IN THE INTERMEDIATE COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA
DOCKET NO. 22-ICA-173

MARK SCAFELLA,

Plaintiff Below, Petitioner,

v.

ERIE INSURANCE COMPANY, and
STANLEY GEHO

Defendants Below, Respondents.

On Appeal from a final order of the
Circuit Court of Marshall County
(Civil Action No. 19-C-116)

BRIEF OF RESPONDENTS ERIE INSURANCE COMPANY AND STANLEY GEHO

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I. INTRODUCTION

Respondents Erie Insurance Company and Stanley Geho (collectively "Respondents" or "Erie") submit this response to the brief of Petitioner Mark Scafella. The Circuit Court properly granted Erie summary judgment on Count I of the Complaint, holding that there is no coverage under Mr. Scafella's homeowner's insurance policy for the barn damaged by fire. Mr. Scafella was admittedly operating a meat, cheese and sandwich store in one area of the barn when a fire erupted in another area of the barn. As such, the unambiguous business pursuits exclusion under the "Other Structures Coverage" applied to preclude coverage for the loss. Erie properly paid Mr. Scafella for his damaged contents under the personal property coverage, and the exception to the business pursuits exclusion does not apply. Finally, Mr. Scafella failed to prove that the doctrine of waiver operates to provide coverage for the barn where coverage otherwise clearly does not exist under the policy. This Court should affirm the Circuit Court's order granting summary judgment to Erie in all respects.

II. STATEMENT OF THE CASE

A. Statement of Facts

Mr. Scafella's home is located at 401 Aurora Avenue, Terra Alta, Preston County, West Virginia. A large multi-use barn is located on the property, comprised of an approximately 53 x 50 foot main barn area and a later added milkhouse addition, measuring approximately 25 x 14 feet. A.R. 0162-170. The original barn area was being renovated by Mr. Scafella with the intention of using it as a restaurant known as "Sophie's Serendipity, LLC". A.R. 159-160. The later added milkhouse addition was being used by Mr. Scafella to house a meat, cheese and sandwich store known as "Olivia's, LLC" (hereinafter "Olivia's"). A.R. 0001. Mr. Scafella had

registered both Olivia's and Sophia's Serendipity as separate limited liability companies with the State of West Virginia. A.R. 0171-72.

It is undisputed that at the time of the fire Olivia's was a fully functioning business selling meats, cheese and sandwiches to customers:

> **REQUEST NO. 4**: Admit that on February 2, 2019, the shop known as "Olivia's" was an operational business.
>
> **REQUEST NO. 4:** Admit.
>
> **REQUEST NO. 7**: Admit that as of February 2, 2019, at Olivia's offered for sale to customers meet, cheese and sandwiches.
>
> **REQUEST NO. 7:** Admit.

A.R. 157-160.[1]

Erie issued Mr. Scafella a homeowner's policy of insurance, Policy No. Q52-6004530, effective April 10, 2018 to April 10, 2019, (hereafter "Policy"). A.R. 00002; 0109-0154. The Policy carried "Other Structures" coverage limits of $101,400.00 and coverage for personal property of up to $380,250.00. A.R. 0100-0101.

The "Other Structures Coverage" provision withing the Policy contains a standard "business pursuits" exclusion as follows:

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[1] Although Mr. Scafella admits that Sophie's Serendipity, LLC was registered as a business entity through the W. Va. Secretary of State, effective August 9, 2018, Mr. Scafella contends that Sophie's Serendipity was not yet an operational business in the barn at the time of the fire. The issue of whether Sophie's Serendipity was a "business" at the time of the fire loss was not a basis for the Circuit Court's orders.

OUR PROMISE – Other Structures Coverage

"We" will pay for loss to:

1. **other structures at the "residence premises" separated from the dwelling, including garages, fences, shelters, tool sheds or carports.**

   Structures connected to the dwelling by only a fence, utility line or similar connection are considered to be other structures.

2. **construction material at the "residence premises" for use in connection with "your" other structures.**

"We" do not pay for loss to structures:

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

A.R. 0115-16. The Policy defines "business" as:

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

A.R. 0114.

On or about February 2, 2019, a fire erupted in the barn, causing damage to the structure and personal contents stored therein. Following the fire, Mr. Scafella submitted a claim to Erie

for the damage to the barn and the contents stored therein. A.R. 0005. Respondent Stanley Geho, a property adjuster for Erie, was assigned to investigate and adjust the claim for damaged to the "Other Structure" and damage to the contents.

Mr. Geho visited the fire damaged barn and also secured a recorded statement from Mr. Scafella's fiancé, Lisa Smith. In her recorded statement taken shortly after the fire, Ms. Smith clearly described Olivia's as being part of the barn (i.e., the same structure) where the fire occurred:

> Q: Now were you there when the fire occurred?
> A: Yes I was. **I was in a different part of the building**.
> Q: **Oh you were actually in the barn itself**?
> A: ***Yes*. I was in where we have the little shop on the side set up, the little shop called Olivia's. I was inside.**
> Q: And what were you doing in the shop?
> A: I was just basically waiting on customers.

A.R. 0162-69. Ms. Smith's description is consistent with Mr. Geho's inspection of the premises and his subsequent diagram of the structure, which clearly depicts the milkhouse as an adjacent addition to the original barn with an interior doorway connecting the milkhouse addition to the original barn area. A.R. 0162-170. Ms. Smith's description is further consistent with photographs of the structure which clearly depict a later added milkhouse addition adjoining the original barn area. A.R. 0219-226. The wall of the original barn abuts the wall of the milkhouse addition and an interior doorway connects the barn area to the milkhouse area without the need to go outside. *See id.*

As a result of his investigation, Mr. Geho concluded that Mr. Scafella was operating a business, *i.e.*, Olivia's, in the barn, thereby precluding coverage under the business pursuits exclusion to the "Other Structures Coverage". Erie issued a partial denial letter, denying Mr.

Scafella's claim for the damage to the barn structure itself under the "Other structures Coverage" based upon the business pursuits exclusion. A.R. 0173-74.

Under the contents portion of his claim, Mr. Scafella claimed approximately 120 items were damaged/destroyed in the fire. Mr. Scafella's Complaint alleges multiple times that the contents stored in the barn were all personal property. A.R. 0003-5 ("He filled the barn with his personal property . . ."; "All of the personal property and implements necessary for the operation of the aforementioned planned business were owned by plaintiff . . ."; "Moreover, the personal property stored within the subject barn was also destroyed and/or damaged."; "The Plaintiff, Mark Scafella, timely reported a claim for his personal property damaged and/or destroyed by the subject fire loss . . ."; "A representative from Defendant, Erie Insurance Company . . . did gather a list of personal property losses from the subject fire."; "Defendant . . . did provide coverage to the plaintiff, Mark Scafella, . . . for his personal property losses for the property destroyed in the subject barn . . .").

Mr. Scafella also contended during the claim process that the damaged contents were personal property: *See* A.R. 0415 ("I spoke with insured. He advised that the listing of personal property items 1-11 missed were for personal use and not business related."); A.R. 0416 ("I spoke with Lisa and she advised they have forwarded email with personal property items which were underpriced or missed entirely."); A.R. 0417 ("Enservio closed out commercial estimate as insured stated that all items would be claimed under personal property as he purchased himself and not related to any business pursuits."); A.R. 0418 ("Enservio rep sent email advising that he's completed on site evaluation. I responded that he needs to separate items as follows: construction business property, meat packing/restaurant property and individual property. . . He

advised that insured is claiming all items listed are his personal property."); A.R. 0419-420 (email from insured listing "personal property items" left off the list or for which the insured was disputing the value assigned); A.R. 0421-429 ("We have addressed all concerns of the insured to date on this personal property side of the loss. The insured states again that all contents listed in this report are personal and paid for by the insured and not purchased by any business.").

Mr. Geho's investigation concluded that the contents were personal property, and Erie paid Mr. Scafella a total of $67,640.80 under the personal property coverage available under the homeowner's policy. A.R. 411-412.

During the underlying litigation before the Circuit Court, Mr. Scafella – through counsel – advanced an argument for the first time in summary judgment briefing that he should have received a commercial policy, not a homeowner's policy. The underwriting file, however, reflects that Mr. Scafella requested and signed an application for homeowner's coverage. Mr. Scafella's agent received an initial inquiry on or before December 7, 2016, from Mr. Scafella's fiancé, Lisa Smith, seeking insurance for a new home and barn on 106 acres being purchased by Mr. Scafella. A.R. 298-300; 302-306. Ms. Smith confirmed that the new property would not operate as an active farm, but that they may run 30 cattle for personal use and make hay. The agent explained: (a) if the cattle were for personal use, a regular homeowner's policy could be issued, but there would be no coverage for the livestock itself, and (b) if they were going to lease the fields to make hay, they should purchase an incidental farming endorsement with the policy. Ms. Smith confirmed that there would be no commercial exposure and requested a quote for a homeowner's policy with an incidental farming endorsement. *See id.* The Agent subsequently issued the quote on December 7, 2016 as requested. A.R. 302-306.

On January 11, 2017, Ms. Smith contacted the agent and requested that she re-quote the policy without the incidental farming endorsement. A.R. 298-300; 307. The agent advised that if the insured was going to do any commercial farming activity, he needed to call back immediately because the new quote was for a strictly personal policy. A.R. 298-300. The agent reissued the quote as requested on January 12, 2017. A.R. 308-310.

Mr. Scafella executed the application for the requoted policy on April 5, 2017. A.R. 311-314. Notably, the application Mr. Scafella executed and submitted to Erie for coverage denies: (1) any animals, including pets or farm animals, present on the insured premises, and (2) any business or occupational pursuits on the insured premises:

ErieSecure Home® Application - WV

***

K:	Are there animals, including farm animals or pets on the premises?	No
L:	Is Applicant conducting any business or occupational pursuits at the premises?	No

A.R. 311-316.

A subsequent inspection of the insured property was performed on May 2, 2017. A.R. 317-327. The inspection noted no domestic or farm animals present on the property during the inspection. *See id.*

Mr. Scafella's Complaint alleges that at sometime prior to the fire, he contacted his insurance agent and advised her as to "his intentions to use the property as a restaurant and/or wine and cheese shop business." A.R. 0004-5. He further advised his agent "that he did not yet have the necessary permits to conduct the business operations within the barn but would return

once the permits were obtained to discuss obtaining any additional commercial general liability insurance he may need for the same." A.R. 0005. There is no evidence on the record that Mr. Scafella ever returned to obtain a commercial general liability policy for his store or restaurant despite the undisputed operation of Olivia's – a store selling meet, cheese, and sandwiches – on the premises.

B. Procedural History

Mr. Scafella initiated this action by filing a complaint against Erie and Mr. Geho on May 15, 2019, in the Circuit Court of Marshall County. The complaint alleges (1) entitlement to declaratory judgment on the issue of coverage, including claims for *Hayseeds* damages; (2) violation of the West Virginia Unfair Trade Practices Act and first-party common law bad faith; and (3) breach of contract.

Erie and Mr. Geho timely served their answer. A.R. 0044-55. The answer denies liability and raises affirmative defenses. *See id.* On May 19, 2020, the Circuit Court approved a jointly submitted *Agreed Order Bifurcating and Advancing Determination of Declaratory Judgment Claim (Count I) on Issue of Coverage*, effectively staying all proceedings, including discovery and trial, relating to the Scafella's claims of bad faith (Count II) and breach of contract (Count II), until final resolution of the declaratory judgment claim (Count I) was resolved. A.R. 0057-58.

Discovery was undertaken pertaining to Mr. Scafella's claims for declaratory judgment. Erie and Mr. Geho filed a *Motion for Summary Judgment* on March 12, 2021. A.R. 0059-174. A briefing order was entered on the summary judgment motion on September 29, 2021. A.R. 0175. Mr. Scafella filed his Response to the motion for summary judgment on

October 20, 2021. A.R. 0177-234. Erie filed a reply in support of its motion for summary judgment on May 3, 2021. A.R. 0245-254. On January 6, 2022, the Circuit Court entertained oral argument on Erie's pending motion for summary judgment, and subsequently issued an order on January 18, 2022, holding as follows:

> On January 6, 2022, this Court heard oral arguments of counsel pertaining to Defendants Erie Insurance Property and Casualty Company ("Erie") and Stanley Geho's Motion for Summary Judgment on Count I of Plaintiff's Complaint for Declaratory Judgment ("Motion"). Upon consideration of the briefing submitted by the parties and the arguments of counsel, this Court finds that the milkhouse and the barn are one structure. However, additional submissions are necessary concerning paragraph 2 of the business exclusion (exception or "claw-back" provision) of the at issue policy before the Court can make a final ruling on the Motion.
>
> Accordingly, the Court ORDERS that the parties complete any additional discovery necessary to inform the Court on this issue by May 13, 2022. The discovery shall be limited to the exception or "claw-back" provision and the nature of the property for which Erie paid.
>
> The parties shall thereafter submit supplemental briefing to the Court limited to the implication of the exception or "claw-back" by June 13, 2022.

A.R. 0257-258.

On June 13, 2022, Erie and Mr. Geho timely filed their *Supplemental Brief in Support of Motion for Summary Judgment on Count I of Plaintiff's Complaint for Declaratory Judgment.* A.R. 0395-439. On June 14, 2022, Mr. Scafella filed *Plaintiff, Mark Scafella's Supplemental Response in Opposition to Defendant's Motion for Summary Judgment on Count I of Plaintiff's Complaint for Declaratory Judgment.* A.R. 0259-276. On June 14, 2022, Mr. Scafella filed his *Motion for Leave to File Exhibit 3 to Plaintiff's Supplemental Response.* A.R. 0277-281. On June 23, 2022, Erie and Mr. Geho filed *Defendants Motion to Strike that Portion of Plaintiff's*

Supplemental Response Noncompliant with this Court's Order of January 18, 2022. A.R. 0282-288.

Although no Court Order was entered, the Court directed counsel by email to further submit responses to the portion of Mr. Scafella's brief outside of the Court's prior January 18, 2022 Order. A.R. 0289-291. On July 12, 2022, Erie and Mr. Geho filed their *Response to Portions of Plaintiff's Supplemental Brief Outside Scope of January 18, 2022 Order*. A.R. 0292-0338. On July 22, 2022, Mr. Scafella responded by serving *Plaintiff, Mark Scafella's, Sur-Response In Opposition to Defendants' Motion for Summary Judgment on Count I of Plaintiff's Complaint for Declaratory Judgment*. A.R. 0339-0366.

On September 12, 2022, the Circuit Court entered its Order Granting Summary Judgment in Favor of Defendants on Count I of Plaintiff's Complaint ("Summary Judgment Order"). A.R. 0367-372. The Circuit Court's Summary Judgment Order elaborated on its prior holding in the January 18, 2022 Order concluding that because Olivia's was being operated in the same structure where the fire occurred, the business pursuits exclusion precludes coverage:

> The parties do not dispute that Olivia's was being operated as a business at the time of the fire. Plaintiff contends, however, that the business pursuits exclusion does not preclude coverage because the milkhouse area in which Olivia's is located is a separate and distinct structure from the main barn area. Plaintiff's argument is unsupported by the evidence in the record, including photograph and diagrams of the structure, which reflects that the main barn area and milkhouse are a single integrated structure. The barn and milkhouse are not only adjacent to each other, but physically attached together with adjacent attached common walls. There is also an entry way or door leading from the milkhouse directly to the main barn area. *See, e.g., Winston v. Hartford Fire Ins. Co.*, 317 S.W.2d 23, 28 (Mo. App. 1958) (considering whether an after built addition is erected in such close proximity to the other structure as to be physical joined thereto); *McMahon v. People's Nat. Fire Ins. Co.*, 14 Teiss. 269, 270 (La. Ct. App. 1917) ("We are

> of opinion that 'additions' to a building include only such structures as are attached to or structurally connected with the main building and are not an out-house entirely detached and wholly disconnected from said main building.").
>
> The business pursuits exclusion provides that Erie will not pay for loss to structures "[u]sed in whole or in part for "business" purposes . . ." The language of the exclusion is clear and unambiguous. As previously held in the Order entered January 18, 2022, "this Court **FINDS** that the milkhouse and the barn are one structure." Because the milkhouse known as Olivia's was part of the same structure as the main barn area and was being used to operate a business, paragraph 1. of the "business pursuits" exclusion applies to preclude coverage for the structure.

Id. Having concluded that the later added milkhouse addition and original barn area were part of the same integrated structure, the Circuit Court next addressed the exception to the "business pursuits" exclusion, and held that it was inapplicable because the contents in the barn were personal property, not business property:

> Having determined that paragraph 1. of the "business pursuits" exclusion applies, this Court must also determine whether the exception or claw-back in paragraph 2. of the business pursuits exclusion is applicable. The relevant provision provides:
>
> *"**We**" do not pay for loss to structures:*
>
> *Used in whole or in part for "**business**" purposes (except rental or holding for rental of structures used for private garage purposes); or*
>
> *Used to store "**business**" property. However if the "**business**" property is solely owned by "**anyone we protect**," "**we**" do provide coverage for the structure. The "business property may not include gaseous or liquid fuel, unless the fuel is in a fuel tank that is permanently installed in a vehicle or craft which is parked or stored in the structure.*
>
> Plaintiff argues that the contents stored inside the barn were business property solely owned by the Plaintiff such that paragraph 2. of the business pursuits exclusion operates to bring the structure back under coverage. There is, however, a vast amount of

> evidence in the record reflecting that the contents stored in the barn for which Erie issued payment were determined by Erie to be personal property and were also claimed by the Plaintiff to be personal property.
>
> Most notably, Erie issued payment under the policy's personal property coverage for approximately 120 items stored in the main barn area which the Plaintiff claimed were damaged/destroyed as a result of the fire. Copies of the checks issued by Erie clearly demonstrate that payment was made pursuant to a "personal property settlement." Likewise, the claim file contains multiple references to the fact that the Plaintiff specifically asserted that the property damaged in the barn fire was personal property, not business property. Plaintiff further claimed that he purchased the contents with personal funds and that the contents were not purchased by any business. As such, this Court **FINDS** that paragraph 2 of the business exclusion (claw back provision) does not apply.

Id. Having concluded that there was no coverage for the fire damage to the barn under the "Other Structures Coverage" provision of the Policy, the Circuit Court also concluded that Mr. Scafella's argument of waiver was unavailing:

> Finally, this Court finds Plaintiff's argument of waiver unavailing. Waiver requires the intentional relinquishment of a known right. *Potesta v. USF&G*, 202 W.Va. 308, 504 S.E.2d 135 (1998). If a plaintiff attempts to show that waiver is "implied," then the plaintiff must prove implied waiver by *clear and convincing evidence* and that "the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed." *Id.* at 315, 142, quoting *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W.Va. 694, 715, 57 S.E. 2d 725, 735 (1950). Waiver may not be used to extend insurance coverage beyond the terms of an insurance contract. *Potesta*, at 320, 147 (emphasis added). "[W]hile implied waiver may be employed to prohibit an insurer, who has previously denied coverage on specific ground(s) from subsequently asserting a technical ground for declination of coverage, *implied waiver may not be utilized to prohibit the insurer's subsequent denial based on the non-existence of coverage*." *Id.* at 322-23, 149-50 (emphasis added).
>
> Plaintiff argues that Erie knew or should have known that the barn would be used for business purposes and therefore waived its right

> to rely on the business pursuits exclusion. The potential future presence of livestock on the Plaintiff's property does not equate to a business enterprise. Moreover, Plaintiff executed and submitted an application to Erie for coverage in which the Plaintiff clearly denied (1) any animals, including pets or farm animals, present on the insured premises, and (2) any business or occupational pursuits on the insured premises. The evidence on the record does not support Plaintiff's position and the Plaintiff has failed to prove the necessary elements of waiver.
>
> Accordingly, Defendants' Motion is **GRANTED** and summary judgment is entered in favor of the Defendants on Count I of the Plaintiff's Complaint.

Id.

Mr. Scafella filed his notice of appeal on October 12, 2022. A.R. 0374-392. Two days later, on October 14, 2022, the Circuit Court entered a Rule 54(b) Order, holding:

> On September 12, 2022, the Court entered its *Order Granting Summary Judgment in Favor of Defendants on Count I of Plaintiff's Complaint*. Said *Order* was entered as a continuation of its order of January 18, 2022.
>
> its September 12, 2022 and January 18, 2022 Orders shall be deemed entries of final judgment of the Circuit Court of Marshall County as to Count I of the Complaint and subject to appellate review, pursuant to **W. Va. R. Civ. P. 54(b)**.

A.R. 0373 (emphasis in original).

III. SUMMARY OF THE ARGUMENT

The Circuit Court properly granted summary judgment to the Respondents on Count I of the Complaint. There are no genuine issues of material fact and the Circuit Court correctly held that as a matter of law there is no coverage under the "Other Structures Coverage" for the damage to the barn because the business pursuits exclusion applies to preclude coverage.

This Court should affirm the Circuit Court's judgment. The business pursuit exclusion under the "Other Structures Coverage" provision of the policy is unambiguous. Under the facts

of this claim, "Other Structures Coverage" is precluded because Mr. Scafella was operating a business out of the same integrated structure for which he claims coverage. The contents in the barn were all determined to be personal property, not business property, so the Circuit Court correctly held that the exception to the business pursuits exclusion does not apply. Finally, the Circuit Court correctly held that Mr. Scafella failed as a matter of law to prove waiver and no genuine issues of material fact are in dispute that waiver does not operate to provide coverage for the barn where no such coverage exits under the Policy. Therefore, the Circuit Court's judgment should be affirmed in all respects.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

There are no matters of first impression because the Circuit Court correctly gave effect to the plain and unambiguous meaning of the policy language. Oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and appendix record and oral argument would not significantly aid the decisional process. W. Va. R. App. P. 18(a)(4). For the same reason, the appeal is appropriate for disposition by memorandum decision under West Virginia Rule of Appellate Procedure 21.

V. ARGUMENT

A. Standards of Review

This Court reviews a circuit court's entry of summary judgment *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755, Syl. Pt. 1 (1994). "'This Court may, on appeal affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.'" *Milmoe v. Paramount Senior Living at Ona, LLC*, 875

S.E.2d 206, Syl. Pt. 2 (W. Va. 2022) (quoting *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466, Syl. Pt. 3 (1965).

B. The Circuit Court Properly Granted Summary Judgment to Erie.

1. There are no genuine issues of material fact and as a matter of law the "Other Structures Coverage" does not provide coverage for the barn.

The Circuit Court properly applied the unambiguous policy language in its grant of summary judgment to Erie on Count I of the Complaint. The Policy unequivocally excludes coverage for structures that are used in whole or in part for business purposes:

> OUR PROMISE – Other Structures Coverage
>
> **"We" will pay for loss to:**
>
> 1. **other structures at the "residence premises" separated from the dwelling, including garages, fences, shelters, tool sheds or carports.**
>
>   **Structures connected to the dwelling by only a fence, utility line or similar connection are considered to be other structures.**
>
> 2. **construction material at the "residence premises" for use in connection with "your" other structures.**
>
> "**We**" do not pay for loss to structures:
>
> 1. used in whole or in part for "**business**" purposes (except rental or holding for rental of structures used for private garage purposes); or
> 2. used to store "**business**" property. However, if the "**business**" property is solely owned by "**anyone we protect**," "**we**" do provide coverage for the structure. The "**business**" property may not include gaseous or liquid fuel, unless the fuel is in a fuel tank that is permanently installed in a vehicle or craft which is parked or stored in the structure.

A.R. 0115-16. The policy in question defines "business" as:

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

A.R. 0114.

A "business pursuits" exclusion is a standard feature in a homeowner's insurance policy intended as a limitation upon coverage. *See, e.g.*, § 128:14. In general, 9A Couch on Ins. § 128:14.[2] As in any policy review, "[w]here the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Syl., *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 172 S.E.2d 714. "In other words, 'the terms of an insurance policy should be understood in their plain, ordinary and popular sense, not in a strained or philosophical sense.'" *Id.*, citing *Polan v. Travelers Ins. Co.*, 156 W.Va. at 255, 192 S.E.2d at 484.

The West Virginia Supreme Court of Appeals has previously found business pursuits exclusions to be unambiguous. *See Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 491-492, 745 S.E.2d 508, 529-530 (2013) (concluding the "policy language to be plain" wherein it defined "business" as "any activity engaged in as a trade, profession or occupation, other than farming"); *see also W. Virginia Ins. Co. v. Jackson*, 200 W. Va. 588, 490 S.E.2d 675 (1997)

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[2] Homeowners' and farmowners' liability policies typically exempt from coverage bodily injury or property damage arising out of or in connection with a business engaged in by the insured. People characteristically separate their business activities from their personal activities, and therefore, business pursuits coverage is not essential for their homeowners' or farmowners' coverage and is excluded to keep premium rates at a reasonable level.

§ 128:14. In general, 9A Couch on Ins. § 128:14.

(affirming the Circuit Court's ruling which granted summary judgment in favor of the insurance company based on the business pursuits exclusion).

In *Jackson*, as in this case, an insurer was sued by its policy holder after limiting the coverage payout for a garage fire loss on the basis that the garage was being used for business pursuits. The policyholder was housing large aquatic tanks and equipment in the garage that he used to conduct experiments to extend the shelf life of lobsters. Lightning struck the garage, starting a fire and resulting in a total loss. The Circuit Court concluded on summary judgment that the insurer had properly limited coverage because the policy holder had received funding from an investor to perform the aquatic experiments in his garage and sought to eventually profit from his experiments. The Circuit Court noted that the profit motive was not contradicted by the fact that he had not yet realized any profit at the time of the fire.

As in *Jackson*, herein, the operation of Olivia's fits squarely within the business exclusion, precluding coverage for loss to structures "***used in whole or in part*** for "**business**" purposes." Although Mr. Scafella admits that Olivia's was a fully operational meat, cheese, and sandwich store – complete with customers – he contends that the business pursuits exclusion does not apply because Olivia's was located in a different part of the structure from where the fire erupted. The fire broke out in the original barn area, while Olivia's was located in a later added milkhouse addition to the original barn structure. The record clearly establishes, and the Circuit Court correctly held, that the "milkhouse" and the area of the barn where the fire erupted are both part of a single integrated structure.

Erie adjuster Stanley Geho inspected the loss location and created a diagram of the barn. A.R. 0162-170. Mr. Geho's investigation concluded that the structure is a multi-use barn

consisting of an approximately 53 x 50-foot main barn area (which the insured was in the process of renovating into a restaurant) and a later added addition thereto measuring approximately 25 x 14 feet ("Olivia's" or the "milkhouse"). *See id.* The original barn and later added addition are connected by the construction of two abutting adjacent walls. *See id.* There is an interior entryway connecting Olivia's to the rest of the original barn so that a person does not need to go outside to move from the primary barn area into Olivia's and vice versa. *See id.* The photographs in the record likewise reflect that the milkhouse and barn were a single integrated structure with a shared interior entryway. A.R. 0219-226.

The recorded statement Mr. Geho obtained from Mr. Scafella's fiancé, Lisa Smith, likewise confirms that she and Mr. Scafella also thought of the original barn and later added milkhouse addition as a single integrated structure. In her recorded statement taken shortly after the fire, Ms. Smith clearly described Olivia's as being part of the barn (i.e., the same structure) where the fire occurred:

> Q: Now were you there when the fire occurred?
> A: Yes I was. **I was in a different part of the building.**
> Q: **Oh you were actually in the barn itself?**
> A: ***Yes*. I was in where we have the little shop on the side set up, the little shop called Olivia's. I was inside.**
> Q: And what were you doing in the shop?
> A: I was just basically waiting on customers.

A.R. 0162-69.

Mr. Scafella's argument that the word "structure" is undefined and ambiguous has no merit. The fact that the word structure is not defined within the Policy does not render the word ambiguous. *See* e.g., *West Virginia Fire & Cas. Co. v. Stanley*, 216 W.Va. 40, 602 S.E.2d 483,

492 (2004) (concluding that even though the word "accident" was not defined in the policies, it was not ambiguous). The Supreme Court of Appeals of West Virginia has repeatedly held that:

> This Court has previously said, 'Language in an insurance policy should be given its plain, ordinary meaning.' Syllabus Point 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W.Va. 430, 345 S.E.2d 33 (1986). Furthermore, Syllabus Point 2 of *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985), states the following well settled principal:
>
> 'Where provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed.' Syl., *Farmers' & Merchants' Bank v. Balboa Insurance Co.*, [171] W.Va. [390], 299 S.E.2d 1 (1982), quoting syl., *Tynes v. Supreme Life Insurance Co.*, 158 W.Va. 188, 209 S.E.2d 567 (1974).
>
> Stated another way, this provision reads as follows:
>
> 'Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.' Syl. pt. 1, *Christopher v. United States Life Ins.*, 145 W.Va. 707, 116 S.E.2d 864 (1960).
>
> Syllabus Point 3, *Soliva, supra.*

Kelly v. Painter, 202 W.Va. 344, 504 S.E.2d 171, 175 (1998). Thus, in reviewing the business pursuits exclusion under the "Other Structures Coverage" provision of the Policy, the term structure "should be understood in [its] plain, ordinary and popular sense, not in a strained or philosophical sense.'" *Cherrington v. Erie Ins. Property and Cas. Co.*, 231 W.Va. 470, 745 S.E.2d 508, 524 (2013) (citing *Polan v. Travelers Ins. Co.*, 156 W.Va. 250, 255, 192 S.E.2d 481, 484 (1972)).

The fact that Mr. Scafella, through his counsel, has advanced alternative tortured meanings for the word structure does not in and of itself render the term ambiguous. "The mere

fact that parties do not agree to the construction of a contract does not render it ambiguous. Even if the language of the insurance policy is ambiguous, 'the liberal construction rule does not require, or even permit, the twisting or distorting of plain words or language.'" *Zurich Ins. Co. v. Uptowner Inns, Inc.,* 740 F. Supp. 404, 408 (S.D.W.Va. 1990) (quoting *Green v. Farm Bureau Mut. Auto. Ins. Co.,* 139 W. Va. 475, 477, 80 S.E.2d 424, 425 (1954)), *aff'd,* 904 F.2d 702 (4th Cir. 1990). It is not the court's function to make policies for parties that are different from the policies executed. *Id. Cf. State Farm Mut. Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 358 F. Supp. 1143, 1147 (S.D.W.Va. 1973) (stating that it is neither the province nor the function of a trial court to supply omissions in or to amend insurance policies).

The term structure is unambiguous and should be given its plain and ordinary meaning. The "essential meaning" per the Merriam-Webster dictionary is "something (such as a house, tower, bridge, etc.) that is built by putting parts together and that usually stands on its own." https://www.merriam-webster.com/dictionary/structure (last visited 11/1/21). Examples provided include: "(1) a brick/steel *structure; (2)* The *structure* was damaged by fire, and (3) a 12-story *structure." Id.* Here, the structure for which Mr. Scafella seeks coverage is a multi-use barn consisting of the original barn and a later added milkhouse addition. Together, the barn and the milkhouse constitute one integrated structure. No ambiguity exists. Mr. Scafella is simply advancing a tortured interpretation of the word structure because under the plain and clear meaning of the term, Mr. Scafella's claim is precluded by the business pursuits exclusion.

This conclusion is further buttressed by the available case law establishing that an after built addition or attachment to an original building is part of the same single structure. Although

West Virginia does not appear to have previously addressed the term structure in this context, other jurisdictions addressing the issue have focused on whether the original building and later added addition are connected or adjacent so as to constitute a single structure. For instance, in *Winston v. Hartford Fire Ins. Co.*, 317 S.W.2d 23 (Mo. Ct. App. 1958), the Court determined that a later added shed addition attached to a barn was a single structure for purposes of insurance coverage. As noted by the *Winston* Court:

> the building, 10 x 30 feet, claimed by plaintiffs to be a garage, was erected some time after the main part of the barn was built. It ran the full length of the barn, was attached thereto as a shed and the barn formed one side of it. The exact date is not given as to the time the barn or shed was erected. . . . This 10 x 30 shed in no respect could be considered a separate building, even though the north side of the shed had a concrete foundation. It was actually a part of the barn connected by rafters extending from the barn over the shed and was under the same roof.

Winston, 317 S.W.2d at 26-27.

Notably, in determining that the later added shed was part of the same structure as the original barn for purposes of insurance, the *Winston* Court focused on whether the after built addition "was erected ***in such close proximity to the other structure as to be physically joined thereto***." *Id.* Herein, as in *Winston*, the later added "milkhouse" addition was built by adding an adjacent wall physically abutting the barn, and the original and later added sections are connected by an interior entryway. The milkhouse is in such close proximity to the barn that they are physically joined and a single integrated structure.

This same concept was also explained in *McMahon v. People's Nat. Fire Ins. Co.*, 14 Teiss. 269, 270–71 (La. Ct. App. 1917), as follows:

> We are of the opinion that "additions" to a building include only such structures as are **attached to** *or* structurally connected with

> the main building and are not an out-house entirely detached and wholly disconnected from said main building, especially where such additions are required to be adjoining and communicating with said main building.

(emphasis added).

Based on the holding in *McMahon*, if an addition is "attached" to the original structure, it is an integrated part of the main building. Herein, the diagrams and photos clearly reflect that the milkhouse is attached to the main barn area. In fact, there is an interior entryway between the original barn area and the later added milkhouse addition, allowing persons to traverse between each area without ever going outside.

Similarly, in *Univ. City v. Home Fire & Marine Ins. Co.*, 114 F.2d 288, 298 (8th Cir. 1940), it was determined that if the various portions of a structure are in such close proximity as to be physically connected, they form one integral unit, the use to which the separate parts are put is necessarily immaterial. In so holding, the *Univ. City* court focused in part on whether "the addition was erected in such close proximity to the other structure as to be physically joined thereto . . ." *Id.* Again, as clearly depicted in photographs and documents adduced as evidence on the record before the Circuit Court, that is precisely the scenario. The later added milkhouse addition was erected "in such close proximity to the [barn] as to be physically jointed thereto." Indeed, the milkhouse and barn are abutted up against each other with no space in between.

The fact that a subsequently added shed or addition may have been built with different materials likewise does not render the structure separate. *See, e.g., Violette v. Queen Ins. Co.*, 96 Wash. 303, 165 P. 65 (1917) (holding that a brick building may include a wooden addition which is attached thereto and is used in connection with the business described as carried on in the insured building); *see also Winston*, 317 S.W.2d at 26-27 (concluding that the later added shed

was part of the original barn even though the shed had a concrete foundation unlike the original barn).

Here, the later added milkhouse addition to the barn is akin to a home with a later added addition of a sunroom. Although the sunroom may be constructed with different materials and capable of being razed without harming the original home, the home and attached sunroom are a single structure or residence for purposes of a homeowner's policy of insurance. Similarly, the later added milkhouse addition to the original barn is also a single structure for purposes of a homeowner's insurance policy.

Based on these facts, the Circuit Court correctly concluded that the milkhouse and the barn are a single structure such that the operation of Olivia's in one part of the structure precluded coverage for the fire that erupted in another area of the structure.

> The parties do not dispute that Olivia's was being operated as a business at the time of the fire. Plaintiff contends, however, that the business pursuits exclusion does not preclude coverage because the milkhouse area in which Olivia's is located is a separate and distinct structure from the main barn area. Plaintiff's argument is unsupported by the evidence in the record, including photograph and diagrams of the structure, which reflects that the main barn area and milkhouse are a single integrated structure. The barn and milkhouse are not only adjacent to each other, but physically attached together with adjacent attached common walls. There is also an entry way or door leading from the milkhouse directly to the main barn area. *See, e.g., Winston v. Hartford Fire Ins. Co.*, 317 S.W.2d 23, 28 (Mo. App. 1958) (considering whether an after built addition is erected in such close proximity to the other structure as to be physical joined thereto); *McMahon v. People's Nat. Fire Ins. Co.*, 14 Teiss. 269, 270 (La. Ct. App. 1917) ("We are of opinion that 'additions' to a building include only such structures as are attached to or structurally connected with the main building and are not an out-house entirely detached and wholly disconnected from said main building.").

> The business pursuits exclusion provides that Erie will not pay for loss to structures "[u]sed in whole or in part for "business" purposes . . ." The language of the exclusion is clear and unambiguous. As previously held in the Order entered January 18, 2022, "this Court **FINDS** that the milkhouse and the barn are one structure." Because the milkhouse known as Olivia's was part of the same structure as the main barn area and was being used to operate a business, paragraph 1. of the "business pursuits" exclusion applies to preclude coverage for the structure.

Having concluded that the milkhouse and barn were part of the same structure, the Circuit Court next addressed whether the exception to the exclusion (coined the "claw-back" provision by the Circuit Court) applied so as to afford coverage for the structure. The provision provides in pertinent part:

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

A.R. 0115-16. The policy in question defines "business" as:

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

A.R. 0114.

Mr. Scafella contends that the exception to the business pursuits exclusion applies because the barn was "used to store **"business"** property" that was "solely owned by" him. Mr.

Scafella's argument in this regard is disingenuous at best and belied by his own submissions to the Circuit Court below. Mr. Scafella's Complaint is replete with allegations acknowledging that the contents damaged in the fire were personal property:

- "He filled the barn with his **personal property** . . ."
- "All of the **personal property** and implements necessary for the operation of the aforementioned planned business were owned by plaintiff . . ."

A.R. 0003 (emphasis added).

* "Moreover, the **personal property** stored within the subject barn was also destroyed and/or damaged."

A.R. 0004 (emphasis added).

* "The Plaintiff, Mark Scafella, timely reported a claim for his **personal property** damaged and/or destroyed by the subject fire loss . . ."

* "A representative from Defendant, Erie Insurance Company . . . did gather a list of **personal property** losses from the subject fire."

* "Defendant . . . did provide coverage to the plaintiff, Mark Scafella, . . . for his **personal property** losses for the property destroyed in the subject barn . . ."

* "By correspondence dated March 21, 2019, the defendants . . . did exclude from coverage plaintiff Mark Scafella's loss of the barn structure which stored the **personal property** of the plaintiff . . ."

A.R. 0005 (emphasis added).

The record is also replete with Mr. Scafella's assertions to Mr. Geho during the claim process that the contents in the barn were personal property, not business property. Mr. Scafella claimed approximately 120 items were damaged/destroyed as a result of the structure fire. A.R. 0399-0409. Mr. Geho determined that the contents were payable under the personal property coverage portion of the policy. *See id.* The personal property items were itemized and valued by a third-party vendor, Enservio. *See id.* Mr. Scafella repeatedly emphasized during the claim

handling process that the contents should be treated as personal property:

- "I spoke with insured. He advised that the listing of **personal property** items 1-11 missed were for personal use and not business related." A.R. 0415 (emphasis added).

- "I spoke with Lisa [Mr. Scafella's fiancé] and she advised they have forwarded email with **personal property** items which were underpriced or missed entirely." A.R. 0416 (emphasis added).

- "Enservio closed out commercial estimate as insured stated that all items would be claimed under **personal property** as he purchased himself and not related to any business pursuits." A.R. 0417 (emphasis added).

- "Enservio rep sent email advising that he's completed on site evaluation. I responded that he needs to separate items as follows: construction business property, meat packing/restaurant property and individual property. . . He advised that insured is claiming all items listed are his **personal property**." A.R. 0418 (emphasis added).

- email from insured listing "**personal property** items" left off the list or for which the insured was disputing the value assigned. A.R. 0419-420 (emphasis added).

- letter from Enservio to Mr. Geho, stating "We have addressed all concerns of the insured to date on this **personal property** side of the loss. The insured states again that all contents listed in this report are personal and paid for by the insured and not purchased by any business." A.R. 0421-429 (emphasis added).

Mr. Scafella's fiancé further confirmed that the contents in the barn were Mr. Scafella's personal belongings:

> Q: Um, as far as let's say the personal property that was damaged in the fire is that personal property owned by both of you?
>
> A: It's **personal property**, um, owned by Mark.
>
> Q: Okay. So the --- uh, the stuff in the building or in the barn is --- is Mark's alone?
>
> A: Um, yeah.
>
> Q: Okay.
>
> A: Well I –I had a few items in there. But, uh, most of it would've been Mark's personal – **personal belongings**.

A.R. 0166-67 (emphasis added).

Mr. Geho determined that the contents claim was properly payable under the personal property coverage available under the Policy and Erie paid Mr. Scafella a total of $67,640.80 for his contents claim. The two checks issued to Mr. Scafella clearly demonstrate that payment was made pursuant to a "personal property settlement." A.R. 4011-12.

The payment of Mr. Scafella's contents claim under the personal property coverage portion of the Policy is in no way "incongruous" with Erie's determination that the barn structure itself was excluded from coverage based on the business pursuits exclusion. In fact, Erie's payment of the contents claim illustrates the fallacy of Mr. Scafella's argument herein. The personal property coverage provides a broad insuring agreement:

> OUR PROMISE – Personal Property Coverage
>
> **"We" will pay for loss to:**
>
> **1. personal property owned or used by "anyone we protect" anywhere in the world.**

A.R. 0116.

Had the contents in the barn been deemed "business property," as advocated by Mr. Scafella for the first time in this lawsuit, the following limitation on contents coverage could have applied:

> **"We" do not pay for loss to:**
>
> **9. except as provided under SPECIAL LIMITS - Personal Property Coverage, property pertaining to a "business" conducted away from the "residence premises," unless at the time of loss such property is on the "residence premises." However, "we" do not cover such property on the**

"residence premises" while it is stored, held as samples, or held for sale or delivery after sale.

A.R. 0116-117. The special limits for business property is significantly less than the amount Mr. Scafella received for his contents claim:

SPECIAL LIMITS – Personal Property Coverage

Limitations apply to the following personal property. These limits do not increase the amount of insurance under Personal Property Coverage:

Total Amount Of Insurance In Any One Loss	**Description Of Personal Property Subject To Limitations**
	***
$2,500	**Property on the "residence premises" used primarily for "business" purposes conducted on the "residence premises," including property in storage, held as samples, or held for sale or delivery after sale**

A.R. 0117.

Based on the evidence before it, the Circuit Court correctly held that the exception or "claw-back" provision to the business pursuits exclusion is not applicable:

> Plaintiff argues that the contents stored inside the barn were business property solely owned by the Plaintiff such that paragraph 2. of the business pursuits exclusion operates to bring the structure back under coverage. There is, however, a vast amount of evidence in the record reflecting that the contents stored in the barn for which Erie issued payment were determined by Erie to be personal property and were also claimed by the Plaintiff to be personal property.
>
> Most notably, Erie issued payment under the policy's personal property coverage for approximately 120 items stored in the main barn area which the Plaintiff claimed were damaged/destroyed as a result of the fire. Copies of the checks issued by Erie clearly

> demonstrate that payment was made pursuant to a "personal property settlement." Likewise, the claim file contains multiple references to the fact that the Plaintiff specifically asserted that the property damaged in the barn fire was personal property, not business property. Plaintiff further claimed that he purchased the contents with personal funds and that the contents were not purchased by any business. As such, this Court **FINDS** that paragraph 2 of the business exclusion (claw back provision) does not apply.

It merits mentioning that Mr. Scafella's argument is further a red herring because it is contingent upon his erroneous contention that the original barn area was a separate structure from the later added addition of the milkhouse. As discussed, *supra*, the milkhouse and original barn area are part of the same integrated structure – much the same as a later added sunroom is part of the original house. As such, the barn was not "used to ***store*** "business" property" because it was also being used to operate Olivia's, a fully operational store with customers. The fact that the electrical fire ignited in one area of the structure and not the area where Olivia's was located has no impact on the operation of the exclusion because the structure was being used "in whole or in part for 'business' purposes." A.R. 0115-16. For this additional reason, the exception to the business pursuits exclusion is not applicable.

Finally, Mr. Scafella did not properly raise or preserve any argument of efficient proximate cause. Neither his complaint nor his summary judgment briefing contains any efficient proximate cause argument, and it is unclear why Mr. Scafella has raised it for the first time in his opening brief by burying it in the section concerning the nature of the contents claim. The West Virginia Supreme Court of Appeals in *Haynes v. Antero Resources Corporation*, No. 15-1203, 2016 WL 6542734, at *3 (W. Va. Oct. 28, 2016) made it clear a party has an obligation to preserve all of its claims:

> "[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim.... Judges are not like pigs hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991); accord *Teague*, 35 F.3d at 985 n.5; *State v. Honaker*, 195 W. Va. 51, 56 n.4, 454 S.E.2d 96, 101 n.4 (1444).

Again, in *Haynes,* this Court made it clear that the rule that judges are not pigs hunting for truffles applies equally to issues not properly raised or decided by the Circuit Court:

> With regard to West Virginia Code § 55-2-1, *et seq.*, although petitioner mentions it in his opening brief to this Court and in his reply to Antero's response, he fails to cite to the record on appeal when or how he raised this issue before the circuit court. Further, neither the November 18, 2015, order, nor the March 24, 2015, order mention this statute. As we stated previously, we are not pigs hunting for truffles.

Id. The Circuit Court was not required to raise, develop, and respond to a proximate efficient cause argument that was never articulated by Mr. Scafella in briefing or argument on summary judgment.

Moreover, the case relied upon by Mr. Scafella in support of his argument, *Murray v. State Farm*, 203 W. Va. 477, 509 S.E.2d 1 (1998), is easily distinguishable from the facts of this case. At issue in *Murray* was the application of an earth movement exclusion, not a business pursuits exclusion. The earth movement exclusion at issue was determined by the *Murray* Court to be ambiguous, whereas herein the business pursuits exclusion is not ambiguous. *Murray*, 203 W. Va. at 485, 509 S.E.2d at 9. It was only in the face of what the *Murray* Court determined was an ambiguous exclusion, that it looked to the proximate efficient cause:

> The majority of courts that have considered earth movement exclusions have found them to be ambiguous. Having found the clause to be ambiguous, courts have used two methods of policy construction to examine whether coverage exists or is excluded under the earth movement exclusion.

> First, courts have applied two doctrines of construction, *ejusdem generis* and *noscitur a sociis,* to limit the application of the earth movement exclusion to natural, catastrophic events, rather than man-made events.
>
> Second, courts have examined the particular causes of the loss presented by the policyholder, and although an excluded event (such as earth movement) may have been a concurring or contributing cause of a loss, courts have allowed policyholders to recover under an insurance policy if the proximate cause of the loss was an event insured by the policy.

Id. Notably, the *Murray* Court held that the proximate efficient cause approach is to be used when there is a "combination of covered and specifically excluded risks. . . ." *Murray*, 203 W. Va. at 489, 509 S.E.2d at 13.

Here the Circuit Court was addressing the operation of a business pursuits exclusion under the "Other Structures Coverage" which is not ambiguous. Likewise, the business pursuits exclusion operates to preclude coverage for a structure when it is "used in whole or in part" for a business. The earth movement exclusion in *Murray* lacked similar language. Finally, there is no requirement that the business activities actually cause the loss for the exclusion to be operable.

2. The waiver doctrine does not operate to provide coverage for the barn structure.

The word waiver appears nowhere in Count I of Mr. Scafella's Complaint. To the contrary, Mr. Scafella alleged that the Policy clearly provided coverage, or alternatively was ambiguous, or alternatively, that he had a "reasonable expectation" of coverage. A.R. 0007-0010. Mr. Scafella's waiver argument was a last-ditch effort raised for the first time on summary judgment to try and create genuine issues of material fact in a claim wherein it is clear that no coverage exists under the Policy. The Circuit Court saw through Ms. Scafella's antics and held that Mr. Scafella had failed to establish waiver. This Court should likewise give no credence to

Mr. Scafella's eleventh hour argument as it is unsupported by the evidence on the record and the available case law.

West Virginia case law on the waiver doctrine vis a vi insurance claims is well established. There is no need for this Court to delve into Mr. Scafella's comparisons of the waiver doctrine to other unrelated and irrelevant insurance principles because West Virginia law is settled on this issue. "To effect a waiver, there must be evidence which demonstrates that a party has **intentionally** relinquished a known right." Syl. Pt. 1, in part, *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998) (quoting Syl. Pt. 2, in part, *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989)) (emphasis added). "This intentional relinquishment, or waiver, may be expressed or implied . . . However, where the alleged waiver is implied, there must be **clear and convincing evidence** of the party's intent to relinquish the known right. " *Potesta*, 202 W. Va. at 315, 504 S.E.2d at 142. The burden of proving waiver is on the party claiming the "benefit of such waiver, and is never presumed." *Id.* at 315, 142, quoting *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W.Va. 694, 715, 57 S.E. 2d 725, 735 (1950). "The doctrine of waiver focuses on the conduct of the party against whom waiver is sought and requires that party to have intentionally relinquished a known right." *Id.* at 316, 143.

Crucially, "the principle[] of waiver [. . . is] inoperable to extend insurance coverage beyond the terms of an insurance contract." *Potesta*, 202 W. Va. at 320, 504 S.E.2d 147. The reason for this rule as explained by the Court in *Potesta* is as follows:

> 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.

Id., citing *Turner Liquidating Co. v. St. Paul Surplus Lines Ins.*, 93 Ohio App.3d 292, 299, 638 N.E.2d 174, 179 (1994).

The only exceptions to this general rule are for the doctrine of estoppel; no such exceptions apply to the waiver doctrine.[3] *Potesta*, 202 W. Va. at 322–23, 504 S.E.2d at 149–50. Therefore, "while implied waiver may be employed to prohibit an insurer, who has previously denied coverage on specific ground(s), from subsequently asserting a technical ground for declination of coverage, implied waiver may not be utilized to prohibit the insurer's subsequent denial based on the nonexistence of coverage." *Id.*; *see also Westfield Ins. Co. v. Davis*, 232 F. Supp. 3d 918, 928 (S.D.W. Va. 2017) (concluding that since the insurer denied coverage based on the "nonexistence of coverage," the doctrine of implied waiver is inapplicable because it cannot extend coverage beyond the terms of the insurance contract and the insurer therefore did not waive its right to deny coverage); *Dow v. Liberty Ins. Co.*, No. CV 3:19-0486, 2021 WL 5411949, at *6 (S.D.W. Va. Nov. 18, 2021) (concluding that insurer's belated reliance on the "water control device or structure" exclusion was based on the non-existence of coverage, not based on a technicality, such that implied waiver did not apply).

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[3] *Potesta* was before the Supreme Court on certified questions. In the underlying action, the insurer denied coverage based upon an exclusion regarding property damage to "property [the insured] own[ed], rent[ed] or occup[ied], and later, in subsequent litigation, relied upon an exclusion concerning "negligent work." The Supreme Court established, among others, the following new syllabus points:

> 5. Generally, the principles of waiver and estoppel are inoperable to extend insurance coverage beyond the terms of an insurance contract.
>
> 6. While implied waiver may be employed to prohibit an insurer, who has previously denied coverage on specific ground(s), from subsequently asserting a technical ground for declination of coverages, implied waiver may not be utilized to prohibit the insurer's subsequent denial based on the nonexistence of coverage.

Herein, Mr. Scafella is limited to his argument of waiver because he failed to raise any argument of coverage through estoppel in his Complaint, briefing at the Circuit Court level, or in his Petitioner's brief. As such, he is precluded from raising such an argument at this late stage. *Addair v. Bryant*, 168 W. Va. 306, 320, 284 S.E.2d 374, 383 (1981) ("Assignments of error that are not argued in briefs on appeal may be deemed by this Court to be waived."); *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 349 n.20, 524 S.E.2d 688, 704 n.20 (1999)) ("Our general rule is that nonjurisdictional questions ... raised for the first time on appeal, will not be considered."); *Whitlow v. Board of Education*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993) ("Our general rule in this regard is that, when non-jurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal.")

The cases relied upon by Mr. Scafella to support his waiver argument, *McKinney*[4] (1959) and *Kimball Ice*[5] (1926), both pre-date the Supreme Court's holding in *Potesta* which clearly established the standard under West Virginia law for proving waiver, as distinguished from estoppel. Both cases involved vacant buildings destroyed by fire and undisputed evidence that the issuing agent admittedly knew the buildings were vacant when the policy was issued. The carrier in both cases subsequently denied coverage based upon the vacancy exclusion of which the insured was previously unaware.

The Supreme Court has previously distinguished *McKinney* and *Kimball Ice* under similar circumstances. In *Ashraf v. State Auto Prop. & Cas. Ins. Co.*, No. 18-0382, 2019 WL 2167960, at *3 (W. Va. May 20, 2019), the Supreme Court was asked to consider whether State Auto had waived its right to rely on a policy provision that reduced coverage on a building by

[4] *McKinney v. Providence Washington Ins. Co.*, 144 W. Va. 559, 109 S.E.2d 480 (1959).

[5] *Kimball Ice Co. v. Springfield Fire & Marine Ins. Co.*, 100 W. Va. 728, 132 S.E. 714 (1926).

fifteen percent because the building was vacant at the time of a fire that destroyed the building in 2012. The Petitioner in *Ashraf* argued that he had a prior vandalism claim on the same building in 2009 during which State Auto was placed on notice that the building was vacant, but continued to reissue the policy of insurance, thereby waiving its right to rely on the vacancy provision. The Supreme Court disagreed, noting that the insured had a duty to read the 2009 denial letter referencing the policy provisions upon which the carrier had relied to deny the prior loss:

> We find no error. This Court has long held that " '[w]here the provisions of an insurance policy contract are clear and unambiguous ... full effect will be given to the plain meaning intended.' Syl., [in part,] *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 172 S.E.2d 714 (1970)." Syl. Pt. 5, in part, *American Nat'l Prop. & Cas. Co. v. Clendenen*, 238 W. Va. 249, 793 S.E.2d 899 (2016). In 2009, petitioner reported a loss to State Auto because the subject building had been vandalized. Upon learning that the building had been vacant for more than sixty consecutive days, State Auto invoked the clear and unambiguous language of the policy's vacancy provision, which enumerated six reasons for denial of coverage, including vandalism.[4] State Auto expressly advised petitioner of the same, in writing, and denied coverage. When petitioner's still-vacant building sustained a fire loss (a covered loss under the policy) in 2012, State Auto again invoked the clear and unambiguous language of the vacancy provision by "reduc[ing] the amount [it] should otherwise pay for the loss or damage by 15%."
>
> We find the instant case to be distinguishable from *McKinney* and *Kimball Ice*. In *McKinney*, the insurer invoked the applicable policy's vacancy provision, of which the insured was previously unaware. In this case, petitioner does not dispute that he was advised of the vacancy provision when his 2009 vandalism claim was denied. We recognize that the written notice denying the vandalism claim did not specifically quote from that portion of the vacancy provision providing for a reduction in coverage for covered causes of loss because that provision was inapplicable to the claim. However, the notice expressly referenced "Section E. Loss Conditions[,] which starts on page 9 of 14[,]" and included

> the coverage reduction provision now at issue. "A party to a contract has a duty to read the instrument." Syl. Pt. 5, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986), *overruled on other grounds by National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Parsons v. Hallliburton Energy Services, Inc.*, 237 W. Va. 138, 785 S.E.2d 844 (2017). Petitioner had a duty to read the coverage reduction provision, as directed by State Auto. *See also American States Ins. Co. v. Surbaugh*, 231 W. Va. 288, 299, 745 S.E.2d 179, 190 (2013) ("Had Mr. Grimmett read the policy, as he was told to do in a letter and on the policy itself, he would have learned of the exclusions and could have contacted American States with any questions he had regarding said exclusions. In other words, American States fulfilled its obligation to bring the exclusion to the attention of Mr. Grimmett, but Mr. Grimmett failed to carry out his duty to read the policy."). Petitioner's claim that the 2009 notice was inadequate to advise him of the coverage reduction provision and amounts to a waiver of the application of the provision in this case is thus unavailing.

Ashraf v. State Auto Prop. & Cas. Ins. Co., No. 18-0382, 2019 WL 2167960, at *4–5 (W. Va. May 20, 2019).

In this case, Mr. Scafella executed an application for a homeowner's policy in which he confirmed that he was not operating a business or occupation from the premises. Thereafter, Erie issued the homeowner's policy based upon his application. As in *Ashraf*, Mr. Scafella had a duty to read the application wherein he represented that no business activity was being operated on the premises to be insured under the homeowner's policy.

As discussed below, there was no evidence of an intentional relinquishment of a known right by Erie, and therefore Mr. Scafella failed to prove waiver. More importantly, even if waiver had existed in this case, under no circumstances could it be applied to extend coverage beyond the terms of the contract. In this case, waiver is inoperable to extend coverage to the

structure of the barn when it was clearly excluded under the terms of the contract such that coverage does not exist.

Erie denied Mr. Scafella's claim for coverage to the structure of the barn because Mr. Scafella was operating Olivia's – a meat, cheese, and sandwich shop - out of the barn. Mr. Scafella presents this Court with innuendo and hypotheses to support his argument that Erie should have known Mr. Scafella was operating a "commercial farm" or construction business somewhere on the property, but notably Mr. Scafella does not point this Court to any evidence on the record that he previously disclosed the operation of Olivia's to Erie. Nor could he because as admitted in the allegations of his complaint, Mr. Scafella told his agent that he would return to obtain the proper commercial general liability coverage when he had the permit to operate his meat and cheese store:

> 20. Prior to any loss under the subject policy, the plaintiff, Mark Scafella, contacted the agent of defendant, Erie Insurance Company, Kendra Simpson and American Insurance Center, LLC. Plaintiff Scafella advised said Erie agent as to the renovations he conducted on the barn on the subject property and his **intentions** to use the property as a restaurant and/or wine and cheese shop business in the near future. Plaintiff Scafella advised said Erie agent that he did not yet have the necessary permits to conduct the business operations within the barn but would return once the permits were obtained to discuss obtaining any additional commercial general liability insurance he may need for the same.

A.R. 0004-5. If this Court accepts Mr. Scafella's allegations in his Complaint at face value, he never disclosed the operation of Olivia's to his agent; he only advised of his future intentions and his plans to return for a commercial general liability policy once the business permits were obtained. *See id.*

The documentary evidence created contemporaneously during the application process similarly reflects a lack of waiver by Erie:

- On December 7, 2016, Mr. Scafella's fiancé, Lisa Smith, contacted the Agent seeking insurance for a new home and barn on 106 acres being purchased by Mr. Scafella. Ms. Smith confirmed that the new property would not operate as an active farm, but that they may run 30 cattle for personal use and make hay. The agent explained: (a) if the cattle were for personal use, a regular homeowner's policy could be issued, but there would be no coverage for the livestock itself, and (b) if they were going to lease the fields to make hay, they should purchase an incidental farming endorsement with the policy. Ms. Smith confirmed that there would be no commercial exposure and requested a quote for a homeowner's policy with an incidental farming endorsement. The Agent subsequently issued the quote on December 7, 2016 as requested. [Aff and Exhibit A-2.]
- On January 11, 2017, Ms. Smith requested that the Agent re-quote the policy without the incidental farming endorsement, which the Agent did the following day on January 12, 2017. [Aff. And A3]
- On April 5, 2017, Mr. Scafella executed the application for the requoted policy as issued on January 12, 2017. [AFf and Exhibit A-5].
- On May 2, 2017, an insurance inspection of the property was completed and noted no domestic or farm animals present on the property during the inspection. [Aff. A-6].

The most crucial documentary evidence is the application itself executed by Mr. Scafella wherein he denied: (1) any animals, including pets or farm animals, present on the insured

premises, and (2) any business or occupational pursuits on the insured premises:

K:	Are there animals, including farm animals or pets on the premises?	No
L:	Is Applicant conducting any business or occupational pursuits at the premises?	No

See id.

Having signed the application, Mr. Scafella is bound by his representations therein that he was not conducting any business or occupational pursuits at the premiums because "[a] party to a contract has a duty to read the instrument." Syl. Pt. 5, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986), *overruled on other grounds by National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Parsons v. Hallliburton Energy Services, Inc.*, 237 W. Va. 138, 785 S.E.2d 844 (2017). Mr. Scafella had a duty to read the application that he executed, as well as the subsequent Policy that he received. These documents are not in dispute and there is no *genuine* issue of material fact that is in dispute.

The Circuit Court, relying on the established West Virginia law on the doctrine of waiver as set forth in *Potesta*, held in relevant part:

> Finally, this Court finds Plaintiff's argument of waiver unavailing. Waiver requires the intentional relinquishment of a known right. *Potesta v. USF&G*, 202 W.Va. 308, 504 S.E.2d 135 (1998). If a plaintiff attempts to show that waiver is "implied," then the plaintiff must prove implied waiver by *clear and convincing evidence* and that "the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed." *Id.* at 315, 142, quoting *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W.Va. 694, 715, 57 S.E. 2d 725, 735 (1950). Waiver may not be used to extend insurance coverage beyond the terms of an insurance contract. *Potesta*, at 320, 147 (emphasis added). "[W]hile implied waiver may be employed to prohibit an insurer, who has previously denied coverage on specific ground(s) from subsequently asserting a technical ground for declination of coverage, *implied waiver may not be utilized to prohibit the*

> *insurer's subsequent denial based on the non-existence of coverage.*" *Id.* at 322-23, 149-50 (emphasis added).
>
> Plaintiff argues that Erie knew or should have known that the barn would be used for business purposes and therefore waived its right to rely on the business pursuits exclusion. The potential future presence of livestock on the Plaintiff's property does not equate to a business enterprise. Moreover, Plaintiff executed and submitted an application to Erie for coverage in which the Plaintiff clearly denied (1) any animals, including pets or farm animals, present on the insured premises, and (2) any business or occupational pursuits on the insured premises. The evidence on the record does not support Plaintiff's position and the Plaintiff has failed to prove the necessary elements of waiver.

A.R. 0367-372.

Contrary to Mr. Scafella's arguments, the Circuit Court did not "pick the set of facts that it liked best." The Circuit Court correctly determined, base on *Potesta*, that Mr. Scafella had failed to establish an intentional relinquishment of rights under the policy by Erie. The fact that cattle may be on Mr. Scafella's property is not akin to the operation of a business because homeowners can own cattle (or horses, goats, chickens, etc.) without engaging in an active farming business. Although Mr. Scafella attempts to create genuine issues of material fact regarding the potential relocation or change of address of his other business, Mr. Scafella has not pointed this Court to any evidence that he had disclosed the operation of Olivia's out of the barn.

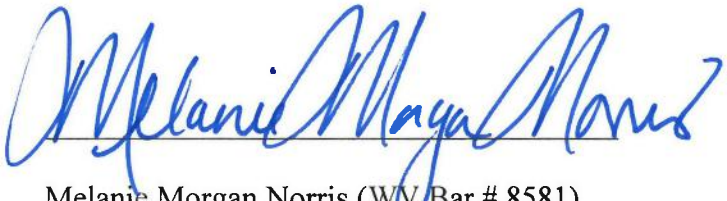
Most importantly, there can be no expansion of coverage under the Policy even if Mr. Scafella could prove a waiver. Here, the plain terms of the policy provide no coverage for the barn structure. Under *Potesta*, the doctrine of waiver is inoperable to expand coverage where none exists.

For these reasons, this Court should affirm the Circuit Court's Summary Judgment Order.

VI. CONCLUSION

For all the foregoing reasons, this Court should affirm the Circuit Court's grant of summary judgment to Erie and Mr. Geho in all respects.

Dated this 27th day of February 2023.



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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of February 2023, true and accurate copies of the foregoing ***Brief of Respondent Erie Insurance Company*** was served upon all counsel of record by electronic filing to the following counsel of record:

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