Supreme Court

of the

State of Florida

Case No. SC12-323
Lower Tribunal Case No. 10-14714

WASHINGTON NATIONAL INSURANCE CORPORATION,
Successor in Interest to Pioneer Life Insurance Company,

Appellant,

– v. –

SYDELLE RUDERMAN, by and through her Attorney-in-fact, Bonnie Schwartz, SYLVIA POWERS, by and through her Attorney-in-fact, Les Powers, individually and on behalf of all others similarly situated, KATE KOLBER, ROBERT SCHWARZ, BLUMA SCHWARZ,

Appellees.

ON APPEAL FROM THE QUESTION CERTIFIED BY THE COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT IN CASE NO. 11-11416

APPELLANT'S REPLY BRIEF ON MERITS

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Table of Contents

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

SUMMARY OF THE ARGUMENT

Respondents' Answer Brief (Ans. Br.) presents a selective and slanted historical perspective on this Court's construction of ambiguous insurance policies. According to Respondents, *contra proferentem* is the exclusive canon of construction permitted under Florida to construe ambiguous insurance policies. But their bold interpretation of this Court's precedent is wrong. As far back as the nineteenth century, this Court has aimed to effectuate the intentions of all types of contracting parties, including insurers and insureds, by considering extrinsic evidence before resorting to the application of *contra proferentem*.

Respondents discount the plethora of authority cited by Washington National Insurance Company ("WNIC") as nothing more than "cherry-picked" dicta. A critical analysis demonstrates that it is Respondents, not generations of judges and scholars, who have it wrong. Prioritizing *contra proferentem*—widely accepted as an interpretive aid of "last resort"—above other principles of construction would upend not only established precedent of this Court but also the expectations of insurers and policyholders around the state.

Respondents resort to distorting Florida law because the extrinsic evidence of the parties' intent unquestionably favors WNIC. It hails from varied and numerous sources, including policy brochures, written communications between policyholders and agents, actuary and regulatory filings, as well as outright

admissions by Respondents, all of which demonstrate conclusively that the policyholders were aware that the maximum limits of home health care coverage, or "caps," would never increase. To ignore such evidence would subvert, rather than further, the intent of the parties and cause injustice to other policyholders who would ultimately bear and pay for this significant unforeseen risk.

Respondents' interpretation not only undermines the intent of the parties, but is also unreasonable. The Policy is clearly a "Limited" benefit Home Health Care Policy that has two distinct caps on the amount of benefits payable. Respondents' interpretation—which wrongfully recasts the caps as "benefits"—would provide an annual and never-ending escalation on plainly labeled lifetime maximum limits. Such an absurd result is contrary to a plain reading of the terms of the Policy.

Finally, Respondents and their *amici* assert that "unique public policy concerns" associated with insurance should lead this Court to adopt their arguments in favor of applying *contra proferentem* at the first sign of ambiguity. These arguments are all baseless and serve to underscore the obvious: that if extrinsic evidence is introduced in this case, the Respondents lose.

ARGUMENT

I. THERE IS NO AMBIGUITY IN THE POLICY

The Eleventh Circuit asked this Court: "Does an ambiguity exist about whether the Policy's 'Automatic Benefit Increase Percentage' applies only to the

'Home Health Care Daily Benefit' or whether it also applies to the 'Lifetime Maximum Benefit Amount' and the 'Per Occurrence Maximum Benefit'?" When the Policy terms are given their ordinary meanings and read in conjunction with the language of the entire Policy, as required under this Court's well-established interpretive principles, the answer to these questions is clearly "No."

Respondents do not even analyze the question posed. In their crusade to fashion an ambiguity from plain and clearly defined terms, they take the liberty to "restate" the certified question. Respondents ask whether the "three different types of benefits" in the Policy "shall increase each year." Ans. Br. 1. But the Policy does not provide, or even mention, "three" benefits. It only provides a Home Health Care Daily Benefit, and two "caps" on coverage known as the Per Occurrence Maximum and Lifetime Maximum. Respondents' restated question, which lacks the precise and clearly defined terms of the Policy itself, demonstrates that the interpretation they advance relies on a fictional reading of the Policy wherein "maximum" limits become endless escalating benefits.

The sources this Court consults to ascertain the generally accepted meanings of words used in insurance policies also support WNIC's construction. *Garcia v. Fed. Ins. Co.*, 969 So.2d 288, 291-92 (Fla. 2007). The generally accepted meaning of "maximum" is "greatest quantity or value attainable or attained." *Merriam-Webster's Collegiate Dictionary* 717 (10th ed. 2002). And "benefit" means

"financial help in time of sickness, old age, or unemployment; a payment or service provided for under an annuity, pension plan, or insurance policy." *Id.* at 106. The commonsense understanding of these two words together—as they appear in Policy terms "Lifetime Maximum Benefit" and "Per Occurrence Maximum Benefit"—is plainly "the greatest quantity of payment or financial help provided under this insurance policy." Indeed, the Eleventh Circuit arrived at this conclusion, as demonstrated by its use of the shorthand "cap" to describe the Per Occurrence and Lifetime Maximum Benefit provisions. *Ruderman ex rel. Schwartz v. Wash. Nat'l Ins. Corp.*, 671 F.3d 1208, 1210-11 (11th Cir. 2012) (per curiam); *Merriam-Webster's Collegiate Dictionary* 168 (10th ed. 2002) (defining "cap" as "an upper limit (as on expenditures): CEILING").

Numerous provisions of the Policy support this commonsense view: (1) the Policy states it provides "Home Health Care Coverage," not "Per Occurrence" or "Lifetime Maximum" coverage; (2) the Policy's index lists, under "Benefits," only "Home Health Care"; (3) the Policy provisions relating to the "Per Occurrence Maximum Benefit" and "Lifetime Maximum Benefit" explain that "no further benefits will be payable" when the "total sum of Home Health Care . . . benefits paid equals the amount shown in the schedule"; and, most tellingly, (4) the "AUTOMATIC DAILY BENEFIT INCREASE" provision says only that "we will increase the Home Health Care Daily Benefit payable under this policy by the

Automatic Benefit Increase Percentage shown on the schedule page." Read together, these provisions inescapably point to the conclusion that the policy provides a single benefit (the Home Health Care Daily Benefit) that is subject to two distinct maxima (the Per Occurrence Maximum Benefit and the Lifetime Maximum Benefit Amount) rather than three unique types of financial assistance.

Ignoring what the Policy actually says, Respondents disregard this Court's teachings and rely exclusively on the Certificate Schedule and what the Policy does *not* say. Ans. Br. 31 ("[T]he insurer placed no provision in the body of the policy expressly stating that it will ***not*** increase the lifetime maximum benefit . . . each year."). This Court has long instructed that insurance policies must be viewed in their entireties, with an eye toward giving effect to all of their terms.[1] This means courts may neither excise provisions nor "rewrite contracts [or] add meaning that is not present." *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005) (quoting *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986)). Rather than reading the Policy as a whole in accord with its plain meaning, Respondents ask the Court to create meaning—and

[1] *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). The policy "should receive a reasonable, practical and sensible interpretation consistent with the intent of the parties—not a strained, forced or unrealistic construction." *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 736 (Fla. 2002).

millions of dollars of additional coverage—by rewriting the Policy in their favor to include language and coverage that was never intended by the parties.

II. FLORIDA LAW PERMITS EXTRINSIC EVIDENCE TO EXPLAIN AMBIGUITIES IN INSURANCE POLICIES

Respondents' Interpretation of The Court's Precedent is Incorrect. Respondents set out a skewed 30-page "history" on the application of *contra proferentem* in an effort to reduce as "erroneous dicta" scores of decisions from Florida appellate and trial courts,[2] as well as the Eleventh Circuit,[3] permitting the introduction of extrinsic evidence to aid the interpretation of ambiguous insurance policies. In Respondents' view, countless judges just have it all wrong. But it is Respondents who are in error.

Indeed, Respondents' argument rests primarily on a tortured and unfounded reading of *L'Engle v. Scottish Union and National Fire Insurance Company*, 37

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[2] *E.g.*, *Navy Mut. Aid Ass'n v. Barrs*, 732 So. 2d 345 (Fla. 1st DCA 1999); *Williams v. Essex Ins. Co.*, 712 So. 2d 1232, 1232 (Fla. 1st DCA 1998); *Reinman, Inc. v. Preferred Mut. Ins. Co.*, 513 So. 2d 788, 788 (Fla. 3d DCA 1987); *Mut. Fire, Marine & Inland Ins. Co. v. Fla. Testing & Eng'g Co.*, 511 So. 2d 360 (Fla. 5th DCA 1987); *Gilman v. John Hancock Variable Life Ins. Co.*, No. 02-0051 AB, 2003 WL 23191098 (Fla. 15th Cir. Ct. Oct. 20, 2003).

[3] Respondents do not even address the scores of persuasive cases from the Eleventh Circuit. *E.g.*, *Estevez v. N. Assurance Co. of Am.*, 428 F. App'x 966, 967 n.1 (11th Cir. 2011) ("[The insured's] argument that extrinsic evidence is not admissible to resolve ambiguities in an insurance contract is without merit."); *Burlington Ins. Co. v. Indus. Steel Fabricators, Inc.*, 387 F. App'x 900, 902 (11th Cir. 2010) ("if the relevant policy language is ambiguous then extrinsic evidence of the parties' intentions may be introduced to explain the ambiguity").

So. 462 (Fla. 1904), and virtually ignores decades of decisions from this Court that explicitly or implicitly held parol evidence admissible to explain ambiguous insurance contracts. *See, e.g.*, *Siegle,* 819 So. 2d at 736; *Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp.*, 636 So.2d 700, 705 (Fla. 1994) (implying extrinsic evidence would be admissible if the policy were ambiguous); *Friedman v. Va. Metal Prods. Corp.*, 56 So. 2d 515, 517 (Fla. 1952) (holding that the court may look to extrinsic evidence to resolve ambiguities in an insurance policy);[4] *Price v. S. Home Ins. Co. of the Carolinas*, 129 So. 748, 750-51 (Fla. 1930) ("An insurance policy, like other contracts, is interpreted . . . as a whole aided by extrinsic evidence.").[5]

Based on their selective retrospective, Respondents contend it is *stare decisis* that *contra proferentem* always precludes the admission of extrinsic evidence in the context of ambiguous insurance policies. But this Court has never held that the doctrine of "last resort" known as *contra proferentem* should be

[4] Respondents contend *Friedman* "does not involve any controversy involving an insurance contract," Ans. Br. 16 n.8, even though this Court explicitly described the guarantee instrument at issue as an "insurance contract," *Friedman*, 56 So. 2d at 517. Further, guarantees have always been considered a form of insurance under Florida law. *See Dadeland Depot v. St. Paul Fire & Marine*, 945 So. 2d 1216, 1226-31 (Fla. 2006) (noting suretyship is a form of guaranty and "the term 'insurance' includes a surety"); *see also* § 631.52, Fla. Stat. (2012) (grouping guarantees and "other forms of insurance" offering protection against risks).

[5] Further, Respondents neglect to reconcile their unfounded interpretation with *Stuyvesant Insurance Company v. Butler*, 314 So. 2d 567, 570 (Fla. 1975), which simultaneously relied on both extrinsic evidence and the doctrine of *contra proferentem* to interpret an ambiguous insurance contract.

employed to exclude extrinsic evidence, and Respondents do not cite a single case otherwise. Instead, as explained in the decisions Respondents ignore (*Price*, *Friedman*, *Dimmitt*, and *Siegle*, cited *supra*), and a host of others, this Court has repeatedly indicated parties to insurance contracts may introduce extrinsic evidence "not to vary or change the terms of the contract, but to explain, clarify, or elucidate" otherwise unclear terms. *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 942 (Fla. 1979);[6] *Aetna Cas. & Sur. Co. v. Cartmel*, 100 So. 802, 803 (Fla. 1924) ("[Insurance] contracts are subject to the same rules of construction applied to other contracts…"). Because of this clear precedent, it is black letter law that parol evidence is admissible to interpret ambiguous insurance policies:

> Parol or extrinsic evidence is admissible to explain the intention of the parties to an insurance policy where the policy does not clearly disclose that intention, and to explain an uncertain or ambiguous expression in the policy or an ambiguity existing in relation to its terms or subject matter. 31B Fla. Jur. *Insurance* § 3639 (2d ed. 2012).

[6] Respondents strenuously attempt to convince the Court that their rule is *stare decisis* precisely because *Excelsior* is so clear on the issue, which is why they argue that this Court does not overrule itself *sub silentio*. Ans. Br. 3. Respondents' entire argument rests on the flawed premise that resort to extrinsic evidence is not an ordinary means of contract construction, which of course it is. Likewise, Respondents misconstrue the holding of *Anderson* as expressly denying the ability to use extrinsic evidence, rather than merely serving as an example of one of many insurance cases where no extrinsic evidence exists. *Anderson*, 756 So. 2d at 29.

The foundation of Respondents' error can be found in their artificial reading of *L'Engle*. In that case this Court plainly used both the doctrine of *contra proferentem* and parol evidence to aid in the interpretation of an ambiguous policy. Respondents seek to avoid that fact by contending that the extrinsic evidence admitted in *L'Engle* was allowed for the purpose of resolving a claim for breach of an oral promise to provide insurance. Not so. Rather than advancing two drastically different theories of liability, *see* Ans. Br. 6, the plaintiff in *L'Engle* pleaded two counts for coverage under the disputed policy that this Court recognized were "substantially the same." *L'Engle*, 37 So. at 463, 466 ("The third count contains the same allegations."). Both counts alleged that the defendant issued coverage, *contra* Ans. Br. 6, and diverged only in their theories of how this Court should read the policy, *i.e.*, in one count the plaintiff pleaded the parties intended "concurrent" in the endorsement to mean "other and additional insurance," and in the other count argued that the policy endorsement on its face permitted it to carry additional insurance and that the defendant, fully aware of that provision, accepted and did not return the premiums plaintiff paid. *L'Engle*, 37 So. at 463. Notably, both theories are predicated on the admission of extrinsic evidence—that of intentions in the former, and that of knowledge in the latter—and this Court readily approved consideration of such evidence.[7] In short,

[7] Yet this Court determined it need not rely on extrinsic evidence because the

Respondents' notion that *L'Engle*'s admission of extrinsic evidence had nothing to do with contracts of insurance is contradicted in the opinion, which holds such evidence could be and had been "applied to contracts of insurance." *Id.* at 467.

Moreover, in support of that holding this Court relied on three separate opinions, one from this Court, one from the United States Supreme Court, and one from Massachusetts, wherein extrinsic evidence was admitted to interpret ambiguous insurance policies. *Id.*[8] To say that the claim at issue did not involve insurance ignores the very essence of the Court's ruling, and runs contrary to the many courts, and commentators that have examined this case over the last century. *See, e.g.*, *Gilman*, 2003 WL 23191098; 31B Fla. Jur. *Insurance* § 3639 ("parol evidence is admissible to . . . explain the meaning in a policy of the words '$2,500, total concurrent insurance permitted.'" (citing *L'Engle*, 37 So. at 462)).

Respondents also misread this Court's use of the phrase "in preference" in *L'Engle*. Nowhere did *L'Engle* address the relative primacy of the interpretive rules of extrinsic evidence and *contra proferentem*. Nor did it make either one of

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clause, "construed naturally according to the obvious meaning of the language used and the purposes for which it was inserted," *id.* at 465, comported with plaintiff's interpretation. *Contra proferentem* was invoked only in the alternative, to demonstrate that "the conclusion [was] correct." *Id.* Under Respondents' own rigid application of "proper case precedent," *L'Engle's* invocation of *contra proferentem* is little more than dicta, not the "essential holding." Ans. Br. 2 n.2, 10.

[8] Most notably, *Solary v. Webster*, 17 So. 646 (Fla. 1895), where extrinsic evidence was admitted to resolve claims on an ambiguous surety bond—an instrument considered a type of insurance. *See Dadeland Depot, Inc.*, 945 So. 2d at 1228-31.

the doctrines mandatory. To the contrary, this Court carefully stated that "extrinsic evidence of the subject-matter of the contract, of the relations of the parties to each other, and of the facts and circumstances surrounding them when they entered into a contract may be received to enable the court to make a proper interpretation of the instrument." *L'Engle*, 37 So. at 467.

A close reading of *L'Engle* thus dispels Respondents' invocation of any rule of *stare decisis* calling for a strict application of *contra proferentem* to the exclusion of extrinsic evidence. Were this Court to adopt Respondents' wild view of the law, it would be abandoning a century of settled law permitting the admission of extrinsic evidence to interpret ambiguous insurance policies, one that practitioners across Florida have embraced as black letter law. *See* 31B Fla. Jur. *Insurance* § 3639. Moreover, by elevating the doctrine of *contra proferentem* in prominence above the ordinary rules of contract interpretation, it would be a decided outlier among its sister states, a majority of which permit extrinsic evidence to construe ambiguous insurance policies.[9]

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[9] *See, e.g., State Farm Mut. Auto. Ins. Co. v. Wilson*, 782 P. 2d 727 (Ariz. 1989) ("The determination that an ambiguity must be construed against the insurer comes in this case, as we believe it must in all cases, at the end of our inquiry. . ."); *Bank of the West v. Super. Ct.*, 833 P.2d 545 (Cal. 1992); *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 72 (Del. 2011) ("If the extrinsic evidence does not reveal the parties' intent . . . then the Superior Court should apply the "last resort" rule of *contra proferentem*"); *Klapp v. United Ins. Group Agency, Inc.*, 663 N.W.2d 447, 456 (Mich. 2003) ("[*C*]*ontra proferentem* is a rule of last resort

Respondents are desperate to have this court disregard extrinsic evidence entirely because it overwhelmingly confirms that the *mutual intent* of the parties was that the 8% escalator would only apply to the Daily Benefit.[10] Respondents therefore choose to obfuscate the issue, raising the specter that WNIC will introduce extrinsic evidence of its unilateral intent, such as the testimony of an underwriter. Not true. WNIC's proffer is not based on subjective intent, but mountains of evidence demonstrating mutual intent, including: (1) insurance agent testimony of contemporaneous discussions with policyholders; (2) marketing materials; (3) written communications between policyholders and insurance agents; (4) communications between policyholders or their representatives and WNIC during the course of the Policy; (5) the parties' course of dealings; and (6)

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because, [t]he primary goal in the interpretation of any contract is to honor the intent of the parties, and the rule . . . does not aid in determining the parties' intent.") (citation and quotation omitted)); *State v. Home Indem. Co.*, 66 N.Y.2d 669, 671 (1985) (holding that if the "insurance contract is ambiguous…the parties may submit extrinsic evidence as an aid in construction" but if the extrinsic evidence does not resolve the ambiguity, it "must be resolved against the insurer"); *Walle Mut. Ins. Co. v. Sweeney*, 419 N.W.2d 176 (N.D. 1988).

[10] Respondents' assertion that this Court has vested *contra proferentem* with a talismanic, "quasi-constitutional" status is simply absurd. Ans. Br. 36. *Contra proferentem* is subject to qualifications that preclude its application. One, it applies only when the policy ambiguity cannot be resolved by "resort to the ordinary rules of construction." *Excelsior*, 369 So. 2d at 942. And two, it does not allow courts to "reach results contrary to the intentions of the parties" because to "give true effect to the intentions of the parties" is "the central concern of the law of contracts even in the realm of insurance where there are unique public policy concerns." *Id.*

WNIC's filings with the Florida Department of Insurance containing the relevant actuarial memoranda, and the regulators' responses and approvals.[11]

Public Policy Favors Ordinary Rules of Interpretation. Respondents and *amici* advance a barrage of hollow public policy arguments to support what they portray as a "consumer friendly" approach. But a close analysis shows them to be baseless and potentially harmful to consumers.

Respondents first urge that the admission of parol evidence would encourage deliberate indifference to clarity. This appears to presume that extrinsic evidence of parties' intentions may be introduced by insurers alone. But none of the cases in which this Court has admitted or contemplated admitting extrinsic evidence to interpret an insurance policy draws any such distinction.[12] Indeed, in *L'Engle* it was the insureds who brought in extrinsic evidence. *See* 37 So. at 466-467.

Respondents also argue that allowing extrinsic evidence will lead to costly litigation in other insurance cases. This risk is minimal, however, because there is rarely extrinsic evidence of either parties' intent, and hardly ever evidence, as there was here, of the parties' *mutual intent*. This is why Respondents were able to

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[11] *See* 11th Cir. Br. for Appellant 7–11, 38–40.

[12] *See, e.g.*, *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1139 (Fla. 1998) (suggesting both parties sought to present argument on the drafting history by stating "unless we conclude that the policy language is ambiguous, it would be inappropriate for us to consider *the arguments*.") (emphasis added); *Dimmitt*, 636 So. 2d at 705 (same).

reference so many Florida Supreme Court cases that discussed *contra proferentem* and not extrinsic evidence; it rarely comes into play.

Respondents likewise fail to consider the legal duties imposed upon insurers by Florida's robust regulatory scheme requiring policies be vetted for ambiguity before sale. *See* § 627.411(1)(b), Fla. Stat. (2012).[13] The failure to appreciate the state's oversight role before drawing unsupported assumptions about insurer behavior leaves Respondents' public policy theory without a leg to stand on. Florida has carefully crafted a regulatory system that seeks a balance between the rights of consumers and the need for insurance companies to accurately price risk. Applying a clear cap to benefits is one of the surest ways an insurance company can predict the amount of risk it assumes.[14]

The real consequence of automatic application of *contra proferentem* is an increase in the cost of insurance. Respondents are fully aware that judicially created coverage will lead to premium increases because they championed higher premiums before the federal court. Appellee's 11th Cir. Opp'n to Mot. to Stay, 15-17. This means a few select policyholders, who may require years of around-the-

[13] Indeed, as the extrinsic evidence here shows, Florida regulators examined the policy, actuarial memo (using loss ratios assuming static maximums) and sales brochures (making clear the maximums never increased) – and approved them all.

[14] Applying *contra proferentem* before other interpretation principles ignores that, "if an insurance company cannot attach a probability to a risk, it cannot calculate the correct premium to charge for bearing the risk." Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 Tex. L. Rev 1581, 1607 (2005).

clock care, will reap a windfall at the expense of the other policyholders who will have to pay for it by dint of higher premiums. Worse still, these healthy policyholders may leave the pool of insureds, thus requiring even greater premium increases of the remaining insureds (this loop of higher rates/greater lapses of healthy insureds is referred to in the industry as a "death spiral" because it ultimately leads to the collapse of the policy block). These concerns demonstrate the potential folly of the automatic application of *contra proferentem*, especially where, as here, the construction runs contrary to the intentions of the parties, the actuarial underpinnings of the Policies and the entire basis upon which these Policies were priced and approved by Florida regulators.

CONCLUSION

For the foregoing reasons, Appellant WNIC respectfully requests that this Court answer the pending certified questions in the negative.

Dated: August 17, 2012

Respectfully submitted,

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Certificate of Service

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Certificate of Compliance

Pursuant to Fla. R. App. P. 9.210(a)(2), the undersigned certifies that this brief was typed using 14 point Times New Roman font.

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