

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0723

ELK RUN COAL COMPANY, INC.,  
d/b/a Republic Energy

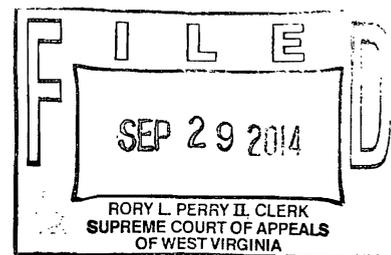
Defendant and Third-Party Plaintiff Below/Petitioner,

v.

CANOPIUS US INSURANCE, INC.,  
f/k/a Omega US Insurance, Inc.; RSUI INDEMNITY  
COMPANY; NATIONAL CASUALTY COMPANY;  
and SCOTTSDALE INSURANCE COMPANY,

Third-Party Defendants Below/Respondents.

(On Appeal from the Circuit Court of  
Kanawha County, No. 11-C-1740)



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**BRIEF OF PETITIONER**

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## I. ASSIGNMENTS OF ERROR

- A. The Circuit Court Erred in Holding that Elk Run Was Not Entitled to Coverage Under the Canopus CGL Policy.
1. The circuit court failed to apply *Consolidation Coal Co. v. Boston Old Colony Ins. Co.* and *Marlin v. Wetzel County Bd. of Educ.* and held that Elk Run was not entitled to directly seek coverage under the Canopus CGL Policy.
  2. The circuit court erred by holding that Section 55-8-14 of the West Virginia Code voided Medford Trucking's indemnity obligation to Elk Run and further erred by failing to apply the holding of *Dalton v. Childress*.
  3. The circuit court erred by holding that the plaintiff's claim did not arise out of or relate to Medford's "Work or other activities" under the Hauling and Delivery Agreement.
  4. The circuit court erred in holding the "auto" exclusion of the Canopus Policy applied to deny coverage to Elk Run.
- B. In the Alternative, the Circuit Court Erred in Holding that Elk Run Was Not Entitled to Coverage Under the Automobile Liability Policies of National Casualty and Scottsdale.
- C. The Circuit Court Erred In Granting Summary Judgment in Favor of RSUI and Holding that Elk Run Was Not Entitled to Coverage Under the RSUI CGL Policy.

## II. STATEMENT OF THE CASE

### A. The Hauling and Delivery Agreement Between Elk Run and Medford.

On October 25, 2004, Elk Run d/b/a Republic Energy (“Elk Run”) and Medford Trucking, LLC (“Medford”) entered into a Hauling and Delivery Agreement (the “Agreement”) under which Medford would haul coal from Elk Run’s Republic Energy mine to various destinations specified by Elk Run. [See JA001323-001380]. The Agreement, which defines Elk Run as the “Owner” and Medford as the “Contractor,” states, “[Medford] shall, during the term of this Agreement, haul coal from [Elk Run’s] premises to various locations set forth on Exhibit A. All of such services are sometimes hereinafter collectively referred to as the ‘Work.’” [JA001323].<sup>1</sup> The Agreement remained in full force and effect during all times relevant.

Section 9 of the Agreement is titled “Indemnity; Insurance.” [JA001331]. Subsection 9.1 contains a broad indemnity provision whereby Medford agreed to defend and indemnify Elk Run from and against any and all claims arising out of Medford’s performance of the “Work or other activities” under the Agreement. Subsection 9.1 states in relevant part:

Except as otherwise expressly provided herein, [Medford] shall indemnify, defend and save harmless [Elk Run], its members, affiliates . . . officers, directors, shareholders, employees and agents . . . from and against any and all demands, actions, suits, claims, rights, losses (including, but not limited to diminution in value), controversies, damages, costs, expenses (including, but not limited to, interest, fines, penalties, costs of preparation and investigation, and the reasonable fees and expenses of attorneys, accounts and other professional advisers), and any other liability of whatsoever kind or nature . . . whether on account of damage or injury (including death) to persons or property, violation of law or regulation, or otherwise, relating to, resulting from, arising out of, caused by or sustained in connection with, directly or indirectly, [Medford’s] performance of the Work or other activities performed pursuant to this Agreement . . . .

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<sup>1</sup> Through various amendments to the Agreement, the locations to which Medford was to haul coal were modified. However, these amendments are not material to the issues presented herein.

[JA001374].

Subsection 9.3 of the Agreement then obligates Medford to purchase and maintain policies of insurance for itself and Elk Run. [JA001332-001335]. This included commercial general liability and automobile liability insurance with minimum limits of \$2,000,000 per occurrence. [JA001333-001334]. The Agreement provides that these insurance policies “shall be primary and not contributory as to any other insurance [Elk Run] may have in place.” [JA001334]. The Agreement further provided that, with the exception of workers’ compensation insurance, Elk Run was to be named as an “additional insured” under the policies. [JA001335].

**B. The Commercial General Liability and Automobile Liability Insurance Policies.**

**1. The Canopus and RSUI Commercial General Liability Policies.**

Pursuant to the Agreement, Medford purchased a commercial general liability policy from Canopus US Insurance Inc. (“Canopus”). [See JA000159-000208]. Canopus sold comprehensive general liability insurance Policy No. OUS035000351 (the “Canopus Policy”) to Medford for the policy period February 3, 2011 to February 3, 2012. [JA000159]. The Canopus Policy provided general liability coverage in the amount of \$1,000,000 per occurrence. [JA000171].

The Canopus Policy obligates Canopus to pay the sums that Medford becomes legally obligated to pay as damages because of “bodily injury” caused by an “occurrence.” [JA000180]. The Canopus Policy defines “bodily injury” to mean “bodily injury, sickness or disease sustained by any person, including death resulting from any of these at any time.” [JA000191].

The Canopus Policy defines an “occurrence” as an “accident, including continuous or repeated exposure to substantially the same general harmful conditions.” [JA000193].<sup>2</sup>

The Canopus Policy further obligates Canopus to pay sums that Medford becomes legally obligated to pay by reason of liability that Medford assumes on behalf of a third-party in an “insured contract.” [JA000181]. The Canopus Policy defines an “insured contract” as, *inter alia*:

That part of any other contract or agreement pertaining to your business . . . 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.

[JA000192]. Canopus’ “insured contract” coverage includes the obligation to defend or pay the defense costs of Medford’s indemnitee when such costs and expenses are also assumed in the “insured contract.” [JA000181]. An example of this is the indemnity provision in subsection 9.1 of the Agreement, which includes the “costs of preparation and investigation” and “the reasonable fees and expenses of attorneys.” [JA001374].

The Canopus Policy also contains a separate, stand-alone “Blanket Additional Insured Endorsement.” [JA000178]. This endorsement requires Canopus to afford “additional insured” status under the Canopus Policy to third-parties for which Medford is obligated to add as an additional insured under a written contract between Medford and the third-party. [JA000178]. The third-party is only an additional insured for liability “caused, in whole or in part, by [Medford’s] acts or omissions” or “the acts or omissions of those acting on [Medford’s] behalf.” [JA000178]. In addition, the endorsement states that it does not provide coverage for “‘bodily injury’ . . . arising out of the sole negligence of the additional insured.” [JA000178].

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<sup>2</sup> There is no dispute that the claims of the plaintiff below involved “bodily injury” resulting from an “occurrence” and/or an “accident” as defined by the insurance policies at issue.

As a general liability policy, the Canopus Policy contains the standard auto exclusion. It excludes coverage for “‘bodily injury’ or ‘property damage’ arising out of, caused by or contributed to by the ownership, non-ownership, maintenance, use or entrustment to others of any . . . ‘auto’ . . . Use includes operation and ‘loading and unloading.’” [JA000172].

The Canopus Policy defines the term “auto,” which is as follows:

“Auto” means:

- a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
- b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, “auto” does not include “mobile equipment.”

[JA000191]. In turn, “mobile equipment” is defined as, *inter alia*, the following:

“Mobile equipment” means any of the following types of land vehicles, including any attached machinery or equipment:

- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

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However, “mobile equipment” does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered “autos.”

[JA000192-000193].

Since the use of an “auto” includes “loading and unloading” under the Canopus Policy, there is a specific definition for it, which is as follows:

“Loading or unloading” means the handling of property:

- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft, or “auto”;
- b. While it is in or on an aircraft, watercraft or “auto”; or
- c. While it is being moved from an aircraft, watercraft or “auto” to the place where it is finally delivered;

But “loading or unloading” does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or “auto.”

[JA000192].

Above the Canopus Policy, RSUI Indemnity Company (“RSUI”) issued a Commercial Excess Liability Policy, Policy No. NHA055540 (the “RSUI Policy”), effective from February 3, 2011 to February 3, 2012. [JA001065-001083]. The RSUI Policy provided an additional \$1,000,000 in commercial general liability coverage over and above the Canopus Policy. [JA001066]. The RSUI Policy was “following form” of the Canopus Policy in that, unless specified otherwise, the RSUI Policy incorporated the same terms and conditions of the underlying Canopus Policy.

## **2. The National Casualty and Scottsdale Automobile Liability Policies.**

In addition to the commercial general liability policies of Canopus and RSUI, pursuant to the Agreement, Medford purchased a commercial auto liability policy from National Casualty Company (“National Casualty”). [JA001101-001229]. Policy No. OPO0035273 (the “National Casualty Policy”) was for the policy period of April 7, 2011 to April 7, 2012 and provided coverage in the amount of \$1,000,000 per occurrence. [JA001101, 001108].

As an auto liability policy, the National Casualty Policy provides the mirror opposite coverage of a general liability policy. Whereas a general liability policy excludes damages

resulting from the ownership, maintenance or use of an “auto,” the National Casualty Policy provides coverage for “‘bodily injury’ or ‘property damage’ caused by an “accident” and resulting from the ownership, maintenance or use of a covered ‘auto.’” [JA001172]. The National Casualty Policy contains the same definitions of the terms “auto” and “mobile equipment” as does the Canopus Policy. [JA001182, 001183-001184].

Similarly, the Canopus Policy’s definition of “loading or unloading” of an “auto” does not include, and therefore it provides coverage for, the “movement of property by mechanical device.” In contrast, the National Casualty Policy provides coverage for the “loading and unloading” of an “auto,” but does not provide coverage for bodily injury or property damage “resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered ‘auto.’” [JA001175].

The National Casualty Policy also provided coverage for those sums that Medford becomes legally obligated to pay by reason of liability that Medford assumes on behalf of a third-party in an “insured contract.” [JA001174]. The National Casualty Policy contains the same standard definition of an “insured contract” as is found in the Canopus Policy. [JA001183]. In addition to the “insured contract” coverage, as required under the Agreement, Elk Run was also designated as an insured under the National Casualty Policy. [JA001196].

Above the National Casualty Policy, Scottsdale Insurance Company (“Scottsdale”) issued an excess auto liability policy. [JA002077-002093]. Policy No. XLS0058690 (the “Scottsdale Policy”) was effective from April 7, 2011 to April 7, 2012 and provided an additional \$1,000,000 in auto liability coverage over and above the National Casualty Policy. [JA002077, 002083]. The Scottsdale Policy was “following form” of the National Casualty

Policy in that, unless specified otherwise, the Scottsdale Policy incorporated the same terms and conditions of the underlying National Casualty Policy.

**C. The Underlying Action and Elk Run's Third-Party Complaint.**

**1. The Plaintiff's Claims.**

The plaintiff below, Timothy Walker, was employed as a coal truck driver for Medford. [JA000028]. On October 3, 2011, the plaintiff filed this action against Elk Run and its employee, Eric Scott Redden, alleging that he suffered personal injuries while performing services at the Republic Energy mine on May 31, 2011. [See JA000027-000033].<sup>3</sup> Specifically, Mr. Redden was using a front-end loader to load coal into the Medford truck that Mr. Walker was driving. [JA000028]. During this process, Mr. Redden allegedly lost consciousness due to a combination of medication and dehydration, causing the front-end loader to strike and flip the Medford truck with Mr. Walker inside. [JA000028].

**2. The Insurance Coverage Dispute.**

On November 1, 2011, pursuant to the Agreement, Elk Run requested in writing that Medford and its insurance carriers provide a defense and indemnity to Elk Run for the plaintiff's claims. [JA000654-000655].

On December 29, 2011, the automobile liability insurer, National Casualty, denied coverage. [JA001425]. National Casualty asserted that the plaintiff's claim did not result from the use of a covered "auto." [JA001429]. As opposed to the claim resulting from the "loading and unloading" and therefore "use" of an "auto," National Casualty took the position that the plaintiff's accident was the result of the movement of property by mechanical device, which the

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<sup>3</sup> The original Complaint was filed on October 3, 2011. Mr. Redden was not a party to the original Complaint, but was named as a defendant in the Amended Complaint filed on October 9, 2012.

National Casualty Policy excludes. [JA001429]. National Casualty advised Elk Run that it should seek coverage under Medford's commercial general liability policy. [JA001429].

While the automobile liability insurer, National Casualty, pointed the finger at the commercial general liability insurer, Canopus, as having the coverage obligation, Canopus pointed straight back at National Casualty. With respect to the "insured contract" coverage, Canopus took the position that the claim did arise out of the use of an "auto" and, as a result, no "insured contract" coverage was available under the Canopus Policy with respect to Medford's indemnity obligation to Elk Run. [JA000657-000658, 000686, 001029-001031].<sup>4</sup>

Canopus did initially accept coverage for Elk Run under the separate "Blanket Additional Insured Endorsement." [JA000657]. However, Canopus subsequently denied coverage on this ground as well. [JA000672-000681]. Canopus took the position that Elk Run was not entitled to "additional insured" coverage based upon the "sole negligence" exclusion of the "Blanket Additional Insured Endorsement" of the Canopus Policy. [JA000672-000681].

On February 7, 2013, in preparation for an upcoming mediation, the plaintiff made a settlement demand upon Elk Run, which Elk Run in turn passed along to Canopus. [JA000683-000684]. On April 1, 2013, Canopus reiterated its previous denial of coverage and stated that it "[would] not be making any offer in response to Plaintiff's demand." [JA000686].

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<sup>4</sup> The plaintiff, Mr. Walker, was an employee of Medford. A commercial general liability policy, such as the Canopus Policy, typically excludes coverage for "bodily injury" to an "employee" of the insured. [JA000181]. However, this employer's liability exclusion "does not apply to liability assumed by the insured under an 'insured contract.'" [JA000181]. In other words, had the plaintiff himself asserted a direct claim against Medford for his injuries, the Canopus Policy would not provide coverage. However, when the plaintiff seeks damages from a third-party such as Elk Run whose liability Medford had assumed in an "insured contract," then the employer's liability exclusion does not apply. Based upon the employers' liability exclusion, Canopus denied any coverage for Medford with respect to any direct claim that the plaintiff may have asserted against Medford, but no such direct claim was ever pursued by the plaintiff. [JA001031-001032]. With respect to Canopus' denial of "insured contract" coverage for Medford's indemnity obligation to Elk Run, Canopus could not and did not assert the employers' liability exclusion. Instead, Canopus relied solely upon the "auto" exclusion in the Canopus Policy. [JA000686, 001029-001031].

With National Casualty denying coverage and arguing that coverage should be under the commercial general liability policy of Canopus and Canopus, in turn, arguing that coverage should be under the auto liability policy of National Casualty, Elk Run was left stuck in the middle. As a result, on May 16, 2013, Elk Run filed its Amended Third-Party Complaint against Canopus, RSUI, National Casualty, and Scottsdale. [JA000075-000095].<sup>5</sup> In its Amended Third-Party Complaint, Elk Run sought a declaration that the commercial general liability policies of Canopus and RSUI provided coverage for the plaintiff's claims or, in the alternative, that coverage was owed under the auto liability policies of National Casualty and Scottsdale. [JA000075-000090]. Elk Run also asserted claims against Canopus for breach of the duty of good faith and fair dealing and for violations of the West Virginia Unfair Trade Practices Act. [JA000090-000095].

**3. The Circuit Court's Granting of Summary Judgment In Favor of Canopus, RSUI, National Casualty, and Scottsdale.**

On January 27, 2014, Elk Run moved for partial summary judgment against Canopus. On January 31, 2014, Canopus filed a motion for summary judgment against Elk Run. On February 11, 2014, RSUI moved for summary judgment against Elk Run. On March 5, 2014, National Casualty and Scottsdale moved for summary judgment against Elk Run. On April 8, 2014, Elk Run filed a motion for summary judgment against National Casualty.

On or around April 2, 2014, Elk Run reached a mutually agreeable settlement with the plaintiff, which resulted in a final resolution and dismissal of the plaintiff's claims against Elk Run and Mr. Redden. [JA002475-002478]. As none of the insurers contributed to Elk Run's

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<sup>5</sup> Elk Run also asserted a third-party claim against Dr. Yasar J. Askoy seeking contribution with respect to the plaintiff's claims. Elk Run alleged that Dr. Askoy was negligent in certifying that Mr. Redden was able to work and operate heavy machinery despite the amounts and combinations of prescription medications that Dr. Askoy had prescribed to Mr. Redden. [JA000076-000079].

settlement with the plaintiff, the settlement had no effect upon Elk Run's third-party claims against Canopus, RSUI, National Casualty, or Scottsdale.

On May 28, 2014, the circuit court entered four orders granting summary judgment in favor of Canopus, RSUI, National Casualty, and Scottsdale and dismissing Elk Run's Amended Third-Party Complaint with prejudice. [JA002429-002474].<sup>6</sup>

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<sup>6</sup> In Section 9 of its Notice of Appeal, Elk Run stated that there had yet to be a final decision on the merits as to all issues and all parties in the litigation. Specifically, on May 9, 2014, the plaintiff below filed his Second Amended Complaint for Declaratory Relief against American Mining Insurance Company ("American Mining"). American Mining was the workers' compensation insurer for the plaintiff's employer, Medford. The sole issue with respect to the plaintiff's Second Amended Complaint for Declaratory Relief was whether American Mining had a valid workers' compensation subrogation lien against the plaintiff's settlement monies pursuant to Section 23-2A-1 of the West Virginia Code and, if so, the amount. This issue did not involve and was completely independent of Elk Run, Canopus, RSUI, National Casualty, and Scottsdale. Thus, the circuit court's summary judgment orders of May 28, 2014 were, in nature and effect, final orders because they fully and completely disposed of any and all issues involving Elk Run, Canopus, RSUI, National Casualty, and Scottsdale. Since the filing of the Notice of Appeal on June 26, 2014, the plaintiff's claim against American Mining has also been dismissed. [JA002479-002480].

### III. SUMMARY OF ARGUMENT

With respect to insurance coverage for the plaintiff, Mr. Walker's, claim, there are two separate lines of insurance with the potential to provide coverage. There is the commercial general liability coverage provided by Canopus and RSUI. On the other hand, there is the auto liability coverage provided by National Casualty and Scottsdale. It is well recognized that general liability and automobile liability insurance policies are designed to provide seamless, non-overlapping coverage. In other words, what one policy covers, the other excludes and vice versa. *See, e.g., Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 769 (5th Cir. 1999) (holding that the policies were "interlocked and mutually exclusive" where "[t]he applicable language in the business auto policy providing its coverage [was] virtually identical to the language of the CGL excluding coverage"); *Hartford Cas. Ins. Co. v. Ewan*, 890 F. Supp. 2d 886, 894 (2012) (W.D. Tenn. 2012) ("Importantly, the Auto and CGL Policies also mirror each other's coverage and exclusions. While the Auto Policy provides coverage for accidents involving an 'auto,' the CGL Policy explicitly excludes from coverage damage arising from the use of an 'auto' . . . Thus, the two policies are demonstrably designed to provide comprehensive coverage without 'double covering' any specific incident.").

Elk Run did not and does not dispute that the commercial general liability and auto liability lines of coverage are mutually exclusive. Simply put, with respect to the plaintiff's accident of May 31, 2011, there is either coverage under the general liability policies of Canopus and RSUI or there is coverage under the auto policies of National Casualty and Scottsdale. This resulted in the general liability carriers pointing the finger at the auto carriers as having the coverage obligation and vice versa. Unfortunately, as opposed to the insurance carriers resolving their differences between themselves, they all denied coverage and left Elk

Run standing in the middle, effectively forcing Elk Run to pursue alternative claims against both the general liability carriers and the auto liability carriers.

Through a number of clearly erroneous and self-contradictory legal rulings, the circuit court held that neither the commercial general liability nor the auto liability policies provided coverage for the accident of May 31, 2011. The circuit court ignored clear precedent of this Court and somehow found a coverage gap where it is impossible for one to exist.

First, the circuit court ignored the clear holdings of *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W.Va. 385, 508 S.E.2d 102 (1998) and *Marlin v. Wetzel County Bd. of Educ.*, 212 W.Va. 215, 569 S.E.2d 462 (2002). Those cases expressly provide that when an indemnity agreement constitutes an “insured contract” under a liability insurance policy, the insured’s indemnitee, as the holder of the “insured contract,” stands in the same shoes of the insured and may directly seek coverage from the insurer under the policy. In this case, the circuit court ignored *Consolidation Coal* and *Marlin*. As opposed to allowing Elk Run stand in the shoes of Medford and pursue coverage directly, the circuit court erred when it held “insured contract” coverage was not available because Elk Run had not asserted a direct indemnity claim against Medford itself.

Second, the indemnity and insurance provisions of the Agreement is a classic example of a contract that was, in substance, “a contract allocating the duty to purchase insurance for the benefit of all parties to the contract” within the meaning of *Dalton v. Childress Service Corp.*, 189 W.Va. 428, 432 S.E.2d 98 (1993). However, the circuit court ignored the law as set forth in *Dalton* and held that indemnity under the Agreement violated West Virginia public policy. Contrary to the circuit court’s holding, West Virginia law, as set forth in *Dalton*, not only permits but encourages these types of agreements. The language of the indemnity agreement

was clearly broad enough to cover the accident of May 31, 2011, even if it resulted from Elk Run's sole negligence. Furthermore, there was no language in the relevant insurance policies that would exclude or otherwise prohibit coverage for Elk Run's sole negligence.

The circuit court next erred by ignoring plain policy language and making two completely inconsistent, self-contradicting rulings. The circuit court first held coverage for the May 31, 2011 accident was excluded under the commercial general liability policies of Canopus and RSUI because accident arose out of the use of the Medford Truck, an "auto." As such, this means that coverage would then have to fall under the auto liability policies of National Casualty and Scottsdale. However, in its orders granting summary judgment in favor of National Casualty, the circuit court held that the May 31, 2011 did not result from the use of an "auto," but instead "mobile equipment," the latter meaning it would be covered by the commercial general liability policies. The circuit court cannot, on the one hand, find that the coverage is excluded under the commercial general liability policy because the claim arises from the use of an auto, but then, on the other hand, find that coverage is excluded under the automobile policies because the claim does not arise from the use of an auto. If the circuit court was correct in holding that coverage was not afforded under the Canopus Policy, then coverage must be provided to Elk Run under the automobile policies of National Casualty and Scottsdale.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The criteria set forth in Rule of Appellate Procedure 18(a) do not apply and the case should be set for oral argument. The case should be set for Rule 19 argument because the circuit court's errors involve the application of settled law.

## V. ARGUMENT

### A. Standard of Review.

This appeal involves the circuit court's entry of summary judgment in favor of Canopus, RSUI, National Casualty, and Scottsdale and the denial of Elk Run's motions for summary judgment. These are subject to *de novo* review. Syl. pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002) ("This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court."); syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is review *de novo*."); *see also* syl. pt. 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."); syl. pt.1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

### B. The Circuit Court Erred in Holding that Elk Run Was Not Entitled to Coverage Under the Canopus CGL Policy.

#### 1. The circuit court erred by failing to apply *Consolidation Coal Co. v. Boston Old Colony Ins. Co.* and *Marlin v. Wetzel County Bd. of Educ.* and holding that Elk Run was not entitled to directly seek coverage under the Canopus Policy.

Under subsection 9.1 of the Agreement, Medford was obligated to defend and indemnify Elk Run for any and all claims and losses "relating to, resulting from, arising out of, caused by or sustained in connection with, directly or indirectly, [Medford's] performance of the Work or other activities performed pursuant to this Agreement." [JA001374]. The Canopus Policy provides coverage for liability that Medford assumed in an "insured contract," which is defined as "[t]hat part of any . . . contract or agreement pertaining to your business . . . under which you

assume the tort liability of another party to pay for ‘bodily injury’ or ‘property damage’ to a third person or organization.” [JA000192]. Medford’s indemnity obligation to Elk Run set forth in subsection 9.1 of the Agreement clearly constituted an “insured contract” within the meaning of the Canopus Policy. *See* syl. pt. 5, *Marlin v. Wetzel County Bd. of Educ.*, 212 W.Va. 215, 569 S.E.2d 462 (2002) (“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.”).

When a commercial general liability policy provides coverage for the “insured contract” of its named insured, the law is well established that the holder of the “insured contract” may pursue coverage directly from the insurer. *See Marlin*, 212 W.Va. at 222, 569 S.E.2d at 469 (“[T]he construction contract between the Board and Bill Rich Construction was an ‘insured contract’ . . . Accordingly . . . the Board ‘stands in the same shoes’ as Bill Rich Construction and may directly seek coverage under the policy.”); syl. pt. 7, *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W.Va. 385, 508 S.E.2d 102 (1998) (“In a policy for commercial general liability insurance . . . when a party has an ‘insured contract,’ that party stands in the same shoes as the insured for coverage purposes.”). The effect of the well-reasoned holdings in *Consolidation Coal* and *Marlin* was to eliminate an unnecessary step that would otherwise burden courts with unnecessary litigation. As opposed to the holder of the “insured contract” suing the named insured on its indemnity obligation, and the named insured then having to pursue coverage from the insurer for the same, *Consolidation Coal* and *Marlin* simply allow the holder of the “insured contract” to stand in the shoes of the named insured and pursue coverage directly from the insurer.

Here, the circuit court failed to apply the holdings of *Consolidation Coal* and *Marlin*. The circuit court recognized that the Canopus Policy would provide coverage for the tort liability of Elk Run that Medford assumed in an “insured contract.” [JA002459]. However, as opposed to allowing Elk Run to directly pursue coverage under the Canopus Policy, the circuit court, without citation to any authority, held that the “insured contract” coverage was limited to indemnity claims asserted directly against Medford. [JA002459]. Because Medford was not a party and, thus, no indemnity claim had been directly asserted against it, the circuit court held that there was no “insured contract” coverage available:

The Insured Contract Provision is an exception to the CGL Provision of the Canopus US Policy with Medford Trucking, and limits the application of the Contractual Liability Exclusion of the Policy for claims asserted against Medford Trucking. As such, the Canopus Policy would not exclude coverage for a claim against Medford Trucking for “bodily injury” or “property damage” for which Medford is obligated to pay damages by virtue of its assumption of such liability in an insured contract (barring other exclusions that may apply). In this case, however, no claims have been, or are being asserted against Medford Trucking.

[JA002459]. Apparently, under the circuit court’s logic, if Elk Run went through the formality of filing a third-party claim directly against Medford for indemnity under subsection 9.1 of the Agreement, there would be “insured contract” coverage under the Canopus Policy for the plaintiff’s claims against Elk Run. However, Elk Run was not entitled to seek this same “insured contract” coverage directly from Canopus.

The circuit court’s holding is completely contrary to this Court’s decisions in *Consolidation Coal* and *Marlin*. There is no requirement that Elk Run have to first sue Medford on its indemnity obligation in order to give rise to “insured contract” coverage. To the contrary, *Consolidation Coal* and *Marlin* give Elk Run, as the holder of an “insured contract,” the right to stand in the shoes of Medford and directly seek coverage under the Canopus Policy. *See*

*Marlin*, 212 W.Va. at 222, 569 S.E.2d at 469 (“[T]he Board ‘stands in the same shoes’ as Bill Rich Construction and may directly seek coverage under the policy.”); syl. pt. 7, *Consolidation Coal Co.*, 203 W.Va. at 385, 508 S.E.2d at 102 (“[W]hen a party has an ‘insured contract,’ that party stands in the same shoes as the insured for coverage purposes.”).

**2. The circuit court erred by holding that Section 55-8-14 of the Code voided Medford’s indemnity obligation to Elk Run and further erred by failing to apply the holding of *Dalton v. Childress*.**

Section 55-8-14 of the Code states as follows:

A covenant, promise, agreement or understanding in or in connection with or collateral to a contract or agreement entered into on or after the effective date of this section, relative to the construction, alteration, repair, addition to, subtraction from, improvement to or maintenance of any building, highway, road, railroad, water, sewer, electrical or gas distribution system, excavation or other structure, project, development or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable and no action shall be maintained thereon.

This section does not apply to construction bonds or insurance contracts or agreements.

W.Va. Code § 55-8-14 (2008 repl.). Relying upon and citing to Section 55-8-14, the circuit court held that “[t]he public policy of the State of West Virginia does not permit nor support Elk Run/Republic’s attempt to obtain indemnification from Medford Trucking under the Hauling Agreement for Elk Run/Republic’s sole negligence.” [JA002457].

The circuit court erred by holding that Section 55-8-14 even applied to the Agreement. First, on its face, Section 55-8-14 is limited to contracts “relative to the construction, alteration, repair, addition to, subtraction from, improvement to or maintenance of any building, highway, road, railroad, water, sewer, electrical or gas distribution system, excavation or other structure,

project, development or improvement attached to real estate, including moving and demolition in connection therewith.” W.Va. Code § 55-8-14. The subject matter of the Agreement between Elk Run and Medford does not pertain to any of these items.

Second, Section 55-8-14 expressly states that it “does not apply to . . . insurance contracts or agreements.” *Id.* Along those lines, the circuit court failed to apply the clear law as set forth in *Dalton v. Childress Service Corp.*, 189 W.Va. 428, 432 S.E.2d 98 (1993). In *Dalton*, this Court recognized that “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 the parties to a contract to allocate among themselves the burden of defending claims.” *Id.* at 431, 432 S.E.2d at 101 (emphasis in original). This Court held that Section 55-8-14 of the Code does not invalidate an indemnity agreement for one’s sole negligence when the contract also provides for the purchase of an insurance fund for the protection of all involved. *Id.* at syl. pt. 1. In fact, as set forth in *Dalton*, public policy supports these types of arrangements. *See id.* at 431, 432 S.E.2d at 101. This Court held that Section 55-8-14 voids a broad indemnity agreement only “(1) if the indemnitee is found by the trier-of-fact to be solely (100 percent) negligent in causing the accident; and (2) it cannot be inferred from the contract that there was a proper agreement to purchase insurance for the benefit of all concerned. *Id.* at syl. pt. 2.

In this case, neither prong under *Dalton* was met. First, Elk Run was never found by the trier of fact to be solely, 100% negligent. In its Amended Third-Party Complaint, Elk Run alleged that the negligence of third-party defendant Dr. Aksoy also caused or contributed to the plaintiff’s alleged damages. [JA000076-000079]. However, in order to protect its interests caused by the insurers’ wrongful denial of coverage, Elk Run reached a settlement with the

plaintiff prior to any adjudication of fault by the trier of fact. Second, and most importantly, the Agreement clearly contained a provision requiring Medford to purchase insurance for the protection of all involved. Subsection 9.3 set forth the various insurance coverages Medford was required to purchase and maintain for both it and Elk Run's protection. [JA001332-001335]. Indeed, it was pursuant to the requirements of subsection 9.3 of the Agreement that Medford purchased the very insurance policies at issue in this case.

Lastly, it appears the circuit court may have believed that the language of the indemnity provision in subsection 9.1 of the Agreement was simply not broad enough to cover Elk Run's sole negligence. In its Order, the circuit court stated:

If the Hauling Agreement was intended to include Medford Trucking's agreement to indemnify Elk Run/Republic for accidents arising entirely from Elk Run/Republic's sole negligence, then Elk Run/Republic was required to clearly express that requirement in the Agreement, and incorporate the requirement into a provision transferring the costs of purchasing insurance for both Medford Trucking and Elk Run/Republic to Medford Trucking. Here, the Indemnity Provision of the Hauling Agreement contains no provision indicating that Medford Trucking is required to indemnify Elk Run/Republic for Elk Run/Republic's sole negligence, and the Indemnity Provision does not otherwise except application of the Provision to Elk Run/Republic's sole negligence. Therefore, the Provision is unenforceable to provide for, or require any indemnification by Medford Trucking for Elk Run/Republic's sole negligence.

[JA002458 (citations omitted)]. Apparently, the circuit court was under the belief that in order to indemnify for one sole's negligence, the agreement must expressly contain the word "negligence" or "sole negligence." This is simply not the law.

In syl. pt. 1, *Sellers v. Owens-Illinois Glass Co.*, 156 W.Va. 87, 191 S.E.2d 166 (1972), this Court held that "[c]ontracts of indemnity against one's own negligence do not contravene public policy and are valid." It was further held that, "[g]enerally, contracts will not be

construed to indemnify one against his own negligence, unless such intention is expressed in clear and definite language.” *Id.* at syl. pt. 3. However, this does not require an indemnity provision to literally use the word “negligence” or “sole negligence.” For example, in *Eastern Gas and Fuel Assoc. v. Midwest-Raleigh, Inc.*, 374 F.2d 451 (4th Cir. 1967), the agreement provided indemnity for any claims ““resulting from, arising out of or incident to the performance of this contract.”” *Id.* at 452. The agreement further provided that the indemnitor would maintain bodily injury and property damage liability insurance to cover any liability arising from performance of the contract. *Id.* Applying West Virginia law, the court held the indemnity language was broad enough to encompass claims due to the indemnitee’s sole negligence.

In our view, the contract is ‘clear and definite’ in its indemnity of Eastern against all liability arising from performance of the contract, despite its own negligence. The contract unqualifiedly provided that Midwest, and its successor Interstate, were to indemnify Eastern for ‘injury and death to persons resulting from, arising out of or incident to the performance’ of the contract and to provide insurance to cover ‘any liability.’

*Id.* at 454; *see also Sellers*, 156 W.Va. at 97-98, 191 S.E.2d at 172 (citing *Eastern Gas* and noting the broad indemnity language). Similarly, in *Dalton*, the indemnity agreement was for ““any and all liabilities . . . arising out of or attributed, directly, to Processor’s performance under this agreement.”” *Dalton*, 189 W.Va. at 430, 432 S.E.2d at 100. It was recognized that this would have been broad enough to cover the indemnitee’s sole negligence. *See id.* at 432, 432 S.E.2d at 102 (“However, the insurance provisions of this contract make it clear that the so-called “indemnity” clause is really only an agreement to purchase insurance, and thus would have protected Lo-Ming even if Lo-Ming had been found 100 percent negligent.”).

In this case, just as in *Eastern Gas* and *Dalton*, the Agreement provides that Medford would indemnify Elk Run for all claims and losses “relating to, resulting from, arising out of,

caused by or sustained in connection with, directly or indirectly, [Medford's] performance of the Work or other activities performed pursuant to this Agreement.” [JA001374]. The Agreement further provides that Medford would purchase insurance to cover this liability. [JA001332-001335]. While, again, there was no adjudication by the trier of fact that Elk Run was solely negligent, the indemnity provision in subsection 9.1 of the Agreement was clearly broad enough to encompass such a result.

**3. The “insured contract” coverage under the Canopus Policy provides coverage even if the plaintiff’s damages were the result of Elk Run’s sole negligence.**

The “insured contract” coverage under the Canopus Policy was clearly broad enough to cover all losses, even if the result of Elk Run’s sole negligence. The “insured contract” in this case is Medford’s indemnity obligation to Elk Run set forth in subsection 9.1 of the Agreement. *See* syl. pt. 5, *Marlin*, 212 W.Va. at 215, 569 S.E.2d at 462 (“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.”). As previously stated above, the indemnity obligation and, thus, the “insured contract” is broad and applies to cover claims resulting from Elk Run’s sole negligence. The Canopus Policy has absolutely no language that would exclude “insured contract” coverage for Elk Run’s sole negligence. There are no limitations in the “insured contract” coverage requiring the loss to be caused in whole or in part by Medford or anyone else’s negligence. The only requirement for “insured contract” coverage is that there be a “contract or agreement pertaining to [Medford’s] business . . . under which [Medford] assume[d] the tort liability of [Elk Run] to pay for ‘bodily injury’ or ‘property damage’ to a third person or organization.” [JA000192]. That requirement is clearly met in this case.

In fact, Canopus' arguments below essentially acknowledged there was broad "insured contract" coverage for Elk Run's sole negligence. In arguing why Elk Run was not entitled to coverage under the "Blanket Additional Insured Endorsement," which is separate and distinct from "insured contract" coverage, Canopus focused on the endorsement's language that a third-party is only an additional insured for liability "caused, in whole or in part, by [Medford's] acts or omissions" or "the acts or omissions of those acting on [Medford's] behalf." [JA000178]. Canopus argued that this language was from a 2004 revision to the Insurance Services Office ("ISO") additional insured endorsement form, which changed the wording from the prior 'arising out of' used in its earlier forms in order to narrow the additional insured coverage. [JA000729-000730]. As Canopus argued:

The 2004 revisions are a belated acknowledgement that the "arising out of" language simply did not accomplish the scope of coverage intended by the industry. Many courts interpreted "arising out of" to be a simple causation test and, therefore, afforded direct primary coverage to the additional insured. The ISO hopes that, by substituting "caused by" for "arising out of," a narrower coverage interpretation will be afforded. Moreover, the revised language specifies that coverage is afforded the additional insured for liability arising out of the named insured's "acts or omissions," not simply the named insured's operations.

[JA000730 (internal quotations and citation omitted)].

Whether or not the modification to the ISO additional insured endorsement has the narrowing effect Canopus contends, the point here is that no such narrowing language is found with respect to the separate "insured contract" coverage. In fact, Canopus could have included such language with respect to its "insured contract" coverage, but did not do so. In 2004, when ISO amended the form additional insured endorsement, ISO also drafted an "Amendment of Insured Contract Definition," which limits the "insured contract" definition by requiring that the "bodily injury" be "caused, in whole or in part, by [the named insured] or by those acting on [its]

behalf.” [JA002114]. The Canopus Policy could have but did not include this limiting “Amendment of Insured Contract Definition” language drafted and made available by ISO. As such, the “insured contract” coverage under the Canopus Policy is broad and simply does not require any negligence on the part of Medford in order for the coverage to apply.

**4. The circuit court erred by holding the plaintiff’s claims did not arise out of or relate to Medford’s “Work or other activities” under the Hauling and Delivery Agreement.**

Subsection 1.1 of the Agreement states, “[Medford] shall, during the term of this Agreement, haul coal from [Elk Run’s] premises to various locations set forth on Exhibit A. All of such services are sometimes hereinafter collectively referred to as the ‘Work.’” [JA001323]. It is undisputed that the accident in question occurred while the front-end loader was being used for and was in the process of loading the Medford truck with coal to be hauled.

The circuit court held that Medford’s indemnity obligation under subsection 9.1 of the Agreement did not apply because the accident did not occur during the hauling of coal by the Medford truck and, therefore, did not occur during Medford’s “Work.” [JA002455-002457]. Drawing a distinction between the loading of coal onto the versus the hauling of coal by the Medford truck, the circuit court stated, “The Hauling Agreement does not include loading coal onto Medford Trucking’s vehicles as part of the ‘Work’ of Medford Trucking.” [JA002455].

The circuit court failed to apply the plain and unambiguous language of subsection 9.1 and improperly limited its scope. Medford’s indemnity obligation under subsection 9.1 of the Agreement was not limited to those claims or losses that occur during the literal hauling of the coal, or “Work,” but was much broader. Under subsection 9.1, Medford was obligated to defend and indemnify Elk Run for any and all claims and losses “relating to, resulting from, arising out of, caused by or sustained in connection with, directly or indirectly, [Medford’s] performance of the Work or other activities performed pursuant to this Agreement.” [JA001374].

It is well recognized that phrases such as “arising out of,” “relating to,” and/or “sustained in connection with” are broad. These phrases do not rise to the level of or otherwise require a direct, proximate causal connection. Instead, they are generally viewed as requiring something more akin to “but for” causation. *See, e.g., Twin City Fire Ins. Co., Inc. v. Ohio Cas. Ins. Co., Inc.*, 480 F.3d 1254, 1264 (11th Cir. 2007) (“Ohio Casualty argues that the indemnity obligation was not triggered because the accident did not ‘arise out of’ West’s work. Ohio Casualty notes that the West workers were injured only because their work for West happened to put them in the path of an accident that was caused solely by ARP’s negligence or wantonness. Ohio Casualty contends that this kind of but-for causation was insufficient to trigger the indemnity obligation: instead, there needed to be a kind of proximate causation for the accident to fall under the agreement. This argument is without merit. Courts have consistently held that but-for causation is enough to constitute ‘arising out of.’”); *Norfolk Southern R.R. Co. v. Nat’l Union Fire Ins. Of Pittsburgh, PA*, 999 F. Supp. 2d 906, 912-13 (2014) (collecting cases); *Perkins v. Rubicon, Inc.*, 563 So.2d 258, 259 (La. 1990) (“[T]he parties agreed that B & B would bear the risk of injuries ‘arising out of’ its performance of the contract. Rather than requiring fault on the part of the contractor, we read this language as requiring a connexity similar to that required for determining cause-in-fact: Would the particular injury have occurred but for the performance of work under the contract? Such a connexity is clearly established by showing that the injured employee was engaged in work under the contract at the time of his injury. Quite simply, Perkins would not have been present at the site to be injured but for B & B’s performance of the work under the contract.”).

Here, a claim that occurs during the placement of the coal in the Medford truck so that it can then be hauled is clearly one that relates to, results from, arises out of, or is sustained,

directly or indirectly, in connection with Medford's "Work or other activities" performed pursuant to the Agreement.

Lastly, it should be pointed out that in the proceedings below, Elk Run and defendant Redden stipulated and agreed that the plaintiff had no comparative negligence. The stipulation states, "The parties hereby stipulate and agree that Defendants Elk Run Coal Company, Inc. and Eric Scott Redden will not argue or assert a comparative negligence defense against Plaintiff Timothy Walker at the trial of this matter." [JA000712-000713]. The sole purpose of this stipulation was, as it says, that the defendants were not going to assert at trial that the plaintiff had any comparative negligence.

In the proceedings below, Canopus argued, and in its Order the circuit court found, that "Elk Run/Republic has, by stipulation and responses to Requests for Admissions, admitted that Plaintiff Walker was guilty of no acts or omissions which caused or contributed to the subject accident." [JA002451-002452]. Although not entirely clear, to the extent the circuit court relied upon the stipulation in finding that the plaintiff's claim did not "arise out of" or "relate to" Medford's "Work or other activities" under the Agreement, that is contrary to the express language of the stipulation itself. A stipulation that a party was not "negligent" is not the same as saying there was no causal connection whatsoever.

**5. The circuit court erred in holding the "auto" exclusion of the Canopus Policy applied to deny coverage to Elk Run.**

As a commercial general liability policy, the Canopus Policy, excludes coverage for injury or damages "arising out of, caused by or contributed to by the ownership, non-ownership, maintenance, use or entrustment to others of any . . . 'auto' . . . ." [JA000172]. Under the Canopus Policy, the definition of "auto" does not include "mobile equipment." [JA000191].

There was no dispute, and the circuit court found, that the Medford truck was an “auto” and the front-end loader was “mobile equipment.” [JA002460].

While there was no dispute that the Medford truck was an “auto” and the front-end loader was “mobile equipment,” a separate issue was whether the plaintiff’s claim against Elk Run still arose out of the “use” of the Medford truck. The Canopus Policy defined “use” to include “loading or unloading.” [JA000172]. However, the Canopus Policy specifically states that “‘loading or unloading’ does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the ‘auto.’” [JA000192]. The issue was, therefore, whether the front-end loader being operated by Mr. Redden to place coal into the Medford truck is a “mechanical device.”

The circuit court erred in that it held the end loader was not a “mechanical device” and, as a result, the claim arose out of the “loading or unloading” and, therefore, the “use” of an auto:

However, it is undisputed that the Elk Run/Republic loader meets the definition of “mobile equipment” under the policy, and it is not a “mechanical device.” A conveyor belt and a tippie are examples of mechanical devices. Bulldozers, loaders, and similar equipment are mobile equipment.

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Here, there is no dispute that the claims asserted against Elk Run/Republic arise solely out of the loading of the Medford Trucking vehicle (an “auto”) by Elk Run/Republic’s employee, Redden.

[JA002460-002461]. In its holding, the circuit court confused two different issues. The first question pertained to the issue of “auto” versus “mobile equipment.” Again, there was no dispute that the Medford truck was an “auto” and the front-end loader “mobile equipment” as defined by the Canopus Policy. Regardless of whether the end loader was “mobile equipment,” a second and separate question was whether the claim still arose from the “use,” *i.e.*, “loading or

unloading,” of the Medford truck, or whether it constituted the “the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the ‘auto.’”

By confusing two separate issues, the circuit court believed that the end loader had to be either “mobile equipment” or a “mechanical device” and that the two were mutually exclusive. To the contrary, the term “mechanical device” is very broad and courts have consistently recognized that equipment or machinery can be, and generally is, both. *See, e.g., Travelers Indem. Co. v. General Star Indem. Co.*, 157 F. Supp. 2d 1273, 1287 (S.D. Ala. 2001) (“There is no dispute that a forklift and a pry-bar are mechanical devices.”); *Palp, Inc. v. Williamsburg Nat. Ins. Co.*, 132 Cal.Rptr.3d 592, 600-601 (Cal. Ct. App. 2011) (front-end loader and excavator are “mechanical devices”); *Dauthier v. Pointe Coupee Wood Treating Inc.*, 560 So.2d 556, 558 (La. App. 1990) (“The fact that a forklift is also classified as ‘mobile equipment’ under the terms of the policy is of no consequence when interpreting the exclusionary clause in question.”); *Cobb County v. Hunt*, 304 S.E.2d 403, 404-05 (Ga. App. 1983) (front-end loader a “mechanical device”). By believing the front-end loader could not be both “mobile equipment” and a “mechanical device,” the circuit court created an absurd result under the Canopus Policy. A commercial general liability policy such as the Canopus Policy covers “mobile equipment,” and the circuit court held that the front-end loader was “mobile equipment.” However, the fact the front-end loader was “mobile equipment,” and not a “mechanical device,” was then the very reason the circuit court relied upon to hold there was no commercial general liability coverage. Thus, under the circuit court’s logic, the same fact that brings a piece of equipment within the coverage of a commercial general liability policy, being “mobile equipment,” was simultaneously used as the ground to take it out of coverage. Such an absurd result cannot stand. Syl. pt. 2, *D’Annunzio v. Security-Connecticut Life Insurance Company*, 186 W.Va. 39, 410

S.E.2d 275 (1991) (“An insurance policy should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties.”).

Lastly, it should be pointed out that the term “mechanical device” is undefined in the Canopus Policy. Under its plain and common meaning, the front end-loader is clearly a “mechanical device.”<sup>7</sup> However, to the extent there is any ambiguity, the law mandates any ambiguities be construed against Canopus and in favor of coverage. *See, e.g., West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Associates, Inc.*, 228 W.Va. 360, 372, 719 S.E.2d 830, 842 (2011) (“[A]mbiguities are always construed against the insurer.”); *Aetna Casualty & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 194, 342 S.E.2d 156, 160 (1986) (same). Here, however, the circuit court construed the term in favor of Canopus and against coverage. Despite “mechanical device” being an undefined term, the circuit court, without citation to any authority, unilaterally determined what was and was not a “mechanical device” within the meaning of the Canopus Policy. [See JA002460 (“A conveyor belt and a tippie are examples of mechanical devices. Bulldozers, loaders, and similar equipment are mobile equipment.”)].

In sum, the broad indemnity provision in subsection 9.1 of the Agreement between Elk Run and Medford constituted an “insured contract” within the meaning of the Canopus Policy. As such, Elk Run was entitled to directly pursue, and Canopus obligated to provide, coverage to Elk Run for the plaintiff’s claims. Elk Run was entitled to this coverage under the Canopus Policy regardless of whether or not the plaintiff’s damages were due to Elk Run’s sole negligence.

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<sup>7</sup> The common, ordinary and accepted definition of the term “mechanical” is “of or relating to machines or machinery.” A “device” is commonly defined as “an object, machine, or piece of equipment that has been made for some special purpose.”

**C. In the Alternative, the Circuit Court Erred in Finding Elk Run Was Not Entitled to Coverage Under the Automobile Liability Policies of National Casualty and Scottsdale.<sup>8</sup>**

It is well recognized that general liability and automobile liability insurance policies are designed to provide seamless, non-overlapping coverage. In other words, what one policy covers, the other excludes and vice versa. *See, e.g., Specialty Nat'l Ins. Co. v. OneBeacon Ins. Co.*, 486 F.3d 727, 732 (1st Cir. 2007) (noting that “OneBeacon’s auto policy covers liability “*resulting from the ... use of a covered auto,*” while Specialty’s [CGL policy] excludes liability “*arising out of the ... use ... of any ... auto*” and that the parties in that case agreed that “their policies are essentially mirror images of each other in this regard—if McMillan’s liability is covered under OneBeacon’s policy, it is excluded from Specialty’s policy and vice versa”) (alterations in original); *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 769 (5th Cir. 1999) (holding that the policies were “interlocked and mutually exclusive” where “[t]he applicable language in the business auto policy providing its coverage [was] virtually identical to the language of the CGL excluding coverage”); *Hartford Cas. Ins. Co. v. Ewan*, 890 F. Supp. 2d 886, 894 (2012) (W.D. Tenn. 2012) (“Importantly, the Auto and CGL Policies also mirror each other’s coverage and exclusions. While the Auto Policy provides coverage for accidents involving an ‘auto,’ the CGL Policy explicitly excludes from coverage damage arising from the use of an ‘auto’ . . . Thus, the two policies are demonstrably designed to provide comprehensive coverage without ‘double covering’ any specific incident.”). “The coverage under the automobile policy is thus ‘dovetailed’ into the exclusion under the comprehensive policy to provide for uniform, non-duplicative liability coverage.” *Northern Ins. Co. of New York v.*

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<sup>8</sup> As previously stated, the Scottsdale Policy is a “following form” excess policy that incorporates the same terms of the underlying National Casualty Policy. If Elk Run is entitled to coverage under the National Casualty Policy, it is also entitled to coverage under the Scottsdale Policy. As a result, Elk Run’s arguments will primarily focus upon and refer to the language of the National Casualty Policy.

*Ekstrom*, 784 P.2d 320, 324 (Colo. 1989). As a result, “[t]he coverage provision in an automobile liability policy and an exclusionary clause in a general liability policy should therefore be construed the same.” *Id.*

This principle is well illustrated here. The Canopus Policy excludes damages arising out of the operation or use of an “auto,” but provides coverage with respect to “mobile equipment.” [JA000191]. On the other hand, the National Casualty Policy provides coverage for the operation or use of an “auto,” but not “mobile equipment.” [JA001182]. Similarly, the Canopus Policy excludes coverage if the claim results from the “loading or unloading” and thus use of an auto, but states that this “loading or unloading” does not include the “movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or ‘auto.’” [JA000192]. On the opposite side, the National Casualty Policy provides coverage if the claim arises from the “loading and unloading” of an auto, but not the “movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered ‘auto.’” [JA001175]. Simply put, because the coverages provided by commercial general liability and auto liabilities are designed to be seamless, coverage for the plaintiff’s claims against Elk Run must necessarily fall under either the Canopus Policy or the National Casualty Policy.

In granting summary judgment in favor of Canopus, the circuit court held that “the claims asserted against Elk Run/Republic arise solely out of the loading of the Medford Trucking vehicle (an ‘auto’) by Elk Run/Republic’s employee, Redden.” [JA002461]. Based upon the circuit court’s finding, there would, in turn, have to be coverage under the National Casualty Policy. However, the circuit court then turned around and made a completely contradictory and

inconsistent ruling. In granting summary judgment in favor of National Casualty, the circuit court held that the plaintiff's claims against Elk Run did not arise out of the use of an "auto":

The Court further finds that no coverage is afforded Elk Run under the policy because the accident resulted from the use of mobile equipment. By policy definition, an "auto" does not include "mobile equipment." The end loader operated by Redden, which admittedly was the sole cause of the accident, is mobile equipment. Therefore, the Court finds that Walker's injuries did not result from the use of a covered auto.

[JA002436]. It cannot be both ways. The circuit court cannot, on the one hand, find that the coverage is excluded under the commercial general liability policy because the claim arises from the use of an auto, but then, on the other hand, find that coverage is excluded under the automobile policies because the claim does not arise from the use of an auto. If the circuit court was correct in holding that coverage was not afforded under the Canopus Policy, then coverage must be provided to Elk Run under the automobile policies of National Casualty and Scottsdale.

**D. The Circuit Court Erred in Granting Summary Judgment in Favor of RSUI.**

RSUI issued a following form excess liability policy providing commercial general liability coverage over and above the Canopus Policy. [JA001065-001083]. As a following form policy, unless specified otherwise, the RSUI Policy incorporates the same terms as the Canopus Policy. Thus, for the same reasons the circuit court erred in finding Elk Run was not entitled to coverage under the Canopus Policy, it also erred in finding no coverage under the RSUI Policy.

RSUI argues, however, that the RSUI Policy had a separate employers' liability exclusion that was broader than that under the Canopus Policy and excluded coverage for any injury to a Medford employee, regardless of whether coverage was sought by Medford or, in this case, Elk Run as the holder of an insured contract. While a commercial general liability policy, such as the Canopus Policy, typically excludes coverage for "bodily injury" to an "employee" of the

insured, [JA000181], this employer's liability exclusion "does not apply to liability assumed by the insured under an 'insured contract.'" [JA000181]. In the case of the RSUI Policy, its employer's liability exclusion makes no mention of liability assumed by the insured under an "insured contract." [JA001074].<sup>9</sup> Because the plaintiff, Mr. Walker's, injuries occurred during the course and scope of his employment with Medford, the circuit court held no "insured contract" coverage was available to Elk Run under the RSUI Policy. [JA002471-002472].

The circuit court erred in granting RSUI summary judgment on this ground, as RSUI's employers' liability exclusion was, at best, ambiguous and conflicts with the "insured contract" coverage language. In *Acceptance Indem. Ins. Co. v. Southwest Arkansas Elec. Coop. Corp.*, No. CV-13-1061, 2014 WL 2560283 (Ark. App. Jun 4, 2014), the insurer made the same argument that RSUI advances here, arguing that its policy did not provide "insured contract" coverage for an injury to the employee of the named insured. The court rejected the insurer's argument, holding that the policy was ambiguous and was to be construed in favor of coverage:

There are two possible interpretations of the policy at issue. The first is that there is no ambiguity when read together and that the "Action Over Exclusion" permits no recovery for bodily injury to an employee of the insured, regardless of the remaining provisions (and stated purpose) of the policy. This interpretation unreasonable fails to give meaning and effect to the entire policy. Furthermore, under this interpretation the stated object of the policy is not accomplished.

The second approach is that the police provides no coverage for an employee injured in the course of employment *unless* the claim was made pursuant to an "insured contract." Thus, the injured employee has no right to damages unless his employer is bound by contract to indemnify another. This reading gives meaning and effect to all provisions and allows for the coverage that the general policy claimed to provide. And it is well settled that where an interpretation that would justify coverage is reasonable, it is our duty to interpret it that way. *Ark. Farm Bureau Ins. Fed'n v. Ryman*, 309 Ark. 283, 831 S.W.2d 133 (1992).

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<sup>9</sup> This is also referred to as an "Action Over Exclusion."

In this case, when the “Action Over Exclusion” and the “insured contract” provisions of the contract are read together, they create an ambiguity, which must be construed in favor of the insured. As such, we affirm the circuit court's grant of summary-judgment against Acceptance.

*Id.* at \*4-5.

Here, the same ambiguity and conflict present in *Acceptance Indemnity* is present in the RSUI Policy. As a result, despite the fact that the plaintiff was an employee of Medford, the RSUI Policy must be construed as providing “insured contract” coverage with respect to the plaintiff’s claims against Elk Run.

## VI. CONCLUSION

For the foregoing reasons, Elk Run respectfully requests this Court reverse the circuit court's entry of summary judgment in favor Canopus and RSUI and remand this matter with directions to the circuit court to enter summary judgment in favor of Elk Run with respect to its claims for declaratory relief and, additionally, to conduct further proceedings with respect to Elk Run's claims against Canopus for breach of the duty of good faith and fair dealing and for violations of the West Virginia Unfair Trade Practices Act.

In the alternative, Elk Run requests this Court reverse the circuit court's entry of summary judgment in favor National Casualty and Scottsdale and remand this matter with directions to the circuit court to enter summary judgment in favor of Elk Run with respect to its claims for declaratory relief against those insurers.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0723

ELK RUN COAL COMPANY, INC.,  
d/b/a Republic Energy

Defendant and Third-Party Plaintiff Below/Petitioner,

v.

(On Appeal from the Circuit Court of  
Kanawha County, No. 11-C-1740)

CANOPIUS US INSURANCE, INC.,  
f/k/a Omega US Insurance, Inc.; RSUI INDEMNITY  
COMPANY; NATIONAL CASUALTY COMPANY;  
and SCOTTSDALE INSURANCE COMPANY,

Third-Party Defendants Below/Respondents.

**CERTIFICATE OF SERVICE**

I, Jonathan L. Anderson, hereby certify that service of the foregoing *Brief of Petitioner* was made upon counsel of record this 29<sup>th</sup> day of September, 2014, by mailing a true and exact copy of thereof via first class United States Mail, postage prepaid, in an envelope addressed as follows:

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