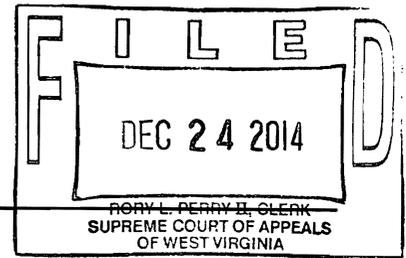


Nos. 14-0967



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**At Charleston**

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**Farmers & Mechanics Mutual Insurance Company,  
Intervenor Below, and Michael O'Connor,  
Counter-Plaintiff Below,**

*Petitioners,*

**v.**

**Marlon Allen, Sr., individually and as Administrator of  
the Estate of Marcus Allen, Counter-Defendant Below,**

*Respondent.*

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**From the Circuit Court of  
Mineral County, West Virginia  
Civil Action No. 12-C-43**

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**PETITIONER, FARMERS & MECHANICS  
MUTUAL INSURANCE COMPANY'S BRIEF**

**MARTIN & SEIBERT, L.C.**

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## TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	4
II.	STATEMENT OF THE CASE .....	5
	A.    UNDERLYING FACTS.....	5
	B.    THE F&M POLICY PROVISIONS AT ISSUE.....	7
	C.    PROCEDURAL HISTORY AND RULINGS BELOW .....	8
III.	SUMMARY OF ARGUMENT.....	10
IV.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	12
V.	ARGUMENT.....	12
	A.    THE STANDARD OF REVIEW FOR A MOTION FOR SUMMARY JUDGMENT.....	12
	B.    THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT CONCLUDED THAT MARCUS ALLEN WAS AN EQUITABLE INSURED UNDER THE POLICY OF INSURANCE ISSUED BY F&M TO SHELLY O’CONNOR, WITH MICHAEL O’CONNOR AS A NAMED ADDITIONAL INSURED .....	13
	C.    THE CIRCUIT COURT’S CREATION OF AN EXCEPTION TO CONTROLLING LAW AS A MATTER OF FIRST IMPRESSION BY HOLDING THAT AN INSURER WAS PRECLUDED FROM EXERCISING ITS LAWFUL RIGHT OF SUBROGATION AGAINST THE LESSEE IF PORTIONS OF THE RENT PAID BY THE LESSEE ARE ALLOCATED BY THE INSURED FOR MAINTAINING INSURANCE WAS IN ERROR.....	18
	D.    THE CIRCUIT COURT’S FINDING THAT ALLEN WAS AN EQUITABLE INSURED BASED UPON HIS “PAYMENT” FOR THE POLICY AT ISSUE WAS IN RELIANCE UPON INFORMATION NOT SUPPORTED BY THE RECORD, WAS CLEARLY ERRONEOUS AND, THEREFORE, WAS IN ERROR.....	22
VI.	CONCLUSION .....	24
VII.	CERTIFICATE OF SERVICE.....	25

## TABLE OF AUTHORITIES

### A. Cases.

<i>Consolidation Coal Co. v. Boston Old Colony Ins. Co.</i> , 203 W.Va. 385, 390, 508 S.E.2d 102, 107 (1998).....	12
<i>Daniel v. United Nat. Bank</i> , 202 W.Va. 648, 651, 505 S.E.2d 711, 714 (1998).....	13, 15
<i>Estate of Helmick v. Martin</i> , 192 W.Va. 501, 504, 453 S.E.2d 335, 338 (1994).....	13, 15
<i>Hanlon v. Chambers</i> , 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995).....	13, 15
<i>Huggins v. Fitzpatrick</i> , 102 W.Va. 224, 135 S.E. 19 (1926).....	13, 16
<i>Keffer v. Prudential Ins. Co.</i> , 153 W.Va. 813, 815-16, 172 S.E.2d 714, 715 (1970).....	18
<i>Kittle v. Icard</i> , 185 W.Va. 126, 133, 405 S.E.2d 456 (1991).....	13, 14, 18
<i>Mazon v. Camden Fire Ins. Ass'n</i> , 182 W. Va. 532, 533, 389 S.E.2d 743, 744 (1990).....	20, 21
<i>Noland v. Va. Ins. Reciprocal</i> , 224 W.Va. 372, 378-79, 686 S.E.2d 23, 30 (2009).....	18
<i>Painter v. Peavy</i> , 192 W.Va. 189, 451 S.E.2d 755 (1994).....	13
<i>Prete v. Merchants Prop. Ins. Col</i> , 159 W.Va. 508, 223 S.E.2d 441 (1976).....	16, 18
<i>Pritt v. Republican Nat. Committee</i> , 210 W.Va. 446, 452-453, 557 S.E.2d 853, 859-860 (2001).....	13, 15
<i>Ray v. Donahue</i> , 177 W.Va. 441, 352 S.E.2d 729 (1986).....	14
<i>Sutton v. Jondahl</i> , 532 P.2d 478, 482 (Oklahoma Civil App. 1975).....	17
<i>Watson v. INCO Alloys Int'l, Inc.</i> , 209 W.Va. 234, 238, 545 S.E.2d 294, 298 (2001).....	13

## **I. ASSIGNMENTS OF ERROR.**

1. The Circuit Court, in granting summary judgment to the Estate of Marcus Allen (hereinafter the "Estate") and denying the Petitioner, Farmers & Mechanics Mutual Insurance Company's (hereinafter F&M") motion for summary judgment, and in concluding that Marcus Allen was an equitable insured under the policy of insurance issued by and thereby mandating that as a matter of equity F&M was not permitted to maintain a claim of subrogation, was in error. The Circuit Court failed to recognize the existence of genuine issues of material fact concerning F&M's counterclaim and therefore its decision was precipitous and constituted reversible error.

2. The Circuit Court's creation of an exception to controlling law in determining that F&M was precluded from prosecuting a subrogation action against the Estate was a matter of first impression when it held that an insurer was precluded from exercising its lawful right of subrogation against a lessee if portions of the rent paid by the lessee are allocated by the insured for maintaining "insurance". The Circuit Court's conclusion that this exception was applicable to the facts in the instant case, even though Marcus Allen (hereinafter "Allen") was not a named insured, a designated insured, a definitional insured, or a named beneficiary under the policy, and even though F&M had no knowledge of Allen or the existence or terms of the agreement between Allen and Shelly O'Connor, was in error.

3. The Circuit Court's finding that Allen paid for the policy at issue and was therefore an insured under said policy was in reliance upon information not supported by the record. The Circuit Court relied upon the agreement between Allen and Shelly O'Connor and ambiguous testimony when it concluded that 100% of the F&M policy premiums were paid by Allen, even though the record reflected that F&M's named insured, Shelly O'Connor, paid the

premiums to the insurance carrier; that she and her father Michael O'Connor were the only named insureds and beneficiaries under the policy; and that F&M was not notified of the existence of the "agreement" between Shelly O'Connor and Allen such a finding, was clearly erroneous and not supported by the evidence in the record.

## **II. STATEMENT OF THE CASE.**

### **A. Underlying Facts.**

Shelly and Michael O'Connor are the owners of a residence located at 175 Keys Street in Keyser, West Virginia (hereinafter referred to as the "subject property"). Joint Appendix (hereinafter "JA") 0023, 0037, 0075-0076 and 0122-0123. Although the subject property was owned by the O'Connor's as tenants in common, Michael O'Connor considered the property to be Shelly O'Connor's residence. JA 0075-0076, 0079 and 0104. At some point in 2009, Shelly O'Connor decided to sell the subject property because she was interested in another property. JA 0028 and 0079.

In December 2009, Shelly O'Connor and Allen entered into a lease to own agreement (hereinafter "Agreement") with respect to the subject property. Pursuant to the terms of the Agreement, Allen agreed to pay Shelly O'Connor \$625.00 a month for 169 months until the purchase price of \$105,300 was paid in full at which time the property would be conveyed to Allen. The monthly payment was allocated as follows: \$555.00 towards the mortgage, insurance and taxes, and \$70.00 for interest. As set forth in the Agreement, any damages to the home, or repairs deemed necessary, were the sole responsibility of Allen. Although the Agreement contained an agreement to purchase, Allen was a tenant of Shelley O'Connor and subject to eviction for non-payment. JA 0175.

F&M is a West Virginia Corporation authorized to sell insurance in the state of West Virginia. F&M issued a homeowners policy of insurance to Shelly O'Connor, bearing Policy No. HPP0043466, which was effective from March 15, 2010 until March 15, 2011. JA 0176-0226. Michael O'Connor was named as an additional insured to that policy. JA 0179. Neither F&M nor its agent were aware that Shelly O'Connor had entered into an Agreement with Allen in December 2009, nor did it know that Allen was a tenant at the subject property. JA 0142, 0147 and 0170-0171. F&M was not made aware of the existence of the Agreement until seven months after the fire, as reflected by the internal time stamped copy of the Agreement in its files. JA 0288. As such, the Policy does not identify Allen, or for that matter, any purported tenant of the subject property as an additional insured. JA 0176-0226.

State Auto is a West Virginia Corporation authorized to sell insurance in the state of West Virginia. State Auto issued a homeowners rental policy of insurance to Allen, bearing Policy No. HWV 0033984, which was effective from March 10, 2010 until March 10, 2011. JA 0227-0258. The State Auto Policy provided the following coverages and limits of liability: personal property (\$20,000); loss of use (\$6,000); personal liability (\$100,000) and medical pay to others (\$1,000). JA 227.

On May 6, 2010, Allen was frying and cooking food on a stove in the kitchen of the subject property, and apparently left the stove unattended for a period of time. JA 0023. As a result of the Allen's unattended cooking, the contents within the frying pan overheated and a grease fire ensued. Eventually, fire engulfed the entire subject property which resulted in extensive damage. JA 0023. As a result of that fire, Allen died. JA 0016 and 0023. Following the fire, Shelly O'Connor submitted a claim under the F&M Policy. Following a review of the

matter, F&M paid Shelly O'Connor for damages associated with the fire loss to the subject property. JA 0024.

**B. The F&M Policy Provisions at Issue.**

There are numerous provisions within the F&M Policy at issue which precluded coverage to Allen as an "insured". With regard to whether the decedent, Allen, was a definitional insured, the policy provided:

**DEFINITIONS**

- A. In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse of a resident of the same household. "We", "us" and "our" refer to the Company providing this insurance.

...

5. "Insured means"
- a. You and residents of your household who are:
    - (1) Your relatives; or
    - (2) Other persons under the age of 21 and in the care of any person named above;

JA 0201.

Another provision upon which F&M relied was:

**SECTION I – CONDITIONS:**

- A. Insurable Interest and Limit of Liability

Even if more than one person has an insurable interest in the property covered, we will not be liable in any one loss:

- 1. To an "insured" for more than the amount of such "insured's" interest at the time of loss; or
- 2. For more than the applicable limit of liability.

JA 0211.

The F&M policy further noted that with regard to **SECTION II – LIABILITY COVERAGES**, which refers back to Coverage E – Personal Liability and Coverage F – Medical Payments To Others:

**F. Coverage E – Personal Liability**

Coverage E does not apply to:

1. Liability:

...

- b. Under any contract or agreement entered into by an “insured”. However, this exclusion does not apply to written contracts:
  - (1) That directly relate to the ownership, maintenance or use of an “insured location”; or
  - (2) Where the liability of others is assumed by you prior to an “occurrence”;unless excluded in a. above or elsewhere in this policy.

JA 217. Based upon this unambiguous policy provision, the Agreement between O’Connor and Allen did not meet the definition of an insured contract.

**C. Procedural History and Rulings Below.**

On April 4, 2012, Marlon Allen, Sr. individually and in his capacity as Administrator of the Estate of Marcus Allen in the Circuit Court of Mineral County, West Virginia filed a wrongful death action against Michael O’Connor. JA 0015-0019. According to Paragraph 5 of the underlying Complaint, “the decedent, Marcus Allen, rented property located at 175 Keys Street, in Keyser, West Virginia, from owner and landlord Michael O’Connor.” JA 0016. The underlying Complaint alleged that Michael O’Connor was negligent in failing to have a smoke detector in the home that resulted in the death of Allen. JA 0016.

On June 4, 2012, Michael O'Connor filed his answer to the Complaint. JA 0019-0025. Included in the answer was a counterclaim lodged by Mr. O'Connor's insurance company, F&M, pursuant to the terms of the Policy, seeking recovery under the doctrine of subrogation for the proceeds paid to Shelly O'Connor attributable to the loss under her policy. JA 0023-0024. The counterclaim specifically alleged "...at all times pertinent hereto Defendant and counter-Plaintiff Michael O'Connor and Shelly O'Connor have been the owners of a parcel of real estate located in Mineral County, West Virginia and situated at 175 Keys Street, Keyser, West Virginia 26726."<sup>1</sup> JA 0023. The counterclaim further asserted that at all times, F&M insured the subject property and the insureds, Michael O'Connor and Shelly O'Connor against standard perils including risk of loss by fire. JA 0023. By virtue of the counterclaim, and as a subrogation matter, F&M sought recovery for sums that it had paid its insured for damages sustained by the fire. JA 0023-0024.

On July 11, 2012 the Estate, by and through its counsel Trevor K. Taylor, retained by Allen's insurer State Auto, filed its answer to the counterclaim and asserted that F&M could not maintain a subrogation claim against Allen because he had an interest in the policy. JA 0026-0031. The legal basis for the Estate's position, as postured by State Auto, was that Allen obtained an "interest" in the F&M Policy because a portion of each monthly payment that Allen made to Shelly O'Connor would "go for mortgage, insurance and taxes" as per the Agreement. JA 0175. Thus, State Auto, through the Estate, argued that Allen was an additional insured under the F&M Policy.

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<sup>1</sup> Later discovery revealed that Michael O'Connor had no actions with regard to the leasing of the property by Shelly O'Connor to decedent Allen.

On October 8, 2013, F&M filed a motion to intervene in the action as a named party and filed a motion for summary judgment seeking a ruling that Allen was not an insured under the policy of insurance. JA 0259-0288. F&M did not dispute that Shelly O'Connor and Michael O'Connor were insureds under the policy, nor did it dispute that the O'Connors were entitled to a defense in the underlying wrongful death action commenced against Michael O'Connor. F&M intervened solely regarding the issue of whether Allen was an insured under the F&M policy. JA 0270.

On November 1, 2013, the Estate (State Auto) filed a cross-motion for summary judgment arguing that Allen should be deemed an insured under the F&M Policy and, therefore, F&M was prohibited from asserting a subrogation claim against the Estate. JA 0289-0300. On March 5, 2014 and September 2, 2014, the Circuit Court entered final Orders with respect to the subrogation claim. JA 0001-0014. The Circuit Court determined that Allen had an interest in the policy because a portion of his rental payments were allocated to the "insurance" premiums pursuant to an agreement between Allen and Shelly O'Connor. JA 0001-0007. By virtue of its ruling, the Circuit Court created an exception to West Virginia's general rule that a party must be a named party to the insurance contract. In that regard, F&M appealed the Circuit Court's September 2, 2014, 2014 Order to this Court.

### **III. SUMMARY OF ARGUMENT.**

This matter arises out of a residential landlord-tenant situation where the tenant, Allen, had signed a lease to own agreement with landlord Shelly O'Connor. Shelly O'Connor was insured by F&M Insurance Company for a premises located in Keyser, West Virginia. The tenant, Allen, was insured by State Auto for the same premises. On May 6, 2010, a fire occurred

at the residence which resulted in the death of Allen. Although the fire was determined to have been caused due to the negligence of Allen, his family brought a wrongful death claim against Michael O'Connor. Michael and Shelly O'Connor were both insureds under an F&M policy of insurance and F&M paid the proceeds for the fire loss of the premises to its insured, Shelly O'Connor. F&M then, by means of a counterclaim in the wrongful death action brought by the Estate, filed a subrogation claim to recoup the loss it had paid to its insured, Shelly O'Connor. Thus, the real parties of interest to the proceedings before this Court are F&M and State Auto pursuant to their respective policies of insurance.

Even though it was undisputed that (1) the cause of the fire was due to the action of Allen; (2) Allen possessed renter's insurance through State Auto which included liability coverage; and (3) Allen was not a named insured under the F&M Policy, the Circuit Court determined that F&M was precluded from pursuing a subrogation action because Allen was an equitable insured under its Policy. The Circuit Court reached this determination based solely upon the rental/lease agreement and testimony from the parties which indicated that a portion of the rent paid by Allen, to his landlord, Shelly O'Connor, was allocated to payment of expenses associated with the property.

The Circuit Court's reasoning was erroneous and contradicts basic West Virginia law concerning the construction of insurance contracts. It was, and still is, F&M's position that Allen was not a named insured or definitional insured, nor was the lease to own agreement an insured contract for purposes of the policy that F&M had issued to Michael and Shelly O'Connor. Thus, the Circuit Court committed reversible error when it ruled that Allen was an equitable insured under the policy based upon disputed facts as to the characterization of the funds paid by Allen to Shelly O'Connor, as well as the equitable nature of subrogation. Many of

the facts relied upon by the Circuit Court were disputed with regard to its Order and disposition of the claim.

It is from the dismissal of the subrogation action and the Order granting the Estate's motion for summary judgment as to the subrogation claim that F&M appeals.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.**

F&M maintains that oral argument is necessary pursuant to the criteria outlined under Rule 18(a) of the West Virginia Rules of Appellate Procedure ("W.Va.R.App.P.") because (a) the parties have not agreed to waive oral argument; (b) the petition is not frivolous; and (c) the dispositive issues have not previously been authoritatively decided by this Court and the decisional process would be significantly aided by oral argument. F&M further states that this case is suitable for oral argument pursuant to W.Va.R.App.P. 19 because it involves: (1) assignments of error in the application of settled law; and (2) the unsustainable exercise of discretion where the law governing that discretion is settled. This case is further suitable for argument under W.Va.R.App.P. 20 because it potentially involves issues of first impression and issues of fundamental public importance.

#### **V. ARGUMENT**

##### **A. The standard of review for a motion for summary judgment.**

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure ("W.Va.R.Civ.P."), summary judgment is required when the record shows that there is no "genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W.Va. 385, 390, 508 S.E.2d 102, 107 (1998). "A

circuit court's entry of summary judgment is reviewed de novo." Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In considering the propriety of summary judgment, this Court is to apply the same standard that is applied at the circuit court level. *Watson v. INCO Alloys Int'l, Inc.*, 209 W.Va. 234, 238, 545 S.E.2d 294, 298 (2001).

In assessing the record to determine whether there is a genuine issue as to any material facts, the Court is required to resolve all ambiguities and draw all factual inferences in favor of party against whom summary judgment is sought. *Hanlon v. Chambers*, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995). A "genuine issue" of material fact, for summary judgment purposes, is simply one half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the nonmoving party that a reasonable jury could return a verdict for that party. The opposing half of a trial worthy issue is present where the nonmoving party can point to one or more disputed "material facts." *Daniel v. United Nat. Bank*, 202 W.Va. 648, 651, 505 S.E.2d 711, 714 (1998). A "material fact" which precludes summary judgment is one that has the capacity to sway the outcome of the litigation under the applicable law. *Pritt v. Republican Nat. Committee*, 210 W.Va. 446, 452-453, 557 S.E.2d 853, 859-860 (2001). Thus, this Court must resolve all ambiguities and draw all factual inferences in favor of F&M. *Hanlon, supra*, and *Estate of Helmick v. Martin*, 192 W.Va. 501, 504, 453 S.E.2d 335, 338 (1994).

**B. The Circuit Court committed reversible error when it concluded that Marcus Allen was an equitable insured under the policy of insurance issued by F&M to Shelly O'Connor, with Michael O'Connor as a named additional insured.**

The Circuit Court specifically found that F&M was not permitted to subrogate against Allen because he "paid" for the policy of insurance that was at issue in the case. JA 0004. As support for its position, the Circuit Court cited to Syl. Pt. 1, *Kittle v. Icard*, 185 W.Va. 126, 405

S.E.2d 456 (1991); *Huggins v. Fitzpatrick*, 102 W.Va. 224, 135 S.E. 19 (1926); Syl Pt. 3, *Ray v. Donahue*, 177 W.Va. 441, 352 S.E.2d 729 (1986). The Circuit Court found that “the right of subrogation depends upon the facts and circumstances of each particular case.” *Kittle*, 185 W.Va. at 133, 405 S.E.2d 456. JA 0004. This finding by the Circuit Court was in error in two respects, (1) it was based upon the existence of genuine issues of material fact concerning F&M’s counterclaim and therefore was precipitous and (2) failed to take into account the fact that Allen was not a named insured or definitional insured under the policy of insurance in the underlying case, a matter of which the material facts were undisputed.

It was undisputed that the only named insured for homeowners policy issued by F&M (Policy No. HPP0043466) for the residence located at 175 Keys Street, Keyser, West Virginia 26726 was Shelly O’Connor. JA 0178-0179. In addition, the Policy, on the second page of the policy declaration plainly identified only one additional named insured Michael J. O’Connor with an address of Route 1, Box 136B, Keyser, West Virginia. JA 0179. These undisputed facts were disregarded, or otherwise ignored by the Circuit Court. Instead, the Circuit Court chose to accept as true several factual assertions presented by State Auto, which were specifically disputed by F&M.

The disputed facts upon which the Circuit Court based its findings, focused upon the “lease to own” agreement between Shelly O’Connor and Allen. Shelly O’Connor had entered into a written agreement with Allen called a lease to own contract in December 2009. Shelly O’Connor had testified that the contract was negotiated by herself and Allen. JA 0002, 0131-0134 and 0175.

The clear language in the contract provided as follows:

**When the mortgage payment are paid in full at First United Bank Shelly O' Connor will receive all further payments until the house is paid in full, which is \$105,300. At that time, only the deed will be given to Marcus Troy Allen as well as changing homeowner name.** (Emphasis added.)

See JA 0175.

The finding by the Circuit Court was contrary to the unambiguous language of the Agreement between Allen and Shelly O'Connor. There was further testimony as follows, at O'Connor's deposition on August 20, 2013, she was asked:

Q. [W]hat action would you have taken to secure your interest should Mr. Allen have breached this agreement? What would you have done to protect yourself?

A. I would have to evict him and take the house back.

JA 153 (lines 1-6). This testimony is contrary to the insured status found by the Court.

Further testimony was that Ms. O' Connor was not signing over checks from Mr. Allen:

Q. But did you have access to his checking account or his funds?

A. No, sir.

Q. You just had his cash? Is that correct?

A. Yes, sir.

JA 155 (lines 7-11). This testimony creates a question of facts as to who "paid" for the F&M policy.

This sworn testimony was at odds with the findings of the Circuit Court. At a minimum it created an issue of material fact which made Summary Judgment on this basis in error.

*Daniel, supra, Pritt, supra, Hanlon, supra, and Estate of Helmick, supra.*

The record further reflected that Shelly O'Connor believed that Allen was a tenant and was leasing the property as evidenced by her testimony below:

A. He was leasing the house from me...

JA 157 (line 12). This belief was supported by the fact Allen had obtained a State Auto renter's policy.

Further, Shelly O'Connor testified that no legal documentation was ever filed in land records because there was no intent to change ownership unless and until the house was paid in full:

Q. And why didn't you file anything stating that Mr. Allen was the owner of the home with the county records room in the land records room, in the land records?

A. Because the Deed wasn't going to be put in his name until he paid in full.

JA 158 (lines 4-8). Ms. O'Connor also testified under oath that she considered herself as the landlord.

Q. [W]ould you have considered yourself a landlord of the 175 Keys Street?

A. Yes.

Q. And then would that be safe to call Mr. Allen the tenant or renter? You said you had determined Mr. Allen was that.

A. I considered him the leaser – lessee.

JA 160 (lines 3-9).

As reflected by the foregoing, the Circuit Court's determination that as a matter of equity subrogation would not lie was not supported by the record. The instant case involves a homeowners policy of insurance and should be interpreted under matters of contract law, not property law. "Subrogation and equitable remedies... are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances and the natural rules which govern their use..." *Huggins, supra*.

The Circuit Court's finding that as a matter of equity the subrogation claim could not proceed failed to take into account the intent of the parties. A basic premise is that a tenant is responsible to a landlord for damage to leased property. The Agreement between Allen and Shelly O'Connor was a residential arrangement, not a commercial lease arrangement with provisions for insurance coverage levels and indemnity. Under a commercial scenario, the Circuit Court's analysis arguably may have been supported by the record. Such was not the case, however, regarding this subrogation claim on a residential property.

The Circuit Court's prohibition against F&M to subrogate against the tortfeasor (Allen) who caused the fire at issue was in contravention of the very definition of subrogation. Subrogation has been defined as "the begotten of a union between equity and her beloved - the natural justice of placing the burden of bearing a loss where it ought to be." *Sutton v. Jondahl*, 532 P.2d 478, 482 (Oklahoma Civil App. 1975). Although couched in terms of F&M versus the Estate, in reality the case is F&M versus State Auto. If insurance was not involved, the landlord, Shelly O'Connor, would have had a cause of action against Allen's Estate for causing the fire. On this basis, the Circuit Court's reliance upon equity to dismiss the subrogation action does not create a "narrow exception" in the law of subrogation. Instead, it abrogates the right of subrogation based upon a misguided understanding of the lease to own arrangement. This "narrow exception" created by the Circuit Court is a deviation from the common law principle that one should be held liable for their negligent acts. Further, it ignores the fact that Allen was insured by State Auto with a policy that provided liability coverage for his actions. In reality the Circuit Court was faced with a subrogation against another insurance carrier and, therefore, its finding that subrogation was precluded on the basis of equity was misplaced and erroneous.

**C. The Circuit Court’s creation of an exception to controlling law as a matter of first impression by holding that an insurer was precluded from exercising its lawful right of subrogation against the lessee if portions of the rent paid by the lessee are allocated by the insured for maintaining insurance was in error.**

The Circuit Court specifically stated that “the law in West Virginia clearly establishes that not only is subrogation an equitable remedy but of great importance in this case. This ‘remedy’ is for the benefit of one secondarily liable who has paid the debt of another and to whom inequity and good conscious should be assigned the right and remedies of the original creditor.” *Citing Kittle, supra.* JA 0005. What the Circuit Court failed to recognize was that the F&M Policy only listed Shelley O’Connor as the named insured on the homeowners policy declaration page. JA 0178-0179. Allen did not appear on the face of the declaration page nor anywhere in the F&M policy. JA 0176 to 0226. The policy did have an “additional insured”, but it was not Allen. JA 0179.

This Court has repeatedly stated that the language in insurance contracts, like other contracts, should be given “its plain ordinary meaning.” *Noland v. Va. Ins. Reciprocal*, 224 W.Va. 372, 378-79, 686 S.E.2d 23, 30 (2009). Black letter law of West Virginia has also stated that when the provisions of an insurance contract are clear and unambiguous, “they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.” *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 815-16, 172 S.E.2d 714, 715 (1970). An insurance contract provision is only ambiguous where it is “reasonably susceptible of two different meanings or where reasonable minds may disagree as to its meaning.” *See Prete v. Merchants Prop. Ins. Col*, 159 W.Va. 508, 223 S.E.2d 441 (1976).

In the instant case, the record was clear that Allen was **not** a named insured under the F&M policy. JA 0176-0226. The analysis then, for purposes of this appeal, is whether there was

evidence upon which the Circuit Court could find that Allen was a “definitional” insured. F&M maintained that there were no facts which supported an argument that Allen was a definitional insured under the policy.

The Policy provided in the HOMEOWNERS 2 – BROAD FORM, section, page 1 of 20, as follows:

**DEFINITIONS**

- A. In this policy, “you” and “your” refer to the “named insured” shown in the Declarations and the spouse of a resident of the same household. “We”, “us” and “our” refer to the Company providing this insurance.

JA 0201. The record is clear that Allen was not an insured and under the subsection “A” of the DEFINITIONS, Allen was not “named” or the spouse. Accordingly, he did not meet the definition under this clear policy provision.

As also argued by F&M below, SECTION I – PROPERTY COVERAGES of the Policy contained no provision or definition that would bring Allen within the terms of the policy of insurance as an “insured.” Specifically, SECTION I – CONDITIONS, on page 11 of 20, provided as follows:

- A. Insurable Interest and Limit of Liability

Even if more than one person has an insurable interest in the property covered, we will not be liable in any one loss:

1. To an “insured” for than the amount of such “insured’s” interest at the time of loss; or
2. For more than the applicable limit of liability.

JA 0211. The Estate claimed that the lease agreement between O’ Connor and Allen was an insured contract under the homeowners policy, thereby conferring upon Allen an additional insured status under the policy. JA 0175. The extension of this argument is that the lease to own

conferred an interest in the real estate to Allen. F&M argued that an insured contract was not within the definitions of the homeowner policy at issue.

As an alternative to definitional insured status, as a matter of first impression, the Circuit Court conferred upon Allen “equitable insured” status. Because F&M was seeking to assert a right of subrogation against the third-party tortfeasor, whom it alleged was responsible for the fire and whom F&M maintained was not an insured, it was error for the Circuit Court to find that F&M’s right to subrogation “produces a result that is not equitable.” JA 0005. The error in the Circuit Court’s analysis is exemplified in its finding that F&M was seeking to recover from Allen “under a policy of insurance that Mr. Allen paid for.” JA 0005. This finding was allegedly supported by the “lease to own” agreement. It was the Estate’s position below that the “lease to own” agreement bestowed upon Allen a contingent property interest. JA 0175. Although the Circuit Court made no such finding, its determination that Allen had an interest in the insurance policy produced the same effect.

This Court has previously held in circumstances such as the instant case that where parties have made claim to proceeds under an insurance policy where they may have had some interest in the real property that “an insurance policy and all rights arising from the policy are controlled by principles of contract, rather than property law.” *Mazon v. Camden Fire Ins. Ass’n*, 182 W. Va. 532, 533, 389 S.E.2d 743, 744 (1990). In *Mazon* this Court specifically held that:

It is well established that a contract of insurance is a personal contract between the insurer and insured named in the policy. It is also axiomatic that an insurance policy is a contract of indemnity which pertains to the parties to the contract opposed to the property being insured. Accordingly, an individual who is not a party to the insurance contract cannot maintain a suit on the policy. (Internal citations omitted)

*Id.*, at 534, 389 S.E.2d at 745.

The *Mazon* case is analogous to the case at bar. As in the *Mazon* case, the contract of insurance was solely between Shelly O'Connor and F&M, not Allen. The evidence was undisputed that Allen was not a party to the insurance policy. JA 00179. The evidence in the record was that neither the insurance agency nor F&M knew of Allen or the lease to own agreement. The testimony was:

Q. Did you ever explain to the Evans Agency that when you were buying the policy this policy that this was under a lease-to-own situation?

A. I don't believe so.

Q. Whenever you bought this policy, was this a renewal of a policy or did you take this policy out whenever you and Mr. Allen made the agreement to sell the property?

A. I believe it was a renewal.

JA 0142 (lines 4-12). The record actually reflects that F&M did not learn about the existence of the Agreement until seven months after the fire. JA 0288.

To summarize, Shelly O'Connor never contacted the insurance agency or F&M concerning the Agreement with Allen. She did not request at any time that the Policy be amended to include an additional insured or that her interests were subject to an "insured contract". Therefore, there was no bargained for legal detriment/consideration between F&M and Shelly O'Connor regarding Allen. Moreover, the Agreement does not include language concerning any obligations owed by F&M or any other property insurer to Allen.

While the Agreement does indicate that Shelly O'Connor intended to allocate each month's rent to the mortgage, insurance taxes and interest, this did not create any type of insured status under the Policy for Allen. Obviously, the purpose for the allocation language was to demonstrate what portions of the rent were being applied to the purchase price, and nothing

more. In fact, the Agreement specifically indicates that Allen would be solely responsible for any damages to the subject property or if someone were to get hurt. JA 0175. Thus, Allen was not being indemnified by Shelly O'Connor with respect to any potential liability or damages with respect to the subject property. To the contrary, pursuant to the terms of the Agreement, Allen agreed to fully indemnify Shelly O'Connor. This is further substantiated by the fact that Allen secured renter's insurance with respect to the subject property, which included liability coverage in the amount of \$100,000 per occurrence from State Auto. JA 0227-0259. Based upon these indisputable facts, Allen was not a named insured, additional insured, definitional insured or equitable insured. Therefore, the Circuit Court's finding that F&M was precluded from pursuing subrogation against Allen because he enjoyed equitable insured status under the F&M Policy was erroneous.

**D. The Circuit Court's finding that Allen was an equitable insured based upon his "payment" for the policy at issue was in reliance upon information not supported by the record, was clearly erroneous and not supported by the evidence and, therefore, was in error.**

The source of the funds from which Shelly O'Connor paid F&M for the policy of insurance should have been of no consequence in the analysis of the Circuit Court in this case. As stated above, Shelly O'Connor had access to cash payments from Allen. JA 155. The Circuit Court relied upon its finding of fact that "the lease to own contract addressed how the monthly payment were to be allocated. Specifically, the contract indicated that the mortgage and taxes for the home were to be paid from the monthly payments of Mr. Allen." JA 0002. The Circuit Court further relied upon the Agreement without any specific reference or citation to any terms of the Agreement itself. In that regard, the Circuit Court concluded "...the contract indicated that the homeowners insurance for the property was to be paid by Mr. Allen's monthly payment." JA

0002. The actual transcript from the December 16, 2013 hearing on the matter indicates that the Circuit Court found the following:

If we had twenty five similar cases like this I think I would probably rule, agree with your position twenty four times. I think, in this case where you've got, and reading both of you cite the *Mazone* case or *Mazun* however you say it, you have the fact that Mr. Allen was paying for the premium, a hundred percent of the premium, and you have Shelly O' Connor's deposition where she says this was for his benefit. Looking at the case law, if it's for the benefit and that person is making the premium, I believe, that carves out a very narrow exception and I don't think that's going to turn insurance law up on its head because of the unusual facts of this case. So, I'm going to find, because under that case law, that this is a very narrow exception, that he did have an interest in the policy, that Shelly O' Connor's deposition testimony, he paid for it and she needed it as for his benefit -- -- case law. So, I'm going to rule that since he had an interest in the policy there could be no subrogation against him. I'm going to throw out the subrogation claim.

JA 0401. It is important to note that the Circuit Court never found that Allen "had equitable title to the property". The Circuit Court appears to have been swayed by the tragic circumstances of the wrongful death case.

A review of the lease to own agreement entered into between Shelly O'Connor and Allen shows that the agreement specifically, as a matter of contract, states that "if there are any damages to the said house after Mr. Allen moves in he is solely responsible." JA 0175. Pursuant to the terms of the Agreement, Allen was required to fully indemnify Shelly O'Connor for any potential liability or damages with respect to the subject property. The Agreement does not contain any indemnification provisions which inure to the benefit of Allen. For these very reasons, Allen obtained a renter's policy of insurance from State Auto. The mere fact that the Agreement includes a breakdown for each month's rent did not create an indemnification provision for Allen's benefit, nor did it bestow upon him equitable insured status on any policy of insurance that Shelly O'Connor purchased. The allocation provision in the Agreement was

nothing more than an abridged amortization schedule so the parties could see what portion of the rent was being applied to the purchase price.

Furthermore, as a matter of contract law, Shelly O'Connor, as the purchaser of the policy of insurance from F&M, had a legal responsibility to pay the premium. This payment of the premium was not conditioned upon whether or not she collected the rent from her tenant, Mr. Allen. In addition, the Agreement did not specify that Shelly O'Connor was required to maintain homeowner's insurance on the property.

Therefore, the Circuit Court's finding that Allen enjoyed equitable insured status under the F&M Policy was erroneous.

## **VI. CONCLUSION.**

For the reasons stated above, Petitioner Farmers & Mechanics Mutual Insurance Company respectfully requests that this Court find as follows:

- (1) That a lease to own agreement does not create equitable insured status for a tenant; or, in the alternative,
- (2) That the determination of equitable insured status should be determined on a case by case basis and that in the case at bar there existed genuine issues of material fact which require further development of the facts related to the understanding of the parties, the knowledge of the insurance company, and agent at the time of issuance of the policy.

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**VII. CERTIFICATE OF SERVICE.**

I, Susan R. Snowden, counsel for Petitioner, Farmers & Mechanics Mutual Insurance Company, do hereby certify that I served the foregoing **Petitioner, Farmers & Mechanics Mutual Insurance Company Brief**, upon the following counsel, by first class mail, postage pre-paid, on this the 23rd day of **December, 2014**.

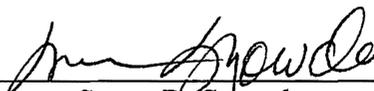
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