IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-20

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

ANDREA DALE DYE,

***Petitioner*,**

v.

FARMERS & MECHANICS MUTUAL INSURANCE COMPANY OF WEST VIRGINIA,

Respondent.

PETITIONER'S BRIEF

PREPARED BY:

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II. QUESTIONS PRESENTED

1. Whether Respondent Farmers & Mechanics Mutual Insurance Company of West Virginia ("F&M") waived and/or is estopped from asserting coverage defenses in the underlying civil action?

2. Whether the Intermediate Court of Appeals erred in granting summary judgment in favor of F&M and against the Petitioner Andrea Dale Dye on the issue of applicability of the "business" exclusion contained in the F&M insurance policy to the facts of this case such that F&M does not owe a duty to defend nor a duty to indemnify the Petitioner in the claims brought against her by the Plaintiffs in the underlying civil action?

3. Whether the Circuit Court erred in granting summary judgment in favor of F&M and against the Petitioner on the issue of whether the facts of the underlying case constitute an "occurrence" under the subject F&M insurance policy such that F&M does not owe a duty to defend nor a duty to indemnify the Petitioner in the underlying civil action?

III. STATEMENT OF THE CASE

A. The Property and Timbering of the Bradley Property.

This is declaratory judgment action regarding the operation of a homeowners insurance policy issued by F&M to Ms. Dye for her home and property located at 1872 Flaggy Meadow Road in Mannington, West Virginia. The case begins sometime in November or December, 2015 when Ms. Dye was approached by Larry Jones of Jones Hauling (collectively "Jones Hauling") regarding an easement across her property to access the neighboring Hayes property, which Jones Hauling was going to timber. R00913-916. At the same time, Mr. Jones inquired about the possible timbering of Ms. Dye's property and later presented Ms. Dye with a "Timber Sale Contract" ("Contract"). R00916. Later, it was revealed that Jones Hauling would also be timbering another

adjacent property belonging to Herbert Hill. *Id.* Subsequently, Ms. Dye granted Jones Hauling the easement over her property for a payment of five hundred dollars ($500.00). R00175.

On January 10, 2016, Ms. Dye signed the Contract, thereby agreeing to sell and Jones Hauling agreeing to buy "all standing timber … growing on and forming a part of real property owned by [Ms. Dye]." R00342-344. The Contract further states as follows:

> SECTION FIVE
> INDEMNITY
>
> 1. Seller [Ms. Dye] makes no representations as to the present or future condition of its property. … Buyer [Jones Hauling] hereby represents that he is personally familiar with [Ms. Dye's] property, and the boundary lines delineating the area to be logged.
>
> …
>
> SECTION EIGHT
>
> Buyer hereby covenants not to cut any line or trees on land owned by other third parties over which a right of way has not been procured. …

Id.

At or near the time the Contract was signed, Ms. Dye provided Mr. Jones with a plat regarding her property. R00916. However, Ms. Dye made no further representation to Jones Hauling about what property or timber she did or did not own. *Id.* Nor did she ever walk or in any way mark her property or trees with or for Jones Hauling. R00918. Ms. Dye relied entirely upon the terms of the Contract and Mr. Jones' verbal representations that he was familiar with her property and would timber only her property. R00918-919.

Ms. Dye was and continues to be a novice as it pertains to timbering – she has no experience with regard to selling timber or otherwise with the timbering industry. R00911-912. Neither does she particularly know the boundaries of her own property as she has never had it surveyed, walked it or otherwise investigated the metes and bounds of her property. R00913.

Ms. Dye's real property is located adjacent to property owned by Gregory and Judy Bradley, plaintiffs below. R00868. The Bradleys purchased their property, consisting of approximately 65 acres, between 2010 and 2012. R00835-836, 840. The Bradley property borders Ms. Dye's property to the west and is only accessible by vehicle through an easement access road across the Dye property – the same road upon which Ms. Dye granted an easement to Jones Hauling for its timbering operations. R00837, 868. The Bradleys' property was only marked with a single "no trespassing" sign near the entrance of the property (on the easement road from the Dye property), but no other defining markings.[1] R00845.

Sometime subsequent to the execution of the Contract, it is believed that Jones Hauling did timber the various properties. The record is unclear as to exactly when the timbering occurred on the various properties, but it is believed to have occurred in early to mid-2016, as evidenced by the checks received by Ms. Dye from Jones Hauling. R01422-1429. Unbeknownst to Ms. Dye, while timbering the properties, Jones Hauling allegedly harvested timber from the Bradleys' property. R00001-4, 836, 922. Ms. Dye was unaware that any of the Bradleys' timber had been harvested. R00919-920, 922. In fact, Ms. Dye had no knowledge of or involvement in the physical timbering operations conducted by Jones Hauling. *Id.* The only thing Ms. Dye knew occurred with regard to the timbering was that she saw "his truck go in empty and come back out with logs on it …," presumably across the easement Ms. Dye had granted to Jones Hauling. R00916-917. To be sure, Plaintiff Gregory Bradley testified that he has no evidence that Ms. Dye ever entered his property to cut and remove the trees or to damage the property in any other way. R00865. In fact, when asked whether he believed that Ms. Dye physically entered his property and cut down the trees, he testified "Oh, absolutely not." *Id.* Further, the record is void of any factual development

[1] There is a fence that runs along some of the property, but the fence is not posted with any markings delineating to whom the various properties belong. R00845.

on whether Jones Hauling ever actually harvested any timber from Ms. Dye's property or ever entered the Dye property other than by crossing the aforementioned easement to gain access to the property adjacent to Ms. Dye's property, whether that be the Bradley property, Hill property or Hayes property, or any combination of the same.

B. The Declaratory Judgment Action and Insurance Policy.

On July 25, 2018, the Bradley's filed the underlying civil action against Ms. Dye, Larry and Roberta Jones d/b/a Jones Hauling and "other unknown defendants." R00001-4. The Complaint alleges, among other things, that "the Defendants, or any of them, … negligently, willfully, wantonly, and without warning or authority, deliberately entered onto the Plaintiff's [sic] 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." R00002. The Plaintiffs further allege that the Defendants "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." *Id.*

As a result of the claims against her, Ms. Dye presented a claim to her homeowners' insurance company, F&M, for defense and indemnification under the liability provisions of the policy issued by F&M, Policy No. HPP0057787 ("Policy"). R00195-200, 206. Subsequently, F&M began providing a defense to Ms. Dye, but under a reservation of rights, reserving the right to deny coverage under the Policy. R00198-199, 1690-1696. In relevant part, the October 11, 2018 F&M Reservation of Rights letter cites the definition of "occurrence" and a business exclusion under the "Damage to Property Of Others" section of the Policy, not the operable liability section

of the Policy, as potentially exclusionary for the claims against Ms. Dye.[2] R01693-1694. Thereafter, on February 19, 2019, F&M intervened in the instant matter and filed a declaratory judgment action against its insured, Ms. Dye, alleging that it has no obligation to its insured under the Policy it sold to her and for which she paid premiums. R00185-320.

The Policy, a common homeowners' insurance policy, provides multiple coverages to Ms. Dye, including personal liability coverage.[3] In its complaint, F&M alleged, in relevant part, that the underlying facts of the Bradleys' action against Ms. Dye did not constitute an "occurrence" as defined by the Policy and that there was a business pursuits exclusion that precluded coverage. *Id.* Importantly, the Policy insures Ms. Dye under **"Section II – Liability Coverages"** as follows:

> **A. Coverage E – Personal Liability**
>
> 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 is groundless, false or fraudulent. …

R00244 (emphasis added). The Policy defines "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: … [p]roperty damage." R00230. The Policy does not define the term "accident." *See* R00202-320. The business pursuits exclusion cited by F&M in its Complaint was

[2] F&M also cited other exclusionary provisions in the Policy that purportedly precluded coverage in this matter to Ms. Dye, namely an earth movement exclusion, an intentional loss exclusion and a personal liability by contract exclusion and a punitive damages exclusion. R1690-96. The Circuit Court, however, eventually granted summary judgment in favor of Ms. Dye on all of those exclusions as inapplicable, including the referenced business pursuits exclusion because the exclusions were not exclusions under the operative sections of the Policy. R01117-1136. Those other particular exclusionary provisions are not subject of this appeal.

[3] There were two policy periods at issue, but both policies are essentially the same for purposes of this analysis. *See* R00202-320.

contained with the "Damage To Property of Others" section of the policy – a completely separate coverage part from the operative liability section of the policy. R00248.

On October 1, 2019, before any depositions were taken in the underlying case, F&M filed its motion for summary judgment asserting that that it did not owe Ms. Dye any duty under her Policy as (1) the Bradleys' claims were not an "occurrence" under the Policy as Ms. Dye's conduct was intentional, and (2) that the Bradleys' claims were excluded under the "business" exclusion in the "Damage to Property to Others" coverage.[4] R00686-707. After briefing and oral argument on those issues, the Circuit Court denied summary judgment on the "occurrence" issue and granted summary judgment in favor of Ms. Dye on all of the Policy exclusions cited by F&M, including the "business" exclusion. R01117-1136.

With regard to the "occurrence" issue, the Circuit Court found that Ms. Dye "denied intentionally or deliberately entering onto the plaintiffs' property and/or intentionally or deliberately removing the plaintiffs' timber or caused damage to their property" and, as a result, "an issue of material fact [exists] that precludes granting of summary judgment in [F&M's] favor at this juncture." R01121, 1130. Further, the Circuit Court, in recognizing that there are multiple theories of liability against Ms. Dye in the underlying action, not just the physical removal of the trees, held that:

> 63. If there is any reasonable construction of the claims in the plaintiffs' Complaint that support coverage to defendant Dye, the Intervenor must provide her with coverage. **See <u>Farmers & Mechanics Mut. Ins. Co. of W. Virginia v. Cook</u>, supra.** This is irrespective as to whether other theories of liability pled could fall outside the scope of coverage. Defendant Dye could have negligently advised that she owned the plaintiffs' property or trees, she may have negligently advised the Jones defendants as to the metes and bounds of her property, she could have negligently overseen or failed to oversee at all the work of the Jones defendants, and/or she could have failed to do her due diligence to determine which trees and/or properties belonged to her. There are multiple theories of negligence that may be

[4] F&M also asserted there was no coverage under the other exclusions listed in footnote 2.

> asserted against her and which do not require her to have acted with intent or the expectation that she was causing harm to the Bradleys.

R01130-1131.

Subsequently, all parties to this matter engaged in mediation on May 12, 2020. R01224. At that time, Ms. Dye had made a $100,000.00 demand to F&M to resolve both her claim for attorneys' fees for substantially prevailing in the Declaratory Judgment Action and her claims for breach of contract and bad faith against. In response to that demand, on May 22, 2020, Susan Snowden, Esq., counsel for F&M, sent a letter to counsel for Ms. Dye on behalf of F&M making a monetary offer of settlement and stating as follows:

> 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 …***

R01586. Notably, Ms. Snowden also included additional settlement terms in the letter (i.e., no admission of liability and requiring the signing of a release of all claims), but did not in any way reference the reservation of rights or a continued effort on F&M's part to deny coverage and prosecute the declaratory judgment action. *Id.*

On June 4, 2020, Rose Casey, F&M's representative handling Ms. Dye's coverage claims, sent the following letter to Ms. Dye via her counsel:

FARMERS & MECHANICS
INSURANCE COMPANIES

P.O. BOX 1917
MARTINSBURG, WV 25402-1917

PHONE 800-444-1917 | FAX 800-333-4319
FMIWV.COM

June 4, 2020

Eric Hayhurst
Hayhurst Law PLLC
PO Box 4635
Morgantown, WV 26504

Re: *Bradley v. Dye*, Civil Action No.: 18-C-110
Circuit Court of Marion County, West Virginia
***
Claim No. FMWVHP17001910
Insured: Andrea Dye

Dear Eric:

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.

F&M will continue to vigorously defend this case on Ms. Dye's behalf against Plaintiffs' claims through the law firm of Bailey Wyant PLLC.

Sincerely,

Rose Casey, Litigation Claims Specialist
Farmers & Mechanics Insurance Companies
PO BOX 1917, Martinsburg, WV 25402-1917
Phone: 1-800-444-1917, x 9360
Fax: 1-800-333-4319
Email RCasey@fmiwv.com or claims@fmiwv.com

R01333-1334.[5] This letter is authored and signed by the same F&M representative who authored and signed the reservation of rights letter sent to Ms. Dye. *Compare* R01334 with R01696. As is clear from the text of these two letters, neither Ms. Snowden nor Ms. Casey qualified F&M's promises to pay upon the reservation or rights previously issued by F&M or, for the matter, in any way. R01334 and 1586.

Based upon F&M's representations in these letters, neither Ms. Dye nor her counsel undertook any further discovery in the declaratory judgment action as it was clear that the insurance coverage issue had been resolved in Ms. Dye's favor. R01697-1709. If not for these letters, Ms. Dye would have undertook additional discovery from F&M, including, but not limited

[5] It should be noted that the Bradleys' demand of $101,000 referenced in the letter was within the Policy limits.

to, deposing Ms. Casey and corporate representative(s) of F&M. Discovery in this matter closed on October 16, 2020. R01227. Thereafter, although a policy limits demand had already been made, the Bradleys renewed their policy limits demand by letter to Ms. Dye's counsel on the liability claims on October 14, 2020. R01335.

C. Pertinent Procedural Background

On October 19, 2020, Ms. Dye filed a Motion for Summary Judgment regarding the declaratory judgment action, which is the subject of this appeal. R01325-1336. In the Motion for Summary Judgment, Ms. Dye argues that, based upon representations of F&M and its attorney in the above-referenced letter, the remaining "occurrence" issue in the declaratory judgment motion is moot. *Id.*

Subsequent to the filing of the Motion for Summary Judgment, on December 10, 2020, Ms. Casey issued a second letter to Ms. Dye's counsel purportedly seeking to clarify her earlier letter promising indemnification under the Policy to Ms. Dye. R01349. On December 14, 2020, F&M filed its response to Ms. Dye's Motion for Summary Judgment, conveniently citing Ms. Casey's December 10, 2020 letter, and arguing that F&M did not waive coverage, nor is it estopped from denying coverage, because of Ms. Snowden and Ms. Casey's letters. R01338-1349. Upon receipt of the same, Ms. Dye's counsel asked Ms. Snowden for the deposition of Ms. Casey. Ms. Snowden refused to arrange the deposition.[6] R01687-1689. Thereafter, F&M revoked its previous offer of settlement by letter from new retained counsel, Brent K. Kesner, Esq. R01587.

Then, on January 20, 2021, seven months after the close of discovery, F&M filed its *Supplemental Response to Andrea Dale Dye's Motion for Summary Judgment and Request for Reconsideration of Ruling on Coverage Issues*, also subject of this appeal. R1469-1519. In that

[6] Notably, this exchange occurred outside of the discovery cutoff. As such, the Petitioner did not have a mechanism to seek the deposition of Ms. Casey, other than request it from her counsel.

pleading, F&M sought to expound on its opposition to Ms. Dye's Motion and to take a second bite at the apple on issues previously decided by the Circuit Court. *Id.* Specifically, F&M cited a case from the Southern District of West Virginia in its effort to have this Court find the facts of this case do not constitute an "occurrence" under the Policy. *Id.* Then, for the first time, F&M cited a business exclusion under the Policy which was not part of its reservation of rights letter, declaratory judgment complaint, nor argued in any other pleading in this matter – the "Business" exclusion under Section II – Exclusions of the Policy. *Id.* That business exclusion reads, in relevant part, as follows:

> 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".

R00246 (emphasis added). "Business" is defined in the Policy as:

> 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; …

R00229.

Before deciding the issues presented in Ms. Dye's *Motion for Summary Judgment* and F&M's *Request for Reconsideration of Ruling on Coverage Issues*, the Circuit Court granted summary judgment in the underlying matter in favor of Ms. Dye. R1626-1645. That ruling was subject of appeal to this Court, which issued a decision reversing the Circuit Court in *Bradley v. Dye*, 875 S.E.2d 238 (W.Va. 2022). After remand, the Circuit Court issued its *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 on November 11, 2022 ("Order"). R1659-1683.

Thereafter, Ms. Dye appealed the Circuit Court's ruling to the Intermediate Court of Appeals ("ICA") in Case Number 22-ICA-301. R1685-1686. The ICA issued a Memorandum Decision on November 16, 2023. R01710-24. Specifically, the ICA upheld the Circuit Court's grant of summary judgment in favor of F&M, ruling that F&M 1) had not waived its coverage defenses; 2) was not estopped from asserting coverage defenses and 3) the conduct of business activity by Jones Hauling alleged to have occurred on the Dye property, an "insured location" under the Policy, constituted a "business" under the Policy, such that coverage was excluded.[7] *Id.*

The ICA's decision hinges upon multiple words and phrases contained within the "business" exclusion that were not previously litigated, although the ICA did not provide much discussion regarding the same. Specifically, the term "insured location" is defined in the Policy as follows:

> a. The "residence premises"'
>
> b. The part of other premises, other structures and grounds used by you as a residence; and
>
> (1) Which is shown in the Declarations; or
>
> (2) Which is acquired by you during the policy period for your use as a residence;
>
> c. Any premises used by you in connection with a premises described in a. and b. above;
>
> d. Any part of a premises:
>
> (1) Not owned by an "insured"; and

[7] The ICA disagreed with the Circuit Court's ruling that Ms. Dye herself was engaged in a "business" as defined under the Policy and West Virginia law, but upheld the grant of summary judgment for F&M on other grounds, as stated.

(2) Where an "insured" is temporarily residing;

e. Vacant land, other than farm land, owned by or rented to an "insured";

f. Land owned by or rented to an "insured" on which a one-, two-, three- or four-family dwelling is being built as a residence for an "insured";

g. Individual or family cemetery plots or burial vaults of an "insured"; or

h. Any part of a premises occasionally rented to an "insured" for other than "business" use.

R00230.

"Residence premises" is defined, in relevant part, by the Policy as "[t]he one-family dwelling where you reside … and which is shown on the 'residence premises' in the Declaration." R00230. "'Residence premises' also includes other structures and grounds at that location." *Id.* The Declarations page states that "[t]he premises covered by this policy is located at 1872 Flaggy Meadow Rd., Mannington, WV 26582-6432" – Ms. Dye's property. R00206 The phrases "arising out of," "in connection with," and "conducted from" are not defined in the Policy.

The Intermediate Court of Appeals issued its Mandate on December 20, 2023. R01725. It is from the Memorandum Decision and Mandate that the Petitioner now appeals.

IV. SUMMARY OF ARGUMENT

The Circuit Court erred in granting, and the ICA erred in upholding, summary judgment in favor of F&M in this matter. The record and law pertaining to this case demonstrate that, instead, summary judgment should have been granted to Ms. Dye or, alternatively, summary judgment should have been denied to all parties as questions of material fact exist such that judgment as a matter of law is inappropriate. There are five reasons for this:

First, by sending the two letters to Ms. Dye promising, without equivocation or qualification, to pay any judgment rendered against her and to continue to vigorously defend her, F&M waived its coverage defenses, including on the "occurrence" issue and application of the "business" exclusion. Further, F&M waived any right to assert the "business" exclusion because it failed to cite exclusion in any correspondence or pleadings in this matter until a motion for reconsideration filed with the Circuit Court well after the close of discovery in this matter.

Second, F&M is estopped from asserting the "occurrence" and "business" exclusionary language because of its conduct of sending the two letters to Ms. Dye, making the aforementioned unequivocal and unqualified promises and Ms. Dye detrimentally relying on the same. Specifically, Ms. Dye relied upon F&M's representations in those letters in giving up her right to further defend the declaratory judgment action and conduct additional discovery as she believed the coverage issues to have been resolved in her favor.

Third, although, as outlined below, the Petitioner contends that coverage for the alleged conduct of Ms. Dye falls within the bounds of coverage of the Policy, F&M's conduct toward Ms. Dye permits coverage to be extended by waiver or estoppel beyond the terms of the Policy in this case.

Fourth, even if waiver and estoppel do not apply, the "business" exclusion is not applicable to the facts of this case for several reasons. Namely, the ICA erroneously applied the exclusion to the alleged "business" conduct of Jones Hauling on Ms. Dye's property as that was never the intent of the exclusion, nor has F&M, the author of the exclusion, ever interpreted it that way. Additionally, the part of the "business" exclusion that relates to "'business' conducted from an insured location" is ambiguous and, as such, is susceptible to the doctrine of reasonable expectations and it is not within the reasonable expectations of Ms. Dye that the exclusion would

apply to a third party "business" conducted on her property. Further, even if the exclusion were applicable to a third-party "business" conducted from her property, there are genuine issues of material fact as whether there ever was third party "business" conducted from her property.

Fifth and finally, even if waiver and estoppel do not apply, the alleged conduct of Ms. Dye in the underlying civil action absolutely falls under the definition of "occurrence" in the Policy and as further defined under West Virginia law. To be sure, Ms. Dye did not take any affirmative action in harvesting the timber or damaging the Bradleys' property, i.e., she did not physically enter the property, did not physically cut any trees and did not physically damage any property. As such, Ms. Dye did not act intentionally or deliberately, nor did she ever intend for the Bradleys' trees and property to be touched. The resultant damage to the Bradleys' property was not intended. At most, the alleged conduct was a negligent mistake. Thus, the alleged conduct was an "occurrence" covered under the Policy.

Therefore, summary judgment was not appropriate in favor of F&M, but rather it was appropriate in favor of Ms. Dye. Alternatively, summary judgment should not have been granted to either party as genuine issues of material fact exist.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent is of the belief that this matter meets the criteria set forth in Rule 20 of the Rules of Appellate Procedure and that the decisional process would be significantly aided by oral argument in that it would allow the parties to further address the arguments presented in the briefs and to respond to questions of the Court regarding the issues presented herein.

VI. ARGUMENT

A. Standard of Review

Although this Court has not issued a ruling or other guidance on the standard of review it will undertake in the review of decision from the ICA, it is the Petitioner's belief that the standard should be the same as this Court has undertaken with regard to grants of summary judgment and interpretations of insurance contracts from the circuit courts – *de novo*. That is, the "review of this appeal from the circuit court's summary judgment order is plenary." *Bradley*, 875 S.E.2d at 242-243 (W.Va. 2022). "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). "Therefore,

> [i]n reviewing a circuit court's order granting summary judgment this Court, like all reviewing courts, engages in the same type of analysis as the circuit court. That is 'we apply the same standard as a circuit court,' reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party."

Bradley v. Dye, 875 S.E.2d at 243 (quoting *State ex rel. Vanderra Res., LLC v. Hummel*, 242 W. Va. 35, 42, 829 S.E.2d 35, 42 (2019)). "In this regard, it is well settled that '[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.'" *Id.* (quoting Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963)). Furthermore, "the interpretation of an insurance contract, including the determination of whether the contract is ambiguous, is a legal determination that … shall be reviewed *de novo* on appeal." Syl. pt. 2, *Riffe v. Home Finders Assoc., Inc.*, 205 W.Va. 216, 517 S.E.2d 313 (1999).

B. The Circuit Court Erred in Granting Summary Judgment in favor of F&M as F&M has Waived Coverage Defenses in this Matter.

An insurance company's words matter and it must be held to account for those words, especially when communicated directly to its insured. *See* Syl. pt. 9, *Marlin v. Wetzel County Bd.*

of Ed., 212 W.Va. 215, 569 S.E.2d 462 (2002) (holding that a certificate of coverage, though not a separate and distinct contract, may be binding upon the insurance company). In this case, F&M made a direct promise to its insured, Ms. Dye, in absolute terms and without equivocation or qualification, that it would "***completely protect***" and indemnify her "from ***any*** financial exposure" and for "the ***entire*** amount of the verdict" in the underlying civil action filed against her by the Bradleys. R01333-1334, 1586 (emphasis added). Further, F&M promised to "continue to vigorously defend" her against the Bradleys' claims. R01586. As such, F&M expressly and intentionally waived its coverage defenses.

"To effect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished a known right." Syl. Pt. 1, *Potesta v. United States Fid. & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998) (internal citations omitted). "This intentional relinquishment, or waiver, may be express or implied." *Id.*, 202 W.Va. at 315, 504 S.E.2d at 142. "However, where the alleged waiver is implied, there must be clear and convincing evidence of the party's intent to relinquish a known right." *Id.* (internal citations omitted). Moreover,

> 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. There is no requirement of prejudice or detrimental reliance by the party asserting waiver.

Id., 202 W.Va. at 316, 504 S.E.2d at 143.

Despite both lower Court's ruling otherwise, there is clear and convincing evidence that F&M intentionally relinquished its coverage defenses in this matter – the two letters: one sent by its lawyer and the other sent by its employee/agent. R01333-1334, 1586. In those letters, F&M unequivocally and in absolute terms promised Ms. Dye that it would **completely** protect her from **any** financial exposure and pay the **entire** amount of a verdict. *Id.* Further, F&M promised to

"continue to vigorously defend" Ms. Dye against the Bradleys' claims. R01586. There was zero qualification by F&M.

To be sure, F&M did not qualify its promise by saying "except if there is a determination by the jury that you acted intentionally or if the Circuit Court determines that the facts do not constitute an 'occurrence' under the Policy," which it now seeks to retroactively add as a qualification to its promise. R01334 and 1586. The actors on behalf of F&M, Susan Snowden and Rose Casey, had been handling this case from the beginning and both knew the coverage issues in this declaratory judgment action; indeed, they were the catalyst for it. Thus, they both understood the significance of their words, on behalf of F&M, to Ms. Dye. As such, F&M expressly (or, at minimum, impliedly) waived its defenses of coverage in this matter and promised to both defend and indemnify Ms. Dye under the Policy. The lower courts erroneously ignored this clear and convincing evidence when ruling in favor of F&M.

Furthermore, "[g]enerally, once an insurance company has denied coverage to an insured and stated its defenses, the insurance company has waived or is estopped from raising new defenses." *Kirschner v. Process Design Assocs.*, 459 Mich. 587, 593, 592 N.W.2d 707, 709 (1999). In this case, F&M did not assert the "business" exclusion under the operable liability section of the Policy in the October 11, 2018 reservation of rights letter, nor did it cite the exclusion in its declaratory judgment complaint. *See* R00195-200, 1690-1696. Instead, it erroneously, and to its detriment, cited a "business" exclusion that pertained to a separate part of the Policy – the Damage to Property Of Others section of the Policy. *See Id.* It was not until after the Circuit Court denied F&M's Motion for Summary Judgment on that particular business exclusion, after the close of discovery, after F&M had sent the above letters promising defense and indemnity to Ms. Dye and after Ms. Dye filed the instant Motion for Summary Judgment, that F&M cited the business

exclusion under the operable liability section of the Policy in its request for reconsideration of the Circuit Court's prior rulings. R01483-1485. At that point, it was too late. For over two years, F&M had relied on the same, previously stated Policy language and exceptions in its attempt to deny coverage to Ms. Dye. By not citing this business exclusion previously, it had waived the opportunity to do so, especially after discovery in the declaratory judgment action it brought against its insured had closed. As such, F&M waived its right to assert that business exclusion and the Circuit Court, as well as the ICA, erred by even entertaining an argument under the same.[8]

Therefore, F&M waived its coverage defenses such that summary judgment should have been granted in favor of Ms. Dye; or alternatively, and at the very least, genuine issues of material fact existed such that summary judgment should not have been granted to either party and the questions of fact should have been presented to a jury in Marion County.

C. The Circuit Court Erred in Granting Summary Judgment in Favor of F&M as F&M is Estopped from Asserting Coverage Defenses in This Matter.

Similar to waiver, West Virginia law demands that F&M be estopped from asserting any further coverage defenses. "Estoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact." Syl. pt. 1, *Potesta*, 202 W. Va. 308, 504 S.E.2d 135 (internal citations omitted). Further,

> [i]n the law of insurance[,] the elements of an estoppel against an insurer are conduct or acts on the part of the insurer which are 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.

Syl. pt. 2, *Id.* (internal citations omitted).

[8] The ICA did not address this issue in its Memorandum Decision.

In a case with similar circumstances, the Appellate Court of Illinois found that an insurer was estopped from denying coverage after it had sent a letter to its insured promising payment on her claim. *See Lumbermen's Mut. Cas. Co. v. Sykes*, 890 N.E.2d 1086 (Ill. App. 2008). In that case, the insurance company had issued a reservation of rights letter on a water and mold damage claim by its insured. *Id.*, 890 N.E.2d at 1090. Subsequently, a representative of the insurer had sent a letter to its insured promising to pay at least a portion of the claim. *Id.*, 890 N.E.2d at 1091. In partially upholding the lower court's grant of summary judgment on part of the claim and holding that genuine issues of material fact existed on the other part, the Court held that the insurer could not "rely on the earlier … reservation of rights letter that it sent to [the insured]" and that it "does not diminish the impact of its subsequent admissions of coverage which [the insured] alleges." *Id.*, 890 N.E.2d at 1103. In so doing, the court reasoned that "'[a]n insurer's letter setting forth its nonwaiver of the issue of coverage is not, under all circumstances and conditions and at all times, a shield against responsibility to an insured.'" *Id.* (internal citations omitted).

In this case, Ms. Dye relied upon the words of Ms. Snowden and Ms. Casey and reasonably believed the coverage issues to be settled – that F&M would continue to vigorously defend her, would indemnify her against the Bradleys' claims "for the entire amount of the verdict" and that she was protected "from any financial exposure." R01334, 1586. Any reasonable person reading the letters would believe the same, as there was no equivocation or qualification in the letters or reference to the previously issued reservation of rights letter. *Id.* Nor was there any attempt to clarify or revoke the promise to pay prior to Ms. Dye's filing of the instant Motion for Summary Judgment; even then it took nearly two (2) months, and subsequent to the close of discovery, for F&M to make its attempt to renege on its promise. R01349. As a result, Ms. Dye, to her detriment,

did not conduct any further discovery on the coverage issues as she reasonably believed that F&M had abandoned its position on the "occurrence" issue. R01704-5.

Specifically, if not for receiving the two (2) letters, Ms. Dye would have, at minimum, taken the depositions of Ms. Casey and corporate representative(s) of F&M. Those depositions would have provided critical information regarding the coverage defenses, including, but not limited to, nailing down all exclusions F&M was relying on in its denial of coverage. Further, Ms. Dye would have expended further resources in obtaining discovery from Jones Hauling on the "occurrence" issue, as well as, possibly, the proper "business" exclusion under the Policy, should that have been elicited from the F&M depositions, including written discovery, subpoenaing documents and taking depositions.

In its ruling, the ICA held that "there is nothing in the record to suggest that Ms. Dye was induced to act or refrained from acting based on the" F&M letters and further states that Ms. Dye "does not explain what discovery she could have conducted or how she relied on these letters to her detriment." R01720. Moreover, the Circuit Court held that Ms. Dye did not explain any detrimental reliance on F&M's representations. R01667. It is generally hard to prove a negative. However, the record, which is all that we have in this case, demonstrates that Ms. Dye did explain her detrimental reliance in her pleadings. *See* R01577. Further, a cursory review of the Docket Sheet from the Marion County Circuit Clerk reveals that no additional discovery was conducted by Ms. Dye following the receipt of the Snowden and Casey letters. R01704-5. As such, Ms. Dye gave up her right to continue to defend the declaratory judgment action, including taking the aforementioned depositions of F&M representatives and seeking further discovery from Jones Hauling, because she believed that the coverage issue had been resolved in her favor by F&M in

that they had unequivocally, in the most absolute terms, promised to continue to defend her, pay any judgment against her in the underlying case and protect her from any financial harm.

Thus, F&M is estopped from continuing to deny coverage in this matter to Ms. Dye. Alternatively, genuine issues of material fact exist as to whether Ms. Dye acted or failed to act in reasonable reliance upon F&M's representations such that summary judgment should not have been granted in favor of either party.

D. Although Not Necessary, Coverage May Be Extended Beyond the Terms of The Policy In This Matter.

The lower courts erred in concluding that a finding of waiver or estoppel by F&M in this case could not extend coverage where it does not exist. R01668-1669. "Generally, the principles of waiver and estoppel are inoperable to extend insurance coverage beyond the terms of an insurance contract." Syl. Pt. 5, *Potesta*, 202 W.Va. 308, 504 S.E.2d 135. However, there are exceptions to that rule which "include, ***but are not necessarily limited to***, instances where an insured has been prejudiced because: (1) an insurer's, or its agent's, misrepresentation made at the policy's inception resulted in the insured being prohibited from procuring the coverage s/he desired; (2) an insurer has represented the insured without a reservation of rights; and (3) the insurer has acted in bad faith. Syl. pt. 7, *Id.* (emphasis added). As demonstrated by the inclusion of the "but not necessarily limited to" language, this list is not exhaustive. *See Marlin v. Wetzel County Bd. of Ed.*, 212 W.Va. at 225, 569 S.E.2d at 472. "These exceptions have been used 'to create insurance coverage where to refuse to do so would sanction fraud or other injustice." *Marlin*, 212 W.Va. at 225, 569 S.E.2d at 473 (citing *Crown Life Ins. Co. v. McBride*, 517 So. 2d 660, 662 (Fla. 1987)).

As outlined below, there would be no extension of coverage beyond the terms of the Policy because the facts of this case fall within the definition of an "occurrence" and the "business"

exclusion does not apply. However, to the extent that this Court may determine otherwise, coverage under the Policy should be extended in this case because of F&M's egregious actions toward its insured.

The ICA held that "the record is devoid of any bad faith on behalf of F&M defending itself in the instant action, while also defending Ms. Dye in the underlying claim against the Bradleys." R01721. In so ruling, the ICA cited this Court in *State ex. Rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 346 n.18, 801 S.E.2d 216, 224 n. 18 (2017), in which this Court held that "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." However, a thorough review and analysis of the *Wilson* case makes clear that this Court was not absolving all insurers from liability for their actions taken during the course of litigation in defending itself against an insured. Rather, an insurer is still bound by its duties under the law to treat its insureds in good faith and fairly in its practices. F&M did not do that in this case.

F&M's conduct in this case has been shockingly violative of its duties of good faith and fair dealing under the law and under its contract of insurance to Ms. Dye. Specifically, F&M, through its counsel and its representative has, as demonstrated above, 1) has misrepresented policy provisions and exclusions to its insured and to the Circuit Court through letters and pleading in violation of W.Va. Code § 33-11-4(9)(a) (R01117-1136, 1690-96); 2) taken positions as to its insured's conduct contrary to the facts and evidence developed in the case (R01117-1136, 1690-96); 3) made promises to its insured to pay any verdict rendered against her and then attempted to take it back (R01333-34, 1349, and 1586-87; 4) has revoked its offer to pay its insured attorneys' fees even after she has substantially prevailed against it in this litigation (R01587); and 5) cited a

never before cited exclusion in this litigation to deny coverage to Ms. Dye long after the close of discovery (R01483-85).

F&M's atrocious conduct, specifically the aforementioned promises to pay and citation of a new business exclusion, have prejudiced Ms. Dye in that she 1) forgave an opportunity to continue discovery on F&M's denial of coverage after the issuance of the Snowden and Casey letters and 2) had no opportunity to conduct discovery on the newly cited "business" exclusion, both explained above. As such, even if the facts of this case fell outside of the definition of "occurrence" or the newly cited "business" exclusion applied, neither of which Ms. Dye concedes, F&M's conduct here rises to the level of bad faith, or worse, such that coverage should be afforded. Failure to afford coverage in this case would "sanction [F&M's] fraud or other injustice" against Ms. Dye. *Marlin*, 212 W.Va. at 225, 569 S.E.2d at 473.

E. The ICA Erred in Upholding the Circuit Court's Grant of Summary Judgment in Favor of F&M as the "Business" Exclusion Under the Policy Does Not Apply to the Facts of This Case.

Although F&M waived and is otherwise estopped from arguing that the business exclusion under the Policy applies in this matter, as outlined above, the ICA erroneously applied the language of the "business" exclusion to the facts of this case. Specifically, while conceding Ms. Dye was not engaged in a "business," the ICA held that "… the business exclusion under F&M's policy applies because Jones Timber Company [sic] was a business conducting business on [Ms. Dye's] property," which is notably different language than the "conducted from" phrase that is actually included in the Policy. R01723. The ICA reasoned that "Jones Timber Company [sic] is clearly a 'business,' and it was timbering tress [sic] on Ms. Dye's property, a business activity, which is expressly excluded under the policy." *Id.* Unfortunately, that is the sum of the ICA's analysis of this issue. A more thorough analysis of the Policy, the facts of the case and the law, however,

demonstrates that either 1) the "business" exclusion simply does not apply here or 2) there are genuine issues of material fact on the issue such that summary judgment was inappropriate. Either way, the ICA decision should be reversed.

i. The "business" exclusion under the Policy was intended to be applied to the conduct of the insured, not a third party.

The Policy defines a "business" as a "trade, profession or occupation engaged in on a full-time, part-time or occasional basis." R00072. The pertinent section of the "business" exclusion of the Policy states that coverage does not apply to "'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'." R00246 (emphasis added). The "insured location" under the Policy is Ms. Dye's property located at 1872 Flaggy Meadow Road. R00206.

However, and importantly, the phrases "arising out of," "in connection with" and "conducted from" are not defined in the Policy. The lack of definitions of these terms and phrases creates an inherent ambiguity in the Policy. *See* Syl. Pt. 1, *Prete v. Merchants Prop. Ins. Co.*, 159 W.Va. 508, 223 S.E.2d 441 (1976) ("Whenever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous."). To be sure, this Court has stated that "[i]ntelligent people for years have differed in their interpretation of the business pursuits clause and divergent results have been reached as a consequence. If reasonably intelligent people differ as to the meaning of a policy provision, ambiguity exists." *Smith v. Sears, Roebuck & Co.*, 191 W. Va. 563 at 566, 447 S.E.2d at 258 (quoting *Myrtil v. Hartford Fire Ins. Co.*, 510 F.Supp. 1198, 1202 (E.D.Pa. 1981) and citing *North Carolina Farm Bureau Mut. v. Stox*, 330 N.C. 697, 412 S.E.2d 318, note 1 (finding the business pursuits exclusion ambiguous); *Foster v. Allstate*

Ins. Co., 637 S.W.2d 655 (Ky.App. 1981) (finding business pursuits exclusion ambiguous and allowing coverage for an accident in the insured's house while she was babysitting); *Gulf Ins. Co. v. Tilley*, 280 F.Supp. 60, 64 (N.D. Ind. 1967), *aff'd*, 393 F.2d 119 (7th Cir. 1968) (an exclusion to be effective "must clearly and unmistakably bring within its scope the particular act or omission")).

Similarly, in *Edwards v. Bestway Trucking*, 212 W.Va. 196, 569 S.E.2d 443 (2002), this Court was called upon to analyze the phrase "conduct of your business" in an insurance policy. The phrase was not defined in the subject policy, and as such, this Court held that the phrase was ambiguous. *Id.*, 212 W.Va. at 197-199, 569 S.E.2d at 444-446. "It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syl. pt. 4, *Nat'l Mut. Ins. Co. v. McMahon & Sons*, 177 W. Va. 734, 737, 356 S.E.2d 488, 491 (1987) (overruled in part and on other grounds). "[A]ny ambiguity in the language of an insurance policy is to be construed liberally in favor of the insured, as the policy was prepared exclusively by the insurer. This principle applies to policy language on the insurer's duty to defend the insured, as well as to policy language on the insurer's duty to pay." *State Bancorp, Inc. v. United States Fid. & Guar. Ins. Co.*, 199 W. Va. 99, 104, 483 S.E.2d 228 (1996).

Unfortunately, this Court has never had the occasion to address whether the specific language of the "business" exclusion in the Policy contemplates "business" of third parties conducted from an "insured location." Neither has any court around the country specifically addressed this question. That is telling. What is even more telling, and compelling for that matter, is that the insurer in this case (F&M), the exclusive preparer of the Policy, has never, during the course of this litigation with the knowledge that, potentially, a third party (Jones Hauling) may have cut timber or otherwise completed work through its business on the insured location, argued

that the "business" exclusion under the Policy applied to the third party's potential "business" conduct at the "insured location."

The Minnesota Court of Appeals in *Erickson v. Christie*, 622 N.W.2d 138, 140 (Minn. App. 2001), analyzing a similar business exclusion, held that "[t]he focus of a business pursuits exclusion is on the ***liability-causing conduct***. If the conduct, by whomever performed, is within a business activity of ***anyone insured under the policy***, coverage is excluded." (emphasis added). A review of reported cases in West Virginia and around the country that have analyzed the applicability of business exclusions in homeowners policies to business conduct have exclusively focused on the conduct of the named insured or other insureds under the subject policy, not third parties. *See e.g. Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W.Va. 470, 745 S.E.2d 508 (2013); *Bailes v. Erie Ins. Prop. & Cas. Co.*, 2010 U.S. Dist. LEXIS 5556 (S.D.W.Va. 2010) (affirmed by *Bailes v. Erie Ins. Prop. & Cas. Co.*, 436 Fed. Appx. 249 (4th Cir. 2011)); *Nationwide Mut. Ins. Co. v. Hayles, Inc.*, 150 P.3d 589 (Wash. App. 2007); *Kessel v. State Auto Mut. Ins. Co.*, 871 N.E.2d 335 (Ind. 2007); *Pepper v. Allstate Ins. Co.*, 20 A.D.3d 633 (N.Y. App. Div. 2005); *State Farm Fire & Casualty Co. v. Vaughan*, 968 S.W.2d 931 (Tex. 1998); *Nationwide Mut. Fire Ins. Co. v. Tufts*, 702 A.2d 422 (Md. App. 1997); and *Bishop v. Crowther*, 428 N.E.2d 1021 (Ill. App. 1981). Thus, it is clear that the "business" exclusion in the Policy only applies to the conduct of Ms. Dye or another insured under the Policy, not the conduct of Jones Hauling. As such, the ICA and the Circuit Court should be reversed

ii. It is beyond the reasonable expectations of Ms. Dye to preclude coverage under the Policy based on the conduct of business by a third party on her property.

This Court has held with regard to ambiguous provisions in an insurance policy:

> Where the language in an insurance policy is ambiguous, this Court has recognized that the doctrine of "reasonable expectations" applies. That doctrine holds that the

> objectively reasonable expectation of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even if a painstaking study of the policy terms would negate those expectations.

Edwards, 212 W.Va. at 197, 569 S.E.2d at 444 (citing *McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987) and *State Bancorp, Inc. Co.*, 199 W. Va. 99, 483 S.E.2d 228). Further, "if an insurance policy term is ambiguous, it should be strictly construed against the insurer and in favor of the insured." *Id.* Moreover, "[w]here the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." Syl. pt. 5, *McMahon & Sons*, 177 W. Va. 734, 356 S.E.2d 488 (1987). "Where ambiguous policy provisions would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted." *Id.*, at syl. pt. 9.

To demonstrate both the ambiguity of the Policy and that the applicability of the business exclusion as suggested by the ICA would not meet the reasonable expectations of Ms. Dye when purchasing the insurance, we can simply extrapolate the reasoning by the ICA to other potential fact patterns. For example, let's assume Ms. Dye, like thousands, possibly hundreds of thousands of other West Virginians, placed an order from an online retailer like Amazon, indisputably a "business," for a household item to be delivered at her residence. Let's also assume that her order from Amazon was transported and delivered to her by a parcel delivery service like United Parcel Service ("UPS"), also indisputably a "business." Then, when the UPS delivery person is delivering the package to Ms. Dye on the "insured location," thereby conducting business on Ms. Dye's property, the UPS driver trips and falls on Ms. Dye's steps which happen to be in disrepair and the UPS driver is injured. The UPS driver then sues Ms. Dye for their injuries. In that scenario and under the ICA's analysis, because UPS was "a business conducting business on her property," does F&M afford coverage under the Policy to Ms. Dye? The answer is undoubtedly no.

Another example: Ms. Dye hires a contractor to build a deck at the "insured location." The contractor negligently performs the work, with obvious defects to anyone looking at the deck, resulting in the deck not being sturdy. Then, without ever inspecting the deck to see if it is safe, Ms. Dye has a barbeque at her home to christen the deck and while several of her guests are on deck it collapses, injuring several people. The injured guests make a claim against Ms. Dye. Is she covered? No. F&M, based on the ICA's interpretation of the Policy, would deny coverage entirely because the contractor "was a business conducting business on her property."[9]

In both scenarios, as in the present case, there was "a business conducting business on [Ms. Dye's] property" and per the ICA's decision, the Policy would not provide coverage to Ms. Dye in those scenarios. These results, including the result reached by the ICA here, absolutely do not meet the reasonable expectations of Ms. Dye, or, for the matter, any other insured that purchased F&M's or a similar policy.[10] Rather, the reasonable expectations of Ms. Dye are that the Policy would provide coverage to her if she is alleged to have acted negligently in this case and under the aforementioned scenarios. And that is not just Ms. Dye's reasonable expectation – it is safe to say that that would be the reasonable expectation of any person purchasing a homeowners insurance policy from F&M or any other insurance company. The ICA's analysis in this case would permit any insurance company that places this particular language in its policy to deny coverage to an insured if any damage arises out of or is in connection with any business that is conducted on an insured location. That is simply beyond the reasonable expectations of an insured. Importantly, it

[9] These examples are provided without considering other potentially applicable exclusions under the Policy as the focus here is on the "business" exclusion because that was the extent of the ICA's analysis and ruling.

[10] There are innumerable examples of a third-party business conducting business on an insured location that would not be covered by a similar business exclusion under the ICA's analysis and reasoning. Some others include: a landscaping company hired by an insured to cut grass at the insured location who negligently runs over debris with a mower which is thrown and damages property of or injures another; an inexperienced excavator hired by an insured digging at the "insured location" and causes damage to utility owned water and sewage lines; or a utility repair person doing work at the "insured location" and is bit by an insured's dog.

is also beyond F&M's interpretation of its own policy language as it has never made that argument in this case, even with having the same facts available to it as the ICA. As such, the ICA and Circuit Court must be reversed.

iii. There is a genuine issue of material fact as to whether Jones Hauling ever conducted business from an insured location.

Even if the business exclusion in the Policy would apply to Jones Hauling's conduct in this case, there is a genuine issue of material fact as to whether Jones Hauling ever conducted business on an "insured location" such that coverage is excluded under the Policy. Again, "[t]he focus of a business pursuits exclusion is on the liability-causing conduct." *Erickson, 622 N.W.2d at 140.* "The question of whether a particular activity or course of conduct comes within this definition of 'business pursuits' must necessarily be determined on a case-by-case basis, with due consideration given to the facts and circumstances of each case." *Camden Fire Ins. Assoc. v. Johnson*, 170 W. Va. 313, 316, 294 S.E.2d 116, 119 (1982). An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion. *McMahon & Sons*, 177 W. Va. 734, 737, 356 S.E.2d 488, 491. Further, whether an activity falls under a business exclusion is a question of fact for a jury. *See generally Smith,* 191 W.Va. 563, 447 S.E.2d 255 (1994).

In this case, as argued fervently by F&M throughout this case, the alleged liability-causing conduct is the physical timbering of the Bradleys' property. As such, the liability-causing conduct occurred on the Bradleys' property, which is indisputably not an "insured location" under the Policy. Thus, it cannot be legitimately argued that the business conduct complained of here was "conducted from an insured location." And even if it could, that is a question of fact for the jury to determine such that summary judgment was not appropriate.

Moreover, the record is void of any evidence that any physical timbering was ever done by Jones Hauling on Ms. Dye's property. Those facts have simply not been developed in this case. Instead, the only facts developed about what occurred on Ms. Dye's property, the "insured location," is the signing of the timber contract and the granting and use of a temporary easement. At this stage, then, only an inference could be made as to whether Jones Hauling ever performed "liability-causing conduct" on an "insured location" that falls under the business exclusion in the Policy, or again, whether that was the liability-causing conduct. In that regard, the ICA should have drawn that inference in favor of Ms. Dye and reversed the Circuit Court's grant of summary judgment. *See Bradley v. Dye*, 875 S.E.2d at 243. To be sure, this Court, in previously reviewing these same facts (entering into a contract and the easement), explicitly held that "there are material questions of fact as to whether Ms. Dye's actions caused the Bradleys' timber to be cut, damaged, and/or carried away such that she is liable for their loss." *Id.* at 244-245. The same must be true for Jones Hauling's actions. Thus, this Court should reverse the ICA and Circuit Court and remand the case back to the Circuit Court for further factual development and trying of the facts to a jury.

F. The Circuit Court Erred in Granting Summary Judgment in Favor of F&M as the Facts of the Underlying Case Constitute an "Occurrence" Under the Policy.

The F&M Policy defines an "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: … [p]roperty damage." R00073. However, the Policy does not specifically define the term "accident." R00045-163. "Ordinarily, 'accident' is defined as 'an event occurring by chance or arising from unknown causes[.]'" *W. Va. Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 49, 602 S.E.2d 483, 492 (2004) (citing *Webster's New Collegiate Dictionary* 7 (1981)). Additionally,

> an 'accident' generally means an unusual, unexpected and unforeseen event. . . . 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.

Id. (internal citations omitted) (emphasis added). Importantly, in determining whether an occurrence was an "accident," this Court has repeatedly held that "primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue." Syl., *Columbia Cas. Co. v. Westfield Ins. Co*., 217 W. Va. 250, 617 S.E.2d 797 (W. Va. 2005).

Furthermore, "accident" language in general liability policies is equivalent to an intentional tort/acts exclusion and should be analyzed the same. *Stanley*, 216 W.Va. at 50, 602 S.E.2d at 493. "Under an intentional acts exclusion, a policyholder may be denied coverage **only if the policyholder (1) committed an intentional act *and* (2) expected or intended the specific resulting damage**." Syl. Pt. 7, *Farmers and Mechanics Mut. Ins. Co. v. Cook,* 210 W.Va. 394, 557 S.E.2d 801 (2001) (emphasis added).

Despite there being zero additional discovery or evidence produced in this case, nor there being a change in the law in West Virginia, the Circuit Court, at the request of F&M, reconsidered its prior ruling on the "occurrence" issue and granted summary judgment in favor of F&M, after refusing to do so in its prior ruling. Indeed, in its prior Order regarding the "occurrence" issue, the Circuit Court ruled that "there has been no evidence presented … that … Ms. Dye expected or intended to cause injury or harm to the plaintiffs." R01130. Moreover, aside from the physical timbering, the Circuit Court recognized that the Bradleys had asserted competing theories of liability against Ms. Dye which would fall under the definition of "occurrence." *Id.* Specifically, the Circuit Court recognized that:

> Defendant Dye could have negligently advised that she owned the plaintiffs' property or trees, she may have negligently advised the Jones defendants as to the

> metes and bounds of her property, she could have negligently overseen or failed to oversee at all the work of the Jones defendants, and/or she could have failed to do her due diligence to determine which trees and/or properties belonged to her. There are multiple theories of negligence that may be asserted against her and which do not require her to have acted with intent or the expectation that she was causing harm to the Bradleys.

R01131. The Circuit Court erroneously ignored its prior rulings in granting summary judgment for F&M after it requested reconsideration.

In so doing, the Circuit Court relied heavily on the case of *Westfield Ins. Co. v. Davis*, 232 F.Supp. 3d 918 (S.D.W.Va. 2017). However, the *Davis* case is entirely distinguishable from the facts of this case. In *Davis*, the defendant-insureds were keenly aware that they were timbering the property belonging to the plaintiffs as the plaintiffs had warned them to cease and desist. *Davis*, 232 F.Supp.3d at 920, 925. These facts are distinguishable from the facts developed here: There is no evidence that Ms. Dye knew that the Bradleys' property was being timbered. To the contrary, Ms. Dye agreed to and believed that any timbering was occurring on her property. Nor was Ms. Dye made aware during the timbering that Jones Hauling was removing the Bradleys' trees or on their property at all.

Furthermore, there were no allegations in the *Davis* case that the physical timbering was done negligently by the persons doing the timbering, as is the case here wherein the Bradleys have made allegations that Jones Hauling acted negligently in removing their trees and damaging their property. *Id.*, 232 F.Supp.3d at 925; *Bradley*, 875 S.E.2d at 246. Thus, the *Davis* case is distinguishable factually and not persuasive on the issue of "occurrence."

Further, the Southern District in *Davis* took the liberty of forecasting what our appellate courts might do on the issue of "occurrence" as it pertains to timbering and whether it may be an "accident" under the Policy and West Virginia law because our courts have not specifically addressed the issue. *Id.*, 232 F.Supp.3d at 924-25. In so doing, the Southern District relied on

decisions from other states that dealt with insurance provisions regarding accidents and intentional acts. However, the Southern District failed to recognize the holdings of our Supreme Court in *Stanley*, 216 W.Va. at 50, 602 S.E.2d at 493, and *Cook,* 210 W.Va. 394, 557 S.E.2d 801, wherein it was held that our courts must review "occurrence" and "accident" issues the same as an intentional acts exclusion. That is, "a policyholder may be denied coverage **only if the policyholder (1) committed an intentional act *and* (2) expected or intended the specific resulting damage**." Syl. Pt. 7, *Cook,* 210 W.Va. 394, 557 S.E.2d 801 (emphasis added).

Other courts which have recognized this same principle of law have recognized that a mistake of fact can be an "occurrence" or "accident" under a liability insurance policy. *See generally, Ferguson v. Birmingham Fire Ins. Co.*, 254 Ore. 496, 460 P.2d 342 (1969) (holding that an insurer had a duty to a policyholder that was sued for trespass after cutting four trees on another's property) and *Patrick v. Head of Lakes Coop. Elec. Assoc.*, 98 Wis.2d 66, 295 N.W.2d 205 (Wis. App. 1980) (holding that the cutting of trees on another's property was unintended and was an "occurrence" under the subject insurance policy.") "To argue that, because the means employed were not accidental, the resulting damage cannot be construed as being 'caused by accident,' though the damage was in no way reasonably anticipated, is to rely upon a fine distinction which would never occur to, or be understood by, the average policy holder." *Haynes v. Am. Cas. Co.*, 228 Md. 394, 399, 179 A.2d 900, 903 (1962). Furthermore, "[i]n our view, to hold that recovery under such a provision is limited to those situations where not only the result was unintended, but also where the means used were accidental, would place too narrow an interpretation upon that phrase." *Id.*, 228 Md. at 400, 179 A.2d at 904.

The Washington Court of Appeals put it this way:

> By use of the term "intentional," however, [the Washington Supreme Court did] not mean that an accident must be caused by an unconscious, nonvolitional act. To

> prove that an intentional act was not an accident, the insurer must show that it was deliberate, meaning done with awareness of the implications or consequences of the act.

Hayles, Inc., 136 Wash. App. 531, 538, 150 P.3d 589, 593 (2007) (referencing *Roller v. Stonewall Ins. Co.*, 115 Wash.2d 679, 801 P.2d 207 (1990) (overruled, in part, on other grounds)).

In the *Haynes* case, employees of the appellant had "encroached on adjacent property and cut down 48 trees," even after the appellant pointed out the property line to them. *Id.*, 228 Md. at 395, 179 A.2d at 901. The Court of Appeals of Maryland held that the insurer was obligated to defend and indemnify the appellant under the subject insurance policy which used the term "accident" in defining what was insured under the policy, similar to the Policy in the instant case. *Id.*, 228 Md. at 395-401, 179 A.2d at 901-904. In so doing, the court reasoned that "'the fact that an injury is caused by an intentional act does not preclude it from being caused by accident if in that act, 'something unforeseen, unusual and unexpected occurs which produces the result.'" *Id.*, 228 Md. at 397, 179 A.2d at 902.

In *York Indus. Ctr., Inc. v. Mich. Mut. Liability Co.*, 271 N.C. 158, 155 S.E.2d 501 (1967), the Supreme Court of North Carolina held that "the invasion of the land … by the plaintiffs, and the resulting damage thereto and liability therefor, was 'caused by an unexpected event or happening,' namely, an error as to the location of the boundary line, and that such injury to the land … was not intended by the plaintiffs." *York*, 271 N.C. at 164, 155 S.E.2d at 506. In *York*, the plaintiffs were sued and held liable in a separate civil action for operating a bulldozer and destroying trees upon property not belonging to them. *Id.*, 271 N.C. at 163, 155 S.E.2d at 505. The plaintiff's insurance company denied coverage under the general liability policy based upon very similar "occurrence" and "accident" language as is contained in the subject Policy. *Id.* The North Carolina court reasoned that:

> It is obvious that the plaintiffs intended to cut down and destroy every tree which they did destroy on the land of the Wests. It is equally clear that they did so in the belief that these trees and shrubs belonged to them and not to the Wests. That is, the plaintiffs did not destroy the trees with the intent to injure or destroy any property right of the Wests. A fair construction of this excluding clause in the policy is that it is intended to remove from the protection otherwise afforded by the policy only the liability of an insured who wilfully damages property, knowing that he has no right to do so. Therefore, if the judgment rendered against the plaintiffs was for damage to the land of the Wests 'caused by an unexpected event or happening,' the proviso does not eliminate the plaintiffs' claim from the coverage of the policy.

York, 271 N.C. at 163, 155 S.E.2d at 505.

Similarly, in *Lumber Ins. Cos. v. Allen*, 820 F.Supp. 33 (D.N.H. 1993), the District Court for the District of New Hampshire, interpreting similar "occurrence" and "accident" provisions in an insurance policy, ruled that an insurer had a duty to defend its insured in a claim for negligent trespass and conversion where the insured allegedly cut down trees on a neighbor's property. The court based its decision upon New Hampshire law defining the term "accident," which is similar to the law in West Virginia in that it places a subjective intent test on the conduct of the insured. *See Allen*, 820 F.Supp. at 34-35; *see also* Syl., *Columbia Cas. Co.*, 217 W. Va. 250, 617 S.E.2d 797. In so doing, the District Court held that "[i]mplicit in the [New Hampshire Supreme] Court's rulings, however, is the recognition that an insured's intentional acts may be considered accidental if the insured did not intend to inflict injury and the insured's intentional acts were not inherently injurious." *Allen*, 820 F. Supp. at 35. Moreover, taking it a step further, the District Court ruled that:

> The New Hampshire Supreme Court has not determined whether an insured's trespass or conversion will be considered accidental if the insured engages in these acts because of a mistaken belief that his conduct was authorized. However, applying the *Malcolm* two-part test, I conclude that the New Hampshire Supreme Court would determine that the insured's conduct was accidental in such cases if the insured's mistaken belief has a basis in fact. The first part of the *Malcolm* test focuses on the insured's subjective intentions and provides that the insured's conduct will not be considered accidental if he intends to injure another by his conduct. A mistaken trespass or conversion easily survives this part of the test

> because an insured has no intention to injure a property owner if he believes that he has an owner's permission when he enters the property and removes what the owner later claims was wrongly converted.

Id.

In the *Hayles, Inc.* case, the insured turned on an irrigation system which caused extensive damage to a crop of onions that belonged to the insured's lessee. 136 Wash. App. at 534-535, 150 P.3d at 591-592. The insurer, Nationwide denied coverage claiming that the turning on of the irrigation system was not an occurrence under the subject policy because it was not an accident. *Id.*, 136 Wash. App. at 535, 150 P.3d at 592. The Washington Appeals Court, upholding the lower court's grant of summary judgment in favor of the insured, held as follows:

> Although [the insured's] awareness of the consequences of his intentional act is a question of fact, summary judgment is appropriate if there is no substantial evidence to sustain a verdict for Nationwide. [] Viewed in the light most favorable to Nationwide, the record provides no evidence that [the insured] knew or should have known that turning on the irrigation system would damage the onion crop. He had no duty to observe the crop and had no authority to decide when the crop needed water or when it needed to be dry. Reasonable minds could conclude only that no one under these circumstances would have anticipated that turning on the water could rot the onions. [] Accordingly, [the insured's] unauthorized act of turning on the irrigation, although intentional, was not deliberate. Because the act constituted an occurrence that caused property damage in the coverage territory, it is covered by the farm policy unless it is subject to an exclusion.

Id., 136 Wash. App. at 539, 150 P.3d at 594.

In this case, Ms. Dye did not physically enter the Bradleys' property, nor did she cut any of their trees or damage any of their property. R00865, 1120. The only acts undertaken by Ms. Dye with regard to the timbering were, after being approached by Jones Hauling, signing the Contract which made Jones Hauling responsible for cutting ***her*** timber, and providing Jones Hauling with a plat of her property. R00342-344, 1120. Thereafter, Ms. Dye did not advise nor demonstrate in any way to Jones Hauling the boundaries of her property, or anyone else's property. R00916-918. That was Jones Hauling's responsibility per the Contract. R00342-344. Thus, as the

facts of this case have developed, Ms. Dye could only potentially be responsible for "negligently advis[ing] that she owned the plaintiffs' property or trees, … negligently advis[ing] the Jones defendants as to the metes and bounds of her property, … negligently oversee[ing] or fail[ing] to oversee at all the work of the Jones defendants, and/or … fail[ing] to do her due diligence to determine which trees and/or properties belonged to her," as recognized by the Circuit Court in its Order. R01130-1131. All of those acts are an "occurrence" or "accident" under the Policy, as recognized by the Circuit Court in its Order. *Id.*

Regardless, the removal of the Bradleys' trees and the damage to their property qualify as "occurrences" under the Policy. Unlike *Davis*, there is zero evidence in the record that in any way demonstrates, or even suggests, actual intent on the part of Ms. Dye, or Jones Hauling for the matter[11], to harvest trees belonging to the Bradleys or damage their property. Instead, the record as a whole suggests that both Ms. Dye and Jones Hauling intended to harvest trees belonging to Ms. Dye, and only Ms. Dye. No one was aware that the Bradleys' trees were removed or damage done until discovered by Mr. Bradley approximately a year after the fact. R00836. Thus, the specific result of the removal of the Bradleys' trees was not expected nor intended by either Ms. Dye nor Jones Hauling. Syl. Pt. 7, *Cook,* 210 W.Va. 394, 557 S.E.2d 801. As such, the event of the removal of the trees and damage to the property qualifies as an "accident" or "occurrence" under the Policy. To suggest otherwise, "would place too narrow an interpretation upon that phrase." *Haynes*, 228 Md. at 400, 179 A.2d at 904.

In that regard, if the terms "occurrence" and "accident" were interpreted as suggested by F&M in this matter to include the Dye and Jones Hauling actions in this case, there would be little that would be covered under its Policy. That is, most actions taken by a homeowner on their

[11] Although not specifically referenced in any pleading or the record in this matter, to the extent the Bradleys are claiming vicarious liability against Ms. Dye for the actions of the Jones Defendants, this argument addresses the same.

property have some level of intent to them. Take the mowing of a lawn, for instance. Would an insurer be permitted to deny coverage to a homeowner when they retain a lawn service to cut their lawn and that service mistakenly and negligently mows a swath of a neighbor's property and/or in the course of doing so throws a rock and injures a person or damages property? The insured intended to hire the lawn service and intended that the lawn be mowed; thus, following the F&M logic, the injury and damage would not be covered.

What about car accidents? Most auto insurance liability policies use the same occurrence/accident language. *See e.g., Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, n. 3 (1985) (quoting Nationwide automobile liability policy using the term "occurrence" in the insuring agreement) and *Payne v. Weston*, 195 W.Va. 502, n. 3 (1995) (quoting Allstate policy using the term "occurrence"). The driving of an automobile is an intentional act, as is speeding or violating other traffic laws. Under F&M's logic, how could an insured operating a motor vehicle, who then causes an automobile "accident," ever be covered under an automobile liability insurance policy? They would not.

These results, which would lead to a slippery slope if this Court adopts F&M's logic on the occurrence/accident language, are completely antithetical to the insuring agreement entered into by any person buying insurance. Indeed, it would be beyond their reasonable expectations of coverage of insureds in that these types of "accidents" are exactly what insured's expect to be covered under the policies of insurance.

The better approach, and the approach taken by many courts in this country, is to include within the definition of "occurrence" or "accident" injuries or damage that, although themselves intended, were not deliberate and/or based upon mistake or error, i.e., the insured acted negligently in performing the "intentional" act. *See Ferguson, Patrick, Haynes*, *York*, *Allen*, and *Hayles, Inc.*,

supra. In this case, based upon the record, the harvesting of the Bradleys' trees could only be considered a mistake of fact, i.e., Jones Hauling mistakenly entered the Bradleys' property and cut their trees. Moreover, the record suggests that the property damage complained of by the Bradleys occurred as an incident to the timbering operations – there is no evidence, or even a suggestion, that it was done deliberately or intentionally. As such, the actions of Ms. Dye and/or Jones Hauling must be considered an "occurrence" under the Policy. Thus, summary judgment should have been granted in favor of Ms. Dye; or alternatively, at minimum, there exists genuine issues of material fact such that summary judgment should not have been granted to either party below.

VII. CONCLUSION

For the foregoing reasons, the Circuit Court erred in granting, and ICA erred in upholding, summary judgment in favor of F&M. This Court should reverse the judgment of the Circuit Court, reverse the Memorandum Decision of the ICA, and grant summary judgment in favor of Ms. Dye or, alternatively, determine that genuine issues of material fact exist, such that summary judgment is not appropriate and remand the case for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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