

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.

**NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.'S
PETITION FOR APPEAL**

Petition for Appeal from Order dated September 30, 2010
in Civil Action No. 09-C-1440 (Judge Charles E. King)
in the Circuit Court of Kanawha County

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I. NATURE OF PROCEEDING AND RULING BELOW

Respondent and Plaintiff below, Jennifer Miller, individually and as mother and next friend of her infant daughter, Trais Westfall, has sued the West Virginia Division of Forestry (“WVDOF”) for injuries sustained by her daughter when her daughter’s face struck a wire strung along the property line of land owned by the WVDOF. National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”) provided liability insurance to the WVDOF for the relevant time period. A dispute exists between Ms. Miller and National Union as to whether the WVDOF has liability insurance coverage under the National Union policy as to Ms. Miller’s lawsuit, a dispute that National Union must now ask this Court to resolve.

As with any tort claim against an agency of the State of West Virginia, the WVDOF enjoys constitutional immunity for such a lawsuit if the WVDOF has no liability insurance coverage for the incident in question. However, if there is insurance coverage for the WVDOF, then Ms. Miller’s lawsuit may proceed. National Union maintains that liability insurance coverage for the incident in question is clearly excluded under Endorsement 7 of the insurance policy in question (an exclusion which this Court has examined before). Ms. Miller maintains that the exclusion contained in Endorsement 7 does not apply.

The dispute between Ms. Miller and National Union essentially boils down to the following: If the wire that injured Ms. Miller’s daughter was part of a fence, or was related or similar to a fence, then the exclusion contained in Endorsement 7 applies, there is no insurance coverage for the WVDOF for the incident in question, and Ms. Miller’s lawsuit against the WVDOF cannot proceed due to the constitutional immunity of the WVDOF. If, on the other hand, the wire that injured Ms. Miller’s daughter was not part of a fence, nor was it related to, nor similar to, a fence, then the exclusion contained in Endorsement 7 does not apply, there is

insurance coverage for the WVDOF regarding this incident, and Ms. Miller's lawsuit against the WVDOF may proceed.

National Union filed a motion for summary judgment regarding this insurance coverage dispute. The Circuit Court denied that motion, ruling that the wire that injured Ms. Miller's daughter was not part of a fence, nor was it related to, nor similar to, a fence.

National Union has filed the instant Petition for Appeal because, as will be proven below, the Circuit Court's ruling is clearly erroneous. It creates insurance coverage where none exists. Moreover, by doing so in the context of a lawsuit against an agency of the State of West Virginia, the Circuit Court seeks to circumvent the limited nature of the State's waiver of its constitutional immunity via the purchase of insurance. The State of West Virginia, through its Board of Risk and Insurance Management ("BRIM"), takes great pains to balance the inherent constitutional immunity of the State against the desire to provide citizens a limited means of seeking recovery from the State for injuries caused by the State, all within the confines of the State's budgetary constraints. Creating insurance coverage for the State of West Virginia where none logically exists is a threat to that delicate balance. The Circuit Court's ruling in this matter does just that, and as such, it cannot stand. National Union respectfully asks this Court to reverse the decision of the Circuit Court regarding the existence of insurance coverage for the WVDOF as to the incident involving Ms. Miller's daughter.

II. STATEMENT OF FACTS

A. Introduction

On or about September 5, 2007, Jennifer Miller's ten-year-old daughter, Trais Westfall, was riding on the handlebars of a bicycle being piloted by Michael Jeffers. (Docket 1-4). The bicycle crossed through a yard owned by Earl Howell, a private citizen. (Docket 40-41). Mr. Howell's yard abutted property owned by the State of West Virginia.¹ (Docket 40-41). The State property at issue is sometimes referred to as a "seedling orchard" or otherwise as being part of the Clements State Tree Nursery (but not in a contiguous manner), located just outside of Point Pleasant, Mason County, West Virginia. (Docket 40-41). After crossing the yard, Trais and her companion, Michael, were proceeding into the seedling orchard when Trais' face struck what Ms. Miller's Complaint identifies as a "solitary, woven metal wire that constituted a dangerous instrumentality or condition." (Docket 1-4). National Union refers to this as a part of a fence. (Docket 40-41). Trais' face was lacerated as a result of the incident. (Docket 1-4).²

B. Plaintiff's Allegations

Jennifer Miller filed a lawsuit alleging negligence by the WVDOF, which negligence Ms. Miller claims resulted in Trais' injuries. (Docket 1-4). Specifically, Ms. Miller alleges that the property line of the WVDOF's property was marked with a solitary, woven metal wire that constituted a dangerous instrumentality or condition, which struck Trais across the face as she rode a bicycle on September 5, 2007. (Docket 1-4). As a result, Ms. Miller alleges the WVDOF is liable for Ms. Miller's daughter's injury and resultant damages because it was foreseeable that the dangerous instrumentality on the WVDOF's property would cause injury. (Docket 1-4).

¹ There is some dispute as to whether the property is owned by the WVDOF or by West Virginia University. For the sake of the determination of a duty to indemnify for this loss, this is not relevant to this Petition, as both are agencies of the State of West Virginia and both were insured by National Union, through BRIM, at the time of this loss.

² For the purposes of this Petition, liability is not an issue.

Ms. Miller's Complaint also seeks a declaration of insurance coverage under National Union Policy Number RMGL 159-52-62 ("the Policy") for such injuries, alleging the Policy provides indemnity for the WVDOF as a result of liability for Ms. Miller's daughter's injury. (Docket 1-4). Specifically, Ms. Miller seeks relief from the WVDOF under and up to its applicable insurance limits. (Docket 1-4).

C. The Policy

The Policy under which Ms. Miller seeks coverage for the WVDOF is a custom-designed policy of insurance provided through BRIM to the State of West Virginia. The limit of the Policy for any occurrence is \$1,000,000.00. Coverage does not exist for actions seeking relief in any non-pecuniary form, including declaratory judgments and associated costs. There are five different forms of coverage under the BRIM policy:

- Coverage A - Comprehensive General Liability Insurance,
- Coverage B - Personal Injury Liability Insurance,
- Coverage C - Professional Liability Insurance,
- Coverage D - Stop Gap Liability Insurance, and
- Coverage E - Wrongful Act Liability Insurance.

According to a Certificate of Liability Insurance pertaining specifically to the WVDOF, the WVDOF is an Additional Insured under the Policy. Also, Endorsement No. 1 of the Policy provides that "The State of West Virginia" means all executive branches of the State of West Virginia, including any Divisions and Departments, of which the WVDOF is one.

According to Endorsement Number 7 ("Endorsement 7"), no coverage exists under any of the coverage forms, Coverages A through E, for the following:

It is agreed that the insurance afforded under this policy does not apply to any claim resulting from the ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use or control of streets (including sidewalks, highways or other public thoroughfares), bridges, tunnels, dams, culverts, storm or sanitary sewers, rights-of-way, signs, warnings, markers, markings, guardrails, *fences, or related or similar activities or things* but it is

agreed that the insurance afforded under this policy does apply (1) to claims of “**bodily injury**” or “**property damage**” which both directly result from and occur while employees of the State of West Virginia are physically present at the site of the incident at which the “**bodily injury**” or “**property damage**” occurred performing construction, maintenance, repair, or cleaning (but excluding inspection of work being performed or materials being used by others) and (2) to claims of “**bodily injury**” or “**property damage**” which arise out of the maintenance or use of sidewalks which abut buildings covered by the policy.

It is further agreed that this exclusion does not apply to any “**Named Insured**” which is not immune under the Constitution of the State of West Virginia. (boldface emphasis in original; italics added).³

D. The Fence

At the time of this accident, Dan Kincaid was the Assistant State Forester for Special Projects for the WVDOF. Mr. Kincaid’s deposition was taken on June 9, 2010.⁴ Mr. Kincaid did not witness the accident, but was directed to the site of the accident after the fact. When asked about his observations of the site, he testified that:

A. Well, they had – it’s just an old fence row. There’s an evident fence row all around the property. Some of the fence was in disrepair in places. Other places were completely overgrown. In some places, it was standing fence. Other places, it was obvious neighbors had probably either cut it or pushed it down toward them so -- because there was places in the orchard where you could see where they had camped overnight and set little fires and things. And some of the neighbors you could tell were even mowing because their yards butt right up -- butted right up against it so they would, you know, weed whack and mow. It was just a -- like you see in the woods anywhere, just an old fence row.

Q. Now, you -- you said that it was -- I think -- and I don’t want to misquote you -- but it was obvious that it was an old fence row. I think that was your testimony. This may sound like a funny question, but why was it obvious to you that it was an old fence row?

A. Well, I’m a forester I guess so I go to -- any time you go from one property to the next, you -- most of the time -- not always, but most of the time you see -- you

³ The incorrect insurance policy was erroneously attached as Exhibit 1 to National Union’s Motion for Summary Judgment, but the correct policy was provided to the trial court prior to oral argument on the motion and the mistake was further clarified during oral argument. The correct policy was attached as Exhibit 1 to Docket 12-13 and Endorsement 7 of that policy is attached to this Petition as Exhibit A to the Appendix.

⁴ (Docket 40-41, Exhibit 2, attached in pertinent part hereto as Exhibit B to the Appendix).

can tell where the property lines are because there's either a fence post or there's wire or sometimes there's an intact fence. But generally, property owners, you know, mark their boundaries so most all the times when you go from one property to another in the woods, you -- or even from farm to farm, you can tell. There's almost always a fence there and it's either intact or you can see fence posts or you can see wire or, you know, a combination of all that.⁵

The remaining part of the fence had already been removed when Mr. Kincaid first went to the scene of the accident, but he did have an opportunity to view the subject "wire":

Q. Have you ever had an occasion to look at the actual wire that it is alleged that this young lady ran into?

A. Jason [Huffman] showed it to me and he's kept it in the closet up there. You know, we were told to keep it in case we ever needed to show it to anybody. So he showed it to me and he cut off a piece of the wire and kept it.

Q. And do you have any understanding as to what that -- what that wire was or what it was ever part of?

A. Well, I'd assume it was -- it's strands of this woven wire that, you know, was on the fence line there on the fence row.

Q. On the occasions that you had to go out to the seed orchard, had you ever observed any other wire of this nature?

A. Yeah, the -- yeah, it was -- I mean, just if you look at it, it's -- it's a fence row all the way around it and it was deteriorating -- it -- I mean, it's like you -- in just looking at it, you can say well that's a fence. It's like this -- this is probably a coffee cup, that's probably a chair, that -- to me, that was fence line. And the best of my recollection, there were places where there was wire and there was places where it had been, you know, probably knocked down, pulled down, fell down, deteriorated, you know, for whatever reason, whoever did it. You know, I don't know. Probably none of our people did it. I mean, all -- there's all kind of neighbors around there. And if you've ever had neighbors, particularly if you own public land, which I've been in that business for 35 years, the neighbors are always wanting to get there on that public land and put their wood shed and put their piles of firewood and -- and walk and picnic and garden and keep the weeds down and keep the snakes back, whatever reason it is, you know, they -- they want to do that so --⁶

⁵ (Exhibit B).

⁶ (Exhibit B).

Mr. Kincaid was likewise the recipient of a memorandum drafted by WVDOF employee Dave McCurdy and dated September 7, 2007 regarding an investigation of this incident.⁷ The memorandum states in pertinent part that “the wire that the man was calling barbed wire was actually the top (heavier wire) wire of the woven wire. All the other wire of the woven wire had deteriorated and fallen away except the bottom (heavier wire). The wire deteriorated because it is 30 years old.”⁸

Mr. Kincaid likewise testified that to his knowledge no WVDOF employees were present at the time of the occurrence and that no work was being performed by WVDOF employees at the time of the occurrence.

Q. Did you have any understanding if any state personnel were present at the seed orchard at the time of this occurrence?

A. Well, it’s my understanding no, there was not any of our people there, you know, when -- it was located five or six miles away from our place of business.

Q. Do you have any understanding if there was any work that was being done at the -- at the seed orchard at the time of this occurrence?

A. Well, I don’t think there was. []⁹

Jason Huffman was, at the time of the accident, an Assistant Nursery Superintendent working under David McCurdy, the Nursery Supervisor for the Clements State Tree Nursery. Mr. Huffman’s deposition was also taken on June 9, 2010.¹⁰ Mr. Huffman testified that, several days after the accident, he accompanied Trais and her family to the scene of the accident:

Q. Oh, I see. So you actually -- you -- you went down to the accident site with the family?

⁷ The September 7, 2007 memorandum was attached as Exhibit 1 to Exhibit 2 of Docket 40-41, but is attached to this Petition as Exhibit C to the Appendix.

⁸ (Exhibit C).

⁹ (Exhibit B).

¹⁰ (Docket 40-41, Exhibit 3, attached in pertinent part hereto as Exhibit D to the Appendix).

A. Right. I -- we were shocked that there had -- we were unaware that there was any wire that was -- could have done that so we went down there or I went down with them and cut that piece out where she had had -- run into.

Q. Okay. Was -- and was Mr. McCurdy with you at that time also?

A. Not at that time.

Q. Okay. So you had the opportunity to -- correct me if I'm wrong, but they -- they showed you where this all happened?

A. Right.

Q. Was the bike still there?

A. No.

Q. Okay. Was the little girl, was she there?

A. She was with the family there.

Q. Okay. And I want to presume at that time she had some bandages --

A. Right. Right.

Q. -- and so forth so this wasn't immediately after the accident; is that correct?

A. Several days I suppose.

Q. Okay. That's what I just was trying to determine. So you went down to the site. What if anything did you do while you were down there?

A. I cut out the piece of wire that she had run into, which was still in the place --

Q. Where did you -- what did you cut the wire away from?

A. From the -- from the fence post.

Q. This was a wire that was attached to posts?

A. Right.

Q. Okay. Was it -- was it in any way attached to any trees?

A. No.

Q. Okay. And then do I understand -- what did you do with the wire?

A. We took that wire back to the office, the piece that was actually injured her. The rest of the wire, we picked up and threw away.¹¹

When asked if he had any doubt in his mind that this “wire” was anything else than a remnant of a fence responded, Mr. Huffman responded:

A. Right. It’s just the remnant of what was left after approximately 30 years I think.¹²

In his deposition, Mr. Huffman likewise identified the location of the accident as represented to him by Trais’ and her family members through at least one of several photographs. The picture represents a view indicative of a fence line with fence posts.¹³ The area between the circled fence posts indicates the location represented to Mr. Huffman where the accident occurred.¹⁴ An additional photo identified by Mr. Huffman during his deposition shows him lifting the bottom “heavier wire” (previously referenced by Mr. Kincaid) that was also part of the fence line at the scene of the accident that had not deteriorated over time.¹⁵

When asked about the presence of any WVDOF personnel or any sort of work or ongoing construction at the accident scene at time of the occurrence, Mr. Huffman replied in a similar fashion to Mr. Kincaid:

Q. Okay. Are you aware if on September 5th of 2007 whether any Division of Forestry personnel were working at the seed orchard?

A. I’m confident that we were all at the nursery site. We weren’t -- no -- nobody was down here working.

¹¹ (Exhibit D).

¹² (Exhibit D).

¹³ The photograph was attached as Exhibit 2 to Exhibit 3 of Docket 40-41, but is attached to this Petition as Exhibit E to the Appendix.

¹⁴ (Exhibits D and E).

¹⁵ The photograph was attached as Exhibit 3 to Exhibit 3 of Docket 40-41, but is attached to this Petition as Exhibit F to the Appendix.

Q. Was there any sort of construction or maintenance, ongoing maintenance work that was being done that day down at that property that you're aware of?

A. Not that I know of. ¹⁶

During Mr. Huffman's deposition, he was presented with the opportunity to review the previously mentioned September 7, 2007, Memorandum from Dave McCurdy to Dan Kincaid. After reviewing the Memorandum, he affirmed the portion of the Memorandum attributed to him. In that portion of the Memorandum he wrote as follows:

The girl was about 7-8 years old. Cut from upper left cheek to bottom right jaw probably 6-7 inch long cut. **Top strand of woven wire is all that is left of fence in that location.** Height is 4-4 ½ ft. **Top strand is heavier wire than the lower sections of wire in woven fence.** There were 8-9 other sections of fence where only top strand was there throughout the orchard. (I cut all these out). Probably most of these were the result of deer pushing through what was left of the lower strands and kids probably came along later and opened them up. I don't think any adult intentionally cut our lower sections and left the top. (Although many adults **have removed entire sections of fence** neatly and kept the yard clean or built a fence for their yard on the property line. The girl talked about crossing through the **fence** on foot to go to her friends house (a short cut) so she was very familiar with the area apparently. The parents didn't seem to know the orchard was there or how I drove through from the road. **Majority of fence** is in very bad shape. There is still some junk being dumped in the orchard. (emphasis added).¹⁷

As a result of the testimony of Dan Kincaid and Jason Huffman as well as all the available evidence, National Union determined that it owed no duty to indemnify the WVDOF, because Ms. Miller's claim for her daughter's injury resulted from the ownership and maintenance of a fence on State property.

¹⁶ (Exhibit D).

¹⁷ (Exhibits C and D).

**III. TRIAL COURT'S ORDER DENYING SUMMARY JUDGMENT
TO DEFENDANT NATIONAL UNION FIRE
INSURANCE COMPANY OF PITTSBURGH, PA.**

On June 29, 2010, National Union filed a Motion for Summary Judgment as to Ms. Miller's declaratory judgment claim because the policy at issue does not provide coverage to the WVDOF for Ms. Miller's claims of injury due to the fence on the State's property. (Docket 40-41).

The trial court concluded that, as a matter of law, the witnesses proffered by National Union as supplying facts necessary for the operation of the exclusionary language in Endorsement 7, Dan Kincaid and Jason Huffman, have limited personal knowledge to testify about the matters at issue and neither witness has personal knowledge about matters that occurred prior to their employment with the WVDOF. (Docket 45-46). Thus, the trial court held these witnesses cannot provide the background upon which National Union bases the use of a "historical definition" that the wire that injured Trais was part of a fence thirty (30) years ago and is permanently considered a "fence" or related or similar thing regardless of its current state or nature on the date of injury, which would exclude Ms. Miller's claims under Endorsement 7. (Docket 45-46).

The trial court further held that the testimony of Mr. Kincaid and Mr. Huffman reveals that even if a "fence" was constructed on the State's property thirty (30) or forty (40) years prior to Trais' injury, as of September 2007, the metal wire which struck Trais' face was no longer a part of any structure that functioned as a fence nor that was intended by the WVDOF to function as a fence. (Docket 45-46). Thus, the Court held that 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.” (Docket 45-46).

Furthermore, the trial court held that “[b]ased on the undisputed testimony of [Jason Huffman], the wire instrumentality that struck [Trais’] 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.” (Docket 45-46). Therefore, the trial court denied National Union’s motion for summary judgment finding that National Union could not meet its burden for proving the facts necessary for the operation of the exclusionary language of Endorsement 7. (Docket 45-46). As a result, the trial court found that coverage exists for Ms. Miller’s claims against the WVDOF and lifted the Agreed Stay in regard to the proceedings in the underlying liability case against the WVDOF, noting the objections of the parties aggrieved by the court’s Order. (Docket 45-46).

IV. STANDARD OF REVIEW

This Court has held that “[a] circuit court’s entry of summary judgment is reviewed *de novo*.” Yunker v. E. Associated Coal Corp., 214 W. Va. 696, 699, 591 S.E.2d 254, 257 (2003) (quoting Syl. pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994)). “Similarly, when review of a circuit court’s **denial** of summary judgment is properly before this Court, [this Court] examine[s] anew the circuit court’s ruling. Id. (emphasis added). In other words, “[t]his Court reviews *de novo* the denial of a motion for summary judgment, where such ruling is properly reviewable by this Court.” Id. (quoting Syl. pt. 1, Findley v. State Farm Mut. Auto. Ins. Co., 213 W. Va. 80, 576 S.E.2d 807 (2002) (emphasis added)).

Furthermore, this Court has held:

[i]n reviewing summary judgment, this Court will apply the same test that the circuit court should have used initially, and must determine whether '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.'

Murray v. State Farm Fire & Cas. Co., 203 W. Va. 477, 509 S.E.2d 1 (1998) (citing Syl. pt. 3, Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y., 148 W. Va. 160, 133 S.E.2d 770 (1963)).

Thus, the appropriate standard of review in this matter is a *de novo* review of the trial court's rulings and this Court must determine whether any genuine issues of fact exist in regard to Plaintiff's declaratory judgment claim against National Union.

V. ASSIGNMENT OF ERROR

National Union assigns the following error of law:

- A. The trial court erroneously held that, as a matter of law, the condition that existed on the date of Trais' accident is best characterized as a "fugitive wire." In so holding, the court ignored the uncontroverted evidence that the "wire" was once a "fence," that the "wire" was on the boundary of the State's property, and that the "wire" ran between two wooden posts. In addition, the witnesses who testified in regard to the "fence" had personal knowledge of the "fence" based on their personal observations as employees of the WVDOF. Thus, the wire that injured Trais' face is a fence or a "related or similar thing" in accordance with Endorsement 7 and for which coverage is excluded.

VI. POINTS AND DISCUSSIONS OF THE LAW

- A. **The September 30, 2010, Order constitutes a final order in its nature and effect; therefore, the Petition for Appeal is appropriately filed at this time.**

This Petition for Appeal is appropriately filed at this time because the September 30, 2010 Order constitutes a final judgment which is appealable under West Virginia Rules of Civil Procedure Rule 54(b), although the liability claims against the WVDOF are still pending. Rule 54(b) states:

Judgment upon multiple claims or involving multiple parties -- When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

W. VA. R. CIV.P 54(b). The Supreme Court of Appeals of West Virginia has held that, even if an order does not contain the certification language under Rule 54(b), an order may be considered final if the order approximates a final order in its nature and effect. Hubbard v. State Farm Indem. Co., 213 W. Va. 542, 549, 584 S.E.2d 176, 183 (2003); Syl. pt. 2, Durm v. Heck's, Inc., 184 W. Va. 562, 401 S.E.2d 908 (1991). In order to determine whether an order approximates a final order in its nature and effect where multiple claims exist, the court must consider whether the judgment completely disposes of at least one substantive claim. Hubbard, 213 W. Va. at 550, 584 S.E.2d at 184.

In Durm, a slip and fall case in which summary judgment was granted for Foodland, this Court noted that “[w]ith the enactment of Rule 54(b), **an order may be final prior to the ending of the entire litigation on its merits if the order resolves the litigation as to a claim or a party.**” 184 W. Va. at 566, 401 S.E.2d at 912 (emphasis added).

Likewise, in Hubbard, the Plaintiff's Complaint sought declaratory judgment against State Farm Indemnity for insurance coverage. 213 W. Va. at 545, 584 S.E.2d at 179. Plaintiff's Complaint also alleged bad faith against State Farm Indemnity and State Farm Mutual. Id. Both

State Farm entities filed separate motions for summary judgment related only to the coverage and duty to defend issues, not the bad faith issues. Id. The Circuit Court denied State Farm Mutual's motion and granted Plaintiff's cross-motion for summary judgment, finding State Farm Mutual had a duty to defend. Id. However, the Court indicated in its July 3, 2000 order in this regard that it did not hear argument on the remaining issues in the parties' motions and did not rule on them at that time. Id.

Later, on November 28, 2000, the Circuit Court denied State Farm Indemnity's motion and granted Plaintiff judgment against State Farm Indemnity, finding the company liable on the failure to defend and bad faith counts of Plaintiff's complaint. Id. However, the Court reserved ruling on the issue of bad faith damages. Id. Further, the order was not directed toward adjudicating liability against State Farm Mutual. Id.

Over a year later, State Farm Mutual filed a motion to reconsider the July 3, 2000 order and the Circuit Court found that particular order interlocutory because all the issues of liability had not been resolved by that order. Id. at 545-546, 179-180. However, the Circuit Court held that the November 28, 2000 order resolved all issues in the case and was a final order. Id. at 546, 180. Thus, the Circuit Court analyzed the two motions for reconsideration under Rule 60 of the West Virginia Rules of Civil Procedure ("Rules") and found that they were not timely filed. Id.

On appeal, this Court found that the "supposed finality of the November 28 order directed to State Farm Indemnity may not be imputed upon the July 3 order pertaining to State Farm Mutual," and thus, the July 3 order remained interlocutory. Id. at 549, 183. However, the Court noted that "[b]ecause the November 28 order did not fully adjudicate the bad-faith claims against State Farm Indemnity, the finality of the November 28 order hinges on" Rule 54(b). Id. The Court held that the November 28 order was final in regard to Plaintiff's

claim that State Farm Indemnity owed a duty to defend and provide coverage because the order found that the company had a duty to defend and provide coverage and awarded damages in the amount of \$300,000. Id. at 550, 184. **“Because the November 28 order could be construed as final as to the coverage and duty to defend claims, State Farm Indemnity could have taken a petition for appeal to this Court from the summary judgment rendered against it on these claims.”** Id. (emphasis added). However, because State Farm Indemnity chose not to appeal the November 28 order, which the WVSC indicated “could be construed as being final under Rule 54(b),” the November 28 order remained interlocutory in the absence of a petition for appeal. Id. at 551, 185. As a result, the Court remanded the case to the circuit court to rule on the motions for reconsideration. Id. at 552, 186.

In the instant case, the trial court’s September 30, 2010 Order denying National Union’s Motion for Summary Judgment is a final Order in regard to National Union because it resolves Ms. Miller’s sole claim against National Union, that is, the declaratory judgment count of Ms. Miller’s Complaint. The trial court determined that the exclusionary language of the Policy at issue did not apply and National Union owed a duty to indemnify the WVDOF. (Docket 45-46). Consequently, the September 30, 2010 Order constitutes a final order and this Petition for Appeal is appropriately filed at this time.

B. The trial court erroneously concluded that National Union has a duty to indemnify the WVDOF for the allegations made by Jennifer Miller.

Jennifer Miller seeks a declaration by this Court that there is insurance coverage for her claims against the WVDOF under Insurance Policy Number RMGL 159-52-62. However, the Policy in question does not provide such coverage.

1. **The relevant inquiry at issue is National Union's duty to indemnify the WVDOF, not the duty to defend.**

In an insurance coverage dispute such as this, it is important for the Court to begin its analysis by determining the type of insurance coverage dispute and the type of insurance coverage at issue. Without such a determination, the incorrect legal standard may be applied to this matter.

This is an insurance coverage dispute between Ms. Miller and National Union, the liability insurance company of the alleged tortfeasor (WVDOF) that Ms. Miller is suing. This is not an insurance coverage dispute between the alleged tortfeasor (WVDOF) and National Union, its liability insurance company. This distinction is critical, because one of the most common issues that arises in an insurance coverage dispute between a liability insurance company and its insured, and which gives rise to much of the case law dealing with such coverage disputes, has absolutely no relevance to this particular insurance coverage dispute. This refers, of course, to an insurance company's duty to defend its insured. See, Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 356 S.E.2d 488 (1997), abrogated on other grounds by Potesta v. U.S. Fid. & Guar. Co., 202 W. Va. 308, 504 S.E.2d 135 (1988).¹⁸

A liability company owes two main duties to its insured: the duty to defend the insured, and the duty to indemnify the insured. See, Tackett v. Am. Motorists Ins. Co., 213 W. Va. 524, 528-529, 584 S.E.2d 158, 162-163 (2003). In this case, Ms. Miller has a significant interest in whether National Union has a duty to indemnify the WVDOF against her allegations; if there is such a duty, then Ms. Miller may sue the WVDOF in tort. If there is no such duty, then Ms.

¹⁸ McMahon & Sons was an appeal taken from the Circuit Court of Jefferson County declaring that a contractor's insurer (National Mutual) had **no obligation to defend** or to pay any liability of the contractor for the destruction of a house under construction. (emphasis added).

Miller is prevented from suing the WVDOF, due to the fact that the WVDOF enjoys the constitutional immunity provided to the State of West Virginia.

In contrast to the duty to indemnify, Ms. Miller has absolutely no legitimate interest in the issue of whether National Union owes the WVDOF a duty to defend the WVDOF against Ms. Miller's allegations. The duty to defend has to do with such issues as who hires counsel for the WVDOF and who pays that counsel for their services. See, Id. It should be noted that there is no dispute between National Union and the WVDOF as to the duty to defend. Even if there were such a dispute, the resolution of that dispute would have absolutely no impact on Ms. Miller. The only relevant issue for Ms. Miller is whether National Union has a duty to indemnify the WVDOF against Ms. Miller's allegations, not whether National Union owes the WVDOF a duty to defend it against those allegations.

This is a significant distinction, because under West Virginia law, the duty to defend is broader than the duty to indemnify. See, Id.; Farmers and Mechs. Mut. Ins. Co. of W. Va. v. Cook, 210 W. Va. 394, 399, 557 S.E.2d 801, 806 (2001). A liability insurance company has a duty to defend its insured against a claim if the allegations in the complaint against the insured are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy. Syl. pt. 3, Bruceton Bank v. U.S. Fid. & Guar. Ins. Co., 199 W. Va. 548, 486 S.E.2d 19 (1997). In contrast, the duty to indemnify is much more concrete. Rather than examining the complaint to see if it is reasonably susceptible of an interpretation that supports coverage, courts seeking to determine whether there is a duty to indemnify must examine the actual facts of the case and apply them to the terms of the insurance policy. See, Cook, 210 W. Va. at 403-404, 557 S.E.2d at 810-811.

Therefore, in determining whether National Union has a duty to indemnify the WVDOF for the allegations by Ms. Miller against the WVDOF, this Court must examine the actual facts of the occurrences between the WVDOF and Ms. Miller and apply those facts to the insurance policy, rather than speculate about a reasonably possible outcome of Ms. Miller's lawsuit against the WVDOF.

2. **Endorsement 7 excludes coverage for claims arising from the ownership, maintenance, supervision, or control of fences or related or similar activities or things.**

Ms. Miller's allegations fall squarely within the exclusions of Endorsement # 7 in Policy Number RMGL 159-52-62.

Endorsement # 7 provides as follows:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ENDORSEMENT # 7

This endorsement, effective 12:01 A.M. July 1, 2007 forms a part of

Policy No. RMGL 159-52-62 issued to The State of West Virginia By National Union Fire Insurance Company of Pittsburgh, Pa.

EXCLUDED PREMISES-OPERATIONS

This endorsement modifies insurance provided under the following:

WEST VIRGINIA COMPREHENSIVE LIABILITY COVERAGE FORM

Section I - Coverages, Coverages A, B, C, D, & E, 2. Exclusions are amended to add:

It is agreed that the insurance afforded under this policy does not apply to any claim resulting from the ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use or control of streets (including sidewalks, highways or other public thoroughfares), bridges, tunnels, dams, culverts, storm or sanitary sewers, rights-of-way, signs, warnings, markers, markings, guardrails, *fences, or related or similar activities or things* but it is agreed that the insurance afforded under this policy does apply (1) to claims of "**bodily injury**" or "**property damage**" which both directly result from and occur while employees of the State of West Virginia are physically present at the site of the incident at which the "**bodily injury**" or "**property damage**" occurred performing construction, maintenance, repair, or cleaning (but excluding inspection of work being performed or materials being used by others) and (2) to claims of "**bodily injury**" or "**property damage**" which arise out of the maintenance or use of sidewalks which abut buildings covered by the policy.

It is further agreed that this exclusion does not apply to any “**Named Insured**” which is not immune under the Constitution of the State of West Virginia (emphasis in original; italics added).

The specific language as set forth above that excludes coverage is for “*ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use or control of streets (including sidewalks, highways or other public thoroughfares), bridges, tunnels, dams, culverts, storm or sanitary sewers, rights-of-way, signs, warnings, markers, markings, guardrails, fences or related or similar activities or things. . . .* [.]” (Exhibit A) (boldface added).¹⁹

3. **Ms. Miller’s claims against the WVDOF are excluded by Endorsement 7 because the uncontroverted evidence proves that the instrumentality that caused injury to Ms. Miller’s daughter was either a fence or it was related to, or similar to, a fence.**

As stated near the beginning of this Petition, the dispute between Ms. Miller and National Union essentially boils down to the following: If the wire that injured Ms. Miller’s daughter was part of a fence, or was related or similar to a fence, then the exclusion contained in Endorsement 7 applies, there is no insurance coverage for the WVDOF for the incident in question, and Ms. Miller’s lawsuit against the WVDOF cannot proceed due to the constitutional immunity of the WVDOF. If, on the other hand, the wire that injured Ms. Miller’s daughter was not part of a fence, nor was it related to, nor similar to, a fence, then the exclusion contained in Endorsement 7 does not apply, there is insurance coverage for the WVDOF regarding this incident, and Ms. Miller’s lawsuit against the WVDOF may proceed.

¹⁹ There is an exception to this exclusion, which has been previously examined by this Court in prior opinions. In order to apply, this exception requires that WVDOF employees be present at the accident site at the time of bodily injury. However, this exception is not relevant and does not apply to this case because both Mr. Kincaid and Mr. Huffman testified that no WVDOF employees were present at the accident site when Ms. Miller’s daughter was injured.

a. **It is a fence.**

In order to properly review the Circuit Court's Order that the instrumentality in question here was a "fugitive wire" rather than part of a dilapidated fence, National Union asks this Court to carefully study the two photographs included in the Appendix. The Court will find one photograph (Exhibit E) that shows a row of wooden posts that someone has planted in the ground, with several feet of each post sticking up vertically out of the ground. The wooden posts run along the property line separating Mr. Howell's property from the property owned by the State of West Virginia. The wooden posts are spaced at regular intervals. The photograph shows circles drawn by Mr. Huffman around two of the wooden posts to signify the two posts that held the wire that injured Ms. Miller's daughter. The other photograph (Exhibit F) shows Mr. Huffman crouching between those same two wooden posts and pulling up, from the ground, a different metal wire (one other than the one that injured Ms. Miller's daughter) that runs along the property line between the two posts.

In order to properly review the Circuit Court's Order, National Union further asks this Court to carefully consider the testimony of both Mr. Huffman and Mr. Kincaid. These gentlemen are foresters for the State of West Virginia's Division of Forestry. According to their testimony, they see fences constantly as part of their jobs. In addition to describing in their depositions the physical location of the wooden posts at issue here, and the wires that either remained attached to those wooden posts (such as the one that injured Ms. Miller's daughter) or had fallen onto the ground from those wooden posts, Mr. Huffman and Mr. Kincaid testified regarding their opportunities to see fences in various states of repair, fences just like the one at issue in this case. They used that experience to give their testimony as to what the "thing" that injured Ms. Miller's daughter was. They gave their perception of what they saw at the scene of

the incident, in the context of what they knew from years of experience with fences along property lines. In their view, it was clear that the thing that injured Ms. Miller's daughter, the thing that they went to the accident scene and observed personally, was an old fence that had fallen into disrepair (Exhibits B and D).

The trial court committed clear error by disregarding the evidence described above. The Circuit Court's Order denying National Union's motion for summary judgment indicated that these witnesses lack personal knowledge of the construction of the fence; in essence, the Circuit Court held that, because neither Mr. Huffman nor Mr. Kincaid were employed by the WVDOF thirty (30) years ago, neither can testify that the instrumentality in question is a fence.

This is clear error. Whether any witness observed the construction of the fence is not the point; the real point is, what was clearly at the scene of the accident to be observed by these witnesses (which they described, both with testimony and photographs), and what reasonable conclusions were drawn by those witnesses from what they plainly observed (which they provided with the assistance of their considerable experience with other fences)?

The Circuit Court misapplied the West Virginia Rules of Evidence in this matter as a justification for ignoring the evidence submitted by Mr. Huffman and Mr. Kincaid. To the extent that Mr. Huffman and Mr. Kincaid went beyond just stating what they saw, and also provided testimony about what the instrumentality that they saw actually was (i.e., they saw a fence in disrepair), such testimony was admissible. West Virginia Rule of Evidence 701 states that lay witnesses may provide opinion testimony which is "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." W. VA. R.EVID. 701 (2011). That is precisely what Mr. Huffman and Mr. Kincaid did, and to ignore such evidence was clear error by the Circuit Court.

Mr. Huffman and Mr. Kincaid were both employed by the WVDOF at the time of Ms. Miller's daughter's accident. As employees of the WVDOF, their job duties include visiting and observing property owned by the State of West Virginia, which property often includes fences and boundaries. As such, it is within their ability to perceive the fence at issue in this case and testify as lay witnesses based on their personal knowledge and rational perceptions and observations of the fence as it existed at the time of the accident, which opinions are helpful to a clear understanding of these witnesses' testimony regarding the instrumentality that caused injury to Ms. Miller's daughter. Mr. Kincaid and Mr. Huffman may not have been present when the fence was constructed years ago, but such a fact does not prevent them from testifying in regard to their observations of the fence as well as their perceptions of the remaining fence line, including posts and wire, in various levels of disrepair around the property at issue.

In fact, the photographs described earlier and the testimony provided by Mr. Kincaid and Mr. Huffman constitute the only evidence in this case which describes the wire instrumentality, or fence, that caused injury to Ms. Miller's daughter. This testimony in regard to the fence at issue is uncontroverted; Ms. Miller provided no evidence to contradict the testimony provided by Mr. Kincaid and Mr. Huffman. In addition, Mr. Kincaid and Mr. Huffman's testimony, along with the photographs identified and explained by Mr. Huffman, refute the false allegation contained in Ms. Miller's Complaint that there was a "solitary" wire at the scene of the accident. Thus, the trial court committed clear error by discounting Mr. Kincaid and Mr. Huffman's personal knowledge and experience in regard to their observations of the fence and ignoring the only existing evidence on this issue. Further, the trial court erroneously concluded, as a matter of law, that the condition that injured Ms. Miller's daughter was a "fugitive wire" instead of the remnant of a fence or a related or similar thing.

The quote that sometimes a “cigar is just a cigar” (as attributed to Sigmund Freud) is somewhat akin to this situation herein. In this instance, a “fence is just a fence,” not an imaginatively named “fugitive wire.” A fence is generally defined as “a barrier intended to prevent escape or intrusion or to mark a boundary; especially: such a barrier made of posts and wire or boards.”²⁰ Although Ms. Miller denies that the wire that injured Ms. Miller’s daughter constitutes a “fence,” Ms. Miller offered no evidence on this issue. It is undisputed that the wires remaining on the State property constitute portions of a fence that has fallen into disrepair. No one disputes that the fence line marked the boundary of the State’s property, and that the remaining wire was strung between two fence posts. As such, there is no dispute that the wire that injured Ms. Miller’s daughter was part of an old fence in accordance with the Merriam-Webster dictionary definition.

b. It is at least related to, or similar to, a fence.

The debate over whether the instrumentality that injured Ms. Miller’s daughter is, or is no longer, a fence, is somewhat academic. To argue that this particular fence had fallen into such disrepair that it no longer constituted a real fence is truly a waste of time, because the exclusion contained in Endorsement 7 is also triggered by the instrumentality being related to, or similar to, a fence. Any fair and intellectually honest review of the evidence in this matter must result in the conclusion that the thing that injured Ms. Miller’s daughter, the wire that was suspended several feet off the ground by being attached to, and stretched between, two wooden posts, was at least related to, or similar to, a fence. If it no longer serves as a working fence, that is due to it falling into disrepair, not because it completely changed the nature of what it was.

It would be interesting to debate the question of what “thing” the wire and wooden posts would have been if they had been uprooted from the ground, put in the back of a truck, and

²⁰ Merriam-Webster Online Dictionary. <http://www.merriam-webster.com/dictionary/fence>

delivered to a landfill. At that point, perhaps they lose their “fence-ness”. However, that is not the set of circumstances that exists here in this case. These wooden posts were still in the ground, the wire was still attached to the wooden posts and stretched between them, and the wooden posts were along the property line. It may have been a shoddy fence compared to what it was thirty years ago, but at the very least, the thing that injured Ms. Miller’s daughter was related to, or similar to, a fence.

In Wrenn v. W. Va. Dep’t. of Transp., Div. of Highways, 224 W. Va. 424, 429, 686 S.E.2d 75, 80 (2009), Justice Workman stated:

although the ‘failure to inspect’ and ‘failure to make safe’ are not specifically identified among the numerous exclusions listed in Endorsement No. 7, these claims necessarily ‘result from,’ or are at least ‘related to,’ the DOH’s ownership of and control over, not to mention its design, maintenance and construction of, the road, bridge, culvert and right-of-way that constituted the site of the accident . . . [and b]ecause all of those acts are clearly excluded from coverage, the overarching duty to ‘make safe’ logically must be excluded as well.

(emphasis added).

In Wrenn, this Court found that the “related to” language contained in Endorsement 7 made the exclusion broad enough to apply to entire theories of liability that were not specifically identified in the exclusion. In similar (but much more modest) fashion, National Union asks this Court to apply the “related to” and “similar to” language contained in the exclusion to the thing that injured Ms. Miller’s daughter. While we can argue about whether it is, or is no longer, a fence, there can be no question that it is at least related to, or similar to, a fence.

4. The reasoning propounded by Ms. Miller and adopted by the Circuit Court is illogical and cannot stand.

Under the reasoning proposed by Ms. Miller and adopted by the trial court, if a fence fails to meet the strict requirements of a livestock fencing statute or the definition of a fence supplied in Webster’s dictionary, then it is no longer a fence, and the Endorsement 7 exclusion

for claims related to fences does not apply. However, this is faulty logic. Does an imperfect road cease to be a road? Does an imperfect guardrail cease to be a guardrail? Using this logic, the exclusion contained in Endorsement 7 would never be triggered. After all, nobody ever sues the State of West Virginia because the State installed a perfect guardrail. No, they sue the State because they accuse the State of either allowing a guardrail to fall into disrepair, failing to install a guardrail properly, or failing to install one at all.

This Court has previously held that the language of Endorsement 7 is clear and unambiguous. See Wrenn, supra, 224 W. Va. at 430, 686 S.E. 2d at 81. Nowhere in Endorsement 7 does it limit its application to instrumentalities that are kept in perfect condition, or even good working order. There is nothing in Endorsement 7 that requires that the instrumentality be in any sort of physical condition. Therefore, conditioning the application of Endorsement 7 on the fence in question being a “lawful” fence was clear error by the Circuit Court.

5. **The State must be allowed discretion to strike the delicate balance between preserving its constitutional immunity and allowing itself to be sued in a limited fashion by the citizenry; it does so by purchasing insurance with exclusions that should be applied as written.**

The State of West Virginia, in its procurement of insurance, has clearly chosen to exclude “any claim resulting from the ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use or control of streets (including sidewalks, highways or other public thoroughfares), bridges, tunnels, dams, culverts, storm or sanitary sewers, rights-of-way, signs, warnings, markers, markings, guardrails, **fences, or related or similar activities or things.**” (Exhibit A) (emphasis added). This very same exclusionary language, although applied to the facts involving a different state agency (the West Virginia Department of Transportation, Division of Highways) has been previously upheld by the West Virginia Supreme Court of

Appeals in Wrenn, 224 W. Va. at 424, 686 S.E.2d at 75. In Syl. pt. 6 of Wrenn, the Court noted that:

[R]ecognizing the breadth of the Division of Highway's "primary functions," and the expense that would be incurred by providing insurance coverage for every function, the coverage currently afforded by the State's liability insurance policy meets the requirement that such coverage provide 'significantly broad protection.' Although the exclusions contained in Endorsement No. 7 to the State's liability insurance policy preclude coverage for many of the Division of Highway's primary functions, the Endorsement does not violate the laws and public policy of West Virginia.

It is critical that this Court appreciate what the Circuit Court did not: that, in the purchase of its insurance policies, the State of West Virginia does its best to strike a balance between two competing goals. On the one hand, the State enjoys constitutional immunity, and does not wish to completely waive such. To do so would have enormous (perhaps disastrous) budgetary ramifications for the State. On the other hand, the State wishes to provide a limited opportunity to the citizenry to sue the State for injuries caused by the State. The State does so by purchasing liability insurance. Through the application of Syllabus Point 2 of Pittsburgh Elevator v. W. Va. Bd. of Regents, 172 W. Va. 743, 310 S.E. 2d 675 (1983), lawsuits against the State are allowed up to the limits of liability insurance coverage purchased by the State.

As this Court recognized in Wrenn, id., the State does not purchase insurance policies that cover every possible contingency. The State's liability insurance policies contain exclusions. The specific exclusion at issue here is the same one that was at issue in the Wrenn case. It is an exclusion that is contained in the Policy due to the thoughtful and deliberate consideration by BRIM (the State agency that custom designs and purchases the State's insurance policies) of the delicate balance between the need to preserve the State's constitutional immunity and the desire to allow limited avenues for suing the State. The West Virginia State Legislature has given BRIM considerable latitude to achieve this balance by fixing the scope of

insurance coverage and exceptions to such coverage. See Syl. Pt. 4, Parkulo v. W. Va. Bd. of Prob. and Parole, 199 W. Va. 161, 483 S.E. 2d 507 (1996).

Make no mistake: BRIM has been given the responsibility of deciding the extent to which the State will allow itself to be sued. BRIM meets that responsibility by custom designing the insurance policies that it purchases for the State. The exclusion contained in Endorsement 7 of the Policy is the expression, by BRIM, of the precise extent to which the State will allow itself to be sued. Other than lawsuits involving the presence of State workers at the scene of an incident, the State has specifically and intentionally chosen to not allow any lawsuits against it based on its “ownership, design, selection, installation, maintenance, location, supervision, operation, construction, use or control of streets (including sidewalks, highways or other public thoroughfares), bridges, tunnels, dams, culverts, storm or sanitary sewers, rights-of-way, signs, warnings, markers, markings, guardrails, fences or related or similar activities or things. . . . [.]” (Exhibit A). This is nothing less than an expression of the public policy of the State of West Virginia on the issue of lawsuits against the State.

Therefore, when the Circuit Courts of the State fail to apply such exclusions as written, they are thwarting the public policy of the State of West Virginia in a very real and direct way. The exclusion at issue in this case is valid, legal, and consistent with West Virginia public policy. As such, it must be applied as written, even if the result of such is to say to someone like Ms. Miller that she cannot sue the State over the injuries sustained by her daughter.

The Circuit Courts of this State cannot be given the freedom to nullify exclusions in the State’s insurance policies by ignoring clear evidence that supports the application of the exclusion. When Circuit Courts are allowed to declare that a thing is something other than what it clearly is, without any evidentiary basis, just to achieve the desired result of allowing someone

to sue the State, we lessen our ability to say that we are a nation governed by the rule of law. Is it right to say that what is really red is green, just so someone can sue the State? It is not, but that is precisely what the Circuit Court has done here. All evidence points to the instrumentality in question here being an old fence in poor condition. At the very least, it is something that is related to, or similar to, a fence. As such, the exclusion contained in Endorsement 7 of the Policy applies, there is no liability insurance coverage for the WVDOF for the allegations against it made by Ms. Miller, the WVDOF is constitutionally immune from suit in the absence of such insurance coverage, and Ms. Miller's lawsuit against the WVDOF cannot go forward.

C. Conclusion

Simply put, there is no way that a case such as this can overcome the exclusion set forth in Endorsement 7 of the National Union policy. The injury sustained by Ms. Miller's daughter, however unfortunate, is not one for which a duty to indemnify the WVDOF arises under the National Union insurance policy at issue. Thus, the trial court erroneously concluded, as a matter of law, that National Union owes a duty to indemnify the WVDOF regarding Ms. Miller's claim.

Consequently, this Court should reverse the trial court's Order denying summary judgment to National Union and dismiss the declaratory judgment action against National Union. Dismissal will not prejudice Ms. Miller, as she is not without further recourse. Ms. Miller may seek relief for her daughter's damages in the West Virginia Court of Claims.

VII. PRAYER FOR RELIEF

National Union respectfully requests this Honorable Court accept this Petition for Appeal, and reverse the September 30, 2010 Order of the trial court, which constitutes the final Judgment Order of the Circuit Court of Kanawha County in regard to National Union and denies its motion for summary judgment.

VIII. REQUEST FOR ORAL ARGUMENT

National Union respectfully requests oral argument on this Petition and the issues identified herein.

Respectfully Submitted,

**NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA.**

BY: SPILMAN THOMAS & BATTLE, PLLC



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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 28th day of January, 2011, addressed as follows:

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KANAWHA COUNTY CIRCUIT COURT

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