

12-0036

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

LISBETH L. CHERRINGTON,

Plaintiff,

v.

**CIVIL ACTION NO.: 06-C-27(P)
Hon. Joseph C. Pomponio, Jr.**

**THE PINNACLE GROUP, INC., a
West Virginia corporation, ANTHONY
MAMONE, JR., an individual and OLD
WHITE INTERIORS, LLC, a West
Virginia limited liability company,**

Defendants,

and

**THE PINNACLE GROUP, INC. and
ANTHONY MAMONE, JR.,**

Third-Party Plaintiffs,

v.

GLW CONSTRUCTION, INC.,

Third-Party Defendant,

and

**ANTHONY A. MAMONE and THE
PINNACLE GROUP, INC.,**

Third-Party Plaintiffs,

v.

**NAVIGATORS INSURANCE COMPANY
and ERIE INSURANCE PROPERTY AND
CASUALTY COMPANY,**

Third-Party Defendants.

**ORDER GRANTING ERIE INSURANCE PROPERTY AND CASUALTY COMPANY
SUMMARY JUDGMENT ON COVERAGE ISSUES**

On December 1, 2011, came the Third-Party Defendant, Erie Insurance Property and Casualty Company ("Erie"), by counsel, the Defendants, Anthony A. Mamone and The Pinnacle

Group, Inc., in person and by counsel, and the Plaintiff, Lisbeth L. Cherrington, by counsel, for hearing upon Erie's Motion for Summary Judgment. Over the objections of the Third-Party Defendant, the Court permitted expert witness testimony as to the coverage issues; however, the Court rejected the Defendants' request to take factual testimony at a summary judgment hearing. Upon hearing the expert witness testimony, the Court entertained argument on Erie's Motion for Summary Judgment with regard to the coverage issues. Upon consideration by the Court of the motions, responses, replies, surreplies and arguments of counsel, and upon consideration of the relevant statutory and common law authorities, and further upon review of the complete record in this case, the Court does hereby **GRANT** the Motion for Summary Judgment filed on behalf of Erie and rules, as a matter of law, that there is no coverage for the defense and/or indemnification of the Plaintiff's claims against the Defendants under any of the three (3) Erie policies at issue. The factual and legal basis for this ruling is as follows:

Findings of Fact

1. Lisbeth L. Cherrington instituted litigation against The Pinnacle Group, Inc. and Anthony Mamone, Jr., (the "Cherrington Litigation") regarding "the construction of a house at Lot #11 Traveller's Hill, The Greenbrier Sporting Club, White Sulphur Springs, Greenbrier County, West Virginia." [First Amended Complaint at ¶ 1].
2. The "First Amended Complaint" in the Cherrington Litigation alleges that "[a]t all relevant times, Anthony Mamone, Jr., was acting for and on his own behalf and on behalf of Pinnacle as its agent, servant and/or employee. Pinnacle and Anthony Mamone, Jr., are hereinafter collectively referred to as 'Pinnacle.'" *Id.* at ¶ 2.

3. The Cherrington Litigation contends that the Plaintiff “entered into a cost plus contract with The Pinnacle Group, Inc. and Anthony Mamone, Jr., for the construction of a house”. *Id.* at ¶ 1.

4. The “First Amended Complaint” further contends that “Pinnacle was negligent in the construction of said home”. *Id.* at ¶ 4. Specifically, Plaintiff’s expert witnesses opine that “[t]he concrete floor on the lower level is uneven and ground moisture may be infiltrating through the floor slab”, “the roof leaks at the chimney”, “[a] sewer pipe full of liquid was covered with carpet in a closet in bedroom three on the lower level”, and “[a] wall containing a pocket door in bathroom 3 on the lower level is not as stiff or rigid as other interior walls”. [Alliance Report at 2]. Additionally, it is alleged that gutters and downspouts are missing, that there is a lack of water diversion, that wood components are in direct contact with soil, that there are issues with the roof seams, and that there is inadequate or missing flashing, caulking and/or paint. [Ellis Report].

5. The Cherrington Litigation further avers that “Pinnacle also undertook to provide furnishings to plaintiff’s home through a third party.” [First Amended Complaint at ¶ 8]. According to the “First Amended Complaint”, Pinnacle “charged plaintiff excess charges for said furnishings and plaintiff was damaged thereby.” *Id.* at ¶ 10. The First Amended Complaint states that “Plaintiff was damaged by misrepresentations of Pinnacle”. *Id.* at ¶ 11. During discovery, Ms. Cherrington testified about what she believed to be “fraud”:

[Cherrington] So he contacted someone apparently from the Carolinas, Mr. Forbes, who could do copper roofs, and Tony told me and gave me in writing that the bill for the copper roof would be \$17 a square, and that he would give me credit for the \$18,000. I called the architect in Hilton Head, asked him what the square - - how that’s calculated on top of the roof so that I could determine whether or not it was the appropriate price. In the meantime, I met with Mr. Forbes and asked him what he

was going to do the roof for. Mr. Forbes told me \$12 a square, and not \$17 a square.

So once again, I began to doubt what I was hearing from Tony versus the person who was actually going to put on the roof.

The landscaping became an issue, because I thought the landscaping was included in the home, and was asked for near the end of the time when things were supposedly being repaired, that I come up with \$35,000 for the landscaping, and I was shocked, because that's not what I had been led to believe. So that price was over and beyond what I had been told. What could you say?

The chimney - - I'm setting in the area eating, watching television, and it rains, and water is coming through all of the stonework, not down the hole in the chimney, but gushing out; not little drips, gushing out, one thing after another.

So my credibility for what I was hearing began to erode, and I felt like someone was deceiving me with respect to handling what they said they would handle on my behalf, and then fixing what they said they would fix, and then the quality of materials and the work being done was not what he said would be done.

Q. Did all of these things come - - I understand gradually. You didn't necessarily, boom, each and every one of these items, not the same day.

But by the fall of '05, had the sum total of all of these things that you've described to us become aware to you?

A. By November or so, I began to think that there was potentially fraud involved, yes.

[Cherrington Dep. at 80-81].

6. Plaintiff asserts that she was damaged "in that her home's fair market value has been and is substantially diminished; plaintiff paid excess moneys to Pinnacle above the amount actually owed; and plaintiff has been subjected to emotional distress and has otherwise been damaged." [First Amended Complaint at ¶¶ 11-12]. Moreover, according to the Cherrington Litigation, "[t]he defendants' conduct was intentional and willful misconduct that entitles plaintiff to punitive damages." *Id.* at ¶ 14. The evidence submitted to the Court revealed:

Plaintiff claims she has and will suffer the following:

- (1) Plaintiff has paid more for building the house than was agreed. The amount will be provided after further discovery.
- (2) See report (attached), which describes some of the faulty workmanship.
- (3) Plaintiff's property value has been severely depreciated by

at least 50% due to faulty workmanship.

(4) Plaintiff has suffered annoyance and inconvenience and emotional distress.

(5) Plaintiff's furniture was overpriced and sold to her at inflated values.

(6) Plaintiff lost the use of her property.

(7) Punitive damages

[Plaintiff's Responses to Erie's Discovery Requests, attached hereto as Exhibit E].

7. The Pinnacle Group purchased a policy of commercial general liability insurance with Erie, policy number Q37-5150118 W, effective January 1, 2004, through January 1, 2005.

8. Tony Mamone purchased a policy of insurance with Erie, policy number Q49-6400490, effective January 14, 2004, through January 14, 2005.

9. Tony Mamone purchased a policy of insurance with Erie, policy number Q28-6950016, effective April 19, 2004, through April 19, 2005

10. The Pinnacle Group and Mamone seek a defense, and indemnity, from and against the Plaintiff's claims under the policies of insurance issued by Erie.

Conclusions of Law

11. The test for determining the propriety of summary judgment was set forth in Syllabus Point 3 of *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963), where the Supreme Court of Appeals of West Virginia held, "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." In Syllabus Point 3 of *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995), the Court stated:

If the nonmoving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party; (2) produce additional

evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

12. Summary judgment is appropriate in the instant case as the question presented involves the interpretation of an insurance policy. The Supreme Court of Appeals of West Virginia has held that “[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court’s summary judgment, is reviewed *de novo* on appeal.” *Murray v. State Farm Fire and Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1 (1998) (quoting *Payne v. Weston*, 195 W.Va. 502, 506-7, 466 S.E.2d 161, 165-6 (1995)). Moreover, “[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.” *Id.* (quoting *Pacific Indemnity Co. v. Linn*, 766 F.2d 754, 760 (3d Cir. 1985)); *See also Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10, Syl. pt. 1 (2002).

13. The traditional standard for determining the duty to defend as established by the Supreme Court of Appeals of West Virginia is:

“[I]ncluded in the consideration of whether the insurer has a duty to defend is whether the allegations in the complaint . . . are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policies.” Syl. Pt. 3, in part, *Bruceston Bank v. U.S. Fidelity and Guar. Ins. Co.*, 199 W. Va. 548, 486 S.E.2d 19 (1997).

Butts v. Royal Vendors, Inc., 202 W. Va. 448, 504 S.E.2d 911, Syl. Pt. 1 (1998).

14. Plaintiff herein asserts that she was damaged “in that her home’s fair market value has been and is substantially diminished; plaintiff paid excess moneys to Pinnacle above the amount actually owed; and plaintiff has been subjected to emotional distress and has otherwise been damaged.” [First Amended Complaint at ¶¶ 11-12]. According to the CGL policy’s

insuring clause¹, it is “bodily injury” that triggers coverage under that portion of the commercial general liability policy. *See Smith v. Animal Urgent Care*, 208 W. Va. 664, 667-8, 542 S.E.2d 827, 830-1 (2000) (stating that “[g]iven the fundamental restriction of the coverage at issue to claims which assert ‘bodily injury,’ we proceed initially to determine whether the complaint at issue contains averments of ‘bodily injury’” and “[l]ike the requisite ‘bodily injury’ necessary to invoke liability coverage, an ‘occurrence’ must similarly exist before American States is obligated to provide indemnification”). “Bodily injury” is defined by the policy as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” [CGL Policy at 10]. In *Smith v. Animal Urgent Care, Inc.*, the Supreme Court of Appeals of West Virginia held that “[i]n an insurance liability policy, *purely mental or emotional harm* that arises from a claim of sexual harassment and lacks physical manifestation *does not fall within a definition of “bodily injury”* which is limited to “bodily injury, sickness, or disease.”” Syl. pt. 1, 208 W.Va. 664, 542 S.E.2d 827 (emphasis added). Notably, Plaintiff and Defendants’ joint coverage expert witness, Dr. Marshall W. Reavis, III, concurred that “emotional distress” is not a “bodily injury” as defined by the Erie CGL policy.

15. As a matter of law, the Court concludes that the “emotional distress” alleged by Plaintiff herein is not a “bodily injury” triggering coverage under the Erie CGL policy.

16. “Property damage” is defined by the subject policy as:

¹ As amended, the insuring clause for the “bodily injury and property damage” liability portion of the subject policy states, in pertinent part:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages, including punitive or exemplary damages to the extent allowed by law, because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.

[Coverage for Punitive Damages Endorsement at 1].

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

[CGL Policy at 12]. The Mamone homeowner's policy defines "Property Damage" as:

1. physical injury to or destruction of tangible property, including loss if its use. All such loss of use shall be deemed to occur at the time of the physical injury that caused it;

2. ~~loss of use of tangible property which is not physically injured or destroyed. All such loss of use shall be deemed to occur at the time of the occurrence.~~

[Homeowner's Policy at 5]. "Property damage" is defined by Mamone's Personal Catastrophe policy as "injury to or destruction of tangible property, including loss of its use, but not the decrease in value of the tangible property due to the damage." [Umbrella Policy at 3].²

² The insuring clause for the "Bodily Injury Liability Coverage" and "Property Damage Liability Coverage" in the Mamone homeowner's policy states:

We will pay all sums up to the amount shown on the Declarations which anyone we protect becomes legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence during the policy period. We will pay for only bodily injury or property damage covered by this policy.

We may investigate or settle any claim or suit for damages against anyone we protect, at our expense. If anyone we protect is sued for damages because of bodily injury or property damage covered by this policy, we will provide a defense with a lawyer we choose, even if the allegations are not true. We are not obligated to pay any claim or judgment or defend any suit if we have already used up the amount of insurance by paying a judgment or settlement.

[Homeowner's Policy at 14]. The insuring clause for Mamone's Personal Catastrophe policy states:

17. In *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W.Va. 498, 625 S.E.2d 260, Syl. pt. 3 (2005) (emphasis added), the Supreme Court of Appeals of West Virginia held that “[a]bsent policy language to the contrary, a homeowner’s policy defining ‘occurrence’ as ‘bodily injury or property damage resulting from an accident’ does not provide coverage for an insured homeowner who is sued by a home buyer *for economic losses* caused because the insured negligently or intentionally failed to disclose defects in the home.” Both expert witnesses testified that economic matters, such as being overcharged, do not constitute “property damage” as defined by the subject policies.

18. As a matter of law, the Court concludes that the damages alleged by Plaintiff herein do not constitute “property damage” triggering coverage under the Erie CGL policy, the Mamone homeowner’s policy or the Mamone personal catastrophe policy as Plaintiff’s losses are *economic* and, therefore, not *tangible*.

19. “Bodily injury and property damage liability” coverage in the CGL policy is triggered by an “occurrence” which is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions”. [CGL Policy at 11]. Likewise, “Bodily injury and property damage liability” coverage in the Mamone homeowner’s policy is triggered by an “occurrence” which is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions”. [Homeowner’s Policy at 5]. Similarly, coverage in Mamone’s Personal Catastrophe policy is triggered by an “occurrence”

We pay the ultimate net loss which anyone we protect becomes legally obligated to pay as damages because of personal injury or property damage resulting from an occurrence during this policy period. We will pay for only personal injury or property damage covered by this policy. This applies only to damages in excess of the underlying limit or Self-Insured Retention.

[Umbrella Policy at 4].

which is defined as “an accident, including continuous or repeated exposure to conditions, which results in **personal injury or property damage** which is neither expected nor intended. **Personal injury or property damage** arising out of your protection of persons or property is covered”. [Umbrella Policy at 3].

20. In *State Bancorp, Inc. v. United States Fid. and Guar. Ins. Co.*, the Supreme Court of Appeals of West Virginia held that “a breach of contract which causes ‘bodily injury’ or ‘property damage’ is not an event that occurs by chance or arises from unknown causes, and, therefore, is not an ‘occurrence’” 199 W.Va. 99, 483 S.E.2d 228, 234 (1997)(citations omitted). Moreover, in *Corder v. William W. Smith Excavating Co.*, the Supreme Court of Appeals of West Virginia held that “[p]oor workmanship, standing alone, cannot constitute an ‘occurrence’ under the standard policy definition of this term as an ‘accident including continuous or repeated exposure to substantially the same general harmful conditions.’” 210 W.Va. 110, 556 S.E.2d 77, 83 (2001).

21. The Plaintiff relies heavily on *Simpson-Littman Construction Co. v. Erie Insurance Property & Casualty Co.*, No. 3:09-0240, 2010 WL 3702601 (S.D.W. Va. Sept. 13, 2010), in an effort to establish that coverage exists under the subject policies. Initially, the Court notes that *Simpson-Littman, supra*, is not a final Order and is not binding authority upon this Court. Regardless, however, the *Simpson-Littman* decision acknowledged the substantial authority from the Supreme Court of Appeals of West Virginia, reasoning that, “[CGL policies do] not cover an accident of faulty workmanship but rather faulty workmanship that causes an accident.” *Id.* at *8 (quoting *Erie Ins. Prop. and Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W. Va. 506, 526 S.E.2d 28, 31 (1999)) (additional citation omitted). The *Simpson-Littman*

Court went on to explain that faulty workmanship, in and of itself, was not sufficient to give rise to an “occurrence”:

As a result, in faulty workmanship cases, there must be something more than the flawed performance to trigger coverage. There must be an unexpected or unforeseen [sic] event. In other words, as explained in *Corder*, “[t]he key to determining the existence of an “occurrence” is whether a separate act or event or happening occurred at some point in time that lead to the [property damage complained of] or whether the [property damage] is tied to the original acts of repair performed by [the insured].” *Corder*, 556 S.E.2d at 84. If the property damage is tied to the original acts performed by the insured, then, despite any negligence, there is no coverage. This is because there is no ‘accident’ and thus no ‘occurrence.’ However, if the damage is tied to a ‘separate act or event or happening,’ then the separate act or event, when unexpected or unusual, may qualify as an ‘occurrence.’ This ‘occurrence,’ if it triggered damage during the policy period, will trigger coverage.

Id. (emphasis added). Applying this reasoning to the facts before it, the *Simpson-Littman* Court noted that the subcontractors’ faulty workmanship *in combination with a separate event* – the settlement of the soil and fill beneath the homeowner’s residence – qualified as an “occurrence.” *Id.* The subcontractors’ faulty workmanship, in and of itself, was not an “occurrence.” *See id.* The Court noted two cases that led it to this conclusion: *American Family Mutual Insurance Co. v. American Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004), and *French v. Assurance Co. of America*, 448 F.3d 693 (4th Cir. 2006). *Id.* at *9. Both of these cases illustrate the reasoning that was crucial to the *Simpson-Littman* Court’s finding that an “occurrence” existed: in these cases, the courts found that a subcontractor’s faulty workmanship in combination with a separate event constituted an “occurrence.” *See American Girl*, 673 N.W.2d 65 (finding an “occurrence” under a general contractor’s CGL policy where a subcontractor’s advice as to soil preparation for the site of a warehouse resulted in the warehouse sinking, which in turn caused the warehouse to buckle); *French*, 448 F.3d 693 (finding an “occurrence” where a

subcontractor's faulty installation of a synthetic stucco system to the outside of a residence led to moisture intrusion and damage to the contractor's otherwise non-defective work (the structure and walls of the residence)).

22. Plaintiff herein does not allege that "a separate act or event or happening," in addition to the purported "faulty workmanship," "lead to" her alleged damages. *Corder, supra* at 84. As a matter of law, the Court concludes that the claims alleged by Plaintiff herein do not constitute an "occurrence" triggering coverage under the Erie CGL policy, the Mamone homeowner's policy or the Mamone personal catastrophe policy.

23. Having determined that no "bodily injury", "property damage" or "occurrence" is alleged in Plaintiff's "First Amended Complaint," the Court concludes that the coverage is not triggered under any of the three (3) Erie policies at issue and, therefore, exclusionary provisions in said policies need not be examined. Nevertheless, the Court concludes that various exclusionary provisions would operate to preclude coverage for Plaintiff's claims against the defendants.

24. Although several exclusionary provisions in the CGL policy are potentially applicable, and were fully briefed by Erie, the argument before the Court focused on three (3) "property damage" exclusions. The Pinnacle policy precludes from coverage:
l. Damage To Your Work

'Property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard'. This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- 1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- 2) A delay or failure by you or anyone acting on your behalf to

perform a contract or agreement in accordance with its terms. This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

n. Recall of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- 1) ‘Your product’;
- 2) ‘Your work’;
- 3) ‘Impaired property’;

If such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

[CGL Policy at 4].

25. Plaintiff and Defendants maintained that exclusion (l) was inapplicable as various

work complained of was performed by subcontractors. Erie submitted, however, that exclusion (m) applied and *included* the work of subcontractors. Erie’s rebuttal expert witness testified accordingly. Notably, exclusion (m) operated to bar coverage, irrespective of the existence of subcontractors, in the strikingly similar case of *Groves v. Doe*, 333 F. Supp. 2d 568 (N.D.W. Va. 2004). Exclusion (m) was also referenced by the Supreme Court of Appeals of West Virginia in *Corder, supra*, at 85. Moreover, the Fourth Circuit Court of Appeals recently upheld a District Court’s award of judgment which had been based upon, among other issues, exclusion (m). *North American Precast, Inc. v. General Cas. Co. of Wisconsin*, 2011 WL 713768 at *577, n. 1 (4th Cir. Mar. 2, 2011) (per curiam) (unpublished).

26. As a matter of law, the Court concludes that, even if the claims alleged by Plaintiff herein satisfy the CGL policy’s insuring clause, they are excluded from coverage by exclusion (m).

27. Having determined that no “bodily injury”, “property damage” or “occurrence” is alleged in Plaintiff’s First Amended Complaint, the Court concludes that the coverage is not triggered under any of Mamone’s personal policies and, therefore, exclusionary provisions in said policies need not be examined. Nevertheless, the Court concludes that various exclusionary provisions would operate to preclude coverage for Plaintiff’s claims against the Defendants.

28. Although several exclusionary provisions in the homeowner’s policy are potentially applicable, and were fully briefed by Erie, the argument before the Court focused on the business pursuits exclusion. Mamone’s Erie homeowner’s policy excludes from coverage:

Bodily injury, property damage or personal injury arising out of business pursuits of anyone we protect.

We do cover:

- a. activities normally considered non-business;
- b. business pursuits of salespersons, collectors, messengers and clerical office workers employed by others. We do not cover installation, demonstration and servicing operations;
- c. business pursuits of educators while employed by others as educators, including corporal punishment of pupils;
- d. occasional business activities of anyone we protect. These include, but are not limited to, babysitting, caddying, lawn care, newspaper delivery and other similar activities.

We do not cover regular business activities or business activities for which a person is required to be licensed by the state.

- e. the ownership of newly-acquired one or two family dwellings, but only for a period of 30 consecutive days after acquisition unless described on the **Declarations**.

[Homeowner’s Policy at 15]. The Mamone policy defines “business” as “any full-time, part-time or occasional activity engaged in as a trade, profession or occupation, including farming.” [Homeowner’s Policy at 4]. Similarly, in Mamone’s umbrella policy, coverage is precluded for **Personal injury or property damage** arising out of the **business pursuits or business property of anyone we protect**.

We do cover:

- a. activities normally considered non-business;
- b. the ownership of newly-acquired one or two family dwellings, but only for a period of 30 consecutive days after

acquisition unless covered by **underlying insurance**;

c. **business** pursuits or their ownership or use of **business property** if **underlying insurance** affords coverage with respect to such **personal injury** or **property damage**, but not for broader coverage than is provided by the **underlying insurance**. This coverage does not apply to the rendering or failing to render professional services.

d. the ownership, use, loading or unloading of **automobiles** or **watercraft** by **anyone we protect**.

e. **business** pursuits of educators while employed by others as educators, including corporal punishment of pupils.

[Umbrella Policy at 5]. “Business” is defined by the Personal Catastrophe policy as “any activity engaged in as a trade, profession or occupation, other than farming.” *Id.* at 3.

29. Commentators have noted that “[h]omeowners’ and farmowners’ liability policies typically exempt from coverage bodily injury or property damage arising out of or in connection with a business engaged in by an insured.” 9A Couch on Ins. § 128:12 (footnote omitted); *See also* David J. Marchitelli, Construction and Application of “Business Pursuits” Exclusion Provision in General Liability Policy, 35 A.L.R.5th 375 (“Business pursuits exclusions may be found in several types of personal liability insurance policies, including practically all homeowner’s policies.”). As the commentary indicates, “[p]eople characteristically separate their business activities from their personal activities, and, therefore, business pursuits coverage is not essential for their homeowners’ and farmowners’ coverage and is excluded to keep premium rates at a reasonable level.” *Id.* (footnote omitted); *See also Metropolitan Property and Cas. Ins. Co.*, 722 N.W.2d 319, 325 (2006) (“A business-purposes exclusion is intended ‘to confine the homeowner’s policy coverage to nonbusiness risks and to relegate business coverage to a commercial policy.’ *Erickson v. Christie*, 622 N.W.2d 138, 140 (Minn.App. 2001). Such an exclusion further serves to ‘delete coverage which is not essential to the purchasers of the policy and which would normally require specialized underwriting and rating, and thus keeps premium rates at a reasonable level.’”) (additional citations omitted). According to commentators:

The general rule is that to constitute a business pursuit for the purpose of an exclusion in a liability policy, there must be continuity [sic] a profit motive. It is not necessary that profit be the sole motivation for the conduct. The business need not be the insured's principal occupation. For example, an insured's involvement as a general partner in a limited partnership has been held to constitute a business pursuit.

2 Insurance Claims and Disputes 5th § 11:15 (footnotes omitted).

30. The seminal case in West Virginia on the exclusion, *Camden Fire Insurance Ass'n v. Johnson*, tracks the commentators' description of the provision. 170 W.Va. 313, 294 S.E.2d 116 (1982). In Syllabus point 1 of that decision, the Supreme Court of Appeals of West Virginia held:

The term 'business pursuits', when used in a clause of an insurance policy excluding from personal liability coverage injuries 'arising out of business pursuits of any insured', contemplates a continuous or regular activity engaged in by the insured for the purpose of earning a profit or a livelihood.

Camden, supra at Syl. pt. 1. The holding was reiterated in *Huggins v. Tri-County Bonding Co.*, 175 W.Va. 643, 337 S.E.2d 12 (1985). The *Huggins* Court further stated that "[t]he question of whether a particular activity or course of conduct comes within this definition of 'business pursuits' must necessarily be determined on a case-by-case basis, with due consideration given to the facts and circumstances of each case." *Id.* at 12 (quoting *Camden, supra* at 119); see also *Smith v. Sears, Roebuck & Co.*, 191 W.Va. 563, 447 S.E.2d 255, 257 (1994).

31. The Court concludes that the subject litigation arose out of Mr. Mamone's continuous or regular activity for the purpose of gaining a profit or livelihood. The Plaintiff and Defendants asserted that Mr. Mamone was a "salesperson", so as to apply an exception to the exclusion, because he markets his business's services. The Court declares that such an application of the policy would be absurd and contracts are never to be interpreted so as to reach

an absurd result. See *Dunbar Fraternal Order of Police, Lodge No. 119 v. City of Dunbar*, 218 W.Va. 239, 624 S.E.2d 586 (2005).

32. The Court concludes that the business pursuits exclusion operates to bar coverage under Mr. Mamone's homeowners' and personal catastrophe policies.

33. The parties agree, and the Court concurs, that punitive damages are excluded from coverage under Mamone's personal policies.

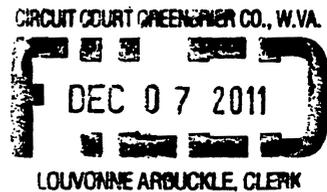
34. The Court concludes that there is no coverage under any coverage part of the three (3) Erie policies at issue for the defense of, and indemnification for, the Plaintiff's claims against the Defendants.

WHEREFORE, the Court being of the opinion, under R. Civ. P. 54(b), that there is no just reason for delay of appellate review of this matter, it hereby **ORDERS, ADJUDGES** and **DECREEES** that, based upon the foregoing, the "Motion for Summary Judgment" filed on behalf of Erie is **GRANTED**. The Court further **ORDERS, ADJUDGES** and **DECREEES** that:

1. The three (3) Erie policies do not provide coverage for the defense of, or indemnification for, this civil action;
2. The lack of coverage renders summary judgment appropriate on all coverage issues;
3. The policy language is clear and unambiguous; and
4. This civil action is dismissed, as against Erie, with prejudice.

The objections of the Plaintiff and the Defendants are noted. The clerk is directed to send copies of this Order to all counsel and parties of record.

Entered this 6th day of December, 2011.
A True Copy:
ATTEST:



Louvonne Arduckle
Clerk, Circuit Court
Greenbrier County, WV

J. C. Pompano

By _____
Deputy

Hon. Joseph C. Pomponio, Jr.

PRESENTED BY:

/s/Michelle E. Piziak

**Michelle E. Piziak, Esq. WVSB #7494
STEPTOE & JOHNSON PLLC
Chase Tower, 707 Virginia Street, East
P. O. Box 1588
Charleston, West Virginia 25326-1588
265310.00715**
