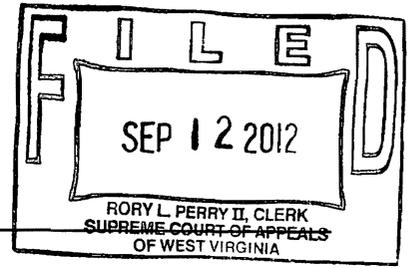


NO. 12-0769



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FREDA BRADLEY, Plaintiff Below,
Petitioner,

v.

**FARMERS & MECHANICS MUTUAL
INSURANCE COMPANY OF WEST
VIRGINIA**, Defendant Below,
Respondent.

PETITIONER'S BRIEF

From the Circuit Court of Logan County, West Virginia
Civil Action No. 10-C-269

Counsel for Petitioner

Carte P. Goodwin (WVSB #8039)
James A. Kirby III (WVSB #8564)
Mary R. Rowe (WVSB #11707)
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500
Charleston, West Virginia 25301
Telephone: (304) 346-7000
Facsimile: (304) 344-9692
cpg@goodwingoodwin.com

TABLE OF CONTENTS

Table of Authorities ii

Assignments of Error1

Statement of the Case1

Summary of Argument4

Statement Regarding Oral Argument and Decision5

Argument5

Conclusion13

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S. Ct. 2505 (1986)	6
<i>Andrick v. Town of Buckhannon</i> , 187 W. Va. 706, 421 S.E.2d 247 (1992)	5, 6
<i>Campbell v. Norfolk & Dedham Mut. Fire Ins. Co.</i> , 682 A.2d 933 (R.I. 1996)	9
<i>Farmers Mut. Ins. Co. v. Tucker</i> , 213 W. Va. 16, 576 S.E.2d 261 (2002)	9
<i>Fidelity & Casualty Co. of N.Y. v. Mitchell</i> , 503 So.2d 870 (Ala. Civ. App. 1987).....	9
<i>Indiana Ins. Co. v. Liaskos</i> , 297 Ill. App. 3d 569, 231 Ill. Dec. 844 (1998)	8, 9
<i>Masinter v. WEBCO Co.</i> , 164 W. Va. 241, 262 S.E.2d 433 (1980)	6
<i>Murray v. State Farm Fire and Cas. Co.</i> , 203 W. Va. 477, 509 S.E.2d 1 (1998)	9
<i>Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc.</i> , 177 W. Va. 734, 356 S.E.2d 488 (1987)	4, 9
<i>Painter v. Peavy</i> , 192 W. Va. 189, 451 S.E.2d 755 (1994)	5
<i>Prete v. Merch. Prop. Ins. Co. of Indiana</i> , 159 W. Va. 508, 223 S.E.2d 441 (1976)	8
<i>State Auto Mut. Ins. Co. v. R.H.L., Inc.</i> , 2010 WL 909073 (W.D. Tenn. March 12, 2010).....	12

Other Authorities

44 Am. Jur. 2D <i>Insurance</i> § 1282 (2009).....	8, 9
--	------

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by concluding that the term “collapse” as used in Ms. Bradley’s policy of insurance was not ambiguous and that Ms. Bradley’s floor did not collapse.
2. The Circuit Court erred – and infringed upon the exclusive province of the jury – by concluding that the damage to Ms. Bradley’s home was not caused by “hidden decay.”

STATEMENT OF THE CASE

In May 2002, Freda Bradley purchased a homeowners insurance policy from Farmers & Mechanics Mutual Insurance Company of West Virginia (“Farmers”). As the Circuit Court observed, Ms. Bradley’s homeowners insurance policy was a “named-peril” policy,¹ which provided in pertinent part under Section 8:

8. ***Collapse.*** *We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:*
 - a. *Perils insured Against in COVERAGE C PERSONAL PROPERTY. These perils apply to covered buildings and personal property for loss insured by this additional coverage;*
 - b. ***Hidden decay;***
 - c. *Hidden insect or vermin damage;*
 - d. *Weight of contents, equipment, animals or people;*
 - e. *Weight of rain which collects on a roof; or*
 - f. *Use of defective material or methods in construction, remodeling if the collapse occurs during the course of the construction, remodeling or renovation.*

Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items b, c, d, e, and f, unless the loss is a direct result of collapse of a building.

¹ In a prime example of the policy’s confusing structure, Section I, “Perils Insured Against,” actually provided that Farmers did not insure for loss involving “collapse”; however, an exception was made under the additional coverage provided by Section 8, which is quoted herein. APP 112-113.

Collapse does not include settling, cracking, shrinking, bulging or expansion.

This coverage does not increase the limit of liability applying to the damaged coverage property.

APP 112 (emphasis added). Similarly, Section 12 provided additional limited coverage for damages caused by fungi, rot, or bacteria:

12. *Fungi, Wet or Dry Rot, Or Bacteria.*

a. *The most we will pay is up to \$10,000 to cover:*

- (1) *The total of all loss payable under Section I Property Coverages caused by fungi, wet or dry rot, or bacteria;*
- (2) *The cost to remove fungi, wet or dry rot, or bacteria from Property covered under Section I;*
- (3) *The cost to tear out and replace any part of the building or Other covered property as needed to gain access to the fungi wet or dry rot, or bacteria; and*
- (4) *The cost of testing of air or property to confirm the absence, presence or level of fungi, wet or dry rot, or bacteria, whether performed prior to, during or after removal, repair, restoration or replacement. The cost of such testing will be provided only to the extent that there is a reason to believe that there is the presence of fungi, wet or dry rot or bacteria.*

Id.

On September 22, 2008, Bradley filed a claim with Farmers for damages to her kitchen and bathroom floors, claiming that her floor had dropped two to four inches and that she feared for her and her daughter's safety. **APP 233**. Following an inspection, Farmers denied coverage by a letter dated October 10, 2008, contending that the homeowners policy did not cover the particular damages to her home.² **APP 59**.

² The October 10, 2008 letter stated, in part:

The cause of the damage to the floor of your house is failure of the floor joists due to long term rotting caused by moisture and mildew from surface and

Faced with this denial, Ms. Bradley filed a seven-count complaint in the Circuit Court of Logan County on September 15, 2010, naming Farmers, Ralph Eldridge (“Eldridge”), Madison Insurance Agency, Inc. (“Madison”), and Shawn Walker (“Walker”) as defendants, asserting claims for violations of the Unfair Settlement Claims Practices Act, common-law bad faith, reasonable expectations, negligence in the sale of the insurance policy, fraud, breach of contract, and declaratory judgment regarding coverage. During the course of the litigation, the Circuit Court dismissed Ms. Bradley’s statutory and common-law bad faith claims against Farmers and dismissed the Complaint in its entirety against Eldridge. On June 3, 2011, Ms. Bradley filed a Second Amended Complaint, pleading with more particularity her fraud claim against Farmers and adding a claim for negligent misrepresentation. Pursuant to a settlement agreement between Bradley, Madison, and Walker, the Circuit Court entered an order on April 23, 2012, dismissing all of Ms. Bradley’s claims against Madison and Walker.

Nearly one month later, by order dated May 11, 2012, the Circuit Court granted Farmers summary judgment on the remaining counts. The Circuit Court determined that Ms. Bradley’s insurance policy did not provide coverage for the damage to her property, and therefore concluded that Farmers was entitled to summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. Central to this determination were those above-referenced provisions of the

subsurface water accumulating under the house. This is due to inadequate perimeter draining and the lack of a vapor barrier.

...

In addition, the framing under the floor is improperly constructed and the joist spans are excessive and joints are improper, resulting in additional loads and sagging.

Therefore, [Farmers] conditionally disclaims coverage to you or to anyone claiming coverage under the policy for this loss.

APP 59.

insurance policy detailing coverage for damage to property involving a “collapse,” for which the policy provides coverage if caused by, *inter alia*, “hidden decay.”

This conclusion was the result of two key findings, both of which were erroneous: (i) that the term “collapse” as used in the policy was not ambiguous, and under the plain and ordinary meaning of the word, Ms. Bradley’s floor did not collapse; and (ii) that even if her floor did “collapse” within the meaning of the policy, there was still no coverage because the collapse was not caused by “hidden decay” as required by the policy.

SUMMARY OF ARGUMENT

The Circuit Court’s perfunctory conclusion that the term “collapse” was unambiguous, along with its abrupt finding that, under the term’s plain meaning, Ms. Bradley’s floor did not “collapse,” is woefully devoid of any legal or factual support. Indeed, the court reached this conclusion without explaining the “plain and ordinary meaning of ‘collapse,’” or without offering any factual description of precisely what happened to Bradley’s floor. The policy itself did not define the term, and the majority of jurisdictions that have confronted this term have concluded that a structure does not have to entirely fall to the ground in order to “collapse.” Moreover, “[i]t 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, *Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987). By ignoring the ambiguity of the undefined policy term “collapse,” and by consequently refusing to strictly construe that term against the insurer (as the majority of jurisdictions have done), the Circuit Court erred.

Additionally, the Circuit Court erred – and infringed upon the exclusive province of the jury – by concluding that the damage caused to Ms. Bradley’s home was not caused by “hidden

decay.” According to the Circuit Court, even if the floor were found to have “collapsed” within the meaning of the policy, there would still be no coverage because the collapse was not caused by “hidden decay” as required by the policy. However, material questions of fact remain as to whether the decay that caused the collapse was “hidden” within the meaning of the policy.

Contrary to the Circuit Court’s finding, which improperly equates knowledge of the effect (the collapse and sinking of the floor) with knowledge of the cause (the hidden decay), the overwhelming evidence in the record suggests that Ms. Bradley was not aware of the underlying decay that caused the damage to her house. At a minimum, material questions of fact remain as to whether the decay was “hidden,” and therefore covered under the policy.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with the criteria set forth in Rule 18 of the Rules of Appellate Procedure, Petitioner submits that oral argument is warranted because the dispositive issues in this case have not been authoritatively decided, and the decisional process in this instance would significantly be aided by oral argument. Specifically, this case is appropriate for Rule 20 oral argument because it involves a question of first impression.

ARGUMENT

I. STANDARD OF REVIEW

A circuit court’s entry of summary judgment is reviewed *de novo*. See *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. *Id.* In Syllabus Point 1 of *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992), this Court explained that “[a] motion for summary judgment should be granted only when it is

clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law.” (internal citation omitted). A circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to conclude whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986). Accordingly, courts must construe the facts in the light most favorable to the non-moving party. *Masinter v. WEBCO Co.*, 164 W. Va. 241, 242, 262 S.E.2d 433, 435 (1980). Because the Circuit Court did not adhere to these standards, the order of summary judgment should be reversed.

II. THE CIRCUIT COURT ERRED BY CONCLUDING THAT THE TERM “COLLAPSE” AS USED IN THE HOMEOWNERS INSURANCE POLICY WAS UNAMBIGUOUS AND THAT MS. BRADLEY’S FLOOR HAD NOT COLLAPSED.

In failing to find the inherent ambiguity in the homeowners policy’s term “collapse,” the Circuit Court erred. As noted, Ms. Bradley’s insurance policy was a “named-peril” policy, which provided in pertinent part:

8. ***Collapse.*** *We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:*
 - a. *Perils insured Against in COVERAGE C PERSONAL PROPERTY. These perils apply to covered buildings and personal property for loss insured by this additional coverage;*
 - b. ***Hidden decay;***
 - c. *Hidden insect or vermin damage;*
 - d. *Weight of contents, equipment, animals or people;*
 - e. *Weight of rain which collects on a roof; or*
 - f. *Use of defective material or methods in construction, remodeling if the collapse occurs during the course of the construction, remodeling or renovation.*

Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall,

bulkhead, pier, wharf or dock is not included under items b, c, d, e, and f, unless the loss is a direct result of collapse of a building.

Collapse does not include settling, cracking, shrinking, bulging or expansion.

This coverage does not increase the limit of liability applying to the damaged coverage property.

APP 112 (emphasis added).

However, the policy neither defines the term “collapse” nor offers any additional guidance beyond these vague terms to inform a homeowner as to the scope of “collapse” coverage.³ Despite the absence of any policy definition, the Circuit Court concluded that the term “is not ambiguous” and that “[u]nder the plain and ordinary meaning of ‘collapse,’ Ms. Bradley’s kitchen floor did not collapse.” **APP 236**. However, the Circuit Court’s perfunctory conclusion that the term “collapse” was unambiguous, along with its abrupt finding that, under the term’s plain meaning, Bradley’s floor did not “collapse,” is woefully devoid of any legal or factual support.

As the Circuit Court noted, when the terms and conditions of an insurance policy “are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.” **APP 236**. Unfortunately, the meaning of “collapse” was apparently “plain” only to the Circuit Court, for nowhere in its opinion does the Circuit Court offer any hint as to this “plain” meaning. Other than passing references to Ms. Bradley’s floor “dropping” and “sinking” several inches, *id.*, the Circuit Court failed to offer any succinct factual description of precisely what happened to Ms. Bradley’s floor, a finding that would have provided some much needed context to help discern the court’s definition/plain

³ It should be noted that, as Ms. Bradley pointed out below, Farmers’ current homeowners policy has been modified to avoid disputes like the instant case by including a clear definition of the term “collapse.” *See Plaintiff’s Second Proposed Order Denying Farmers and Mechanics Mutual’s Motion for Summary Judgment*, filed February 14, 2012.

meaning of “collapse.”⁴ Instead, the Circuit Court simply stated that “[t]he term collapse is not ambiguous.” *Id.* As a result, the Circuit Court concluded:

Under the plain and ordinary meaning of “collapse”, Ms. Bradley’s kitchen floor did not collapse. . . . Even if the term collapse were open to interpretation and it could be found that Ms. Bradley’s sinking kitchen floor is a “collapse” (which this Court clearly finds it is not a collapse), it was not caused by “hidden decay.”

Id. At best, one only can surmise that what ever happened to Ms. Bradley’s floor did not meet the definition adopted (but not explained) by the Circuit Court. As a result, this Court is now placed in the untenable position of reviewing the Circuit Court’s decision to ascribe *plain meaning* to a term that it failed to define.

Although terms should be given their ordinary meaning, “[w]henver the language of an insurance policy provision is reasonably susceptible to two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous.” Syl. Pt. 1, *Prete v. Merch. Prop. Ins. Co. of Indiana*, 159 W. Va. 508, 223 S.E.2d 441 (1976). However, in the instant case, the policy did not define the term and this Court has yet to have been presented with discerning the meaning of “collapse.” In those jurisdictions that have confronted this issue, the majority of our sister states have concluded that “collapse” does not require the “complete destruction” or “falling in” of a structure. See 44 AM. JUR. 2d *Insurance* § 1282 (2009) (“Under the majority view . . . the term ‘collapse’ does not require complete destruction or falling in of the building.”); see also *Indiana Ins. Co. v. Liaskos*, 297 Ill. App. 3d 569, 577, 231 Ill. Dec. 844, 850 (1998) (“It is clear . . . that under the majority view the term ‘collapse’ does not require complete destruction or falling in of the building or a part

⁴ In her deposition, Ms. Bradley stated that her floor “fell through” and sunk more than “an inch or two.” She stated further that she was not able to walk on her kitchen floor. **APP 201.** She said, “It was collapsed. You couldn’t walk on it. . . . [I]t hadn’t dropped to the ground, but it was – it was – it had sunk, collapsed. . .” **APP 202.**

thereof . . .”); *Fidelity & Casualty Co. of N.Y. v. Mitchell*, 503 So.2d 870 (Ala. Civ. App. 1987) (finding “collapse” where stairway and floor fell inches); *Campbell v. Norfolk & Dedham Mut. Fire Ins. Co.*, 682 A.2d 933 (R.I. 1996) (finding “collapse” where basement foundation wall had crumbled and caused unlevel floors and cracked walls in upper part of house).

Although some courts have held that “collapse” is an unambiguous term “denot[ing] a falling in, loss of shape, or reduction to flattened form or rubble,” 44 AM. JUR. 2d *Insurance* § 1282 (2009), the jurisdictional split on this question actually supports a finding of ambiguity. *See Murray v. State Farm Fire and Cas. Co.*, 203 W. Va. 477, 509 S.E.2d 1, n. 5 (1998) (internal citation omitted) (“A provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways. This rule is based on the understanding that one cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance.”). Given this ambiguity, the term should have been strictly construed against the insurer. *See* Syl. Pt. 4, *McMahon*, 177 W. Va. 734, 356 S.E.2d 488. (“[i]t 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.”); *Farmers Mut. Ins. Co. v. Tucker*, 213 W. Va. 16, 21, 576 S.E.2d 261, 266 (2002) (“When the words of an insurance policy are, without violence, susceptible to two or more interpretations, that which will sustain the claim and cover the loss must be adopted.”).

Here, having failed to acknowledge this jurisdictional split and the inherent ambiguity of the undefined term, the Circuit Court compounded its error by failing to offer any hint regarding the precise nature of Ms. Bradley’s damage and deciding, without explanation, that the condition of Ms. Bradley’s floor did not satisfy its unexpressed definition of “collapse.” For these reasons, the entry of summary judgment was erroneous and should be reversed.

Additionally, the Circuit Court's conclusion that no collapse had occurred also resulted in the erroneous decision to deny Ms. Bradley's claim under Section 12 of the policy. However, irrespective of whether a collapse had occurred, coverage under Section 12 was based upon damage to Ms. Bradley's floor separate and distinct from the occurrence of a "collapse." The Circuit Court was apparently so hung up on defining "collapse" (albeit only to itself) that it erroneously determined that coverage under Section 12 *also* was contingent upon the occurrence of a "collapse" – a determination wholly at odds with the plain language of the policy.

2. THE CIRCUIT COURT ERRED AND INFRINGED UPON THE EXCLUSIVE PROVINCE OF THE JURY BY CONCLUDING THAT THE DAMAGE CAUSED TO MS. BRADLEY'S HOME WAS NOT CAUSED BY HIDDEN DECAY.

Similarly, the Circuit Court erred – and infringed upon the exclusive province of the jury – by concluding that the damage caused to Ms. Bradley's home was not caused by "hidden decay." According to the Circuit Court, even if the floor were found to have "collapsed" within the meaning of the policy, there would still be no coverage because the collapse was not caused by "hidden decay" as required by the policy. APP 236. However, material questions of fact remain as to whether the decay that caused the collapse was "hidden" within the meaning of the policy.

Contrary to the Circuit Court's finding, which improperly equates knowledge of the effect (the collapse and sinking of the floor) with knowledge of the cause (the hidden decay), the overwhelming evidence in the record suggests that Ms. Bradley was not aware of the underlying decay that caused the damage to her house. APP 197. At a minimum, material questions of fact remain as to whether the decay was "hidden," and therefore covered under the policy.

Indeed, the Circuit Court itself had previously acknowledged that questions of fact remained as to the existence of hidden decay. In a hearing on August 8, 2011, the Court

questioned whether there was “a genuine issue of material fact of hiddenness.” **APP 288**. After requesting additional briefing on this precise issue, the Circuit Court then plainly stated during a February 1, 2012 hearing:

I’m convinced that with respect to the hiddenness of the decay that there’s an issue of fact there . . . And as I’ve said, there’s an issue of fact on the hiddenness of decay.

APP 313 (emphasis added).

Yet, in granting summary judgment, the Circuit Court inexplicably reversed course, concluding that, “Even if the term collapse were open to interpretation and it could be found that Ms. Bradley’s sinking floor is a ‘collapse’ (which this Court clearly finds it is not a collapse), it was not caused by ‘hidden decay.’” **APP 236**. The Circuit Court’s contradictory statements are confusing, for the record is replete with evidence regarding the “hidden” nature of the decay. At a minimum, a review of the record reveals that the Circuit Court’s initial impression was correct that material questions of fact remain.

Ms. Bradley testified that she had no knowledge of the decay that caused the floor to collapse. **APP 94**. Of course, Farmers disagrees and asserts that Ms. Bradley had knowledge of the decay, and therefore it could not have been “hidden.” The thrust of Farmers’ argument centers on an earlier claim for coverage that Ms. Bradley had filed in 2005. At that time, Farmers denied Ms. Bradley’s claim, informing her that the damage to her home was the result of “improper methods of construction and settlement.” **APP 58**. Critically, the 2005 denial made no mention of mold, fungi, bacteria, or damage caused by water infiltration – the precise type of hidden decay that caused the 2008 collapse. Nevertheless, Farmers argues that if Ms. Bradley had read the report that accompanied the 2005 denial, she would have known about the

decay, stating, “had Bradley bother [sic] to read the report, she would have known what was reported about the condition of the home.” APP 46.

However, as Farmers’ own representatives apparently concede, Ms. Bradley could not have discovered the hidden decay simply by reading the report or looking at the black and white pictures provided to her in 2005. Farmer’s inspector Darren Franck testified that “from a black and white photo it’s hard to tell exactly what’s going on [under the house].” APP 369. During his deposition, Mr. Franck testified further:

A: . . . Like I said, it’s pretty difficult to try to tell exactly what’s going on in terms of mold growth from the black and white photo.

Q: If you hadn’t been under the house and saw these pictures, would you be able to tell that there was mold growth underneath the house?

A: Just from those pictures?

Q: Yeah.

A: Probably not.

Id. Likewise, Franck admitted it was unlikely that one could see the decay to the floor joists unless you crawled under the house. APP 372.

The testimony of Farmers’ own representatives, combined with Ms. Bradley’s factual assertions and the Circuit Court’s initial impression suggest that questions of fact remain as to whether the decay was “hidden.” *See State Auto Mut. Ins. Co. v. R.H.L., Inc.*, 2010 WL 909073, at *1 (W.D. Tenn. March 12, 2010) (concluding that, despite the insured being given an inspection report detailing potential problems concerning wood moisture, the damage was not “hidden” because the report did not document specific decay and there was no evidence that the decay was visible). Although Ms. Bradley may have been aware of the effects of the damage, the Circuit Court improperly conflated knowledge of these effects with knowledge of the hidden decay. Because questions of fact remain as to whether the decay was hidden, the judgment of the Circuit Court should be reversed.

CONCLUSION

For the reasons set forth above, Petitioner Freda Bradley respectfully requests that this Court reverse the Circuit Court's order of summary judgment.

Respectfully submitted,

FREDA BRADLEY

By Counsel



Carte P. Goodwin (WVSB #8039)
James A. Kirby III (WVSB #8564)
Mary R. Rowe (WVSB #11707)
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500
Charleston, West Virginia 25301
Telephone: (304) 346-7000
Facsimile: (304) 344-9692
cpg@goodwingoodwin.com

No. 12-0769

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FREDA BRADLEY, Plaintiff Below,
Petitioner,

v.

**FARMERS & MECHANICS MUTUAL
INSURANCE COMPANY OF WEST
VIRGINIA**, Defendant Below,
Respondent.

(From the Circuit Court of Logan County, Civil Action No. 10-C-269)

CERTIFICATE OF SERVICE

I, Mary R. Rowe, hereby certify that I served a copy of the foregoing **Petitioner's Brief** on this 12th day of September, 2012, by United States mail, postage prepaid, to the following:

James A. Varner, Sr., Esq.
Debra Tedeshi Varner, Esq.
Michael D. Crim, Esq.
McNeer, Highland, McMunn and Varner, L.C.
Empire Building – 400 West Main Street
P.O. Drawer 2040
Clarksburg, WV 26302-2040
(*Counsel for Respondent*)



James A. Kirby III (WVSB #8564)