

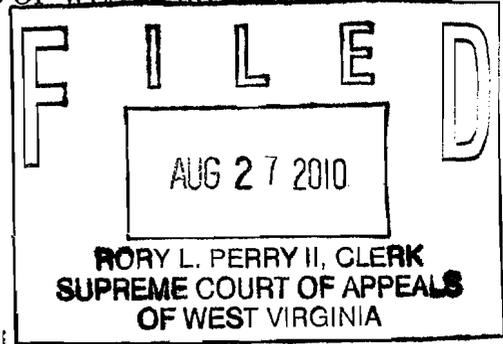
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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



COPY

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)

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**BRIEF ON BEHALF OF APPELLEE, RESOURCE CONSULTANTS  
AND DEVELOPERS, INC., AND CROSS ASSIGNMENT OF ERROR**

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

Bituminous Casualty Corporation [hereinafter “Bituminous”] appeals from an Order entered by Judge James Rowe of the Circuit Court of Greenbrier County granting Resource Consultants and Developers, Inc.’s [hereinafter “RCDI”] Motion for Summary Judgment finding that Bituminous had a duty to defend RCDI in a civil action filed against RCDI by Mindy and Billy McCormick. The Circuit Court properly found the indemnification agreement between RCDI and its sub-contractor, Davis & Burton Contractors, Inc. [hereinafter “Davis & Burton”], constituted an “insured contract,” requiring Bituminous to defend RCDI under its policy insuring Davis & Burton.

The Cross Assignment of Error assigned by RCDI arises from the Circuit Court’s denial of that portion of RCDI’s Motion for Summary Judgment which sought a defense for RCDI based upon the issuance of a Certificate Of Insurance by Bituminous’ authorized agent identifying RCDI as an additional insured on Bituminous’ policy insuring Davis & Burton. The Circuit Court ruled that RCDI failed to prove detrimental reliance upon the Certificate Of Insurance.

This declaratory judgment action arises out of civil litigation styled, Mindy and Billy McCormick and David Carroll v. Walmart Stores, Inc.; RCDI Construction, Inc.; West Virginia Department of Transportation, Division of Highways; and The Town of Lewisburg, West Virginia, being Civil Action No. 01-C-251(R)[hereinafter referred to as “underlying action”]. The Plaintiffs in the underlying action are property owners downstream from a Wal-Mart shopping center constructed in 1995. In 2001, Plaintiffs filed suit against Wal-Mart, the architect and engineering firm, Freeland-Clinkscales and Kaufman, and RCDI, the general contractor that constructed the Lewisburg Wal-Mart, alleging that the amount of water flowing onto their

property since the 1995 construction of the Lewisburg Wal-Mart exceeded the amount of water that flowed onto their properties prior to the construction. The underlying action alleged, in part, that RCDI did not construct the water containment/management structures in accordance with the plans. (See underlying Plaintiff's Complaint at Paragraphs 24, 27, 36, 54, 55, 56, 61-64, and 65-68 attached as Exhibit B to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment).

In February 2005, RCDI<sup>1</sup> filed a Third-Party Complaint against Davis & Burton, the subcontractor RCDI hired to perform the site work and construct the storm water drainage system for the Wal-Mart project. The Third-Party Complaint against Davis & Burton sought indemnification and contribution for any liability stemming from its negligence with regard to construction of the storm water drainage system.

RCDI instituted this declaratory judgment action against Bituminous on December 1, 2005. The Complaint For Declaratory Relief sought coverage and a defense for RCDI under a general liability policy of insurance issued by Bituminous to its named insured, Davis & Burton, on the basis of the indemnity agreement and a Certificate Of Insurance identifying RCDI as an additional insured.

On June 13, 2006, the Circuit Court entered an Order dismissing the underlying action against RCDI on the grounds that the statute of limitations barred Plaintiffs' claims. On June 14, 2006, the Court dismissed RCDI's Third-Party Complaint against Davis & Burton finding that Davis & Burton did not breach the terms of its contract with RCDI as Plaintiffs' damages

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<sup>1</sup> RCDI was represented in the underlying action by Pullin, Fowler & Flanagan, PLLC.

stemmed from a flawed design plan and not from the actual construction of the storm water drainage system. (See June 14, 2006 Order granting Davis & Burton's Motion for Summary Judgment, at Pages 9-10). The Court also found that Davis & Burton did not breach its contract with RCDI by failing to have RCDI named as an additional insured on its policy with Bituminous since it obtained a Certificate Of Insurance from Bituminous' agent which listed RCDI as an additional insured.

By Order entered October 5, 2007, the Circuit Court held that Davis & Burton's insurer, Bituminous, had a duty to defend RCDI based upon the indemnification provision between RCDI and Davis & Burton. The Circuit Court found that the allegations against RCDI in the underlying action included allegations of negligent construction of the storm water drainage system, thereby invoking Davis & Burton's obligation under the indemnity agreement. The Circuit Court's ruling was based upon the Court's decisions in Marlin v. Wetzel County Bd. of Educ., 212 W.Va. 215, 569 S.E.2d 462, 468 (2002) and Consolidation Coal Co. v. Boston Old Colony Ins. Co., 203 W.Va. 385, 508 S.E.2d 102 (1998), which mandated the assumption of the defense of RCDI by Bituminous.

In its Petition for Appeal, Bituminous seeks the reversal of the Circuit Court Order and a finding that there was no duty to defend owed by Bituminous, the indemnitor's insurer, despite the clear intent of the parties in the contract to shift the risk of loss to Davis & Burton's insurer as evidenced by the indemnity agreement and the contractual requirement that RCDI be added as an additional insured on Bituminous' policy.

RCDI raises a cross assignment of error that the Circuit Court erred by failing to find that Bituminous was estopped to deny a defense to RCDI by virtue of the Certificate Of Insurance which identified RCDI as an additional insured.

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### III. STATEMENT OF FACTS

RCDI is a West Virginia corporation located in Parkersburg, West Virginia. In the Summer of 1994, RCDI entered into a contract to act as the general contractor for the construction of a Wal-Mart store located in Lewisburg, West Virginia. RCDI subcontracted out the site work as well as the construction of the storm water drainage system to a Kentucky corporation named Davis & Burton. After the Wal-Mart store was constructed, downstream property owners experienced flooding. In December 2001, these property owners filed a Complaint against RCDI, as well as Wal-Mart and other defendants, which alleged, in part, that RCDI did not properly construct the Lewisburg Wal-Mart's storm water drainage system in accordance with the design plans and, as such, RCDI should be liable for causing damage to the Plaintiffs' property. (See underlying Plaintiffs' Complaint at Paragraphs 24, 27, 36; 54-56; 61-64; and 65-68 attached as Exhibit B to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment).

RCDI's entered into a Subcontractor Agreement with Davis & Burton on September 1, 1994, which required Davis & Burton to perform construction of the storm water drainage system work for the Wal-Mart development. The Subcontractor Agreement provided:

Subcontract includes all material, labor, equipment, supervision, engineering, permits & fees . . . tools of the trade and anything else necessary to perform all of the erosion control, grading and excavation, undercutting and rock excavation, complete storm sewer system, complete sanitary sewer system, and complete water system.

\* \* \*

7. Storm Sewer: The storm sewer system includes all testing, layout, supervision, engineering, connections, and all other items

necessary for complete storm system per the plans and specifications.

(See Page 6A of Subcontractor Agreement attached as Exhibit C to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment).

Pursuant to the Subcontractor Agreement, Davis & Burton was to have RCDI named as an Additional Insured under its liability insurance and to provide RCDI with a Certificate Of Insurance indicating its status as an Additional Insured:

Section 13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability. Subcontractor must provide contractor with a Certificate of Bodily Injury (including death), automobile, and property damage liability insurance (minimum \$2,000,000 per occurrence) naming Resource Consultants & Developers, Inc., RCDI Construction Management, Inc., and Wal-Mart Stores, Inc. as additional insureds. Certificates must state that above limits are provided and that insurance will not be canceled while the work specified is in progress without 30 days prior written notice to the named insureds.

(See Paragraph 13.3 of Subcontractor Agreement attached as Exhibit C to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment).

RCDI was provided a Certificate of Insurance by the Putman Agency, Inc., dated October 19, 1994, which indicated RCDI was insured for commercial general liability coverage under Davis & Burton's policy with Bituminous Casualty, CGL Policy No. CLP2160263, with a Policy Effective Date of 8/28/94 to 8/28/95. (See Certificate of Insurance, dated 10/19/94, attached as Exhibit D to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment). The Certificate of Insurance provided, in part, \$2,000,000.00 in completed operations coverage to RCDI. The Putnam Agency (hereafter "Putnam") is an agency authorized under an agreement with Bituminous to bind coverages and issue Certificates Of Insurance on behalf of Bituminous.

(See Agency-Company Agreement, dated 08/24/88, attached as Exhibit I to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment). Bituminous argues that its agent, Putnam, failed to notify it of the additional insured status of RCDI. Thus, Bituminous contends no endorsement adding RCDI as an additional insured was ever made on its policy. (See Appellant brief at Page 6).

The Subcontractor Agreement between RCDI and Davis & Burton contains an indemnification agreement, which required Davis & Burton to indemnify RCDI for all claims, damages and attorney fees "arising out of or resulting from the performance of the subcontractor's [Davis & Burton] work under this subcontract." (See Paragraph 4.6.1 of Subcontractor Agreement attached as Exhibit C to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment).

When the underlying Complaint was filed, RCDI tendered its defense to Davis & Burton's insurer, Bituminous. (See Exhibit E attached to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment). In January 2002, Bituminous denied that RCDI was an insured under its policy despite Bituminous' agent's issuance of the Certificate Of Insurance to the contrary. (See Exhibit F attached to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment). RCDI's carrier, USF&G, assumed the defense of RCDI and incurred in excess of \$95,000.00 in fees and costs in defending RCDI. USF&G instituted this action in December 2005 in the name of RCDI, as its subrogee, to recover these defense fees and costs, which should have been assumed by Bituminous. Discovery in the underlying action

proceeded for five (5) years until in June 2006, when the Circuit Court granted summary judgment to Davis & Burton and RCDI in the underlying action.

In light of the Court's dismissal of RCDI and Davis & Burton from the underlying litigation, the only issue remaining in the declaratory judgment action was not an issue of whether RCDI should be indemnified for any damages it was required to pay to the Plaintiffs, but rather the obligation for the cost of defending RCDI for the five (5) years the litigation was pending. In granting summary judgment in favor of RCDI in the instant action, the Circuit Court held that by virtue of the indemnity agreement, RCDI stood in the shoes of Davis & Burton entitling it to a defense from Bituminous based upon the allegation that RCDI was negligent in the construction of the water management or containment system. The Circuit Court awarded RCDI the \$95,334.93 incurred in defending RCDI plus fees and costs incurred in pursuing the instant declaratory judgment action of \$27,650.72.<sup>2</sup>

#### **IV. DISCUSSION OF LAW**

##### **A. THE CIRCUIT COURT PROPERLY FOUND THAT THE INDEMNIFICATION AGREEMENT BETWEEN DAVIS & BURTON AND RCDI CONSTITUTED AN "INSURED CONTRACT."**

The Circuit Court, applying West Virginia law to the Subcontractor Agreement, found that the indemnification agreement constituted an "insured contract," thus, entitling RCDI to a defense under Davis & Burton's policy of insurance with Bituminous. Whether the indemnity provision constitutes an "insured contract" implicates choice of law principles applicable to contracts, rather than liability issues. See Lee v. Saliga, 179 W.Va. 762, 373 S.E.2d 345, 349 (1988). Typically, "the law of the state in which a contract is made and to be performed governs

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<sup>2</sup> Bituminous does not contest the reasonableness of the amount of attorney fees and costs awarded.

the construction of a contract when it is involved in litigation in the courts of this State.”

Michigan Nat. Bank v. Mattingly, 158 W.Va. 621, 212 S.E.2d 754, (1975) at Syl. pt. 1. In

Liberty Mut. Co. v. Triangle Industries, Inc., 182 W.Va. 580, 390 S.E.2d 562 (1990), the Court

held:

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.

Id. at 565.

In the instant case, the Circuit Court correctly applied the law of West Virginia in interpreting whether the indemnification provision contained in the Subcontractor Agreement constituted an “insured contract.” (See Order entered 10/05/07 at Page 6). Specifically, the Subcontractor Agreement between Davis & Burton and RCDI which contains the indemnity provision at issue in this litigation was entered into in the State of West Virginia. It involved a general contractor incorporated in the State of West Virginia and located in Parkersburg, West Virginia. The plaintiffs in the underlying action were all property owners in Lewisburg, West Virginia. The subcontract pertains specifically to a project in Lewisburg, West Virginia. As is evident from the brief of Bituminous, the construction and interpretation of the terms of the indemnity agreement itself are at issue in this appeal. Further, although the insurance policy was issued in the State of Kentucky and the subcontractor does business and is incorporated in the State of Kentucky, the overwhelming contacts, including the work that is the subject of the underlying action, occurred in West Virginia. As such, the significant contacts with West

Virginia would also require application of West Virginia law. Further, as the Circuit Court recognized in construing the Certificate Of Insurance, public policy requires the application of West Virginia law. (See Court Opinion at Page 7).<sup>3</sup>

Davis & Burton's Subcontractor Agreement to construct the storm water drainage system for the Wal-Mart shopping center required it to name RCDI as an Additional Insured under its policy of insurance with Bituminous. Davis & Burton obtained a Certificate Of Insurance from Bituminous' insurance agent, the Putnam Insurance Agency, which identified RCDI as an Additional Insured under the Bituminous policy providing, in part, \$2,000,000.00 in completed operations' coverage. The Subcontractor Agreement between RCDI and Davis & Burton also contained an indemnification agreement, which provided:

4.6.1 To the fullest extent permitted by law, the Subcontractor [Davis & Burton] shall indemnify and hold harmless the Owner, Contractor [RCDI], Architect, Architect's consultants, and agents and employees of any of them from and against 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**, provided that 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) including loss of use resulting therefrom, but only to the extent caused in whole or in part by 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.** .

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<sup>3</sup> It does not appear that any Appellate Court in the State of Kentucky has ever addressed "the insured contract" holding of Marlin, which requires the insured's indemnitor to assume the defense of the indemnitee. The Kentucky Court of Appeals in Western Leasing, Inc. v. Acordia of Kentucky, Inc., 2010 W.L. 1814959 (Ky.App. May 07, 2010), cited Marlin with approval in holding that the issuance of a Certificate of Insurance gives rise to a negligent misrepresentation claim. (See Cross Assignment Of Error at Page 40).

(Emphasis added). (See Subcontractor Agreement attached as Exhibit C to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment).

The Bituminous policy insuring Davis & Burton provides contractual liability coverage for insured contracts:

\* \* \*

**2. Exclusions**

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:

\* \* \*

(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 this insurance applies are alleged.

(See Endorsement CG00430592 to Bituminous' CGL Policy No. CLP2160263 collectively attached as Exhibit K to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment).

"Insured Contract" is defined under the policy, in part, as follows:

8. "Insured contract" means:

\* \* \*

f. 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 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. . . .

(See Page 8 of Policy attached as Exhibit K to RCIDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment).

West Virginia law favors and enforces indemnity arrangements as "a perfectly proper" method of allocating risks to certain parties and for insurance purposes. Riggle v. Allied Chemical Corp., 180 W.Va. 561, 378 S.E.2d 282, 289 (1989); see also, Marlin v. Wetzel County Bd. of Educ., 212 W.Va. 215, 569 S.E.2d 462, 468 (2002) (indemnification and hold-harmless agreements are a means of shifting the financial consequences of a loss). "Indemnity clauses serve our goals of encouraging compromise and settlement by reducing settlement discussions to bilateral discussions, by encouraging adequate levels of insurance and by allowing parties to a contract to allocate among themselves the burden of defending claims." Dalton v. Childress Service Corp., 189 W.Va. 428, 432 S.E.2d 98, 101 (1993). Thus, express contracts of indemnity, even resulting in an indemnification against the indemnitee's own negligence, do not contravene public policy and must be enforced. Sellers v. Owens-Illinois Glass Co., 156 W.Va. 87, 191 S.E.2d 166, at Syl. pt. 1 (1972).

In Marlin, this Court recognized that the phrase "liability assumed by the insured under any contract" in an insurance policy, "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." Id. 569 S.E.2d at 469. This is exactly what RCDI and Davis & Burton intended by Davis & Burton agreeing to indemnify RCDI and agreeing to add RCDI as an additional insured on its policy with Bituminous. Davis & Burton assumed the "tort liability of another party," here RCDI, agreeing to indemnify and save RCDI harmless from and against "claims, damages, losses and expenses, including but not limited to attorney fees, arising out of or resulting from the performance of the subcontractor's work . . ." Thus, the indemnity provision clearly qualifies as an "insured contract."

In Marlin, the general liability policy issued to Bill Rich Construction insured "any sums which the insured was legally required to pay as damages because of bodily injury or property damage," and the contractual liability policy exclusion likewise contained an exception for "liability assumed by the insured under contract." The indemnification provision in the construction contract required Bill Rich to "indemnify and hold harmless" the indemnitee, there the Board of Education, "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 . . ." Marlin, 569 S.E.2d at 473 N.2. Like RCDI, the Board was also to be added as an Additional Insured on the contractor's policy. 569 S.E.2d at 465.

This Court ruled in Marlin that the construction contract between the Board of Education and Bill Rich Construction was an "insured contract." As such, the insurance policy insured against sums which the construction company assumed under the indemnification agreement entitling the Board to coverage under the policy. In addition, the Court ruled that, because the

contract shifted the legal responsibility for tort liability from the Board to Bill Rich, the Board stood in the same shoes as the insured and could “directly seek coverage under the policy” issued by Bill Rich’s insurer. S.E.2d at 469. This Court held that Bill Rich’s insurer was obligated to provide a defense to the Board of Education. Id.

Under West Virginia law, “[w]hen a party has an insured contract, that party stands in the same shoes as the insured for coverage purposes.” Consolidation Coal Co. v. Boston Old Colony Ins. Co., 203 W.Va. 385, 508 S.E.2d 102 (1998) at Syl. pt. 7. Consequently, RCDI, as the indemnitee under the contract with Davis & Burton, “stood in the shoes” of Davis & Burton and was entitled to a defense under Davis & Burton’s policy with Bituminous. Moreover, as Davis & Burton was required and, in fact, attempted to have RCDI named as an Additional Insured, it was clearly the intent of the contracting parties to afford coverage to RCDI under the Bituminous policy. The primary object of contract interpretation is to “ascertain and give effect to the intention of the parties.” Sellers v. Owens-Illinois Glass Co., 156 W.Va. 87, 92-93, 191 S.E.2d 166, 169 (1972); See also, 3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist., 174 S.W.3d 440, 448 (Ky., 2005).

In its brief, Bituminous contends that the indemnity provision between Davis & Burton and RCDI is not an “insured contract” arguing it is substantially different than the provision in Marlin. Bituminous' argument should be rejected based both on public policy grounds and in order to give effect to the contracting parties’ intent to transfer risk.

The indemnity provision between Davis & Burton and RCDI provides:

4.6.1 To the fullest extent permitted by law, the Subcontractor [Davis and Burton] shall indemnify and hold harmless the Owner, Contractor [RCDI], Architect, Architect's consultants, and agents and employees of

any of them from and against 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**, provided that 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) including loss of use resulting therefrom, but only to the extent caused in whole or in part by 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. . . .**

(Emphasis added).

The indemnification provision in Marlin provides:

4.18.1 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.

(Emphasis added). Marlin, 569 S.E.2d at N.2.

The two indemnification provisions are substantively indistinguishable in their effect on the insurer's duty to defend the indemnitee. Bituminous points to the language ". . . but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor . . . ," contained in the Davis & Burton contract as distinguishing it from Marlin, and argues that this provision limits Bituminous' indemnity obligation to only that damage caused by Davis &

Burton's negligence. Bituminous' argument mischaracterizes the issue on appeal as one of indemnification for damages, as opposed to the real issue of whether there existed a duty to defend. Based upon the allegations contained in the underlying Complaint, for five (5) years there existed the potential that RCDI could be found liable for the alleged negligent construction of the storm water drainage system. Davis & Burton subcontracted for and performed the construction of the storm water drainage system. Therefore, the allegations of negligent construction would have necessarily arisen from the work performed by Davis & Burton. Under the indemnity agreement, a judgment for damages could potentially have arisen out of the work of the subcontractor and, thus, was within the scope of the indemnification agreement. It is RCDI's potential liability that must be the focus when ascertaining whether Bituminous had a duty to defend.

[I]f part of the claims against an insured fall within the coverage of a liability insurance policy and part do not, the insurer must defend all of the claims, although it might eventually be required to pay only some of the claims. Second, an insured's right to a defense will not be foreclosed unless such a result is inescapably necessary.

Horace Mann Ins. Co. v. Leeber, 180 W.Va. 375, 376 S.E.2d 581, 584 (1988) (quoting Donnelly v. Transportation Insurance Co., 589 F.2d 761, 765 (C.A.Va. 1978)).

The cases cited by Bituminous from other jurisdictions which construed indemnity agreements containing the "only to the extent" language did not involve the issue of the insurer's duty to defend. Those cases involved whether the insurer or the indemnitor was required to indemnify for damages that were not caused by the negligence of the indemnitor. The jurisdictions cited by Bituminous do not impose a duty to defend upon the indemnitor's insurer; thus, the only issue addressed by those courts was the scope of the ultimate indemnity obligation

and whether the indemnitor's insurer had to indemnify for damages caused by the negligence of the indemnitee. Unlike those jurisdictions cited by Bituminous, West Virginia law does impose a duty to defend on the indemnitor's insurer. (See Marlin v. Wetzel County Bd. of Educ., 212 W.Va. 215, 569 S.E.2d 462 (2002); See also, Consolidation Coal Co. v. Boston Old Colony Ins. Co., 203 W.Va. 385, 508 S.E.2d 102 (1998)). Under Bituminous' analysis, there would never be a duty to defend on the part of the indemnitor's insurer since the relative fault of the parties is not determined until the end of the case. This would result in both the indemnitor and the indemnitee providing for their own defenses and litigating their respective degrees of fault. This runs counter to the public policy in West Virginia which recognizes that indemnity clauses encourage compromise and settlement by encouraging adequate levels of insurance, permitting contracting parties to agree to allocate the burden of defending claims and reducing settlement discussions to bilateral discussions. (See Dalton, 432 S.E.2d at 101).

In the instant case, the Circuit Court properly found that there was a duty to defend as the allegations against RCDI were predicated, in part, upon the alleged negligent construction of the storm water drainage system, construction which was performed by Davis & Burton. Even though both Davis & Burton and RCDI were dismissed from the case on summary judgment, for five (5) years RCDI was forced to defend itself, even though the allegations against it arose from the work of Davis & Burton and, thus, were within the scope of the indemnification provision. (See Order entered on 10/05/07 at Page 10). West Virginia is not alone in imposing a duty upon an indemnitor's insurer to defend an indemnitee. See Krieger v. Wilson Corp., 139 N.M. 274,

131 P.3d 661 (N.M.App. 2005); York v. Vulcan Materials Co., 63 S.W.3d 384 (Tenn.Ct.App., 2001).

Bituminous has also failed to distinguish the Davis & Burton indemnification provision from that in Marlin, which similarly sought to limit Bill Rich's indemnity obligation to those damages "... caused in whole or in part by any negligent act or omission of the ... subcontractor ... ." The Circuit Court properly found that the Marlin indemnity provision:

... did not require that it [indemnity provision] shift all the tort liability, or that the liability be proven. Rather, it found an insured contract where the liability was merely alleged and where some of that liability could have shifted from one party to the other. The Court [Marlin] then held that coverage extended to the Board directly as if the Board "[stood] in the same shoes" as the general contractor.

(See Circuit Court Order Denying Motion For Reconsideration, dated May 15, 2008).

Under Bituminous' analysis, the indemnity provision in Marlin would not constitute an "Insured Contract" and there would not have been a duty on the part of the contractor's insurer in Marlin to defend the Wetzel Board of Education since the indemnity obligation was limited to damages "caused in whole or in part" by the contractor. Acceptance of Bituminous' argument would require the reversal of this Court's decision both in Marlin and in Consolidation Coal Co. v. Boston Old Colony Ins. Co., 203 W.Va. 385, 508 S.E.2d 102 (1998). Rather, the proper construction, adopted by the Circuit Court, is that the indemnification provision in the instant case purporting to limit the indemnity obligation to damages caused by the indemnitor's negligence, does not eliminate the duty to defend so long as there are allegations of damages arising out of the indemnitor's work.

Further, adopting the construction of the indemnity provision suggested by Bituminous would render meaningless the indemnification agreement between RCDI and Davis & Burton. Specifically, West Virginia law recognizes comparative contribution among joint tortfeasors. See Sitzes v. Anchor Motor Freight, Inc., 169 W.Va. 698, 289 S.E.2d 679, at Syl. pt. 3 (1982). Under Bituminous' argument, the indemnity provision would simply provide for comparative contribution between RCDI and Davis & Burton once the respective negligence of each party to the indemnification agreement is determined. This result would provide nothing more than comparative contribution already recognized under West Virginia law and would effectively nullify the indemnity provision. Such a construction of the indemnity provision is contrary to the clear intent of Davis & Burton and RCDI to shift the risk of loss from RCDI to Davis & Burton's insurer for claims arising out of the subcontractor's work.

Further, both the Marlin and the Davis & Burton indemnity provisions provide for indemnification for the indemnitee's own negligence by inclusion of the provision that indemnity will exist "regardless of whether or not . . . caused in part by a party indemnified hereunder . . . ." Where, as exists in the instant case, a party contractually agrees to indemnify with respect to damages arising out of its negligent acts or omissions, the indemnification obligation is triggered even if the indemnitee has been adjudicated negligent. See, e.g., Dalton v. Childress Service Corp., 189 W.Va. 428, 432 S.E.2d 98, 100-102 (1993) (Indemnitor agreed to indemnify against any and all claim "arising out of or attributed, directly to Processors' performance under this agreement"); Valloric v. Dravo Corp., 178 W.Va. 14, 357 S.E.2d 207, 209, 214 (1987) (Indemnitor agreed to indemnify "against any and all claims . . . on account of property damage

or personal injury (including death), arising out of or in connection with the work done or to be performed and in connection with or arising out of the acts or omissions of [indemnitor's] employees.”).

RCDI was entitled to a defense under Bituminous' policy even if it had ultimately been found to have been negligent. Dalton, 432 S.E.2d at 101. In Dalton, the indemnitee was only found 10% negligent, but the Supreme Court of Appeals stated that even if the indemnitee had been found 100% negligent, the insurance provisions of the contract made it clear that the “indemnity” clause was really only an agreement to purchase insurance. This Court held that public policy requires indemnity agreements be enforced unless they “indemnify against the sole negligence of the indemnitee without an appropriate insurance fund, bought pursuant to the contract, for the expressed purpose of protecting all concerned.” 432 S.E.2d at 101.

Davis & Burton's Subcontractor Agreement furthered the public policy outlined in Dalton – that is, the required purchase of insurance. The Subcontractor Agreement obligated Davis & Burton to procure liability insurance, have RCDI named as an Additional Insured under the policy, and indemnify RCDI for damages arising from Davis & Burton's performance of the subcontract. The allocation of risk and defense costs set forth in this subcontract for insurance purposes encourages compromise and must be enforced as written. Dalton, 432 S.E.2d at 101; VanKirk v. Green Const. Co., 195 W.Va. 714, 466 S.E.2d 782 (1995) at Syl. pts. 4 & 5; Riggle v. Allied Chemical Corp., 180 W.Va. 561, 378 S.E.2d 282, 289 (1989); see also Marlin, 569 S.E.2d at 468.

The express terms of the indemnification agreement between RCDI and Davis & Burton provides for indemnification from and against damages, including attorney fees, "arising out of or resulting from the performance of the subcontractor's work" and also provides that the indemnification extends to the "negligent acts or omissions of the subcontractor . . . regardless of whether or not . . . caused in part by a party indemnified hereunder . . . ." Given the agreement to have RCDI added as an Additional Insured under the Bituminous policy and the issuance of a Certificate Of Insurance reflecting as much, it was clearly the intent of the parties that RCDI's tort liability arising from Davis & Burton's construction of the Wal-Mart storm water drainage system be shifted to Bituminous. Therefore, the Circuit Court correctly found the indemnification provision does assume the "tort liability" of RCDI and constitutes an insured contract giving rise to Bituminous' duty to defend RCDI.

**B. THE CIRCUIT COURT PROPERLY FOUND THAT BITUMINOUS HAD A DUTY TO DEFEND RCDI BASED UPON THE UNDERLYING COMPLAINT'S ALLEGATIONS OF NEGLIGENCE ARISING FROM THE CONSTRUCTION OF THE STORM WATER DRAINAGE SYSTEM.**

Bituminous argues that the Circuit Court's Order granting Davis & Burton summary judgment finding that it was not negligent in the construction of the storm water drainage system, eliminates any legal obligation for Bituminous to indemnify RCDI. Bituminous' argument again misstates the issue. The issue is whether Bituminous had a duty to defend RCDI, not whether Bituminous had a duty to indemnify RCDI for any damage award.

As 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. There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage. Furthermore, it is generally

recognized that the duty to defend an insured may be broader than the obligation to pay under a particular policy.

Aetna Cas. & Sur. Co. v. Pitrolo, 176 W.Va. 190, 194, 342 S.E.2d 156, 160 (1986).

Both Davis & Burton and RCDI were granted summary judgment dismissing them from the underlying action. The only issue remaining is whether Bituminous had a duty to defend RCDI requiring it to reimburse the attorney fees and costs incurred in defending RCDI for five (5) years.

In its Order entered October 5, 2007, the Circuit Court recognized that the claims asserted in the underlying action against RCDI arose, in part, from the alleged negligent construction of storm water drainage system:

This Court's finding that Davis & Burton was not negligent clearly eliminated Davis & Burton's duty to indemnify RCDI per the language in their insured contract. However, this Court did not make this finding until its Order of June 14, 2006. The original complaint in this matter was filed on October 30, 2001. Thus, for nearly five years Davis & Burton's level of negligence in this matter was undetermined. What was known is that Plaintiffs' land was allegedly being inundated with water coming from the storm water management system that Davis & Burton constructed. The Complaint and the various amended complaints clearly alleged damage arising out of or resulting from Davis & Burton's construction of the storm water management system.

(See Order entered October 5, 2007 at Page 10).

Thus, for purposes of determining whether Bituminous had a duty to defend RCDI, the allegations contained in the underlying Complaint control. See Aetna 342 S.E.2d at 160. In the instant case, there are allegations that RCDI negligently constructed the storm water drainage

system.<sup>4</sup> As Davis & Burton actually performed the construction under the subcontract, it was brought in as a third-party defendant by RCDI. Once RCDI tendered its defense, Bituminous should have assumed the defense of RCDI based upon the negligent construction allegations. Bituminous refused to do so stating that RCDI was never added as an Additional Insured under its policy. (See Bituminous' denial letters attached as Exhibit F to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment).

Bituminous cites to this Court's decision in Oakes v. Monongahela Power Co., 158 W.Va. 18, 207 S.E.2d 191 (1974), to support its argument that before the indemnification liability on the part of Davis & Burton can attach for RCDI's attorney fees incurred in the defense of the underlying action, Davis & Burton would have to have been found negligent in some way. (See Appellant Brief at Page 28). Oakes is not applicable in the instant matter. Oakes was decided more than 28 years prior to Marlin and did not involve the issue of whether the indemnitor's insurer must defend the indemnitee. Oakes' holding was limited to the indemnitor's duty to indemnify for damages. Further, Bituminous cites to this Court's decision in Valloric v. Dravo Corp., 178 W.Va. 14, 357 S.E.2d 207 (1987), indicating that Valloric does

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<sup>4</sup> The allegations in the underlying Complaint, filed in December 2001, included, in part:

24. Upon the construction and completion of the Walmart Supercenter project, the plans that had been developed for handling the storm water discharge from the Walmart Supercenter site were not implemented (nor were the water containment/management structures constructed as reflected on said plans) by the defendants Walmart and RCDI.

27. Irrespective of the knowledge of the defendants concerning the valuable commercial real estate owned by the plaintiffs, none of the defendants undertook action to complete or compel the completion of the stormwater runoff plans as designed and presented to public bodies for approval, but rather allowed the excessive storm water runoff from the Walmart Supercenter site to inundate the valuable real estate of the plaintiffs.

36. The acts of all of the defendants were negligent.

54. The defendants Walmart and RCDI, through plans and drawings submitted to government agencies, advised government agencies that certain structures and certain mechanisms would be put in place in an effort to manage the excessive storm water runoff from the Walmart Supercenter site and areas to the north of that site and then wholly failed to implement portions of the plans and structures and wholly failed to construct other portions of the structures as designed.

not impose a duty to defend upon the indemnitor. Valloric did not involve the issue of whether the indemnitor's insurer had a duty to defend. However, Valloric is relevant insofar as it demonstrates the public policy of this State to place responsibility for the costs of defense upon the indemnitor when the allegations of a complaint are within the scope of the indemnity agreement. Specifically, the Court held:

Ordinarily, if an indemnitor does not assume control of the indemnitee's defense, he will be held liable for the attorney's fees and costs incurred by the indemnitee in the defense of the original action. This rule is predicated on the fact that the indemnitor has originally been notified of the underlying action, has been requested to assume the defense, and has refused to do so.

Valloric, 357 S.E.2d at Syl. pt. 5; State ex rel. Vapor Corp. v. Narick, 173 W.Va. 770, 774-75, 320 S.E.2d 345, 350 (1984); Harris v. Allstate Ins. Co., 208 W.Va. 359, 362, 540 S.E.2d 576, 579 (2000).

The allegations against RCDI included negligent construction of the storm water drainage system and, therefore, clearly arose out of work which was performed by Davis & Burton. Thus, the claim against RCDI was within the scope of the indemnity agreement placing responsibility for defense fees and costs upon Davis & Burton and, thus, its insurer, Bituminous.

**C. THE CIRCUIT COURT PROPERLY APPLIED THE TERMS OF THE BITUMINOUS POLICY INSURING DAVIS & BURTON AND FOUND THAT RCDI WAS ENTITLED TO A DEFENSE AS IT "STOOD IN THE SHOES" OF DAVIS & BURTON FOR PURPOSES OF THE DEFENSE OWED BY BITUMINOUS.**

Bituminous argues that the language of the Insuring Agreement under the Bituminous policy insuring Davis & Burton was changed by endorsement and that this change eliminated any duty to defend on the part of Bituminous. This argument ignores the fact that Davis & Burton was contractually obligated to have RCDI added as an additional insured on its policy with

Bituminous and to indemnify RCDI for any damages, including attorney fees and costs incurred by RCDI in defending any claims arising out of Davis & Burton's work. To accept Bituminous' argument would undermine the intent between the contracting parties, to-wit, to shift legal responsibility for defending claims arising out of Davis & Burton's work to Davis & Burton's insurer, Bituminous.

The contractual liability coverage expressly provides for the recovery of "reasonable attorney fees and necessary litigation expenses incurred by or for a party **other than the insured.**" In the instant case, RCDI, as the indemnitee, is that "party other than the insured" to whom Davis & Burton had a duty to assume their defense or to reimburse their attorney fees and costs. "When a party has an insured contract that party stands in the same shoes as the insured for coverage purposes." See Consolidation Coal Co. v. Boston Old Colony Ins. Co., 203 W.Va. 385, 508 S.E.2d 102 (1998) at Syl. pt. 7. The "insured contract" language contained in the Bituminous policy read in conjunction with the indemnification provision between RCDI and Davis & Burton shifts the legal responsibility for tort liability and resulting attorney fees and costs incurred in defending claims from RCDI to the insurer for Davis & Burton, Bituminous. Marlin held that the "insured contract" language shifts legal responsibility for tort liability from the indemnitee to the indemnitor. Id. 569 S.E.2d at 469.

In its brief, Bituminous recognizes the practical sense of imposition of a duty to defend upon an indemnitor under the Marlin decision. (See Bituminous brief at Page 30). However, Bituminous makes the untenable argument that the "stand in the shoes" analysis should only apply where the policy clearly covers the insured for indemnity liability, and where the

indemnatee is clearly entitled to indemnity . . . .” (See Bituminous brief at Page 30). This argument ignores the basic principle of insurance law that the duty to defend is broader than the duty to indemnify. Bituminous’ alteration of the “stand in the shoes” doctrine would effectively eliminate any duty to defend on the part of the indemnitor’s insurer and would result in the overturning of the Marlin decision.

Davis & Burton agreed to indemnify RCDI, including assuming RCDI’s reasonable attorney fees and costs incurred in litigation, by virtue of the express language contained in the indemnification provision between these two entities. As there was an allegation of negligent construction made against RCDI arising out of Davis & Burton’s work, Bituminous is now responsible for the defense fees and costs incurred on behalf of RCDI, as well as the fees and costs incurred in pursuing this declaratory judgment action.

**D. THE CIRCUIT COURT PROPERLY HELD THAT IT IS THE SOLE OBLIGATION OF BITUMINOUS TO ASSUME THE DEFENSE COST OF RCDI IN DEFENDING THE UNDERLYING CLAIMS.**

Bituminous argues that if coverage is afforded RCDI under its policy, the “other insurance” provisions of Bituminous’ and USF&G’s policy insuring RCDI should apply requiring each policy to share equally in the defense costs. Such a result would be contrary to the intent of the contracting parties and is not supported by the majority of jurisdictions addressing that issue. The Fourth Circuit and other jurisdictions have held that a contract with an indemnification clause controls the allocation of insurance not the “other insurance” clause. The Fourth Circuit Court of Appeals stated:

In particular, the general rule, as stated by a ‘leading commentator,’ is that ‘an 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.’

See St. Paul Fire & Marine Ins. Co. v. American Intern. Specialty Lines Ins. Co., 365 F.3d 263, 270-271 (C.A.4 (Va.), 2004). See also Travelers Property Cas. Co. of America v. Liberty Mut. Ins. Co., 444 F.3d 217, 224 (C.A.4 (Md.), 2006) (reaffirming its previous statement that an indemnity agreement between insureds or a contract with an indemnification clause may shift the entire loss to a particular insurer regardless of the existence of an “other insurance” clause).

In a case arising out of the Fifth Circuit, a subcontractor’s employee sued for injuries that were in the scope of an indemnity agreement between the subcontractor and the contractor. American Indem. Lloyds v. Travelers Property & Cas. Ins. Co., 335 F.3d 429, 431-432 (C.A.5 (Tex.), 2003). The subcontractor was an insured under a policy which named the contractor as an additional insured. The Court examined the “other insurance” clause and agreed that under the general rule, where two liability insurance policies issued by different insurers provide primary coverage to the same insured, one insurer is entitled to recover from the other for the excess paid. Id. at 435. However, the Fifth Circuit went on to state that the general rule is subject to an exception routinely applied by courts in situations such as that which occur in the construction industry. “[W]here the policy of the insurer seeking to invoke the ‘other insurance’ clauses also covers another insured who is liable to indemnify the insured in the policy of the other insurer, the indemnity agreement may shift the entire loss notwithstanding the ‘other insurance’ clause in its policy.” Id. at 436. The Fifth Circuit examined cases from other jurisdictions with similar facts and found their analysis to be consistent with its own. See Wal-Mart Stores, Inc. v. RLI Ins. Co., 292 F.3d 583, 588-594 (C.A.8 (Ark.), 2002); Aetna Ins. Co. v. Fidelity & Cas. Co. of New York, 483

F.2d 471 (C.A.5 1973). The Fifth Circuit concluded that the indemnity agreement had controlling effect over any “other insurance” clause. *Id.* Courts focus on indemnity provisions as opposed to the “other insurance” provisions concerning the allocation of risk in order to give effect to the parties’ contractual expectations. See St. Paul Fire & Marine Ins. Co. v. American Intern. Specialty Lines Ins. Co., 365 F.3d at 271.

In the instant case, Davis & Burton and RCDI intended the risk to be allocated to the policy insuring Davis & Burton through Bituminous. This intent is evidenced by the parties’ Subcontractor Agreement, which contains an indemnification provision and an additional insured requirement. This Court should give effect to the parties’ contractual expectations and find that the indemnification clause, not the “other insurance” provision, governs the allocation of defense fees and costs.

Bituminous also misconstrues the competing “other insurance” clauses of both Bituminous’ policy and USF&G’s policy. Specifically, both parties contain the same “other insurance” clauses except USF&G’s policy contains an additional provision which makes it excess to Bituminous. Specifically, sub-section (4) to sub-paragraph (b) of USF&G’s “excess insurance” provision quoted in Bituminous’ brief provides:

- (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.

RCDI, by virtue of the additional insured certificate and the indemnity provision, did have other insurance which was to be applied on a primary basis for work or operations performed on

their behalf by Davis & Burton and which would have covered acts and omissions of RCDI alleged against it pertaining to negligent construction. Thus, subsection (4) of USF&G's "excess insurance" provision is implicated and would require USF&G's policy to be excess.

Therefore, RCDI respectfully requests this Court find that the indemnity agreement controls the allocation of the defense fees and costs notwithstanding the existence of an "other insurance" clause in the policy. Alternatively, this Court may find that the "other insurance" clause under USF&G's policy causes it to be excess over that provided by Bituminous.

**V. CROSS ASSIGNMENT OF ERROR BY RESOURCE CONSULTANTS AND DEVELOPERS, INC.**

**A. THE CIRCUIT COURT ERRED IN FINDING THAT THERE WAS NO EVIDENCE OF DETRIMENTAL RELIANCE BY RCDI ON THE CERTIFICATE OF INSURANCE ISSUED BY BITUMINOUS' AGENT.**

The Circuit Court of Greenbrier County's Order entered on October 5, 2007 granting in part and denying in part RCDI's Motion for Summary Judgment denied relief to RCDI predicated upon RCDI's claimed detrimental reliance upon a Certificate Of Insurance issued by Bituminous' agent identifying RCDI as an Additional Insured. In denying RCDI's Motion for Summary Judgment on this ground, the Court erroneously found that RCDI did not offer proof of detrimental reliance upon the Certificate Of Insurance necessary under both Kentucky and West Virginia law to invoke coverage and a defense under the Certificate. (See October 5, 2007 Order at Page 8).

The Circuit Court correctly found that both Kentucky and West Virginia law requires an insurance company to provide insurance represented in a Certificate if the certificate holder detrimentally relies upon such representation. This Cross Assignment of error will first address the propriety of the Circuit Court's initial ruling that both Kentucky and West Virginia law recognize

imposing liability on an insurer based upon representations in the Certificate Of Insurance. The second part will address the Circuit Court's erroneous finding that the detrimental reliance element was missing from RCDI's claim predicated on the Certificate Of Insurance.

1. **COVERAGE ARISING FROM A CERTIFICATE OF INSURANCE.**

Under West Virginia Choice of Law principals, the West Virginia Supreme Court has held:

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.

Liberty Mut. Ins. Co. v. Triangle Industries, Inc., 182 W.Va. 580, 390 S.E.2d 562 (1990).

The Circuit Court found in the present case that the insurance contract was made in Kentucky, but was to be performed in West Virginia and that Kentucky law would govern unless it violated the public policy of West Virginia. (See October 5, 2007 Order at Page 5). The Court found that both Kentucky and West Virginia law hold an insurer liable for its agent's representations made in the Certificate Of Insurance and, alternatively, if Kentucky's did not, that as a matter of public policy, West Virginia law should control. (See October 5, 2007 Order at Page 7).

There is no conflict of law issue if the law in the competing jurisdictions does not conflict. In the instant case, both West Virginia and Kentucky recognize representations made in the Certificate Of Insurance are enforceable. See Marlin v. Wetzel County Bd. of Educ., 212 W.Va. 215, 569 S.E.2d 462 (2002); Western Leasing, Inc. v. Acordia of Kentucky, Inc., 2010 W.L. 1814959 (Ky.App. May 07, 2010).

The Subcontractor Agreement between RCDI and Davis & Burton required Davis & Burton to obtain insurance in the amount of \$2,000,000.00 per occurrence and to name RCDI and Wal-Mart as an additional insured. Pursuant to Paragraph 13.1 of the Subcontractor Agreement, Davis & Burton was required to file with RCDI a Certificate Of Insurance showing RCDI was named as an additional insured. A Certificate Of Insurance was issued on October 19, 1994 by the Putman Agency, Inc. to the Certificate Holder, RCDI. (See Certificate of Insurance, dated 10/19/94, attached as Exhibit D to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment). This Certificate Of Insurance indicates the Bituminous policy would afford \$2,000,000.00 in completed operations coverage to RCDI.

In granting Davis & Burton's Motion for Summary Judgment in the underlying action, the Circuit Court found that Davis & Burton complied with its contractual duties by securing the Certificate Of Insurance for RCDI. (See June 14, 2006 Order at Page 12). Bituminous asserts that RCDI was not added as an additional insured under its policy because it was not provided a copy of the at-issue Certificate Of Insurance by its agent until after the underlying litigation was commenced. The Putman Agency's failure to notify Bituminous to add RCDI as an additional insured does not obviate the duty imposed upon Bituminous to defend RCDI in the underlying action.

The Putman Agency is a Kentucky insurance agency that issued the Certificate Of Insurance to RCDI, a West Virginia corporation, for a project that Davis & Burton was performing for RCDI in Lewisburg, West Virginia. At the time of the issuance of the Certificate Of Insurance, the Putnam Agency was under an Agency-Company Agreement with Bituminous

Casualty Corporation. (See Agency-Company Agreement attached as Exhibit I to RCDI's Memorandum Of Law In Support Of Its Motion For Summary Judgment). The Agency-Company Agreement provided:

The Company and the Agent agree as follows:

1. AUTHORITY OF AGENT

The Agent is an independent contractor, not an employee of the Company; thus, he has exclusive control of his time, the conduct of his agency and the selection of insurers he will represent. Subject to requirements imposed by law and the terms of this agreement, **the Agent is authorized on behalf of the Company to:**

- a. Solicit, receive and transmit applications to the Company, and **bind and execute insurance contracts (including certificates relating thereto)**, and fidelity bonds but only when specifically authorized by the Company, for the classes of insurance, and fidelity bonds, which the Company lawfully has the authority to write and for which a commission is specified in the attached Casualty Insurance Commission Schedule or Property Insurance Commission Schedule of this agreement, subject to the Company's underwriting program. . . .

(Emphasis added). (RCDI's Motion for Summary Judgment at Exhibit I).

The corporate designee<sup>5</sup> of Bituminous testified that the Putman Agency was authorized to write commercial lines of liability coverage and to bind coverage on behalf of Bituminous:

Q. Mr. Jeschke with regard to the authority of the Putman Agency in particular in this Agency Agreement, wouldn't they have authority to issue a Certificate of Insurance which is Exhibit 4 to Davis & Burton and a Certificate holder RCDI.

A. Yes and No.

Q. Okay, explain.

A. Yes they would have had the opportunity to issue the Certificate. For a short period of time they would have been able

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<sup>5</sup> Jonathan R. Jeschke was designated as the West Virginia Rules of Civil Procedure 30(b)(7) representative of Bituminous who is a Vice President and underwriter for Bituminous Corporation and the head of agency management between Bituminous and its agents.

to bind coverage under binding authority. However, it's their [Putman Agency] responsibility to notify the company within five days of them binding us on a risk or an exposure for us to do the proper underwriting to see if we would agree with staying on that coverage.

(RCDI's Motion for Summary Judgment at Exhibit H, Page 15).

\* \* \*

It was within the scope of the Company-Agency Agreement and the authority of the Putman Insurance Agency to extend additional insured status to RCDI:

Q. With regard to the authority of the Putman Insurance Agency to extend additional insured status to RCDI is there authority for them to do that.

A. Yes there is.

Q. What is the basis for that authority?

A. Under Section I Authority of Agent – Company Agreement.

Q. Again is that authority of the Putman Agency to extend additional insured status subject to any conditions.

A. Yes it is. Again, the classes of business for which the company is licensed the company underwriting program and again that would only be for a five day period without notification of the company.

(RCDI's Motion for Summary Judgment at Exhibit H, Pages 17 & 18).

There does not exist any conflict of law issues presented in the application of either Kentucky or West Virginia law on the substantive issues involved in this case since both West Virginia and Kentucky law recognize that an insurer is liable for the acts of its agent. See Jarvis v. Modern Woodmen of America, 185 W.Va. 305, 406 S.E.2d 736, 740 (1991); Aliff v. Atlas Assur. Co., 102 W.Va. 638, 135 S.E. 903 (1926); Kincaid v. Equitable Life Assur. Soc. of U.S., 116 W.Va. 672, 183 S.E. 40 (1935); Pan-American Life Ins. Co. v. Roethke, 30 S.W.3d 128 (Ky. 2000); Continental Cas. Co. v. Linn, 226 Ky. 328, 10 S.W.2d 1079 (Ky.App. 1928); Breeding v.

Massachusetts Indem. and Life Ins. Co., 633 S.W.2d 717 (Ky. 1982); In re Miller, 267 B.R. 785 (Bkr. W.D.Ky. 2000); and Cincinnati Ins. Co. v. Clary, 435 S.W.2d 88 (Ky. 1968). Pan-American Life Ins. Co. v. Roethke, 30 S.W.3d 128 (Ky. 2000), involved an action against an insurer predicated upon an agent's misrepresentation of the coverage afforded under a group health policy. The Kentucky Supreme Court recognized that the agent was acting within the scope of his authority when he allegedly misrepresented the scope of coverage. The Court found that an insurer is liable, "when the agent acts within the scope of his authority and the insured reasonably relies upon that act and that reliance constitutes the cause of insured's damages."

The West Virginia Supreme Court in Marlin v. Wetzel County Bd. of Educ., 212 W.Va. 215, 569 S.E.2d 462 (2002), held that a "certificate of insurance is an insurance company's written representation that a policy holder has certain insurance coverage in effect at the time a certificate is issued." The Marlin Court held, "the insurance company may be estopped from later denying the existence of that coverage when the policy holder or the recipient of the certificate has reasonably relied to their detriment upon a misrepresentation in the certificate." Id. at Syl. pt. 9.

Bituminous makes the same argument asserted by the insurer in Marlin that it had no knowledge of the certificate's existence and, therefore, could not modify the actual policy to include coverage for RCDI. See Marlin, 569 S.E.2d at 469, 470. This Court recognized in Marlin:

A problem with certificates of insurance, which appears to be common in indemnification contracts such as that in the instant case, is that insurance agents often issue certificates of insurance detailing a particular form of coverage, but then fail to notify the insurance company of the need to alter or amend the coverage to match the certificate. The result is that the insurance company—like in the instant case—refuses to provide coverage. . . .

Marlin, 569 S.E.2d at 470, 212 W.Va. at 223.

The Marlin court recognized the general principle that the doctrine of estoppel “may not be used to create insurance coverage, or increase coverage beyond that provided by the policy.” Id. at 472. Potesta v. U.S. Fidelity & Guar. Co., 202 W.Va. 308, 504 S.E.2d 135 (1998). There are several exceptions to that rule including where an insured has been prejudiced because:

(1) An insurer’s, or its agent’s, misrepresentation made at the policy’s inception resulted in the insurer being prohibited from procuring the coverage s/he desired;

\* \* \*

Potesta, at Syl. pt. 7.

The Court in Marlin held :

A certificate of insurance is evidence of insurance coverage, and is not a separate and distinct contract for insurance. However, because a certificate of insurance is an insurance company’s written representation that a policyholder has certain insurance coverage in effect at the time the certificate is issued, the insurance company may be estopped from later denying the existence of that coverage when the policyholder or recipient of a certificate has reasonably relied to their detriment upon a misrepresentation in the certificate.

Marlin, 569 S.E.2d at 472-473, 212 W.Va. at 225-226.

The decision in Marlin, was cited most recently, with approval, by the Court of Appeals of Kentucky in Western Leasing, Inc. v. Acordia of Kentucky, Inc., 2010 W.L. 1814959 (Ky.App. May 07, 2010). Western Leasing involved a contract in which Centennial Resources Inc. was required to provide insurance and storage for heavy mining equipment in its possession which had been provided to it by Western Leasing. The Agreement required Western Leasing's predecessor in interest, Senstar Finance, to be named as an additional insured and loss payee. Centennial sought

insurance through an insurance broker, Acordia, who obtained insurance from Reliance National Insurance Company. Western Leasing asked for proof that Centennial had obtained insurance on the equipment and that Senstar had been named as an additional insured. Acordia delivered a Certificate of Insurance that indicated that Centennial was the insured, Acordia was the producer and Senstar Finance was the certificate holder. The Certificate of Insurance also reflected that the loss payee and additional insured was the certificate holder, Senstar Finance. The Certificate of Insurance at issue in Western Leasing contained a similar disclaimer to that issued by Bituminous' agent indicating that it was issued only for informational purposes and conferred no rights upon the certificate holder.

Subsequently, Centennial filed for bankruptcy and many of the critical parts and components on the heavy equipment were removed. An insurance claim was made on behalf of Senstar Finance by Western Leasing. The Certificate of Insurance contained several errors including the fact that the equipment set forth on the certificate was not actually covered under the policy disclosed on the face of the certificate. Further, the actual policy did not include Senstar as an additional insured and loss payee. The Certificate of Insurance also was incorrect in that it reported it was a "blanket policy." The actual policy was a "scheduled policy" whereby each piece of equipment needed to be listed on the policy in order to be afforded coverage. Western Leasing subsequently purchased the damaged equipment and obtained an assignment from Senstar's of its interest in the Certificate of Insurance.

The Kentucky Court of Appeals addressed the issue of whether the agent Acordia was subject to liability for the production and issuance of a Certificate of Insurance which contained

affirmative misrepresentations on the face of the document. The Court of Appeals held that affirmative misrepresentations on the face of the Certificate of Insurance can give rise to a claim for negligent misrepresentation in Kentucky. (Western Leasing at Page 3). In reaching this holding, the Court of Appeals recognized that Kentucky had adopted a cause of action for negligent misrepresentation as set forth in the Restatement (Second) of Torts § 552 (1977).<sup>6</sup> Id. at Page 3. (*citing* Ann Taylor, Inc. v. Heritage Ins. Services, Inc., 259 S.W.3d 494 (Ky.App., 2008).

Under the negligent misrepresentation standard adopted in Kentucky, as with the estoppel claim recognized in Marlin, there is a requirement that there has been some reliance upon the false information. Id. at Page 7. The criteria used by the Court in Western Leasing is whether the insured "justifiably relied." The Court of Appeals in Western Leasing recognized:

[W]hile COIs are not intended to and should not be relied upon for a rendition of the full terms of an insurance policy, they do serve a general purpose of evidencing the existence of an insurance policy and the general terms of what the policy covers.

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<sup>6</sup> Restatement (Second) Of Torts § 552 (1977):

- (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
- (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
  - (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
  - (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
- (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

If COIs cannot be relied upon for these limited purposes, then they would cease to have any legitimate use whatsoever. In light of this jurisdiction's adoption of the tort of negligent misrepresentation, we cannot sanction the issuance of documents among business professionals purporting to "certify" information that is affirmatively misrepresented or false. The production of such false information for the guidance of others in their business transactions is specifically actionable as a tort in this jurisdiction where the information is justifiably relied upon by another to his or her detriment.

Id. at Page 9.

It is clear from the holdings in Western Leasing and Marlin that both Kentucky and West Virginia recognize that if there is justifiable or detrimental reliance upon a Certificate Of Insurance, then the insurer must provide coverage and a defense consistent with the Certificate.

Therefore, the Circuit Court of Greenbrier County correctly held that both Kentucky and West Virginia law will enforce the coverage provided in a Certificate Of Insurance when the certificate holder reasonably relies to its detriment upon that Certificate. In the instant case, Putnam Agency issued the Certificate Of Insurance naming RCDI as an additional insured with \$2,000,000.00 in completed operations coverage listed on the Certificate. The Putnam Agency was the authorized agent to act on behalf of Bituminous. Bituminous cannot now argue under either Kentucky or West Virginia law that it is not liable for the acts of its agent done within the scope of the agent's authority in issuing the Certificate Of Insurance.

## **2. DETRIMENTAL RELIANCE.**

The Circuit Court of Greenbrier County erred when it found that there was no evidence that RCDI detrimentally relied upon the Certificate Of Insurance issued by the Putnam Agency. There was evidence that had RCDI not received a Certificate Of Insurance, RCDI would have

considered Davis & Burton to be in breach of their Subcontractor Agreement and would have taken action to obtain a new subcontractor who would secure the appropriate insurance coverage.

Under both West Virginia and Kentucky law, detrimental reliance is an essential element of proof for a certificate holder to prevail under either an estoppel or negligent misrepresentation theory against an insurer and its agent. Estoppel “applies when a party is induced to act or to refrain from acting to his/her detriment because of his/her reasonable reliance on another party’s misrepresentation or concealment of a material fact.” Marlin, 569 S.E.2d at 472, *quoting* Ara v. Erie Ins. Co., 182 W.Va. 266, 387 S.E.2d 320 (1989), “[E]stoppel of this character is not sustainable unless a party has been induced to rely upon asserted facts or representations and thereby moved or acted to his detriment, or in a manner he would not have done but for his reliance upon such asserted facts or representations.” Potesta v. U.S. Fidelity & Guar. Co., 202 W.Va. 308, 504 S.E.2d 135 (1998), *citing* ABCD. . . Vision, Inc. v. Fireman’s Fund Ins. Companies, 84 Or.App. 645, 734 P.2d 1376 (1987).

In Marlin v. Wetzel County Bd. Of Educ., 212 W.Va. 215, 569 S.E.2d 462 (2002), this Court found that the Board relied upon the misrepresentation of its additional insured’s status accepting the argument made by the Board that they “reasonably relied upon the representation to its detriment and thereby allowed Bill Rich Construction to perform the construction work without adequate insurance coverage.” Marlin, 569 S.E.2d at 469. As in Marlin, RCDI also relied to its detriment upon the issue of the Certificate Of Insurance by allowing Davis & Burton to continue its construction of the storm water management system.

In RCDI's Response To Bituminous' First Set Of Interrogatories, dated January 22,

2007, Interrogatory Nos. 1(a) and 2(c) state as follows:

**INTERROGATORY NO. 1:** In paragraph 13 of its Complaint in Civil Action No. 05-C-342, RCDI asserts that it "materially relied upon the Certificate of Insurance when entering into the subcontract with Davis & Burton." Please state:

(a) Each fact upon which RCDI bases the referenced allegation, including specifically each and every way upon which RCDI contends it relied on the referenced Certificate of Insurance; and

\* \* \*

RESPONSE: (a) RCDI relied upon Davis & Burton's representation in its contract that it would add RCDI as an additional insured on its insurance policy with Bituminous pursuant to the terms and requirements contained in the contract and that it would issue a certificate of insurance representing that RCDI had been added. RCDI would not have entered into the contract with Davis & Burton unless Davis & Burton agreed to add it as an additional insured. If Davis & Burton would have failed to produce a certificate of insurance identifying it as an insured, RCDI would have considered Davis & Burton in breach of its contract and would have sought to have Davis & Burton either fulfill the terms of its contract by adding RCDI as an additional insured or would have sought a new subcontractor who would have complied with the terms of the contract. Once Davis & Burton had a certificate of insurance issued through the Putman Insurance Agency, RCDI believed Davis & Burton had completed its contractual obligation to have RCDI added as an additional insured and permitted Davis & Burton to continue per the terms of its contract.

\* \* \*

**INTERROGATORY NO. 2:** In paragraph 13 of its Complaint in Civil Action No. 05-C-342, RCDI asserts that "Bituminous is estopped from denying RCDI's status as an additional insured under the policy of Bituminous insuring Davis & Burton." Please state:

(c) Each fact upon which RCDI bases its contention set forth above; and

\* \* \*

RESPONSE: (c) Davis & Burton requested the Putman Insurance Agency to add RCDI as an additional insured under its policy with Bituminous. The Putman Insurance Agency was an authorized agent of the Bituminous Casualty Insurance Company and in that capacity issued a certificate of insurance to RCDI purporting to add them as an additional insured onto Bituminous' policy. RCDI relied upon the certificate as set forth in Interrogatory No. 1. The Putman Agency failed to add RCDI as an additional insured.

\* \* \*

(See complete discovery responses attached to RCDI's Memorandum In Opposition To Bituminous' Motion for Summary Judgment as Exhibit A).

Further, in his deposition the President of RCDI noted his belief that the effect of the failure of Bituminous to assume the defense resulted in increased premium costs for RCDI's coverage with USF&G. (See deposition of James Cochrane dated March 22, 2007, attached to RCDI's Memorandum In Opposition To Bituminous' Motion for Summary Judgment as Exhibit B at Pages 50-52).

It is axiomatic that prejudice results to a certificate holder who conditions the subcontractor's work upon naming the contractor as an additional insured under their subcontractor's policy when, in fact, that does not occur. As evidenced in Marlin, had Davis & Burton not provided the Certificate Of Insurance, it would have not been in compliance with the Subcontractor Agreement and RCDI would have had every right to find Davis & Burton in breach of the agreement and obtain a subcontractor who would provide adequate levels of insurance to protect RCDI. Further, it is RCDI's belief that its premiums and loss history would be affected by the payment of almost \$100,000.00 in attorney fees in defending the claim. The fact that

Bituminous refused to defend RCDI throughout the course of the underlying litigation and has continued to deny its duty to defend RCDI in this litigation is prejudice to RCDI as a matter of law.

The Circuit Court clearly erred by failing to consider the testimony of James Cochrane of RCDI concerning his perceived detriment from a premium basis of his company, RCDI, as well as the verified interrogatory responses which clearly demonstrate that RCDI allowed Davis & Burton to continue work on the project by virtue of the Certificate Of Insurance. It is difficult to fathom any other prejudice that a certificate holder who has been identified as an additional insured could ever proffer to a trial court in support of its claim of detrimental reliance.

WHEREFORE, RCDI respectfully requests this Court to reverse the Circuit Court of Greenbrier County and find that the Certificate Of Insurance issued by Bituminous' agent afforded RCDI coverage and require Bituminous to assume RCDI's defense in the underlying litigation.

#### V. CONCLUSION

RCDI respectfully requests this Court to affirm the Circuit Court of Greenbrier County's granting of summary judgment to RCDI finding that its indemnification agreement with Davis & Burton constituted an insured contract requiring Bituminous to defend RCDI and to affirm the Circuit Court's awarding of attorney fees and costs incurred in defending RCDI, as well as those attorney fees and costs incurred in prosecuting the declaratory judgment action. Further, RCDI requests this Court grant RCDI the relief sought in its Cross Assignment of Error, finding that the Certificate Of Insurance was reasonably relied upon to its detriment by RCDI, thus, entitling RCDI to coverage and a defense from Bituminous.

RESOURCE CONSULTANTS AND  
DEVELOPERS, INC.

Appellee,

By Counsel

A handwritten signature in black ink, appearing to read "Peter G. Zurbuch", written over a horizontal line.

PETER G. ZURBUCH

WV State Bar No. 5765

BUSCH, ZURBUCH & THOMPSON, PLLC

P. O. Box 1819

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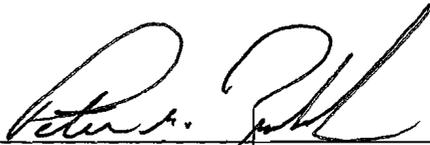
(304) 636-3560

**CERTIFICATE OF SERVICE**

The undersigned counsel for Respondent, Resource Consultants and Developers, Inc., does hereby certify that on this date a true copy of the foregoing **Brief On Behalf Of Appellee, Resource Consultants And Developers, Inc., And Cross Assignment Of Error** was served upon counsel of record, by depositing a true copy in the United States mail, postage prepaid, in an envelope addressed as follows:

John J. Polak, Esq.  
ATKINSON & POLAK, PLLC  
P.O. Box 549  
Charleston, WV 25322-0549  
*Counsel for Bituminous Casualty Corporation*

Dated at Elkins, WV, this the 26<sup>th</sup> day of August, 2010.

  
\_\_\_\_\_  
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