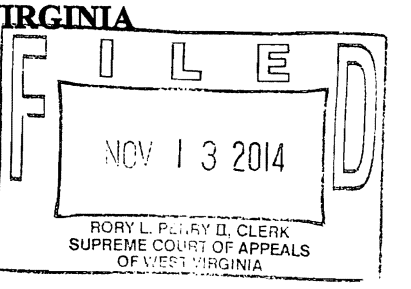
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**




**DOCKET NO. 14-0723**

**ELK RUN COAL COMPANY, INC.,**
**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.**

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# BRIEF OF RESPONDENTS CANOPIUS US INSURANCE, INC. AND RSUI INDEMNITY COMPANY

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## STATEMENT OF THE CASE

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 under which Medford would haul coal from Elk Run's Republic Energy mine to various destinations specified by Elk Run. [*See* JA001323-1380, the October 25, 2004 Agreement, and its amendments, (collectively referenced as "the Agreement" or "the Hauling Agreement")]. The Agreement, which describes 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 G. All of such services are sometimes hereinafter collectively referred to as the "Work." [JA001366].

Section 9 of the Agreement is titled "Indemnity; Insurance. [JA001331]. Subsection 9.1 (as amended by the Fourth Amendment to the Hauling Agreement, dated February 15, 2010), contains an 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." [JA001374-JA001375]. Subsection 9.1 reads in pertinent part as follows:

> Except as otherwise expressly provided herein, [Medford] shall indemnify, defend and save harmless [Elk Run], ...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, accountants 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...[JA001374-JA001375].

Section 9.3 of the Agreement obligates Medford to purchase and maintain policies of insurance. [JA001332-JA001335]. This includes commercial general liability and automobile liability insurance. [JA001335].

*Canopius' Coverage Position*

Omega US Insurance Inc. (now known as Canopius Insurance, Inc.) issued Policy No. OUS035000351 to Medford Trucking, LLC. [JA000159-JA000208]. Elk Run tendered for coverage as an additional insured to Canopius under the Canopius Policy issued to Medford. [JA002132, JA002139-JA002218]. Canopius determined to accept Elk Run's tender for defense coverage based upon the allegations, but to not presently accept the tender for indemnity coverage because the facts were largely unknown at the time. [JA002133]. Thus, Canopius provided a defense to Elk Run, subject to a reservation of rights to deny coverage under certain Policy provisions, including the Additional Insured Endorsement and Auto Exclusion, pending determination of the relevant facts. See February 8, 2012 from Johns Eastern to Elk Run. [JA002133, JA002219-2233].

The document disclosure indicated that the accident arose out of Elk Run's and its employee's acts and conduct, not out of any of Medford's or its employee's acts or conduct; that Elk Run's own employee operating Elk Run's own loader and performing Elk Run's loading work, not any acts, conduct or work of Medford, solely caused the accident. At the time of the accident, Mr. Redden ("Redden"), Elk Run's employee, directed Plaintiff Walker where to park the Medford truck, and Walker was sitting in the Medford truck, seat-belted. The accident occurred while Redden was operating the Elk Run loader to load coal into the Medford truck, when he passed out and the loader struck and turned over the Medford truck, injuring Walker. [JA000717]. Consequently, Canopius

determined it had no obligation to provide coverage under its additional insured endorsement on the Policy issued to Medford. [JA002134]. The facts also indicated that Medford should not have any contractual indemnification obligations to Elk Run, but even if it did, these obligations would only be the result of Medford's ownership, operation or use of its truck and consequently, Canopius determined that the Auto Exclusion applied to any obligations for defense and indemnity of Elk Run related to Medford's contractual indemnification agreement or the additional insured endorsement. [JA002134]. Given the facts and Canopius' determination that it had no coverage for the Walker lawsuit, Canopius denied indemnity, and sent a denial letter dated October 2, 2012 to Elk Run. [JA002134, JA002234-JA2244].

*The RSUI Policy*

In addition to the underlying Canopius Policy, Medford was insured under Policy No. NHA055540 issued by RSUI Indemnity Company ("RSUI"), with effective dates of February 3, 2011 to February 3, 2012. [JA 1065-1083]. The RSUI policy is an "excess" or "umbrella" policy which follows the Canopius Policy and incorporates the same exclusions and limitations. The RSUI Policy provides, in relevant part, "[t]his insurance shall not apply to any occurrence for which "underlying insurance" does not provide coverage for at least the applicable limits shown on the Schedule of Underlying Insurance." [JA 1076]. Furthermore, the Policy indicates, "[t]his insurance is subject to the same terms, conditions, agreements, exclusions and definitions as the "Underlying Insurance,"..." [JA 1082] and "[t]he exclusions applicable to the "Underlying Insurance" also apply to this insurance." [JA 1082] As such, the coverage issues under the RSUI Policy are identical to those arising under the Canopius Policy with one important exception, the RSUI Policy contains an

exclusion for any liability for injuries to an employee of Medford, regardless of how that liability might have arisen, which states. It provides:

> **Commercial Excess Liability Policy**
>
> This policy does not apply to bodily injury, sickness, disease, disability, or shock, including death resulting therefrom to:
>
> **1.** An employee of the Insured arising out of and in the course of employment by the insured; or
>
> **2.** The spouse, child, parent, brother and sister of that employee as a consequence of **1.** above.
>
> This exclusion applies:
>
> **a.** Whether the Insured may be liable as an employer or in any other capacity; and
>
> **b.** To any obligation to share damages with or repay someone else who must pay damages because of the injury.
>
> ***

[See JA 1074].

After the October 2, 2012 denial letter, Canopius continued to defend Elk Run and waited for Elk Run to respond to its denial letter. [JA002135]. However, without responding, Elk Run filed an Amended Third-Party Complaint naming Canopius, as well as the other insurers, RSUI, National Casualty Company ("National Casualty") and Scottsdale Insurance Company ("Scottsdale") as third-party defendants, seeking a declaration of its entitlement to coverage and for bad faith. [JA002135, JA000075-JA0000361].

On January 27, 2014, Elk Run moved for partial summary judgment against Canopius. [JA000493-JA000692].[1] Elk Run asserted that it was entitled to defense in the Walker action under the Policy's "insured contract" coverage provision because the Hauling Agreement's indemnity provision qualified as an "insured contract." Elk Run argued that as an indemnitee, it "stands in the shoes" of Medford and may pursue a defense directly from Canopius.

On February 3, 2014, Canopius moved for summary judgment. [JA000714-JA0001036]. Canopius argued that the undisputed facts were that Redden, Elk Run's employee, directed Plaintiff Walker where to park the Medford truck, and that Redden was operating an Elk Run loader to load coal into the Medford truck and passed out and struck the truck, which was parked and not moving at the time. These facts indicated that no acts/omissions by Medford or its employee Plaintiff Walker caused or contributed to the accident and Redden solely caused the accident and injuries to Walker. Hence, the injuries to Walker were not caused in whole or in part by any act/omission of Medford or Walker, and Canopius had no coverage obligations.[2]

Canopius also argued that even if the injuries were caused in whole or in part by the act/omission of Medford or someone on its behalf, any such act/omission involved the ownership, operation or use of the Medford truck and the loading of the Medford truck and consequently, the Auto Exclusion in the Canopius Policy applied to exclude coverage. In its Response to Elk Run's motion for summary judgment [JA001093-JA1100], Canopius argued that even if Medford was obligated to indemnify Elk Run, which Canopius denied, the obligation would only arise out of the

[1] On February 11, 2014, RSUI moved for summary judgment. [JA001037-JA001085]. On March 7, 2014, National Casualty and Scottsdale moved for summary judgment. [JA001409-JA002095]. On April 8, 2014, Elk Run filed a motion for summary judgment against National Casualty. [JA002312-JA002399].

[2] Canopius also raised in its motion the sole negligence exclusion in the Additional Insured Endorsement, and arguments regarding bad faith, but those arguments are not the subject of this Appeal.

operation and use of the Medford truck and the Policy's Auto Exclusion clearly applied to exclude coverage.

The Response also argued that Medford had no indemnification obligations because Medford never agreed to assume Elk Run's liability for injuries from an accident that did not relate to, result from, arise out of, were not caused by and were not sustained in connection with, directly or indirectly, Medford's performance of its "Work" under the Hauling Agreement.[3] Instead, the undisputed facts established that Walker's injuries arose solely from the acts/omissions of Elk Run and its employee, Redden. These facts included Elk Run's Stipulation that Walker did nothing that caused/contributed to the accident. [JA001234-JA001256]).

On May 28, 2014, the Circuit Court entered four orders granting summary judgment in favor of Canopius, RSUI, National Casualty and Scottsdale, and dismissed Elk Run's Amended Third-Party Complaint. [JA002429-JA002474]. In the Circuit Court's Order granting Canopius' motion for summary judgment [JA002450-JA002463], the Circuit Court recited the pertinent undisputed facts: that on the date of the subject accident, Plaintiff Walker was seat belted in his Medford truck waiting for Elk Run to load the truck; (2) that Walker was parked, as directed by Elk Run's employee, Redden; and (3) that Redden was in the process of loading the Medford truck when he reportedly passed out, and drove Elk Run's end-loader into the Medford truck, flipping or knocking it over. The Circuit Court noted that as a result of the accident, Walker brought a claim for injuries and damages in a suit brought against Elk Run and Redden, and that Medford was not a party to the Walker action. [JA002451]. The Circuit Court also aptly noted that Elk Run "has, by stipulation

[3]The Hauling Agreement by amendment was limited to hauling of coal, not loading. Consequently Elk Run's argument regarding any "loan" of either the front-end loader or Redden's services as a means of triggering "insured contract" coverage, was flawed.

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" and that Elk Run "has provided the Court with no evidence or argument that Medford Trucking was guilty of any acts or omissions which caused or contributed to the subject accident." [JA002451-JA002452].

The Circuit Court emphasized that Paragraph 1.1 of the Hauling Agreement defines Medford's "Work" as requiring Medford to haul coal from Elk Run's premises to various locations, but that the Agreement does not include loading coal onto Medford's vehicles as part of the "Work" of Medford. [JA002455]. Further, there was no evidence presented to the Circuit Court to indicate that Medford controlled or directed the loading of the Medford vehicle at any time, or that Medford had any control over Elk Run's employee, Redden, who was operating Elk Run's loader at the time of the accident. In support of this point, the Circuit Court noted that Provision 1.3 of the Agreement provided that Medford only had control and responsibility for the coal under the Agreement "**FROM THE TIME IT WAS LOADED ONTO MEDFORD'S TRUCK UNTIL DELIVERED**." [JA002456]. Thus, the Circuit Court held that Elk Run's argument that loading the coal onto the Medford truck was a necessary step to complete the hauling and was included within the Agreement's definition of "Work" was "inconsistent with the clear language of the Hauling Agreement." [JA002456-JA002457].

The Circuit Court noted, "The 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", and it referenced West Virginia Code §55-8-14 as addressing the public policy of West Virginia related to indemnification agreements. The Circuit Court held that if the Agreement was "intended" to include Medford's indemnification

of Elk Run "for accidents arising entirely from Elk Run/Republic's sole negligence," then Elk Run was required (1) to clearly express that requirement in the Agreement, and (2) to incorporate the requirement into a provision transferring the cost of purchasing insurance for both Medford and Elk Run to Medford. [JA002457].

After pointing out that the indemnity provision in the Hauling Agreement did not indicate that Medford was required to indemnify Elk Run for Elk Run's sole negligence, and that the indemnity provision did not otherwise except application of the provision to Elk Run's sole negligence, the Circuit Court held that the indemnity provision was "unenforceable to provide for, or require any indemnification by Medford Trucking for Elk Run/Republic's sole negligence." [JA002457-JA002458].

Regarding Elk Run's assertion that it was an insured under the Canopius Policy's "insured contract" provision, the Circuit Court aptly observed that by making such an argument, Elk Run conceded that it was not an insured under the Blanket Additional Insured Endorsement, on the basis that the Endorsement, while it expands the definition of those entities who are insureds, also limits such insurance to the liability of such entities for injuries/damages caused in whole or in part by Medford's acts/omissions, and that Elk Run did not present any argument that it had any liability for injury/damage to Walker that arose in whole or in part from Medford's acts/omissions. [JA002458].

In response to Elk Run's argument that it derives coverage from the Insured Contract Provision of the Canopius Policy, the Circuit Court observed that Elk Run argued that the provision expands the definition of "Insureds." The Circuit Court noted that the "insured contract" provision is included within the Policy's Exclusions and limits the application of the "insured contract" exclusion as to certain claims against Medford. The Circuit Court pointed out that Elk Run

impermissibly merged the Insured Contract Provision (contained in the Policy's Exclusions) with the Insuring Agreement of the Policy and, consequently its argument that it derived coverage from the "Insured Contract" Provision was of no merit. [JA002458-JA002459]. The Circuit Court explained that Elk Run was not an insured under the Policy's definition "Who Is An Insured." [JA002459].

Regarding Elk Run's argument that it is entitled to coverage under the Insured Contract Provision, the Circuit Court explained that the Insured Contract Provision is an exception to the Contractual Liability Exclusion of the Policy, and that the Policy would not exclude coverage for a claim against Medford for "bodily injury" or "property damage" for which Medford was obligated to pay damages by virtue of its assumption of such liability in an insured contract (barring other exclusions that may apply). However, in the instant case, no claims were asserted against Medford and the Contractual Liability Exclusion was not at issue. [JA002459].

Regarding Elk Run's argument that the Auto Exclusion Provision did not apply, the Circuit Court noted that the Policy excluded coverage for "bodily injury" arising out of the ownership, maintenance, use, or entrustment of any auto. The Circuit Court stated that the term "use" expressly includes loading, and that the term, "auto" does not include "mobile equipment" but, in any case, Elk Run's "mobile equipment" (the end-loader) is not insured under the Canopius Policy, as it was not owned/operated by Medford. The Circuit Court also disagreed with Elk Run's argument that a loader was a "mechanical device" and that the Auto Exclusion was not applicable. Observing that a "conveyor belt and a tipple" are examples of "mechanical devices" and that "bulldozers, loaders and similar equipment" are examples of "mobile equipment", the Court correctly found that it was undisputed that the Elk Run loader met the definition of "mobile equipment" under the Policy and,

as such, it was not a "mechanical device." [JA002459-JA002460]. Accordingly, the Circuit Court issued an Order granting summary judgment to Canopius, denying Elk Run's motion for partial summary judgment, and dismissing the third-party complaint against Canopius.

Elk Run now appeals from the Circuit Court's Order. For all of the reasons discussed below, Canopius respectfully maintains that the Circuit Court properly granted Canopius' motion for summary judgment, denying Elk Run's motion for partial summary judgment, and dismissing the third-party complaint against Canopius, and that its Order should in all respects be affirmed by this Court on appeal.

## SUMMARY OF ARGUMENT

The Circuit Court correctly found that insurance policies issued to Medford by Canopius and RSUI did not provide coverage for the claims being asserted against Elk Run. In particular, the Circuit Court was correct in finding that Walker's claims against Elk Run did not arise out of or relate to Medford's "Work", as required for indemnification under the Hauling Agreement between Medford and Elk Run. Specifically, it is undisputed that Redden, an Elk Run employee, directed the claimant where to park the Medford truck. Further, it is undisputed that Redden was using an Elk Run front end loader to load coal into the truck and that Medford and its employees had no control over that process. In fact, Elk Run stipulated that Walker, the only Medford employee involved, was not comparatively negligent. Therefore, there was no genuine question of fact regarding whether the claims arose from Medford's "Work."

The Circuit Court also properly found that the public policy of West Virginia does not support Elk Run's attempt to obtain indemnification from Medford under the Hauling Agreement for Elk Run's sole negligence. In the absence of any evidence that Medford or its employee were

at fault, Elk Run was the only party that could be found to be at fault. Likewise, the Circuit Court properly found that Elk Run was not entitled to merge the Insuring Agreement of the Canopius Policy with the Insured Contract provision in an effort to modify the definition of who is an insured under either the Canopius Policy or the RSUI umbrella Policy. The Circuit Court also correctly found that the Auto Exclusion of the Canopius Policy applied to exclude coverage to Elk Run for Walker's claims since it is undisputed that the claims involved the use of a motor vehicle. Finally, the Circuit Court correctly found that the exclusions and limitations in the Canopius Policy applied to exclude coverage under the RSUI Policy and correctly applied the Employer Liability Exclusion found in the RSUI Policy. Such exclusions have been found to be valid in West Virginia and RSUI properly brought that exclusion to the attention of its insured.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

These Respondents represent that oral argument is unnecessary pursuant to the criteria contained in Rules 18 and 19 of the Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia, because the case involves assignments of error in the application of settled law, and because the case presents claims involving only a narrow issue of law.

## ARGUMENT

### A. Standard of Review.

Elk Run appeals the four orders issued by the Circuit Court granting summary judgment in favor of Canopius, RSUI, National Casualty, and Scottsdale, and denying Elk Run's motions for summary judgment. Under settled West Virginia law, these orders are subject to *de novo* review. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*."); *see also*, *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.").

While the standard of review is *de novo*, when this Court reviews a decision of the Circuit Court to grant summary judgment, it does so under the same standards that the Circuit Court applied to determine whether summary judgment was appropriate. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 335 (1995). The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court's summary judgment, is reviewed *de novo* on appeal. *Payne v. Weston*, 195 W.Va. 502, 507, 466 S.E.2d 161 (1995). In West Virginia, insurance policies are controlled by the rules of construction applicable to contracts. *Payne v. Weston*, 195 W.Va. 507. Thus, it is well-settled that, when reviewing an insurance policy, the Supreme Court "will apply, and not interpret, the plain meaning of an insurance contract in the absence of ambiguity or some other compelling reason" and the Court will read the policy's terms "to avoid ambiguities and not torture the language to create them." *Payne v. Weston,* 195 W.Va. 507.

**B. The Circuit Court properly held that Petitioner Elk Run was not entitled to coverage under the Canopius CGL Policy for Walker's claims asserted against Elk Run.**

**1. The Circuit Court properly held that Walker's claim did not arise out of or relate to Medford's "Work", as required for indemnification under the Hauling Agreement.**

In its Legal Argument Point V.B.4. (Brief of Petitioner, p.25-27), Elk Run argues that the Circuit Court erred by holding that Walker's claims did not arise out of or relate to Medford's "Work or other activities" under the Hauling Agreement and that Medford's indemnity obligation under subsection 9.1 of the Agreement was not triggered. Such an argument is erroneous, not only because

it misstates the undisputed pertinent facts, but because it relies upon legal authority that is not controlling. Indeed, two of the three cases cited by Elk Run are not governed by the law of West Virginia, but rather the law of Alabama and Louisiana and, in any event, they, along with the third case, are not helpful to Elk Run's position.

Specifically, Elk Run argues that the Walker claim arises out of and relates to Medford's "Work" because the accident occurred during the placement of coal in the Medford truck. Elk Run argues that the accident "arises out of" the performance of Medford's work because loading of coal was a necessary part of Medford's work and that in order to haul coal, it first needs to be loaded in the truck. The Circuit Court correctly found, however, that under the Hauling Agreement, Medford's "Work" only included hauling, not loading. Consequently, the Circuit Court properly found that the indemnification obligation was not triggered. [JA002455-JA002457].

Elk Run's objection to the Circuit Court distinguishing between the loading of coal on the truck, which was being performed by Elk Run's Redden at the time of the accident, and the hauling of coal by Medford, which did not occur, is baseless. A review of the terms of the Hauling Agreement confirms that to trigger the indemnification obligation under the Agreement, the "Work" of hauling must be performed by Medford. [JA001366]. Elk Run's argument that the scope of the "Work" must include loading, merely because it must occur first before Medford can haul the coal is not just contrary to the terms of the Agreement, but implausible. Indeed, as the Circuit Court held, Elk Run's argument is akin to the absurd argument that Elk Run would be entitled to indemnification for injuries and damages which occur during the course of mining of the coal, since there would be no coal for Medford Trucking to haul if the coal were not first mined. [JA 2457]

In support of its argument, Elk Run cites the cases of *Twin City Fire Ins. Co., Inc. v. Ohio Cas. Ins. Co., Inc.*, 480 F.3d 1254 (11th Cir. 2007), *Norfolk Southern R.R. v. Nat'l Union Fire Ins. of Pittsburgh, PA*, 999 F.Supp.2d 906 (S.D. W.Va. 2014), and *Perkins v. Rubicon, Inc.*, 563 So.2d 258 (La.1990). Elk Run's argument is that Walker's mere presence at the time of the accident, even though at the time he was not performing "Work" under the Hauling Agreement, should be sufficient to show that his injuries arose out of Medford's "Work" under the Hauling Agreement. However, a review of these cases establishes that they do not support Elk Run's position.

First, two of the cases are not controlling because they are not governed by West Virginia law. *Twin City Fire Ins. Co., Inc. v. Ohio Cas. Ins. Co., Inc.*, 480 F.3d 1254 (11th Cir. 2007), is governed by Alabama law and *Perkins v. Rubicon, Inc.*, 563 So.2d 258 (La.1990), is governed by Louisiana law. Second, and more significant, in each instance, in their indemnity agreement, the parties specified that the indemnitee would be indemnified against the consequences of its own negligence. Third, in each of the cases, it is clear that unlike West Virginia, the out-of-state public policy is to enforce an attempt by an indemnitee to obtain indemnification for its own sole negligence, provided the parties explicitly provide for such indemnification. Finally, in each case, the injured party was performing work that was contemplated by the agreement at issue.

For example, in the case of *Twin City Fire Ins. Co., Inc. v. Ohio Cas. Ins. Co., Inc.*, 480 F.3d 1254 (11th Cir. 2007), G. A. West & Co. ("West") agreed to supply labor to Alabama River Pulp Co. ("ARP"). The contract between the parties provided, in part: "To the fullest extent permitted by law, [West] shall indemnify and hold harmless ARP...from and against any and all claims, costs, losses and damages...arising out of or in any way related to the performance of the Work by [West] or the

agents, servants, employees or Subcontractors [of West], in whatever manner the same may be caused, occasioned or contributed to by the negligence, sole or concurrent, of ARP..." *Id.* at 1256.

The contract required West to obtain insurance to cover its indemnity obligation and to add ARP to its policies as an additional insured. At the time of the accident, ARP had a primary CGL policy from Twin City, an excess policy from Twin City, and an umbrella policy from Hartford Casualty that was excess to both Twin City policies, and West had a primary CGL policy from Amerisure and an umbrella policy from Ohio Casualty. ARP was named an additional insured on both the Ohio Casualty and the Amerisure policies. *Id.* at 1256-1257.

Dumas and Stabler suffered burn injuries from a ruptured storage tank "during the course and scope of their employment with West." *Id.* at 1257. At the time of the accident, their work for West on ARP's premises brought them into the tank's vicinity. The parties agreed that ARP's actions caused the rupture. *Id.* at 1257.

Regarding the issue of liability under the indemnity agreement, the Court of Appeals for the Eleventh Circuit adopted a broad interpretation of the phrase "arising out of". In support of this interpretation the Court pointed out that "the indemnity clause at issue here includes much more than liability that arises out of West's [the insured's] work. It includes claims "in any way related to the performance" of West's work, "in whatever manner the same may be caused." *Twin City Fire Ins. Co., Inc.*, 480 F.3d at 1264.

This case is not controlling because it was decided under Alabama law which supports and enforces an attempt by an indemnitee to obtain indemnification for its sole negligence. Contrary to the instant facts, in *Twin City Fire Ins. Co., Inc.*: (1) the indemnification agreement explicitly included accidents whose "sole" cause was the negligence of the indemnitee, and (2) it is undisputed

that at the time of the accident, the underlying plaintiffs, employees of West [the indemnitor], were actively performing work for their employer on ARP's premises. In the instant matter, it is indisputable that the subject indemnification agreement does not explicitly include accidents whose "sole" cause is the negligence of Elk Run and, at the time of the incident, Walker was not performing its "Work" under the Hauling Agreement. The subject accident arose solely out of the performance of Elk Run's work of loading coal.

The case of *Perkins v. Rubicon, Inc.*, 563 So.2d 258 (La.1990), is also not controlling. Like the Alabama case, the case involves the law of a state other than West Virginia and the decision reflects the public policy of Louisiana, to broadly interpret the phrase "arising out of", and to enforce an indemnity agreement which explicitly provides that the indemnitee is indemnified against the consequences of his own negligence.

In *Perkins*, 563 So.2d 258 (La.1990), B & B, a maintenance service company, entered into a contract with Rubicon, the owner of an industrial plant, for B & B to provide maintenance services. B & B agreed to "indemnify and hold [Rubicon] harmless from all claims, suits, actions, losses and damages for personal injury, including death and property damage, even though caused by the negligence of [Rubicon], arising out of [B & B's] performance of the work contemplated by this agreement." *Id.* at 258.

The plaintiff, Perkins, a B & B employee, was injured when he was working inside a tank at the Rubicon premises. The tank was isolated for maintenance work. Plaintiff was injured when he inhaled gas that drifted over to his work site. *Id.* at 258-259.

Perkins filed suit against Rubicon and its insurer, alleging that he was injured by the negligence of Rubicon's employees "while he [Perkins] was performing work for B & B at the plant

under the maintenance contract". *Id.* at 258-259. Rubicon requested that B & B defend it under the indemnity agreement. When B & B refused, Rubicon filed a cross-claim against B & B.

The Court granted summary judgment for Rubicon ordering B & B to defend and indemnify Rubicon. The Court of Appeals affirmed. On appeal to the Supreme Court of Louisiana, the Court affirmed, holding that plaintiff's injuries arose out of the performance of the contract and that B & B was obligated to indemnify Rubicon.

Regarding the issue of whether Louisiana would enforce a contract of indemnity whereby the indemnitee is indemnified against his own negligence, the Supreme Court of Louisiana stated that such a contract would be "strictly construed", and not enforced "unless such an intention is expressed in unequivocal terms". *Id.* at 259. The Court found that the indemnification agreement "unequivocally" stated that B & B would indemnify Rubicon for damages for injuries "even though caused by the negligence of [Rubicon]." *Id.*

The Court disagreed with B & B's argument that Perkins' presence and performance of his employment duties under the contract at the time of the accident were not sufficient to establish that his injuries arose out of B & B's performance of the contractual work. The Court explained, "Because the purpose of an indemnity agreement is to allocate risks inherent in the activity between the parties to the contract", it was necessary to "determine whether the risk that resulted in the injury was one contemplated by the parties to the contract." *Id.* The Court noted that while Rubicon wished to contract out its maintenance work to B & B, it did not want to assume the greater risks of injury that were inherent in having B & B perform the maintenance work. *Id.*

Thus, the Court concluded that "the parties agreed that B & B would bear the risk of injuries "arising out of" its performance of the contract" and, rather than requiring fault by B & B, the Court

interpreted 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 the work under the contract?" *Id.* The Court found that a "connexity" was established "by showing that the injured employee was engaged in work under the contract at the time of his injury." *Id.*

The *Perkins* case is not controlling, because it was decided under Louisiana law and in accordance with the public policy of Louisiana, which supports and enforces an attempt by an indemnitee to obtain indemnification for its own sole negligence and, further, because the critical facts differ greatly from the instant facts. Contrary to the instant facts, in *Perkins*,:(1) the indemnification agreement explicitly included accidents caused by negligence of the indemnitee, and (2) at the time of the accident, Perkins was actively performing work for his employer B & B under the maintenance contract at Rubicon's plant. Here, Elk Run's indemnification agreement does not, explicitly or implicitly, include accidents caused by the sole negligence of Elk Run, and at the time of the subject accident, Walker was not performing any work under the Hauling Agreement. Here Walker's accident arose solely out of the performance of Elk Run's work of loading the coal.

The *Perkins* case was distinguished by a later case, *Dean v. Griffin Crane & Steel, Inc.*, 935 So. 2d 186 (Ct. of Appeal of La., First Circuit 2006), in which the Court of Appeal of Louisiana, First Circuit, was asked to interpret a contract of indemnity that included a provision for unconditional indemnity, but which did not expressly include liability for the indemnitee's own negligence or fault. Importantly, the Court, in addition to reviewing Louisiana's rules for interpreting contracts of indemnity that include liability for the indemnitee's own negligence or fault, explains in great detail what the Supreme Court of Louisiana meant in the *Perkins* case, when it held that the phrase "arising out of" requires a "connexity" similar to that required for "cause-in-fact" and

the facts that must be present for a court to apply such an approach—that is, that the approach taken in *Perkins* does not apply where there is a dispute as to the nature of the work upon which the right to indemnity is based.

In *Dean v. Griffin Crane*, 935 So. 2d 186, on December 5, 2001, Franklin, the plant engineer for Abita Brewing Co., L.L.C. ("Abita"), a brewery in Louisiana, telephoned Griffin Crane & Steel Service, Inc. ("Griffin Crane"), to secure the services of a large crane and an operator for the purpose of moving and positioning large fermentation tanks at the brewery. Abita's premises were twenty to thirty miles from Griffin Crane's equipment yard and it took about an hour for the crane to travel from Griffin Crane's equipment yard to the brewery. The crane was operated by Griffin Crane's employee, Williams. After arriving at the brewery, Williams operated the crane under the direction of Franklin, with the rigging of the fermentation tanks to the crane being handled by Abita employees. After the task of moving the tanks was completed, Williams filled in the time information on a form lease document and secured the signature of Abita's agent. *Dean v. Griffin Crane,* 935 So. 2d 188.

Williams left the Abita premises no later than 1:30 p.m. The subject accident occurred at approximately 2:12 p.m. on a Louisiana highway, as Williams was returning to his employer Griffin Crane's yard with the crane. The accident occurred about four miles from Griffin Crane's yard. The crane struck a school bus operated by Dean. *Id.* at 188.

Dean and his wife sued Williams, Griffin Crane, and their liability insurer, Security Insurance Company of Hartford for damages. Plaintiffs alleged that the sole cause of the accident was Williams's negligence, imputable to Griffin Crane as his employer and to their liability insurer. Defendants served a third-party demand upon Abita, alleging that they were entitled to indemnity

from Abita for plaintiffs' claims under the contract. The third-party demand did not assert any independent fault contributing to the accident or vicarious liability on the part of Abita, but only its liability as a conventional indemnitor under the contract. Abita answered the third-party demand, denying its liability for indemnity. *Id.* at 188.

On appeal, the Court of Appeals of Louisiana, First Circuit, rendered judgment in favor of Abita, dismissing it as a party to the litigation. The Court recited Louisiana's well-settled rule, that a contract of indemnity whereby the indemnitee is indemnified against its own negligence is strictly construed and will not be enforced unless such an intention is expressed in unequivocal terms, and that use of general words such as "any and all liability" is not sufficient to establish such an intention. *Id.* at 190-191.

On appeal, Griffin Crane urged the Court to follow the *Perkins* case, and apply the "but for" analysis to interpret the phrase "arising out of," arguing that "but for the performance of its work under the contract, which included its crane's travel to and from Abita's brewery, the accident would not have occurred; thus, the accident arose out of the performance of the work." *Id.* at 192.

The Court disagreed, emphasizing that the contract "expressly limited the connexity required for imposition of unconditional indemnity to "the *work*."" The Court placed great emphasis on the contract's definition of "work description" as "unload tanks," and on the fact that the contract clearly distinguished the "time [the crane] left yard" from the "time [the crane] start [*sic*] *work*." The Court explained that in the instant case the "focus of analysis" should be "the meaning of the "work" being performed." Further, the Court noted that in *Perkins* there was no dispute as to the nature of the work upon which the right to indemnity was based, but that was not the case in *Dean*. *Id.* at 192.

The Court distinguished the instant facts from the *Perkins* facts, as follows:

> "No direct, logical connexity exists between the limited scope of the work of unloading the tanks on Abita's premises and the motor vehicle accident, which was significantly removed both in time (over forty minutes after the crane left Abita's premises) and location (from sixteen to twenty-six miles) from that finished work. In contrast, the connexity in *Rubicon* [*Perkins*] was "clearly established by showing that the injured employee was engaged in *work* under the contract *at the time of his injury.* Quite simply, [the injured employee] would not have been *present at the site* to be injured but for [the indemnitor's] performance of the *work* under the contract." *Rubicon, 563 So. 2d at 259.* (Emphasis supplied.)" *Id.* at 192, fn.6.

In sum, the *Dean* case establishes that the application of the "but for" test in *Perkins* is limited to the factual situation presented in *Perkins*, where there was no dispute as to the nature of the work upon which the right to indemnity was based. The *Dean* case represents yet another reason why the *Perkins* case is not controlling to the instant facts, where it is indisputable that at the time of the accident, the plaintiff Walker was not performing its "Work" under the Hauling Agreement. The Hauling Agreement defines the "Work" to be performed by Medford as limited to hauling coal, not loading coal.

The third case cited by Elk Run in support of its argument is *Norfolk Southern R.R. v. Nat'l Union Fire Ins. of Pittsburgh, PA*, 999 F. Supp. 2d 906 (S.D. W.Va. 2014). In the case, Norfolk Southern Railway Company ("Norfolk Southern") filed a lawsuit against Westchester Fire Insurance Company ("Westchester), seeking coverage as an additional insured for damages resulting from a railroad derailment.

Employees of Norfolk Southern and Cobra Natural Resources, LLC ("Cobra ") were positioning a train under a coal loading facility (the "loadout") in order to fill rail cars with coal. As the train passed under the loadout, a Cobra employee noticed that Cobra's scanning device was not properly scanning rail cars. Cobra's loadout operator asked that Norfolk Southern pull the train clear of the loadout and then return it so the cars could be rescanned. As the train was backed through the

loadout, a rail broke, derailing several cars. One of the derailed cars struck the loadout's support beans, causing the loadout to collapse. *Norfolk Southern R.R. v. Nat'l Union Fire Ins. of Pittsburgh, PA*, 999 F. Supp. 2d 909.

Several suits were filed against Norfolk Southern for damages sustained during the derailment and loadout collapse. Norfolk Southern contended that it incurred substantial liability as a result of the suits and brought suit alleging it should be indemnified under a CGL policy issued by Westchester. In its motion for summary judgment, Norfolk Southern contended that the Westchester policy, obtained by Alpha Natural Resources, Inc. ("Alpha") for Cobra, included Norfolk Southern as an additional insured for its liability arising out of the derailment. Westchester argued that Norfolk Southern was not an additional insured and, even if it was, the policy did not cover Norfolk Southern's liability arising out of the derailment. *Id.* at 909.

Norfolk Southern and Westchester each moved for summary judgment on the issue of whether Norfolk Southern was an additional insured under the Westchester policy. After finding that Norfolk Southern was an additional insured under the Westchester policy, the Court had to decide whether the derailment qualified for coverage under the policy. The Westchester policy covered additional insureds, "but only with respect to liability arising out of 'Your Work', 'Your Product' and to property owned or used by you." As Cobra was the named insured on the Westchester policy the Court explained that "you" referred to Cobra. The Court noted that coverage for the derailment turned on whether it was an incident "arising out of" "work or operations performed by [Cobra] or on [Cobra's] behalf." *Id.* at 912.

The Court explained that the West Virginia Supreme Court of Appeals had not defined the phrase "arising out of" in the particular context, but that it had indicated that it would interpret the

phrase broadly, citing *Baber v. Fortner ex rel. Poe,* 186 W.Va. 413, 412 S.E.2d 814 (W.Va. 1991), and noting that in the *Baber* case, "the phrase 'arising out of the ownership, maintenance or use' in automobile insurance policies was given a broad interpretation." *Baber, 186* W.Va. 413, 412 S.E.2d 814, 817. The Court further discussed how the phrase was interpreted by the courts of other states, commenting that it was given a broad meaning, such as "originating from", "growing out of", "incident to", "flowing from" or "done in connection with." *Norfolk Southern R.R.*, 999 F.Supp.2d at 913.

After pointing out that both parties argued that *Baber* supported their respective positions, the Court recited the pertinent facts of that case; that the insured faced a wrongful death suit after he intentionally shot a man through the window of his vehicle, claimed that the shooting arose from the "ownership, maintenance or use" of his vehicle and asked his insurance company to indemnify him. After stating that the phrase "arising out of the ownership, maintenance or use" in an automobile insurance policy was given a broad interpretation, the *Baber* Court declined to find that the policy extended to the shooting, on the grounds that the shooting was not "foreseeably identifiable with the normal use of the vehicle", and thus, held it was not an act "arising out of the ownership, maintenance, or use of the vehicle." The Court explained that contrary to Westchester's position, "the result in *Baber* did not turn solely on the lack of a direct causal relationship. Rather, the Court noted that the shooting was not "foreseeably identifiable with the normal use of the vehicle." *Baber, 412 S.E.2d at 819.*" *Norfolk Southern R.R.*, 999 F.Supp.2d at 914.

Thus, the *Norfolk Southern R.R.* Court held that "a derailment at a railroad coal loadout is foreseeably identifiable with Cobra's work at the loadout," and that at the time of the derailment, Norfolk Southern was repositioning the train at Cobra's request for Cobra to unload coal and

therefore, the derailment arose out of Cobra's work, or at the very least, out of operations performed on Cobra's behalf. The Court found that contrary to *Baber*, Cobra's loadout operations related to the derailment; that it occurred at Cobra's loadout, during Cobra's loadout operations, and on property Cobra leased. *Id.* at 913-914.

Although the Court in *Norfolk Southern R.R.* interpreted the phrase "arising out of" broadly, it did so in the context of determining whether additional insured coverage is owed for "liability arising out of" "work or operations performed by" the named insured, or "on behalf" of the named insured and, consequently, the case has no application to the instant matter.

The issue here is not whether Elk Run is an additional insured under the Canopius Policy, and Elk Run has abandoned any such argument on appeal. The Circuit Court correctly pointed out that in asserting coverage under the Insured Contract Provision, Elk Run "concedes that it is not an insured under the Blanket Additional Insured Endorsement, as the Endorsement expands the definition of those entities who are insureds under the Medford Trucking Policy with Canopius, but limits such insurance to the liability of such entities for injuries/damages caused in whole or in part by Medford Trucking's acts or omissions. Here, Elk Run/Republic has presented no argument to the Court that it has any liability for injury/damage to the Plaintiff Walker, arising in whole or in part by Medford Trucking's acts or omissions". [JA002458].

Contrary to the *Norfolk Southern* facts, the instant case involves a claim for injuries to the indemnitor's employee, and the precise issue raised here is whether such a claim "arises out of" the indemnitor's "Work," as the term is defined by the Agreement between the indemnitee and the indemnitor—that is, hauling of coal.

Here, at the time of the accident, Walker, Medford's employee, was not performing any work under the Hauling Agreement. Elk Run does not and cannot dispute that there is no evidence that Walker's injuries arose out of any actions by Medford or its employee Walker. Indeed, it is undisputed that at the time of the accident, Walker correctly positioned the truck per Elk Run's employee Redden's instructions, and he [Walker] was properly seat-belted.

Moreover, as the circuit court aptly observed, Elk Run has "by stipulation and in 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-JA002452]. *See also* Stipulation [JA001230-JA00123] and Responses of Defendant, Elk Run Coal Company, d/b/a Republic Energy, to Plaintiff's Third Set of Requests for Admission [JA002066-JA002072]. In response to request for admission number 15, "Admit that you have no evidence that Plaintiff was comparatively negligent", Elk Run responds "Admit", and in response to a request for admission number 16, "Admit that the Plaintiff was not negligent in connection with the May 31, 2011 incident giving rise to this cause of action", Elk Run responds, "Objection; asked and answered." [JA002069]. In its opinion, the Circuit Court further noted that Elk Run "has provided the Court with no evidence or argument that Medford Trucking was guilty of any acts or omissions which caused or contributed to the subject accident." [JA002452].

For all of the above reasons, Elk Run's Argument Point V.B.4. is erroneous. Canopius respectfully submits that the Circuit Court properly held that Walker's claim did not arise out of or relate to Medford's "Work" under the Hauling Agreement and, consequently, Medford's indemnity obligation under subsection 9.1 of the Hauling Agreement was not triggered.

**2. The Circuit Court properly noted that Section 55-8-14 of the Code expressed the public policy of the State of West Virginia, that does not support Elk Run's attempt to obtain indemnification from Medford under the Hauling Agreement for Elk Run's sole negligence, and the Court correctly applied the holding of *Dalton v. Childress.***

In its Legal Argument Point V.B.2. (Brief of Petitioner, p. 19-23), Elk Run argues that the Circuit Court erred by holding that Section 55-8-14 of the Code voided Medford's indemnity obligation to Elk Run and that the Circuit Court further erred by failing to apply the holding of *Dalton v. Childress*, 189 W.Va. 428, 432 S.E.2d 98 (1993), which Elk Run argues supports its position that the indemnity provision in the Hauling Agreement is broad enough to include indemnification for Elk Run's sole negligence. For the reasons set forth below, Elk Run's argument is erroneous.

First, Elk Run's argument misstates the Circuit Court's ruling. The Circuit Court cited Section 55-8-14 of the Code to illustrate that West Virginia's public policy does not support Elk Run's attempt to obtain indemnification for its own negligence. The Circuit Court did not specifically state that the subject indemnification agreement is void. [JA002457].

Section 55-8-14 applies to agreements to indemnify against the sole negligence of the indemnitee in connection with construction or other similar types of contracts, and the Section provides that such an agreement to indemnify is against the public policy of West Virginia, and void and unenforceable. The Circuit Court properly observed that Section 55-8-14 expresses the public policy of West Virginia and, under the undisputed facts here, Medford owes no indemnification to Elk Run and in turn, Canopius owes no defense or indemnity to Elk Run.

Second, Elk Run's argument that the Circuit Court erred in failing to apply *Dalton* is also wrong, because the Circuit Court did follow the case, but not in support of Elk Run's position.

Rather, the Circuit Court cited *Dalton*, along with *Sellers v. Owens-Illinois*, 156 W.Va. 87, 191 S.E.2d 166 (1972) [also cited by Elk Run in support of its position], as authority for the Circuit Court's holding:

> 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 cost of purchasing insurance for both Medford Trucking and Elk Run/Republic to Medford Trucking. ***See, Sellers v. Owens-Illinois, and Dalton v. Childers.*** 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." [JA002457-JA002458].

Although the *Sellers v. Owens-Illinois* case pre-dates the effective date of Section 55-8-14 [June 6, 1975], and it involved excavation of land as well as the construction of a warehouse [which would clearly implicate Section 55-8-14], it raised the issue of an attempt by an indemnitee to obtain indemnification for its own sole negligence, so the case is relevant to the instant matter, as to what language is required for a court to enforce such an indemnification provision. In *Sellers*, the Supreme Court of Appeals of West Virginia stated that, as a general rule, "contracts will not be construed to indemnify a person against his own negligence unless such contention is expressed in unequivocal terms". 156 W.Va. at 91. Thus, where the subject indemnification clause provided that "Subcontractor shall indemnify Contractor against all claims for damages arising from accidents to persons or property occasioned by the Subcontractor, his agents or employees," the *Sellers* Court held that the indemnity agreement was "not sufficiently clear and definite" to require the indemnitor to indemnify the indemnitee for its sole negligence. *Id.* at 94.

The Circuit Court also cited *Dalton v. Childers*, a case decided in 1993, after the effective date of Section 55-8-14, and which implicated Section 55-8-14. In *Dalton* the circuit court held that despite the fact that the indemnitor was held to be 73% negligent, the indemnity agreement was void under Section 55-8-14. On appeal, the Supreme Court of Appeals of West Virginia reversed. The Supreme Court of Appeals found that Section 55-8-14 requires courts to void a broad indemnification 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." *Dalton v. Childers*, 189 W.Va. at 431. The Court explained that in the case the indemnitee was not indemnified for their "sole negligence", because the jury found it to be only ten percent negligent, and thus the agreement requiring indemnification "would not violate the public policy contained in *W.Va. Code 55-8-14* [1975] under even the most literal possible interpretation." *Id.* at 432. The Court also pointed out that the insurance provisions of the contract made it clear that the indemnity clause was "really only an agreement to purchase insurance", and it would have protected the indemnitee even if it had been found 100 percent negligent. *Id.* at 432.

Thus, the Circuit Court in the instant case properly cited to *Dalton* in support of that portion of its holding that if the Hauling Agreement was intended to include Medford's agreement to indemnity Elk Run for accidents arising entirely from Elk Run's sole negligence then, in addition to Elk Run being required to clearly express such an intention in the Agreement, it should have also incorporated the requirement into a provision transferring the cost of purchasing insurance for both Medford and Elk Run to Medford Trucking. [JA002457].

For all of the above reasons, Canopius submits that Elk Run's argument is without merit.

**3. The Circuit Court properly held that Elk Run was not entitled to merge the language of the Insuring Agreement of the Canopius Policy with the language of the Insured Contract provision in order to create coverage where it did not otherwise exist.**

In its Legal Argument Point V.B.1. (Brief of Petitioner, p.16-19), Elk Run argues that the Circuit Court erred by failing to apply *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), and holding that Elk Run was not entitled to directly seek coverage under the Canopius Policy. In fact, Elk Run's argument misconstrues the Circuit Court below's ruling and seeks to broadly expand the holdings of the cases upon which it relies. Far from finding that Elk Run was not entitled to directly seek coverage from Canopius, the Circuit Court below simply found that Elk Run was not entitled to re-write the Canopius Policy to support its claim for coverage.

In support of its position, Elk Run argues that Medford's indemnity obligation to Elk Run [set forth in Section 9.1 of the Hauling Agreement [JA001374-JA001375]] constituted an "insured contract" under the Policy, and that the Circuit Court erred in failing to apply the precedent set forth in the *Consolidation Coal* and *Marlin* cases, which, according to Elk Run, indicate that the holder of an "insured contract" may pursue coverage directly from the insurer. While each case does hold that the holder of an "insured contract" "stands in the shoes of the insured for coverage purposes", that holding does not support Elk Run's position. Put simply, Elk Run is asking the Court to find that as the holder of an insured contract, it obtains separate coverage under the Canopius commercial general liability policy which applies even if the policy's named insured, Medford was not involved

in the loss in any way. Rather than simply "stepping into the named insured's shoes" for purposes of liability arising out of Medford's conduct or operations, Elk Run argues that it meets the definition of an insured under the Canopius Policy and obtained free insurance for all of its own operations, regardless of whether Medford was at fault in any way. In order to achieve this result, Elk Run asks the Court to ignore the fact that it does not meet the Canopius Policy definition of "Who Is An Insured" and the fact that the accident at issue was solely caused by Elk Run.

Elk Run bases its argument on the fact that the Insuring Agreement of the Canopius Policy provides, "We will pay those sums that the Insured becomes legally obligated to pay as damages because of "bodily injury"...to which this insurance applies..." [JA 000180]. Elk Run then suggests that the Canopius Policy can somehow be "stretched" to apply to Elk Run's own independent liability since there is an exception to the Canopius Policy Exclusion for liability "[a]ssumed in a contract or agreement that is an "insured contract" in the Policy Exclusions [JA 000181]. Elk Run seeks to merge the language of the Insuring Agreement with the language of the Insured Contract exception found in the Policy's Exclusions to create coverage for its sole negligence, even though the Hauling Agreement only speaks in terms of claims "relating to, resulting from, arising out of, caused by or sustained in connection with, directly or indirectly, [Medford's] performance of the Work"[JA JA001374-JA001375] Moreover, the Blanket Additional Insured Endorsement of the Canopius Policy expressly provides liability coverage to additional insureds under an insured contract "only with respect to liability . . . caused in whole or in part, by . . . your [the named insured's] acts or omissions." [JA000178] and expressly excludes liability arising out of the sole negligence of such additional insureds. [JA000178]

The Canopius Policy defines "Who Is An Insured," indicating that since Medford Trucking is an LLC, Medford Trucking is an insured; its members are insureds, but only with respect to the conduct of the Medford Trucking business; and its employees are insureds, but only for acts within the scope of their employment. [JA 000187-000188] As a separate legal entity that did not purchase the Canopius Policy and is not identified in the Policy Declarations, Elk Run does not meet the definition of "Who Is An Insured" and, thus, does not have an independent right to coverage absent some involvement by Medford which would trigger the "Insured Contract" exception to the exclusions. While the Insured Contract Provision does limit the application of the Contractual Liability Exclusion for claims asserted against Medford, and Elk Run would "stand in the shoes" of Medford for purposes of a claim arising from Medford's work or operations, the facts of this case do not support any claim against Medford. Instead, this case involves Elk Run's attempt to seek liability coverage under Medford's Canopius Policy for its sole negligence.

If the holdings of *Consolidation Coal* and *Marlin* were expanded to include claims arising from the sole negligence of all entities that enter into insured contracts with a named insured, regardless of that named insured's involvement in the loss, it would be impossible for any insurer to assess its potential exposure when deciding whether to assume a risk. Each time a named insured entered into a new contract, the insurer would find itself exposed to the potential liability of any insured contract holder regardless of any act or omission of the named insured. Having issued a policy to a carpet installer, for example, an insurer could easily find itself exposed to all of the potential liabilities of the dynamite manufacturer that needed new carpet. The Circuit Court below properly rejected Elk Run's request to re-write the Canopius Policy and expand the law in that fashion.

### 4. Elk Run's argument, that the "insured contract" coverage under the Canopius Policy provides coverage even if the plaintiff's damages were the result of Elk Run's sole negligence, is flawed.

In its Legal Argument Point V.B.3 (Brief of Petitioner, p. 23-25), Elk Run argues that the "insured contract" coverage under the Canopius Policy provides coverage even if the plaintiff's damages were the result of Elk Run's sole negligence. This argument is without merit. Elk Run's argument is as follows: (1) that the indemnity obligation in the Hauling Agreement is "broad and applies to cover claims resulting from Elk Run's sole negligence", (2) that there are no limitations in the Canopius Policy that would exclude "insured contract" coverage for Elk Run's sole negligence, and (3) that "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", and that such a requirement is met here. (Brief of Petitioner, p. 23). Elk Run's argument is erroneous, as contrary to both the facts and the controlling law.

The Circuit Court properly noted that the Insured Contract Provision is an exception to the Contractual Liability Exclusion, and that the Insured Contract Provision limits the application of the Contractual Liability Exclusion of the Canopius Policy for claims asserted against Medford. [JA002459]. As the Circuit Court explained, the Canopius Policy would not exclude coverage for a claim against Medford for either "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. [JA002459]. However, as the Circuit Court aptly pointed out, no claims have been or are being asserted against Medford, which undisputedly was without fault. [JA002459].

As Canopius has pointed out in its Legal Argument Point B.2., the Circuit Court correctly observed that Section 55-8-14 of the Code expressed the public policy of the State of West Virginia that does not permit or support Elk Run's attempt to obtain indemnification from Medford under the Hauling Agreement for Elk Run's sole negligence. The facts of the instant case are such that there is no "insured contract" coverage owed anyway since, as Canopius has established in its Legal Argument Point B.1., the injuries suffered by Walker did not arise out of Medford's "Work" under the Hauling Agreement. In sum, there simply is no "insured contract" obligation on Medford or in turn, on Canopius due to the facts of this case. For these reasons, Elk Run's argument is of no avail.

**5. The Circuit Court properly held that the Auto Exclusion of the Canopius Policy applied to exclude coverage to Elk Run for Underlying Plaintiff Walker's claims against Elk Run.**

In its Legal Argument Point V.B.5. (Brief of Petitioner, p. 27-30), Elk Run argues that the Circuit Court erred in holding that the Auto Exclusion of the Canopius Policy applied to deny coverage to Elk Run, specifically that it was error not to apply the "mechanical device" exception to the "loading or unloading" definition, as, according to Elk Run, the front-end loader was a "mechanical device." Elk Run's argument is unnecessarily confusing and in any event, entirely unavailing. It ignores the basic undisputed facts of the case and the clear and unambiguous terms of the Policy.

The critical facts are that, at the time of the accident, Walker was sitting in the Medford truck, when the truck was struck by the Elk Run front-end loader which was operated by Redden, Elk Run's employee. Further, at the time of the accident, Redden was loading coal onto the Medford truck.

The Auto Exclusion applies to autos. The Medford truck was clearly an "auto" as defined by the Policy and to which the Exclusion applies. The definition of "Auto" in the Policy includes, "A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment," which clearly encompasses the Medford truck.

The Exclusion, as amended, excludes coverage for injuries or damages arising out of, caused by or contributed to by the ownership, non-ownership, maintenance, use or entrustment to others of any auto, with use including loading or unloading. The West Virginia Courts hold that for injuries to arise out of the use of a vehicle, the incident must be "foreseeably identifiable with the normal use of the vehicle." According to the West Virginia Court of Appeals:

> *'Cases construing the phrase "arising out of the ... use of a motor vehicle" uniformly require that the injured person establish a causal connection between the use of the motor vehicle and the injury. Such causal connection must be more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use of the vehicle.' Trent v. Cook, 1996 W.Va. LEXIS 103 (W.Va. July 12, 1996).*

Here, the Medford truck's involvement was in regard to its normal operations, having been driven to the site by Walker for loading by Elk Run, and Elk Run's was in the process of loading the Medford truck when the accident occurred. The wording of the Exclusion makes clear that loading is a "use" to which the Exclusion applies.

In determining whether the Auto Exclusion applies, the focus must be on Medford's activities/work and its equipment, not Elk Run's separate activities and equipment. Consequently, if 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. Consequently, whether Elk Run's front-loader is "mobile equipment" is irrelevant to the coverage issue because the front-end loader is not insured under the Canopius Policy, since it was not "owned"

or "operated" by Medford. Indeed, even Elk Run concedes that its front-end loader is "mobile equipment." (Brief of Petitioner, p. 28).

Rather, Elk Run's argument is that the Circuit Court erred in finding that Elk Run's front-end loader was not a "mechanical device" and, thus, erred in not applying the Canopius Policy's "mechanical device" exception to the "loading or unloading" definition. Regarding this point, the Circuit Court found that the Policy defines "loading" as the "handling of property for movement onto an "auto" and that "loading" "does not include the movement of property by means of a mechanical device other than a hand truck." [JA002460]. In response to Elk Run's argument that its front-end loader was a "mechanical device" under the Policy, the Court aptly found that it was "undisputed" that the subject loader was "mobile equipment" as defined by the Policy, and thus not a "mechanical device." [JA002460]. The Court gave examples of "mechanical devices", including a "conveyor belt" and a "tipple", pointing out that "bulldozers, loaders and similar equipment" are "mobile equipment." [JA002460].

Canopius submits that the Circuit Court was correct. A "tipple" is defined as "a device that tilts or overturns a freight car to dump its contents", "a place where loaded cars are emptied by tipping", and "a structure where coal is cleaned and loaded in railroad cars or trucks." (Random House Dictionary) A "conveyor belt" is defined as "an endless belt or chain, set of rollers, etc., for carrying materials or objects short distances, as from one part of a building to another." (Random House Dictionary). On the other hand, a "front-loader", also known as a "front end loader", is a type of tractor that is normally wheeled and uses a "front-mounted square wide bucket connected to the end of two booms (arms) to scoop up loose material from the ground and move it from one place to another." *http://en.wikipedia.org/wiki/Loader_(equipment).* A loader is primarily used for loading

materials "into an awaiting dump truck or into an open trench excavation." *http://en.wikipedia.org/wiki/Loader_(equipment).*

Given these definitions, and given that the instant subject matter involves the coal mining industry, it is clear that the Circuit Court approached the issue by using a "plain and common meaning" approach. The Circuit Court was correct in describing examples of both "mechanical devices" and "mobile equipment" and, consequently, it was correct in holding that Elk Run's front-end loader was "mobile equipment" and not a "mechanical device."

For these reasons, Elk Run's Argument Point V.B.5. is erroneous. The Circuit Court properly found that the Auto Exclusion of the Canopius Policy applied to exclude coverage to Elk Run for Walker's claims against it.

**C. The Circuit Court properly held that Petitioner Elk Run was not entitled to coverage under the RSUI Policy.**

On its face, the subject RSUI Policy indicates that it is an excess policy that affords coverage in excess of the limits shown in Item 6 of the Declarations, Schedule of Underlying Insurance. **Section I-Excess Liability Insurance 1. Insuring Agreement**. Page 1 of 2, [JA 1082]. Likewise, Item 6 of the Declarations, Schedule of Underlying Insurance, identifies Omega US Insurance Company as the insurer providing the underlying insurance. (As noted above, Canopius was formerly known as Omega US Insurance Company). [JA 1067] Similarly, the **Other Insurance** provision indicates, "[t]his insurance is excess over any other valid and collectible insurance whether primary, excess, contingent or any other basis, except other insurance written specifically to be excess over this insurance." RSUI Policy, [JA 1083 at page 2 of 2]. Because the Canopius Policy does not apply to the claims at issue, the Circuit Court below properly found that the RSUI Policy is also inapplicable.

The RSUI Policy follows the Canopius Policy because it expressly incorporates all of the exclusions and limitations previously discussed under **Section II-Exclusions**, [JA 1082, at page 1 of 2.] In addition, the **Exclusion-Sublimited Underlying Coverage** endorsement reiterates that the RSUI Policy does not apply to any occurrence for which "underlying insurance" does not provide coverage. [JA 1076] Here, it is undisputed that Redden, an Elk Run employee, directed Walker where to park the Medford truck. Further, it is undisputed that Redden was using Elk Run's front end loader to load coal into the Medford truck and struck the truck after he passed out. Accordingly, there are simply no facts showing any act or omission by Medford or its employee, Walker, that caused or contributed to the accident. Instead, the undisputed evidence establishes that Elk Run was solely responsible for the accident and the injuries to Walker. In fact, Elk Run stipulated that Walker was not comparatively negligent. [See the Stipulation at JA 1063-1064]. Since Walker's injuries were not caused in whole or in part by any act or omission of Medford or its employee (Walker), Canopius and, by extension, RSUI have no coverage obligations to Elk Run under the Insuring Agreement of the Blanket Additional Insured Endorsement in the Canopius Policy and the language of the RSUI Policy incorporating the terms of the underlying Canopius coverage.

Even assuming, *arguendo*, the facts could have fallen within the Additional Insured Endorsement's Insuring Agreement, the Canopius Endorsement includes a Sole Negligence Exclusion that specifically excludes any damages that arose out of or resulted from Elk Run's sole negligence. Since Redden was performing duties as an employee of Elk Run at the time of the accident, any negligence on his part is negligence on the part of Elk Run. Therefore, the accident resulted from the sole negligence of Elk Run and the Sole Negligence Exclusion would apply to exclude coverage for Walker's claims. Likewise, even if Walker's injuries were caused in whole

or in part by the acts or omissions of Medford or someone on its behalf, those acts and omissions necessarily involve the ownership, operation or use of the Medford Truck and, in particular, the loading of the Medford Truck. As a result, the Auto Exclusion in the Canopius Policy would also apply and exclude coverage. By extension, that exclusion also excludes coverage under the RSUI Policy, in which it is incorporated.

The RSUI Policy is a pure excess policy. "'[T]he fundamental purpose of excess insurance is to protect the insured against excess liability claims.'" *Gauze v Reed*, 219 W.Va. 381, 633 S.E.2d 326, 332 (2006), quoting *Wurth v. Ideal Mut. Ins. Co.*, 34 Ohio App.3d 325, 518 N.E.2d 607 (1987). "[E]xcess insurance does not drop down. . . " *Id.* Given the absence of coverage under the Canopius Policy and the failure any party to exhaust the Canopius Policy, coverage under the RSUI Policy is simply inapplicable.

It should also be noted that the RSUI Policy also contains a clear and unambiguous **Employers Liability Exclusion** endorsement which excludes coverage for the subject claim, independent of the Canopius exclusions. It provides that the "policy does not apply to bodily injury to. . . . " an employee of the Insured arising out of and in the course of employment by the insured." The exclusion applies "[w]hether the Insured may be liable an employer or in any other capacity[.]" [JA 1074] Here, Walker was undisputedly an employee of Medford, the Named Insured on the RSUI Declarations Page. Per the terms of the exclusion, it is immaterial that Medford is not alleged to be liable as Walker's employer.

Similar employers liability exclusions have been found to be a valid exclusion in West Virginia. For example, in *Leuikart v. Valley Brook Concrete & Supply, Inc.*, 216 W.Va. 748, 613 S.E.2d 896 (2005), this Court was asked to address an employers liability exclusion when a delivery

driver died as a result of a motor vehicle accident while in the course and scope of his employment. The personal representative of the decedent brought suit against the deceased employee's employer, alleging a deliberate intent violation under *W. Va. Code §23-4-2(c)(2)*. The employer's insurer filed a declaratory judgment action, seeking a determination that, among other things, the employer's liability exclusion barred coverage. The exclusion was, in all material respects, identical to the RSUI exclusionary endorsement and was found to be unambiguous.

In *Leuikart*, this Court also examined the duties imposed upon an insurer in the state of West Virginia and noted the " duty to make exclusionary language conspicuous, plain and clear, . . . and bring such exclusions to the attention of the insured." *Leuikart*, 613 S.E.2d at 900. Here, the RSUI exclusionary endorsement is, as required by *Leuikart*, "conspicuous" and "clearly visible or obvious. . ." *Id.* The exclusionary endorsement in the RSUI policy is contained on its own page and advises the reader to read the endorsement carefully. The reader is advised that the endorsement modifies the policy. As in *Leuikart*, the fact that the exclusionary language was set apart from other language by an emboldened subheading requires the conclusion that the exclusion is conspicuous. Therefore, the plain and conspicuous language of the RSUI Policy bars coverage for the subject claims.

Under West Virginia law, liability insurance creates two (2) duties for the insurer: the duty to defend and the duty to provide coverage. *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 194, 342 S.E.2d 156, 160 (W. Va. 1986). The insurer must defend its insured if the allegations and the facts behind them "are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy." *Id.*; Syl. Pt. 6, *Farmers and Mechanics Mut. Ins. Co. of West Virginia v. Cook*, 210 W.Va. 394, 557 S.E.2d 801 (W. Va. 2001); *Horace Mann Ins. Co. v. Leeber*,

180, W.Va. 375, 378, 376 S.E.2d 581, 584 (W. Va. 1988) (quoting *Pitrolo*). However, the insurer "need not defend ... if the alleged conduct is entirely foreign to the risk insured against." *Leeber*, 378, 584. In this case, the RSUI Policy clearly and unambiguously excludes coverage for "bodily injury to. . . . " an employee of the Insured arising out of and in the course of employment by the insured" and that is exactly the type of claim at issue in this case. Therefore, RSUI had no duty to defend or indemnify Elk Run.

Clear insurance policy provisions are to be applied. Syl. Pt. 5, *Cook* (quoting Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W.Va. 430, 345 S.E.2d 33 (W. Va. 1986)); *Green v. Farm Bureau Mut. Auto Ins. Co.*, 139 W.Va. 475, 480, 80 S.E.2d 424, 426 (W. Va. 1954). Moreover, an insurer may validly limit coverage, and policy provisions that limit coverage are placed in the policy for that very reason. *Green*, 480, 426. Inasmuch as the RSUI Policy unambiguously excludes coverage for exactly the type of claims at issue here, the Circuit Court properly awarded summary judgment to RSUI.

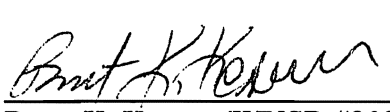
## CONCLUSION

For all of the reasons set forth above, the judgment of the Trial Court below should be affirmed.

**Respectfully submitted,**

**CANOPIUS US INSURANCE, INC., and RSUI INDEMNITY COMPANY,**

**By Counsel**



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

**DOCKET NO. 14-0723**

**ELK RUN COAL COMPANY, INC.,**
**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.**

## CERTIFICATE OF SERVICE

I, Brent K. Kesner, counsel for Respondents Canopius US Insurance, Inc. And RSUI Indemnity Company, do hereby certify that service of the foregoing **BRIEF OF RESPONDENTS CANOPIUS US INSURANCE, INC., AND RSUI INDEMNITY COMPANY** has been made upon counsel of record by hand delivering a true and exact copy thereof to:

Jonathan L. Anderson, Esq.
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in a properly addressed envelope, postage prepaid, and depositing the same in the regular course of the United States mail this **13th day of November, 2014.**

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