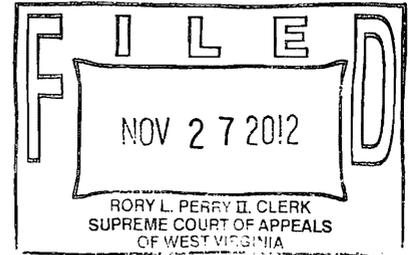


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

John D. Longanacre,  
D/B/A Longanacre Funeral Home,  
Plaintiffs Below  
Petitioner



vs. No. 12-0993 (Circuit Court Civil Action No. 12-C-98)

Farmers Mutual Insurance Company, a West Virginia Corporation,  
Defendant Below,  
Respondent

## **BRIEF FOR THE PETITIONERS**

Barry L. Bruce (WV Bar No. 511)  
Jesseca R. Church (WV Bar No. 11428)  
Barry L. Bruce and Associates, L.C.  
101 W. Randolph St.  
P.O. Box 366  
Lewisburg, WV 24901  
(304) 645-4182  
(304) 645-4183 (Fax)  
E-mail: [bbruce@blblaw.org](mailto:bbruce@blblaw.org)

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## ASSIGNMENTS OF ERROR

1. The Circuit Court erred in concluding that the intentional, non-willful and legal acts of Appellant in disinterring Mr. Anderson did not constitute an “occurrence” as defined in Appellant’s commercial liability insurance policy.
2. The Circuit Court erred in not providing a separate analysis on the claim of negligence in the underlying Complaint and in finding such claims were not an “occurrence” as defined in Appellant’s commercial liability insurance policy.
3. The Circuit Court erred in not addressing and providing an analysis of the Appellee’s duty to defend Appellant on the negligence claims in the underlying Complaint.

## STATEMENT OF THE CASE

This Court is being asked to reverse a decision by the Circuit Court of Greenbrier County that incorrectly found that Farmers Mutual Insurance Company (Appellee/Respondent) did not act in bad faith when denying both coverage and refusing to provide a defense to their policy holder Longanacre Funeral Home (Appellant/Petitioner).

On July 21, 2009, Betty Anderson through her Counsel, Douglas Arbuckle, was issued an Order by the Circuit Court of Greenbrier County, Judge Pomponio, to disinter her brother, Melvin Anderson. (App. 72). On September 25, 2009, Betty Anderson through her attorney, Douglas Arbuckle, hired Longanacre Funeral Home (Appellant/Petitioner) to disinter Melvin Anderson pursuant to a Court Order. (App. 71-72). Mr. Arbuckle notified the administrator of the cemetery by mail and filed the affidavits required by said Order. (App. 74). John Longanacre of Longanacre Funeral Home contacted Arthur Baker, President of Greenbrier Valley Memorial Vault Company, Inc. (GVMVC), about disinterring Mr. Andersons’ remains from the Bennet Family Cemetery and re-entombing his remains at Greenbrier Memorial Gardens. (App. 4). GVMVC accomplished this task on November 5, 2009, after making sure that the State permit was in place and the Court had authorized the move. (Id.).

On or about June 22, 2010, the step-children of Melvin Anderson, Becky A. Orndol and Richard W. Alderson filed a Complaint against Betty Anderson, Longanacre Funeral Home and GVMVC, alleging that the Defendants (a) never informed Plaintiffs of the disinterment of Melvin Anderson from the Bennet Family Cemetery or of the location of the re-entombment of Mr. Anderson in the Greenbrier Memorial Gardens; (b) Defendants wrongfully exerted dominion over and converted the property of Plaintiffs when Mr. Anderson's military marker was removed from the Bennett Family Cemetery and placed in storage at Greenbrier Memorial Gardens and when Mr. Anderson was re-entombed in the crypt at Greenbrier Memorial Gardens; (c) negligently disturbed the grave of Marlene Anderson during the disinterment of Melvin Anderson; and (d) Plaintiffs suffered mental anguish and distress due to the disturbance of their mother's grave. (App. 12). Since the complaints made by Plaintiff Becky Orndol were mostly directly against Ms. Anderson's right to disinter Mr. Anderson, then Ms. Anderson and Mr. Arbuckle agreed to take the lead in the defense by quickly filing a Motion to Dismiss on August 9, 2010. (App. 75). Defendants believed these claims would be resolved by the Motion to Dismiss. Defendants Longanacre and GVMVC simply filed an Answer with Affirmative Defenses. (App. 88-95).

On March 21, 2011, the Court entered its Order denying Defendant Anderson's Motion to Dismiss (App. 83-86). In the Order, Judge Pomponio, concluded:

**In this case, the Defendants disinterred and reinterred their loved one, Melvin Anderson. Although the defendants appear to be acting within the confines of the Court Order which allowed such disinterment, the *manner* in which the disinterment took place is the thrust of the Plaintiff's Complaint. As Syllabus Point 2 of Whitehair indicates, even an authorized disinterment may be carried out in such a way that is actionable. The Plaintiff has accused the Defendant of negligently mishandling the grave of Marlene**

**Walkup Anderson during the authorized disinterment of Melvin Anderson. Under Whitehair, this action should stand.** (App. 86).

On July 20, 2011, Counsel for Longanacre and GVMVC sent letters to their respective insurance companies/agents giving notice of the suit and claim, said letters also enclosed the Court's Order denying the Motion to Dismiss the Orndol Complaint. (App. 103-04). Appellees, at the hearing on their Motion to Dismiss, acknowledged they received said Order with letter requesting coverage and defense. (App. 150-51) GVMVC's insurance company, Travelers, immediately took over the case. (App. 62). On August 10, 2011, Respondent/Appellee, Farmers Mutual Insurance Company, sent a letter to Longanacre (Petitioner/Appellant) denying coverage and defense. (App. 105-08). On March 27, 2012, a hearing was held on Defendants' Motion for Summary Judgment, and the Court entered an Order granting the motion for summary judgment on all counts on April 17, 2012. (App. 122-133). No Appeal was filed to the West Virginia Supreme Court of Appeals from said Order.

On May 4, 2012, Appellant, John Longanacre, filed a Complaint alleging the common law action of "bad faith" against Appellee, Farmers Mutual Insurance Company, for denying Appellant's claim for coverage under the commercial liability insurance policy and/or a legal defense under the policy. Appellee, in the case below, refused to provide coverage or a defense and was granted a Rule 12(b)(6) judgment against Appellant. Thus, Appellant brings this action.

**SUMMARY OF ARGUMENT**

This case is about both liability coverage and a duty to defend. The first issue that must be addressed is whether the allegations in the Orndol (underlying) Complaint meet the definition of an "occurrence" under the insurance policy? In order to properly analyze this issue it is

important to understand the allegations of the Orndol Complaint.

The Orndol Complaint makes several allegations against the Defendants, but as Judge Pomponio pointed out, in the Order denying the Motion to Dismiss the Complaint, the thrust of the Complaint is the *manner* in which the disinterment took place, not the disinterment itself. The allegations relating to the disinterment of Melvin Anderson deal with intentional, authorized, and legal actions of the Defendant, while the allegations relating to the grave of Marlene Anderson are claims exclusively related to negligence, a non-intentional tort. As Ordered by Judge Pomponio, in the Order granting the disinterment of Melvin Anderson the step-children of Melvin Anderson were not his heirs or next of kin, and therefore had no rights to his body or property. Case law in West Virginia states, “If the spouse is deceased, the cause of action passes to the next of kin, in order of relation established by the statute governing intestate succession.” Whitehair v. Highland Memory Gardens, Inc., 174 W. Va. 458 at 463 (1985). Of course, the Plaintiffs of the Orndol Complaint, as the children of Marlene Anderson, had a right to bring suit to any disturbance or desecration to their mother’s grave. It is important to understand that there are two separate and distinct graves, with two different parties having the right and interest to bring a suit, and two different and distinct claims being brought. The only allegation in the Orndol Complaint that the Plaintiffs had standing to bring was the claim that Defendants had negligently mishandled the grave of Marlene Walkup Anderson during the authorized disinterment of Melvin Anderson.

The disinterment of Melvin Anderson was authorized by a Court Order signed by Judge Pomponio. (App. 72). The exclusion language of the commercial liability insurance policy, that is the subject of this action, states as follows: “‘We’ do not pay for ‘bodily injury’, ‘property

demand' (sic), or mental anguish arising out of the willful violation by or with the knowledge and consent of an 'insured' of a statute, ordinance or regulation." (App. 19). The Defendants in the Orland Complaint followed all legal requirements necessary to disinter and reinter the body of Melvin Anderson. The Principal coverage of the policy covers bodily injury, property damage, or mental anguish that is caused by an occurrence, which takes place during the policy period. (Id.). The policy defines occurrence as an "accident." (App. 20). Accident includes events caused by negligence.

The purpose of having commercial liability coverage is to be insured against allegations of wrong doing where the insured acted under the protection of the law. In this case, Appellant performed the required disinterment of Melvin Anderson, without willfully or knowingly violating a statute, ordinance, or regulation. If Appellant had knowingly, willfully, or intentionally violated the law during the moving of Mr. Anderson's body, then there would be no liability coverage, because such actions would not have been an "occurrence." Further, if Appellant had caused some damage to Mr. Anderson's body or property in the course of legally moving the body and his actions in doing so were not "willful," said actions would be covered under the terms of his commercial liability policy, provided those bringing the suit had standing to do so. In this case, however, not only did Appellant operate under the protection of the law, but the Plaintiffs in the Orland Complaint had no standing to bring any action in regards to the body and property of Melvin Anderson, as they were not his heirs.

The Plaintiffs in the Orland Complaint did have standing to bring suite on a claim of negligent mishandling of the grave of Marlene Anderson. Negligence is a claim that is often included under the term accident, and accident is the definition of occurrence under the

commercial liability policy. Therefore, all the accusations against Appellant in the Orbold Complaint should be covered under the commercial liability policy as they are not included in the exclusion clause and certainly constitute an “occurrence.” It is important to understand, however, that the negligence claim is the only allegation upon which the Orbold Plaintiffs had standing and negligence easily falls under the definition of “occurrence which is an accident.” (Id.).

Certainly, an allegation of negligence does in fact meet the definition of occurrence under the commercial liability policy that is the subject of this case, thus the Circuit Court erred in not ruling that Appellee had a duty to provide a defense and acted in bad faith in denying defense coverage to Appellant. The Circuit Court failed to discuss the fact that the test to provide a defense is a different standard than providing coverage under the laws of the State of West Virginia. The test to determine an insurer’s duty to defend under the insurance policy is one that is liberally construed in favor of the insured. Syl. Pt. 5 Tacket v. American Motorists Ins. Co., 211 W.Va. 524 (2003).

The Orbold Complaint made an allegation of negligence against the Appellant, and negligence meets the definition of occurrence. Thus, under the commercial liability policy the insurer/Appellee owed a duty to defend to the insured/Appellant. The trial Court in appraising the sufficiency of a complaint on a motion under Rule 12(b)(6) should not dismiss the complaint unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Owen v. Board of Education, 190 W.Va. 677 (1994). Appellant’s Complaint met and exceeded this standard. Having a negligence claim filed against the Appellant in the underlying suit makes coverage and defense an issue. The trial Court failed to provide any analysis as to the Appellee’s duty to defend, and subsequently, the Circuit Court

erred in granting Appellee's motion to dismiss.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issues in this case have been authoritatively decided in long standing and well-established case law, oral argument under Rev. R.A.P. 18(a)(3) is not necessary.

### ARGUMENT

#### Standard of Review

“Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.” Syl.Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, (1995).

**I. The Circuit Court erred in concluding that the intentional, non-willful and legal acts of Appellant in disinterring Mr. Anderson did not constitute an “occurrence” as defined in Appellant’s commercial liability insurance policy.**

The Circuit Court, Judge Rowe, after hearing argument on Appellee’s Motion to Dismiss, concluded, “With the exception of the negligence claim all of the claims against Longanacre concerned intentional and knowing acts and therefore the Court finds that these do not constitute occurrences under the policy.” (App. 144). The Circuit Court relied on the definitions of occurrence and accident provided in American Modern Home Insurance Company v. Corra, 222 W.Va. 797 (2008), “accident” is defined as “an event occurring by chance or arising from unknown causes.” Id. at 801. The Circuit Court also relied on the statement that “conduct engaged in knowingly is not an ‘accident’ and thus not an ‘occurrence.’” Id. Thus, the Circuit Court in the case below concluded that Corra stood for the fact that any conduct engaged in knowingly is not an “accident” and thus not an “occurrence.” However, the Appellee and the Circuit Court have misconstrued the narrow holding of Corra. The ruling in Corra is stated

completely in Syl. Pt. 2 as follows:

**Absent policy language to the contrary, a homeowner's insurance policy defining "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in . . . bodily injury or property damage," does not provide coverage where the injury or damage is allegedly caused by the homeowner's conduct in knowingly permitting an underage adult to consume alcoholic beverages on the homeowner's property. (Emphasis added).**

The rule in Corra is very specific, where the homeowner knowingly permits an underage adult to consume alcoholic beverages on the homeowner's property then there is no liability coverage because such intentional and illegal actions do not constitute an occurrence. The present case is distinguishable from Corra because the Appellant's actions were authorized by a Court Order and followed the letter of the law. The disinterment of Melvin Anderson was authorized by a Court Order signed by Judge Pomponio. (App. 72). The exclusion language of the commercial liability insurance policy, that is the subject of this action, states as follows: "We do not pay for 'bodily injury', 'property demand' (sic), or mental anguish arising out of the willful violation by or with the knowledge and consent of an 'insured' of a statute, ordinance or regulation." (App. 19). It is true that Appellant intentionally and knowingly removed the body of Melvin Anderson, but it was also done legally. In Corra, the insured knowingly engaged in illegal activity and was subsequently denied coverage, in the present case, Appellant did nothing wrong. Appellant did not knowingly, willfully, nor intentionally engage in activity that was a violation of a statute, ordinance or regulation, yet he was still denied liability coverage to which he is entitled. The Circuit Court was wrong to rule that the intentional and knowing but lawful acts of Appellant did not meet the definition of occurrence under the policy.

## **II. The Circuit Court erred in not providing a separate analysis on the claim of negligence**

**in the underlying Complaint and in finding such claims were not an “occurrence” as defined in Appellant’s commercial liability insurance policy.**

An important fact for this Court to understand is that the Orndol Complaint Plaintiffs only had standing to bring a suit regarding the allegations of negligence in regards to their mother’s grave. The Court below provided no coverage analysis regarding this completely distinct negligence claim. Thus, the Circuit Court was clearly wrong in its decision to dismiss Appellant’s case because the negligence claim made in the Orndol Complaint was a predominate claim and easily fell within the definition of “occurrence” under Appellant’s commercial liability insurance policy. Hence, the main issue, in this case is whether or not negligence meets the definition of “occurrence.” The reason negligence is the most significant aspect of the Orndol Complaint is due to the Circuit Court, Judge Pomponio’s, conclusion in the Order denying the Motion to Dismiss the Orndol Complaint:

**Although the defendants appear to be acting within the confines of the Court Order which allowed such disinterment, the *manner* in which the disinterment took place is the thrust of the Plaintiff’s Complaint. As Syllabus Point 2 of Whitehair indicates, even an authorized disinterment may be carried out in such a way that is actionable. The Plaintiff has accused the Defendant of negligently mishandling the grave of Marlene Walkup Anderson during the authorized disinterment of Melvin Anderson. Under Whitehair, this action should stand. (App. 86).**

Here, the Circuit Court was clear that the Orndol Complaint stood on the allegation of negligence. The Principal Coverage of the commercial liability policy held by Appellant states:

**“We” will pay those sums which the “insured” becomes legally obligated to pay as “damages” due to bodily injury or property damage, including mental anguish, to which this insurance applies. The “bodily injury”, “property damage”, or mental anguish must be caused by an “occurrence” which [. . .] must occur during the policy period. (App. 19).**

The policy further states that “Occurrence means an accident, and includes repeated exposure to

similar conditions.” App. 20. As stated above, in American Modern Home Insurance Company v. Corra, 222 W.Va. 797 (2008), this Supreme Court of Appeals examined a similar definition of occurrence and stated that they did not believe the term “accident” in the policy to be ambiguous, “[t]he common and every day meaning of ‘accident’ is a chance event or event arising from unknown causes.” Id. at 801. The Court explained, after a detailed discussion, that “an ‘occurrence,’ in addition to excluding intentional conduct, also excludes conduct that is foreseen and expected. Again, knowing conduct is certainly foreseen or expected, and thus cannot be considered an ‘occurrence.’” Id. at 802. Nothing in the Orndol Complaint or Appellee’s arguments indicates that the allegations of negligently mishandling of the grave of Marlene Anderson were either foreseen or expected results of the moving of the body of Melvin Anderson.

In the present case, Appellant knowingly and intentionally, but legally, disinterred Mr. Melvin Anderson, thus the rule in Corra does not apply as that case stands on the illegal and intentional actions of the homeowner. More importantly, however, is the fact that the Plaintiffs in the Orndol Complaint had no standing to bring suit for any of the intentional actions taken by Appellant in regards to Mr. Anderson because they were not his heirs. So, the allegation of negligence in regards to the grave of Mrs. Anderson is a clearly distinct and separate claim. Therefore, the fact that Appellant did not intentionally or knowingly damage or mishandle the grave of Marlene Anderson is a fact vitally important to this case. Appellant was engaged in activity properly authorized by a Court Order, in moving the body of Mr. Melvin Anderson, nothing in Appellant’s actions indicates he foresaw or expected to negligently disturb the grave of Marlene Walkup Anderson. Any damage to Mrs. Anderson’s grave was accidental at best, it was

a chance event and how it happened was unknown since Appellant was solely engaged in the disinterment of Melvin Anderson.

Negligence is an unintentional tort, it is an accident, it is rarely foreseeable or intentional. Appellant did not intentionally or knowingly disturb the grave of Marlene Anderson. The Circuit Court was correct in its conclusion that “With the exception of the negligence claim” all other claims against Appellant concerned intentional and knowing acts. The Court below acknowledges the negligence claim as not being an intentional act, but the Court erred in not analyzing coverage on the negligence claim and not ruling negligence is an “occurrence.” Judge Rowe ended the Order granting Appellee’s Motion to Dismiss by stating, “In any event Longanacre cannot use the claims arising in negligence to prevent the operation of “occurrence” language in the policy.” Appellant is not trying to prevent the operation of “occurrence” language, rather, Appellant argues that both the intentional actions and the negligence claims (though two separate and distinct claims) constitute occurrences under the policy and thus entitle him to coverage.

Based upon the Order of the Motion to Dismiss the Orndol Complaint, the allegation of negligently mishandling the grave of Marlene Anderson is the “thrust” of the Complaint. (App. 86). The Court below erred in granting Appellee’s Motion to Dismiss because negligence does meet the definition of “occurrence” and thus coverage and a duty to defend is owed to Appellant.

**III. The Circuit Court erred in not addressing and providing an analysis of the Appellee’s duty to defend Appellant on the negligence claims in the underlying Complaint.**

Appellant sued in the Court below for failure to provide a defense, the Circuit Court failed to discuss the fact that the test for providing a defense is a different standard than providing

coverage. Appellee argued that coverage was properly denied because “[t]he crux of the allegations in the Orndol Plaintiff’s Complaint were that Longanacre wrongfully disinterred and reinterred Melvin Anderson’s body” and everything else complained of flows from the intentional movement. (App. 47). This statement is contrary to the conclusion held by the Circuit Court in denying the Motion to Dismiss the Orndol Complaint, in which the Court found that it was not the authorized disinterment that was the “thrust” of the Complaint, but rather the *manner* in which the disinterment took place and the negligent mishandling of Marlene Anderson’s grave. (App. 86). Thus, Appellee is incorrect in arguing that the predominate cause of the alleged loss in the underlying complaint is the intentional and authorized actions of the Appellant. The rule for coverage comes from Syl. Pt. 8 of Murray v. State Farm Fire and Casualty Co., 203 W.Va. 477 (1998), which states:

**When examining whether coverage exists for a loss under a first-party insurance policy when the loss is caused by a combination of covered and specifically excluded risks, the loss is covered by the policy if the covered risk was the efficient proximate cause of the loss. No coverage exists for a loss if the covered risk was only a remote cause of the loss, or conversely, if the excluded risk was the efficient proximate cause of the loss. The efficient proximate cause is the risk that sets others in motion. It is not necessarily the last act in a chain of events, nor is it the triggering cause. The efficient proximate cause doctrine looks to the quality of the links in the chain of causation. The efficient proximate cause is the predominating cause of the loss. (Emphasis added).**

In this case the “predominate cause of the loss” is an allegation of negligence. Plaintiffs in the Orndol Complaint suffered no loss from the intentional moving of the body of Mr. Melvin Anderson because they never had any interest in the property or right to Mr. Anderson’s remains. Instead, the Orndol Complaint stood on the claim of negligently disturbing the grave of Marlene Walkup Anderson. The fact that the claim of negligence occurred during the authorized

disinterment of Melvin Anderson does not change the fact that the claim of negligence was efficient proximate cause of the Orndol Complaint, as determined by Judge Pomponio in his March 21, 2011 Order. The obvious argument is that without the intentional moving of Mr. Anderson's body then there would have been no claim for negligence, but that is simply not true because the Orndol Plaintiffs only had standing to bring the claim of negligence. Appellant was engaged in a disinterment authorized by Court Order. Appellant had a commercial liability coverage policy to insure himself against unfounded allegations of illegal activity and unforeseeable events, such as a claim of negligently disturbing a nearby, but separate grave.

Of course, the efficient proximate cause rule is one that goes to coverage. The duty to defend is a different legal standard, then failure to provide liability coverage. The rule, which requires the insurer to provide a defense to the insured is stated in Bowyher v. Hi-Lad, Inc., 216 W. Va. 634 (2004) at 651:

**An insurance company's duty to defend an insured is broader than the duty to indemnify under a liability insurance policy. An insurance company has a duty to defend an action against its insured if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers. If, however, the causes of action alleged in the plaintiff's complaint are entirely foreign to the risks covered by the insurance policy, then the insurance company is relieved of its duties under the policy. "Included in the consideration of whether an insurer has a duty to defend is whether the allegations in the complaint ... are reasonably susceptible of the insurance policy. Syllabus Point 3, in part, Bruceton Bank v. United States Fidelity and Guaranty Insurance Co. 199 W. Va. 548, 486 S. E. 2d 19 (1997). Thus, "any question concerning an insurer's duty to defend under an insurance policy must be construed liberally in favor of an insured where there is any question about an insurer's obligations." Syllabus Point 5, Tackett v. American Motorists Ins. Co., 2113 W. Va. 524, 584 S. E. 2d 1158 (2003).**

Applying that standard to the facts of this case, the Circuit Court should not have dismissed the

claim for providing defense. The Orndol Complaint alleged claims of negligence against Appellant, and as stated above, negligence is covered under the policy as an “occurrence.” The test is a “could” test not a “does” test. In Horace Mann Ins. Co. v. Leeber, 180 W.Va. 375 (1988), the rule on duty to defend is stated simply, “if part of the claims against an insured fall within the coverage of a liability insurance policy and part do not, the insurer must defend all the claims, although it might eventually be required to pay only some of the claims.” A noteworthy case to mention here is American Modern Home Insurance Company v. Corra, 222 W.Va. 797 (2008), which was discussed extensively above. The majority in Corra found that the homeowner was not entitled to coverage, but the author of the opinion acknowledges in footnote 9, that for coverage and the duty to defend there are separate analysis to consider:

**Notwithstanding the decision in this case, the author of this opinion, in contrast to the majority of the Court, believes that there are factual issues not yet developed in the trial court which could possibly have an impact on the ultimate issue of the insurer's duty to defend and indemnify in this case. Therefore, although a majority of the Court does not presently share this view, the author believes that the insurer should be required to provide a defense to Mr. Corra. Id. at 803.**

In the present case, Appellee had a duty to provide coverage and a defense to Appellant. In failing to even provide a defense, Appellee acted in bad faith. The Circuit Court erred in both not addressing the duty to defend, but also in dismissing the case. Appellant’s complaint met and exceeded the standard to deny a motion under Rule 12(b)(6), since a complaint should not be dismissed unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim. Owen v. Board of Education, 190 W.Va. 677 (1994).

Having a negligence claim filed against Appellant in the underlying suit makes coverage and defense an issue. It is critical to understand that at the time Appellant made the demand to

Appellee for coverage and defense under the commercial liability policy, the Circuit Court under Judge Pomponio had already held that the disinterment was done under a Court Order. It was the manner of the disinterment, which produced the claim of negligence to the grave of Marlene Anderson and that was the only claim upon which the Orndol Complaint could stand upon. The Appellee had a copy of Judge Pomponio's Order on the Motion to Dismiss the Orndol Complaint; Appellee knew that the case for which they needed to provide coverage/defense was on a claim of negligence. The Appellant's Complaint clearly stated a claim covered by the policy both for coverage and defense. The Circuit Court, Judge Rowe, was wrong to grant the Motion to Dismiss, and Appellee owes a duty to defend and coverage to Appellant.

### **CONCLUSION**

The Circuit Court erred in granting Appellee's Motion to Dismiss for three main reasons. First, the Circuit Court erred in concluding that the intentional, non-willful and legal actions of Appellant, regarding the moving of Melvin Anderson's body, did not constitute an "occurrence." The Court wrongfully construed the rule in Corra, which hinges not on intentional actions, but rather on knowingly engaging or allowing some illegal activity. Second, the Circuit Court erred in not providing an analysis on the separate and distinct claim of negligence and finding that the claim of negligence in the underlying Complaint was not an "occurrence." Both the insurance policy and West Virginia case law defines occurrence as an accident and accident in this case includes negligence. Finally, the Circuit Court erred in not addressing and providing an analysis of the Appellee's duty to defend Appellant on the negligence claims in the underlying Complaint. The Appellee owes both coverage and a duty to defend to Appellant and thus both should be properly addressed.

WHEREFORE, for all the reasons stated herein, Appellant respectfully requests this Court to reverse the Circuit Court's decision in the underlying case was not an "occurrence" under the commercial liability insurance policy, thus no coverage and no defense, and find the negligence claim in said complaint was an occurrence under the subject policy and Appellee must provide both coverage and/or a defense under the policy.

PLAINTIFF

BY COUNSEL



Jessica R. Church, State Bar ID #11428

Barry L. Bruce, State Bar ID #511

Barry L. Bruce and Associates, L. C.

P. O. Box 388

Lewisburg WV 24901

Tel. 304 645 4182

Fax 304 645 4183

(Counsel for Plaintiff)

**CERTIFICATE OF SERVICE**

I, Jesseca R. Church, Barry L. Bruce and Associates, L.C. counsel for Petitioner, John D. Longanacre, D/B/A Longanacre Funeral Home, do hereby certify that on the 26<sup>th</sup> day of November 2012, I served a true copy of the foregoing by depositing said copy in the United States mail, with sufficient Postage attached thereto, to counsel:

James A. Varner, Sr.  
McNeer, Highland, McMunn & Varner, L.C.  
P.O. Drawer 2040  
Clarksburg, WV 26302-2040



Jesseca R. Church (WV Bar No. 11428)  
Barry L. Bruce and Associates, L.C.  
101 W. Randolph St.  
P.O. Box 366  
Lewisburg, WV 24901  
(304) 645-4182  
(304) 645-4183 (Fax)