiguously excludes coverage from fire damage also applies to flood damage.

The evidence in the case fails to support this argument, and directly contradicts the Defendant-Respondent's position. The uncontroverted evidence shows that the Protective Safeguard Endorsement "will not pay for loss or damage caused by or resulting from fire." (R2-718). The damage to Plaintiff-Appellant's Premises was not caused by a fire, but from a flood.

Even assuming arguendo that Defendant-Respondent's expert's opinion that Plaintiff-Appellant failed to maintain the fire sprinkler system through lack of heat, Defendant-Respondent still cannot escape liability.

In Diaz v. New York Downtown Hosp., 99 N.Y.2d 542 (2002), the Court of Appeals held that "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . the opinion should be given no probative force and is insufficient to withstand summary judgment."

Defendant-Respondent's expert relied solely on gas use invoices prior to the date of the flood, which ranged from twenty to twenty-five dollars. He did not rely on the gas invoice that covered the date in question that reflected an invoice of $229.46. (R2-623, R2-624).

Since the Plaintiff-Appellant's insurance policy clearly covered the damage to her property, the court below improperly determined that she failed to meet her initial burden. Therefore, this Court must reverse and direct the court below to enter a judgment in favor of Plaintiff-Appellant.

POINT II-PLAINTIFF-APPEALLANT'S FUNDAMENTAL RIGHT OF DUE PROCESS AND A FAIR TRIAL WERE DENIED WHEN THE LOWER COURT ERRONEOUSLY PERMITTED COLLATERAL EVIDENCE TO ATTACK PLAINTIFF-APPELLANT'S CREDIBILITY, THE MAGISTRATE ASSUMED AN ACTIVE ROLE AS A PARTICIPANT, ADVOCATE AND AN UNSWORN WITNESS, AND THE APPLICATION TO CONFORM THE PLEADINGS TO THE FACTS WAS DENIED

A. The Lower Court Erred in Allowing Plaintiff-Appellant Credibility to be Attacked Through an Unrelated Civil Judgment

In allowing Plaintiff-Appellant to be cross-examined in relation to unrelated judgment which revoked her medical license, the lower court inappropriately allowed Defendant-Respondent to conduct a trial within a trial based on a collateral issue that unjustly ruined Plaintiff-Appellant's credibility.

First, the lower court committed clear error when Plaintiff-Appellant's motion in limine to exclude any reference to the revocation of Plaintiff-Appellant's medical license was denied. Second, it was plain error to allow Defendant-Respondent to badger Plaintiff-Appellant on the witness stand, and introduce the

revocation decision into evidence, after Plaintiff-Appellant responded in the affirmative but disputed one of the findings. Clearly, this evidence was highly prejudicial.

In Badr v. Hogan, 75 N.Y.2d 629, 637 (1990), the Court of Appeals held "the emphasis given to the confession of the judgment as bearing on the critical issue of plaintiff's credibility, both during the trial and in defense counsel's summation" was sufficiently prejudicial to warrant a new trial. The Badr Court reasoned a witness is allowed to be cross-examined to determine the witness's credibility when there is a specific immoral, vicious or criminal act. Id. at 634. Although, the nature and extent of the cross-examination is discretionary, there must be some tendency to show moral turpitude to be relevant in an attack on credibility. Id. Whether or not the line of questioning was proper, the subject matter was unquestionably collateral. Id. When a plaintiff's alleged prior misconduct has no direct bearing on any issue other than credibility, it only shows the plaintiff acted deceitfully on a prior unrelated occasion. Id.

Similarly, in Parsons v. 218 E. Main St. Corp., 1 A.D.3d 420 (2d Dep't 2003), this court reversed a judgment in favor of the defendant where the trial court improperly allowed counsel to introduce a hospital record on a matter that was irrelevant to any issue in the case. Id.

In this case, Defendant-Respondent's sole purpose for introducing Plaintiff-Appellant's revocation of her medical license was to assassinate her credibility, which the court allowed to go unfettered. (R1-29). The lower court denied Plaintiff-Appellant's motion in limine to exclude the reference as unduly prejudicial, despite the revocation being irrelevant, nonprobative, and nonconclusive. (R1-29, R1-31).

When Defendant-Respondent's counsel delivered the opening statement he immediately told the jury Plaintiff-Appellant's medical license was revoked for fraud. (R1-55). On cross-examination of Plaintiff-Appellant, defense counsel relentlessly questioned Plaintiff-Appellant on every aspect of the decision. (R1-90—R1-92). After Plaintiff-Appellant rebutted the truth of one of the findings, the lower court reminded counsel that Plaintiff-Appellant was not able to defend herself, "Excuse me. Excuse me. I'm going to allowed him to introduce that into evidence if she doesn't testify." (R1-92). At that point, the lower court addressed Plaintiff-Appellant, "Now answer the question. Did they come to a determination that you were operating a fraudulent practice out of that location?" "Yes?" (R1-92). Although the lower court previously ruled that the decision would not be admitted into evidence, it was not satisfied with Plaintiff-Appellant's answers and assisted in admitting the decision into evidence. (R1-30, R1-101). Once the decision was entered into evidence Plaintiff-Appellant continued to be subjected to

attack as the Defendant-Respondent was allowed to read nine paragraphs of the decision findings to the jury, and the findings were repeated at times at the lower court's request. (R1-101, R1-104). Finally, Defendant-Respondent urged the jury to read the twenty-five page findings that revoked Plaintiff-Appellant's medical license during deliberation. (R1-174).

This extreme prejudice imputed on the Plaintiff-Appellant was further intensified when the trial court constantly re-affirmed to the jury the revocation of Plaintiff-Appellant's medical license determines "whether or not she [was] worthy of credibility or not." (R1-53, R1-59, R1-93).

Here, the lower court not only erroneously allowed this collateral evidence to attack Plaintiff-Appellant's credibility throughout the trial and during Defendant-Respondent's summation, but participated by continuously reiterating to the jury this collateral evidence had a direct bearing on her credibility, which warrants a new trial.

B. The Lower Court Assumed an Active Role as a Participant, Advocate and an Unsworn Witness at the Trial, thereby Depriving Plaintiff-Appellant of her Fundamental Due Process Right To A Fair Trial

The Fifth and Fourteenth Amendments of United States Constitution guarantees to each person Due Process of Law. U.S. Const. amend. V; U.S. Const. amend, XIV, § 1. Similarly, Article I, §6 of the State of New York's Constitution also protects each person's right to Due Process of Law. N.Y. Const. art. I, §6.

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." In Re Murchison, 349 U.S. 133 (1955). A fair tribunal necessarily means that there are boundaries for how far a presiding judge may involve themselves in the proceedings. It requires that "such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." See Murchison, 349 U.S. at 136.

Here, the court below took on an active role as a litigant and an advocate for the Defendant-Respondent, abandoning its role as a neutral arbiter, and became an unsworn witness. As a consequence, this Court should reverse the judgment.

The law is clear that a court may not assume the advocacy role traditionally reserved for counsel. People v. Arnold, 98 N.Y.2d 63 (2002), Matter of Carroll v. Gammerman, 193 A.D.2d 202 (1st Dep't 1993). Though a trial judge may clarify confusing testimony and facilitate the orderly progress of a trial, its power must be "exercised sparingly, without partiality, bias or hostility" or else a denial of Due Process will result. People v. Storfs, 47 N.Y.2d 882, 883 (1979). A judge must be careful in assuming an active role, as over-intervention in a case carries a far greater danger of prejudice than under-intervention. The Court of Appeals has held that "a Trial Judge's examination of witnesses carries with it so many risks of unfairness that it should be a rare instance when the court rather than counsel

examines a witness." People v. Yut Wai Tom, 53 N.Y.2d 44, 57 (1981); accord People v. Melendez, 227 A.D.2d 646 (2d Dep't 1996) (reversing conviction based in part on trial judge's questioning witnesses).

At all times, the judge should be "guided by the principle that his function is to protect the record, not to make it." Yut Wai Tom, 53 N.Y.2d at 58. Should the court, in posing questions, "overstep[] the bounds and assume[] the role of a prosecutor, however well intentioned the motive, there is a denial of [due process] and there must be a reversal." People v. Tucker, 89 A.D.2d 153, 154 (1st Dep't 1982) (quoting People v. Ellis, 62 A.D.2d 469,470 (1st Dep't 1978) (internal citations omitted); see also People v. Buckheit, 95 A.D.2d 814 (2d Dep't 1983) (overturning conviction when trial court elicited material testimony concerning key issue in case); People v. Anderson; 37 A.D.2d 728 (2d Dep't 1971) (reversing conviction based on trial court's extensive participation in rebuttal witness questioning).

Under the circumstances of this case, the court abused its discretion as a matter of law. It assumed the parties' traditional role of deciding what evidence to present, and actively inserted itself into the questioning of witnesses.

Here, a review of the transcript reveals that the lower court either cross-examined Plaintiff-Appellant or interrupted her testimony throughout the trial. There were several pages of questioning of Plaintiff-Appellant solely by the lower

court. Likewise, the lower court, working in tandem with the Defendant-Respondent's counsel, both extensively cross-examined Plaintiff-Appellant about her use of heat in the Premises. (R1-92, R1-93, R1-110, R1-111).

During Daniel Karl's testimony, the lower court also either questioned Karl or interrupted counsel during his questioning several times. A review of the transcript of Karl's testimony reveals that, like Plaintiff-Appellant, the trial court engaged in a toe-to-toe cross-examination of Daniel Karl for pages of testimony, taking over the responsibility from counsel.

The actions by the lower court demonstrate bias and improper conduct against the Plaintiff-Appellant and substantiated its role as an active participant who was also clearly interested in the outcome of the hearing it was presiding over.

Finally, the lower court's extensive cross-examination of the Defendant-Respondent's expert witness must be compared with its conduct during the testimony of Katica Lehman. During Lehman's testimony, the lower court did not engage in the same kind of contentious examination as with both Plaintiff-Appellant and Daniel Karl. During her direct examination, the lower court only asked where in the Plaintiff-Appellant's insurance policy did it state you must maintain heat to maintain the fire protective system. (R1-135). Lehman responded that the policy did not state this. (R1-135). On cross-examination by Plaintiff-

Appellant's counsel, the lower court interrupted or asked questions a total of 22 times.

The lower court violated Plaintiff-Appellant's Due Process rights when it failed to remain a neutral arbiter. Instead, the lower court took on active role as an ally of the Defendant-Respondent, when the Justice's bias clearly warranted recusal.

C. The Lower Court Erred When It Denied Plaintiff-Appellant's Application To Conform The Pleadings To The Facts

Based on the procedural history of this case, and the lack of prejudice to the Defendant-Respondents, the lower court improvidently exercised its discretion in denying the Plaintiff-Appellant's motion pursuant CPLR 3025(c), to amend the complaint to include a cause of action for bad faith, when Defendant-Respondent's witness admitted under oath that coverage was improperly denied based on an exclusion that did not apply to the damages sustained by Plaintiff-Appellant.

Pursuant to CPLR § 3025(c) "the court may permit pleadings to be amended before or after a judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances." See Dittmar Explosives v. A.E. Ottaviano, Inc., 20 N.Y.2d 498, 502 (1967). Leave to amend must be freely given absent prejudice or surprise. Fahey v. County of Ontario, 44 N.Y.2d 934 (1978); Loomis v. Civetta Corinno Constr. Corp., 54 N.Y.2d 18, 23 (1981); Murray v. City of New York, 43 N.Y.2d 400, 405 (1977); Weinstein

Enters. v. Cappelletti, 217 A.D.2d 616, 617 (2d Dep't 1995); Dos v. Scelsa & Villacara, 200 A.D.2d 705, 707 (2d Dep't 1994); Brook-Hattan Utilities, Inc. v. 893 Constr. Corp., 180 A.D.2d 660 (2d Dep't 1992); see also First Wis. Trust Co. v. Hakimian, 237 A.D.2d 250 (2d Dep't 1997) (the court must ignore defects, mistakes, and irregularities in pleadings absent a showing of prejudice). This Department has concluded, pursuant to the statutory language, that pleadings "may be conformed to the proof at any time." Thailer v. LaRocca, 174 A.D.2d 731 (2d Dep't 1991). Therefore, mere lateness does not bar the amendment. Edenwald Contr. Co. v. City of New York, 60 N.Y.2d 957, 959 (1983). The lateness must be coupled with prejudice to the other side. Id. When a variation develops between the pleading and the proof admitted the opposing party cannot later claim surprise or prejudice. Donner v. Baker, 11 A.D.2d 905 (1960). Often, when this type of variation develops, courts sua sponte, review and amend the pleadings to conform to the proof. See Matter of Pittsford Gravel Corp. v. Zoning Bd. Of Town of Perinton, 43 A.D.2d 811, 812 (4th Dep't 1973); Harbor Assoc. v. Asheroff, 35 A.D.2d 667, 668 (2d Dep't 1970); Di Rosse v. Wein, 24 A.D.2d 510, 511 (2d Dep't 1965).

In this case, Defendant-Respondent's offered no evidence that they would have been prejudiced by the approval of the application. Moreover, the Defendant-Respondent essentially conceded that the insurance policy exclusion did not apply

to the claim by the Plaintiff-Appellant. Thus, the Defendant-Respondent cannot claim surprise when they did not contest their own finding.

Furthermore, the evidentiary record reveals Plaintiff-Appellant submitted substantial evidence in the motion for summary judgment and in the motion to reargue summary judgment, that supported the exclusion did not apply to Plaintiff-Appellant's claim. Pursuant to this variation the lower court should have permitted Plaintiff-Appellant to conform the pleadings to the evidence that Defendant-Respondent had denied coverage based on bad faith.

If this Court finds the lower court erred in this decision, at a minimum this matter should be remanded with instructions that the judgment be reversed.

CONCLUSION

This Court should reverse the Judgment in favor of Defendant-Respondent and direct the lower court to enter a judgment in favor of Plaintiff-Appellant. The Plaintiff-Appellant's insurance policy obviously covered the damage to her Premises. Furthermore, the Plaintiff-Appellant met her initial burden of showing prima facie entitlement to summary judgment as a matter of law.

Alternatively, this Court should vacate the Judgment in favor of Defendant-Respondent and dismiss the case pursuant to the violations of Plaintiff-Appellant's Due Process rights. The lower court erroneously allowed an unrelated civil judgment to attack Plaintiff-Appellant's credibility throughout the trial and through

summations. When collateral evidence is used strictly to destroy credibility it requires a new trial. Furthermore, the lower court abandoned its role as a neutral arbiter and stepped into the shoes of an advocate for the Defendant-Respondent, which further violated the Plaintiff-Appellant's right to a fair trial.

Based upon the foregoing, Plaintiff-Appellant respectfully requests this Court to remand with instructions the judgment be reversed and awarded to Plaintiff-Appellant.

Dated: Winter Park, Florida
December 6, 2013

Respectfully Submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

----------X

DR. MARIA ANGHEL,

Plaintiff-Appellant,

-against-

UTICA MUTUAL INSURANCE COMPANY.

Defendant-Respondent.

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Nassau County
Index # 3157/11

Appellate Division
Docket #2013-07415

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

PATRICK MICHAEL MEGARO, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms as follows under penalty of perjury:

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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The total number of words in the brief, inclusive of point heading and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 9,753.

Dated: Winter Park, Florida
December 6, 2013

PATRICK MICHAEL MEGARO

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

----------X

DR. MARIA ANGHEL,

Plaintiff-Appellant,

-against-

UTICA MUTUAL INSURANCE COMPANY,

Defendant-Respondent.

----------X

Nassau County
Index # 2011/003157

STATEMENT PURSUANT TO CPLR § 2105

Appellate Division
Docket # 2013-07415

PATRICK MICHAEL MEGARO, an attorney duly admitted to practice law before the Courts of the State of New York, hereby certifies pursuant to CPLR § 2105, that the forgoing papers constituting the Record on Appeal have been personally compared by me with the originals filed herein and found to be true and complete copies of those originals and the whole thereof now on file in the office of the Clerk of the County of Nassau.

Dated: Winter Park, Florida
December 6, 2013

PATRICK MICHAEL MEGARO