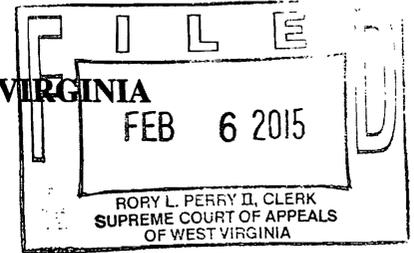


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0967



**FARMERS & MECHANICS MUTUAL  
INSURANCE COMPANY, Intervenor Below, and  
MICHAEL O'CONNOR, Counter-Plaintiff Below,**

**Petitioners,**

vs.

**Appeal from the Circuit Court of Mineral  
County, West Virginia  
(No. 12-C-43)**

**MARLON ALLEN, SR., Individually and as  
Administrator of the ESTATE OF MARCUS ALLEN,  
Counter-Defendant Below,**

**Respondent.**

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**RESPONSE TO PETITIONER'S BRIEF OF  
MARLON ALLEN, SR., INDIVIDUALLY AND AS  
ADMINISTRATOR OF THE ESTATE OF MARCUS ALLEN**

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## STATEMENT OF THE CASE

### I. COUNTER TO PETITIONER'S FACTUAL ALLEGATIONS.

Petitioner Farmers & Mechanics Mutual Insurance Company included a discussion of the purported "Underlying Facts" relating to the issues before this Court. However, Petitioner's discussion omits several important facts which bear directly upon this Court's consideration of Petitioner's various Assignments of Error. The following is a discussion of these important facts.

In December 2009, Shelly O'Connor and Michael O'Connor entered into a lease-to-own contract with Marcus Allen for the residence located at 175 Keys Street, Keyser, West Virginia. (*See* Joint Appendix (hereinafter "JA"), at 175.) In late 2009, Ms. O'Connor decided that she wanted to move. (*Id.* at 124.) In order to buy another home, she had to sell her home at 175 Keys Street. (*Id.* at 125-126.) Marcus Allen was looking to buy a home and was interested in the 175 Keys Street residence. (*Id.*) Ms. O'Connor knew this because she was extremely good friends with Marcus Allen. (*Id.* at 135.) Because Marcus Allen was going to have problems obtaining traditional financing for the residence, Ms. O'Connor negotiated an owner-financing arrangement. (*Id.* at 134-137.)

According to Ms. O'Connor, this contract was negotiated between her and Marcus Allen. (*Id.* at 132-133.) Pursuant to this contract, Marcus Allen was to pay the total purchase price of \$105,300.00 to Shelly O'Connor. (*Id.* at 175.) However, during the negotiations, it was agreed that the monthly payment was to be kept as low as possible. (*Id.* at 134.) As a result, it was agreed that Marcus Allen would pay the total purchase price in monthly installments in the amount of \$625.00 over the course of 14 years. (*Id.* at 175.) The payment of \$625.00 was to be allocated as follows: \$555.00 for the mortgage, **insurance** and taxes and \$70.00 to Ms.

O'Connor as interest each month. (*Id.* at 23-25; 175.) (emphasis added) The lease-to-own contract indicated that once Marcus Allen took possession of the house, neither Ms. O'Connor nor Michael O'Connor were responsible for repairs to the home. (*Id.*)

More specifically, Ms. O'Connor offered the following testimony at her deposition on August 20, 2013, regarding the contract between her, Mr. Connor and Marcus Allen:

Q. In this contract, you have in here a - - how the payment of 625 a month was to be broken down. It's the last paragraph. Do you see that, Shelly?

A. Yes, sir.

Q. It says the payment of 625 is broken down as follows: \$555 will go for mortgage, insurance, and taxes. Do you see that?

A. Yes, sir.

Q. That was a provision that you put in there. Is that correct?

A. Yes, sir.

Q. Why did you include that language?

A. Because I wanted to make sure that he knew what he was paying for.

Q. Okay. You wanted him to understand that this is what he was getting as part of the contract?

A. Correct, yes.

Q. Would it be accurate to say that what you were trying to do is, is to demonstrate to him that there was a mortgage outstanding on the property, that he was paying money to make sure it was satisfied?

A. Yes.

Q. And, likewise, that there were taxes on the property that he was paying to make sure that the property was protected from being put up for sale on the courthouse steps; right?

A. Yes, sir.

Q. And, also, that he was paying for insurance that would protect the property that he was now the owner of; is that correct?

A. Yes, sir.

Q. Would it be accurate to say that the insurance that he was paying for was insurance to protect his own property?

A. Yes.

(*Id.* at 138-140.)

Notably, Petitioner failed to address these uncontroverted facts surrounding the purchase of its policy by Shelly O'Connor. Indeed, Petitioner makes no mention of the fact that Ms. O'Connor purchased the Petitioner's policy solely from the monies paid by Marcus Allen for Marcus Allen's benefit. As Ms. O'Connor testified during her deposition, the \$389.00 premium payment for the Petitioner's policy that insured the home was paid entirely from Marcus Allen's monthly payments to her. (*Id.* at 146.) Ms. O'Connor testified that the Petitioner policy purchased with Marcus Allen's money was purchased for Marcus Allen's benefit. (*Id.* at 141; 143; 146.) She indicated that it was for Marcus Allen's benefit because as she saw it, "the house was his." (*Id.* at 152.) In fact, Ms. O'Connor testified that since Marcus Allen lived at the home and paid for the policy on the home, her expectation was that Marcus Allen was the insured under the policy. (*Id.* at 146.) Ms. O'Connor stated that when the contract was signed in December 2009 she viewed the 175 Keys Street residence as belonging to Marcus Allen. (*Id.* at 40; 149.) She indicated that while she was still listed on the deed as the owner of the home, she no longer had access to the home (because the locks were changed), she no longer paid any bills

for the home, and she no longer called it her “home.” (*Id.* at 165-167.) She testified that it was Marcus Allen’s home, and she purchased the Farmers policy at issue for his benefit and to protect his interests in the home. (*Id.* at 167.)

Ms. O’Connor’s expectation was that Marcus Allen should have been protected by the policy because he was the one who paid for the policy and, for that matter, was the person who primarily benefitted from the policy. (*Id.*) In fact, according to Ms. O’Connor, she intended for Marcus Allen to be protected by the policy. (*Id.*) She agreed that Marcus Allen trusted her to secure insurance for the home and for his interests to be protected. (*Id.* at 167-168.) That is what she felt she had done by obtaining the Farmers policy at issue in this case. (*Id.* at 162-164.) Ms. O’Connor testified that when she drafted the agreement between herself and Marcus Allen, her intention was to make sure that Marcus Allen and she were both protected in this transaction. (*Id.* at 146.) Ms. O’Connor indicated that the extent of her “ownership” of the home was that the home had yet to be transferred into Marcus Allen’s name and that she had the right to retake the home if Marcus Allen failed to make his monthly payments. (*Id.* at 152-153.) However, Ms. O’Connor denied that she paid anything out of her own pocket for the Farmers policy. (*Id.* at 162-163.)

Petitioner also failed to advise this Court of Michael O’Connor’s testimony, which like Ms. O’Connor, indicated that the 175 Keys Street property was Marcus Allen’s home and that the Farmers’ policy was purchased for Marcus Allen’s benefit. (*Id.* at 105-106.) Mr. O’Connor testified that there was insurance purchased for the property from the payments made on a monthly basis by Marcus Allen. (*Id.* at 105.) Mr. O’Connor believed that since Marcus Allen paid for the policy then like Mr. and Ms. O’Connor, Marcus Allen was also insured under the policy. (*Id.* at 108.) Mr. O’Connor agreed with Ms. O’Connor’s testimony that once Marcus

Allen moved into the house after signing the lease-to-own agreement, the house belonged to Marcus Allen. (*Id.* at 113.) Mr. O'Connor testified that it was his expectation that all three of them would be protected by the Farmers policy. (*Id.* at 106.)

## II. PROCEDURAL HISTORY.

On April 5, 2014, Marlon Allen, Sr., individually and as Administrator of the Estate of Marcus Allen (hereinafter referred to as "Mr. Allen"), filed a Complaint in the Circuit Court of Mineral County, West Virginia, relating to a fire that occurred at the home located at 175 Key Street, Keyser, West Virginia. (*See* JA, at 15-18.) Marcus Allen died as a result of fire. (*See id.*) Mr. Allen sued Michael O'Connor, one of the two identified owners of the property, claiming that the dwelling Marcus Allen was leasing to own had no smoke detectors, which was in violation of state and local laws, rendering the property unsafe, unsecure and uninhabitable, causing Marcus Allen's death. (*See id.* at 16.)

Thereafter, Michael O'Connor served an Answer to Mr. Allen's Complaint on June 4, 2012. (*See id.* at 19-25.) Mr. O'Connor asserted a Counter-Claim against Mr. Allen, individually and as Administrator of the Estate of Marcus Allen, alleging that it was his actions that caused the fire, damaging the home. (*Id.*) It was noted in the Counter-Claim that Michael O'Connor and Shelly O'Connor were insured by Petitioner, and, as a result, Petitioner paid its insureds for the damage they sustained in the fire. (*Id.* at 23-24.) Petitioner, by virtue of the Counter-Claim, sought subrogation from Mr. Allen for the monies it paid to its insured. (*Id.* at 24.) On July 11, 2012, Mr. Allen served his Answer to the Counter-Claim.

On October 8, 2013, after discovery had been conducted in this matter, Petitioner filed a Motion for Leave to Intervene. (*Id.* at 259-266.) Petitioner sought leave to intervene in the action for purposes of "resolving certain questions and disputes which [had] arisen regarding the

status of the decedent, Marcus Allen, as a potential insured on a policy of insurance issued by F&M related to a Counterclaim pending ..., to construe the insurance policy at issue, and declare the rights and obligations of the parties ....” (*Id.* at 259.) Filed contemporaneously with its Motion for Leave to Intervene was Exhibit 1, a Motion for Summary Judgment and Memorandum in Support. (*Id.* at 267-284.) In particular, the Circuit Court was called upon to determine whether Marcus Allen was, in some way, an insured under the Petitioner’s policy of insurance, which had been issued to Ms. O’Connor, prohibiting Petitioner from seeking subrogation against Marcus Allen’s Estate.

Subsequently, on November 1, 2013, Mr. Allen filed his own Motion for Summary Judgment and Memorandum of Law in Support. (*Id.* at 289-300.) Responses were filed to the respective motions, and a hearing was held on December 16, 2013. (*See id.* at 301-328; 387-402.) By Order entered on March 5, 2014, the Circuit Court granted Mr. Allen’s Motion for Summary Judgment. (*See id.* 8-14.) There, the Court found that, based upon Ms. O’Connor’s clear testimony at her deposition that she believed the policy was for Marcus Allen’s benefit, as well as the fact that 100% of the premiums were paid from Marcus Allen’s money, Petitioner was prohibited from seeking subrogation against Marcus Allen. In making this finding, the Circuit Court relied upon *Mazon v. Camden Fire Insurance Association*, 182 W. Va. 532, 389 S.E.2d 743 (1990).

After a failed attempt to appeal the Circuit Court’s March 5<sup>th</sup> Order due to a finding by this Court that the March 5<sup>th</sup> Order was an interlocutory order that was not subject to appeal, Petitioner made a Motion for Relief from Order Granting Summary Judgment. (JA, at 367-380.) The Circuit Court granted Petitioner’s Motion, making the March 5<sup>th</sup> Order a final order pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure. (*Id.* at 7.)

## SUMMARY OF ARGUMENT

Petitioner has asserted three separate assignments of error in its brief. However, they are largely redundant and all of them fail to address the real issue in this case, which is that Petitioner is attempting to assert its right to subrogation against the individual who paid for the policy and who had equitable title in the property. In other words, Petitioner seeks to have the equitable doctrine of subrogation used against Marcus Allen, when it is Marcus Allen and his property that should be protected by an insurance policy purchased solely by Marcus Allen's money. Essentially, Petitioner's claim for subrogation allows it to keep insurance proceeds paid by Marcus Allen for the home he was purchasing that was insured by Petitioner, then ask that Marcus Allen pay back properly paid proceeds from the Policy for this loss. This produces a situation where Petitioner is unjustly enriched, and such a result, is not permitted by West Virginia law. In fact, the doctrine of equity mandates that Petitioner's claim fail as a matter of law. *Kittle v. Icard*, 185 W. Va. 126, 405 S.E.2d 456 (1991); *Huggins v. Fitzpatrick*, 102 W. Va. 224, 135 S.E. 19, 20 (1926); Syllabus Point 3, *Ray v. Donohew*, 177 W. Va. 441, 352 S.E.2d 729 (1986); *Porter v. McPherson*, 198 W. Va. 158, 479 S.E.2d 668 (1996); *Buskirk v. State-Planters' Bank Trust Co.*, 113 W. Va. 764, 169 S.E. 738 (1933). In addition to the traditional principles of equity, the clear principles of law set forth by this Court in *Mazon v. Camden Fire Insurance Association*, 182 W. Va. 532, 389 S.E.2d 743 (1990) further defeat Petitioner's contention. When the general principles of law established in *Mazon* are applied to the present case, Marcus Allen's interest in the subject property was protected by the Petitioner's policy as he was the individual for whom the policy was secured. Under these circumstances and contrary to

Petitioner's assertion, there were no genuine issues of material fact, and the Circuit Court properly granted Respondent's Motion for Summary Judgment.

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

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument in this case is unnecessary because the principle issues in this case have been authoritatively decided previously, and the facts and legal arguments are adequately presented in this brief and the record on appeal. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

### **ARGUMENT**

#### **I. STANDARD OF REVIEW.**

"A circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, *Painter v Peavey*, 192 W. Va. 189, 451 S.E.2d 755 (1994). When considering the propriety of summary judgment, the West Virginia Supreme Court of Appeals applies the same standard that is applied at the circuit court level. "[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 the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). If the record taken as a whole cannot lead a rational trier of fact to find for the nonmoving party, summary judgment must be granted. *Parker v. Estate of Bealer*, 656 S.E.2d 129, 132 (2007) (citing *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995)). In the present case, the Circuit Court of Mineral County properly granted Mr. Allen summary judgment.

**II. THE CIRCUIT COURT PROPERLY CONCLUDED THAT, BASED UPON EQUITABLE PRINCIPLES, PETITIONER HAD NO RIGHT TO SUBROGATION AGAINST MARCUS ALLEN, THE PERSON WHO FUNDED THE PETITIONER'S POLICY.**

As noted by the Circuit Court in its March 5, 2014, Order, Petitioner should not be permitted to subrogate against Mr. Allen because he paid for the policy. (JA, 12.) Petitioner is attempting to use an equitable doctrine - subrogation - so as to produce an inequitable, unfair, and unjust result. Indeed, this Court has explored the meaning and purpose of subrogation on numerous occasions, and in that regard, it is important to note that in West Virginia "the right of subrogation depends upon the facts and circumstances of each particular case." Syllabus Point 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, 20 (1926); Syllabus Point 3, *Ray v. Donohew*, 177 W. Va. 441, 352 S.E.2d 729 (1986). Additionally, the West Virginia Supreme Court of Appeals has held that, "subrogation, being a creature of equity, will not be allowed except where the subrogee has a clear case of right and no injustice will be done to another." Syllabus Point 2, *Kittle v. Icard*, 185 W. Va. 126, 405 S.E.2d 456 (1991); *Buskirk v. State-Planters' Bank Trust Co.*, 113 W. Va. 764, 169 S.E. 738 (1933). As explained in *Porter v. McPherson*, 198 W. Va. 158, 479 S.E.2d 668 (1996), "subrogation did not originate out of statute, custom, or common law but it was adapted from the equitable principles found in the Roman or civil law." Citing 83 C.J.S. Subrogation § 2 (1953). The *Porter* Court also agreed that, "subrogation is related closely, if not directly, to the equitable principles of 'restitution' and 'unjust enrichment'." *Id.*

Even a cursory consideration of the facts and circumstances in this case demonstrate that Petitioner should not be permitted to subrogate against Marcus Allen. In fact, to permit subrogation in this case would clearly result in "injustice" to Marcus Allen. As explained previously, Marcus Allen had agreed to purchase the insured premises located at 175 Keys

Street. The contract between Marcus Allen and Ms. O'Connor gave Marcus Allen complete control and dominion over the home as of January 1, 2010. The contract required that Mr. Allen pay to Ms. O'Connor every month \$625. From these monthly payments, it was agreed that "\$550.00 will go for mortgage, insurance and taxes." (emphasis added). Ms. O'Connor testified that pursuant to the contract, she did purchase insurance for Marcus Allen's home, for Marcus Allen's benefit, with Marcus Allen's monthly payments. The insurance that she purchased for Marcus Allen and for Marcus Allen's home was the policy provided by Petitioner. There is nothing equitable about allowing Petitioner, with a policy purchased with Marcus Allen's money for Marcus Allen's home, to turn around and ask for Marcus Allen's Estate to repay it for the loss covered under the Petitioner's policy.

As stated above, subrogation is 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 in equity and good conscience should be assigned the rights and remedies of the original creditor." *Kittle v. Icard*, 185 W. Va. 126, 405 S.E.2d 456 (1991). In this case, Petitioner has paid a debt to Ms. O'Connor for the policy covering Marcus Allen's home. Petitioner's right to subrogation is to the extent that Ms. O'Connor, as its named insured, has a right to assert a claim against Marcus Allen for the loss. However, this produces a result that is hardly equitable. Essentially, Petitioner wants to step into the shoes of Ms. O'Connor and seek repayment from Marcus Allen under a policy of insurance that Mr. Allen paid for and was to benefit from. Remember, at the time of the fire, Marcus Allen had total control over the insured home. While he did not have legal title, he most definitely had equitable title. In West Virginia, in a case dealing with personal property, it was held that, "where the seller has delivered goods to the buyer under a conditional sales contract, the interest of the buyer therein is an equitable property

right.” *Cook v. Citizens Ins. Co.*, 105 W. Va. 375, 143 S. E. 113 (1928). Consequently, based upon equitable principles, Petitioner has no right to subrogation in this case against a person that funded Petitioner’s policy.

Petitioner attempts to distract the Court from the inequity it seeks to create by discussing a rental policy of insurance issued to Marcus Allen by State Auto Property and Casualty Insurance Company. Whether Marcus Allen possessed insurance is of no consequence to this Court’s consideration of Petitioner’s Assignments of Error. Rather, the only policy of insurance of any importance to this Court is that issued by Petitioner. This Court is now called upon to determine whether Petitioner can assert an equitable right of subrogation against an individual, and/or his Estate, where it was said individual’s monies that paid for the policy of insurance and it was for said individual’s benefit that the policy of insurance was purchased. That Marcus Allen may have had a policy of insurance of his own should have no influence on this Court’s consideration of this important issue, especially where that policy of insurance provided no coverage for Marcus Allen’s equitable ownership in the subject property. Indeed, according to Petitioner, it would have this equitable cause of action for subrogation regardless of whether Marcus Allen, or others similarly situated, possessed some form of rental insurance. Again, such an assertion flies in the face of the law that emphasizes that subrogation is a doctrine based on fairness.

Further, throughout its brief, Petitioner makes much of the contract between Marcus Allen and the O’Connors, asserting that said contract was a traditional lessor-lessee, or landlord-tenant, agreement. Much like its discussion of the rental policy of insurance issued to Marcus Allen, the contract’s status was of little relevance to the Circuit Court’s decision as to whether Petitioner could pursue subrogation. Likewise, it should be of little relevance to this Court.

Regardless of whether Marcus Allen was a lessee or tenant, the equitable principles surrounding the doctrine of subrogation dictate that Petitioner's claim for subrogation be dismissed. Petitioner's claim for subrogation, if allowed to proceed, would permit it to keep insurance proceeds paid by Mr. Allen for the home he was purchasing that was insured by Petitioner. This produces a situation where Petitioner is unjustly enriched, and such a result, as found by the Circuit Court, is not permitted by West Virginia law.<sup>1</sup>

**III. THE WEST VIRGINIA SUPREME COURT OF APPEALS DECISION IN *MAZON V. CAMDEN FIRE INSURANCE ASSOCIATION* FURTHER DEMONSTRATES THAT MARCUS ALLEN'S PAYMENT FOR THE PETITIONER'S POLICY, WHICH WAS PURCHASED SOLELY FOR HIS BENEFIT, PREVENTS PETITIONER FROM SUBROGATING AGAINST HIM.**

Petitioner has asserted that under no circumstances could the Circuit Court have held that Petitioner was precluded from asserting a claim for subrogation against Marcus Allen. However, this assertion is contrary to the clear principles of law set forth by this Court in *Mazon v. Camden Fire Insurance Association*, 182 W. Va. 532, 389 S.E.2d 743 (1990). Indeed, when the general

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<sup>1</sup> In fact, this very conclusion is supported by *Sutton v. Jondahl*, 532 P.2d. 478 (Okla. App. Div. 2 1997), the Court of Appeals of Oklahoma decision cited by Petitioner. It is interesting that Petitioner should cite to *Sutton* as it only further makes Mr. Allen's point. Indeed, in *Sutton*, the Court of Appeals of Oklahoma found that "basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interest of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary." *Id.* at 482. In so finding, the Court of Appeals of Oklahoma held that a company affording such coverage should not be allowed to shift a fire loss to any occupying tenant even if the latter negligently caused it. *Id.* In *Sutton*, the landlord's fire insurance carrier sued a tenant and his 10-year-old-son (in the name of the property owners) to recover a \$2,382.57 fire loss, stemming from a failed experiment by the son with an inexpensive chemistry set given to him by his father. *Id.* at 478. A jury returned a verdict favoring the insurance company against only the father. *Id.* From this decision, the father appealed. *Id.* Under these circumstances, the Court found that the right of "subrogation should not be available to the insurance carrier because the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary, comparable to the permissive-user feature of automobile insurance. This principle is derived from a recognition of a relational reality, namely, that both landlord and tenant have an insurable interest in the rented premises--the former owns the fee and the latter has a possessory interest." *Id.* at 482. In the present case, Mr. Allen is not asking the Court to go this far. Rather, here, Mr. Allen is asking that this Court, for the sole purpose of prohibiting subrogation, find that it is inequitable to allow Petitioner to seek such relief where Mr. Allen paid for the premiums of the Petitioner's policy, which was purchased solely for his benefit.

principles of law established in *Mazon* are applied to the present case, Marcus Allen's interest in the subject property was protected by the Petitioner policy. *Mazon* notes that "a policy of fire insurance is a personal contract between the insurer and the insured" and that "a person who is not a party to the insurance contract . . . is not entitled to a share of the insurance proceeds by the mere fact they have an insurable interest in [the] property." *Id.* at 745. (citation omitted) However, the West Virginia Supreme Court of Appeals noted in *Mazon* that there is an exception to this general principle. The Court noted that a party for whose benefit an insurance contract was written is entitled to share in the proceeds. *Id.* *Mazon* indicated that those who are not the named insured must only establish that the named insured intended to cover an interest other than his or her own insurable interest in order to establish him or herself as an additional insured and to share in the proceeds. *See id.* Based upon these findings set forth in *Mazon*, it is clear that this Court contemplated a scenario where there could be additional insureds under a policy of insurance other than those named.

In *Mazon*, the plaintiff was co-owner of a property and marital home at which she no longer resided as a result of a divorce, but her ex-husband and the couple's two children did. *Id.* at 744. The plaintiff's ex-husband applied for and obtained an insurance policy from the defendant on the property and former marital home. *Id.* at 744. He was the sole insured on the policy and he paid all the policy premiums. After a fire destroyed the home, the ex-husband received proceeds for the full amount of the claim. *Id.* Subsequently, the plaintiff initiated an action claiming that she was entitled to a portion of the proceeds based upon her one-half ownership interest in the former marital property. *Id.* The *Mazon* Court found that the plaintiff was not entitled to any of the insurance proceeds because she was not a party to the insurance contract nor was the contract written for her benefit.

Contrary to Petitioner's assertion, the facts of *Mazon* are not the facts present in this case. Rather, despite Petitioner's failure to make mention of them, the uncontroverted facts of this case clearly establish that Marcus Allen possessed an equitable ownership in the property, 100 percent of the premiums for the insurance policy were paid from Mr. Allen's money and the insurance policy was purchased solely for his benefit, which undisputedly renders him an additional insured pursuant to *Mazon*. As noted above, Ms. O'Connor testified, during her deposition, that the \$389.00 premium payment for the Petitioner's policy that insured the home was paid entirely from Marcus Allen's monthly payments to her. (JA, at 146.) She indicated that the Petitioner's policy was purchased for Marcus Allen's benefit because as she saw it, "the house was his." (*Id.* at 152.) She further stated that because Marcus Allen lived at the home and paid for the policy on the home, her expectation was that Marcus Allen was the insured under the policy. (*Id.* at 146.) Although Ms. O'Connor remained listed on the deed as the owner of the home, she no longer had access to the home (because the locks were changed), she no longer paid any bills for the home, and she no longer called it her "home." (*Id.* at 165-167.) Rather, according to Ms. O'Connor, it was Marcus Allen's home and she purchased the Petitioner policy at issue for his benefit and to protect his interests in the home. (*Id.* at 167.) Like Ms. O'Connor, her father, Michael O'Connor, co-signer on the original mortgage that Ms. O'Connor took out on the property, also agreed that the 175 Keys Street property was Marcus Allen's home and that the Petitioner's policy was purchased for Marcus Allen's benefit. (*Id.* at 105-106.) Mr. O'Connor testified that the insurance purchased for the property was paid for from the payments made on a monthly basis by Marcus Allen. (*Id.* at 105.) Under these circumstances and the principles of law set forth by *Mazon*, it defies the principles of equity to allow Petitioner to pursue subrogation against Mr. Allen.

Petitioner further attempts to defeat Marcus Allen's protected status by noting that Petitioner had no knowledge of Marcus Allen's identity before the loss and/or the agreement between the O'Connors and him, and that Marcus Allen did not make any claim for the policy proceeds that Petitioner paid to Ms. O'Connor for the fire loss. The principles of law set forth in *Mazon* do not require that the identity of a person for whose benefit an insurance contract is written be known to the insurer. Further, it also does not indicate that any underlying agreements between the insured and the individual for whose benefit the insurance was purchased, reflect this arrangement, and/or the legal obligations between the insurer, the named insured and the other party. Rather, it only requires that said individual establish that the named insured intended to cover that individual's interest. In the instant case, Mr. Allen has presented uncontroverted evidence that Petitioner's policy was purchased by Ms. O'Connor for the sole benefit of Marcus Allen. Petitioner's lack of knowledge of Marcus Allen should not influence this Court's decision as the Petitioner's policy appears to have covered the property in its entirety, including the interest held by the O'Connors as well as Marcus Allen. Accordingly, Petitioner's risk was the same regardless of the number of insureds under the policy. Further, whether Marcus Allen made a claim for the policy proceeds paid under the Petitioner's policy is of little consequence to the determination of Marcus Allen's status under the policy. Regardless of whether Mr. Allen made a claim for the policy proceeds does not alter the fact that Mr. Allen was the sole individual for whom the policy was purchased and the individual who paid for the premiums associated with said policy.

Petitioner cites SECTION I - CONDITIONS, on page 11 of 20 of its policy, which purportedly seeks to limit the insurable interest and liability covered by the policy. More specifically, that provision notes that "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 the loss.” However, this language cannot preclude recovery by Marcus Allen under the Petitioner’s policy. Indeed, as the above discussion explains, the facts of this case expressly place Marcus Allen within the exception set forth in *Mazon*, and thereby preclude Petitioner from seeking subrogation from Mr. Allen.

In multiple sections throughout its brief, Petitioner argues that the Circuit Court failed to take into account that Marcus Allen was not a named insured or definitional insured under the policy of insurance. This assertion is plainly wrong and misconstrues the Circuit Court’s decision. First, it is important to note that Mr. Allen acknowledged that Marcus Allen was not a named insured under the policy of insurance issued by Petitioner. Second, Petitioner is capable of advancing this argument only by completely and utterly failing to acknowledge the Circuit Court’s consideration of the *Mazon* decision. (JA, at 12.) As is evident from the Circuit Court’s Order, it looked beyond the mere named insureds and/or definitional insureds identified by the policy to consider whether any other interests existed in the subject property that the named insured may have intended to protect instead of, or in addition to, his or her own interest. As discussed at length above, this analysis is authorized by the *Mazon* decision. In fact, under circumstances like those present in this case, the *Mazon* decision authorizes circuit courts to look beyond the traditional principles of law in West Virginia regarding interpretation of insurance contracts. Compare *Mazon v. Camden Fire Insurance Association*, 182 W. Va. 532, 389 S.E.2d 743 (1990) with *Noland v. Va. Ins. Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23 (2009); *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970). Under these circumstances, a determination of whether Marcus Allen was a named insured or definitional insured under the policy of insurance was not the sole determination to be made by the Circuit Court, and

therefore, said determination was not controlling of the Circuit Court's resolution of the issue of whether Petitioner could assert subrogation against Mr. Allen. As the Circuit Court's decision so clearly and concisely demonstrates, under the *Mazon* analysis, it is evident the Petitioner policy was purchased with Marcus Allen's money and for his benefit, and therefore, he was the individual for whom the policy was purchased, allowing him to share in its proceeds. Under such circumstances, equitable principles dictate that Petitioner has no right to subrogation in this case.

**IV. CONTRARY TO PETITIONER'S ASSERTION, THERE WERE NO GENUINE ISSUES OF MATERIAL FACT THAT PROHIBITED THE CIRCUIT COURT FROM DECIDING THE VALIDITY OF PETITIONER'S RIGHT TO SUBROGATION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT.**

Petitioner contends that the Circuit Court "failed to recognize the existence of genuine issues of material fact concerning F&M's counter claim." (P. Brief, p.4.) Here, Petitioner appears to take issue with certain finding made by the Circuit Court, which it claims created an issue of material fact, making summary judgment "precipitous." Petitioner cites provisions of the contract entered into between its insureds, Shelly O'Connor and Michael O'Connor, and Marcus Allen. Petitioner also cites to deposition testimony of Ms. O'Connor. Petitioner argues that the Circuit Court's "finding" was contrary to the unambiguous language of the contract and Ms. O'Connor's testimony. However, Petitioner fails to specifically identify the allegedly erroneous finding by the Circuit Court to which it is referring. Nevertheless, Petitioner contends that because Ms. O'Connor was not signing over checks from Mr. Allen to pay for the Petitioner's policy, but rather was using the cash he provided to her to pay for the Petitioner policy, there was a question of fact as to who "paid" for the Petitioner's policy. While this is an interesting theory about which one could possibly speculate, such speculation in this case is not

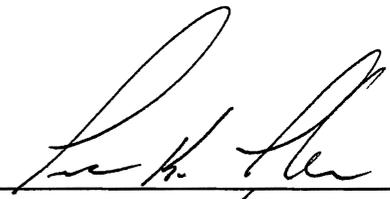
needed. Ms. O'Connor's testimony is very clear on this issue. She took Marcus Allen's money and use it as the lone source for paying for Petitioner's policy.

Interestingly, at no time, whether when filing its own Motion for Summary Judgment or responding to Mr. Allen's Motion for Summary Judgment, did Petitioner raise a purported issue of material fact that would have barred resolution of the matters raised by said Motions. In fact, by filing its own Motion for Summary Judgment, Petitioner certified that no genuine issue of material fact existed. Petitioner never advised the Circuit Court that its position changed in this regard. Further, when the facts are considered, the evidence as to who paid for the policy is undisputed. Marcus Allen paid for the Petitioner's policy. The contract between Marcus Allen and the O'Connors clearly acknowledges this. For that matter, the contract further specified that it was Ms. O'Connor who was required to maintain homeowner's insurance on the property. As Ms. O'Connor testified, and pursuant to the agreement, she paid the \$389.00 premium for the homeowner's insurance entirely from Marcus Allen's monthly payments to her. (*Id.* at 146.) Contrary to Petitioner's third assignment of error, these are all undisputed facts that cannot be ignored by this Court when determining whether Petitioner may subrogate against Marcus Allen.

### **CONCLUSION**

WHEREFORE, for the foregoing reasons, Respondent Marlon Allen, Sr., individually and as Administrator of the Estate of Marcus Allen, counter-defendant below, requests that this Honorable Court affirm the decision of Circuit Court of Mineral County to grant summary judgment in favor of Mr. Allen and to find that the Court made no errors when it concluded that Petitioner could not assert subrogation against Mr. Allen, individually and as administrator of the Estate of Marcus Allen.

Signed:



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of February, 2015, true and accurate copies of the foregoing were served *via* United States Regular Mail, postage-paid, addressed to counsel for all other parties to this appeal as follows:

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