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

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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 REPLY

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

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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. 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, including substantial farming activities. As a result, Respondent, Erie Insurance Company, was permitted to collect a premium off of an "Other Structures" coverage that it knew would be inapplicable at the time of policy inception. Moreover,

the evidentiary record evinces that the application the Respondents rely upon for claiming that Mr. Scafella misrepresented the status of farming operations on his property was never delivered to him. There has not been a document, email, direct message or other record of communication evincing delivery of this electronic application form to Mr. Scafella despite him specifically requesting the Respondents to produce the same.

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.

III. LAW & ARGUMENT

1. The Respondents rely upon disputed facts for their contention that no waiver of any "business" exclusion occurred in regard to the "Other Structures" coverage portion of Petitioner's policy.

As previously asserted, 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 Petitioner

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.

The parties to this appeal have hashed out the legal arguments in great detail in both their briefs and in the numerous filings in the Circuit Court hereinbelow. As such, there is no need to readdress the same. However, the Respondents make several factual assertions in their brief that must be briefly addressed.

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, despite their contentions otherwise. The Respondent Erie issued the policy with knowledge of these risks. Irrespective of the same, the Respondents claim, at pages 38 and 39 of their *Brief*, that the Petitioner did not indicate that he was operating a commercial cattle farm on his property and that he rejected more extensive farming endorsements on the policy. However, each and every fact relied upon by the Respondents in their defense is a disputed fact. Moreover, this matter presents a he-said/she-said dispute between Mr. Scafella and the Respondents' sales agent, Kendra Simpson. As such, summary judgment on the issue of waiver should have never been granted.

The Respondents' contention that, Respondent Erie had no knowledge of the subject cattle farming is based almost entirely off of the Affidavit of the sales agent, Kendra Simpson. However, Ms. Simpson's contentions were disputed in the proceedings hereinbelow. Her assertion that Erie initially issued an "incidental farming" policy makes no sense as the policy did not distinguish between types of farming. *App. p. 0020.* The plain language of the policy indicates that "Business" as used in the policy "…means any full-time, part-time or occasional activity engaged in as a trade, profession or occupation, **including farming.**" *See Id.*. There is no reference in the policy to the

term "incidental farming," nor is there any exception contained in the policy for "incidental farming." Per the terms of the policy, **farming is business.** *See Id.* Regardless, the quote at issue is clearly not for "incidental farming." It is for commercial farming operations. Having 30 to 60 head of cattle is not "incidental," and Mr. Scafella never represented his operations in that regard to be incidental. *Appx. p. 0365.*. Moreover, the Respondents' admission that Ms. Simpson knew Mr. Scafella was planning to have 30 cattle on his property, despite their characterization of the same, is a damning admission of his planning knowledge to conduct farming business on the property pursuant to the policy's definition.

Ms. Simpson's claims are not bolstered by her file, which contains no correspondence regarding policy negotiations between her and Mr. Scafella. There are no letters, emails, or other communications between Ms. Simpson and Mr. Scafella corroborating her contentions as to the nature of the communications at policy inception. We are left to take Ms. Simpson at her word. Ms. Simpson's claim that Mr. Scafella, by and through Ms. Smith, rejected the policy quote on the more extensive farming coverage is not supported by any evidence other than her own statement. In fact, the files of Ms. Simpson are devoid of any evidence that this quote was actually delivered to Mr. Scafella for review. *See Appx. pp. 0365-0366.* There is no email, letter, or other written communication documenting or delivering the same. Mr. Scafella suspects that he was never provided the same because the premium was too high and Erie and its agent did not want to lose the insurance sale, so it went back to the drawing board a secured another quote without communicating the same to him. *See Id.* However, at no time did Mr. Scafella represent to Erie that he was no longer farming on the property or that he stopped farming it. *Appx. pp. 0365-0366.* Such a representation makes no sense as he was farming the property before he bought it and Erie knew he was in the business of farming already.

The only document allegedly in Ms. Simpson's file regarding underwriting communications is a vague sticky note claimed to be notes from communications with the Petitioner and/or his girlfriend. *See Appx. p. 0276.* However, the Petitioner subpoenaed Ms. Simpson's file in the proceedings below. The sticky note was not contained in production from the subpoena. *See Appx. 0344.* This fact was raised with the Circuit Court below. *See Id.* Instead, that sticky note only showed up in the final set of discovery responses from the Respondents wherein it magically appeared. That sticky note is hardly reliable evidence and could have been created at any time by Ms. Simpson. In fact, the sticky note stands in contrast to a distinct absence of any relevant written communications with Mr. Scafella surrounding the policy's underwriting or quote issuances. One would expect to see substantial evidence of communications and correspondence between insurer and insured during the underwriting process, not solely a single sticky note that was previously unproduced.

The Respondents assert that the insurance inspector did not document cattle on the Petitioner's property and that this somehow means that no cattle were present at that time. However, Mr. Scafella had a lease on the property to farm it prior to moving in and had approximately 60 head of cattle on the property when Erie's agent came to the premises. *Appx. pp. 0365-0366.* If the absence of things contained in the Erie representative's means that those things did not exist, then there was no giant barn or other outbuildings on the Petitioner's property either. *See Appx. pp. 0208-0218.* Certainly, the Respondents would not posit such a contention as it is undisputed that those buildings existed at the time the Erie representative was on the property. However, the Erie representative in his report <u>did not document the existence of the giant barn on the premises over where the cattle were located</u>, as well as several other outbuildings on the property. *See Id.* Instead, he focused on the Petitioner's residence and the structures near it. Does

his failure to document the undisputed existence of a giant barn and numerous other outbuildings mean that they did not exist? Of course not. Likewise, his lack of reference to cattle on the property is not evidence that the same were not there either. He was not there to document the existence of cattle. The evidentiary record confirms that commercial farming was being conducted on the property, despite whether the Erie agents inspection report discusses the same. *Appx. pp. 0365-0366.*

Most egregiously, Erie attempts to assert that Mr. Scafella misrepresented his farming activity in the application for coverage. However, Mr. Scafella did not complete the subject application, nor did he sign it. *Appx. pp. 0365-0366.* Once again, there is no evidence in the record of any chain of custody for the electronic signature upon the same. Mr. Scafella has no recollection of ever signing the same and there is no correspondence, email or otherwise that he has been able to locate demonstrating that he electronically executed the same. *See Id.* As an electronic communication, there would have to have been a record of this document being sent to Mr. Scafella for electronic signature. Mr. Scafella explained that, in the past, those electronic documents would be delivered by email. *See Id.* However, once again, no record of communications in this regard exists. *See Id.*

The Petitioner specifically requested complete underwriting files from the defense in the matter below. It has not and cannot produce documentation evincing delivery of this electronic application or signature page to Mr. Scafella. As the Court may see, this is a common theme with Ms. Simpson's underwriting files. There is a distinct lack of documentation that one would expect to see in a typical insurance file and a lack of correspondence with the insureds. All she can produce is a sticky note. Mr. Scafella suspects that Erie and/or its agent, Kendra Simpson, signed the form on his behalf over the phone, but that he had never seen, nor reviewed the application

prior to her executing it for him. *See Id.* Mr. Scafella would have never signed an application indicating that he did not have cattle when he had a full herd of cattle actively on the property at the time of policy issuance and at the time of Erie's inspection. *Appx. pp. 0365-0366.*

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. 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

IV. 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 20th day of March, 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