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 REPLY BRIEF

PREPARED BY:

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

II. INTRODUCTION

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

III. STATEMENT OF THE CASE

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

1. The Respondent states in its brief that it did not seek summary judgment until after the conclusion of discovery. Respondent's Brief, p. 6. That is false. The Respondent filed its summary judgment motion on the coverage issues on October 1, 2019. R00686-832. That was well before discovery had closed in the matter and nearly two months before Ms. Dye was even deposed. *See* R00909.
2. The Respondent states in its Brief that on April 10, 2020 the Bradleys withdrew their policy limits demand to Ms. Dye and F&M. Respondent's Brief, p. 7. However, the June 4, 2020 letter from Ms. Casey states that F&M is "in receipt of the demand from Plaintiffs in this matter for the sum of $101,000." R01334. That demand represents the $100,000 limit under the liability portion of the Policy and the $1,000.00 limit under the damage to property of other portion of the Policy. Even if that demand was revoked at some point, on October 14, 2020, the Bradleys, via counsel, again made a policy limits demand upon Ms. Dye and F&M via her counsel provided by F&M. R01335. Regardless of the timing, the Bradleys' $101,000 demand, which was within the limits of the F&M Policy, triggered F&M's unequivocal promise to pay made in the May 22, 2020 and June 4, 2020 letters.

3. The Respondent incorrectly states and argues that "discovery with respect to [the coverage] issues was already over by May and June of 2020, when the subject letters were sent." Respondent's Brief, p. 21. Again, this is false. Discovery was not closed at that time. In fact, a Scheduling Conference was held in the Circuit Court just one week following Ms. Casey's June 4, 2020 letter on June 11, 2020, at which time discovery was extended in the case until October 16, 2020. R01227.

IV. ARGUMENT

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

"'Waiver may be established by express conduct or impliedly, through inconsistent actions." *Potesta v. U.S. Fid. & Guar. Co.*, 202 W.Va. 308, 315, 504 S.E.2d 135, 142 (1998) (quoting *Ara v. Erie Ins. Co.*, 182 W.Va. 266, 269 387 S.E.2d 320, 323 (1989)). F&M's argument that it consistently maintained its coverage denials in this case flies in the face of its own letters promising to "***completely protect***" and indemnify Ms. Dye "from ***any*** financial exposure" for "the ***entire*** amount of the verdict" in the underlying civil action filed against her by the Bradleys. R01333-1334, 1586 (emphasis added). These actions by F&M were express as it relates to its coverage position in this case. F&M argues that if it had intended to waive its coverage position, "it would have been incumbent upon F&M to formally withdraw its reservation of rights letter, to advise the Circuit Court that the factual determinations to be made [sic] the jury at trial were no longer necessary and to dismiss its suit seeking a declaratory judgment." Respondent's Brief, p. 16. That, however, is not consistent with the procedural posture of this case at the time the letters were sent. The declaratory judgment action had largely been decided at that point via the Circuit Court's January 9, 2020 Order, which granted summary judgment in favor of Ms. Dye on all of

the exclusions cited by F&M in its reservation of rights letter. R01118-1136. Thus, the reservation of rights letter had largely been vacated through the Circuit Court's Order.

The only remaining issue after the Circuit Court's January 9, 2020 Order was the "occurrence" issue. However, F&M's letters ***expressly*** made unequivocal promises to pay ***any*** verdict rendered against Ms. Dye. That means that F&M would have paid a verdict rendered against Ms. Dye regardless of the jury's findings on her level of culpability (i.e., did she cut the trees or was she just negligent in hiring Jones Hauling or otherwise engaging with them to cut her trees, as noted by both this Court and the Circuit Court). Moreover, the factual determinations to be decided by the jury had other implications besides the coverage issue, (i.e., liability and apportionment thereof). At the very least, the letters implied that F&M was no longer maintaining a coverage denial on the basis of "occurrence" under the Policy. After all, there was ample evidence in the record to suggest that Ms. Dye did not intentionally do anything with regard to the Bradleys' trees or property – and F&M knew it.

F&M further wants this Court to believe, just as it did with the Circuit Court, that its letters were simply sent under the principles and for the purpose of protecting itself under *Shamblin v. Nationwide*, 183 W.Va. 585, 396 S.E.2d 766 (1990).[1] To believe and acquiesce to the same would turn the principles of *Shamblin* on their head. Indeed, the effect of the *Shamblin* decision is to hold an insurance company's feet to the fire when engaging in settlement negotiations in that it forces an insurance company to consider the interests of its insured "*at least*" as much as its own interests. *Shamblin*, 183 W.Va. at 593, 396 S.E.2d at 774 (emphasis added). Here, F&M gave no consideration to Ms. Dye's interests in this case, but instead, attempted to use several non-

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

applicable policy exclusions to deny coverage to her. Then, in an effort to lure her into submission in the declaratory judgment action, sent her letters unequivocally promising to pay any verdict rendered against her in the underlying liability action. That F&M now wants to characterize those letters as being "*Shamblin* letters" is both absurd and offensive to the notions of fair play prescribed by *Shamblin* itself. As such, this untoward and shameless effort by F&M should be rejected by this Court, as it should have been by the Circuit Court.

F&M further argues that Ms. Dye "failed to present any evidence that F&M intended to voluntarily relinquish the rights it had otherwise carefully preserved." Respondent's Brief, p. 19. First, this assertion is simply incorrect as the aforementioned letters from F&M are themselves evidence of F&M's intent, whether it wants to admit that or not. Second, the sequence of events in the underlying case prevented Ms. Dye from discovering any further evidence with regard to F&M's conduct or intent. Namely, F&M's letter attempting to clarify its promise to Ms. Dye was not sent until December 10, 2020, nearly two months after Ms. Dye filed the subject *Motion for Summary Judgment* and after discovery had closed. R01349. At that time, Ms. Dye's counsel attempted to take the deposition of Ms. Casey but was rebuffed by F&M's counsel. R01687-89. In that regard, F&M should not be permitted to benefit from its own misconduct in stifling discovery in this matter. Should this Court believe F&M's argument that more evidence should have been presented, the Court should reverse the ICA and Circuit Court's decisions and remand the case for further discovery on the issue.

Additionally, F&M argues that Ms. Dye "presented absolutely no evidence to the Circuit Court to suggest that she changed her position to her detriment based upon the May 22, 2020, and June 4, 2020 letters, or that she was somehow misled by them" and cited to the ICA's memorandum opinion in this regard. Respondent's Brief, p. 20. F&M goes on to argue that Ms.

Dye's argument that "she chose to forego additional discovery on the coverage issues … ignore[s] the fact that discovery … was already over … when the subject letters were sent." *Id.*, p. 20. Again, both assertions are false. Discovery was not over – it did not end until October 16, 2020. R01227. Further, at the time the letters were sent, the occurrence issue still remained active. The reality is that upon receiving the letters from F&M, Ms. Dye believed that F&M had given up on the occurrence issue and, thus, all coverage issues were resolved. As such, she did not need to engage in further discovery or otherwise explore F&M's motives in sending the letter as they were clear based upon the text of the letters. This fact is demonstrated by the docket in the Circuit Court revealing that no further action was taken by her on the coverage issue (she did not serve any further written discovery requests or notice any depositions to seek further discovery on the occurrence issue) until she filed her summary judgment motion. R01704-05.

Moreover, despite F&M's contentions, there could be no further evidence to provide: The underlying matter is a lawsuit over coverage and the issue at bar involves Ms. Dye's actions taken, or not taken, within that litigation. Aside from the arguments of the parties themselves and the pleadings and other documents generated within the litigation, there is no additional evidence to produce regarding Ms. Dye's reliance upon F&M's letters.

Finally, with regard to waiver and estoppel, F&M argues that it did not act in bad faith toward Ms. Dye in this matter such that coverage could not be extended beyond the terms of the Policy under *Potesta*, 202 W.Va. 308, 504 S.E.2d 135. However, the record clearly demonstrates otherwise. Specifically, in its reservation of rights letter, in its complaint for declaratory relief in the underlying matter and in its October 1, 2019 motion for summary judgment, F&M cited several policy exclusions that were simply not applicable to the claims in the underlying matter as they were not part of the subject liability coverage of the Policy. R00185-320, 686-707 and 1690-96.

Namely, F&M cited an earth movement exclusion, an intentional loss exclusion and a personal liability by contract exclusion. *See Id.* The Circuit Court found that these exclusions were absolutely not applicable to the liability coverage portion of the Policy, which, of course, was written by F&M. *See* R01117-1136. In that regard, F&M knowingly "misrepresent[ed] pertinent facts or insurance policy provisions relating to coverage at issue" to both its insured and the Circuit Court in violation of the Unfair Trade Practices Act. W.Va. Code § 33-11-4(9)(a).

In support of its argument, F&M cites, just as the ICA did, the case of *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). As stated in the Petitioner's Brief, however, this Court did not absolve all insurers from liability for their actions taken during the course of litigation in defending itself against an insured. To be sure, this case differs from the *Wilson* case. In *Wilson*, the insured never lost coverage and the protections afforded by the subject insurance policy. *See Id.* Here, the bad faith actions of F&M, as outlined above and in the Petitioner's brief, have led to the denial of coverage in this matter for Ms. Dye and, by extension, the courts of this State upholding that denial.

As such, F&M has clearly committed acts of bad faith in this matter such that coverage may be extended beyond the terms of the Policy, ***if*** that were necessary after determination of the "occurrence" issue. Thus, summary judgment was not appropriate for F&M, but instead, should be granted in favor of Ms. Dye.

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

As the ICA properly held in its Memorandum Opinion, Ms. Dye was not engaged in a "business" as that term was defined in the Policy and under West Virginia law. Specifically, the ICA held that the Circuit Court was erroneous in its ruling and that Ms. Dye was not making a "'profit from the sale of the timber." R01723. The Respondent now wants this Court to overturn

the ICA's holding on this issue and affirm the Circuit Court's conclusion that Ms. Dye was engaged in a "business."

The Policy defines a "business" as a "trade, profession or occupation engaged in on a full-time, part-time or occasional basis." R00072. "The term 'business pursuits', when used in a clause of an insurance policy excluding from personal liability coverage injuries 'arising out of business pursuits of any insured', contemplates a ***continuous or regular activity*** engaged in by the insured for the ***purpose of earning a profit or a livelihood***." Syl. pt. 1, *Camden Fire Ins. Ass'n v. Johnson*, 170 W. Va. 313, 294 S.E.2d 116 (1982) (emphasis added). As is demonstrated by this Court's statement, both elements – continuous/regular and profit/livelihood – must be met in order to apply the exclusion. The word "continuous" is defined as "marked by uninterrupted extension in space, time, or sequence." *Merriam-Webster's Dictionary* (online), https://www.merriam-webster.com/dictionary/continuous, last visited March 10, 2023. "Regular" is defined as "recurring, attending, or functioning at fixed, uniform, or normal intervals." *Merriam-Webster's Dictionary* (online), https://www.merriam-webster.com/dictionary/regular, last visited March 10, 2023.

The term "profit" is defined variably as "gain" or "the excess of returns over expenditure in a transaction or series of transactions; *especially*: the excess of the selling price of goods over their cost." *Merriam-Webster's Dictionary* (online), https://www. https://www.merriam-webster.com/dictionary/profit, last visited May 6, 2023 (emphasis in original). The term "livelihood" is defined as "means of support or subsistence." *Merriam-Webster's Dictionary* (online), https://www. https://www. https://www.merriam-webster.com/dictionary/livelihood, last visited May 6, 2023.

"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.*, 170 W.Va. at 316, 294 S.E.2d at 119. Further, whether an insured's activity falls under a business exclusion is a question of fact for a jury. *See U. S. F. & G. Ins. Co. v. Brannan*, 22 Wn. App 341, 589 P.2d 817 (Wash. App. 1979).

This Court, albeit in a footnote, has already addressed the issue of whether Ms. Dye was engaged in a "business" with Jones Hauling and summarily rejected the argument. *See Bradley v. Dye*, 875 S.E.2d 238, 245, n. 10 (W.Va. 2022). Specifically, this Court stated:

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

Id.

Further, the ICA rejected F&M's argument that Ms. Dye was engaged in a "business," reasoning as follows:

> The circuit court based this conclusion on *Westfield Insurance Company v. Davis*, 232 F.Supp.3d 918 (S.D. W. Va. 2017), where the United States District Court for the Southern District of West Virginia held that the defendants in that case were engaged in a business with the timber company solely because they entered in the contract with the timber company for a profit. While *Davis* is persuasive and substantially similar, we find the facts surrounding the contracts entered into in *Davis* and in this case are different. Here, Ms. Dye was approached by Jones Timber Company, and entered into a contract that incorporated a compensation formula for the purchase of the standing timber, she sold the timber up front and was not

> guaranteed any profit, rather she was guaranteed 33% from the sale of the timber once it was sold at the mill. To hold that she was "engaged in" a business, simply by selling the timber on her land pursuant to formula based on a compensation formula would distort the term "profit" and would be detrimental to the law on joint ventures in the State. Thus, we find that Ms. Dye was not "engaged in" a business with Jones Timber Company, rather she sold the standing timber on her land for a percentage to be determined by a compensation formula after the timber was cut, removed, and sold at the mill.

R01723.

Despite these unequivocal analyses and rulings from this State's two appellate courts, F&M continues to maintain that its insured, Ms. Dye, was "clearly 'engaged in' … business" in this case. Respondent's Brief, p. 30. Even without the rulings from this Court and the ICA, based upon the case law and facts of this case, F&M's arguments, and the Circuit Court's ruling, lack merit and are erroneous.

In *Camden*, the issue was whether a grandmother who was being paid by West Virginia DHHR to babysit her grandchild was operating a business in her home and, thus, whether an injury arising from that business was excluded under her homeowner's insurance policy. *See Camden*, 170 W. Va. 313, 294 S.E.2d 116. The Supreme Court found that the grandmother was not engaged in a business pursuit, reasoning that "[s]he was not licensed to operate a day care center in her home and did not offer or advertise her services as a babysitter." *Id.*, 170 W.Va. at 317, 294 S.E.2d at 120. Moreover, the Court reasoned that the grandmother's "motive was not to earn a living or to make a profit." *Id.*, 170 W.Va. at 318, 294 S.E.2d at 120.

Both the Circuit Court and the Respondent erroneously rely upon *Westfield Insurance Co. v. Davis*, 223 F.Supp.3d 918 (S.D.W.Va. 2017) case to support its respective ruling and argument that the aforementioned business exclusion is applicable to Ms. Dye's claims in this case. R01678; Respondent's Brief, p. 24-25. However, the *Davis* case is inapposite. First, the insured location (where the timbering occurred) in the *Davis* case was not the residential property of the defendants.

As a non-residential property, the property would generally be seen as an investment-type property, where one looks to earn money in some form or fashion from the property. Second, it is clear from the facts in *Davis* that the defendants sought out to have the property timbered in a concerted effort to make money. In fact, one of the defendants testified that "'we needed the money.'" *Davis*, 234 F.Supp. 3d at 926. Those facts are what the *Davis* court relied upon in finding the business exclusion applicable to the timber theft claims made in that case. Moreover, the *Davis* court completely ignored the requirement that the alleged activity be continuous or regular and made no finding on that issue.

The Circuit Court also erroneously relied upon *West Virginia Ins. Co. v. Jackson*, 200 W.Va. 588, 490 S.E.2d 675 (1997). In *Jackson*, the issue was whether the insured was using equipment that burnt in his garage for business pursuits. *See Id.* Specifically, the insured "constructed three 'marine life support systems in a garage on the covered property and utilized these tanks in his experimentation with methods designed to extend the shelf life of lobsters and other marine life." *Id.*, 200 W.Va. at 589, 490 S.E.2d at 676. In pursuing this venture, he borrowed money and had the intent to continue the activity until he was successful in his experiments. *Id.*, 200 W.Va. at 589-590, 490 S.E.2d at 676-677. The Supreme Court found that the business exclusion applied to the insureds continuous activities as "he was engaged in an attempt to create a marketable technique for extending shelf life of marine life and sold the lobsters in connection with that goal." *Id.*, 200 W.Va. at 591, 490 S.E.2d at 678.

This case is wholly different than either *Davis* or *Jackson* and is more akin to *Camden*. First, Ms. Dye's property that was to be timbered was on her residential property, not an investment-type property like in *Davis*. R00910. Second, like the insured in *Camden*, it is undisputed that Ms. Dye is not in the timbering business herself – she does not have any sort of

timbering knowledge, training or experience, she is not licensed to cut or haul timber and she does not hold herself out with regard to any of those things. R0911-912. Third, Jones Hauling approached Ms. Dye, without solicitation by her, with interest in timbering her property. R00913-916. Fourth, as the agreement was for Jones Hauling to receive 67% of the revenue from the sale of the timber and 33% would go to Ms. Dye, Jones Hauling were providing a service to Ms. Dye. R00342-344. As such, as the ICA correctly held, she was not profiting from the sale of her timber. R00917. In fact, Ms. Dye had no idea what the value of the timber on her property was or how much she stood to receive from the timbering – she never gave any thought to it. R00918, 926. Thus, Ms. Dye was not motivated by profit in the transaction.

Importantly, F&M does not dispute Ms. Dye's arguments that the ICA erroneously held that its Policy excludes coverage for occurrences arising from the business pursuits of third parties upon an insured's property, and even appears to admit that Ms. Dye is correct in that assertion in its Brief. *See Respondent's Brief*, p. 29. Instead, F&M attempts to tie the business pursuits of the third-party in this case on the insured property (i.e., Jones Hauling harvesting timber)[2] to Ms. Dye by as shared motivation of profit from the activity, which the ICA clearly did not do in its decision. *See Id.* at 28; R01723. This, again, is in direct contravention of this Court's prior ruling, as well as that of the ICA.[3] Despite F&M's argument to the contrary, it makes no difference whether Jones Hauling was motivated by or earning a profit in the alleged timbering of Ms. Dye's property. Rather, the analysis must focus on Ms. Dye, the insured's motivation and conduct. *See e.g.*, Syl., *Columbia Cas. Co. v. Westfield Ins. Co*., 217 W. Va. 250, 617 S.E.2d 797 (W. Va. 2005). And that was not to make a "profit."

[2] Ms. Dye still maintains there is a question of fact as to whether any timber was ever harvested on the "insured location" as stated in her initial Brief.

Additionally, there can be no legitimate argument that the timbering activity here was a "continuous or regular activity" as those terms are defined. Rather, this was a one-time transaction to timber Ms. Dye's property. R00342-344. This was not a continuous or regular activity on her property, as opposed to a business she set up to run out of her home for an indefinite or permanent basis. This was, instead, a transaction that had a finite beginning and end. Moreover, the record is not clear when Jones Hauling performed the timbering and whether the timbering continued without interruption. Nonetheless, the timbering was absolutely not "recurring, attending, or functioning at fixed, uniform, or normal intervals." As such, based upon the facts and circumstances of this particular case, the newly cited "business exclusion" by F&M is not applicable to Ms. Dye's claims in this matter.

Simply put, Ms. Dye was not engaged in the business of logging, nor did she solicit Jones Hauling, nor anyone else for the matter, to timber her property. Ms. Dye, a timbering novice, was coincidentally approached by the Jones Defendants to timber her property as they were timbering neighboring properties.

Ms. Dye is employed full-time by the Marion County Board of Education as a bus driver. R00910. She has no experience with regard to selling her timber or otherwise with the timbering industry. R00911-912. The total amount received by Ms. Dye from the sale of the timber by the Jones Defendants was $11,320.14. R00967-973. The money she received was but a fraction of the proceeds for the sale of the timber. R00917. Point being, the sale of the timber in this case cannot credibly be said to have either been either for earning a "profit" or "livelihood" by Ms. Dye. To be sure, she was losing money on sale of the timber, not gaining or earning an excess over the sale price. Moreover, she earned a living by working, and continuing to work, for the Marion County

Board of Education – the sale of the timber did not replace her job, nor did she depend upon it as a "means of support or subsistence."

Therefore, based upon the foregoing and the arguments set forth in the *Petitioner's Brief*, this Court should reverse the ICA and Circuit Court ruling in this mater, hold that summary judgment is not appropriate for F&M and hold that summary judgment is appropriate in favor of Ms. Dye or, alternatively, remand for further factual development.

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

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

F&M also ignores the law of this case. Specifically, F&M states that the Bradleys only allege "intentional acts in the form of harvesting trees and building timber haulage roads." *Respondent's Brief*, p. 33. This Court has already rejected those arguments. Specifically, this Court held that Ms. Dye, in overturning the Circuit Court's grant of summary judgment in her favor, owed a duty to the Bradleys based upon her conduct. *Bradley*, 875 S.E.2d at 246. This Court, in making that ruling, reasoned that there was factual development in the case that Ms. Dye "did not know the boundaries of her land;" posted signs on the Bradleys' property "declaring herself as its

owner; and that she may have "verbally represented to [Jones Hauling] that she owned the land they logged." *Id.* That ruling made clear that the Bradleys had sufficiently pled and alleged an accident, or a claim of negligence, against Ms. Dye. Even the Circuit Court recognized this and held in its January 9, 2020 Order that Ms. Dye could only potentially be responsible for "negligently advis[ing] that she owned the plaintiffs' property or trees, … negligently advis[ing] the Jones defendants as to the metes and bounds of her property, … negligently oversee[ing] or fail[ing] to oversee at all the work of the Jones defendants, and/or … fail[ing] to do her due diligence to determine which trees and/or properties belonged to her" and the like since she had not physically taken any action in cutting the trees. R01130-31. Thus, F&M's argument is without merit.[4]

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

> *Rolette Country v. Western Casualty & Sur. Co.*, 452 F. Supp. 125 (D.N.D. 1978), involved a county sheriff seizing a mobile home under a warrant of attachment obtained by a creditor of the owner of the mobile home. The subject actions that did not constitute an "occurrence" were taken directly by the insured-sheriff, not a third-party hired by the sheriff. Further, there could be no argument that the sheriff's actions of seizing property were not intentional.
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> *Thrif-Mart, Inc. v. Commercial Union Assurance Co.*, 154 Ga. App. 344, 268 S.E.2d 397 (Ga. Ct. App. 1980), involved the insured breaking into a store and intentionally setting fire to it – just simply nowhere near equivalent to the facts in this case.
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> *American Home Assurance Co. v. Osborne*, 47 Md. App. 73, 422 A.2d 8 (Md. Ct. Spec. App. 1980), involved a claim of conversion against a tow truck driver for his

[4] F&M also argues that "the Bradleys are not alleging that the timbering was somehow done negligently." That is also false. In his deposition, Mr. Bradley stated that, referring to his expert's report, there were trees that were harvested or destroyed that were not ready for harvest. See R00863. As such, the Bradleys have and are making a claim that the timbering was "somehow done negligently."

> direct action of towing cars. However, in finding that there was no "occurrence" under the subject policy based on the insureds actions, the court implicitly recognized that there could have been coverage for an "occurrence" under the policy if there had been improper driving or mishaps that had occurred, i.e., negligence claims related to the towing of cars.
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> *National Farmers Union Property & Cas. Co. v. Covash*, 452 N.W.2d 307 (N.D. 1990), involved the direct action of the insured in erecting a gate to close a public section line. The court found this to be an intentional act directly on the part of the insured.
>
> *General Insurance Co. v. Palmetto Bank*, 268 S.C. 355, 233 S.E.2d 699 (1977), involved conversion actions against the insured alleging that it had distrained the aggrieved party's property for failure to pay rent. Again, this was a direct action by the insured knowingly taken against the property of another.
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> *Deseret Fed. Sav. & Loan Ass'n v. United Stated Fidelity & Guaranty Co.*, 714 P.2d 1143 (Utah 1986), involved several actions taken by the insured-bank directly against its tenant, who filed a constructive eviction action against the bank. The bank admitted that the acts causing the damages were intentional.
>
> *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Group*, 681 P.2d 875 (Wash. Ct. App. 1984), involved a breach of contract claim wherein the insured-contractor refused to do work – which is not even close to the facts of the case here.

As such, none of these cases are persuasive. In this case, the issue at hand is the harvesting of the Bradleys' trees and the damaging of their property – nothing else. In that regard, there is zero evidence in the record that demonstrates that Ms. Dye either (1) took any direct, *intentional* action to cut the Bradleys' trees or damage their property or (2) intended for the same to occur. As such, none of the cases cited by F&M are persuasive in this case.

To be sure, the facts developed in this case, as demonstrated by the appendix record, clearly demonstrate that the only intentional conduct of "cutting of timber roads and the harvesting and sale of timber" was done by Jones Hauling, which is not the insured under the Policy. The Bradleys' case against Ms. Dye can only involve negligent actions like those identified by this Court and the Circuit Court, which do not involve her touching even one of the Bradleys' trees or damaging their property in any way. As such, Ms. Dye's conduct here clearly falls within the

definition of "occurrence" under the Policy such that summary judgment is not appropriate for F&M, but instead, is appropriate in favor of Ms. Dye. Alternatively, a genuine issue of material fact exists such that summary judgment was inappropriate and the matter should be reversed and remanded for further proceedings.

V. CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Eric M. Hayhurst, counsel for Petitioner, do hereby certify that I have served the foregoing **"Petitioner's Reply Brief"** upon all parties and known counsel of record, via File & Serve Xpress, as indicated below, this 14th day of August, 2024, addressed as follows:

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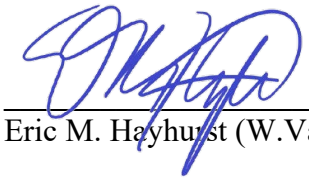

Eric M. Hayhurst (W.Va. #11042)