Case No. 22–ICA-301

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Apr 18 2023
04:12PM EDT
Transaction ID 69848345

ANDREA DALE DYE,

Plaintiff Below, Petitioner,

v.

FARMERS AND MECHANICS
MUTUAL INSURANCE COMPANY
OF WEST VIRGINIA,

Respondent.

FROM THE CIRCUIT COURT OF
MARION COUNTY, WEST VIRGINIA
Civil Action No. 18-C-110

BRIEF OF RESPONDENT FARMERS AND MECHANICS MUTUAL INSURANCE COMPANY OF WEST VIRGINIA

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STATEMENT OF THE CASE

In the present action, the Petitioner, Andrea Dale Dye is appealing the Circuit Court of Marion County's award of summary judgment in favor of Respondent, Farmers And Mechanics Mutual Insurance Company Of West Virginia ("F&M"). Petitioner asserts that the Circuit Court erred when it found that the removal of timber from property belonging to the Plaintiffs below, Gregory Bradley and Judy Bradley, did not constitute an "occurrence" for purposes of triggering liability insurance coverage under the Petitioner's F&M Homeowners Insurance Policy. In addition, the Petitioner asserts that the Circuit Court erred when it found that the F&M Policy properly excluded coverage for liability arising from the removal of timber from a neighboring property under the exclusion for liability arising out of a "business" engaged in by an insured. In conjunction with those assignments of error, Petitioner further asserts that the Circuit Court should have found that F&M waived its coverage defenses and was estopped from denying coverage for the Bradley's claims. As will be shown, Petitioner's arguments are without merit and the Circuit Court correctly awarded summary judgment to F&M.

The Underlying Claims

This action arises from claims asserted by the Bradleys in connection with the harvesting of timber from their property located on Flaggy Meadow Road in Mannington District, Marion County, West Virginia. In that regard, the Bradleys originally placed the Petitioner on notice of a timber trespass claim at the Flaggy Meadow Road property through a letter from their attorney dated October 11, 2017. (A.R. 372) This was followed by a second letter dated May 22, 2018, in which the Bradleys' attorney also indicated that the Petitioner, who is the owner of an adjoining tract of land, had refused to allow the Bradleys to access their property over a right-of-way which

had purportedly existed for approximately 150 years. (See A.R. 369) The Bradleys then filed suit against the Petitioner and the timber cutters on July 25, 2018.

In their *Complaint* filed in the Circuit Court of Marion County, West Virginia, the Bradleys asserted that their property was damaged because the Petitioner either intentionally or negligently directed the timber harvesters (Defendants below, Larry and Roberta Jones, d/b/a Jones Hauling) who were removing timber from Petitioner Dye's property to also enter the Bradleys' property and remove their trees. (See A.R. 1-2, the *Complaint*.) The Bradleys alleged:

> the Defendants, or any of them, their heirs, successors, servants, agents or employees, negligently, willfully, wantonly, and without warning or authority, deliberately entered onto the Plaintiff's above-stated parcel of real estate and maliciously cut and removed valuable trees from the Plaintiffs' parcel and otherwise damaged the Plaintiffs' real estate and remaining standing timber.

(See A.R. 2, the *Complaint* at Paragraph 4.) The Bradleys then went on to allege that the Petitioner and the timber harvesters damaged the surface of their property during the timbering operations. (See A.R. 2, the *Complaint* at Paragraph 5.) Their Complaint alleges:

> the Defendants, or any of them, their heirs, successors, servants, agents or employees, negligently, willfully, wantonly, and without warning or authority, deliberately entered onto the Plaintiffs' above-stated parcel of real estate and maliciously damaged the Plaintiffs' soil, surface drainage systems, fencing, and riparian buffer zones and otherwise negligently and carelessly damaged the Plaintiffs' property proximately causing damages therein.

(See A.R. 2.) The Bradleys seek compensation for the alleged damage to their property and treble damages pursuant to *W.Va. Code §61-3-48a* which provides:

> Any person who enters upon the land or premises of another without written permission from the owner of the land or premises in order to cut, damage or carry away or cause to be cut, damaged or carried away, any timber, trees, logs, posts, fruit, nuts, growing plant or product of any growing plant, shall be liable to the owner in the amount of three times the value of the timber, trees, growing plants or products thereof, which shall be in addition to and notwithstanding any other penalties by law provided.

W. Va. Code § 61-3-48a. (See A.R.2.)

The F&M Policy

At the time of the alleged timber removal, the Petitioner was insured by F&M under a Homeowners Policy, identified as Policy No. HPP0057787 ("the Policy"), which had relevant coverage dates of July 2, 2017 through July 2, 2018. (See A.R. 45-162.). Under **SECTION II - LIABILITY COVERAGES**, the F&M Policy provides:

> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:
>
> 1. Pay up to our limit of liability for the damages for which an "insured" is legally liable. Damages include prejudgment interest awarded against an "insured"; and
>
> 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when our limit of liability for the "occurrence" has been exhausted by payment of a judgment or settlement.

(A.R. 87.)

Under the "**DEFINITIONS**" Section, the F&M Policy defines the term "occurrence" as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:
>
> a. "Bodily injury"; or
>
> b. "Property damage".

(A.R. 73.)

The term "business" is defined as follows:

"Business" means:

a. A trade, profession or occupation engaged in on a full-time, part-time or occasional basis; or

b. Any other activity engaged in for money or other compensation, except the following:

(1) One or more activities, not described in (2) through (4) below, for which no "insured" receives more than $2,000 in total compensation for the 12 months before the beginning of the policy period;…

(A.R. 72.)

The Policy then provides under "**SECTION II — EXCLUSIONS**," as follows:

E. Coverage E — Personal Liability And Coverage F — Medical Payments To Others

Coverages **E** and **F** do not apply to the following:

1. Expected Or Intended Injury

"Bodily injury" or "property damage" which is expected or intended by an "insured", even if the resulting "bodily injury" or "property damage":

a. Is of a different kind, quality or degree than initially expected or intended; or

b. Is sustained by a different person, entity or property than initially expected or intended.

However, this Exclusion **E.1**. does not apply to "bodily injury" or "property damage" resulting from the use of reasonable force by an "insured" to protect persons or property;

2. "Business"

a. "Bodily injury" or "property damage" arising out of or in connection with a "business" conducted from an "insured location" or engaged in by an "insured", whether or not the "business" is owned or operated by an "insured" or employs an "insured".

This Exclusion E.2. applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business".

b. This Exclusion **E.2**. does not apply to:

(1) The rental or holding for rental of an "insured location";

(a) On an occasional basis if used only as a residence;

(b) In part for use only as a residence, unless a single-family unit is intended for use by the occupying
family to lodge more than two roomers or boarders; or

(c) In part, as an office, school, studio or
private garage; and

(2) An "insured" under the age of 21 years involved in a part-time or occasional, self-employed "business" with no employees;

(A.R. 89.)

The policy then provides, under "**SECTION III - ADDITIONAL COVERAGES**:"

C. Damage To Property Of Others

1. We will pay, at replacement cost, up to $1,000 per "occurrence" for "property damage" to property of others caused by an "insured".

2. We will not pay for "property damage":

a. To the extent of any amount recoverable under Section I;

b. Caused intentionally by an "insured" who is 13 years of age or older;

e. Arising out of:

(1) A "business" engaged in by an "insured";

* * *

(A.R. 91.)

Finally, the F&M Policy contains an Endorsement labeled "**PUNITIVE AND EXEMPLARY DAMAGES EXCLUSION,**" which provides:

> **SECTION II — EXCLUSIONS**
> **E. Coverage E — Personal Liability And Coverage F — Medical Payments To Others**
>
> Coverages E and F do not apply to the following:
>
> The following is added:
>
> **9. Punitive or Exemplary Damages**
>
> Punitive or exemplary damages or related defense costs. This exclusion applies regardless of any other provision of this policy and/or any endorsement which might be attached to it.

(A.R. 99.)

Because the F&M Policy provides general liability coverage for "bodily injury" or "property damage" caused by an "occurrence," and does not provide coverage for non-accidental claims, such as those asserted by the Bradleys, F&M advised the Petitioner that while it would defend her against the Bradleys' claims, that defense would be subject to a full reservation of its rights to contest coverage. (See A.R. 1690-1696, F&M's October 11, 2018 Reservation of Rights letter.) Pursuant to the Reservation of Rights, F&M has provided a defense for the Petitioner, since the litigation began. On October 22, 2018, F&M sought to intervene in the action in order to seek a declaratory judgment with respect to the coverage issues. (See A.R. 37-170, F&M's *Motion To Intervene*, with attachments.) It is the Circuit Court's finding in favor of F&M on the coverage issues which give rise to this appeal.

The Litigation

On February 19, 2019, the Circuit Court below granted F&M's *Motion To Intervene,* and permitted F&M to intervene to seek a declaratory judgment with respect to coverage for the

Bradleys' claims against the Petitioner under the F&M Policy. (See A.R. 179-184, the *Agreed Order Granting Farmers & Mechanics Mutual Insurance Company of West Virginia's Motion To Intervene.)* F&M then filed its *Third-Party Complaint For Declaratory Judgment*. (A.R. 195-320) The parties proceeded to conduct discovery with respect to both the coverage issues and the Bradleys' underlying claims. Upon conclusion of discovery, F&M asked the Circuit Court to grant it summary judgment on the coverage issues based upon the fact that there was no alleged "occurrence" and based on various exclusions in the Policy. (See A.R. 687-707, F&M's October 1, 2019 *Motion For Summary Judgment*.) The Petitioner responded (See A.R. 975-1000) and, on January 9, 2020, the Circuit Court below denied F&M's *Motion For Summary Judgment* based upon its conclusion that factual issues existed with respect to whether the intentional injury exclusion in the F&M Policy would apply. (See A.R. 1118-1136, the Circuit Court's January 9, 2020 *Order*.) In particular, the Circuit Court equated the requirement of an "occurrence" to trigger coverage with the intentional act exclusion, and noted:

> Pursuant to West Virginia law, whether a liability claim is barred by an "intentional acts" exclusion or presents an "occurrence" under the policy are equivalent legal issues. W. Virginia Fire & Cas. Co. v. Stanley, 216 W. Va. 40, 48-50, 602 S.E.2d 483, 491-93 (2004) ("There does appear to be general agreement that this language is the equivalent of the intentional tort exclusion. Consequently, we conclude that language in a motor vehicle liability policy defining "accident" to include "bodily injury or property damage the insured neither expected or intended" is generally designed to exclude coverage for an intentional tort such as sexual assault."). Both require an inquiry into the subjective intent of the insured tortfeasor. As such, F&M's arguments under the "occurrence language and "intentional acts "exclusion in the policy present the same legal issue.

(See A.R. 1128-1129, the Circuit Court's *Order*, at Paragraph 53.) The Circuit Court then determined that it was F&M's burden to prove facts necessary to support the application of the intentional acts exclusion, and noted:

> In the instant case, there has been no evidence presented by F&M, who bears the burden of production on this Motion, that its insured, Ms. Dye, expected or intended to cause injury or harm to the plaintiffs.

(See A.R. 1130, the Circuit Court's *Order* at Paragraph 57.)

On January 22, 2020, the Bradleys made a demand for settlement against the Petitioner and F&M. (A.R. 1341) By correspondence dated April 10, 2020, the Bradleys withdrew that demand, which purportedly exposed the Petitioner to the possibility of a judgement that exceeded her insurance coverage in the event such coverage was found to exist. (A.R. 1341) While F&M continued to assert that there was no coverage for the claims at issue, the Bradleys' demands prompted F&M to send a letter to Dye dated June 4, 2020, in which it informed Dye, "if we receive a demand within the policy limits and are unable to resolve the matter within policy limits and proceed to trial, that should a verdict be returned in excess of the policy limits, F&M would satisfy the entire amount of the verdict." (See A.R. 1334, the June 4, 2020 Letter from Rose Casey of F&M to Attorney for Petitioner, Eric Hayhurst.) Even though that letter made no admissions or concessions regarding the unresolved coverage issues, the Petitioner then filed her October 19, 2020 *Motion For Summary Judgment* (A.R. 1326-1332), in which she suggested that the letter was tantamount to a waiver of F&M's coverage position and a forfeiture of all of its prior reservations of rights.

On December 14, 2020, F&M responded to Petitioner's *Motion For Summary Judgment*, noting that the question of whether Dye acted intentionally remained to be decided and pointing out that, under West Virginia law, the principles of waiver and estoppel are inoperable to extend insurance coverage beyond the terms of an insurance contract. (See A.R. 1338-1347) To clarify the posture of the coverage litigation, F&M supplemented its previous response to the Petitioner's *Motion For Summary Judgment* by filing its *Motion For Reconsideration Of Ruling*

On Coverage Issues (A.R. 1469-1489), which asked the Circuit Court to reconsider certain elements of its earlier ruling on the coverage issues. (See A.R. 1475-1483.) On January 25, 2021, the Circuit Court held a hearing on a number of pending motions and invited the parties to submit any further briefing on the coverage issues along with proposed findings of fact and conclusions of law. (See A.R. 1565.)

After the Petitioner had submitted her *Response* (A.R. 1569-1585) and F&M had submitted its *Reply* (A.R. 1603-1613), the Circuit Court entered its November 10, 2022 *Order Denying Third-party Defendant Andrea Dale Dye's Motion For Summary Judgment and Granting Farmers & Mechanics Mutual Insurance Company of West Virginia's Request for Reconsideration of Ruling on Coverage Issues*. (See A.R. 1659-1683.) The Circuit Court found that the alleged removal of timber from the Bradley's property did not constitute an "occurrence" for purposes of triggering liability insurance coverage under the F&M Policy and further found that the F&M Policy excluded coverage for the Bradleys' claims under the exclusion for liability arising out of a "business" engaged in by an insured. The Circuit Court rejected the Petitioner's arguments that F&M had waived its coverage defenses and/or was estopped from denying coverage for the Bradley's claims.[1]

[1] F&M would note that in a June 14, 2022 decision, the West Virginia State Supreme Court made a number of rulings respect to the Bradleys' underlying claims against the Petitioner which may also impact the coverage issues here. Specifically, the Supreme Court found that there were sufficient facts developed in discovery to support the Bradleys' claims against the Petitioner and reversed the Circuit Court's award of summary judgment in her favor with respect to those claims. Specifically, 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, thereby resulting in liability under *West Virginia Code §61-3-48a.* Moreover, the Court concluded that whether the Petitioner acted "with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others," was a question of fact for a jury's determination which places the issue of punitive damages before the jury. See *Bradley v. Dye,* 247 W. Va. 100, 875 S.E.2d 238, 247 (2022)

The Petitioner filed her *Notice of Appeal* with respect to that ruling on December 9, 2022, and her *Brief* on March 10, 2023.

The Petitioners' *Brief* sets forth numerous assignments of error pertaining to the Circuit Court's findings in favor of F&M. The Petitioner disputes the Circuit Court's findings with respect to whether the timber removal allegations constitute an "occurrence" sufficient to trigger coverage under the F&M Policy and its finding that the business exclusion in the F&M Policy applied to the Bradleys' claims. In addition, the Petitioner asserts that the Circuit Court should have found that that F&M had waived its coverage defenses and was estopped from denying coverage for the Bradley's claims based upon the June 4, 2020 letter advising that F&M would satisfy the entire amount of any excess verdict. (A.R. 1334) F&M now submits its *Response Brief* and asks that the Circuit Court's November 10, 2022 *Order* be affirmed.

SUMMARY OF ARGUMENT

The Circuit Court properly granted summary judgment to F&M with respect to coverage for the Bradley's claims against the Petitioner. The Circuit Court properly found that the Bradleys' allegations regarding the removal of timber from their property did not constitute an "occurrence" sufficient to trigger coverage under the F&M Policy. The Circuit Court properly found that the business exclusion in the F&M Policy applied to the Bradleys' claims because the purpose of the agreement entered into by the Petitioner was to sell timber and make a profit from such sale. The Circuit Court properly rejected the Petitioner's argument that F&M had waived its coverage defenses and her argument that F&M was estopped from denying coverage for the Bradley's claims based upon the June 4, 2020 letter advising that F&M would satisfy the entire amount of any excess verdict.

With respect to the Petitioner's waiver and estoppel arguments, the Petitioner is required to demonstrate that F&M intentionally relinquished a known right and that the petitioner relied upon F&M's conduct to her detriment. F&M has consistently denied that coverage exists and has never expressly relinquished its rights under the Policy. Moreover, the doctrine of waiver cannot create coverage where none is contracted for by the parties. "Waiver" can only be used to continue coverage which would otherwise be lost by a technical non-compliance with a forfeiture clause. In this case, the Petitioner is seeking to have the Court use waiver to write a new policy which does not require an "occurrence" to trigger coverage and does not contain a business pursuits exclusion. Under applicable law, such coverage defenses may not be waived merely by an insurance company's failure to specify them, and coverage cannot be broadened through waiver to make the policy cover a risk which would not otherwise be covered. Likewise, the Petitioner has not demonstrated that she relied upon any waiver of coverage by F&M to her detriment. While she has asserted that she chose to forego additional discovery with respect to the coverage issues based upon F&M's conduct, she ignores the fact that the time for such discovery had already passed when the subject letters were sent, and the Court had even ruled on the coverage issues. Finally, the Petitioner's assertion that coverage can be broadened through waiver and estoppel in light of F&M's alleged "bad faith" is without merit where F&M has defended the Petitioner under a reservation of rights throughout this litigation.

With respect to the "occurrence" issue, the F&M Policy only provides coverage for damages caused by an "occurrence," defined as an accident. Here, all of the Bradleys' claimed damages arise from intentional conduct such as the cutting of trees and the building of timbering roads. The Petitioner's assertion that coverage exists merely because she did not intend to cut the Bradleys' timber or build roads on the Bradleys' property misses the point. Because the alleged

damages were the expected result of the alleged conduct, no accident took place and coverage is not triggered under the F&M Policy.

With respect to the business exclusion found in the F&M Policy, coverage does not apply because the evidence establishes that the Petitioner entered into the timbering agreement for the purpose of making a profit from the sale of the timber. The fact that she did not own the timbering business herself and was not "regularly" engaged in that business is irrelevant.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument under *Rule 20* of the *West Virginia Rules of Appellate Procedure* because she asserts that the decisional process would be significantly aided by oral argument. In response, F&M would note that because the issues raised in this appeal address only the application of settled law to the subject claims, oral argument is not necessary.

ARGUMENT

I. Standard of Review.

The Petitioners appeal the November 11, 2022 *Order* issued by the Circuit Court denying the Petitioner's request for summary judgment and granting summary judgment in favor of F&M. Under settled West Virginia law, the *Order* is subject to *de novo* review. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*."); *see also*, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002) ("This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.").

While the standard of review is *de novo*, when the Court reviews a decision of the Circuit Court to grant summary judgment, it does so under the same standards that the Circuit Court applied to determine whether summary judgment was appropriate. *Williams v. Precision Coil,*

Inc., 194 W.Va. 52, 59, 459 S.E.2d 329, 335 (1995). *Rule 56* of the *West Virginia Rules of Civil Procedure* governs requests for partial summary judgement and provides: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The purpose of summary judgment is to dispose promptly of controversies on their merits if no facts are disputed or only a question of law is at issue. *W. Va. R. Civ. P. 56(c)*; *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994)*; Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 59, 459 S.E.2d 329 (1995). If a party moves for summary judgment and presents "affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in *W. Va. R. Civ. P. 56(f)"*. Syl. Pt. 3, *Williams*, 194 W. Va. 52, 459 S.E.2d 329. Immaterial facts are irrelevant, and summary judgment is required if the non-movant cannot establish an essential element of her case. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 59, 459 S.E.2d 329 (1995); Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

A "genuine issue" for summary judgment purposes is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party; the opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

A "material fact" is one that has the capacity to sway the outcome of litigation under the applicable law. *Jividen*, 194 W. Va. 705. For purposes of determining whether there is a genuine issue of material fact sufficient to preclude summary judgment, factual disputes that are irrelevant or unnecessary will not be counted. *Id*. The nonmoving party must, at a minimum, offer more than a "scintilla of evidence" to support his claim. *Id*. The mere contention that issues are disputable is not sufficient to deter the trial from the award of summary judgment. *DeRocchis v. Matlack, Inc.*, 194 W. Va. 417, 460 S.E.2d 663 (1995). Summary judgment "*shall* be entered against" an adverse party, *W. Va. R. Civ. P. 56(e)* (emphasis supplied), who cannot point to "specific facts demonstrating that, indeed, there is a 'trialworthy' issue." *Williams*, 194 W. Va. at 60.

Although the non-movant for summary judgment is entitled to the most favorable inferences that may reasonably be drawn from the evidence, it cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another. *Marcus v. Holley*, 217 W.Va. 508, 516, 618 S.E.2d 517, 525 (2005). Unsupported speculation is not sufficient to defeat summary judgment. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 59, 459 S.E.2d 329 (1995).

II. The Circuit Court properly rejected the Petitioner's arguments regarding waiver and estoppel.

The Petitioner begins her arguments by asserting that F&M expressly waived its coverage position by sending letters to Petitioner's counsel promising "without equivocation or qualification" to pay any judgment rendered against the Petitioner and to vigorously defend her. (See Petitioner's *Brief* at pg. 14.) Petitioner then argues that, in light of that waiver, F&M is

estopped from now asserting any coverage defenses. These arguments are without merit and simply ignore applicable West Virginia law on the issue of waiver and estoppel.

Waiver and estoppel, as they apply in the context of insurance coverage, were discussed at length in the case of *Potesta v. U.S. Fid. & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998), wherein the Court explained:

> to establish waiver there must be evidence demonstrating that a party has intentionally relinquished a known right. See also Dye v. Pennsylvania Cas. Co., 128 W.Va. 112, 118, 35 S.E.2d 865, 868 (1945) (" '**Waiver is the voluntary relinquishment of a known right**'." (citation omitted)). This intentional relinquishment, or waiver, may be expressed or implied. Ara at 269, 387 S.E.2d at 323 ("**Waiver may be established by express conduct or impliedly, through inconsistent actions**." (citing Creteau v. Phoenix Assurance Co., 202 Va. 641, 119 S.E.2d 336, 339 (1961)). However, where the alleged waiver is implied, there must be clear and convincing evidence of the party's intent to relinquish the known right. Hoffman v. Wheeling Sav. & Loan Ass'n, 133 W.Va. 694, 713, 57 S.E.2d 725, 735 (1950) (" '**A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights**.' " (Citation omitted). Furthermore, "**[t]he burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed**." Id. (citing Hamilton v. Republic Cas. Co., 102 W.Va. 32, 135 S.E. 259 [(1926)]). See also Mundy v. Arcuri, 165 W.Va. 128, 131, 267 S.E.2d 454, 457 (1980) ("One who asserts waiver ... has the burden of proving it." (Citations omitted)); 19 Michie's Jurisprudence Waiver § 5 at 678 (1991) ("The burden of proof is on the one asserting a waiver.").

Id., at 315, 142 (Emphasis added.) Importantly, the Court also noted "[t]he doctrine of waiver focuses on the conduct of the party against whom waiver is sought," here, F&M. *Id* at 315-316, 142-143.

In this case, the Petitioner asserts that F&M waived its arguments regarding coverage by promising to pay the entire amount of the verdict. However, her arguments ignore the facts of this case. Throughout this litigation, F&M has asserted that its Policy does not provide coverage for the Plaintiffs' claims. In fact, F&M has expressly sought a declaratory judgment to that effect. (See A.R.195-320.) Moreover, F&M has provided a defense while the litigation proceeds subject

to a full reservation of its rights in an effort to protect its insured in the event coverage was found to exist. (See 1690-1696, F&M's October 11, 2018 Reservation of Rights letter.) Had F&M truly intended to waive its coverage position in June of 2020, as the Petitioner suggests, 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 the jury at trial were no longer necessary, and to dismiss its suit seeking a declaratory judgment (See F&M's *Third-Party Complaint For Declaratory Judgment* A.R. 195-320.) F&M took none of those steps, and instead continued to participate in the litigation in order to preserve its position. Thus, all of F&M's conduct as the case developed has been consistent with its position that no coverage exists under its Policy for the Bradleys' claims. While the Petitioner seeks to seize upon F&M's June 4, 2020 letter in an effort to play "gotcha" and sidestep the contested coverage issues altogether, she has offered no evidence that F&M intended to waive its coverage position. Instead, the Petitioner suggests that F&M could waive its previously articulated coverage positions merely by failing to mention them in the subject letters. Such an argument ignores the basic principles of waiver as they apply in the context of an insurance policy. As the Supreme Court noted in *Potesta*:

> The doctrine of waiver cannot create coverage where none is contracted for by the parties. Waiver can only be used to continue coverage which would otherwise be lost by a technical non-compliance with a forfeiture clause."

Potesta, at 320, 147. In the instant case, the Petitioner is seeking to have the Court use waiver to write a new policy for the parties which does not require an "occurrence" to trigger coverage and does not contain a business pursuits exclusion. The Court in *Potesta* explained why such a request must fail, noting:

> defenses founded on a lack of basic coverage "may not be waived merely by the company's failure to specify them in its initial response to the claim, for the effect of that would be to expand the policy to create a risk not intended to be undertaken

> by the company. . . .whatever may be the scope of waiver in the law of insurance, it does not extend to the broadening of the coverage, so as to make the policy cover a risk not within its terms. That would require a new contract, and cannot be accomplished by waiver." . . .
>
> The reasons usually addressed in support of the general rule that waiver and estoppel cannot extend coverage of an insurance policy are that a court cannot create a new contract for the parties, that an insurer should not be required to pay a loss for which it charged no premium, and that a risk should not be imposed upon an insurer which it might have denied.

Potesta, at 319-20, 146-47. Thus, the Petitioner's suggestion that F&M could inadvertently waive its entire coverage position by sending a letter with respect to how it would respond to a policy limits demand and/or in the event of an excess verdict is simply without merit.

The June 4, 2020 letter (A.R.1334) was obviously written in order to address the type of exposure discussed in *Shamblin v. Nationwide*, 183 W.Va. 585, 396 S.E.2d 766 (W. Va. 1990). In that regard, the insurer in *Shamblin* failed to settle covered claims against its insured for its policy limits when it had the opportunity to do so and the claimant obtained a verdict in excess of the insurer's limits. The *Shamblin* Court found that the insurer was liable for the excess verdict, and stated:

> We believe that wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to so settle and where such settlement within policy limits would release the insured from any and all personal liability, that the insurer has prima facie failed to act in its insured's best interest and that such failure to so settle prima facie constitutes bad faith towards its insured.

Id., at 595, 776. Far from expressly and unequivocally conceding its coverage position, F&M's June 4, 2020, letter did not address coverage at all and was merely intended to advise the Petitioner that F&M would follow the requirements of *Shamblin* in the event coverage was found to exist. Specifically, the letter indicated:

> Please be advised that we are in receipt of the demand from Plaintiffs in this matter for the sum of $101,000. This is to inform you that if we receive a demand within

> the policy limits and are unable to resolve the matter within policy limits and proceed to trial, that should a verdict be returned in excess of the policy limits, F&M would satisfy the entire amount of the verdict.

(See A.R. 1334.) Likewise, the May 22, 2020, letter upon which the Petitioner also relies indicated:

> As I indicated in our last conversation, F&M would like to resolve its outstanding issues with Ms. Dye at this time and continue to defend the claims against her brought by Plaintiffs, Gregory S. Bradley and Judy Johnson Bradley. Thank you for forwarding to my attention the legal fees which you indicated are associated with the matter so far. At this time, F&M offers to settle any and all claims against F&M by your client, Andrea Dale Dye, in exchange for payment of $15,000. F&M will further issue to your client an excess protection letter whereby it would agree that in the event that it is unable to resolve the case and a verdict should be returned in excess of the policy limits, that F&M would satisfy the entire amount of the verdict. Such an agreement would completely protect Ms. Dye from any financial exposure. Further, F&M would continue to vigorously defend your client against Plaintiffs' claims through the law firm of Bailey Wyant PLLC. This offer of settlement is made without admission of liability, is inclusive of a signed release of any and all claims, to include attorney fees.

(See A.R. 1586.) Leaving aside the fact that the May 22, 2020, letter is inadmissible under *Rule 408* of the *West Virginia Rules of Evidence* because it is part of an offer of compromise or settlement, the Petitioner is simply ignoring the fact that both letters amount to nothing more than statements about what actions F&M might take in the future in the event certain circumstances arise. The absence of any reference to F&M's coverage position in the letters merely illustrates the fact they were never intended to address the coverage issues in the first place. While the Petitioner argues that the Circuit Court should have found that F&M waived its coverage position by failing to reserve its coverage position in the letters, she failed to present any evidence that F&M intended to voluntarily relinquish the rights it had otherwise carefully preserved. In effect, she argues that wavier could be implied merely by failing to mention the coverage issues in letters dealing with other matters. Under the principles set forth in *Potesta*, the mere failure to mention a

coverage position does not operate to extend coverage that otherwise would not exist. See *Potesta*, at 319-20, 146-47. In that regard, the Court explained:

> implied waiver may not be utilized to prohibit the insurer's subsequent denial based on the nonexistence of coverage.

Potesta, at 323, 150. Therefore, the Circuit Court correctly found that no wavier had occurred.

The Petitioner's related arguments regarding estoppel also fail as a matter of law. In that regard, equitable estoppel "'applies when a party is induced to act or to refrain from acting to [his/]her detriment because of [his/]her reasonable reliance on another party's misrepresentation or concealment of a material fact.'" *Marlin v. Wetzel County Board of Supervisors*, 212 W.Va. 215, 225, 569 S.E.2d 462, 472 (2002) (citation omitted). It is "designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience.'" *Id.* (citation omitted). Estoppel focuses "on the party seeking its application[,]" here, the Petitioner. *Potesta*, at 143. "[T]he elements of an estoppel ... are conduct or acts on the part of the insurer ... sufficient to justify a reasonable belief on the part of the insured that the insurer will not insist on a compliance with the provisions of the policy and that the insured in reliance upon such conduct or acts has changed his position to his detriment." *Id.*; Syl. Pt. 4, *Id.* In that regard, the Court in *Potesta* noted:

> in order apply the doctrine of estoppel, the insured must prove that s/he relied to her/his detriment on the initially stated ground for denial.

Potesta, at 323, 150.

In this case, F&M timely communicated its coverage position and reservation of rights to the Petitioner and has consistently maintained its position as the litigation has progressed. In contrast, the Petitioner 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. Therefore, the Circuit Court properly found that estoppel does not apply.

As discussed above, the West Virginia State Supreme Court has held:

> Estoppel is properly invoked to prevent a litigant from asserting a claim or a defense against a party who has detrimentally changed his[/her] position in reliance upon the litigant's misrepresentation or failure to disclose a material fact.

Potesta, at 316, 143. While the Petitioner asserts that she chose to forego additional discovery on the coverage issues in reliance upon the various statements made by F&M and its counsel, her arguments in that regard ignore the fact that discovery with respect to those issues was already over by May and June of 2020, when the subject letters were sent. In fact, the briefing on the coverage issues was also complete and the Circuit Court had already denied F&M's *Motion For Summary Judgment* on the coverage issues on January 9, 2020. (See A.R. 1118-1136, the Circuit Court's January 9, 2020 *Order*.) Therefore, the Petitioner's suggestion that her reliance upon such statements somehow harmed her position in this case is simply without merit.

Obviously, the F&M Policy had been purchased and the Bradleys' claims had already been asserted at the time the subject statements were made in the correspondence of May and June of 2020. Therefore, the Petitioner could not have chosen a different policy which provided more or different coverage in reliance upon the letters. Likewise, F&M had already asserted its coverage position in response to the Bradleys' claims and the parties had already been actively pursuing the litigation at the time the subject letters were sent. The Petitioner did not concede any issue or change her position at all in response to the subject letters and the opportunity for discovery which she purportedly chose to forego had already been completed. Put simply, the Petitioner has never failed to assert some defense, neglected to raise some coverage issue or unwisely settled some claim in reliance upon any of the statements which she now contends support her estoppel claim.

Because such detrimental reliance is a necessary element of estoppel, her arguments fail as a matter of law. See *Potesta*, at 323, 150.

Finally, at pg. 18 of her *Brief*, the Petitioner asserts that regardless of the principles set forth in *Potesta*, coverage can be extended beyond the terms of the F&M Policy based upon F&M purported "bad faith" in its handling of the Bradleys' claims against her. In fact, she describes F&M's conduct as "egregious" and "shockingly violative of its duties of good faith and fair dealing." As discussed above, it is undisputed that F&M has been defending the Petitioner in this action pending the resolution of the coverage issues. Therefore, any assertion that F&M has acted in bad faith fails as a matter of law. The West Virginia State Supreme Court of Appeals addressed this precise issue in the case of *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 801 S.E.2d 216 (2017), which involved a bad faith claim being asserted against an insurer which was defending under a reservation of rights and noted:

> A prerequisite for any first-party bad faith action is an underlying claim for coverage or benefits or an action for damages which the insured alleges was handled in bad faith by its insurer. In the instant case, the Cava defendants, frustrated by the fact Zurich has not increased its settlement offer to the plaintiff above the $300,000 limit of the garage liability policy during the pendency of the declaratory judgment action, filed their cross-claims against Zurich for intentional, willful, and malicious wrongful litigation conduct. Beyond the hyperbole, however, their complaints amount to no more than attacks on Zurich for defending itself in the declaratory judgment action and second-guessing of strategic decisions made by the defense counsel retained by Zurich. **But, the Cava defendants offer no authority to support their proposition that an insured has a bad faith cause of action against his or her insurer when the insurer has not declined to defend the insured, and is *continuing* to defend the insured with independent counsel, while simultaneously defending its own declaratory judgment action. The Cava defendants' allegations are not that Zurich refused a defense, but that it is *currently* consciously undermining their defense. In our view, these facts lead to the unavoidable conclusion that their cross-claims are premature, and, therefore, not ripe for adjudication.**

Id., at 345, 223. Later, the Court recognized that merely pursuing a coverage position in a declaratory action does not give rise to a bad faith claim, and stated:

> an insurer should have the right to defend itself in a plaintiff's declaratory judgment action without risking exposure merely because the strain inherent in litigation discomfits its insured.

Id., at 347, 225. Here, F&M has never left the Petitioner exposed to the Bradleys' claims and she has no evidence that F&M has acted in "bad faith." Instead, F&M has paid for her defense throughout this litigation even though there is clearly no coverage under its Policy for the claims being asserted against her.

III. The Circuit Court correctly found that the intentional cutting of trees is not an "occurrence" even if there was a mistake as to the ownership of the subject property.

Under West Virginia law, liability insurance creates two (2) duties for the insurer: the duty to defend and the duty to provide coverage. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 194, 342 S.E.2d 156 (1986). An insurer must defend its insured if the allegations and the facts behind them "are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy." *Id.*; Syl. Pt. 6, *Farmers & Mechs. Mut. Ins. Co. v. Cook*, 210 W. Va. 394, 557 S.E.2d 801 (2001); *Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 378, 376 S.E.2d 581 (1988) (citing *Pitrolo*). An insurer must defend all the claims if its policy could apply to any of them, but it "need not defend ... if the alleged conduct is entirely foreign to the risk insured against." *Leeber*, 180 W. Va. at 378. Likewise, clear insurance policy provisions are to be applied. *Cook*, 210 W. Va. at Syl. Pt. 5 (citing Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 33 (1986)); *Green v. Farm Bureau Mut. Auto Ins. Co.*, 139 W. Va. 475, 80 S.E.2d 424, 426 (1954). An insurer may validly limit coverage, and policy provisions that limit coverage are placed in a policy for that very reason. *Green*, 80 S.E.2d at 426. Insurance

coverage is a matter of law if material facts are undisputed. Syl. Pt. 1, *Tennant v. Smallwood*, 211 W. Va. 703, 568 S.E.2d 10 (2002).

Initially, it should be noted that under West Virginia "law regarding the shifting burdens of proof[,]" the insured bears the initial burden of "'demonstrating the existence of coverage under the general insuring clause; that is, the insured should first demonstrate that, assuming no exclusions are applicable, all or a portion of the judgment is encompassed by the policy.'" *Camden-Clark Memorial Hosp. Ass'n v. St. Paul Fire & Marine Ins. Co.*, 224 W.Va. 228, 682 S.E.2d 566, 574-75 (2009) (citation omitted). Only if the insured can show the policy's basic applicability does the insurer bear "'the burden of proving the applicability of a policy exclusion.'" *Id.* (citation omitted). For example, in *Payne v. Weston*, 195 W. Va. 502, 466 S.E.2d 161 (1995), the West Virginia State Supreme Court noted that the initial burden is on an insured, such as the Petitioner, to prove the existence of an applicable insurance contract. The Court explained:

> The plaintiffs' burden of proof is easily stated. Under West Virginia law, the plaintiffs must prove both the existence of an applicable insurance contract and its material terms. It is only when the plaintiffs have established a prima facie case of coverage that the burden of production shifts to the defendants. In this context, the plaintiffs must present sufficient evidence to show the existence of each element of their case on which they will bear the burden at trial.

Id., at 506, 165. In this case, the requirement of an alleged "occurrence" is necessary to trigger coverage under the F&M Policy in the first place. While it is F&M's burden to prove the existence of facts necessary to support the application of an exclusion, it was the Petitioner's burden to prove that coverage was triggered because an "occurrence" was at issue. Under applicable West Virginia law, she could not do so.

As noted previously, the F&M Policy provides general liability coverage to pay those sums which the Petitioner becomes legally obligated to pay as damages because of "bodily injury" or

"property damage" caused by an "occurrence," to which the Policy applies. Here, there is no allegation or claim for "bodily injury," as defined by the Policy. The Bradleys do, however, appear to allege property damage, in that they allege that timber was removed from their property and that the soil and fences were damaged. (A.R. 2.) In fact, the Plaintiffs assert that they are entitled to an amount equal to three times the value of the timber removed from their property, pursuant to *W. Va. Code 61-3-48a*. (A.R. 2.) However, the Bradleys do not assert a claim for loss or damage arising from an "occurrence," defined by the Policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (A.R. 73.) Instead, the Bradleys allege intentional acts in the form of cutting down trees and building timber haulage roads. In that regard, the term "accident" has been found to be unambiguous: its "common and everyday meaning .is a chance event or event arising from unknown causes." *West Virginia Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 49, 602 S.E.2d 483, 492 (2004). "'To be an accident, both the means and the result must be unforeseen, involuntary, unexpected, and unusual.'" *Id.* (citations omitted). Here, all of the allegations concern the underlying Defendants' intentional conduct in the form of cutting timber roads onto the Bradleys' property and harvesting timber from the property even though they had no legal right to do so. No accident is alleged or at issue. Therefore, coverage under the liability provisions of the F&M Policy is not triggered.

Cases in West Virginia clearly establish that an accident can only occur where both the means and the result are unexpected and unforeseen. In connection with a timbering trespass, both the means and the result are anticipated. That is, both the removal of the timber and any damage to the property associated with the same are intended by the harvester of the timber. Therefore, no accident is alleged or at issue in connection with the subject claims. Absent an

accident, no coverage under the F&M occurrence-based Policy can be found to exist. For example, under applicable West Virginia Law,

> An accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces the damage... To be an accident, both the means and the result must be unforeseen, involuntary, unexpected, and unusual.

State Bancorp, Inc. v. U.S. Fid. & Guar. Co., 483 S.E.2d 228, 234 (W. Va. 1997) (*per curiam*) (citation omitted) Similarly, the West Virginia State Supreme Court has reviewed West Virginia law with respect to the meaning of the term "accident" in the context of the occurrence language in an insurance policy, and noted:

> Where a homeowner engages in conduct knowingly, that conduct clearly cannot be said to be unexpected or unforeseen from the perspective of the homeowner. In other words, conduct engaged in knowingly is not an "accident" and thus not an "occurrence" . . .

Am. Modern Home Ins. Co. v. Corra, 222 W.Va. 797 at 801, 671 S.E.2d 802 at 806 (W.Va. 2008). Here, the Petitioner clearly intended to have timber harvested and all of the alleged damages arise from her business activities. Therefore, even if one were to assert that the underlying Defendants believed that the timber being removed belonged to the Petitioner, the removal of the trees was not an "occurrence," as that term is defined by the F&M Policy. (See A.R. 73.)

While the Supreme Court of Appeals of West Virginia does not appear to have decided a case directly on point with respect to the cutting of timber, the United States District Court for the Southern District of West Virginia has issued an opinion on this issue which is persuasive. In the case of *Westfield Insurance Company v. Richard Davis, et. al.,* (232 F. Supp. 3d 918 (S.D.W. Va. 2017)) (A.R. 1490-1504), the District Court addressed this precise issue and found that coverage was never triggered under a homeowners policy because a mistake in timbering operations which resulted in the cutting of trees from an adjoining property did not constitute an "occurrence." (See

1490-1504, the copy of the District Court's February 7, 2017 Memorandum Opinion And Order.) Similarly, in another federal decision dealing with the issue of whether a mistake as to the location of a property line constituted an accident, the Fifth Circuit addressed the following question:

> The damage was caused by a trespass upon the property of the Country Club by an employee of the appellant for whose acts the appellant was liable. The trespass was the result of a mistaken and erroneous belief of the employee as to where he was to go for the doing of that which he was directed to do. Was this 'caused by accident' as that phrase was used in the policy?

M. R. Thomason, Contractor v. U. S. Fid. & Guar. Co., 248 F.2d 417, 419 (5th Cir. 1957) The Court answered that question as follows:

> Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen and unintended. There was no insurance against liability for damages caused by mistake or error. The cause of the injury was not an accident within the meaning of this policy.

Id. Similar considerations apply here, where there was clearly an intent to harvest timber and cut roads to haul it, even if a mistake existed as to the location of the Bradleys' property lines.

Importantly, the District Court in *Davis,* also expressly rejected arguments, such as those made by the Petitioner, that allegations of "negligence" in the complaint could convert such intentional conduct into an "occurrence" for purposes of coverage. (See A.R. 1499-1500.) Such a finding is consistent with the West Virginia State Supreme Court of Appeals' holding in *Smith v. Animal Urgent Care, Inc.*, 208 W. Va. 664, 542 S.E.2d 827 (W. Va. 2000), where the Court examined the extensive authority on this issue and stated:

> Accordingly, we determine that **the inclusion of negligence-type allegations in a complaint that is at its essence a sexual harassment claim will not prevent the operation of an "intentional acts" exclusion** contained in an insurance liability policy which is defined as excluding "bodily injury" "expected or intended from the standpoint of the insured."

Id. at 671. (Emphasis supplied.) Whether the Defendants below "intended" to cut timber belonging to the Bradleys, it is absolutely clear that they intended to cut down trees and build timber roads. The Petitioner's suggestion at pg. 22 of her *Brief* that *Davis* can be distinguished merely because there is no evidence that the Petitioner "knew that the Bradleys' property was being timbered" misses the point. All of the claims in this case concern alleged damages caused by sawing though trees to cut them down and breaking the earth with heavy equipment to create a road. Therefore it is obvious that the resulting damage in the form of a tree falling down or the earth being broken was not unforeseen, unexpected, or unusual. Instead, those were precisely the results intended when the saws in question were picked up and the bulldozers were started. Merely asserting that the decision on which trees to cut or where to cut the road was "negligent" does not convert intentional conduct into an accident.

West Virginia's State Supreme Court has also found no coverage for knowing and intentional conduct. For example, in a case involving coverage for knowingly permitting underage persons to consume alcohol at an insured's home the West Virginia State Supreme Court outlined the decisions dealing with what constitutes an "occurrence" and noted:

> Mr. Corra asserts that under our law an "occurrence" under a homeowner's policy exists unless the policyholder commits an intentional act and expected or intended the resulting damage. We do not find this to be an accurate characterization of our law. As seen from our discussion above, an "occurrence," in addition to excluding intentional conduct, also excludes conduct that is foreseen and expected. Again, knowing conduct is certainly foreseen or expected, and thus cannot be considered an "occurrence."

Am. Modern Home Ins. Co. v. Corra, 222 W. Va. 797, 802, 671 S.E.2d 802, 807 (2008). There is also substantial authority from other jurisdictions which supports the proposition that damages resulting from knowing and intentional conduct cannot be deemed an "accident" for purposes of insurance coverage, even if that conduct was based upon a mistake. This line of cases was

addressed by the Seventh Circuit in the case of *Red Ball Leasing, Inc., et al. v. The Hartford Accident and Indemnity Company*, 915 F.2d 306 (7th Cir. 1990). In *Red Ball Leasing*, the Court indicated that Courts have concluded, after examining policy provisions, that a volitional (intentional) act does not constitute an "accident." The Court went on to indicate that a volitional act that is allegedly based on erroneous information, is not an "accident" or "occurrence." In reaching its opinion, the Court cited several cases relevant to F&M's position here. They include:

> *Rolette Country v. Western Casualty & Sur. Co.*, 452 F. Supp. 125 (D.N.D. 1978) ("Claim against County Sheriff for deprivation of constitutional rights not an "occurrence" because the acts of seizing mobile home and automobile were clearly intentional, not accidental");
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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) (If jury determined that insured intended to cause damage to store, it would be irrelevant that he did not intend to start fire; the resulting damage was both intentional and expected);
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> *American Home Assurance Co. v. Osborne*, 47 Md. App. 73, 422 A.2d 8 (Md. Ct. Spec. App. 1980) (Towing of vehicles was not an accident because there was no injury caused that was unexpected);
>
> *National Farmers Union Property & Cas. Co. v. Covash*, 452 N.W.2d 307 (N.D. 1990) (Because trespass is an intentional act, injury was not caused by an occurrence);
>
> *General Insurance Co. v. Palmetto Bank*, 233 S.E.2d 699 (Sale of machine stored in warehouse after party storing the machine failed to pay rent; damage was certainly expected and intended by insured);
>
> *Deseret Fed. Sav. & Loan Ass'n v. United Stated Fidelity & Guaranty Co.*, 714 P.2d 1143 (Utah 1986) (Injury caused by an intentional act, constructive eviction, was not unexpected and unintended damages covered by the policy);
>
> *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Group*, 681 P.2d 875 (Wash. Ct. App. 1984) (An accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces the damage);

> *Thompson v. USF&G*, 248 F.2d 419 (5th Cir. 1957) (Bulldozer strayed onto adjoining land by mistake; not an accident for purposes of insurance coverage that referred only to accidents, because the act was voluntary and intentional).

In her *Brief*, the Petitioner directs the Court to a number of cases from other jurisdictions which have reached different conclusions with respect to the "occurrence" issue. *See, Ferguson v. Birmingham Fire Ins. Co.*, 254 Ore. 496, 460 P.2d 342 (1969), *Patrick v. Head of Lakes Coop. Elec. Assoc.*, 98 Wis.2d 66, 295 N.W.2d 205 (Wis. App. 1980), *Haynes v. Am. Cas. Co.*, 228 Md. 394, 179 A.2d 900 (1962) and *York Indus. Ctr., Inc. v. Mich. Mut. Liability Co.*, 271 N.C. 158, 155 S.E.2d 501 (1967). While none of those decisions are controlling and, unlike *Davis*, did not involve the interpretation of West Virginia law, it should be noted that the Court in *Davis* did recognize that Courts across the nation were split on the issue. In fact, the *Davis* Court even cited the *York Indus. Ctr., Inc. v. Mich. Mut. Liability Co.* decision in a footnote, but then concluded as follows:

> While the WVSCA has not directly considered whether an intentional act done based on a mistake of fact can be an "accident" under an insurance policy, the courts that have considered the issue are split in their conclusions. **Given the apparent approval of the "both the means and the result must be unforeseen, involuntary, unexpected" language defining the term "accident," and the WVSCA's focus on the intentional nature of the act, rather than the result, at issue in Corra, this Court finds that the WVSCA would adopt the view that an intentional act, performed as intended, is not an "accident" because it is done based on a mistake of fact. In the instant case, the Davis Defendants hired Parsons to timber trees, and that is what he did. Roy and Blankenship do not argue that the timbering process was done negligently, just that it was done on the wrong property.**

Davis, at 924–25. For obvious reasons, similar considerations would apply to the nearly identical factual situation in this case and the Petitioner's reliance upon decisions applying other states' laws is misplaced. Here, all of the Bradleys' allegations concern intentional conduct (the cutting of timber roads and the harvesting and sale of timber) which, by its very nature, cannot constitute an

accident or occurrence. Whether the Petitioner believed she had a right to cut the subject timber or made a mistake as to the property lines is simply irrelevant.

While the Petitioner attempts to distinguish the *Davis* decision, a review of the facts of that case reveals that the principles discussed therein apply to this case as well. For example, the Davis insureds were the owners of an adjoining tract who had entered into an agreement with Parsons Logging to timber their property. (See A.R. 1491, the District Court's *Memorandum Opinion And Order,* at Pg. 2.) Therefore, the Davis Defendants were in effectively the same position as the Petitioner in this case. Next, the Petitioner asserts at pg. 22 of her *Brief* that *Davis* can be distinguished because the insureds in that case were warned to cease timbering the property but failed to do so. Once again, the Petitioner's arguments miss the point. The Court in *Davis* noted:

> In the instant case, the Davis Defendants hired Parsons to timber trees, and that is what he did. Roy and Blankenship do not argue that the timbering process was done negligently, just that it was done on the wrong property. . . . The Court concludes that the Davis Defendants' policy does not provide coverage for the claims asserted by Roy and Blankenship because no "occurrence" is alleged in Roy and Blankenship's state court complaint.

(See A.R. 1499-1500, the District Court's *Memorandum Opinion And Order* in *Davis,* at Pgs. 10-11.) Clearly, the same principles apply here where F&M's insured, Dye, hired the Jones Defendants to timber trees and that is precisely what they did. Like the claimants in *Davis*, the Bradleys are not alleging that the timbering was somehow done negligently. Instead, they are alleging that it was done on their property as opposed to the property of the Petitioner. As the District Court in *Davis* recognized, such allegations simply do not represent an "occurrence" to trigger coverage.

IV. The Circuit Court correctly found that the F&M Policy properly excludes coverage for the Petitioner's business pursuits such as the cutting of timber for a profit.

In addition to taking issue with the Circuit Court's findings with respect to the "occurrence" issue, the Petitioner also asserts that the Circuit Court erred when it found that the business exclusion in the F&M Policy applied to bar coverage for the Bradleys' claims against her. In that regard, the F&M Policy, like the Westfield policy in *Davis,* expressly excludes coverage for liability arising out of a "business" engaged in by an insured. Specifically, the F&M Policy provides, under "SECTION II - EXCLUSIONS," that the personal liability coverage does not apply to:

> **2. "Business"**
>
> a. "Bodily injury" or "property damage" arising out of or in connection with a "business" conducted from an "insured location" or engaged in by an "insured", whether or not the "business" is owned or operated by an "insured" or employs an "insured".
>
> This Exclusion **E.2**. applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business".

(See A.R. 89.) In the case of *W. Virginia Ins. Co. v. Jackson*, 200 W. Va. 588, 490 S.E.2d 675, (W.Va. 1997), the West Virginia State Supreme Court dealt with a similar business pursuits exclusion in a homeowners insurance policy and found that the determination of whether a particular activity constituted a "business pursuit" should be addressed on a case by case basis. *Jackson* at 677, 590. The Court then found that a homeowner who was maintaining marine aquariums in his garage was engaged in a business pursuit based upon the purpose for which he maintained them even though he was not earning a profit, and noted:

> The fact that the marine life systems were not Mr. Bessette's means of providing livelihood is not dispositive on the issue of whether the property was business property. Although Mr. Bessette had not yet profited from the sale of the marine life, the evidence reflects that he was engaged in an attempt to create a marketable technique for extending the shelf life of marine life and sold the lobsters in connection with that goal. He borrowed funds to advance this enterprise. This was not a pursuit simply designed for personal gratification, and to classify it as merely a hobby would be inaccurate.

Id., at 591, 678. Here, the cutting and sale of timber was not a hobby for the Petitioner but occurred in connection with her business agreement with Defendant below Jones Hauling to harvest timber. As the District Court noted in *Davis,* when it found that the homeowners there were "engaged" in a business:

> the logging at issue here is distinguishable from hiring someone to do repairs on a home, in that the Davis Defendants'[sic] received a share of the profits from the logging.

Davis, at 926. Here, the only purpose for the agreement entered into by the Petitioner was to sell timber and make a profit from such sale. For example, the Petitioner was asked during her deposition:

> Q. Were you hiring Mr. Jones to perform the services of timbering your property for you?
>
> A. Yeah.
>
> Q. Pursuant to those services, you were going to pay him what; a percentage of the timber that he took off the property?
>
> A. That I was going to pay him?
>
> Q. Yes.
>
> A. I didn't pay him.
>
> Q. He took the timber off your property and resold it; is that right?
>
> A. Yes.

> Q. And then he charged you a fee, being a percentage of the timber; is that right?
>
> A. Yes.
>
> Q. How much did he pay you under the contract for the timber that he removed for you?
>
> A. Thirty-three percent.

(See A.R. 1621, excerpts from Dye's deposition, at pgs. 35-36.) She then testified that Jones did, in fact, pay her for the subject timber, indicating:

> He would just hand me the log of the kind of timber he took in and he would hand me the check and explain, "This is your portion, this is the amount of your check" and that was it. I can't tell you if he came every week, every two weeks. I really don't know how often he did come.

(See A.R. 1622 at pg. 47.) Thus, there can be little doubt that the purpose of cutting the subject trees was to profit from the sale of the timber. As in *Davis*, such activities clearly fall under the "business pursuits" exclusion. Likewise, the business exclusion applies whether or not the business is owned or operated by an insured or employs an insured. (See A.R. 89.) Accordingly, if Jones Hauling was performing operations related to a timbering business, as has been alleged in the Bradleys' *Complaint* (See A.R. 2) and has been admitted by the Petitioner in her deposition, the F&M Policy excludes coverage for any injury or damages arising out of or in connection with that business operation, regardless of the Petitioner's intent with respect to the timber.

In a further effort to distinguish the discussion of the application of the business exclusion in *Davis*, the Petitioner suggests at pg. 28 of her *Brief* that this case is more akin to the case of *Camden Fire Ins. Ass'n v. Johnson*, 170 W. Va. 313, 294 S.E.2d 116 (1982), where the business pursuits exclusion was found not to apply. However, the *Johnson* decision involved babysitting

by a grandmother as opposed to entering into a contract with a timber cutter to sale trees for a share of the profits. The Court in *Camden* noted:

> We are of the opinion that these facts demonstrate that Sadie Johnson's motive was not to earn a living or to make a profit by keeping children in her home. Rather, she was induced to care for and supervise her grandchildren by the love and affection she held for them and by a desire to assist their mother in finding and keeping a job. Under these circumstances we must conclude that Sadie Johnson was not engaged in a business pursuit at the time of the accident.

Id., at 318, 120. Here, no other possible motive for the cutting of the subject trees besides earning a profit has even been suggested.

The Petitioner also focuses upon the fact that the Court in *Camden* discussed "continuous" or "regular" activities as opposed to a casual sale of an item of property by someone not ordinarily engaged in that activity. In effect, the Petitioner seeks to compare her actions to the selling of a car by the owner as opposed to a car dealer. This argument misses the point. As discussed above, the Petitioner engaged a professional timber cutter to cut the subject trees under a contract and received multiple payments for her share of the profits from the venture. (See A.R. 1621-1622) Therefore, even though the Petitioner did not personally own the logging business, the exclusion applies because she was clearly "engaged in" making a profit from the business through her contract with Jones. While she now suggests that she was somehow "losing money on her timber" (See the Petitioner's *Brief* at pg. 31), she cannot escape the fact that she entered into the contract with Jones to receive a share of the proceeds from the sale of the trees to be cut. As recognized in *Davis*, such activity falls squarely under the business pursuits exclusion, which eliminates coverage under the F&M homeowners Policy.

V. The Circuit Court correctly found that F&M was entitled to summary judgment as a matter of law.

Rule 56 of the *West Virginia Rules of Civil Procedure* governs motions for summary judgement and provides, ". . . judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 59, 459 S.E.2d 329, 335, 336 (1995); *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Moreover, to defeat summary judgment, an opposing party "may not rest upon [its] mere allegations[,]" W. Va. R. Civ. P. 56(e), but must "by affirmative evidence demonstrate that a genuine issue of fact exists." *Painter*, 192 W.Va. at 192 n. 5, 451 S.E.2d at 758 n. 5 (1994).

As discussed above, the evidence in this case clearly showed that all of the Bradleys' claimed damages arose from intentional timbering operations as opposed to an "accident" and clearly did not constitute an "occurrence" sufficient to trigger coverage under the F&M Policy. Likewise, the evidence clearly demonstrated that all of the Bradleys' claimed damages arose from a business activity of the Petitioner which was undertaken for the purpose of making a profit and were therefore excluded from coverage. Under these circumstances, the Circuit Court below correctly found that F&M was entitled to summary judgment with respect to the coverage issues and properly denied the Petitioner's request for summary judgment against F&M.

Conclusion

For the foregoing reasons, the Petitioner's appeal should be denied and the Circuit Court's November 10, 2022 *Order* awarding summary judgment to F&M should be affirmed.

Respectfully submitted,

FARMERS AND MECHANICS MUTUAL INSURANCE COMPANY OF WEST VIRGINIA

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CERTIFICATE OF SERVICE

I, Brent K. Kesner, counsel for Respondent, do hereby certify that I have served the foregoing "**Brief of Respondent**" upon all parties and known counsel of record, via File & ServeXpress, as indicated below, this 18th day of April, 2023, addressed as follows:

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