

11-0315

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

JENNIFER MILLER, individually  
and as mother and next friend of  
TRAIS WESTFALL, an infant,

2010 SEP 30 PM 4:57

CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

Plaintiff,

v.

CIVIL ACTION NO. 09-C-1440

JUDGE Charles King

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA,  
and WEST VIRGINIA DEPARTMENT  
OF COMMERCE, DIVISION OF FORESTRY,

Defendants.

**ORDER DENYING SUMMARY JUDGMENT TO DEFENDANT  
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA**

On July 30, 2010 came the parties, by counsel, to present argument on the Defendant Insurer's previously filed Motion for Summary Judgment as to Plaintiff's Declaratory Judgment Action. Having reviewed the Pleadings, hearing argument of counsel and being otherwise apprized, the Court does hereby **DENY** the Defendant's Motion for Summary Judgment, finding as a matter of law that, even when viewing the evidence in Defendant's best light, the Defendant cannot meet its strict burden to prove the facts upon which its proffered exclusionary language operates. In so finding, the Court does hereby make the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. The action arises from a bicycle accident on September 5, 2007 in which Plaintiff's minor daughter, Trais Westfall, was injured on or near certain real property

located in Mason County, West Virginia that is owned, maintained and/or controlled by Defendant State of West Virginia.

2. Plaintiff brought the present action, alleging a negligence claim against the Defendant WVDOF as well as a Count for Declaratory Judgment Action seeking recognition of coverage under a policy of liability insurance issued by Defendant National Union Fire Insurance Company of Pittsburgh, PA (hereinafter "National Union") to the Defendant WVDOF.

3. Defendant National Union's insurance policy (Policy No. RMGL 159-52-62) contained a "Wrongful Act Liability Insurance" Coverage Form, which states:

C. The Company [Defendant National Union] will pay on behalf of the "Named Insured" [State of West Virginia, including any State Agency such as Defendant WVDOF], in accordance with the terms of this coverage part, all sums which the "Named Insured" shall become legally obligated to pay as damages for a "loss" arising from any "Wrongful Act" of the "Named Insured"....

Insurance Policy, p.14. Defendant National Union's policy goes on to define

"Wrongful Act" as "any actual or alleged act, breach of duty, neglect, error, misstatement, misleading statement or omission by the "insured(s) in the performance of their duties for the "Named Insured"...." Insurance Policy, at p.16.

4. Defendant National Union did not challenge that Plaintiff's claim falls within the Wrongful Act Liability Coverage Form, but rather that coverage is precluded by virtue of exclusionary language contained in Endorsement Number Seven (7), which purports to "exclude[s] from insurance coverage any claim resulting from the ownership, design, selection, installation, maintenance, location, use or control of any public thoroughfares, rights-of-way, signs, warnings, markers, markings, fences, or related or similar activities or things." Endorsement Seven (7) to Insurance Policy.

5. The subject insurance policy does not define the term "fence" in any way. The Briefs of both parties cite a common dictionary definition of "fence" as follows – "a barrier intended to prevent escape or intrusion or to mark a boundary; especially; such a barrier made of posts and wire or board" from the Merriam-Webster Online Dictionary. <http://www.merriam-webster.com/dictionary/fence>.

6. This definition goes beyond merely a list of component parts to include both the function and purpose of the subject "barrier" in determining its quality as a "fence." Specifically, the definition cited by the parties for a "fence" states that the barrier serves the function of "keeping something in" (i.e., to prevent escape) or "keeping something out" (i.e., to prevent intrusion). Without considering the functional aspect of the definition, one is left with simply "component parts" – for instance, a nail, a wire, a board, a post – none of which would reasonably qualify, in their own right, independently as "a fence."

7. The parties agree that the specific instrumentality that struck Plaintiff's face in the subject bicycle accident was a strand of woven metal wire located approximately four (4) to four and one-half (4 ½) feet from the ground.

8. Defendant National Union contends that the metal wire had been part of a "fence" some thirty (30) to forty (40) years prior as part of a Forest Genetics project conducted by WVU at the Seed Orchard and, as a result, was properly excluded under Endorsement Seven (7) to the policy as a "fence."

9. Defendant National Union further contends that the "fence" erected some thirty (30) to forty (40) years prior had deteriorated over the course of those years into the woven metal wire that injured Plaintiff.

10. In attempting to meet its evidentiary burden to prove the facts upon which the exclusion operates, Defendant National Union cites deposition testimony from two (2) Defendant WVDOF employees – Jason Huffman and Dan Kincaid – who proffered their recitation of an oral history suggesting that a fence had been constructed some thirty (30) to forty (40) years prior to Plaintiff's injury for the purpose of keeping people out of the Seed Orchard, as part of the Forest Genetics project conducted by WVU. Kincaid Depo. p.44, ll.20-24, Huffman Depo., p.41, ll. 22-24

11. It is undisputed that neither witness was employed with the Defendant WVDOF at the time period when the fence was allegedly constructed thirty (30) to forty (40) years prior to Plaintiff's injury, nor did either witness have any other source of personal knowledge as to the same. Huffman Depo., p. 6, ll. 16-18, Kincaid Depo. p.5, ll.15-20.

12. When restricted to the time period with which the witnesses did have personal knowledge, Defendant WVDOF Witness Jason Huffman testified that since 2000, there was neither a structurally intact fence surrounding the property, nor any intention by Defendant WVDOF to exclude persons from the land, who were permitted to come and go freely upon the land. Huffman Depo., p.42, l.17 through p.43, l.19.

13. Huffman further testified that upon his arrival at the accident scene on September 5, 2007, there were not six (6) strands of wire, as required to meet the definition of a "lawful fence" under West Virginia Code § 19-17-1, but rather that there was a single strand elevated at four (4) to four and a half (4 ½) feet and an uninvolved strand of wire laying on the ground. Huffman Depo., p.39. ll.2-10.

## CONCLUSIONS OF LAW

14. West Virginia jurisprudence has long held that "[w]here the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." *Id.*

15. Because Defendant National Union is attempting to preclude coverage for Plaintiff's claim through exclusionary language in its policy, West Virginia law requires the Insurer to meet a strict burden:

An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.

Nat'l Mut. Ins. Co. v. McMahon & Sons, 356 S.E.2d at 495 (citing Estrin Constr. Co. v. Aetna Cas. & Sur. Co., 612 S.W.2d 43 (Mo. Ct. App. 1981); Leverette v. Aetna Cas. and Sur. Co., 276 S.E.2nd 859 (Ga. 1981); Michigan Mut. Liability Co. v. Stallings, 523 S.W.2d 539 (Mo. Ct. App. 1975)).

16. Accordingly, Defendant National Union must meet a strict burden in proving the facts necessary to the operation of the exclusionary language of Endorsement Seven (7), namely that the woven metal wire that injured Plaintiff on September 5, 2007 sufficiently qualified as a "fence" under the policy to defeat indemnity for her injuries.

17. Plaintiff submits that the wire did not constitute a "fence" on the day in question, as the wire itself fails to meet the dictionary definition of a "fence," which definition incorporates a "functional" component. On the other hand, Defendant proffers an "historical definition" to suggest that some thirty (30) years prior, the subject wire may have been part of a "fence," and that regardless of its current state or nature on the date of injury, the wire is permanently considered a "fence" and, thus, excluded

under the exclusionary language of its policy.

18. West Virginia Civil Procedure Rule 56 envisions a Summary Judgment determination made on the basis of evidence that is admissible under the West Virginia Rules of Evidence. The Rule states that the Court may consider the "pleadings, depositions, answers to interrogatories, and admissions on file . . ." W.Va. R. Civ. Pro. 56 (c) (2010). Further, the Rule allows testimony by affidavit, but echoes a strict requirement that any such testimony be "made on personal knowledge" and "set[ting] forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." W.Va. R. Civ. Pro. 56 (e) (2010).

19. In subsequent decisions, the Supreme Court of Appeals of West Virginia has recognized an expansion of the material to be considered, but maintained the requirement of admissibility:

Rule 56(c) of the West Virginia Rules of Civil Procedure does not contain an exhaustive list of materials that may be submitted in support of summary judgment. In addition to the material listed by that rule, a trial court may consider any material that would be admissible or usable at trial.

Aluise v. Nationwide Mut. Fire Ins. Co., 218 W. Va. 498 (2005).

20. In the case at hand, both witnesses proffered by Defendant National Union as supplying facts necessary for the operation of the exclusionary language in Endorsement Seven (7) have limited personal knowledge. Both witnesses concede the limited time period in which either has *personal knowledge* sufficient to testify about the matters at issue. Neither witness has personal knowledge about matters that occurred prior to their employment with the Defendant WVDOF. If restricted to matters upon which they have *personal knowledge*, as opposed to rank hearsay, the witnesses

cannot even provide the background upon which Defendant bases the use of a "historical definition."

21. West Virginia Evidence Rule 602 states that a witness "may not testify in a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." W.Va. Rule Evid. 602 (2010). The rationale of this evidentiary requirement has been thus explained:

Rule 602 provides that a witness may testify only about matters of which she has first-hand knowledge. The testimony must be based upon events perceived by the witness through one of the physical senses. To be specific, first-hand knowledge includes more than what is seen. It includes also such senses as hearing, smelling, feeling and tasting. Perception of fact by the senses of the witness, that is, first-hand knowledge, is a fundamental qualification of testimonial competency. The origin and viability of this qualification is found in the law's requirement that only reliable information underlie judicial decisions. The rule – an extension of the law's preference that decisions be based on the best evidence available – is grounded in the realization that the possibility of distortion increases with transfers of testimony and that, consequently, the most reliable testimony is that which is obtained from the witness who perceived the event.

Franklin D. Cleckley, Vol. 1, Handbook on Evidence for West Virginia Lawyers, § 6-2 (B) (4th ed. 2000) (bold emphasis added).

22. The portion of the testimony submitted by both parties which is based on personal knowledge (i.e., after their employment began with the Defendant WVDOF) reveals that even if a "fence" had been constructed in the area thirty (30) or forty (40) years prior, as of September, 2007, the metal wire which struck and injured Plaintiff's face was no longer a part of any structure that functioned as "a fence" nor that was intended to function as "a fence" by the Defendant WVDOF. To this end, the condition that existed on the date of Trais' disfigurement is best characterized as a "fugitive wire," rather than characterized historically, by witnesses without personal knowledge, as a

"fence" in order to defeat indemnity.

23. Beyond the dictionary definition discussed above, Chapter 19 of the West Virginia Code contains Article 17, entitled "Fences." Section 1 of Article 17 provides the Code's only definition of a "lawful fence":

§ 19-17-1. Definition of lawful fence.

Every fence of the height and description hereinafter mentioned shall be deemed a lawful fence as to any horses, mules, asses, jennets, cattle, sheep, swine, or goats, which could not creep through the same, that is to say:

(e) If built with posts and wire, or pickets and wire, four feet high, and shall consist of not less than six strands, the first strand five inches, the second strand ten inches, the third strand seventeen inches, the fourth strand twenty-five inches, the fifth strand thirty-six inches, and the sixth strand forty-eight inches from the ground; and if with more than six strands, the space between the strands shall in no case be greater than hereinbefore provided. The space between the posts shall, in no case, be greater than sixteen feet;

W. Va. Code § 19-17-1 (2010).

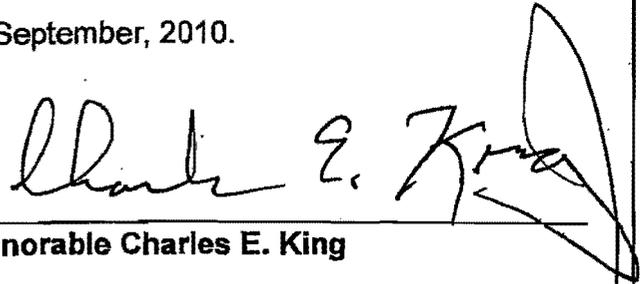
24. Based on the undisputed testimony of Defendant WVDOF employee Jason Huffman, the wire instrumentality that stuck Plaintiff's face did not meet the definition of a "lawful fence" per West Virginia Code section 19-17-1 (2010), as it had less than six (6) strands of wire.

Accordingly, the Court **FINDS** that, even viewing the evidence in the light most favorable to the Defendant National Union, it cannot meet its strict burden for proving the facts necessary for the operation of its proffered exclusionary language, and thus, coverage exists, as a matter of law, for Plaintiff's claims. Defendant's Motion for Summary Judgment is thus **DENIED**, and the Agreed Stay as to proceeding on the underlying liability case against Defendant WVDOF is lifted.

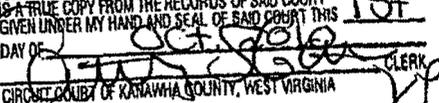
The Court notes the objection and the exception of the party or parties aggrieved

by this Order. The Clerk is directed to send a Certified Copy of this Order to all counsel of record.

ENTERED this the 30<sup>TH</sup> day of September, 2010.



Honorable Charles E. King

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 1st  
DAY OF October 2010  
 CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

9/30/10  
Date  
 Certified copies sent to:  
2. Out of record  
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(please indicate)  
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Other methods accomplished:  
Phillips  
Deputy Circuit Clerk

C. Lovejoy  
W. Valentino  
M. Casey

No. \_\_\_\_\_

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA.,

Petitioner and Defendant Below,

v.

JENNIFER MILLER, individually and as  
mother and next friend of TRAIS WESTFALL,  
an infant,

Respondent and Plaintiff Below.

CERTIFICATE OF SERVICE

I, Don C. A. Parker, hereby certify that service of **National Union Fire Insurance Company of Pittsburgh, Pa.'s Petition for Appeal** has been made upon the parties of record by placing a true copy thereof in an envelope deposited in the regular course of the United States Mail, with postage prepaid, on this 28<sup>th</sup> day of January, 2011, addressed as follows:

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KANAWHA COUNTY CLERK COURT  
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