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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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)

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT.....3

A. Coverage Must Fall Under Either the General Liability Policies of Canopius and RSUI or the Automobile Liability Policies of National Casualty or Scottsdale.....3

B. Contrary to the Circuit Court's Order and Canopius' Argument, Elk Run Was Not Using the Insured Contract Provision to Expand the Definition of "Insureds" Under the Canopius Policy, But Was Simply Seeking Coverage From Canopius in Accordance with *Consolidation Coal Co. v. Boston Old Colony Ins. Co.* and *Marlin v. Wetzel County Bd. Of Educ.*.....5

C. Medford's Indemnity Obligation Under Subsection 9.1 of the Agreement Is Broad Enough to Encompass the Plaintiff's Claims, Even If Resulting From the Sole Negligence of Elk Run.....7

III. CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Cobb County v. Hunt, 304 S.E.2d 403, 404-05 (Ga. App. 1983) 5
Consolidation Coal Co. v. Boston Old Colony Ins. Co., 203 W.Va. 385, 508 S.E.2d 102 (1998). 5
Dalton v. Childress Service Corp., 189 W.Va. 428, 432 S.E.2d 98 (1993)..... 8, 9
Dauthier v. Pointe Coupee Wood Treating Inc., 560 So.2d 556, 558 (La. App. 1990) 4
Eastern Gas and Fuel Assoc. v. Midwest-Raleigh, Inc., 374 F.2d 451 (4th Cir. 1967)..... 7, 10
Hartford Cas. Ins. Co. v. Ewan, 890 F. Supp. 2d 886, 894 (2012) (W.D. Tenn. 2012)..... 3
Jefferson v. Sinclair Refining Co., 179 N.E.2d 706 (N.Y. 1961).....5
Marlin v. Wetzel County Bd. of Educ., 212 W.Va. 215, 569 S.E.2d 462 (2002)..... 1, 5, 6
Palp, Inc. v. Williamsburg Nat. Ins. Co., 132 Cal.Rptr.3d 592, 600-601 (Cal. Ct. App. 2011)..... 4
Specialty Nat'l Ins. Co. v. OneBeacon Ins. Co., 486 F.3d 727, 732 (1st Cir. 2007)..... 3
Travelers Indem. Co. v. General Star Indem. Co., 157 F. Supp. 2d 1273, 1287 (S.D. Ala. 2001) 4

Other

The Handbook on Additional Insureds 1

I. INTRODUCTION

Liability insurance policies often contain multiple sources of coverage. First is "insured contract" coverage. Insured contract coverage arises when a named insured "promises to indemnify or hold harmless another party, and thereby agrees to assume that other party's tort liability." Syl. pt. 5, *Marlin*, 212 W.Va. 215, 569 S.E.2d 462 (2002). With insured contract coverage, coverage is not based upon the indemnitee's status as an insured under the policy, but upon the named insured's contractual indemnification obligation to the indemnitee. A second and separate source of coverage is additional insured coverage. In contrast to insured contract coverage, additional insured coverage is direct coverage provided to a designated additional insured based upon its status as an insured under the policy. *See* The Handbook on Additional Insureds, American Bar Association, at 45 (Menapace *et al.* ed. 2012) ("[A]dditional insured coverage is liability coverage afforded under the named insured's policy directly to the additional insured for its liability to third parties. By contrast, contractual indemnification coverage concerns the 'insured contract' coverage afforded directly to the named insured for its contractual indemnification obligation . . . .").

It is undisputed that the general liability policies of Canopius U.S. Insurance Inc. ("Canopius") and RSUI Indemnity Company ("RSUI") and the automobile liability policies of National Casualty Company ("National Casualty") and Scottsdale Insurance Company ("Scottsdale") all provide insured contract coverage. This requires Canopius/RSUI or National Casualty/Scottsdale to pay sums that the named insured, Medford Trucking, LLC ("Medford"), becomes legally obligated to pay by reason of tort liability that Medford assumes on behalf of its indemnitee, Elk Run Coal Company, Inc. d/b/a Republic Energy ("Elk Run"), in an insured contract. [JA000181, JA001174]. It is also undisputed that Elk Run was an additional insured

under the general liability policies of Canopius/RSUI and the automobile liability policies of National Casualty/Scottsdale. [JA000178, 001196]. In this case, it is the insured contract coverage under the general liability policies of Canopius/RSUI or, in the alternative, the automobile liability policies of National Casualty/Scottsdale that is at issue.

On November 1, 2011, pursuant to Medford's indemnity obligation in the Hauling and Delivery Agreement (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 against it. [JA000654-000655]. In response, the primary automobile liability insurer, National Casualty, denied coverage, taking the position that the plaintiff's claim against Elk Run did not result from the use of a covered "auto." [JA001425-001430]. As opposed to the claim resulting from the "loading and unloading" and therefore "use" of an "auto," National Casualty asserted that the plaintiff's accident was the result of the movement of property by mechanical device, which the National Casualty Policy excludes. [JA001429]. National Casualty advised Elk Run that it should seek coverage under Medford's commercial general liability policy. [JA001429]. However, the primary general liability carrier, Canopius, took the mirror opposite position. Canopius denied insured contract coverage solely on the basis that the plaintiff's claim did arise out of the use of an "auto." [JA000657-000658, 000686, 001029-001031].

The real issue in this appeal is not if coverage exists for Elk Run, but simply where it lies. Elk Run understands and has never disputed that is not entitled to coverage from both the general liability and automobile liability policies. However, as a matter of law, coverage must fall in one or the other. If National Casualty and Scottsdale are correct, then coverage for Elk Run must lie under the general liability policies of Canopius and RSUI. On the other hand, if Canopius and

RSUI are correct, then coverage for Elk Run must lie under the automobile liability policies of Canopius and RSUI.

II. ARGUMENT

A. Coverage Must Fall Under Either the General Liability Policies of Canopius and RSUI or the Automobile Liability Policies of National Casualty and Scottsdale.

As set forth in Elk Run's initial brief, it is well recognized that general liability and automobile liability insurance policies are designed to provide seamless, non-overlapping coverage. 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); *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.").

Here, the Canopius 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 Canopius 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].

National Casualty and Scottsdale argue they do not provide coverage because the plaintiff's claim against Elk Run did not arise out of the use of an "auto," but was the result of the movement of property by mechanical device. Canopius and RSUI argue that the plaintiff's claim does arise from the use of a covered "auto," the Medford truck, and did not arise from the movement of property by a mechanical device. Again, either National Casualty and Scottsdale are correct and coverage lies with the general liability policies of Canopius and RSUI or vice versa. What is clear is that coverage must exist for Elk Run under one or the other.

Nonetheless, with that said, Elk Run would again point out the issue of what constitutes a "mechanical device." The circuit court erroneously held, and Canopius continues to argue, that the front-end loader could not be both "mobile equipment" and a "mechanical device." In its initial brief, Elk Run cited the litany of case law where courts have rejected this absurd result and held that equipment or machinery can be, and generally is, both mobile equipment and a mechanical device. *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"). It is telling that in its Response, Canopius does not and cannot cite to a single case that supports its argument that the front-end loader does not constitute a "mechanical device." [Canopius Response at pp.35-36].

B. Contrary to the Circuit Court's Order and Canopius' Argument, Elk Run Was Not Using the Insured Contract Provision to Expand the Definition of "Insureds" Under the Canopius Policy, But Was Simply Seeking Coverage From Canopius in Accordance with *Consolidation Coal Co. v. Boston Old Colony Ins. Co.* and *Marlin v. Wetzel County Bd. of Educ.*

As previously stated, with insured contract coverage, coverage is provided to the named insured's indemnitee, not based upon the indemnitee's status as an insured under the policy, but upon the named insured's contractual indemnification obligation to the indemnitee. In some jurisdictions, because the named insured's indemnitee is not an insured under the policy, courts have held that the indemnitee cannot directly seek insured contract coverage from the insurer. Instead, the indemnitee must first pursue an express indemnity claim against the named insured. *See, e.g.*, *Jefferson v. Sinclair Refining Co.*, 179 N.E.2d 706, 708 (N.Y. 1961) (holding that indemnitee's suit against insurer for insured contract coverage was premature prior to it securing a judgment for express indemnity against the named insured). However, other jurisdictions, such as West Virginia, allow the named insured's indemnitee to seek insured contract coverage directly from the insurer. *See Marlin v. Wetzel County Bd. of Educ.*, 212 W.Va. 215, 222, 569 S.E.2d 462, 469 (2002) ("[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.").

In this case, under subsection 9.1 of the Hauling and Agreement (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]. This clearly constituted an "insured contract" within the meaning of the policies at issue. *See* syl. pt. 5, *Marlin*, 212 W.Va. at 215, 569 S.E.2d at 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."). As a result, in accordance with *Marlin* and *Consolidation Coal*, Elk Run directly sought coverage from Canopius.[1]

In its Order granting summary judgment in favor of Canopius, the circuit court apparently misunderstood the nature of insured contract coverage and misconstrued Elk Run's arguments. Specifically, the circuit court's Order stated that Elk Run's was arguing "that the Insured Contract Provision expands the definition of 'Insureds'" and that Elk Run was therefore attempting to "merge[] the Insuring Agreement with the Insured Contract Provision" of the Canopius Policy. [JA002458-002459]. While the circuit court recognized that the Canopius Policy would provide insured contract coverage for liability that Medford assumed in an insured contract, the circuit court held no such coverage was available because no claim had been asserted against Medford. [JA002459].

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[1] Elk Run also directly sought coverage from the automobile liability policies of National Casualty and Scottsdale. However, because West Virginia law so clearly permits Elk Run to directly seek insured contract coverage, the automobile liability carriers, correctly so, did not raise the baseless argument that Canopius advances.

Contrary to the circuit court's ruling, Elk Run made no such argument that the insured contract provision of the Canopius Policy expanded the definition of "insured" under the Canopius Policy. Indeed, as set forth above, insured contract coverage is not based upon Elk Run's status as an insured under the Canopius Policy, but Elk Run's status as Medford's indemnitee under an insured contract. Because Elk Run was directly seeking coverage from Canopius in accordance with *Marlin* and *Consolidation Coal*, the circuit court apparently assumed Elk Run was required to be, and therefore was attempting to argue, that it was an insured under the Canopius Policy. That, however, was not the case and is not the law.

Simply put, if this matter were in a jurisdiction where an indemnitee cannot directly seek insured contract coverage from an insurer, the circuit court's ruling might have some merit. Because Elk Run was not an insured, it would have to first pursue an express indemnity claim against Medford for which Canopius would then provide coverage to Medford. However, this matter is governed by West Virginia law, and clear West Virginia law as set forth in *Marlin* and *Consolidation Coal* provides that Elk Run is entitled to directly seek coverage from Canopius and the circuit court erred in holding to the contrary.

C. Medford's Indemnity Obligation Under Subsection 9.1 of the Agreement Is Broad Enough to Encompass the Plaintiff's Claims, Even If Resulting From the Sole Negligence of Elk Run.

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]. The law is clear that this language is broad enough to encompass any liabilities, even if resulting from Elk Run's sole negligence. *See, e.g.*, *Eastern Gas and Fuel Assoc. v. Midwest-Raleigh, Inc.*, 374 F.2d 451, 454 (4th Cir.

1967) (agreement providing indemnity for any claims "resulting from, arising out of or incident to the performance of this contract" was sufficiently clear and definite so as to cover the indemnitee's sole negligence under West Virginia law); *Dalton v. Childress Service Corp.*, 189 W.Va. 428, 430, 432 S.E.2d 98, 100 (1993) (indemnity agreement covering "any and all liabilities . . . arising out of or attributed, directly, to [the indemnitor's] performance under this agreement" broad enough to encompass claims arising from the indemnitee's sole negligence). Moreover, Medford's indemnity obligation under the Agreement is accompanied by a provision requiring Medford to purchase adequate insurance for the protection of both Medford and Elk Run, alleviating any possible argument that indemnifying Elk Run for its sole negligence violated West Virginia public policy. *See id.* at syl. pt. 2.

Canopius cannot dispute these points. However, in a desperate attempt to avoid its coverage obligations, Canopius argues that the plaintiff's claims against Elk Run never came within the indemnity provisions of subsection 9.1 of the Agreement because the plaintiff's accident did not occur during the hauling of coal by the Medford truck and, therefore, did not occur during Medford's "Work." First, Canopius continues to ignore the fact that 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].

Second, Canopius' argument is inconsistent with its stated basis for denying insured contract coverage. In denying insured contract coverage, Canopius took and continues to take

the position that coverage is excluded under its policy's "auto" exclusion because the plaintiff's claim arose from the use of the Medford truck. [*See* Canopius Response at p.34 ("[I]f Canopius were to owe Elk Run defense and indemnity, it would be due to the involvement of the Medford truck, and not Elk Run's employee's operation of Elk Run's own equipment."); *id.* at p.3 (stating that Medford's contractual indemnification obligations to Elk Run "would only be the result of Medford's ownership, operation or use of its truck"); JA000657-000658, 000686, 001029-001031]. However, out of the other side of its mouth, Canopius wants to argue that the plaintiff's claim was not one "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 [the] Agreement." Canopius cannot have it both ways and its blantant attempts to do so are, candidly, only further evidence of its bad faith conduct.

Lastly, it appears Canopius is attempting to equate negligence with the scope of indemnity under the Agreement. In other words, Canopius is arguing that unless Medford was itself independently negligent, then a claim cannot arise out of or related to Medford's work. For example, in its Response, Canopius argues that because Elk Run stipulated that the plaintiff was not comparatively negligent, then the plaintiff's claim cannot have arose from Medford's work. [Canopius Response at p.10]. Canopius' argument flies in the face of well-established West Virginia law and would turn the law of indemnity on its head. Take, for example, *Dalton v. Childress Service Corp.* discussed above. In *Dalton*, the indemnity agreement covered "'any and all liabilities . . . arising out of or attributed, directly, to [the indemnitor's] performance under this agreement.'" *Dalton*, 189 W.Va. at 430, 432 S.E.2d at 100. This Court recognized that this language was broad enough to encompass claims arising from the indemnitee's sole negligence. *See id.* at 432, 432 S.E.2d at 102. However, under Canopius' argument, this result

would be impermissible because if the indemnitee was solely negligent, then the claim could not have arisen out of the indemnitor's performance of the agreement. Likewise, under Canopius' argument, *Eastern Gas and Fuel Assoc. v. Midwest-Raleigh, Inc.* was also erroneously decided because a claim resulting from the indemnitee's sole negligence could not, as a matter of law, have arisen out of the indemnitor's performance of the contract.

As set forth in Elk Run's initial brief, Canopius essentially admitted that its insured contract coverage was broad enough to cover Elk Run's sole negligence. [*See* Petitioner's Brief at pp.23-25]. Canopius undoubtedly could have included language in its policy limiting its insured contract coverage, but Canopius did not do so. [*See id.*]. Because Canopius cannot achieve its desired result with its own policy language, Canopius cannot now seek to achieve that result by taking a legally unsupported, unprecented view of the indemnity agreement between Medford and Elk Run.

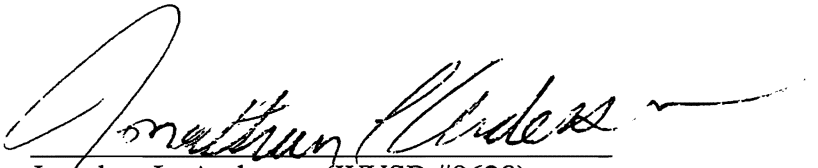
III. CONCLUSION

For the foregoing reasons and those set forth in its initial Brief, Elk Run respectfully requests this Court reverse the circuit court's entry of summary judgment in favor Canopius 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 Canopius 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,

ELK RUN COAL COMPANY, INC.



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CERTIFICATE OF SERVICE

I, Jonathan L. Anderson, hereby certify that service of the foregoing ***Petitioner's Reply Brief*** was made upon counsel of record this 3rd day of December, 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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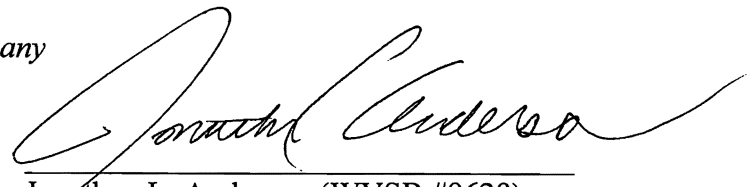

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