

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**RESOURCE CONSULTANTS AND  
DEVELOPERS, INC.,**

**Plaintiff/Appellee,**

**v.**

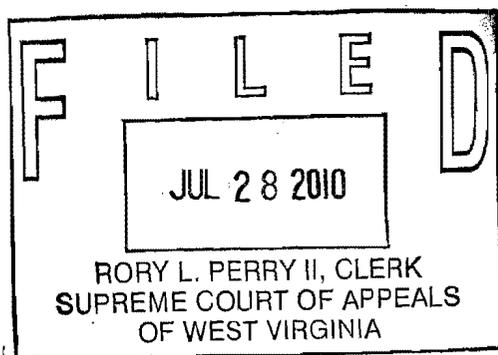
**Appeal No.: 35524  
(Circuit Court of Greenbrier County,  
West Virginia  
Civil Action No. 05-C-342  
Judge James J. Rowe)**

**BITUMINOUS CASUALTY CORPORATION,**

**Defendant/Appellant**

**(Consolidated with McCormick, et al. v. WalMart Stores, Inc.. et al.,  
Civil Action No. 01-C-251, Circuit Court of Greenbrier County, West Virginia)**

**BRIEF ON BEHALF OF APPELLANT  
BITUMINOUS CASUALTY CORPORATION**



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**BRIEF ON BEHALF OF APPELLANT  
BITUMINOUS CASUALTY CORPORATION**

**I. KIND OF PROCEEDING AND NATURE OF  
THE RULING OF THE CIRCUIT COURT**

This appeal arises from a ruling regarding liability insurance coverage rendered in a declaratory judgment action instituted by Resource Consultants and Developers, Inc. (“RCDI”) as Civil Action No. 05-C-342 in the Circuit Court of Greenbrier County, West Virginia, against Bituminous Casualty Corporation (“Bituminous”). The insurance declaratory judgment action arose out of and was ultimately consolidated with a tort case, McCormick v. WalMart Stores, Inc., et al., Civil Action No.: 01-C-251, also pending in the Circuit Court of Greenbrier County, West Virginia. The McCormick action involved a claim for property damage that occurred in the vicinity of the WalMart store in Lewisburg, West Virginia. RCDI had been the general contractor on the Lewisburg, WalMart project. Davis & Burton, a Kentucky corporation, was a subcontractor for RCDI on the project. Bituminous provided a Commercial General Liability Policy (CGL) to Davis & Burton Contractors, Inc. (“Davis & Burton”).

Davis & Burton’s subcontract with RCDI contained an indemnity provision which required Davis & Burton to indemnify RCDI for claims arising out of or resulting from the performance of Davis & Burton’s work “to the extent caused in whole or in part by negligent acts or omissions” of Davis & Burton. In a third-party complaint filed by RCDI in the McCormick tort action, RCDI asserted that Davis & Burton was liable to RCDI for indemnification as to the McCormick claim under the contractual indemnity provision. However, the Circuit Court as a matter of law found that Davis & Burton committed no “negligent acts or omissions.” As a result, the Circuit Court expressly held that Davis & Burton

had no contractual obligation to indemnify RCDI, and granted summary judgment in favor of Davis & Burton on RCDI's indemnity claims. That ruling was not appealed by RCDI.

RCDI also filed this declaratory judgment action directly against Bituminous contending that Bituminous, as Davis & Burton's liability insurer, had a direct obligation to afford insurance coverage, including a duty to defend RCDI in the McCormick tort litigation. Notwithstanding that the Circuit Court expressly concluded that RCDI was not an insured or an additional insured under the Bituminous policy, and despite the Circuit Court's previous holding that Davis & Burton had *no* contractual indemnity obligation to RCDI, the Circuit Court inexplicably ruled that Bituminous, under the policy, owed coverage, including a duty to defend RCDI in the McCormick lawsuit. As a result of that ruling, the Circuit Court awarded RCDI judgment against Bituminous for \$95,334.93 in defense costs incurred in the defense of the McCormick tort case, Civil Action No. 01-C-251. The Court also awarded RCDI \$27,650.72 in costs incurred in the prosecution of the insurance coverage action Civil Action No. 05-C-342.

In reaching this anomalous decision, the Circuit Court made several significant legal errors, and misinterpreted the indemnity agreement between Davis & Burton and RCDI, and most egregiously found that Bituminous owed coverage under the standard commercial liability policy for a nonparty that is not an insured thereunder.<sup>1</sup>

In so doing, the Circuit Court disregarded or misapplied most of the important principles that apply to decisions regarding coverage under commercial liability insurance policies. The

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<sup>1</sup> Davis & Burton's Kentucky insurance broker had mistakenly send out a standard form Certificate of Insurance incorrectly stating that RCDI was an additional insured under the Bituminous policy. RCDI also maintained that that error made it an insured under the policy. The Circuit Court properly rejected that claim, holding that RCDI was not entitled to coverage from Bituminous under the mistaken misstatement contained in the Certificate of Insurance because RCDI could not show that it relied on the Certificate to its detriment to support a claim of estoppel or negligent misrepresentation. *October 5, 2007 Order at 8.*

Circuit Court also rendered a decision on insurance coverage under reasoning that is irreconcilable with the Circuit Court's related decision regarding contractual indemnity.

In this appeal, the Court must review three orders entered by the Circuit Court in the declaratory judgment action. In its initial order dated October 5, 2007, the Circuit Court first considered the question of whether the law of West Virginia or Kentucky governed the declaratory judgment action. The Circuit Court noted that the insurance contract between Bituminous and Davis & Burton was entered into in Kentucky, the agent who issued a Certificate of Insurance was in Kentucky, and the contract between Davis & Burton and RCDI was entered into in West Virginia for work to be performed in West Virginia. *See October 5, 2007 Order at 4.* The Circuit Court then cited to this Court's seminal holding in Liberty Mutual Ins. Co. v. Triangle Industries, Inc., 182 W. Va. 580, 390 S.E.2d 562 (1990), that:

In a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of this state.

The October 5, 2007 Order concluded that, in this case, "the law of Kentucky governs unless it is contrary to the public policy of West Virginia." *October 5, 2007 Order at 5.*<sup>2</sup>

As noted above, the Circuit Court found that RCDI was not entitled to coverage under the Certificate of Insurance. In that same order, however, the Circuit Court ruled that Bituminous had a duty to defend RCDI in the McCormick litigation because of the "stand in the shoes" concept discussed in Marlin v. Wetzel County Board of Education, 212 W.Va. 215, 569 S.E.2d

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<sup>2</sup> The Circuit Court did not address the question of whether West Virginia had a more significant relationship to the transaction and the parties.

462 (2002) (“when a party has an ‘insured contract,’ that party stands in the same shoes as the insured for coverage purposes.”).

Notwithstanding recognition that Kentucky law should apply to any analysis of the insurance policy, the Circuit Court ruled that West Virginia law should determine whether that contract was an “insured contract” as defined by the Bituminous policy “[b]ecause the contract between RCDI and Davis & Burton was entered in West Virginia.” *October 5, 2007 Order at 6, n.1*. Further, entirely apart from which state’s law governed the issue, the Circuit Court wrongly concluded that the indemnity provision at issue in this case was an “insured contract” without any citation to authority in any state and without any analysis of either the language of the clause or the definitional provision in the policy.

Pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, Bituminous timely filed a motion to reconsider Judge Rowe’s October 5, 2007 ruling. In that motion Bituminous argued that RCDI did not have an “insured contract” with Davis & Burton as defined by the policy and the law, and that, even if the indemnity provision at issue could be deemed to be an insured contract, the Marlin “stand in the shoes of the insured” principle could not be applied in this case because of significant differences between the Bituminous insurance policy issued to Davis & Burton and the insurance policies issued to the contractor in Marlin. Bituminous pointed out that there are textual differences in the terms of the Bituminous policy from the insurance policy at issue in Marlin that have special significance in relation to the obligation to defend claims against non-parties to the insurance contract.

By Order dated May 15, 2008, the Circuit Court denied the motion to reconsider, reaffirming its initial ruling that the indemnity provision was an “insured contract.” *May 15, 2008 Order at 8*. The May 15, 2008 Order did not address the other issues raised by Bituminous

including the effect of the differences in the instant policy language from the liability policies at issue in Marlin.

Finally, by Order dated September 8, 2009, Judge Rowe resolved the last remaining issue in the declaratory judgment action and awarded RCDI the above-referenced monetary relief. In that order, the Circuit Court also ruled that the Davis & Burton/RCDI indemnity clause “overrides the ‘other insurance’ clauses in the insurance policies” and ordered that Bituminous was responsible for 100% of RCDI’s defense costs. *September 8, 2009 Order at 12*. The September 8, 2009 Order was a final order resolving all matters in dispute in Civil Action No. 05-C-342.

## II. STATEMENT OF FACTS

The facts relevant to the declaratory judgment action were already a part of the Circuit Court’s findings or were otherwise undisputed.<sup>3</sup>

In August 1994, Davis & Burton placed a bid with RCDI to perform work relating to the installation of a storm water management system for a WalMart store to be located in Lewisburg, West Virginia in Greenbrier County. RCDI was the general contractor for the construction project. On September 1, 1994, Davis & Burton entered into a written contract with RCDI to act as RCDI’s subcontractor for the construction of the stormwater drainage system. Under Provision 4.6.1 of the contract with RCDI, Davis & Burton was required to indemnify and hold

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<sup>3</sup> The Circuit Court’s June 14, 2006 Order in Civil Action No. 01-C-251 made certain “Findings of Undisputed Fact” that are relevant to the declaratory judgment action. *See June 14, 2006 Order in Civil Action No. 01-C-251 at 4-6*. Because the two cases were consolidated, the Circuit Court’s rulings in Civil Action No. 01-C-251 became the law of the case for both of the consolidated actions. “The law of the case doctrine provides that a prior decision in a case is binding upon subsequent stages of litigation between the parties to promote finality.” State ex rel Tennnet Merchant Services, Inc. v. Jordan, 217 W. Va. 696, 702 n.14, 619 S.E.2d 209, 215 n.14 (2005).

harmless RCDI for any claims, damages, losses and expenses “but only to the extent caused in whole or in part *by the negligent acts or omissions*” of Davis & Burton. (Emphasis added.)

The contract between RCDI and Davis & Burton required Davis & Burton to obtain insurance in the amount of two million dollars (\$2,000,000.00) per occurrence, and to name RCDI and WalMart as additional insureds. Pursuant to Section 13.1/13.3 of the subcontract with RCDI, Davis & Burton was required to file with RCDI a Certificate of Insurance showing RCDI as an additional insured, prior to commencement of the subcontractor’s work.

Davis & Burton commenced construction of the stormwater management system in September 1994. On October 19, 1994, Putnam Agency, Inc., an insurance agency located in Ashland Kentucky, that had procured the policy for Davis & Burton, issued a Certificate of Insurance which indicated that Davis & Burton had general liability coverage under Bituminous policy number CLP 2 160263 for the policy period from August 28, 1994 to August 28, 1995. The Certificate also stated that “[t]he certificate holder [RCDI] and RCDI Management, Inc. and Wal-Mart Stores Inc. are listed as additional insureds.” In fact, nothing in the policy actually made RCDI an “additional insured” thereunder.

Records produced by Bituminous and the Putnam Agency in the declaratory judgment litigation showed that no request had ever been made to add RCDI or any other entity as an “additional insured” on Davis & Burton’s Bituminous policy. The Bituminous policy contained no “additional insured” endorsements.

The work of Davis & Burton was supervised and observed by employees of RCDI. The evidence showed that RCDI was responsible for reviewing the Periodic Progress Reports submitted by Davis & Burton and monitoring the progress of Davis & Burton’s work to ensure compliance with the stormwater drainage plans designed by Freeland-Clinkscales and Kauffman,

the design engineering firm that designed the WalMart site (including its stormwater management plan). WalMart's construction Manager visited the site on a monthly basis and reviewed the progress of Davis & Burton's work before recommending payment to Davis & Burton for the percentage of work completed. Davis & Burton's work on the project was completed in 1995.

On October 30, 2001, the McCormick plaintiffs filed suit against WalMart, RCDI, the City of Lewisburg and the West Virginia Department of Transportation, Division of Highways, alleging that stormwater was being diverted onto their adjacent properties as a result of the construction of the Lewisburg WalMart.<sup>4</sup> The McCormicks asserted claims based upon intentional and negligent trespass, intentional and negligent violation of the "reasonable use" doctrine, intentional interference with advantageous business relations: the tort of outrage, and intentional infliction of emotional distress.<sup>5</sup>

In February 2005, RCDI filed a third-party complaint in the McCormick case against Davis & Burton, alleging entitlement to indemnification, seeking contribution, and asserting that the damage was a result of negligence of Davis & Burton in the construction of the stormwater discharge system. RCDI's third-party complaint also explicitly alleged that Davis & Burton had breached its contract with RCDI by failing to defend and indemnify RCDI and by failing to have RCDI named as an additional insured on the Bituminous policy.

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<sup>4</sup> An Amended Complaint subsequently added claims by the McCormick plaintiffs against the designers Freeland-Clinkscapes and Kauffman.

<sup>5</sup> Significantly, the McCormick plaintiffs never made any claims directly against Davis & Burton and never even alleged that Davis & Burton was negligent in the performance of its work on the project. Nor did any other party to the litigation. The only party ever to even allege negligence on the part of Davis & Burton was RCDI, in the third-party complaint seeking indemnity and contribution.

After extensive discovery, summary judgment motions were filed. The Circuit Court granted summary judgment to Davis & Burton on RCDI's third-party complaint, *inter alia*, rejecting RCDI's claim for contractual indemnification and holding in relevant part that:

A review of the contract language reveals that Davis & Burton is only required to indemnify and hold harmless RCDI for any "claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract . . . ***to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor.***" Plaintiffs' claims for damages stems from a fundamentally flawed design plan, not negligence with regard to the construction of the storm water drainage system. As there is no genuine issue of material fact by which it can be asserted that the construction of the storm water drainage system proximately caused Plaintiffs' damages, ***Davis & Burton has committed no negligent acts or omissions which caused said damages to rise. Since Davis & Burton have [sic] committed no negligent acts or omissions which gave rise to Plaintiffs' damages, Davis & Burton has no obligation to indemnify or hold harmless RCDI in this matter. . . .***

*June 14, 2006 Order at 9-10, emphasis added.*

The Circuit Court also rejected RCDI's breach of contract claim, finding that Davis & Burton had "met all of the necessary contractual prerequisites relative to provided [sic] RCDI with a Certificate of Insurance and naming RCDI as an additional insured." *June 14, 2006 Order at 11.* Thus, the Circuit Court dismissed RCDI's third-party complaint in its entirety. By separate order dated June 13, 2006, the Circuit Court also dismissed the plaintiffs' claims against RCDI as barred by the statute of limitations.

Despite this ruling by the Circuit Court, RCDI's insurance coverage declaratory judgment action against Bituminous, which had been commenced six months earlier and consolidated with Civil Action No. 01-C-251 by Order dated June 16, 2006, was nonetheless pursued by RCDI's commercial general liability insurer (in RCDI's name) to recover reimbursement from

Bituminous for defense costs that RCDI or its insurer had incurred in defending the McCormick case. RCDI was defended in Civil Action No. 01-C-251 from the inception of that action by its own insurance carrier and incurred no costs or expenses of its own in that defense. Counsel in the declaratory judgment action is also being paid by RCDI's liability insurance carrier to pursue that action in RCDI's name.

As noted above, the Circuit Court's rulings in Civil Action No. 05-C-342 that are at issue in this appeal are the three orders issued by Judge Rowe on October 5, 2007, May 15, 2008 and September 8, 2009.

### **III. ASSIGNMENTS OF ERROR**

- A. The Circuit Court Erred In Finding That Davis & Burton's Contract With RCDI Was An "Insured Contract" As Defined By The Insurance Policy.**
- B. The Circuit Court Erred In Finding That Bituminous, As Davis & Burton's Insurer, Had A Duty To Defend RCDI, When No Allegations of Negligence Were Made Against Davis & Burton By Any Other Party To The Litigation And RCDI's Own Allegations Of Negligence Against Davis & Burton Failed.**
- C. Even If Davis & Burton's Contract With RCDI Was An "Insured Contract," The Circuit Court Erred In Failing To Apply The Clear And Unambiguous Language of The Bituminous Policy Governing Claims Under An "Insured Contract."**
- D. The Circuit Court Erred In Its Analysis Of The Interplay Between The "Other Insurance" Provisions Of The Insurance Policies Implicated By The McCormick Claims And The Indemnity Agreement.**

#### IV. POINTS OF LAW AND CITATIONS OF AUTHORITY

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## V. THE STANDARD OF REVIEW

Insofar as Judge Rowe's Orders resolved the declaratory judgment claims asserted by RCDI involving insurance coverage on motion for summary judgment, the scope of review in this case is plenary; the standard of review is *de novo*. With regard to the appropriate standard of review in a declaratory judgment action, this Court has stated:

because the purpose of a declaratory judgment action is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed *de novo*; however, any determination of fact made by the circuit court in reaching its ultimate resolution are reviewed pursuant to a clearly erroneous standard. Accordingly, we hold that a circuit court's entry of a declaratory judgment is reviewed *de novo*.

Cox v. Amick, 195 W. Va. 608, 612, 466 S.E.2d 459, 463 (1995).

In this appeal, the Court must review the Circuit Court's interpretation of an insurance contract. In Syllabus point 2, Riffe v. Home Finders Associates, Inc., 205 W. Va. 216, 517 S.E.2d 313 (1999), this Court held:

The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed *de novo* on appeal.

See also, Syllabus Point 1, Tennant v. Smallwood, 211 W.Va. 703, 568 S.E.2d 10 (2002), (“Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.”). The question of which state's law governs the analysis of the insurance contract is purely a question of law for the Court.

To the extent that the Circuit Court interpreted the indemnity agreement between Davis & Burton and RCDI, it was also deciding questions of law. “[Q]uestions about the meaning of contractual provisions are questions of law” to be reviewed *de novo* by this Court. Fraternal

Order of Police, Lodge No. 69 v. City of Fairmont, 196 W. Va. 97, 100, 468 S.E.2d 712, 715 (1996). Accordingly, the standard of review applicable to this appeal is a *de novo* standard.

## VI. ARGUMENT

### A. **The Circuit Court Erred In Finding That Davis & Burton's Contract With RCDI Was An "Insured Contract" As Defined By The Insurance Policy.**

The Circuit Court based its ruling that Bituminous had a duty to defend RCDI in Civil Action No. 01-C-251 on this Court's holding in Marlin v. Wetzel County Board of Education, 212 W.Va. 215, 569 S.E.2d 462 (2002), that, "when a party has an 'insured contract,' that party stands in the same shoes as the insured for coverage purposes." The term "insured contract" is a term that is used and, in fact, is specifically defined in, the insurance policy. Any analysis of whether the indemnity provision in Davis & Burton's subcontract constituted an "insured contract" within the policy definition is a question of insurance law. As noted above, the Circuit Court's initial order concluded that Kentucky law governed the interpretation of the insurance policy. *October 5, 2007 Order at 5*. Notwithstanding this conclusion, the Circuit Court interpreted this policy language under West Virginia law because the subcontract was entered into and was to be performed in West Virginia.

The question of what Davis & Burton's indemnity obligations to RCDI were under the subcontract was indeed a question of West Virginia law. However, the question of whether the indemnity provision of that subcontract (as controlled by West Virginia law) was an "insured contract" as defined by the policy, is a question of interpretation of the insurance policy, not a question of interpretation of the subcontract. Under either state's law, however, the indemnity provision of the Davis & Burton subcontract was not an "insured contract."

In reaching its decision, the Circuit Court concluded that the indemnity provision at issue in this case was an “insured contract.” *See October 5, 2007 Order at 10; May 15, 2008 Order at 8.* However, the indemnity provision at issue in this case contains a significant difference from the provision at issue in Marlin. Because of that difference, RCDI did not have an “insured contract” with Davis & Burton, the Bituminous insured, as defined by the policy and the law. As such, RCDI has no right under Marlin to “stand in the shoes” of the Bituminous insured with regard to a claim for a defense under the insurance policy issued by Bituminous to Davis & Burton and the Circuit Court was wrong in so holding.

The Bituminous policy defines “insured contract,” in pertinent part, as: “That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) ***under which you assume the tort liability of another*** to pay damages because of ‘bodily injury’ or ‘property damage’ to a third person or organization, if the contract or agreement is made prior to the bodily injury or property damage. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.” *Bituminous Summary Judgment Exhibit C-1 at ¶ V.8.f, emphasis added. See also Marlin, Syllabus Point 5 (“The phrase ‘liability assumed by the insured under any contract’ in an insurance policy, or words to that effect, refers to liability incurred when an insured promises to indemnify or hold harmless another party, ***and thereby agrees to assume that other party’s tort liability.***” Emphasis added.)*

Thus, to qualify as an “insured contract,” the indemnity agreement in this case must require that Davis & Burton assume the tort liability of RCDI to pay damages to the McCormick plaintiffs or to any other third person or organization making a claim for bodily injury or

property damage against RCDI. As this Court stated in Marlin, “the coverage arises from a specific contract to assume liability for another's negligence.” Id. at 222, 569 S.E.2d at 469.

The indemnity provision that this Court found to be an “insured contract” in Marlin, provided that:

To the fullest extent permitted by law, the Contractor [Bill Rich Construction] shall indemnify and hold harmless the Owner [Wetzel County Board of Education] ... and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death ... and (2) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified thereunder....

Id. at 218 n.2, 569 S.E.2d at 465 n.2.

The indemnity provision between RCDI and Davis & Burton that is at issue in this case is the standard indemnity language contained in the 1987 edition of AIA Document A-401, Standard Form of Agreement Between Contractor and Subcontractor. That indemnity provision states:

To the fullest extent permitted by law, the Subcontractor [Davis & Burton] shall indemnify and hold harmless the ... Contractor [RCDI], ... from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), **but only to the extent caused** in whole or in part by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation

shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 4.6.

*See RCDI Summary Judgment Exhibit C at ¶ 4.6.1, emphasis added.* The obvious (and significant) difference between these two provisions is that the A-401 form indemnity provision used in the contract between RCDI and Davis & Burton requires indemnity “*only to the extent caused by*” the Subcontractor’s negligence.<sup>6</sup>

This difference is best demonstrated by the following example: Suppose that a jury concluded that a claimant had suffered damages of \$100,000 for bodily injury or property damage at the hands of a Contractor and a Subcontractor and further concluded that the Contractor was 95% negligent and the Subcontractor was 5% negligent. Under the indemnity agreement in Marlin, because it was found to be partly at fault for the claimant’s injuries, the indemnifying Subcontractor would be responsible to the Contractor for all of the claimant’s damages, including the \$95,000 that the jury deemed to have resulted from the Contractor’s fault. The Subcontractor would assume *all* of the tort liability of the Contractor. Under the indemnity agreement in this case, however, the indemnifying Subcontractor would only be responsible to the Contractor for the \$5,000 that the jury deemed to have resulted from the

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<sup>6</sup> Although not in the context of a declaratory judgment claim against the subcontractor’s insurer, one court, in interpreting a provision similar to that contained in the Davis & Burton subcontract, has recently observed that: “On its face, the indemnity provision did not require [the subcontractor] to defend [the general contractor]; the word ‘defend’ is notably absent. Instead, the parties agreed [the subcontractor’s] obligation to indemnify and hold [the general contractor] harmless from and against all claims would be limited ‘to the extent caused in whole or in part by’ [the subcontractor’s] negligence. In our view, the ‘to the extent’ phrase prevents any interpretation of the indemnity provision as creating a duty to defend. A claim is defended necessarily before it is decided; but the language used here envisioned a determination of [the subcontractor’s] fault before [the subcontractor] would be required to indemnify and hold [the general contractor] harmless against all claims. We cannot square the language of this indemnity provision with a duty to defend existing in advance of a determination of fault.” MT Builders, L.L.C. v. Fisher Roofing, Inc., 219 Ariz. 297, 305, 197 P.3d 758, 766 (Ariz.App.2008), footnotes omitted. *See also* Syllabus Point 1, Oakes v. Monongahela Power Co., 158 W. Va. 18, 207 S.E.2d 191 (1974), discussed *infra* at VI.B.

Subcontractor's fault. The Subcontractor would assume *none* of the tort liability of the Contractor.

An analysis of these two types of indemnity provisions conducted by the court in Rush v. Norfolk Electric Co., Inc., 70 Mass.App.Ct. 373, 874 N.E.2d 447 (2007), confirms this. In comparing an indemnity provision in a general contract (that was nearly identical to the indemnity provision in Marlin) to an indemnity provision in a subcontract (that was nearly identical to the provision in the Davis & Burton subcontract with RCDI), the court in Rush pointed out that:

The important difference between the clauses is found in the scope of the respective indemnities. Under the general contract, the indemnitor, if liable at all, is liable for the entirety of any loss or expense incurred by the indemnitee. This is so even when, as here, the indemnitee is itself partly responsible for that loss or expense. ... In contrast, the extent of the indemnification obligation under paragraph 4.1 of the subcontract is limited in that the indemnitor is responsible only "to the extent [that damages are] caused in whole or in part by the acts or omissions of the Subcontractor." That language reflects an intention of the parties to limit a contractual indemnity obligation to losses caused by the indemnitor's conduct.

Id. at 379, 874 N.E.2d at 452, citations omitted. *See also* Riggle v. Allied Chemical Corp., 180 W.Va. 561, 378 S.E.2d 282 (1989) (Under indemnity agreement that did not contain the "only to the extent caused by" language, contractor was responsible for entire \$500,000 verdict after jury apportioned causation at 55% to Owner and 45% to Contractor.).

Put another way, the Court must ask the following question: what "tort liability" of RCDI did Davis & Burton assume under this indemnity provision? The answer is none. If no tort liability is assumed, the provision does not constitute an "insured contract" even though the provision is labeled as an "indemnity" clause. "[T]he insured must assume the other contracting party's tort liability to third parties in order for insured contract coverage to attach." Richmond

and Black, Expanding Liability Coverage, Insured Contracts and Additional Insureds, 44 Drake L. Rev. 781, 784 (1996).

In Syllabus point 4, VanKirk v. Green Construction Co., 195 W. Va. 714, 466 S.E.2d 782 (1995), this Court stated: “In construing the language of an express indemnity contract, the ordinary rules of contract construction apply.” The Court has also observed that, “[i]n construing a contract of indemnity and determining the rights and liabilities of the parties thereunder, the primary purpose is to ascertain and give effect to the intention of the parties.” Sellers v. Owens-Illinois Glass Company, 156 W. Va. 87, 92, 191 S.E.2d 166, 169 (1972).

In discussing the intention of parties who agree to such a provision, the Supreme Court of Missouri has stated that, “[t]he phrase ‘to the extent caused’ expresses an intention to limit the indemnitor’s liability to the portion of fault attributed to the indemnitor. . . . The preferred construction of the indemnification provision at issue, one that provides a reasonable meaning to each phrase of the provision, requires nothing more than that [the subcontractor] indemnify [the Contractor] for [the Subcontractor’s] negligence even if [the Contractor] participates in part in [the Subcontractor’s] negligent conduct. To hold otherwise would make the intended expression to limit liability to the acts of the indemnitor meaningless.” Nusbaum v. City of Kansas City, 100 S.W. 3d 101, 106-07 (Mo. 2003), citation and footnote omitted.

Indeed, other courts that have construed the A-401 form indemnity provision or substantially similar provisions have held that the subcontractor’s indemnity obligation is limited under the subcontract to losses caused by the subcontractor’s own conduct. *See* North American Site Developers, Inc. v. MRP Site Development, Inc., 827 N.E.2d 251, 254-55 (Mass. App. 2005) (citing cases); Mautz v. J.P. Patti Co. 298 N.J.Super. 13, 21, 688 A.2d 1088, 1092-93 (1997), *certif. denied*, 151 N.J. 472, 700 A.2d 883 (1997) (“We find this clause clear and

unambiguous. The clause states [the Subcontractor's] obligation to indemnify [the Contractor] but only *to the extent* that the claim is caused by [the Subcontractor's] own negligence. The clause does not provide for indemnity to [the Contractor] for [the Contractor's] own negligence, but only to the extent of [the Subcontractor's] negligence.” Emphasis in original.);

Braegelmann v. Horizon Development Co., 371 N.W.2d 644 (Minn. App. 1985) (Under indemnification agreement which required subcontractor to indemnify and hold harmless general contractor from damages to the extent caused in whole or in part by any negligent act or omission of subcontractor, general contractor was not entitled to indemnification from subcontractor to the extent damages were caused by general contractor's own negligence.); MSI Const. Managers, Inc. v. Corro Iron Works, Inc., 208 Mich. App. 340, 527 NW 2d 79 (1995) (Subcontractor liable to contractor to the extent of its own negligence but is not required to indemnify the contractor for the contractor's negligence.); Hagerman Const. Corp. v. Long Elec. Co., 741 N.E.2d 390 (Ind. App. 2000) (Subcontractor was liable to the general contractor to extent of the subcontractor's own negligence for employee's injuries, but not to the extent of the general contractor's negligence.).<sup>7</sup>

As the Supreme Court of Pennsylvania has observed in construing this indemnity provision, “courts in other jurisdictions that have considered virtually identical language to that used in the indemnity provision here have concluded, as we do now, that the clause provides

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<sup>7</sup> In Dillard v. Shaughnessy, Finkel & Scott Architects, Inc., 884 S.W.2d 722 (Mo. App. 1994) (applying Kansas law), an indemnitee, who was found to be not negligent and dismissed from the underlying case, sought to collect attorney fees and costs from the partially negligent indemnitor under an indemnification provision similar to the one at issue in this case. The court concluded that the “to the extent” language limited the indemnitor's liability to that portion of the attorney fees and costs that corresponded to the indemnitor's percentage of fault for the plaintiff's injuries. *See also* East-Harding, Inc. v. Horace A. Piazza & Associates, 80 Ark.App. 143, 91 S.W.3d 547 (2002) (Indemnitor required to reimburse indemnitee for the percentage of expenses and fees equal to indemnitor's percentage of fault.). In this case, Davis & Burton's percentage of fault was determined to be zero.

indemnity only for the amount of damage caused by the indemnitor's negligence, and not for damages attributable to the indemnitee's negligence." Greer v. City of Philadelphia, 568 Pa. 244, 251-252, 795 A.2d 376, 381 (2002).

The significance of these decisions is that they confirm that the A-401 form indemnity provision (or similarly worded indemnity provisions) only requires the Subcontractor to indemnify the Contractor *for the Subcontractor's negligence*. The provision does not require the Subcontractor to assume the Contractor's tort liability. Accordingly, this indemnity provision cannot constitute an "insured contract."

Courts from other jurisdictions that have conducted this analysis have agreed. In American Economy Ins. Co. v. Texas Instruments Inc., 2006 WL 616017 (N.D.Tex. 2006), the court reviewed a dispute over insurance coverage between American Economy Insurance Company, the insurer for Garcia Technical Services ("Garcia"), a service provider, and Texas Instruments Inc. ("TI"). The court reviewed an indemnity agreement between Garcia and TI which stated that, "[Garcia] shall defend ... [TI] ... against all claims ... to the extent arising from the acts or omissions or failure of [Garcia]...." The court concluded that this provision did not constitute an "insured contract." In so holding, the court stated:

Plaintiff [American Economy Insurance] has no duty to defend and indemnify TI, based on contractual indemnity, because Garcia did not assume liability under an "insured contract." The Primary Policy covers contractual indemnity only if Garcia assumes TI's tort liability under an "insured contract." Although Garcia signed an indemnity agreement (the "Indemnity Agreement") with TI, the Indemnity Agreement does not qualify as an "insured contract" under the Primary Policy because Garcia did not assume TI's tort liability. The Primary Policy defines an "insured contract" as any agreement "under which you [Garcia] assume the tort liability of another party." In this case, Garcia did not assume TI's tort liability under the Indemnity Agreement. The Indemnity Agreement states that "Contractor [Garcia] shall defend ... Owner [TI] ... against all claims ... to the extent arising from the acts or omissions or failure

of Contractor [Garcia]...” This language only requires Garcia to defend or indemnify TI for Garcia's negligence; it does not require Garcia to assume TI's tort liability. *See Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 708 (Tex.1987) (interpreting similar indemnity language). Because the Indemnity Agreement does not require Garcia to assume TI's tort liability, the Indemnity Agreement does not qualify as an “insured contract,” and Plaintiff has no duty to defend and indemnify TI based on contractual indemnity.

Id. at \*2.

Similarly, in Hankins v. Pekin Ins. Co., 305 Ill.App.3d 1088, 713 N.E.2d 1244, 239

Ill.Dec. 394 (1999), the court held:

According to the terms of the policy, an “insured contract” is one that provides for one of the contracting parties to assume someone else's tort liability, that is, someone else's liability for their own negligence. Thus, an “insured contract” is one in which one of the contracting parties agrees to indemnify the other from and against that other party's own negligence.

...[W]e do not find the instant hold-harmless agreement to clearly, explicitly, and unequivocally express the parties' intention that Hankins would indemnify Rudolf against Rudolf's own negligence. To the contrary, the Agreement in the case at bar provides that Hankins will indemnify Rudolf for damages for bodily injury caused in whole or in part by *Hankins*' negligent act or omission. This language appears to limit Hankins' liability to its own negligence and does not extend to the negligence of Rudolf. We simply do not find that the language of the hold-harmless agreement clearly expresses an intention to indemnify Rudolf against its own negligence. Accordingly, because in the hold-harmless provision Hankins has not agreed to assume the tort liability of Rudolf but has only agreed to indemnify Rudolf to the extent of Hankins' own negligence, the Agreement is not an “insured contract” within the meaning of the Pekin policy.

Id. at 1093, 713 N.E.2d at 1248-1249, 239 Ill.Dec. at 398-99, emphasis in original.

In Lubrizol Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 200 Fed. Appx. 555 (6<sup>th</sup> Cir. 2006), the Sixth Circuit (applying Ohio law) analyzed whether an indemnity agreement

qualified as an insured contract under an umbrella policy which provided that an insured contract was one under which the insured “assumes the tort liability of another party to pay for Bodily Injury ... to a third person or organization.” The court determined that “by the plain language” of an agreement in which the insured agreed to “indemnify, defend, and hold [the Vendor] harmless from claims, demands, and causes of action asserted against [the Vendor] by [the insured's] employees for personal injury or death, or for loss of or damage to property that results from [the insured's] negligence or willful misconduct hereunder,” the insured was required to indemnify the Vendor only for damage resulting from the insured's own negligence or willful misconduct. Therefore, the court concluded that, “[t]he indemnity agreement cannot, then, be an insured contract under the umbrella insurance policy's particular language, because it does not require the assumption by [the insured] of the tort liability of another party.” *Id.* at 562. *See also Allianz Ins. Co. v. Goldcoast Partners, Inc.*, 684 So.2d 336 (Fla.App. 1996) (contract which did not require indemnity “unless (and then only to the extent) such injury, illness, property damage and/or death is caused by [manufacturer], its parent, affiliates, subsidiaries or its franchisees” did not require manufacturer to indemnify franchisee for franchisee's own negligence under the contract and, therefore, manufacturer's insurance policy provided no coverage on an insured contract.); *Mount Vernon Fire Ins. Co. v. Kent Development of New York, Inc.*, 1996 WL 521426 (S.D. N.Y. 1996) (Indemnity agreement was not insured contract where the agreement was solely about expenses caused by the Subcontractor and, therefore, the Subcontractor did not assume the Contractor's liability, it merely agreed to protect the Contractor from any potential costs “springing from tortious conduct” by the Subcontractor.); *Nu-Pak, Inc. v. Wine Specialties International, LTD.*, 253 Wis. 2d 825, 643 N.W.2d 848 (2002) (Insured's contractual obligation

to indemnify customer for insured's negligence would not be insured contract because there is no assumption of another's liability.).

Judge Copenhaver has also ruled similarly in a case in the United States District Court for the Southern District of West Virginia. In Energy Corp. of America v. Bituminous Cas. Corp., 543 F.Supp.2d 536 (S.D.W.Va. 2008), the court reviewed an indemnity provision in a contract between Energy Corporation of America and S.W. Jack Drilling Company, a Bituminous insured. In resolving the question of whether the indemnity provision in that case constituted an "insured contract," Judge Copenhaver stated:

The analysis of whether the Contract is an "insured contract" begins with the language of the CGL Policy, which as earlier noted defines an "insured contract" as follows:

That part of any other contract or agreement pertaining to your business ... *under which you [S.W. Jack] assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization.* Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

(CGL Policy (emphasis added)).

...

In the Contract S.W. Jack agrees to assume liability for and indemnify, release, defend, and hold Energy harmless for "any bodily injury to Contractor's [S.W. Jack's] ... employees ... *solely caused by Contractor's negligence or willful misconduct.*" (Contract ¶ 19.1 (emphasis added)). Except for this liability assigned to S.W. Jack, Energy expressly agrees to be liable for other damages "regardless of how or when such damages or destruction occurs." (*Id.* ¶ 19.2). Inasmuch as S.W. Jack assumes responsibility only for damages "solely caused by Contractor's [S.W. Jack's] negligence or willful misconduct," S.W. Jack does not assume the liability of anyone other than itself. Thus, the contract is not a contract under which S.W. Jack "assume[s] the tort liability of another party ...." Accordingly, the Contract is not an "insured contract" under the clear and unambiguous terms of the CGL Policy.

Id. at 546. While the indemnity language in Energy Corp. is different than the language in this case, the end results are the same. The indemnity provision in Energy Corp. only required the indemnitor to assume liability for its own fault. Because the indemnity provision did not require the indemnitor to assume the liability of anyone other than itself, the indemnity agreement did not constitute an “insured contract.” Although the case was analyzed under Pennsylvania law, West Virginia or Kentucky law principles would lead to the same result.<sup>8</sup>

Significantly, neither RCDI nor the Circuit Court’s orders cite to any case that examines a similarly worded indemnity agreement and concludes that it is an insured contract. Moreover, although the Circuit Court’s orders suggest that the indemnification “shifts *some* level of RCDI’s potential tort liability to Davis & Burton,” the shifting of some liability is not enough, the indemnity agreement must shift the entire liability. Indeed, Circuit Court never identified what level of RCDI’s tort liability could possibly be assumed by Davis & Burton under this provision. In fact, the *only* tort liability that Davis & Burton assumes under this provision is its own.

Because the indemnity provision of the contract between Davis & Burton and RCDI is not an “insured contract,” the “stand in the shoes” principle set forth in Marlin cannot apply. The Circuit Court erred when it so ruled.

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<sup>8</sup> The District Court conducted a conflict of laws analysis applying Triangle Industries, *supra*, and concluded that, because the policies were issued by a Pennsylvania broker to a Pennsylvania corporation, Pennsylvania law should apply to the interpretation of the insurance policy, notwithstanding the fact that the underlying claim rose in West Virginia. Energy Corp., 543 F.Supp. 2d at 541-44. *See also* APAC-Atlantic, Inc. v. Protection Services, Inc., 397 F.Supp. 2d 792 (N.D. W. Va. 2005) (Pennsylvania law governed in determining whether a Pennsylvania subcontractor’s commercial general liability insurer had a duty to defend a West Virginia wrongful death action arising from an automobile accident that occurred in West Virginia.).

**B. The Circuit Court Erred In Finding That Bituminous, As Davis & Burton's Insurer, Had A Duty To Defend RCDI, When No Allegations of Negligence Were Made Against Davis & Burton By Any Other Party To The Litigation And RCDI's Own Allegations Of Negligence Against Davis & Burton Failed.**

The Circuit Court's ruling that RCDI would "stand in the shoes" of the insureds (Davis & Burton) for coverage purposes under the Bituminous policies is irreconcilable with the Court's earlier holding that the indemnification provision was inapplicable to the McCormick claims because Davis & Burton had committed no "negligent acts or omissions." Thus, the indemnity clause could not be made the basis for any duty or obligation, even if in academic terms, it was an "insured contract."

Significantly, this Court stated in Marlin that, "West Virginia law allows indemnity provisions in contracts because 'indemnity clauses serve our goals of encouraging compromise and settlement ... by allowing the parties to a contract *to allocate among themselves the burden of defending claims.*'" 212 W.Va. at 221, 569 S.E.2d at 468, *quoting Dalton v Childress Service Corp.*, 189 W.Va. 428, 431, 432 S.E.2d 98, 101 (1993), emphasis added. In this case, RCDI and Davis & Burton did exactly that when they entered into a contract which contained an indemnity provision which *only required* Davis & Burton to indemnify and hold harmless RCDI for any "claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract . . . to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor." RCDI and Davis & Burton agreed to allocate "the burden of defending claims" to Davis & Burton, *but only if* the claim was caused in whole or in part by Davis & Burton's negligence, and even then, only to the extent of such negligence. Of course, the Circuit Court found that Davis & Burton was not negligent. *See June 14, 2006 Order at 9-10.* Thus by RCDI's own agreement, in this case, the burden of defending the McCormick claim was allocated to RCDI and only to RCDI.

Moreover, and contrary to RCDI's assertion, West Virginia law does not impose a *duty* to defend on the indemnitor when a defense is tendered pursuant to an indemnity contract.

In this case, as the Circuit Court aptly recognized, the indemnity obligation of Davis & Burton, as the Subcontractor, is only triggered if the "negligent acts or omissions of the Subcontractor" are the cause (in whole or in part) of the claimant's damages. In Syllabus Point I, Oakes v. Monongahela Power Co., 158 W. Va. 18, 207 S.E.2d 191 (1974), this Court held:

Where, in an indemnification agreement, the liability of the indemnitor is premised on the fact that the injury for which the indemnitee held liable was caused by an act or omission of said indemnitor, the issue of whether the injury was caused by such act or omission must be properly adjudicated before such liability attaches.

Under Oakes, before any indemnification liability on the part of Davis & Burton can attach, including liability for RCDI's attorney's fees incurred in defense of the McCormick suit, Davis & Burton would have to have been found negligent in some way.<sup>9</sup> Of course that issue *was* adjudicated entirely in Davis & Burton's favor in this case but, in any event, no *duty* to assume RCDI's attorney fees and expenses can be imposed prior to that adjudication.

In the insurance context, "[a]s a general rule, an insurer's duty to defend is tested by whether the allegations in the plaintiff's complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy." Aetna Casualty & Surety Co. v. Pitrolo, 176 W. Va. 190, 194, 342 S.E.2d 156, 160 (1986). *See also* Corder v. William W. Smith Excavating Co., 210 W. Va. 110, 113, 556 S.E.2d 77, 80 (2001) ("[I]n determining

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<sup>9</sup> Nor does Valloric v. Dravo Corp., 178 W. Va. 14, 357 S.E.2d 207 (1987) impose a *duty* to defend the indemnitee on the indemnitor. Valloric simply stands for the proposition that, if an indemnitor does not assume control of the indemnitee's defense in the underlying action, it does so at its own risk. *See also* State ex rel Vapor Corp. v. Narick, 173 W. Va. 770, 775, 328 S.E.2d 345, 350 (1984) ("In the indemnity field, it is recognized that an indemnitor *may* assume control of the indemnitee's defense, at least where no conflict of interest exists." *Emphasis added.*). In this case, a conflict of interest would have existed because Davis & Burton would have benefited under the indemnity contract if RCDI were found to be negligent in any way in the McCormick litigation.

whether an insurer has a duty to defend, the determination is made based upon the allegations of the complaint.”).

In that regard, this case is unlike Marlin. There, the Court assumed that the contractor/indemnitor was liable to indemnify the Board of Education for two reasons. First, unlike the very limited indemnity provision in this case, the clause in Marlin was all-embracing. Second, in Marlin the plaintiffs had alleged negligence against both the Board of Education *and* the contractor.<sup>10</sup> Here, there was never even an allegation by the McCormick plaintiffs that Davis & Burton negligently performed any of *its duties* on the Lewisburg Walmart project. The only party that ever alleged negligence on the part of Davis & Burton was RCDI, in an obvious, but ultimately unavailing attempt to implicate the indemnification provision in the subcontract. Nonetheless, the Circuit Court improperly permitted RCDI to use its own failed allegations of negligence against its subcontractor to conjure up a duty on the part of Bituminous to defend RCDI under the policy, when the Circuit Court itself concluded the subcontractor was neither negligent nor responsible in any way for the McCormick plaintiffs’ property damages. That decision was inherently inconsistent and legally incorrect.

**C. Even If Davis & Burton’s Contract With RCDI Was An “Insured Contract,” The Circuit Court Erred In Failing To Apply The Clear And Unambiguous Language of The Bituminous Policy Governing Claims Under An “Insured Contract.”**

The “stand in the shoes of the insured” concept was first recognized by this Court in Consolidation Coal Co. v. Boston Old Colony Ins. Co., 203 W. Va. 385, 508 S.E.2d 102 (1998). In that case, Consolidation Coal had indemnity agreements with a contractor and a subcontractor who were both insured under the same policy issued by Boston Old Colony. Neither party

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<sup>10</sup> See Marlin, 212 W. Va. at 219, 569 S.E.2d at 466.

disputed that the indemnity agreements constituted “insured contracts” under the terms of the Boston Old Colony policy. At issue was whether separate policy limits were available to Consolidation Coal Company for each insured against whom the coal company had asserted an indemnity claim. The Court held that separate limits were available, stating:

CCC had an insured contract with Heston and Omni. In this instance, the BOC policy is ambiguous because it suggests that by virtue of the separately paid premiums, both Heston and Omni have \$1,000,000 in coverage. However, if both Heston and Omni caused accidents at the same time, the policy attempts to limit coverage to \$1,000,000. If we were to apply this limitation in the policy, we would consequently nullify the meaning and purpose of the “insured contract” provisions of the policy. Therefore, we hold that in a policy for CGL insurance and SEL insurance, when a party has an “insured contract,” that party stands in the same shoes as the insured for coverage purposes. Thus, we find that the circuit court erred by finding that the insurance policy provided only \$1,000,000 in coverage, instead of \$2,000,000 in coverage.

Id. at 392-93, 508 S.E.2d at 108-10. In reaching its decision, the Court in Consolidation Coal was not called upon to examine either the “duty to defend” issue or the type of policy language that is at issue in this case.

In Marlin, this Court went on to expand the “stand in the shoes of the insured” concept to allow the Wetzel County Board of Education as indemnitee, to “directly seek coverage under the [indemnitor’s] policy.” Marlin, 212 W. Va. at 222, 569 S.E.2d at 469. In the context of the duty to defend, the “stand in the shoes” analysis may make some practical sense some of the time, because it does avoid circuitry in some situations. But those situations could only exist where the policy clearly covers the insured for indemnity liability, and where the indemnitee is clearly entitled to indemnity, a circumstance completely lacking in this case.

As a concept of insurance law, however, the “stand in the shoes” method of analysis is deficient because it runs counter to the well-settled, fundamental rule that insurance policies are

contracts, and the rights and liabilities of parties under contracts must be determined according to the terms of the agreement. The standard commercial general liability insurance policies contain detailed terms and provisions that are devoted to identifying “Who Is An Insured.” The policy also makes quite clear that any party who does not qualify as an “insured” is not entitled to coverage, a defense, or any other benefits and protections. Under fundamental, universally applicable insurance principles, those clear and unambiguous provisions are to be applied as written, and not judicially construed. This Court has repeatedly and quite recently reaffirmed that principle. *See* Syllabus Point 3, Blake v. State Farm Mut. Auto. Ins. Co., 224 W. Va. 317, 685 S.E.2d 895 (2009); Syllabus Point 3, Lewis v. Dils Motor Co., 148 W. Va. 515, 135 S.E.2d 597 (1964). The “stand in the shoes” analysis as applied in Marlin is contrary to these fundamental rules.

Nonetheless, even if the indemnity provision in this case could be deemed to be an insured contract, the Marlin “stand in the shoes of the insured” principle should not and cannot be applied in this case because of the express language of the insurance policy. The Bituminous insurance policy at issue in this case contains significant provisions that were not contained in the insurance policy in Marlin. The Circuit Court never addressed these critical distinctions.

First, the “Insuring Agreement” in the Bituminous policy issued to Davis & Burton is contained in an endorsement to the policy which provided that:

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. *We will have the right and duty to defend the insured against any “suit” seeking those damages.* However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply.

*Bituminous Summary Judgment Exhibit C-1 at ¶ 1. a. (Endorsement CG 00 43 (05/92)), emphasis added.* The language contained in the ISO-drafted endorsement (approved for use in both Kentucky and West Virginia at the time of the policy issuance) is significant because the language limits the insurer's duty to defend to only include suits against the insured.

This Court has recognized that an insurer's duty to defend is controlled by the terms of the insurance policy at issue. In Tackett v. American Motorists Ins. Co., 213 W. Va. 524, 528, 584 S.E.2d 158, 162 (2003), this Court stated:

A contract for indemnification from loss typically also includes a provision whereby the insuring entity agrees to provide legal representation to said insured with respect to any claims filed against him/her for which the subject policy provides coverage. This type of arrangement has come to be known as the insurer's duty to defend. See, e.g. Black's Law Dictionary 523 (7<sup>th</sup> ed. 1999) (defining "duty-to-defend clause" as "[a] liability-insurance provision obligating the insurer to take over the defense of any lawsuit brought by a third party against the insured on a claim that falls within the policy's coverage"). Unquestionably, the terms of the pertinent insurance contract govern the parties' relationship and define the scope of coverage as well as the existence of the insurer's duty to defend its insured.

In this case, an express endorsement makes clear that the insurer's duty to defend is specifically limited to only include suits against the insured.

If the indemnity provision of the Davis & Burton subcontract with RCDI is an "insured contract," then the policy provision quoted above must necessarily be implicated. Under the "Insuring Agreement," Bituminous only has a duty to defend "the insured." RCDI was never "the insured" under the policy. Davis & Burton was the only insured under the Bituminous policy.

In reaching its conclusion that Bituminous had a duty to defend RCDCI, the Circuit Court relied on the distinction between the insurer's duty to defend and its duty to indemnify. *October 5, 2007 Order at 10-11*. As noted above, however, Bituminous' duty to defend under this policy specifically applies only to Davis & Burton. The Court cannot simply disregard this policy provision, particularly in light of the recognition in Tackett that the terms of the insurance policy define the existence of an insurer's duty to defend.

Additionally, the Bituminous policy endorsement not only changes the duty to defend language, it expressly addresses the status of defense costs of the policyholder's indemnitee.

The endorsement states:

This insurance does not apply to:

b. "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. ***Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage",*** provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

*Bituminous Summary Judgment Exhibit C-1 at ¶ 2. b. (Endorsement CG 00 43 (05/92)), emphasis added.*

Under the contractual liability exclusion language in the endorsement, attorney fees and litigation expenses incurred by any party other than Davis & Burton, the named insured, are deemed to be “damages” under the policy. Thus, any claim that RCDI might have for such expenses as a result of its indemnity agreement (a claim expressly rejected by the Circuit Court in its June 14, 2006 Order dismissing RCDI’s indemnity claim against Davis & Burton) could only be a claim for damages as a third party claimant, not a claim for a defense as a first party insured.

The Legislative Rules of the West Virginia Insurance Commissioner are pertinent to this analysis. 114 WVCSR § 14-2.3 states: “First Party Claimant or Insured’ means an individual, corporation, association, partnership or other legal entity asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such policy or contract.” Conversely, 114 WVCSR § 14-2.8 states: “Third Party Claimant’ means any individual, corporation, association, partnership or other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract of an insurer.” Clearly, under this policy language, RCDI can only be a third party claimant. Indeed, this Court has recognized substantial distinctions between the rights of a first party claimant and a third party claimant. *See e.g. Syllabus, Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 504 S.E.2d 893 (1998) (“A third party has no cause of action against an insurance carrier for common law breach of the implied covenant of good faith and fair dealing or for common law breach of fiduciary duty.”). The law cannot simply ignore the plain language of the policy to grant artificial rights to RCDI.

In Syllabus, Keffer v. Prudential Ins. Co. of America, 153 W.Va. 813, 172 S.E.2d 714 (1970), this Court held that: “Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.” Further, in Payne v. Weston, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995), this Court stated: “In West Virginia, insurance policies are controlled by the rules of construction that are applicable to contracts generally. We recognize the well-settled principle of law that this Court will apply, and not interpret, the plain and ordinary meaning of an insurance contract in the absence of ambiguity or some other compelling reason. Our primary concern is to give effect to the plain meaning of the policy and, in doing so, we construe all parts of the document together. We will not rewrite the terms of the policy; instead, we enforce it as written.” The Court cannot fail to give full effect to or rewrite these provisions by artificially treating RCIDI, a third party claimant not insured by Bituminous, in the same manner as a Bituminous insured.

The significance of the application of the above-referenced language is underscored in Wausau Underwriters Ins. Co. v. Mt. Vernon Fire Ins. Co., 507 F.Supp.2d 898 (N.D.Ill. 2007). In Wausau Underwriters, the court found that a franchise agreement was an “insured contract” as defined by the franchisee’s primary commercial general liability insurance policy. The franchisee’s primary policy contained the above-referenced provision that treated indemnity costs assumed by the franchisee as damages. However, the franchisee’s primary policy limits had been exhausted by payment of the liability limit to the underlying wrongful death claimant. As such, the primary CGL insurer was not obliged to pay the franchisor’s defense costs in the underlying claim, notwithstanding the fact that its insured was obligated for those costs under the indemnity provision of the franchise agreement.

When the named insured is entitled to a defense under a traditional commercial general liability policy, there is no limit on the cost of that defense, nor does such cost erode the liability limits available to the insured. However, a holder of an indemnity claim against the insured under an “insured contract” is not similarly situated to the insured. The indemnity claims of that person or entity are limited by the policy limits available to the named insured. In discussing this policy language, the court in Golden Eagle Ins. Co. v. Insurance Co. of the West, 99 Cal.App.4th 837, 121 Cal.Rptr.2d 682 (Cal. App. 2002), noted, “[b]ecause defense costs assumed by the insured are covered as ‘damages,’ they reduce indemnity limits on all claims covered by the policy (whereas defense costs are *in addition to* indemnity limits).” Id. at 847 n.5, 121 Cal.Rptr.2d at 688 n.5 (citation omitted, emphasis in original).

The policy changes noted above were not present in Marlin. Marlin’s “stand in the shoes of the insured” analysis is not appropriate when the policy contains provisions which, like the instant Bituminous policy, make clear that the indemnitee is a third-party claimant, not a first-party insured and thus, is not due any direct benefits of the policy.<sup>11</sup>

**D. The Circuit Court Erred In Its Analysis Of The Interplay Between The “Other Insurance” Provisions Of The Insurance Policies Implicated By The McCormick Claims And The Indemnity Agreement.**

If the Bituminous policy is implicated with regard to the McCormick claims against RCDI, the “Other Insurance” provisions of the multiple insurance policies applicable to the McCormick claims against RCDI become relevant. RCDI was defended in Civil Action No. 01-C-251 from the inception of that action by its own Commercial General Liability Insurance carrier. *See Bituminous Summary Judgment Exhibit D*. RCDI itself incurred no costs or expenses

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<sup>11</sup> No Kentucky case has recognized the “stand in the shoes of the insured” concept as applied in Marlin.

in that defense and, in fact, both defense counsel for RCDI in Civil Action No. 01-C-251 and counsel for RCDI in Civil Action No. 05-C-342 have been paid by RCDI's liability insurance carrier. *See Bituminous Summary Judgment Exhibit E*. Thus, even if there was a duty to defend RCDI under the Bituminous policy, the Circuit Court was faced with a situation where RCDI had two liability policies that were applicable to the McCormick lawsuit. This required the Circuit Court to apply the "Other Insurance" clauses of both the Bituminous policy and RCDI's own policy (originally issued by USF&G). *See State of W. Va. Bd. of Vocational Ed. v. Janicki*, 188 W. Va. 100, 102, 422 S.E.2d 822, 824 (1992) ("the unmistakable and valid objective of 'other insurance' clauses is to limit or avoid a carrier's liability when risk coverage is identical").

The "Other Insurance" provision of the Bituminous policy provides, in part:

If other valid and collectible insurance is available to the insured for a loss we cover under Coverage A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance.

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then we will share with all that other insurance by the method described in c. below.

b. Excess Insurance.

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

- (1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work."
- (2) That is Fire insurance for premises rented to you; and
- (3) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I).

*See Bituminous Summary Judgment Exhibit C-1 at ¶ IV.4.*

RCDI's USF&G policy contains the identical "Other Insurance" provision, but also includes an endorsement which adds the following as subsection (4) to the subparagraph b "Excess Insurance" provision quoted above:

(4) When you have other insurance to apply on a primary basis for:

(a) Work or operations performed on your behalf; and

(b) Your acts or omissions in connection with the general supervision of such work or operations.

*See Exhibit A to Bituminous response to RCDI Motion For Attorney Fees at Endorsement CL/CG 99 02 04 87.*

The additional provision (4) in RCDI's USF&G policy does not apply to this case because the claims asserted against RCDI by the McCormick plaintiffs were not claims related to the "general supervision of" the "work or operations performed on [RCDI's] behalf." This endorsement is clearly intended to apply to situations wherein the policy's named insured is added as an "Additional Insured" to a subcontractor's policy and where the "Additional Insured" coverage expressly does not apply to property damage arising out of any act or omission of the additional insured other than the general supervision of the insured subcontractor's work performed for the additional insured. *See Bituminous Summary Judgment Exhibit C-3.* That is not the case herein and, in fact, the Circuit Court's October 5, 2007 Order specifically noted that, "RCDI is entitled to the full coverage of the [Bituminous] policy, not merely the "Additional Insured" coverage..." *October 5, 2007 Order at 9 n.2.*

Thus, because none of the "Excess Insurance" provisions of either policy apply, both policies are considered to be primary. Both policies contain identical "Method of Sharing" provisions which state, in pertinent part, that: "If all of the other insurance

permits contribution by equal shares, we will follow this method also. Under this approach, each insurer contributes equal amounts until it has paid its applicable limits of coverage or none of the loss remains whichever comes first.” See *Bituminous Summary Judgment Exhibit C-1 at ¶ IV.4.c.; Exhibit A at ¶ IV.4.c.* When applying the policies’ respective “Other Insurance” provisions, Bituminous’ liability for any fees and costs associated with the defense of RCDI in Civil Action No. 01-C-251 could only be 50%.

The Circuit Court, however, found that “the indemnification clause contracted between RCDI and Davis & Burton is controlling, holding the ‘other insurance’ clauses of the two policies irrelevant.” *September 8, 2009 Order at 11.* In so holding, the Circuit Court relied upon *American Indem. Lloyds v. Travelers Property & Cas. Ins. Co.*, 335 F.3d 429, 436 (5<sup>th</sup> Cir. 2003) (“[A]n indemnity agreement between the insureds or a contract with an indemnification clause, such as is commonly found in the construction industry, may shift an entire loss to a particular insurer notwithstanding the existence of an ‘other insurance’ clause in its policy,” citing 15 *Couch on Insurance* (3rd Ed.1999; Russ & Segalla) § 219:1 at 219-7.) and *St. Paul Fire & Marine Ins. Co. v. American Intern. Specialty Lines Ins. Co.*, 365 F.3d 263 (4<sup>th</sup> Cir. 2004) (Under Virginia law, indemnification provisions of agreement controlled allocation of liability between their primary and excess insurers for tort settlement and allegedly conflicting “other insurance” clauses in policies were irrelevant.).

Significantly, in *Travelers Property Cas. Co. of America v. Liberty Mut. Ins. Co.*, 444 F.3d 217 (4<sup>th</sup> Cir. 2006), the Fourth Circuit explained its holding in *St. Paul Fire & Marine*, noting that

*In St. Paul Fire & Marine Ins. Co. v. American Intern. Specialty Lines Ins. Co.*, 365 F.3d 263 (4<sup>th</sup> Cir. 2004), the insureds of several insurance companies became jointly and severally responsible for the food poisoning of the plaintiff in the underlying

action and accordingly settled with the plaintiff before seeking to resolve the allocation of insurance coverage. After the settlement, the insurance companies instituted an action in which we held that *before* the insurance coverage could be determined and allocated, the liability of the insureds needed to be determined, including contractual liability created by an indemnification clause between two of the insureds. *Id.* at 268. When the analysis for underlying liability was conducted, it was determined that final responsibility for the food poisoning was shifted by reason of an indemnification clause from the insured of one insurance company to the insured of another. We held therefore that coverage followed, because the insurance covered the liability of the insureds as determined not only by law but also by application of their indemnification agreements. As we said, “[A]n indemnity agreement between the insureds or a contract with an indemnification clause ... may shift an entire loss to a particular insurer notwithstanding the existence of an ‘other insurance’ clause in its policy.” *Id.* at 270-71 (internal quotation marks and citation omitted). Thus, responsibility for insurance coverage followed the liability of the insureds.

*Id.* at 224, emphasis in original.

This Court has not spoken on this issue, but even if it is inclined to adopt the reasoning of these cases, Judge Rowe’s conclusion that, because the indemnity provision controls, “Bituminous is responsible for the entire amount of attorney fees owed to RCDI,” is a *non sequitur*. As the Fourth Circuit pointed out in *Travelers*, liability, “including contractual liability created by an indemnification clause,” must be determined first. Then, “responsibility for insurance coverage follow[s] the liability of the insureds.” In this case, Judge Rowe first determined contractual liability under the indemnity clause, and then completely ignored his own finding in determining who was responsible for insurance coverage.

As this Court has observed, indemnity agreements allow the parties to a contract to allocate among themselves the burden of defending claims. *Dalton v. Childress Service Corp.*, 189 W.Va. 428, 431, 432 S.E.2d 98, 101 (1993). *See also* *Blessing v. National Engineering & Contracting Co.*, 222 W.Va. 267, 272, 664 S.E.2d 152, 157 (2008) (“[I]ndemnification

agreements are by nature essentially non-insurance contractual risk transfers.”). As noted above, RCDI and Davis & Burton did exactly that when they agreed to an indemnity provision which **only required** Davis & Burton to indemnify and hold harmless RCDI for any “claims, damages, losses and expenses, including but not limited to attorney’s fees, arising out of or resulting from the performance of the Subcontractor’s Work under this Subcontract . . . to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor.” RCDI and Davis & Burton agreed to allocate “the burden of defending claims” to Davis & Burton, **but only if** the claim was caused in whole or in part by Davis & Burton’s negligence, and even then, only to the extent of such negligence. The Circuit Court found that Davis & Burton was not negligent. *See June 14, 2006 Order at 9-10*. Thus by RCDI’s own agreement with its subcontractor, the **entire** burden of defending RCDI in the McCormick lawsuit was allocated to RCDI and only to RCDI.

How then, can this very same indemnity provision be used to justify allocating the entire burden of defending RCDI in the McCormick lawsuit to Davis & Burton’s insurer? If the indemnity agreement controls the allocation of defense costs instead of the “other insurance” clauses of the insurance policies, then it must control in its entirety. The Circuit Court’s June 14, 2006 Order concluded that “Davis & Burton has committed no negligent acts or omissions which caused said damages to rise. Since Davis & Burton have [*sic*] committed no negligent acts or omissions which gave rise to [the McCormick] Plaintiffs’ damages, Davis & Burton has no obligation to indemnify or hold harmless RCDI in this matter.” *June 14, 2006 Order at 9*. If Davis & Burton has no such obligation under the controlling indemnity agreement, no such obligation can be imposed on Davis & Burton’s insurer.

Under any analysis of this issue, however, the Circuit Court was wrong. Bituminous cannot be responsible for 100% of RCDI's fees and expenses occurred in the McCormick lawsuit.

**VII. RELIEF PRAYED FOR**

For the reasons set forth herein, the Appellant, Bituminous Casualty Corporation, prays that the Court reverse and vacate the Orders of the Circuit Court of Greenbrier County, West Virginia, and find that Appellant had no duty to reimburse the Appellee for any fees and expenses incurred in the defense of Civil Action No. 01-C-251, and grant Appellant such other and further relief as the Court deems appropriate.

BITUMINOUS CASUALTY CORPORATION,  
By Counsel

*John J. Polak*

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**CERTIFICATE OF SERVICE**

I, John J. Polak, counsel for Defendant/Appellant, do hereby certify that service of the  
**“BRIEF ON BEHALF OF APPELLANT BITUMINOUS CASUALTY CORPORATION”**  
was made upon the parties listed below by mailing a true and exact copy thereof to:

Peter G. Zurbuch, Esq.  
BUSCH, ZURBUCH & THOMPSON, PLLC  
P.O. Box 1819  
Elkins, WV 26241  
*Counsel for Resource Consultants and Developers, Inc.  
in Civil Action No. 05-C-342*

in a properly addressed envelope this 28<sup>th</sup> day of July, 2010.

  
\_\_\_\_\_  
John J. Polak  
(WV State Bar No. 2929)