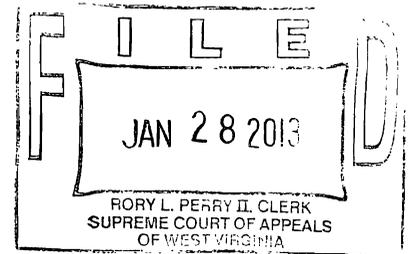


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

**PETITIONER'S REPLY BRIEF**

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## 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 regarding subject matter jurisdiction and probated Wills, oral argument under Rev. R.A.P. 18(a)(3) is not necessary. Unless the Court, in its discretion, determines that oral argument is necessary then oral argument would be appropriate under Rev. R.A.P. 20 (a)(1) and (2) as a case of first impression or a case involving issues of fundamental public importance.

### ARGUMENT

**I. Respondent owes Petitioner a duty to defend against the allegation of negligently disturbing the grave of Marlene Anderson because the cause of action of negligence, in this case, meets the definition of “occurrence.”**

In order to determine if Farmers Mutual Insurance Company (Respondent) has a duty to defend its insured John D. Longanacre, d/b/a Longanacre Funeral Home (Petitioner), under West Virginia State law, it is necessary to compare the pertinent provisions of the commercial liability insurance policy with the allegations in the underlying Complaint. See State Auto Prop. & Co. v. Wohlfeil at 4-5 (N.D.W.Va. 2012). 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).**

The Principal Coverage of the commercial liability policy held by Petitioner 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).**

"Occurrence" is defined by the policy under the Definitions Section: "Occurrence means an accident, and includes repeated exposure to similar conditions." Of course, "accident" is not an ambiguous term, the common and every day meaning is "a chance event or event arising from unknown causes." Thus, conduct engaged in knowingly is not an "accident" and therefore not an "occurrence." American Modern Home Insurance Company v. Corra, 222 W.Va. 797 at 801 (2008).

Initially, several allegations were made in the underlying (Ornold) Complaint, many of them related to the intentional and knowing acts allegedly committed by Petitioner in disinterring and reinterring the body of Melvin Anderson. However, the Ornold Complaint also included a claim of negligently disturbing the grave of their mother, Marlene Anderson, during the disinterment of Melvin Anderson and the claim that the Ornold Plaintiffs suffered mental anguish and distress due to the alleged disturbance of their mother's grave. (App. 12). Now, a question as to an insurer's duty to defend must be construed liberally in favor of an insured. See supra Bowyer v. Hi-Lad, Inc. In the case before this Court, the allegations of negligently disturbing the grave of Marlene Anderson constitute an "occurrence" under the insurance policy. Petitioner never intended nor did he knowingly disturb the grave of Marlene Anderson. Any

unintentional or unknown disturbance to a nearby grave, while Petitioner was engaged in the legally authorized action of removing the body of Melvin Anderson, is for all intents and purposes an “accident.” Petitioner did not knowingly disturb the grave of Marlene Anderson nor did he intentionally cause mental anguish or distress to the Plaintiffs in the underlying Complaint. Allegations of negligently disturbing an adjoining grave are “reasonably susceptible of an interpretation” that they fall within the plain meaning of the Principal Coverage Section of the commercial liability policy held by Petitioner. Id.

An insurance company must look to the allegations contained in the underlying Complaint in order to determine if a duty to defend exists. Looking at the Orndol Complaint, on its face, it is clear that the allegation of negligence to Marlene Anderson’s grave is an action stated against the insured that “could, without amendment, impose liability for risks the policy covers.” Id. The rule is made clear in Horace Mann Ins. Co. v. Leeber, 180 W.Va. 375 (1988), which simply states, “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.” In this case the claim of negligence falls within the definition of an “occurrence,” and thus a duty to defend exists. This analysis is based upon viewing all the allegations of the underlying Complaint, which the Court below was clearly wrong in making.

It is important, in determining that Respondent has a duty to defend Petitioner, to understand that when Respondent received notice of the Orndol Complaint and the request for coverage and defense, by Court Order, the only issue upon which Plaintiffs had standing to bring suit was on the negligence claim. In the Court Order granting the disinterment and reburial of

Melvin Anderson, the Judge found that “Melvin Lehew Anderson had no natural childre, and that he did not adopt the children of Marlene Anderson, so that his siblings [. . .], consitute his sole heirs at law.” (App. 72). Further, Respondent admits on page 12 and 13 of their Brief that the Ornlod Plaintiffs lacked standing to sue over the movement of Melvin Anderson’s body and due to the lack of standing the bulk of the Ornlod Complaint was dismissed. At the time Respondent received the request for coverage and defense they also received the Order that explained the negligence claim was the only cause of action upon which the Ornlod Plaintiffs’ had any claim for loss.

The insurance company merely had to apply the law of the State of West Virginia to know that the Ornlod Plaintiffs lacked standing to bring suit where they possessed no interest as they were not Melvin Anderson’s heirs. There were no allegations in the underlying Complaint claiming that the Plaintiffs were the heirs of Melvin Anderson. The law of West Virginia is clearly stated in Syl. Pt. 9 of Hairston v. General Pipeline Construction, Inc., 226 W. Va. 663 (2010) which says, “The next of kin who possess the right to recover in a common law cause of action for grave desecration shall be the decedent's surviving spouse or, if such spouse is deceased, the person or persons of closest and equal degree of kinship in the order provided by West Virginia Code § 42–1–1, et seq.”

However, the situation was made even more simple for the Respondent because along with the underlying Complaint they received the Dismissal Order that showed that the issues involving the removal of Mr. Anderson’s body had already been dismissed. Therefore, the claims for loss or damages related to the legally approved disinterment of the body of Melvin Anderson were not only frivolous but already disregarded in a Court of law and should not be

used an excuse to deny both coverage and a duty to defend.

**II. The use of the “efficient proximate cause” doctrine to deny coverage is inappropriate since the only legitimate cause of loss was based upon the single claim of negligence.**

In examining the facts of the present cause it is important for this Court to understand that the “efficient proximate cause” doctrine does not apply in this case. As stated above, when determining whether or not to provide or deny coverage the insurance company looks to the allegations contained in the Complaint at the time they are presented to the insurance company. Respondent is wrong in stating on page 13 of their brief that “it is the Complaint itself, prior to much of it being dismissed, which must be examined.” The present case is factually distinguished from other cases in that at the time the Complaint was presented to the insurance company “the bulk of the Orndol Complaint was dismissed for a lack of standing.” (Respondent’s Brief pg 13). It is not only inappropriate but in fact it is absurd for the insurance company to go back and use allegations which had already been removed from the Complaint to deny coverage. At the time the insurance company received the Complaint it was already well established by West Virginia Case Law (See Supra Hairston) and two Circuit Court Orders (App. 15 and 72) that the Orndol Plaintiffs had no standing to bring any allegations for the intentional moving of Melvin Anderson’s body as they were not his heirs. These facts are not “irrelevant,” but rather they show that the doctrine “efficient proximate cause” does not apply in this case.

The only claim for the insurance company to consider at the time they received the Complaint and Court Order dismissing all other claims was the claim of negligence. In this case the allegation of negligently mishandling the grave of Marlene Anderson falls within the definition of an “occurrence” in the insurance policy. Any allegation of negligence to an

adjoining grave site would be an “accident” that is “a chance event” (Petitioner did not intend to disturb any other grave) “or event arising from unknown causes” (nor did Petitioner have any knowledge that such a disturbance had occurred). Supra. American Modern Home Insurance Company v. Corra at 801.

Even assuming *arguendo* that the Respondent is correct and the entire Complaint must be examined then based on the discussion above, the duty to defend still clearly exists. However, instead of addressing the issues regarding a duty to defend Respondent has focused their argument upon the legal doctrine of “efficient proximate cause.” This rule is stated in Syl. Pt. 8 of Murray v. State Farm Fire and Casualty Co., 203 W.Va. 477 (1998):

**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.**

After examining the Orndol Complaint and applying the law of the State of West Virginia it is obvious that the Plaintiffs in the underlying Complaint could not suffer any loss related to the moving of the body of Melvin Anderson as they were not his heirs. Therefore, the negligence claim regarding the disturbance of the grave of Marlene Anderson is not only the predominate cause of the loss it is in fact the only loss for which the Orndol Plaintiffs had standing to bring suit.

The facts in the present case are unique in that at the time the request for coverage and

defense was made to Respondent the Circuit Court had already determined that the negligence claim was the only allegation to survive the motion to dismiss and the Respondent states as much on page 13 of their brief. If Respondent is correct in their argument, then whenever an insurance company examines a Complaint that presents allegations which are frivolous, bogus and Plaintiffs have no standing to bring as long as they allege actions not covered by the policy, then coverage can simply be denied. This scenario is exactly what is happening in this case. It is true, the insurance company must look to the underlying Complaint in determining if coverage exists, but the insurance company cannot ignore the laws of the State and deny coverage on causes of action for which the Plaintiffs had no right to bring. Additionally, the fact that at the time the insurance company received the Complaint they also received the Circuit Court Order dismissing “the bulk of the Orndol Complaint” that dealt with the intentional act of moving the body of Melvin Anderson (Respondent’s Brief pg 13). The movement of Melvin Anderson’s body was not the “efficient proximate cause of the loss” in the Orndol Complaint because any allegation related to Melvin Anderson’s deceased remains did not cause a loss where Orndol Plaintiffs had no rights or interest. The only cause of loss in the underlying Complaint, as held by Judge Pomponio’s Order, was the claim of negligently disturbing the grave of Marlene Anderson. (App 85-86).

In granting Respondent’s Motion to Dismiss this case the Circuit Court below concludes his analysis by stating: “Later, the Court found no evidence of negligence. In any event Longanacre cannot use the claims arising in negligence to prevent the operation of “occurrence” language in the policy.” (App. 144). The Circuit Court is wrong in its final ruling because Petitioner’s argument is that the alleged negligence in this case meets of the definition of

“occurrence” and thus Petitioner wants to invoke the language of the policy not prevent it. The Circuit Court’s use of the “efficient proximate cause” analysis to conclude that the intentional and knowing acts of Petitioner do not constitute an occurrence is in error. The only cause of loss in the Orndol Compliant was on the negligence claim alone, which the Circuit Court found to be an exception to the other claims in the underlying Complaint and excluded it from his conclusion that the intentional and knowing acts were not an occurrence. Id. Thus, the negligence claim meets the definition of an “occurrence” under the insurance policy, which is the subject of this action. Therefore, the Circuit Court erred in holding that Respondent did not owe coverage and a duty to defend to Petitioner.

**CONCLUSION**

WHEREFORE, for all the reasons stated herein, Petitioner 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 Respondent must provide both coverage and/or a defense under the policy.

Respectfully submitted,

THE PETITIONER

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**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 25<sup>th</sup> day of January 2013, I served a true copy of the foregoing by depositing said copy in the United States mail, with sufficient Postage attached thereto, to counsel:

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