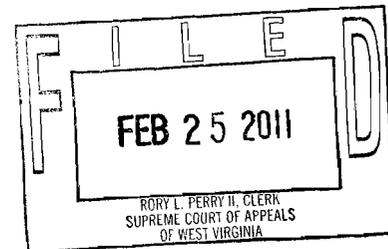


No. 11-0315

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, P.A.,**

Petitioner and Defendant below,



v.

**JENNIFER MILLER, individually and as
mother and next friend of TRAIS W., an infant,**

Respondent and Plaintiff below.

RESPONDENT'S RESPONSE TO PETITION FOR APPEAL

Petition for Appeal taken from Order dated September 20, 2010
in the Circuit Court of Kanawha County
Civil Action No. 09-C-1440
(Judge Charles E. King)

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I. KIND OF PROCEEDING AND NATURE OF RULING

Petitioner National Union Fire Insurance Company (“National Union”) has issued a policy of liability insurance which provides coverage for the State of West Virginia, including State Agency – the West Virginia Division of Forestry (“WVDOF”). Respondent Jennifer M., as mother and next friend of her infant daughter, Trais W., brought a personal injury claim against the WVDOF, along with a Declaratory Judgment Action against Petitioner National Union seeking a declaration that the subject insurance policy provided coverage for Respondent’s personal injury claim against Petitioner’s Insured, WVDOF. The parties agreed to stay the underlying liability case against WVDOF while conducting discovery, then briefing and arguing the merits of the Declaratory Judgment Action for coverage.

This Petition for Appeal arises as a result of the entry of Circuit Court of Kanawha County’s September 30, 2010 “Order Denying Summary Judgment to Defendant National Union Fire Insurance Company.” This Order did not invalidate the subject Policy in any way, but instead, found that, even viewing the evidence in Petitioner National Union’s best light, Petitioner failed to meet its strict burden to prove the facts upon which proffered exclusionary language in an insurance policy operated. The subject Order set forth Findings of Fact and Conclusions of Law, which necessarily involved both evidentiary analysis of the proof advanced by Petitioner National Union to be sufficient to meet its burden and application of clear principles of law from West Virginia Insurance jurisprudence regarding policy exclusions.

Petitioner National Union claims that the Trial Court's finding of coverage was erroneous and sets forth its sole Assignment of Error as follows:

National Union does not have a duty to indemnify the WVDOF for Jennifer Miller's claims against the WVDOF because such claims are excluded by Endorsement 7 of the Policy as the uncontroverted evidence proves that the claims arose out of the ownership, maintenance, supervision, or control of a fence or related or similar activity or thing.

Petition, p.13. Respondent respectfully submits that the Trial Court's ruling properly upheld the rule of law that Insurers seeking to avoid coverage based on application of exclusionary language must meet a strict burden in proving the facts upon which the exclusions operates. Further, the Trial Court carefully reviewed each piece of evidence advanced by Petitioner National Union and properly found that the evidence proffered by Petitioner in meeting its burden was insufficient. Its ruling creates no new law nor threatens the State's ability to procure insurance, but, rather, makes a specific finding as to the evidentiary sufficiency in this particular case.

II. STATEMENT OF FACTS

This Petition arises from a tragic bicycle accident that occurred on September 5, 2007 on land that is conceded to be owned by the State of West Virginia – a “Seed Orchard” maintained as part of the Clements State Tree Nursery, just outside of Point Pleasant, West Virginia. (Docket 1-4). Respondent's ten (10) year old daughter, Trais W., was riding a bicycle and there struck a woven metal wire on the State's land. (Docket 1-4), see Photograph excerpt as Respondent's Exhibit A. The collision with the wire caused a gaping wound in the child's face, which required surgical repair and yet necessitates future scar revisions. (Docket 1-4).

It was undisputed that the underlying Defendant, WVDOF, was insured under a policy of liability insurance issued by Petitioner National Union, referenced as Policy No. 159-52-62, with a policy period of July 1, 2007 to July 1, 2008. The pertinent provision of the “Wrongful Act Liability Insurance” Coverage Form states:

- C. The Company [Petitioner 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 (Docket 40-41). The policy then goes on to define

“Wrongful Act” as follows:

- A. “Wrongful Act” shall mean 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, p.16 (Docket 40-41).

It was likewise undisputed that the Respondent specifically alleged in Count Two of her Complaint that Petitioner National Union’s Insured, Defendant WVDOF, was negligent and breached one (1) or more duties which proximately caused injury. (Docket 1-4). As such, the Respondent clearly plead a cause of action against Petitioner National Union’s Insured, Defendant WVDOF, that would fall within the preliminary language of the insurance policy’s Insuring Agreement.

Moving from the above-referenced ambit of coverage, Petitioner National Union argued that Respondent’s claims against its insured, Defendant WVDOF, were properly excluded from coverage by exclusionary language in Endorsement Seven (7) to the

policy. Specifically, Petitioner National Union cited exclusionary language that it 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), (**bold emphasis added**) (Exhibit A to Petitioner’s Appendix).

West Virginia jurisprudence has long held insurers to a *strict burden* with regard to the use of exclusionary language to avoid payment of otherwise covered claims. In National 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 (1998), the Court made several pronouncements of first impression in this area. First, the Court noted 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.**” Syl. pt. 5, McMahon & Sons, 177 W.Va. at 736, 356 S.E.2d at 490 (**bold emphasis added**).

Next, and central to the Trial Court’s decision herein, is the Court’s recognition that the Insurer seeking to proffer exclusionary language to defeat insurance coverage for a claim bears a strict evidentiary burden of proof. The McMahon & Sons Court, citing law across the country, held:

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.**

n.5, McMahon & Sons, 177 W.Va. at 741, 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.2d 859 (Ga. 1981); Michigan Mut. Liability Co. v. Stallings, 523 S.W.2d 539 (Mo. Ct. App. 1975) (**bold emphasis added**). The Court in McMahon & Sons adopted this pronouncement in its entirety as Syllabus Point seven (7) in the Majority Opinion. Id.

Below, Respondent sought to hold Petitioner to its strict burden in proving the facts in this specific instance upon which the proffered exclusion operates. Respondent pointed out that Petitioner had the opportunity to define the terms of its policy, including a precise definition of a “fence” and chose not to do so. Next, Respondent argued that Petitioner: (1) wrongfully set forth a blanket “historical definition” of a “fence” (“once a fence, always a fence”) as opposed to a “functional definition” (e.g., the dictionary definition); and (2) sought to prove its misguided definition with inadmissible testimony by witnesses who conceded limited, insufficient personal knowledge. As such, Respondent argued, and the Trial Court correctly ruled, that Petitioner’s Motion for Summary Judgment be denied, and coverage be properly owing for the Respondent’s personal injury claim. This Petition for Appeal ensued.

III. STANDARD OF REVIEW

Petitioner correctly notes that a “circuit court’s entry of summary judgment is reviewed *de novo*.” Petition at 12, 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)). This Court has likewise explained the use of this

standard in the context of review for *denial* of a summary judgment. *Id.* (quoting Syl. pt. 1, Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. 80, 576 S.E.2d 807 (2002)).

In the case *sub judice*, however, the denial of summary judgment and consequent finding that coverage existed was based on the premise that even taking the evidence in the light most favorable to Petitioner, it failed to meet its strict evidentiary burden to prove the facts upon which the proffered exclusion operated with the requisite admissible evidence. To the extent that evidentiary analysis was required, this may properly be characterized as a "mixed question." This Court has said:

Many cases involve what courts term "mixed" questions—questions which, if they are to be resolved properly, necessitate combining fact-finding with an elucidation of the applicable law. The standard of review applicable to mixed questions usually depends upon where they fall along the degree-of-deference continuum: "The more fact dominated the question, the more likely it is the trier's resolution of it will be accepted unless shown to be clearly erroneous."

n.3, FOP, Lodge No. 69 v. City of Fairmont, 196 W. Va. 97, 100-101, 468 S.E.2d 712, 715 (1996) (quoting Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 459 S.E.2d 374, 383 (1995)).

Thus, Respondent would suggest that the Conclusions of Law articulated by the Trial Court would be properly reviewed on a *de novo* basis, while the underlying evidentiary analysis upon which its decision rested (i.e., sufficiency of evidence presented under the Insurer's strict burden) be entitled to a greater degree of deference.

IV. POINTS AND DISCUSSION OF LAW

A. The September 30, 2010 Order Does Resolve the Only Claim Against Petitioner National Union and, Consequently, Respondent Concedes that the Petition for Appeal is Timely Filed

Petitioner begins its Discussion of Law with an explanation as to the timeliness of its Appeal. Petition, pp. 13-16. Respondent concedes that the sole claim against the Petitioner was an action for Declaratory Relief under the West Virginia's Uniform Declaratory Judgments Act, W.Va. Code §§ 55-13-1, *et seq.* With the entry of the September 30, 2010 Order by the Circuit Court of Kanawha County, Respondent secured the entire scope of relief sought against Petitioner in the form of a declaration that a duty to indemnify indeed existed for her claims. The Court's decision in Hubbard v. State Farm Indem. Co., 213 W.Va. 542, 584 S.E.2d 176 (2003), would appear to control and hold that the September 30, 2010 Order "could be construed as final under Rule 54(b)" although it "would remain interlocutory in the absence of a petition for appeal." Id. at 551, 185. As such, Respondent concedes the timeliness of the Petition for Appeal in this specific instance.

B. The Trial Court Correctly Ruled that Petitioner Failed to Meet its Strict Burden of Proving that the Subject Metal Wire, as it Existed on the Date of Plaintiff's Injury, was a "Fence" for Purposes of the Proffered Exclusionary Language.

The core of the parties' dispute is whether the Petitioner advanced sufficient admissible evidence to meet its strict burden of proving that the metal wire that injured minor Trais W. on September 5, 2007 qualified as a "fence" for purposes of the exclusionary language of Endorsement Seven (7) to the policy. Because Petitioner

National Union chose not to define its policy term “fence,” the parties were forced to argue a proper definition. Respondent submits that the Trial Court correctly ruled 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 as discussed below. Further, the Trial Court properly rejected Petitioner National Union’s wrongful use of an “historical definition” to suggest that some thirty (30) years prior, the subject wire may have been part of a “fence,” such that regardless of its 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.

1. Petitioner’s Position Failed under a “Functional” Dictionary Definition

In briefing below, both parties cited a 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 boards.” (Docket 40-41, 43-44) (*citing Merriam-Webster Online Dictionary. <http://www.merriam-webster.com/dictionary/fence>*). The verbiage of this definition, *each word of which has meaning*, makes clear that the function and purpose of the subject “barrier” is necessary to informing its quality as a “fence.”¹ Simply put, a “fence” is a barrier that serves the function of “keeping something in” (i.e., to prevent escape) or “keeping

¹When a dictionary definition contains multiple elements, all are central to determining the plain meaning. For instance, in Camden Fire Ins. Ass'n v. Johnson, 170 W. Va. 313, 315 294 S.E.2d 116, 118 (1982), this Court noted that there were “two elements” in the definition of policy term “Business Pursuits,” first, continuity, and secondly, the profit motive. Likewise, here are two (2) elements present: (1) the components and (2) the function.

something out” (i.e., to prevent intrusion). Otherwise, 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.”

Though Petitioner National Union presented the Trial Court with no testimony from a witness with personal knowledge, the testimony of the WVDOF personnel suggested that they were aware of oral history that approximately thirty (30) years prior to Trais W.’s injury, a wire and post barrier was placed around a twenty (20) acre portion of area of the Clements State Tree Nursery known as the “Seed Orchard.” See Huffman Depo., p.41, ll. 22-24, Exhibit B to Respondent’s Appendix. Again, without personal knowledge, the oral tradition suggests the barrier was placed in the “60s [or] 70s” as part of Forest Genetics project through WVU. See Kincaid Depo., p.8, ll.16-19, Exhibit C to Respondent’s Appendix. The original function of the barrier is also suggested to have been to prevent entry into the area where the “genetically superior” trees were located:

Q. And I think you mentioned earlier that because it’s a seed orchard, the intention would be to keep people out of it?

A. Yeah. I mean, I’m sure – I mean, I wasn’t there when they, you know, established but I’m sure Dr. Cech and all, I mean they’d want to keep people out of there because they’re growing these trees, you know, for research study.

Kincaid Depo., p.44, ll.20-24, Exhibit C to Respondent’s Appendix.

There was, however, no question that the original function of any barrier (apparently as well as WVU’s maintenance of the land itself) was eventually abandoned, decades before Trais W.’s accident in 2007. The testimony relays an understanding that Dr. Cech retired in the “late 70s, early 80s and then WVU never

replaced him.” Id. at p.8, l.23 through p.9, l.4, Exhibit C to Respondent’s Appendix.

Subsequently, the WVDOF used the property to collect seeds from the trees planted as part of Dr. Cech’s work. Id., Exhibit C to Respondent’s Appendix.

Importantly, upon the conclusion of the WVU Forestry Genetics project in the “late 1970s [or] 80s,” the WVDOF then changed the function of any original barrier, both with regard to its structural integrity as well as any intention that any remnant function as a fence. In this regard, WVDOF Assistant Nursery Superintendent Jason Huffman testified:

Q. I think you mentioned that portions of – there were portions around the perimeter of the seed orchard where there was no fence whatsoever; is that correct?

A. Correct.

Q. As of September, 2007, there was no a [sic] solid perimeter around the land, correct?

A. Correct.

Q. What is the earliest time period that – and I’m trying to figure out a way to get this without – yeah, I understand the fence is something that keeps something out or something in. And at some point, I think you’ve testified that you and perhaps others gave people permission to come freely onto the land, correct? For picnicking and walking dogs and such?

A. Correct.

Q. At what time period – what’s the earliest time you can remember giving folks permission to pass freely onto the land?

A. Possibly around 2000 or so.

Q. Okay.

A. It had been going on for years before I was ever employed so –

Q. Fair enough. But with regard to your personal knowledge, at least around 2000 there is no intention to prevent people from coming onto the land or from leaving the land, right?

A. Correct.

Huffman Depo., p.42, l.17 through p.43, l.19, Exhibit B to Respondent's Appendix.

Simply put, the Trial Court correctly ruled that by the time of the September, 2007 injury, the metal wire which struck and injured Trais W.'s face was no longer a part of any structure that functioned as "a fence" or intended to function as "a fence" by the WVDOF. Rather, at best, Petitioner National Union could only argue the metal wire that injured Trais W. may have once been a component of some barrier thirty (30) years prior. The Respondent and Trial Court agreed that the proper inquiry was whether the instrumentality that injured Trais W. on September 5, 2007 met the definition, including the functional component, of a "fence" on that date, regardless of changed structural integrity and intentions that may or may not have been formed thirty (30) years prior. To this end, the condition that existed on the date of Trais W.'s disfigurement was best characterized as a "fugitive wire" in a component fashion, rather than some elaborate fence construction in order to defeat indemnity.

2. Petitioner's Position Failed under a Statutory Definition

Again, because the Petitioner Insurer chose not to define the term "fence" in its policy, the parties were left to argue a dictionary definition and how to interpret and apply the same to the subject metal wire. The Trial Court correctly noted, however, that there is at least one other source that provides guidance in defining a fence – the West Virginia Code. Using the Code's only definition of a "lawful fence," there was no

question that the Petitioner Insurer again failed to prove facts which would meet its strict burden.

Chapter 19 of the West Virginia Code is the “Agriculture” Chapter and contained within is Article 17, entitled “Fences.”² 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) (bold emphasis added).

In the case at hand, the evidence was undisputed that nothing remotely resembling a “lawful fence” as defined by West Virginia Code section 19-17-1 was present on September 5, 2007. In fact, the WVDOF personnel who arrived first at the accident scene testified as follows:

Q. And I took from that that the first strand off the ground and the only strand off the ground is one strand of woven wire four to four and a half feet from the ground?

A. Right.

²Also found within this very Chapter is the creation and purpose of the State Agency at issue – underlying Defendant WVDOF. See W.Va. Code §§ 19-1A-1, et seq.

Q. You're certainly clear that when you made it to the accident scene, there were not six strands of wire –

A. No.

Q. – correct?

A. No.

Huffman Depo., p.39. II.2-10 (**bold emphasis added**) Exhibit B to Respondent's Appendix. At best, 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, certainly not a "lawful fence" as defined by the Code.

As such, Petitioner was unable to meet its strict burden in proving that Respondent's claim was properly excluded and, thus, the Trial Court's denial of its Motion for Summary Judgment was proper and finding of coverage was proper.

C. Even Assuming that an Historical Definition is Sufficient for Determining Whether a Wire Constitutes a "Fence," Petitioner Failed to Meet its Burden With Sufficient Admissible Evidence for an Award of Summary Judgment

Even if Petitioner's argument that "once part of a fence, always a fence" was accepted for purposes of determining what definition to use, the Petitioner still had to prove the facts to meet that definition with sufficient admissible evidence – which the Trial Court properly found that it failed to do.

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). Case law 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, 625 S.E.2d 260 (2005) (**bold emphasis added**).

In the case at hand, Petitioner purported to meet its burden of proving the facts necessary for the operation of the exclusionary language in Endorsement Seven (7) through the deposition testimony of WVDOF personnel Jason Huffman and Dan Kincaid. Respondent countered with the evidentiary attack that both witnesses conceded the limited time period in which either had *personal knowledge* sufficient to testify. If restricted to matters upon which they have *personal knowledge*, as opposed to rank hearsay, the witnesses could not even provide the background upon which Petitioner based the use of an “historical definition.” Simply put, the Trial Court held that if Petitioner sought to meet its strict burden to prove that the subject metal wire was “a fence” on September 5, 2007 *because it was once part of a fence*, then it had to **prove with admissible evidence that it was once part of a fence**. It failed to do so.

1. Petitioner Offered No Testimony by a Witness with Personal Knowledge

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**).

A careful review of the evidence presented is critical to a proper analysis of the Petitioner’s argument. In support of meeting its strict burden, Petitioner first offered the deposition testimony of WVDOF employee Dan Kincaid, whose employment with WVDOF began approximately one (1) year prior to Trais W.’s accident – decades after the wire is alleged to have been placed. Kincaid Depo., p. 5, ll.15-20, Exhibit C to Respondent’s Appendix. It is uncontroverted that Witness Kincaid was neither personally present, nor even employed by the WVDOF, during the time period when it is alleged that the wire was placed (late 1970's). As a result, any testimony that

Witness Kincaid provided on the history of events that predate his involvement necessarily derived from a source other than his personal knowledge and, therefore, was both inadmissible and insufficient.³

Further, Witness Kincaid conceded that he had no personal knowledge *even about the existence of the Seed Orchard itself* prior to 2006. When asked about any personal contact with the forest geneticist who is alleged to have overseen the original Seed Orchard work decades prior, Kincaid stated “**I didn’t even know there was one [Seed Orchard] up there until after I came to work for the Division of Forestry [April 2006].**” Kincaid Depo., p.30, ll. 9-15 (**bold emphasis added**), attached as Exhibit C to Respondent’s Appendix. Witness Kincaid was then asked about his personal knowledge about the precise location of Trais W.’s injury and admitted no personal observation of the same prior to the injury:

Q. But – prior to – I guess I’m trying to figure out is it fair to say that it was **not until after the accident that you personally observed the area** where the accident occurred?

A. That’s correct.

Kincaid Depo., p. 33, ll.1-5 (**bold emphasis added**), Exhibit B to Respondent’s Appendix. Witness Kincaid admitted that he never observed the instrumentality in its present condition on September 5, 2007, as the subject wire had already been removed following Trais W’s injury. Id. at p.39, ll.15-17, Exhibit C to Respondent’s Appendix.

³Witness Kincaid even concedes that the source of his understanding on the workings of the Seed Orchard is external to his personal knowledge, stating that “I mean, this is all hearsay. But he [another former WVDOT employee] told me they’d run over there and mow it and stuff like that.” Kincaid Depo., p.9, ll. 7-8, Exhibit C to Respondent’s Appendix.

The only other testimony proffered by the Petitioner to the Trial Court was WVDOF employee Jason Huffman, whose employment with the WVDOF likewise began decades after the alleged placement of the subject woven metal wire. Huffman Depo., p. 6, ll. 16-18, Exhibit B to Respondent's Appendix. By virtue of his employment date as well, Witness Huffman was clearly not present when the metal wire was alleged by the Petitioner to have been placed, nor during the time that the Genetics Study was allegedly conducted. In fact, when limited to his personal knowledge, Witness Huffman conceded that he could offer no testimony with regard to what was historically located in the area where Trais W. was injured:

Q. – but clearly your testimony is that you can't say that you have any personal knowledge of what was between those two posts other than what you saw, which was one wire on the top and one wire on the bottom, correct?

A. Correct.

Huffman Depo., p.44, ll.20-24, Exhibit B to Respondent's Appendix.

Finally, Petitioner presented with its Motion, and discusses in its Petition, a WVDOF Memorandum, which was attached as Exhibit C to Petitioner's Appendix. This named author of the WVDOF Memorandum is attributed to be another WVDOF former employee (David McCurdy), whose testimony was not presented by Petitioner for consideration in its present Motion. Instead, Petitioner referred to the a portion of the unsworn Memorandum that incorporates "the portion of the Memorandum attributed to [Witness Jason Huffman]."⁴ (Docket 40-41).

⁴Respondent argued below that the Memorandum itself, if proffered, would likewise fail given its nature as inadmissible Hearsay under West Virginia Evidence Rule 802.

Respondent submitted that Witness Huffman's "portion" of the Memorandum added nothing new in terms of evidentiary support for Petitioner's position, nor did it reveal any additional, previously unknown source of personal knowledge which would render the testimony admissible. Rather, Witness Huffman's language in the WVDOF Memorandum merely related what he found after the accident had occurred and he visited the accident scene with Trais W.'s parents. In relating the same, Witness Huffman utilized the word "fence" as a descriptor in several places. However, Witness Huffman's use of the term "fence" in a post-accident Memorandum neither created personal knowledge where none existed nor otherwise changed either the previously discussed inadmissible nature of his testimony or the character of the instrumentality from a "fugitive wire" to a lawful "fence."

D. The Wrenn Decision is Legally Distinguishable From the Present Insurance Coverage Dispute

Petitioner relies heavily on the decision of the Supreme Court of Appeals of West Virginia in Wrenn v. W. Va. Dep't. of Transp., Div. of Highways, 224 W.Va. 424, 429, 686 S.E.2d 765, 80 (2009), which admittedly addresses the present Endorsement Seven (7). While there is no disagreement as to the holdings in Wrenn, the issue that was before the Trial Court, and now before this Honorable Court was simply not implicated in Wrenn. Specifically, Wrenn dealt with a motor vehicle accident and resulting wrongful death claims arising from the maintenance of a section of road known as "Devil's Fork Road" in Wyoming County. Wrenn did not present an issue of whether the its Plaintiff's allegations involved "roadway" claims against the WVDOT. Absolutely no decision was required as to whether Devil's Fork Road met the definition

of “public thoroughfares” under the policy.

Rather, the holdings in Wrenn were distinct and specific: (1) Endorsement Seven offers “reasonably broad protection” even if it excludes some of a State agency’s “Primary Functions” (obviating the former argument made in Ayersman v. WVDEP, 208 W.Va. 544, 542 S.E.2d 58 (2000)); and (2) Endorsement Seven does not violate West Virginia public policy. Neither issue was argued to the Trial Court with regard to the Petitioner’s Motion for Summary Judgment. Wrenn did not overrule or eliminate the Insurer’s burden of proof with exclusionary language under McMahon & Sons, rather it was never an issue because the parties apparently agreed that they were addressing a “public thoroughfare” and/or “road.” Here the parties are contesting the sufficiency of the proof advanced by the Insurer with regard to its exclusionary language, implicating the qualitative nature of the metal wire that ripped Trais W.’s face, such that Wrenn is simply inapposite.

E. While the State Should Be Permitted to Strike a Balance Between Immunity and Seeking Insurance, its Insurer is Not Exempt from Long-Standing Principles of West Virginia Jurisprudence

Petitioner concludes its Petition with a discussion of West Virginia public policy, much of which is taken from the Court’s decision in Wrenn. While it is true that the State of West Virginia has the ability to strike a balance through the design of its insurance protections, it is likewise true that Insurance Companies such as Petitioner National Union Fire Insurance Company of Pittsburgh, PA are held to the same standards of law as any other insurer. Syllabus Point 5 of National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987) sets forth a clear, strict

burden on *all Insurers* seeking to avoid coverage by virtue of exclusionary language. This Court's mandates apply as equally to Petitioner National Union as they did to National Mutual Insurance Company. The Trial Court herein did not fail to apply exclusions as written, as suggested by the Petitioner, but instead applied the law equally, holding held Petitioner to the same legal standard as every other Insurer in the same circumstance.

The rejection of the present Appeal would neither serve to invalidate Endorsement Seven (7) nor have any of the long-reaching effects advanced by Petitioner in a "parade of the horribles." Rather, this Court would be upholding decades of Insurance jurisprudence -- simply continuing to require Insurance Companies who wish to rely on exclusionary language to meet a strict burden in proving the facts upon which such exclusions operate. This is neither novel, nor "disastrous" as suggested by Petitioner. The rule of law in this regard is long-standing, clear and equally applied, as it was by the Trial Court in this instance.

F. Though Not the Basis of the Trial Court's Decision Below, its Conclusion is Correct Under an Application of Rules of Construction in Cases of Ambiguity

Finally, as a potential Cross Assignment of Error should the Petition be granted, Respondent did advance a third argument below that was not adopted by the Trial Court in its Order, namely that conflicting policy language created an ambiguity which required construction in favor of indemnity as a matter of law. In doing so, Respondent argued that coverage existed under other language in the policy (Endorsement Fifteen (15)) which gives rise to an ambiguity when considered *in para materia* with the

proffered Endorsement Seven (7). Specifically, Endorsement Fifteen (15) states:

WRONGFUL ACTS LIABILITY COVERAGE EXTENDED FOR PRIOR ACTS

This insurance shall cover loss arising from **any claim** made against the “Named Insured”, the estates, heirs, legal representative or assigns of deceased persons who were “insured” at the time of the “Wrongful Act” upon which such claims are based for **“Wrongful Acts” that were committed in the “policy territory” during the period July 1, 1977 to July 1, 1995** for the State of West Virginia agencies . . . so long as the claim made against the “insured” for a loss arising from any “Wrongful Act” of the “insured” or of any person for whose actions the “insured” is legally responsible was never reported to the “Named Insured’s” prior carrier(s) and the Board of Risk and Insurance Management of The State of West Virginia had no knowledge of the claim during the pendency of your claims made policy(ies).

Endorsement Fifteen (15), Exhibit D to Respondent’s Appendix.

The Endorsement purports to cover *any claim* under the “Wrongful Acts” Coverage Part that were committed during the 1977-1995 time period, without limitations for the accrual of a particular claim. Again, assuming *arguendo* that the “historical definition” suggested by Petitioner was proper, then Petitioner was left with arguing that a “fence” was constructed decades ago and then deteriorated over the time period (for instance, from a lack of maintenance, reasonable care or upkeep), including the 1977-1995 time period for which coverage expressly exists in Endorsement Fifteen (15). The impact of this Endorsement is highlighted in the testimony advanced by the Petitioner:

Q. When was it put there?

A. To my understanding, it was – it was approximately 1978.

Q. And is it your testimony that from 1978 to 2007 when this accident – that fence deteriorated?

A. Correct. To some degree.

Huffman Depo., p. 41, l. 22 through p. 42, l.3; Exhibit B to Respondent's Appendix.

Such testimony would then implicate a claim for "Wrongful Acts" by the Defendant WVDOF during the time period for which extended Wrongful Acts coverage is specifically provided in Endorsement Fifteen (15) of Defendant's policy.

The Plaintiff argued that when two (2) policy provisions conflict as to the existence of insurance coverage, an ambiguity has been created. Again, West Virginia jurisprudence is well-developed in this area, and clear in its guidance in resolving the ambiguity in favor of indemnity:

The problem of ambiguity in a contract of insurance has been extensively addressed by this Court, and ambiguity has been defined as follows: "Whenever the language of an insurance policy provision is reasonably susceptible of two different meaning or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous." Riffe v. Home Finders Associates, Inc., 205 W. Va. 216, 221, 517 S.E.2d 313, 318 (1999). Where an ambiguity exists, this Court has explained that certain rules of construction will be implemented. "First, any ambiguity in the language of an insurance policy is to be construed liberally in favor of the insured, as the policy was prepared exclusively by the insurer. This principle applies to policy language on the insurer's duty to defend the insured, as well as to policy language on the insurer's duty to pay." Horace Mann Ins. Co. v. Leeber, 180 W. Va. 375, 378, 376 S.E.2d 581, 584 (1988). In syllabus point two of State v. Janicki, 188 W. Va. 100, 422 S.E.2d 822 (1992), this Court stated that "'it is well[-]settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.' Syl. Pt. 4, National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987)." See also Aetna Casualty & Sur. Co. v. Pitrolo, 176 W. Va. 190, 194, 342 S.E.2d 156, 160 (1986) ("we have long recognized that since insurance policies are prepared solely by insurers, any ambiguities in the language of insurance policies must be construed liberally in favor of the insured").

Wehner v. Weinstein, 216 W. Va. 309, 315, 607 S.E.2d 415, 421 (2004).

In the case at hand, Endorsement Seven (7) purports to take away insurance coverage for Respondent's loss, whereas Endorsement Fifteen (15) purports to extend

insurance coverage. As such, there is an internal inconsistency which renders an ambiguity in the policy as a whole. West Virginia's rules on construction then apply to resolve this ambiguity in favor of a finding of insurance coverage for Respondent's claims. As such, Petitioner's Motion for Summary Judgment properly failed and coverage was properly found.

V. CONCLUSION

In sum, Respondent respectfully submits that Petitioner's Motion for Summary Judgment was properly denied, as the Trial Court properly found that Petitioner National Union failed to meet its burden to prove the facts necessary to support the operation of the exclusionary language of Endorsement Seven (7). West Virginia law holds Insurers seeking to defeat coverage through exclusionary language to a strict burden per McMahon & Sons, Inc. and its progeny. The subject metal wire simply does not qualify as a "fence" under either a dictionary definition, which incorporates a functional aspect, or under West Virginia Code section 19-17-1 as a "lawful fence."

At best, Petitioner argues for an "historical definition" that if the wire was used in a "fence" decades ago, then it is always to be considered as a "fence," regardless of changed circumstances or present condition. While vehemently disputed by Respondent, even assuming *arguendo* that such a definition is operable, Petitioner submitted as its proof for the historical origins of the wire the testimony of two (2) WVDOF employees without sufficient personal knowledge to render such testimony admissible. Its attempt to argue that recordation of such information from witnesses without personal knowledge in the form of a Memorandum likewise fails.

Further, although not the basis of the Trial Court's decision, the scenario posited by the Petitioner – namely that a fence was constructed decades ago that deteriorated into a woven wire over the course of several decades – would, if taken as true, implicate coverage under another policy provision, Endorsement Fifteen (15). Such a conclusion would render an ambiguity in the policy's meaning, such that rules of construction would require a finding of indemnity.

VI. PRAYER FOR RELIEF

Respondent Jennifer Miller, as mother and next friend of her infant daughter, Trais W., respectfully prays that this Honorable Court will reject the Petition for Appeal filed by National Union Fire Insurance Company of Pittsburgh, PA and allow her to proceed with her underlying personal injury claim.

**JENNIFER MILLER, as mother and
next friend of TRAIS W., an infant,**



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No. 11-0315

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, P.A.,**

Petitioner and Defendant below,

v.

**JENNIFER MILLER, individually and as
mother and next friend of TRAIS W., an infant,**

Respondent and Plaintiff below.

CERTIFICATE OF SERVICE

I, Chad S. Lovejoy, hereby certify that service of "Respondent's Response to Petition for Appeal" has been made upon the parties of record by placing a true copy in an envelope deposited in the U.S. Mail, with postage prepaid, on this the 25th day of February, 2011, addressed as follows:

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EXHIBITS

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