IN THE INTERMEDIATE COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

Case No. 22-ICA-173
(Appeal from Marshall Co. Circuit Court Case No. 19-C-116 (J. Cramer))

MARK SCAFELLA,

PETITIONER,

VS.

ERIE INSURANCE GROUP, and STANLEY GEHO, JR.,

RESPONDENTS.

PETITIONER'S BRIEF

John R. Angotti, Esquire (#5068)
David J. Straface, Esquire (#3634)
Chad C. Groome, Esquire (#9810)
ANGOTTI & STRAFACE, L.C.
274 Spruce Street
Morgantown, WV 26505
(304) 292-4381 – P
(304) 292-7775 – F
johnangotti@angottistrafacelaw.com
djstraface@angottistrafacelaw.com
chadgroome@angottistrafacelaw.com
Of Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

W.Va. Statutes and Rules

W.Va. Caselaw

Extra-jurisdictional Caselaw

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in granting summary judgment on *Count I* of the *Complaint* in favor of the Respondents and Defendants below, Erie Insurance Company and Stanley Geho, as the factual record demonstrates that there exists a genuine issue of material fact as to whether Respondent, Erie, waived application of the claimed "business purpose" exclusion contained within the subject policy's "Other Structures" coverage.

2. The Circuit Court abused its discretion and committed clear error when it held that the "business purpose" exclusion contained within the "Other Structures" coverage in the subject policy precluded coverage for the fire damage to the Petitioner's barn insofar as it found that the same was "used in whole or in part for 'business' purposes[.]"

3. The Circuit Court erred when it granted summary judgment on *Count I* of the *Complaint* finding that the Petitioner's claims were not covered by the plain terms of the "claw-back" provision contained within the "business purpose" exclusion in the subject policy's "Other Structures" coverage.

II. STATEMENT OF THE CASE AND PROCEDURAL POSTURE

The instant case presents a dispute and declaratory judgement action over the applicability of an exclusion contained in an "Other Structures" coverage contained within an Erie Insurance Company homeowners' policy.

Relevant Factual Summary

The Petitioner, Mark Scafella, is a resident of Terra Alta, Preston County, West Virginia. (*Appx. p. 0238).* In 2017, Mr. Scafella purchased a cattle farm in a beautiful location outside of Terra Alta located at 401 Aurora Avenue called "Country Chapel Farm." (*Id.*) "Country Chapel Farm" contained significant acreage, a residential home, a large barn, a well house, several sheds or smaller barns (one of which served as a tractor museum), and a small country church. (*Appx. p. 0239*). Mr. Scafella is a hard-working and busy man with a strong entrepreneurial spirit. He operated a contracting company out of his home called Marksman Contracting, LLC. (*Appx. p. 0240*). He was also in the business of commercial beef farming. (*Appx. pp. 0239-0249*).

Mr. Scafella purchased the 401 Aurora Avenue because it fulfilled multiple needs and presented an additional significant business opportunity. The property was ideal for Mr. Scafella's beef farming operations. It had vast pastures and a large barn, amongst other warehouses, which were perfect for continuing these operations. Mr. Scafella was so eager to farm the property that he leased the farm from the seller while he was brokering the deal on the purchase of the property so that he could place his 60+ heads of cattle on the same immediately. (*Appx. p. 0239*).

Mr. Scafella saw an opportunity in the 401 Aurora Avenue property beyond just providing him with a primary residence, a cattle farm, and a place to run his contracting business. Specifically, Mr. Scafella believed that the farm would be an ideal, one-stop destination for couples wanting to have a rural destination wedding. (*See Id.*). The "Country Chapel Farm" property has most of the implements necessary for such an operation already built in, including vast amounts of space, a home that could be used as a bed-and-breakfast, and a quaint little church on the premises. (*See Id.*). All the property needed to make this idea a reality was a hall or food service area for the wedding receptions. (*See Id.*).

While Mr. Scafella was brokering a deal for the purchase of the 401 Aurora Avenue farm, he contacted Respondent, Erie Insurance Company, to inquire about obtaining insurance on this property. (*See gen. Appx. pp. 0198-0208*). Mr. Scafella had done substantial business with Erie in the past, and it provided him with numerous insurance coverages already, including, but not limited to, commercial general liability coverage, workers' compensation coverage, and auto fleet coverage for his company. (*See App. pp. 0227-0234, 0350-0360*). Mr. Scafella reached out to Erie's agent, Kendra T. Simpson of American Insurance Center regarding insurance. (*See gen. Appx. pp. 0198-0208, 0239*).

Mr. Scafella discussed the coverages he needed. During the course of those conversations, Mr. Scafella advised Respondent, Erie Insurance Company, and its agent Ms. Simpson, of his intent to farm the property and raise beef cattle on the same. (*Appx. pp. 0198-0199, 0239, 0276, 0302*). Ms. Simpson clearly communicated this fact to Respondent, Erie Insurance Company, as Erie to issue a quote to her for an ErieSecure Home policy coverages for "Farm Property (Special)," for coverage upon the frame barn at issue in this matter, and for blanket coverage for livestock. (*Appx. pp. 0198-0199*). Oddly, however, there is no evidence contained in the files of Erie or Ms. Simpson demonstrating that a copy of this quote was provided to Mr. Scafella. It is almost as if Ms. Simpson recognized that the premium quote was not competitive and that she was afraid to communicate it to Mr. Scafella out of fear that he would reject it or take all of his business elsewhere, including the multiple other policies he had purchased through her and Erie. Instead, Ms. Simpson obtained a second quote from Erie. (*Appx. p.* 0201). This time the premium quote was lower, but it still contained coverage for farm equipment and other structures. (*See Id.*). The quote was accepted by Mr. Scafella and Erie issued the policy. (*Appx. pp. 0202-0206*). When Respondent, Erie Insurance Company, issued this policy it was aware that Mr. Scafella would be operating a farm on the premises and, also, that he would be running his Marksman Contracting, LLC business on the premises. (*See App. pp. 0227-0234, 0350-0360*). In fact, documents secured from Erie in the course of discovery revealed that it changed the address for the Marksman Contracting, LLC operations on the other policies it issued to Mr. Scafella from his old address to 401 Aurora Avenue. (*See Id.*).

Furthermore, following his moving the beef cattle to the 401 Aurora Avenue farm, a representative of defendant, Erie Insurance Company, from Mueller Reports performed an inspection and walk-through of the property for insurance services around the time of the closing

on the property. (*Appx. pp. 0240, 0208-0218*). At the time this inspection was completed, Mr. Scafella was actively farming the subject property and the same would have been apparent to any reasonable person visiting the property who would have had to park near the barn and hear and see the cattle in the vicinity. (*Appx., p. 0240*). Accordingly, at all times material and relevant, defendant, Erie Insurance Company, and/or its representatives were or should have been fully aware that Mr. Scafella was raising and intended to raise commercial cattle on the property. Likewise, defendant, Erie Insurance Company, further knew that Mr. Scafella's contracting business, Marksman Contracting, LLC, operated out of the 401 Aurora Avenue property. (*See App. pp. 0227-0234,0350-0360*). Nevertheless, defendant, Erie Insurance Company, knowingly accepted the risks of insurance despite farming business being conducted about the property.

Petitioner, Mark Scafella, was of the reasonable belief and expectation that he had coverage on his property for fire loss, including his large barn, at all times material and relevant. (*Appx. p. 0240*). Ultimately, Mr. Scafella closed on the 401 Aurora Avenue farm believing that he was fully insured from fire loss. (*See Id.*). Mr. Scafella began taking his cattle to slaughter and selling a portion of the fruits of his farming operation out of a structure on the farm known as the "milk house," sometimes also referred to as the "well house." (*Appx. p. 0240*). Mr. Scafella began calling this operation "Olivia's, LLC." (*See Id.*) The aforementioned "milk house" sits adjacent to the large barn on the property that is at issue in this matter. (*See Id., see also Appx. pp. 0219-0226, 0240-0241*).

Also, after moving in, Mr. Scafella began using free time to work on renovating the lower level of the large barn into a dining and/or catering hall. (*Appx. p. 0241*). As previously indicated, the absence of a reception hall on the property was the only thing that prevented "Country Chapel Farm" from having all the means necessary to operate as a one-stop, rural wedding destination.

(*See Id.*). Mr. Scafella spent countless hours and months tediously remodeling the lower level of the barn into a restaurant-style layout. (*See Id.*). He built a kitchen, a prep room, a server station, bathrooms, and a bar, all by his own hand. Mr. Scafella ultimately intended to make the restaurant/dining hall a farm-to-table operation serving beef from the property and locally-sourced foods. (*See Id.*). He intended to call the forthcoming restaurant, "Sophie's Serendipity, LLC."

Prior to the fire loss, however, the lower level of the barn was nothing more than a shell of a restaurant. (*Appx., p. 0242*). The restaurant was never operational. (*See Id.*). It also never served a single meal. (*See Id.*). The lower level of the barn sat idle waiting for completion and for Mr. Scafella to obtain the necessary licensures and permits so the same could be used in the future as a restaurant or catering hall. Not only was the restaurant not functional, but Mr. Scafella did not operate any business out of the barn at all times material and relevant. (*See Id.*). Instead, the barn was used to primarily to store Mr. Scafella's personal property used for his contracting business, his farming operations, and held his restaurant equipment and furniture for his future hall. (*See Id.*). It should be noted, despite the Respondent's contentions otherwise, Mr. Scafella contacted Respondent's agent, Kendra T. Simpson, about these operations and his need for insurance coverage on the same. (*See Id.*). As such, the Respondent was aware of Mr. Scafella's plans for the lower level of the barn.

On February 2, 2019, Mr. Scafella suffered a major fire loss in the large barn at the 401 Aurora Avenue property. (*See Id.*). The cause of the loss was not from any business operation on the premises, but was electrical, and is not in dispute. (*Appx. p. 0242*). Mr. Scafella had installed an electrical outlet on the lower level of his barn that was faulty and which led to the fire. The fire caused significant structural damage to the large barn and the loss of numerous items of Mr. Scafella's personal business property. However, the "milk house" where Mr. Scafella sold his

beef through the Olivia's, LLC, storefront was not affected by the fire and the origin of the fire had nothing to do with its operations. (*Appx. p. 0242*). Mr. Scafella was devastated considering the amount of hard work he put into his property, but was confident that he took the necessary precautions in securing insurance to protect his investments.

Mr. Scafella presented his fire loss claim to Respondent, Erie Insurance Company, for payment. Erie initially provided coverage to Mr. Scafella for his personal property located in the large barn to the tune of approximately $72,000.00. (*Appx. p. 0243*). However, when it came to the structure of the large barn, Respondent, Erie Insurance Company, denied Mr. Scafella's claims. Respondent, Erie Insurance Company, claimed that Mr. Scafella was operating a business out of the premises, that it was unaware of the same, and that, as a result, his claim was excluded from coverage under the "Other Structures" coverage contained in his policy. (*Appx. pp. 0059-0174).*

The "Other Structures" coverage in the policy, the policy states:

> **"We"** will pay for loss to :
>
> 1. other structures at the **"residence premises"** separated from the dwelling, including garages, fences, shelters, tool sheds or carports.
> Structures connected to the dwelling by only a fence, utility line or similar connection are considered to be other structures.
> 2. construction material at the **"residence premises"** for use in connection with **"your"** other structures.

However, the policy goes on to indicate that:

> **"We"** do not pay for loss to structures:
>
> 1. used in whole or in part for **"business"** purposes (except rental or holding for rental of structures used for private garage purposes); or
> 2. used to store **"business"** property. However, if the **"business"** property is solely owned by **"anyone we protect," "we"** do provide coverage for the structure. The **"business"** property may not include gaseous or liquid fuel, unless the fuel is in a fuel tank that is permanently installed in a vehicle or craft which is parked or stored in the structure.

(*Appx. p. 0021*).

Mr. Scafella was upset that Erie claimed that it was unaware of his business operations on the property when he had told it from day one of his intentions to run a beef farm on the same and

run his contracting business out of the property. Respondent, Erie Insurance Company, asserted that he was selling beef out of the fire-damaged barn and that his claim was properly denied. However, the sale of beef was out of the "milk house." (*See gen.,Appx. pp. 0059-0174, 0173-0174).*

Respondent, Erie Insurance Company's coverage determination was wrong. (*Appx., pp. 0173-0174*) It not only knew Mr. Scafella was running businesses on the premises when it issued the subject policy, but it failed to recognize that Mr. Scafella was not running any business out of the barn. It was attempting to conflate the "milk house" structure with that of the large barn.

This was an unfair characterization. Granted, the "milk house" sits adjacent to the barn. However, the "milk house" has its own foundation. (*Appx., pp. 0219-0226, 0240-0241*). The barn is made of stone, while the "milk house" has separate block walls. (*See Id.*). Likewise, the "milk house" has its own separate roof. (*See Id.*). The "milk house" has its own four walls and does not rely upon a common wall with the barn for its fourth wall or for support, despite sitting adjacent to the barn. (*See Id.*). The "milk house" has its own electrical hook-ups, separate and apart from that of the barn. (*See Id.*). The "milk house" has its own water supply, separate and apart from that of the barn. (*See Id.*). The "milk house" runs on the farm's well water, while the barn runs on city water. (*See Id.*). The "milk house" has its own entrance and exit, separate and apart from the barn. (*See Id.*). For all intents and purposes, the "milk house" where Mr. Scafella sells farm-raised beef through Olivia's, LLC, is a separate structure from the barn. (*See Id.*). In fact, if the large barn were razed, it would in no manner affect the "milk house" structure. Likewise, if the "milk house" were razed, it would in no manner impact the structure of the barn. (*See Id.*).

As a result of Respondent, Erie Insurance Company's decision, Mr. Scafella was forced to make all of the structural repairs to the barn out of his own pocket and on his own, which he did.

(*Appx. p. 0243)*. Frustrated by the decision, Mr. Scafella filed suit against Respondent, Erie Insurance Company, and its acting adjuster, Stanley Geho[1], seeking declaratory judgment on the issue of coverage for the barn structure (Count I), for violations of the UTPA and/or common law bad faith (Count II), and for breach of contract (Count III). (*See Appx. p. 0001*).

Relevant Procedural History

On or about March 11, 2021, the Respondents, Erie Insurance Company and Stanley Geho, filed a *Motion for Summary Judgment on Count I of Plaintiff's Complaint for Declaratory Judgment*, pursuant to **W.Va. R. Civ. P. 56**. (*Appx. pp. 0059-0174*). Therein, Respondents asserted that the exclusionary language contained in the "Other Structures" coverage referenced hereinbefore excluded the Petitioner's claims from coverage. The matter was eventually placed on a briefing schedule (*Appx. pp. 0175-0176*), and the Petitioner filed a timely answer to the same, asserting therein that the provision was inapplicable, that Mr. Scafella's claims fell within the scope of the "claw-back" provision in the exclusion, and that the Respondents had waived the application of the exclusion by issuing the subject policy with knowledge of Mr. Scafella's business activities on the premises (*Appx., 0177-0235*).

The matter was fully brief and set for hearing on January 6, 2022. (*Appx., pp. 0255-0258*). By *Order* dated January 18, 2022, the Circuit Court found that "the milk house and the barn are one structure." (*Appx. pp. 0257-0258*). The Circuit Court provided no analysis at how it arrived at this determination, nor did it cite legal authority supporting its findings. (*See Id.*). That said, the Circuit Court decided that additional discovery was warranted on the issue of the application of the exception to the business exclusion in the subject coverage. (*See Id.*). The Court permitted additional discovery on the same through May 13, 2022 and provided a supplemental briefing

[1] Underlying defendant, Stanley Geho, is a resident of Marshall County, West Virginia, hence the action being filed in the Circuit Court of Marshall County.

deadline of June 13, 2022. (*See Id.*). The Circuit Court's *Order* of January 18, 2022, did not address Mr. Scafella's arguments regarding the application of the waiver doctrine. (*See Id.*).

Additional discovery was completed. Both parties submitted timely briefs in accordance with the Circuit Court's *Order* of January 18, 2022. (*Appx. pp. 0259-0281, 0395*). However, Respondents, Erie Insurance Company and Geho, filed a motion to strike Mr. Scafella's supplemental briefing, in part, as they claimed that the same went beyond the scope of the Circuit Court's *Order* of January 18, 2022 insofar as it presented argument on the doctrine of waiver. (*Appx. pp.0282-0288*). The Respondents asserted that the *Order* limited briefing to issues surrounding the application of the application of the exception to the business exclusion and its "claw-back" exception. (*See Id.*). The Petitioner asserted that the issue of waiver went directly to the issues of the application of the exclusion and was left unresolved by the Circuit Court. By emails dated July 1-5, 2022, the Circuit Court law clerk, Angela Cisar, advised that the Court believed the supplemental briefing went beyond the issues set forth in the January 18, 2022 *Order*. However, instead of striking those arguments, the Circuit Court permitted additional briefing on the issue. (*Appx., pp. 0289-0291*).

After additional supplemental briefing was provided by the parties on the issue of waiver, the Circuit Court contacted the parties by email from its law clerk, Ms. Cisar, and advised that it was inclined to grant the Respondents' *Motion*. It instructed the Respondents, Erie Insurance Company and Geho, to prepare an *Order* granting the same. The Respondents complied with the Circuit Court's request, and prepared the *Order Granting Summary Judgment in Favor of Defendants on Count I of Plaintiff's Complaint*, which was entered by the Circuit Court. (*Appx. pp. 0367-0372*). The *Order* provided little analysis of the waiver issue at bar, and made sweeping factual conclusions regarding material disputed facts. (*See Id.*). Despite this, the *Order* was

entered on September 12, 2022. (*See Id.*). On October 14, 2022, the Circuit Court entered a *Rule 54(b) Order* finding that its January 18 and September 12, 2022 *Orders* should be treated as final appealable orders of the Court. (*Appx. p. 0373*). It is from this series of *Orders* that this appeal arises.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner, Mark Scafella, asserts that the instant matter is one that is ripe for oral argument pursuant to **W.Va. R. App. P. 20(a)**. **Rule 20(a)** expressly provides, in relevant part, that "...[c]ases suitable for Rule 20 argument include, but are not limited to: (1) cases involving issues of first impression; (2) cases involving issues of fundamental public importance; (3) cases involving constitutional questions regarding the validity of a statute, municipal ordinance, or court ruling; and (4) cases involving inconsistencies or conflicts among the decisions of lower tribunals." The instant matter regards matters of first impression regarding the application of a "business purpose" exclusion contained in the "Other Structures" coverage of a homeowners policy of insurance. It further presents a matter of first impression as to the legal definition of a structure or what constitutes separate structures for the purposes of insurance coverage in this State. As such, this matter should be presented by way of **Rule 20** argument.

IV. SUMMARY OF ARGUMENT

The Circuit Court of Marshall County abused its discretion in granting summary judgment, pursuant to **W.Va. R. Civ. 56**, and otherwise committed clear error insofar as it failed to acknowledge evidence in the factual record supporting Mr. Scafella's contentions and which created genuine issues of material fact precluding the entry of summary judgment. By doing so, the Circuit Court violated the dictates of **Rule 56** and its interpretive jurisprudence, abused its

discretion by choosing the set of facts in the case that it liked best, and made decisions of fact which were proper for Jury determination.

The Circuit Court paid little attention to Mr. Scafella's assertion of the doctrine of waiver. This was despite there being substantial evidence in the factual record evincing that the Respondent, Erie Insurance Company, knew Mr. Scafella was running businesses at the subject property before and/or at the time of policy inception. As a result, Respondent, Erie Insurance Company, was permitted to collect a premium off of a coverage that it knew was inapplicable at the time of policy inception.

Similarly, the Circuit Court improperly found that the "business purposes" exclusion of the "Other Structures" coverage was applicable despite the evidence in the factual record demonstrating that Mr. Scafella was not conducting business in the large barn where the fire occurred. Rather, the "milk house" where Mr. Scafella was selling meat through Olivia's, LLC was a separate structure from the large barn where the fire occurred.

Lastly, the Circuit Court erroneously held that the Petitioner's claims were not covered by the plain terms of the "claw-back" provision contained within the "business purpose" exclusion in the subject policy's "Other Structures" coverage. This is despite the facts that the factual record demonstrated that the fire-damaged barn was used to store the plaintiff's business property and that the origin of the fire had nothing to do with any business purpose or operation of Mr. Scafella, but was of electrical origin.

This Court should rectify these errors and abuses by reversing the January 18 and September 12, 2022 series of *Orders* regarding these issues and remand this matter for further proceedings, accordingly.

V. LAW & ARGUMENT

Standard of Review

"The circuit court's function at the summary judgment stage is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). Consequently, we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 553 (1986); *Masinter v. WEBCO Co.*, 164 W.Va. 241, 262 S.E.2d 433 (1980); *Andrick*, 187 W.Va. at 708, 421 S.E.2d at 249. In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]' *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513, 91 L.Ed.2d at 216. Summary judgment should be denied 'even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.' *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887, 72 S.Ct. 178, 96 L.Ed. 666 (1951). Similarly, when a party can show that demeanor evidence legally could affect the result, summary judgment should be denied." **Williams v. Precision Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995).**

"A circuit court's entry of summary judgment is reviewed *de novo, see* Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994); *Drewitt v. Pratt*, 999 F.2d 774, 778 (4th Cir.1993); and, therefore, we apply the same standard as a circuit court. *Helm v. Western Maryland Ry. Co.*, 838 F.2d 729, 734 (4th Cir.1988)." **Id. at ____, 459 S.E.2d at 335 (1995).**

1. **The Circuit Court erred in granting summary judgment on *Count I* of the *Complaint* in favor of the Respondents and Defendant below, Erie Insurance Company and Stanley Geho, as the factual record demonstrates that there exists a genuine issue of material fact as to whether Respondent, Erie, waived application of the claimed "business purpose" exclusion contained within the subject policy's "Other Structures" coverage.**

The Circuit Court of Marshall County abused its discretion and committed clear error when it granted summary judgment in favor of Respondents and Defendants, hereinbelow, Erie Insurance Company and Stanley Geho, on the issues of coverage in *Count I* of the *Complaint*. The Circuit Court ignored the evidence in the factual record demonstrating that Respondent knew, prior to issuing the subject policy, that the plaintiff ran a businesses, as defined by the policy, from his 401 Aurora Avenue home. Likewise, the Circuit Court ignored the factual record insofar as it evinced that the Respondent knew Mr. Scafella was running businesses at the property at the time of and following policy inception. In fact, the Circuit Court's *Orders* barely even address the issue of waiver and engages in no meaningful discussion of the facts underlying that issue. The Circuit Court should have never granted summary judgment on *Count I* of the *Complaint* as, construing the factual record in a light more favorable to the non-moving Petitoner the record evinces that genuine issues of material fact exist regarding the application of the doctrine of waiver which precluded the entry of summary judgment.

In the underlying matter, the Respondent, Erie Insurance Company, by and through its soliciting agent, American Insurance Group and Kendra T. Simpson, had direct knowledge of the plaintiff's business activity at the insured premises both pre- and post-policy inception. However, the Respondent issued the policy with knowledge of these risks. It is well-settled in West Virginia that "[w]here the soliciting agent has knowledge of past conditions or existing facts which at the time would serve to void the policy, the company issuing the policy cannot insist upon such facts for the purpose of avoiding its liability." **Syl., Kimball Ice Co. v. Springfield Fire & Marine Ins.**

Co., 100 W. Va. 728, 132 S.E. 714 (1926). This principle was echoed in **Syl. Pt. 2, McKinney v. Providence Washington Ins. Co., 144 W. Va. 559, 559, 109 S.E.2d 480 (1959)**, wherein the Court held that "[w]hen a duly authorized agent of the insurer knows at the time the policy is issued that the building is vacant, and it was later destroyed by fire while vacant but had been occupied between the time of the issuance of the policy and the time of the loss, the provision of the policy that the insurer shall not be liable if the building is vacant or unoccupied for a definite number of days is waived by the insurer."

The reason for this rule is obvious. "When the facts are thus known before the contract is made, a condition against the state of things known by all the parties to exist cannot be deemed to be within their intention or purpose." **Kimball Ice at ___, 132 S.E. at 715.** As "[t]he issuance of the policy by the company is, according to the generally accepted rule, a waiver of a known ground of invalidity, and equivalent to an assertion that the policy is valid at the time of its delivery, although the facts known to the company would, under the express terms of the agreement, render it void or voidable." 32 Cyc. 1343, citing many decisions from 32 states, and numerous federal jurisdictions." **Id.** In other words, the Courts of this State have found it to be inherently unjust or unfair to allow insurers to take premium payments from insureds knowing that the coverage they will be issuing will be issuing will be excluded, in whole or in part, by a known condition of the property.

The application of the waiver doctrine in this context can be likened this State's requirement that substantial prejudice be caused to an insurer before it may disclaim coverage due to the operation of a policy exclusion or cooperation clause in the policy. **See Syl. Pts. 6, 7, Kronjaeger v. Buckeye Union Ins. Co., 200 W. Va. 570, 572, 490 S.E.2d 657, 659 (1997)("['Before an insurance policy will be voided because of the insured's failure to**

cooperate, such failure must be substantial and of such nature as to prejudice the insurer's rights.['] Syllabus Point 1, ***Bowyer by Bowyer v. Thomas,*** **188 W.Va. 297, 423 S.E.2d 906 (1992)."** Syllabus point 5, ***Charles v. State Farm Mutual Automobile Insurance Company,*** **192 W.Va. 293, 452 S.E.2d 384 (1994)....Where an insured has failed to obtain his/her insurer's consent before settling with a tortfeasor but in settling has procured the full policy limits available under the tortfeasor's insurance policy, the insurer must show that it was prejudiced by its insured's failure to obtain its consent to settle in order to justify a refusal to pay underinsured motorist benefits.").** Like the "substantial prejudice" requirement above, insurers are not permitted to escape coverage due to the operation of an exclusion that they know will be triggered by a condition of the property at policy issuance, as those insurers suffer no prejudice.

Principles of waiver in this context may also be likened to the rules applicable to material misrepresentations made in insurance policy applications. In such situations, insurers are not permitted to avoid coverage due to a material misrepresentations in the application process absent a showing of both materiality and prejudice. As the Court recognized in **Syl. Pt. 3, McDowell v. Allstate Vehicle & Prop. Ins. Co., 881 S.E.2d 447, 449 (W. Va. 2022)**: "'Under W.Va. Code, 33-6-7(b) and (c) (1957), in order for a misrepresentation in an insurance application to be material, it must relate to either the acceptance of the risk insured or to the hazard assumed by the insurer. Materiality is determined by whether the insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.' Syl. pt. 5, *Powell v. Time Ins. Co.*, 181 W. Va. 289, 382 S.E.2d 342 (1989)."

It should be noted that, the Court in **McDowell at ____, 881 S.E.2d at 458-460** found there to be disputes of material fact precluding summary judgment regarding alleged misrepresentations made by the insured that the insurer was claiming should disclaim coverage. One of those disputes involved the knowledge of the issuing agent regarding conditions of the insured property that the insurer disclaimed knowledge of or alleged were misrepresented in the policy application process. The Court indicated the knowledge of the agent, despite claimed misrepresentations could nullify this defense, as "[w]e note that the general rule is that an insurer is bound by the information acquired by its agent in taking an application, and the insurer is assumed to have at least constructive notice of what the agent knows. *See generally, Restatement of the Law of Liability Insurance* § 5 (2019)." **Footnote 15, in relevant part, McDowell, *supra.*** The Court reversed the Circuit Court's grant of summary judgment, in part, based upon this factual dispute concerning agent knowledge. This Court noted therein that "...'[a] disputed question whether the agent of the insurer was apprised of the true facts with regard to a particular issue, but failed without knowledge or collusion of the insured to put the information in the document sent to the insurer, is properly submitted to the jury.' *Id.*" **See Id. at ____, 881 S.E.2d at 457.** Likewise, this Court found that issues of the materiality of a claimed misrepresentation were "...ordinarily a jury question. However, if the evidence excludes every reasonable inference except that the misrepresentation was material, then the question of materiality becomes one of law for the court." **Syl. Pt. 7, Id.**

In sum, it has always been the policy of this State to hold insurers' feet to the fire to provide coverage for conditions of the insured premises that are known by the insurer or its agent at or near the time of policy issuance. Insurers cannot escape their obligations to their insureds based upon facts that were known to them at policy issuance or that were immaterial to their decision to accept coverage.

In the instant matter, the Circuit Court ignored these principles of law when it granted summary judgment to the Respondents, Erie Insurance Company and Geho, on the issues of coverage in *Count I* of the *Complaint*. Not only did it ignore those principles, but it further ignored the rules applicable to decisions regarding summary judgment and its analysis of the factual record. The Respondents, Erie Insurance Company and Geho, asserted hereinbelow that the plaintiff was using his barn for "'business' purposes" and, as such, no coverage for loss to the structure should be afforded to him. The Petitioner contended that Respondents' interpretation of this exclusion was incorrect, and the same is addressed in other sections hereinbelow. However, even if the Respondents were correct, Erie's knowledge of the Petitioner's business operations at the 401 Aurora Avenue property should have been found to have waived the application of the exclusion.

The subject Erie policy defines **"business"** as used in the policy as follows:

> **"Business"** means any full-time, part-time or occasional activity engaged in as a trade, profession or occupation, including farming.

At the time of policy issuance and thereafter, Respondent, Erie Insurance Company, had knowledge that the plaintiff was conducting business from his 401 Aurora Avenue property. (*See App. pp.. 0198-0199, 0208-0218,0227-0234,0238-0243,0276, 0302,0350-0360*). It cannot deny this.

First, Respondent, Erie Insurance Company, knew that Mr. Scafella was operating his contracting business, Marksman Contracting, LLC, from the 401 Aurora Avenue property and had previously operated the business out of his former residential address on Hileman Road. (*See App. pp. 0227-0234,0350-0360*). The Respondent cannot dispute its knowledge of this fact because *it insured those activities at both the Hileman Road and 401 Aurora Avenue properties.* (*See Id.*). The Respondent, Erie Insurance Company, insured Mr. Scafella's contracting business with

liability coverage, workers compensation coverage, and auto fleet coverage, to name a few. It was intimately familiar with his business operations as his insurer. (*See Id.*).

Documents disclosed in discovery evinced that the Respondent processed multiple change of policy forms during Mr. Scafella's move from Hileman to the 401 Aurora Avenue property to reflect his business's new address. (*See Id.)* For example, the change of policy information form for Mr. Scafella's business auto fleet coverage was issued by Erie and represented that the business fleet was moving from the former Hileman Road address to Aurora Avenue on April 25, 2017. (*Appx. p. 0350*). Likewise, on April 25, 2017, the plaintiff's group business catastrophe insurance coverage policy issued by Erie also incurred a change of address. (*Appx. p. 0351*). That form contains the query: "Is this an address update only (not physically moving)?" (*See Id.*). The answer: "No." (*See Id.*). The form goes on to ask: "Will this change a location address also?" (*See Id.*). The answer: "Yes." (*See Id.*). The forms clearly indicates that Mr. Scafella's business was moving to Aurora Avenue. Furthermore, on April 25, 2017, Respondent, Erie Insurance Company, also changed the location of the plaintiff's business on his workers' compensation insurance coverage policy issued by Erie. (*Appx. p. 0352*). That form also asks: "Is this an address update only (not physically moving)?" (*See Id.*). The answer: "No." (*See Id.*). The form goes on to ask: "Will this change a location address also?" (*See Id.*). The answer: "Yes." (*See Id.*). The form clearly indicates that Mr. Scafella's business is moving from Hileman to Aurora Avenue. As the Court may see, at least three forms regarding Mr. Scafella's Marksman Contracting business demonstrate clear knowledge on the part of Erie that the location of the business was moving to the insured premises at Aurora Avenue.

In addition to knowing of Mr. Scafella's operation of his contracting business from his insured residential property, the Respondent, Erie Insurance Company, also had pre- and post-

issuance knowledge that Mr. Scafella was running commercial farming business from the 401 Aurora Avenue residence.. (*Appx. pp. 0198-0199, 0239, 0276, 0302*). Pursuant to the plain terms of the policy at issue, "farming," including part-time or occasional farming, is "business" as defined by the policy. Respondent, Erie Insurance Company, knew through its agent, Kendra T. Simpson, of Mr. Scafella's plans for farming activities. (*See Id.*). Mr. Scafella told Ms. Simpson and/or Erie of his intent to run a cattle farm on the 401 Aurora Avenue property. (*See Id.*). This fact is evinced by the fact that Ms. Simpson secured a quote from Respondent, Erie Insurance Company, for farming activity, for additional coverage for the for the barn at issue, and for coverage for Mr. Scafella's livestock. (*Appx. pp. 0198-0199*). Mr. Scafella would have needed these coverages because, before purchasing the 401 Aurora Avenue property, he struck a deal with the seller to allow him to lease the property for the purposes of pasturing his 60+ heads of cattle. In fact, as previously indicated, Mr. Scafella transferred his herd of cattle to 401 Aurora Avenue prior to purchasing the property. Upon receipt of the aforementioned quote, it does not appear that Mr. Scafella was provided a copy of the quote. The factual record infers that Ms. Simpson recognized high premium rate for the policy and did not want to run Mr. Scafella off as a customer. As such, she requested a second quote, this time only providing a quote for farming equipment. (*Appx. p.* 0201). In addition to the Respondent's agent's direct knowledge of farming business on the property, the Respondent sent another agent to conduct a site inspection of the property. (*Appx. pp. 0240, 0208-0218*). At that time, the 401 Aurora Avenue property would have been littered with cattle and there would have been ample evidence of farming activity. (*See Id.*).

Lastly, Mr. Scafella asserted in the matter below that he spoke with Respondent's agent, Kendra T. Simpson, about obtaining insurance on the very operations that it now claims to lack knowledge of. (*Appx. p. 0242*). In fact, Mr. Scafella also asserted that he was in the process of

speaking with Ms. Simpson about obtaining the necessary insurances on the catering business that had not yet begun operations on the property. (*See Id.*).

As this Court may see, the Circuit Court ignored a factual record that was laden with evidence supporting the Petitioner's contentions. Instead, it picked the set of facts that it liked best, in violation of its duty to construe the entire factual record and any inferences drawn from it in a light most favorable to the non-movant.[2] Cursory review of the Circuit Court's *Orders* reveals that it undertook no meaningful analysis of the issue of waiver therein. Had it done so, it would have had to have acknowledged the substantial amount of evidence disputing the Respondent's assertions upon motion for summary judgment. The Circuit Court did not.

As such, the Circuit Court committed an abuse of its discretion in granting summary judgment herein, and entered judgment on an issue that is, at worst, an issue for the Jury. Moreover, it excused the Respondent, Erie Insurance Company, from providing coverage for the structural damage to plaintiff's barn even though the record suggested that it knew the same was used, in whole or in part, for a business purpose prior to or at the time of policy issuance. In doing so, it permitted Respondent Erie to profit from a premium payment for fire coverage for "Other Structures" which it would have had no intention of honoring at policy inception.

2. **The Circuit Court abused its discretion and committed clear error when it held that the "business purpose" exclusion contained within the "Other Structures" coverage in the subject policy precluded coverage for the fire damage to the Petitioner's barn insofar as it found that the same was "used in whole or in part for 'business' purposes[.]"**

[2] The *September 12, 2022 Order* at issue was drafted by the Respondents, Erie Insurance Company and Stanley Geho, in this matter at the Circuit Court's direction. Party-drafted orders on summary judgment often contain one-sided views of the factual record. However, regardless of who drafted the order, the failure of the same to meaningfully consider the evidence in the record to the contrary and/or analyze the same on the issue of waiver amounts to a clear abuse of discretion. **The Petitioner would submit that little attention was paid to this issue by the Respondents because they could not meaningfully address the factual record therein without accidentally demonstrating to the Circuit Court that there existed obvious issues of material fact.**

The Circuit Court committed clear error when it held that the subject fire-damaged barn was used for a business purpose insofar as it found that the "milk house" and the "barn" were the same structure. The "barn" is a structure that is independent of the "milk house." The Circuit Court undertook no analysis of the factual record in reaching its sweeping conclusion that the "barn" and "milk house" were one in the same. Likewise, it failed to construe the factual record in a light most favorable to Mr. Scafella, accepting the Respondent's factual assertions as the facts of the case.

In the Court below, the Respondents, Erie Insurance Company and Stanley Geho, asserted that there was no coverage for Mr. Scafella's fire damages to his barn's structure under the "Other Structures" coverage in the subject policy, insofar as they alleged that he was conducting a meat-cutting business in the barn. As previously indicated, with respect to the "Other Structures" coverage in the policy, the policy states:

> **"We"** will pay for loss to :
>
> 3. other structures at the **"residence premises"** separated from the dwelling, including garages, fences, shelters, tool sheds or carports.
> Structures connected to the dwelling by only a fence, utility line or similar connection are considered to be other structures.
> 4. construction material at the **"residence premises"** for use in connection with **"your"** other structures.

However, the policy goes on to indicate that:

> **"We"** do not pay for loss to structures:
>
> 3. used in whole or in part for **"business"** purposes (except rental or holding for rental of structures used for private garage purposes); or
> 4. used to store **"business"** property. However, if the **"business"** property is solely owned by **"anyone we protect," "we"** do provide coverage for the structure. The **"business"** property may not include gaseous or liquid fuel, unless the fuel is in a fuel tank that is permanently installed in a vehicle or craft which is parked or stored in the structure.

The issue below concerned whether Mr. Scafella was operating a meat-cutting business out of the barn proper, as it was clear from the language of the policy that the "business purpose" exclusion was applicable on a structure-by-structure basis. The Respondents claimed that Mr.

Scafella was selling meat from his commercial farm operation out of the large barn. However, Mr. Scafella contended that he was not operating any business out of the barn and only sold beef out of the structure known as the "milk house" adjacent to the barn. The Respondents claimed that the structures were one-in-the-same.

In support of his argument below, Mr. Scafella submitted substantial evidence establishing the separate nature of the structures. He demonstrated that the "milk house" had its own foundation and four block walls of its own. (*Appx., pp. 0219-0226, 0240-0241*). He showed that the "milk house" has its own roof, separate and apart from the barn. (*See Id.*). He noted that the "milk house" had its own electrical system and hook-ups that were separate and apart from the barn. (*See Id.*). He showed that the "milk house" has its own water supply, separate and apart from the barn. (*See Id.*). In fact, the barn runs on city water supply, while the "milk house" runs on the farm's own well water. (*See Id.*). Mr. Scafella demonstrated that the "milk house" had its own external entrance separate from the barn. (*See Id.*). Moreover, the "milk house" bore signage ("Olivia's, LLC") designating its separation from the barn. (*See Id.*). Mr. Scafella showed that, if the barn or the "milk house" were torn down, the structure of the other building would in no manner be affected. (*See Id.*). Numerous pictures produced by Mr. Scafella supported his contentions in this regard. (*Appx. pp. 0219-0226*). Moreover, those pictures revealed the clear seams and delineations between the two buildings' materials. (*See Id.*). The Respondents, Erie Insurance Company and Geho, could not genuinely contest these contentions, but nonetheless asserted that the structures were one-in-the-same to the extent that they touched and insofar as an internal door was cut between the structures for convenience. The Respondent also tried to assert that the structures were the same because a non-owner of the property, Respondent's girlfriend, referred to the area of the meat store she was working in as the "barn." (*Appx. p. 0167*).

Without any analysis of the factual record, the Circuit Court came to the sweeping conclusion in its January 18, 2022 *Order* that both the "barn" and the "milk house" were the same structure. (*Appx. pp. 0257-0258*). In reaching this decision, the Circuit Court, again, took the Respondent's contentions of fact as true and ignored the evidence provided by Mr. Scafella. (*See Id.*). The Circuit Court's conclusion both violated the standard of review for motions for summary judgment regarding the construction of facts and the law governing construction of insurance policies.

There is no legal authority in this State defining what constitutes a structure or separate structures for the purposes of fire insurance coverage for "Other Structures." We are left to the language of the subject Erie policy. However, that policy fails to define the scope of the term "structure," rendering the subject policy ambiguous in its application to the case at bar. What qualifies as a "structure" and what separates one structure from another? The policy leaves one to guess.

It is well-settled in West Virginia that, "[w]henever the language of an insurance policy provision is reasonably susceptible of 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. Merchants Prop. Ins. Co. of Indiana, 159 W. Va. 508, 508, 223 S.E.2d 441, 442 (1976).** "'Ambiguous and irreconcilable provisions of an insurance policy should be construed strictly against the insurer and liberally in favor of the insured, although such construction should not be unreasonably applied to contravene the object and plain intent of the parties.' Point 2, Syllabus, Marson Coal Co. v. Insurance Co., W.Va., 210 S.E.2d 747 (1974)." **Syl. Pt. 2, Id.** "As a general rule, we accord the language of an insurance policy its common and customary meaning. That is, '[l]anguage in

an insurance policy should be given its plain, ordinary meaning.' *Horace Mann Ins. Co. v. Adkins,* 215 W.Va. 297, 301, 599 S.E.2d 720, 724 (2004) (internal quotations and citation omitted)... Further, '[w]here a provision of an insurance policy is ambiguous, it is construed against the drafter, especially when dealing with exceptions and words of limitation.' *Payne v. Weston,* 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995) (citing Syl. pt. 1, *West Virginia Ins. Co. v. Lambert,* 193 W.Va. 681, 458 S.E.2d 774 (1995)). **Boggs v. Camden-Clark Mem'l Hosp. Corp., 225 W. Va. 300, 304–05, 693 S.E.2d 53, 57–58 (2010).**

In the subject policy, Respondent, Erie Insurance Company, failed to define the scope of its "Other Structures" coverage (or the exclusions to the same) properly and adequately. The term "structure" is undefined in the policy. That is an omission that, as a matter of law, should have operated to the detriment of the Respondents and in favor of coverage to Mr. Scafella. However, the Circuit Court undertook no analysis of what constituted a "structure" for the purposes of coverage and did not strictly construe the scope of the same (or the applicable facts) against the Respondents.

Employing a plain, common meaning approach to the subject Erie policy's definition of what constitutes a "structure" and what separates a "structure" from another militated in favor of a finding of coverage to Mr. Scafella. Pursuant to the common English meaning and/or dictionary definition of "structure," the term can mean a building or virtually anything that is constructed. Likewise, the definition of the word "building" defines that term broadly to mean, generally, a permanent structure with a roof and its own walls for permanent use.[3] Simply applying the

---

[3] *Merriam-Webster's Dictionary* defines the common meaning of the word "structure" as a noun as follows:

1: the action of building : CONSTRUCTION
2a: something (such as a building) that is constructed
b: something arranged in a definite pattern of organization a rigid totalitarian *structure*— J. L. Hessleaves and other plant *structures*
3: manner of construction : MAKEUPGothic in *structure*

common definitions of these terms to the policy, it was reasonable for the Circuit Court to conclude that the "milk house" - a permanent block building with its own roof, its own four walls, its own utilities hook-ups, its own external entrance/exit, and its own character – was a separate and distinct "structure" from the adjacent barn. This is especially so where each building could stand alone without the other's existence.

There is no legal authority in this State defining the scope of the term "structure" in this context. The legal authorities relied upon by Respondents, Erie Insurance Company and Geho, below only served to prove the Petitioner correct in his assertions. For example, in **Winston v. Hartford Fire Ins. Co., 317 S.W.2d 23 (Mo. Ct. App. 1958)** the Missouri Court of Appeals found a garage and a barn to be one building insofar as they shared rafters and were under the same roof. The Court found the garage and barn therein to be one structure, not because they were adjacent, but because they shared components critical to each other's structural integrity (e.g., rafters and a roof). Those circumstances did not exist in this case as the "barn" and the "milk house" structures

---

4a: the arrangement of particles or parts in a substance or body soil *structure*molecular *structure*
b: organization of parts as dominated by the general character of the whole economic *structure*personality *structure*
c: coherent form or organization tried to give some *structure* to the children's lives
5: the aggregate of elements of an entity in their relationships to each other the *structure* of a language

Merriam-Webster. (n.d.). Structure. In *Merriam-Webster.com dictionary*. Retrieved October 19, 2021, from https://www.merriam-webster.com/dictionary/structure.

As one can see from the definition of "structure," it has a vague scope. A fence or a railroad track could be a "structure." However, it is clear that all "buildings" are a type of structure per the dictionary definition, and that structures may be defined by the character of their organization. *Merriam-Webster's Dictionary* defines the word "building" as a noun as follows:

1: a usually roofed and walled structure built for permanent use (as for a dwelling)
2: the art or business of assembling materials into a structure

Merriam-Webster. (n.d.). Building. In *Merriam-Webster.com dictionary*. Retrieved October 19, 2021, from https://www.merriam-webster.com/dictionary/building.

stand on their own. Each have their own separate four wall, their own roofs, their own utilities hookups, their own dedicated entrances, etc.

In **McMahon v. People's Nat. Fire Ins. Co., 14 Teiss. 269, 270-71 (La. Ct. App. 1917),** relied upon by Respondent below, Louisiana Court of Appeals was attempting to distinguish between additions to buildings (parts that are one-in-the-same) and separate structures. The **McMahon** Court turned to the *Encyclopedia of Law and Procedure,* 19 *Cyc., pp.* 664-665 *and notes*, 59-60-61, for guidance and which instructed that the litmus test for determining whether a structure is a separate structure or just mere an addition to a building is whether the same is "...structurally connected with and dependent upon the main building." Once again, the **McMahon** Court focused on the structural connectively of a structure adjacent to a building to determine its character as an addition. The dependency of the structures upon each other's integrity was the key to determining whether adjacent structures were the same. For reasons already referenced, the "barn" and "milk house" are structurally independent of one another.

The Circuit Court committed an abuse of its discretion in granting summary judgment on *Count I* of the Complaint in favor of the Respondent on the issue of whether the "barn" and the "milk house" were the same structure. Construing the facts in a light most favorable to Mr. Scafella and strictly construing the undefined provisions of the subject policy against the Respondent, the Circuit Court should have found the structures to be separate. At the very least, genuine issues of material fact should have precluded judgment in favor of the Respondent in this regard.

3. The Circuit Court erred when it granted summary judgment on *Count I* of the *Complaint* finding that the Petitioner's claims were not covered by the plain terms of the "claw-back" provision contained within the "business purpose" exclusion in the subject policy's "Other Structures" coverage.

The Circuit Court erred when it granted summary judgment on *Count I* of the *Complaint* in favor of Respondents, Erie Insurance Company and Geho, insofar as the barn should have been covered under the plain language of the exclusion relied upon by Respondents. The exclusion relied upon by the Respondents clearly provided coverage to the Petitioner for the exact scenario at issue in the case below. Namely, the subject policy provided coverage to Mr. Scafella for damage to the structure insofar as the barn structure was used to store his business property. The Circuit Court failed to recognize that this fact was a coverage-triggering event and should have denied the Respondents' *Motion* accordingly..

As previously discussed, the exclusion relied upon by defendants, Erie and Geho, regarding "Other Structures" coverage states as follows:

> **"We"** do not pay for loss to structures:
>
> 1. used in whole or in part for **"business"** purposes (except rental or holding for rental of structures used for private garage purposes); or
> 2. used to store **"business"** property. However, if the **"business"** property is solely owned by **"anyone we protect," "we"** do provide coverage for the structure. The **"business"** property may not include gaseous or liquid fuel, unless the fuel is in a fuel tank that is permanently installed in a vehicle or craft which is parked or stored in the structure.

As the Court may see, the exclusion relied upon by Respondent plainly contains a coverage-triggering provision (which the Circuit Court referred to as a "claw-back" or "pullback" provision) where coverage for an otherwise excluded structure is provided where the structure is used to store the business property of an insured. The factual record indisputably revealed that the subject barn at issue was used to store Mr. Scafella's personal business property. (*Appx., pp. 0280-0281*). In fact, the subject barn was filled with implements of Mr. Scafella's commercial beef farming operations, the tools and equipment for his contracting business, and it held property and items that were intended to be utilized in the future for a catering and/or farm-to-table restaurant business that was not yet operative, as well as various other items owned by Mr. Scafella. (*See Id., see also, Appx. pp. 0238-0243*). There is no question that said property was solely the property of

Mr. Scafella as Respondent, Erie Insurance Company, provided coverage to Mr. Scafella for the loss of these items under his personal property coverage.

As Mr. Scafella argued below, if the barn was used to store property that belongs solely to him but that was used for a business purpose, the plain language of the exclusion rendered the exclusion inapplicable. To the extent that there was any question with the application of the policy's pull-back language, those ambiguities should have been strictly construed against the insurer and in favor of coverage to the insured. "Whenever the language of an insurance policy provision is reasonably susceptible of 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. Merchants Prop. Ins. Co. of Indiana, 159 W. Va. 508, 508, 223 S.E.2d 441, 442 (1976)** "'Ambiguous and irreconcilable provisions of an insurance policy should be construed strictly against the insurer and liberally in favor of the insured, although such construction should not be unreasonably applied to contravene the object and plain intent of the parties.' Point 2, Syllabus, Marson Coal Co. v. Insurance Co., W.Va., 210 S.E.2d 747 (1974)." **Syl. Pt. 2, Id.** "We previously have held that '[a]n insurance policy should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties.' Syl. pt. 2, *D'Annunzio v. Security–Connecticut Life Ins. Co.*, 186 W.Va. 39, 410 S.E.2d 275 (1991)." **Cherrington v. Erie Ins. Prop. & Cas. Co., 231 W. Va. 470, 482, 745 S.E.2d 508, 520 (2013).**

In the underlying matter, the Circuit Court misapplied the clear language of the "claw-back" provision in granting summary judgment to the Respondents and further ignored the indisputable facts regarding the nature of the property stored in the barn. In doing so, the Circuit Court gave no effect to the "claw-back" provision, placing it in conflict with other exclusionary

language in the same provision. However, the law in West Virginia does not subscribe to an insurance policy construction that lends itself to the mantra: what the policy giveth in one exclusion, the policy then taketh away in the very next exclusion. **Cherrington v. Erie Ins. Prop. & Cas. Co., 231 W. Va. 470, 488, 745 S.E.2d 508, 526 (2013)(citing, Tews Funeral Home, Inc. v. Ohio Cas. Ins. Co., 832 F.2d 1037, 1045 (7th Cir.1987) (construing insurance policy to find coverage where one policy provision specifically provided coverage for subject conduct while subsequent policy provision attempted to exclude coverage for very same conduct), overruled on other grounds by National Cycle, Inc. v. Savoy Reinsurance Co. Ltd., 938 F.2d 61 (7th Cir.1991)).** It must be noted that West Virginia law expressly holds that it is unreasonable to construe two policy exclusions according to their plain language when the operative effect of this exercise results in such incongruous results. **See Syl. Pt. 2, D'Annunzio v. Security–Connecticut Life Ins. Co., 186 W.Va. 39, 410 S.E.2d 275 (1991).** The policy clearly provides coverage from the claw-back provision. The Circuit Court violated the aforesaid principle by denying coverage for the Petitioner's barn.

It should be further noted that the Circuit Court's application of the exclusion relied upon by Respondents, Erie Insurance Company and Geho, was also in error insofar that it was indisputable that the cause of the fire loss had nothing to do with business activity in the barn. As the Court stated at **Syl. Pt. 8, Murray v. State Farm Fire & Cas. Co., 203 W. Va. 477, 480, 509 S.E.2d 1, 4 (1998),** "When examining whether coverage exists for a loss under a first-party insurance policy when the loss is caused by a combination of covered and specifically excluded risks, the loss is covered by the policy if the covered risk was the efficient proximate cause of the loss. No coverage exists for a loss if the covered risk was only a remote cause of the loss, or conversely, if the excluded risk was the efficient proximate cause of the loss. The efficient

proximate cause is the risk that sets others in motion. It is not necessarily the last act in a chain of events, nor is it the triggering cause. The efficient proximate cause doctrine looks to the quality of the links in the chain of causation. The efficient proximate cause is the predominating cause of the loss."

The factual record clearly evinced that the cause of the fire loss was an electrical outlet installed by Mr. Scafella that failed. (*Appx. p. 0242*). That outlet was contained in an area of the barn where there clearly was no business activity. (*See Id.*). Moreover, the cause of the electrical outlet failure had nothing to do with business activity on the premises. These aforementioned facts were indisputable. Nevertheless, the Circuit Court still found the Petitioner's claims were left excluded by the policy. The Circuit Court's decision erroneously misapplied the principle espoused by **Murray**. Regardless of Respondents' position concerning whether business activity was being conducted in the barn proper or not, the efficient proximate cause of the loss had absolutely nothing to do with any business activity on the premises. The Respondents can point to no fact disputing this. As such, the Respondents' underlying *Motion* should have been denied.

The Circuit Court committed an error in granting summary judgment on *Count I* of the *Complaint* in favor of the Respondents on the issue of coverage under the exclusion's "claw-back" provision. The factual record established both that Mr. Scafella's barn was used to store his business property, and that the cause of loss had nothing to do with business activity. Both of these facts should have resulted in the Circuit Court denying Respondents' underlying *Motion*.

VI. CONCLUSION

The January 18 and September 12, 2022 *Orders* of the Circuit Court of Marshall County granting summary judgment to the Respondents, Erie Insurance Company and Stanley Geho, on *Count I* of the *Complaint* must be reversed and remanded for further proceedings. As this Court

may see, the Circuit Court of Marshall County abused its discretion in granting summary judgment, pursuant to **W.Va. R. Civ. 56**, and otherwise committed clear error insofar as it failed to acknowledge evidence in the factual record supporting Mr. Scafella's contentions and which created genuine issues of material fact. By doing so, the Circuit Court violated the dictates of **Rule 56** and its interpretive jurisprudence, abused its discretion by choosing the set of facts in the case that it liked best, and made decisions of fact which were proper for Jury determination. As such, the relief sought by the Petitioner, Mark Scafella, is proper.

Respectfully Submitted,

MARK SCAFELLA, Petitioner,

BY: 

John R. Angotti, Esquire (W.Va. Bar #5068)
David J. Straface, Esquire (W.Va. Bar #3634)
Chad C. Groome, Esquire (W.Va. Bar #9810)
Angotti & Straface, L.C.
274 Spruce Street
Morgantown, WV 26505
(304) 292-4381 – P
(304) 292-7775 – F
johnangotti@angottistrafacelaw.com
djstraface@angottistrafacelaw.com
chadgroome@angottistrafacelaw.com
Of Counsel for Petitioner, Mark Scafella

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and accurate copy of the foregoing **PETITIONER'S BRIEF** was served upon all counsel of records by electronic filing this 12th day of January, 2023 to the following:

Melanie M. Norris, Esquire
STEPTOE & JOHNSON, PLLC
1233 Main Street, Suite 3000
P.O. Box 751
Wheeling, WV 26003-0751
Melanie.norris@steptoe-johnson.com
Of Counsel for Respondents

Of Counsel for Respondent