IN THE INTERMEDIATE COURT OF APPEAL OF WEST VIRGINIA

Case No. 22-ICA-301
(Underlying Marion County Civil Action No. 18-C-110)

ANDREA DALE DYE,

Petitioner,

v.

FARMERS & MECHANICS MUTUAL INSURANCE COMPANY OF WEST VIRGINIA,

Respondent.

PETITIONER'S REPLY BRIEF

PREPARED BY:

Counsel for Andrea Dale Dye

ERIC M. HAYHURST (W.Va. No. 11042)
HAYHURST LAW, PLLC
34 Commerce Drive, Suite 203
Morgantown, WV 26501
Telephone: (304) 212-7099
Facsimile: (304) 212-7108
eric@hayhurstlaw.com

DATED: MAY 8, 2023

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II. INTRODUCTION

The Petitioner files this Reply to the Respondent's brief to both correct the factual record and to rebut the arguments made by the Petitioner.

III. STATEMENT OF THE CASE

In its response brief, the Respondent misstates or mischaracterizes some of the facts and procedural history in this matter. In that regard, the Petitioner hereby submits the following:

1. The Respondent states in its Brief that on April 10, 2020 the Bradleys withdrew their policy limits demand to Ms. Dye and F&M. Respondent's Brief, p. 8. However, the June 4, 2020 letter from Ms. Casey states that F&M is "in receipt of the demand from Plaintiffs in this matter for the sum of $101,000." R01334. That demand represents the $100,000 limit under the liability portion of the Policy and the $1,000.00 limit under the damage to property of other portion of the Policy. Even if that demand was revoked at some point, on October 14, 2020, the Bradleys, via counsel, again made a policy limits demand upon Ms. Dye and F&M via her counsel provided by F&M. R01335. Regardless of the timing, the Bradleys' $101,000 demand, which was within the limits of the F&M Policy, triggered F&M's unequivocal promise to pay made in the May 22, 2020 and June 4, 2020 letters.
2. The Respondent attempts to mischaracterize the Supreme Court's holdings in *Bradley v. Dye*, 875 S.E.2d 238 (W.Va. 2022), by suggesting that the Supreme Court held that there was "sufficient facts developed in discovery to support the Bradleys' claims against the Petitioner" and that the "Supreme Court found that a jury could reasonably conclude that Petitioner's actions caused the Bradleys' timber to be cut, damaged and/or carried away …" Respondent's Brief, p. 9, n.1. However, the Supreme Court's

ruling makes clear that there is no *mens rea* required to prove claims under W.Va. Code § 61-3-48a. *Bradley*, 875 S.E.2d at 244. Instead, the whole of the Supreme Court's ruling in *Bradley*, which implicitly recognizes that there is zero evidence in the record that Ms. Dye physically, herself, entered the Bradleys' property and cut, damaged and/or carried away their timber, suggests that Ms. Dye could potentially be held liable under the statute through other actions, not directly related to the cutting of the Bradleys' timber. *See generally*, 875 S.E.2d 238.

3. Moreover, the Supreme Court recognized in its opinion that the Bradleys sufficiently stated a claim of negligence against Ms. Dye surrounding her actions, including, not knowing the boundaries of her land and posting signs declaring herself as the owner of the property. *Id.* at 246. This is directly counter to the Respondent's assertion that "the Bradleys are not alleging that the timbering was somehow done negligently." Respondent's Brief, p. 30. As such, the Supreme Court's rulings in *Bradley* support a finding that the F&M Policy provides coverage to Ms. Dye in this matter.

4. The Respondent incorrectly states and argues that "discovery with respect to [the coverage] issues was already over by May and June of 2020, when the subject letters were sent." Respondent's Brief, p. 20. In fact, a Scheduling Conference was held in the Circuit Court just one week following Ms. Casey's June 4, 2020 letter on June 11, 2020, at which time discovery was extended in the case until October 16, 2020. R01227.

IV. ARGUMENT

A. The Circuit Court Erroneously Rejected the Petitioner's Arguments Regarding Waiver and Estoppel.

"'Waiver may be established by express conduct or impliedly, through inconsistent actions." *Potesta v. U.S. Fid. & Guar. Co.*, 202 W.Va. 308, 315, 504 S.E.2d 135, 142 (1998)

(quoting *Ara v. Erie Ins. Co.*, 182 W.Va. 266, 269 387 S.E.2d 320, 323 (1989)). F&M's argument that it consistently maintained its coverage denials in this case flies in the face of its own letters promising to "***completely protect***" and indemnify Ms. Dye "from ***any*** financial exposure" for "the ***entire*** amount of the verdict" in the underlying civil action filed against her by the Bradleys. R01333-1334, 1586 (emphasis added). These actions by F&M were express, or at the very least inconsistent, as it relates to its coverage position in this case. F&M argues that if it had intended to waive its coverage position, "it would have been incumbent upon F&M to formally withdraw its reservation of rights letter, to advise the Circuit Court that the factual determinations to be made [sic] the jury at trial were no longer necessary and to dismiss its suit seeking a declaratory judgment." Respondent's Brief, p. 16. However, the declaratory judgment action had largely been decided at that point via the Circuit Court's January 9, 2020 Order, which granted summary judgment in favor of Ms. Dye on all of the exclusions cited by F&M in its reservation of rights letter. R01118-1136. Thus, the reservation of rights letter had largely been vacated through the Circuit Court's Order.

The only remaining issue after the Circuit Court's January 9, 2020 Order was the "occurrence" issue. However, F&M's letters ***expressly*** made unequivocal promises to pay ***any*** verdict rendered against Ms. Dye. That means that F&M would have paid a verdict rendered against Ms. Dye regardless of the Jury's findings on her level of culpability (i.e., did she cut the trees or was she just negligent in hiring the Joneses or otherwise engaging with them to cut her trees). Moreover, the factual determinations to be decided by the jury had other implications besides the coverage issue, (i.e., liability and apportionment thereof). At the very least, the letters implied that F&M was no longer maintaining a coverage denial on the basis of "occurrence" under

the Policy. After all, there was ample evidence in the record to suggest that Ms. Dye did not intentionally do anything with regard to the Bradleys' trees or property – and F&M knew it.

F&M further wants this Court to believe, just as it did with the Circuit Court, that its letters were simply sent under the principles and for the purpose of protecting itself under *Shamblin v. Nationwide*, 183 W.Va. 585, 396 S.E.2d 766 (1990).[1] To believe and acquiesce to the same would turn the principles of *Shamblin* on their head. Indeed, the effect of the *Shamblin* decision is to hold an insurance company's feet to the fire when engaging in settlement negotiations in that it forces an insurance company to consider the interests of its insured "*at least*" as much as its own interests. *Shamblin*, 183 W.Va. at 593, 396 S.E.2d at 774 (emphasis added). Here, F&M gave no consideration to Ms. Dye's interests in this case, but instead, attempted to use several non-applicable policy exclusions to deny coverage to her. Then, in an effort to lure her into submission in the declaratory judgment action, sent her letters unequivocally promising to pay any verdict rendered against her in the underlying liability action. That F&M now wants to characterize those letters as being "*Shamblin* letters" is both absurd and offensive to the notions of fair play prescribed by *Shamblin* itself. As such, this untoward and shameless effort by F&M should be rejected by this Court, as it should have been by the Circuit Court.

F&M further argues that Ms. Dye "failed to present any evidence that F&M intended to voluntarily relinquish the rights it had otherwise carefully preserved." Respondent's Brief, p. 18. First, this assertion is simply incorrect as the aforementioned letters from F&M are themselves evidence of F&M's intent, whether it wants to admit that or not. Second, the sequence of events in the underlying case prevented Ms. Dye from discovering any further evidence with regard to

[1] This is despite the fact that there is no reference to *Shamblin* in the letters – which is one of the arguments F&M uses for its explanation as to why the letters do not address coverage; that is, there was no reference to coverage in the letters so, therefore, there could have been no waiver.

F&M's conduct or intent. Namely, F&M's letter attempting to clarify its promise to Ms. Dye was not sent until December 10, 2020, nearly two months after Ms. Dye filed the subject Motion for Summary Judgment and after discovery had closed. R01349. At that time, Ms. Dye's counsel attempted to take the deposition of Ms. Casey but was rebuffed by F&M's counsel. R01687-89. In that regard, F&M should not be permitted to benefit from its own misconduct in stifling discovery in this matter. Should this Court believe F&M's argument that more evidence should have been presented, the Court should reverse the Circuit Court's decision and remand the case for further discovery on the issue.

Additionally, F&M argues that Ms. Dye "presented absolutely no evidence to the Circuit Court to suggest that she changed her position to her detriment based upon the May 22, 2020, and June 4, 2020 letters, or that she was somehow misled by them." Respondent's Brief, p. 19-20. F&M goes on to argue that Ms. Dye's argument that "she chose to forego additional discovery on the coverage issues … ignore[s] the fact that discovery … was already over … when the subject letters were sent." *Id.*, p. 20. Again, that is simply not true. Discovery was not over – it did not end until October 16, 2020. R01227. The reality is that upon receiving the letters from F&M, Ms. Dye believed the coverage issues were resolved and, as such, she did not need to engage in further discovery or otherwise explore F&M's motives in sending the letter as they were clear based upon the text of the letters. This fact is demonstrated by the docket in the Circuit Court revealing that no further action was taken by her on the coverage issue (she did not serve any further written discovery requests or notice any depositions) until she filed her summary judgment motion. R01704-05.

Moreover, despite F&M's contention, there could be no further evidence to provide: The underlying matter is a lawsuit over coverage and the issue at bar involves Ms. Dye's actions taken,

or not taken, within that litigation. Aside from the arguments of the parties themselves and the pleadings and other documents generated within the litigation, there is no additional evidence to adduce regarding Ms. Dye's reliance upon F&M's letters.

Finally, with regard to waiver and estoppel, F&M argues that it did not act in bad faith toward Ms. Dye in this matter such that coverage could not be extended beyond the terms of the Policy under *Potesta*, 202 W.Va. 308, 504 S.E.2d 135. However, the record clearly demonstrates otherwise. Specifically, in its reservation of rights letter, in its complaint for declaratory relief in the underlying matter and in its October 1, 2019 motion for summary judgment, F&M cited several policy exclusions that were simply not applicable to the claims in the underlying matter as they were not part of the subject liability coverage of the Policy. R00185-320, 686-707 and 1690-96. Namely, F&M cited an earth movement exclusion, an intentional loss exclusion and a personal liability by contract exclusion. *See Id.* The Circuit Court found that these exclusions were absolutely not applicable to the liability coverage portion of the Policy, which, of course, was written by F&M. *See* R01117-1136. In that regard, F&M knowingly "misrepresent[ed] pertinent facts or insurance policy provisions relating to coverage at issue" to both its insured and the Circuit Court in violation of the Unfair Trade Practices Act. W.Va. Code § 33-11-4(9)(a). As such, F&M has clearly committed acts of bad faith in this matter such that coverage may be extended beyond the terms of the Policy, ***if*** that were necessary after determination of the "occurrence" issue. Thus, summary judgment was not appropriate for F&M, but instead, should be granted in favor of Ms. Dye.

B. The Circuit Court erred in finding that the cutting of trees is not an "occurrence."

F&M's entire argument with regard to the "occurrence" issue completely ignores the black letter law in West Virginia that, in determining whether something was an "occurrence" under a

policy of insurance, "**primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue**." Syl., *Columbia Cas. Co. v. Westfield Ins. Co*., 217 W. Va. 250, 617 S.E.2d 797 (2005) (emphasis added). Further, F&M ignores the black letter law that a policyholder may only be denied coverage as it relates to "occurrence" "if the policyholder (1) committed an intentional act *and* (2) **expected or intended the specific resulting damage**." Syl. Pt. 7, *Farmers and Mechanics Mut. Ins. Co. v. Cook*, 210 W.Va. 394, 557 S.E.2d 801 (2001) (emphasis added).

In support of its argument, F&M cites a list of several cases from other states. However, a thorough review of these cases demonstrates that they all involve direct actions of the insured under the subject policies and their actions taken directly against the aggrieved parties' property – far different than the case here. Specifically:

> *Rolette Country v. Western Casualty & Sur. Co.*, 452 F. Supp. 125 (D.N.D. 1978), involved a county sheriff seizing a mobile home under a warrant of attachment obtained by a creditor of the owner of the mobile home. The subject actions that did not constitute an "occurrence" were taken directly by the insured-sheriff, not a third-party hired by the sheriff. Further, there could be no argument that the sheriff's actions of seizing property were not intentional.
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> *Thrif-Mart, Inc. v. Commercial Union Assurance Co.*, 154 Ga. App. 344, 268 S.E.2d 397 (Ga. Ct. App. 1980), involved the insured breaking into a store and intentionally setting fire to it – just simply nowhere near equivalent to the facts in this case.
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> *American Home Assurance Co. v. Osborne*, 47 Md. App. 73, 422 A.2d 8 (Md. Ct. Spec. App. 1980), involved a claim of conversion against a tow truck driver for his direct action of towing cars. However, in finding that there was no "occurrence" under the subject policy based on the insureds actions, the court implicitly recognized that there could have been coverage for an "occurrence" under the policy if there had been improper driving or mishaps that had occurred, i.e., negligence claims related to the towing of cars.
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> *National Farmers Union Property & Cas. Co. v. Covash*, 452 N.W.2d 307 (N.D. 1990), involved the direct action of the insured in erecting a gate to close a public section line. The court found this to be an intentional act directly on the part of the insured.

> *General Insurance Co. v. Palmetto Bank*, 268 S.C. 355, 233 S.E.2d 699 (1977), involved conversion actions against the insured alleging that it had distrained the aggrieved party's property for failure to pay rent. Again, this was a direct action by the insured knowingly taken against the property of another.
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> *Deseret Fed. Sav. & Loan Ass'n v. United Stated Fidelity & Guaranty Co.*, 714 P.2d 1143 (Utah 1986), involved several actions taken by the insured-bank directly against its tenant, who filed a constructive eviction action against the bank. The bank admitted that the acts causing the damages were intentional.
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> *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Group*, 681 P.2d 875 (Wash. Ct. App. 1984), involved a breach of contract claim wherein the insured-contractor refused to do work – which is not even close to the facts of the case here.

In this case, it cannot be refuted that there is zero evidence in the record that demonstrates that Ms. Dye (1) took any direct action cut the Bradleys' trees or damaged their property or (2) intended for the same to occur. As such, none of the cases cited by F&M are persuasive in this case.

Finally, F&M argues that "all of the Bradleys' allegations concern intentional conduct (the cutting of timber roads and the harvesting and sale of timber)" – that is simply not true. Respondent's Brief, p. 29. Both the Supreme Court and the Circuit Court have recognized that the Bradleys have sufficiently plead a negligence cause of action against Ms. Dye. Specifically, the Supreme Court recognized the sufficiency of the claim in overturning the Circuit Court's ruling that she owed no duty of care to the Bradleys. *See Bradley*, 875 S.E.2d at 245-246. Further, the Circuit Court held in its January 9, 2020 Order that Ms. Dye could only potentially be responsible for "negligently advis[ing] that she owned the plaintiffs' property or trees, … negligently advis[ing] the Jones defendants as to the metes and bounds of her property, … negligently oversee[ing] or fail[ing] to oversee at all the work of the Jones defendants, and/or … fail[ing] to do her due diligence to determine which trees and/or properties belonged to her" and the like since she had not physically taken any action in cutting the trees. R01130-31. To be sure, the facts

developed in this case, as demonstrated by the appendix record here, clearly demonstrate that the only intentional conduct of "cutting of timber roads and the harvesting and sale of timber" was conducted by the Jones defendants, which are not insured under the Policy. The Bradleys' case against Ms. Dye can only involve negligent actions like those identified by the Supreme and Circuit Courts, which do not involve her touching even one of the Bradleys' trees or damaging their property in any way. As such, Ms. Dye's conduct here clearly falls within the definition of "occurrence" under the Policy such that summary judgment is not appropriate for F&M, but instead, is appropriate in favor of Ms. Dye.

C. The Circuit Court erroneously found that Ms. Dye's conduct was a business pursuit under the F&M Policy.

F&M argues that Ms. Dye has "clearly 'engaged in' making a profit from the business through her contract with Jones." Respondent's Brief, p. 34. However, the Supreme Court, albeit in a footnote, specifically addressed the issue of whether Ms. Dye was engaged in a business with the Jones Defendants. *See Bradley*, 875 S.E.2d at 245, n.10. Specifically, the Court noted:

> We summarily reject the partnership and joint venture theories [propounded by the Bradleys] as the Bradleys have identified no persuasive evidence to support them. Their partnership theory is based upon an obvious typographical error in the logging contract that identified Ms. Dye, herself, as a partnership. We find no language in the logging contract demonstrating a partnership was formed between Ms. Dye and the Jones co-defendants. Similarly, there is no evidence that Ms. Dye exercised any management or control over the timbering operation, which is a necessary element of a joint venture. See Armor v. Lantz, 207 W. Va. 672, 680, 535 S.E.2d 737, 745 (2000) (observing that "'[a]n essential element of a . . . joint venture is the right of joint participation in the management and control of the business'" (quoting Bank of California v. Connolly, 36 Cal. App. 3d 350, 111 Cal. Rptr. 468, 478 (Cal. Ct. App 1973))).

Id.

Simply put, Ms. Dye was not engaged in the business of logging, nor did she solicit the Jones Defendants, nor anyone else for the matter, to timber her property. Ms. Dye, a timbering

novice, was coincidentally approached by the Jones Defendants to timber her property as they were timbering neighboring properties.

Further, "[t]he term 'business pursuits', when used in a clause of an insurance policy excluding from personal liability coverage injuries 'arising out of business pursuits of any insured', contemplates a *continuous or regular* activity engaged in by the insured for the purpose of **earning a profit or a livelihood**." Syl. pt. 1, *Camden Fire Ins. Ass'n v. Johnson*, 170 W. Va. 313, 294 S.E.2d 116 (1982) (emphasis added). The term "profit" is defined variably as "gain" or "the excess of returns over expenditure in a transaction or series of transactions; *especially*: the excess of the selling price of goods over their cost." *Merriam-Webster's Dictionary* (online), https://www. https://www.merriam-webster.com/dictionary/profit, last visited May 6, 2023 (emphasis in original). The term "livelihood" is defined as "means of support or subsistence." *Merriam-Webster's Dictionary* (online), https://www. https://www. https://www.merriam-webster.com/dictionary/livelihood, last visited May 6, 2023.

Ms. Dye is employed full-time by the Marion County Board of Education as a bus driver. R00910. She has no experience with regard to selling her timber or otherwise with the timbering industry. R00911-912. The total amount received by Ms. Dye from the sale of the timber by the Jones Defendants was $11,320.14. R00967-973. The money she received was but a fraction of the proceeds for the sale of the timber. R00917. Point being, the sale of the timber in this case cannot credibly be said to have either been either for earning a "profit" or "livelihood" by Ms. Dye. To be sure, she was losing money on sale of the timber, not gaining or earning an excess over the sale price. Moreover, she earned a living by working, and continuing to work, for the Marion County Board of Education – the sale of the timber did not replace her job, nor did she depend upon it as a "means of support or subsistence." As such, the business pursuits exclusion cannot apply in this

matter, such that summary judgment is not appropriate for F&M, but instead, is appropriate in favor of Ms. Dye.

V. CONCLUSION

For the foregoing reasons, and for those stated in the Petitioner's Brief, the Petitioner respectfully submits that the Circuit Court committed error by granting summary judgment in favor of F&M. The Petition requests that this Court reverse the judgment of the Circuit Court and grant summary judgment in favor of Ms. Dye or, alternatively, determine that genuine issues of material fact exist, such that summary judgment is not appropriate, and remand the case for further proceedings.

Respectfully Submitted,

ERIC M. HAYHURST (W.Va. No. 11042)
HAYHURST LAW PLLC
34 Commerce Dr., Ste. 203
Morgantown, WV 26501
(304) 212-7099 office
(304) 212-7108 fax
eric@hayhurstlaw.com

CERTIFICATE OF SERVICE

I, Eric M. Hayhurst, counsel for Petitioner, do hereby certify that I have served the foregoing **"Petitioner's Reply Brief"** upon all parties and known counsel of record, via File & Serve Xpress, as indicated below, this 8th day of May, 2023, addressed as follows:

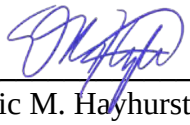
John Angotti
Angotti & Straface
274 Spruce Street
Morgantown, WV 26505
Counsel for Plaintiff

James W. Marshall, III
Daniel T. LeMasters
Bailey Wyant, PLLC
115 West King Street
Martinsburg, WV 25401
Counsel for Defendant Andrea Dye

Susan R. Snowden
Jackson Kelly PLLC
P.O. Box 1068
Martinsburg, WV 25402
Counsel for Farmers & Mechanics Mutual Insurance Company

Brent K. Kesner, Esq.
Barbara J. Keefer, Esq.
Kesner & Kesner, PLLC
P.O. Box 25857
Charleston, WV 25329
Counsel for Farmers & Mechanics Mutual Insurance Company

Larry and Roberta Jones
Jones Hauling
2631 Pickenpaw Road
Smithfield, WV 26437
Via U.S. Mail



Eric M. Hayhurst (W.Va. #11042)