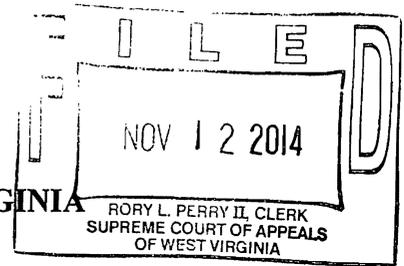


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 14-0723



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

Defendant and Third-Party Plaintiff Below/Petitioner,

v.

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

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

Third-Party Defendants Below/Respondents.

**BRIEF OF RESPONDENTS
NATIONAL CASUALTY COMPANY AND
SCOTTSDALE INSURANCE COMPANY**

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I. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Plaintiff below, Timothy Walker (“Walker”), an employee of Medford Trucking, LLC (“Medford”), sustained injuries on May 31, 2011, when a Caterpillar 992D front end loader (“end loader”) operated by Eric Redden (“Redden”), an employee of Petitioner Elk Run Coal Company, Inc. d/b/a Republic Energy (“Elk Run”), struck and overturned a Medford truck in which Walker was sitting. Walker did not assert a claim against his employer, Medford, in the underlying action.

At the time of the accident, Medford had in effect a Commercial Auto Liability Policy issued by National Casualty Company (“NCC”) and an excess liability policy issued by Scottsdale Insurance Company, which covered the truck in which Walker was sitting at the time of the subject accident. [JA 1440–2029; 2075–2093]. There is no dispute that the end loader Redden was operating was not an insured vehicle under either Policy.

It is further undisputed that Redden’s operation of the end loader was the sole cause of the accident and Walker’s injuries. Walker was seated in his truck with seatbelt fastened reviewing paperwork when Redden, while operating the end loader, passed out, circled in a reverse arc around Walker’s truck and struck Walker’s truck with the rear-end of the end loader. [JA 68–72; 781–782; 823; 847–849]. Elk Run admitted in the case below that there was no evidence that Walker was negligent and further stipulated that it would not assert a comparative negligence defense against Walker at trial. [JA 1434; 1438].¹

¹ In responses of Defendant, Elk Run Coal Company d/b/a Republic Energy, to Plaintiff’s Third Set of Requests for Admission, Elk Run admitted in Request No. 15 that it had no evidence that Plaintiff was comparatively negligent. Elk Run then responded to Request No. 16 as follows: “Admit that the Plaintiff was not negligent in connection with the May 31, 2011 incident giving rise to this cause of action. Response: Objection; asked and answered.” Thus, Elk Run effectively admitted that Walker and the insured truck in which he was sitting at the time of the accident were free of fault.

B. NATIONAL CASUALTY COMPANY POLICY

NCC issued a Commercial Auto Policy to Medford Trucking, LLC, policy number OPO0035273 for the policy period April 7, 2011 to April 7, 2012 ("Policy") which provided coverage in the amount of \$1,000,000.00. [JA 1440–2029]. Pursuant to Endorsement, the Policy designated Elk Run Coal Co., Inc. DBA Republic Energy as an additional insured. [JA 1538].

The Trucker's Coverage Form Supplemental Declarations of the NCC Policy provides that the coverage will apply only to those "autos" shown as covered autos. [JA 1450]. The Medford truck in which Walker was sitting at the time of the accident, was listed as a scheduled covered auto under the NCC Policy. The end loader operated by Redden was not listed in the schedule of covered autos.

As a commercial auto liability policy, the NCC Policy contains a standard auto coverage grant, which states as follows:

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto". [JA 1514].

The NCC Policy defines the term "auto" as follows:

"Auto" means:

1. A land motor vehicle, "trailer" or semitrailer designed for travel on public roads; or
2. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment". [JA 1524]

In turn, "mobile equipment" is defined, in relevant part, as follows:

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

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

However, "mobile equipment" does not include land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos". [JA 1525–1526]

The NCC Policy excludes the following:

Exclusions:

This insurance does not apply to any of the following.

Movement Of Property By Mechanical Device

“Bodily injury” or “property damage” resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered “auto.” [JA 1516–1517].

C. SCOTTSDALE INSURANCE COVERAGE POLICY

Above the NCC Policy, Scottsdale Insurance Company (“Scottsdale”) issued an excess auto liability policy. Policy number XLS0058690 (“Scottsdale Policy”) was effective from April 7, 2011 to April 7, 2012 and provided an additional \$1,000,000.00 in auto liability coverage over and above the NCC Policy. [JA 2075–2093; 2077; 2083]. The Scottsdale Policy was

“following” form of the NCC Policy in that, unless specified otherwise, the Scottsdale Policy incorporated the same terms and conditions of the underlying NCC Policy [JA 2084].²

D. PROCEDURAL HISTORY

On November 1, 2011, Elk Run requested in writing that Medford and its insurance carriers provide a defense and indemnity to Elk Run for Walker’s May 31, 2011 injury claims. On December 29, 2011, NCC denied coverage, asserting that the Plaintiff’s claim did not result from the use of a covered auto, but rather was solely caused by Redden’s operation of mobile equipment, which by definition is not a covered auto under the Policy. NCC further took the position that Walker’s accident was the result of movement of property by mechanical device, which the NCC Policy excludes. [JA 1425–1430]. As a result, on May 16, 2013, Elk Run filed an Amended Third Party Complaint against NCC and Scottsdale. In its Amended Third Party Complaint, Elk Run sought a declaration that coverage was owed under the auto liability policies of NCC and Scottsdale. [JA 0075–0095].

On March 5, 2014, NCC and Scottsdale moved for summary judgment against Elk Run. [JA 1409–2054; 2055–2095]. On May 28, 2014, the Circuit Court entered Orders granting summary judgment in favor of NCC and Scottsdale and dismissing Elk Run’s Amended Third Party Complaint with prejudice. [JA 2449–2463; 2464–2474]. In granting summary judgment, the Circuit Court found that Walker’s injuries admittedly were caused solely by Redden’s operation of a noninsured end loader, conduct wholly independent of the use of the insured Medford truck. Accordingly, the Circuit Court found an insufficient causal nexus between Walker’s injuries and the use of the insured truck to establish coverage for Elk Run under either

² As set forth in *Brief of Petitioner* at p. 31, footnote 8, the Scottsdale policy incorporates the same terms of the underlying NCC Policy. As will be argued, *infra*, because Elk Run is not entitled to coverage under the NCC Policy, Elk Run similarly is not entitled to coverage under the Scottsdale Policy. Therefore, this Respondent’s joint brief on behalf of both National Casualty Company and Scottsdale Insurance Company will focus upon and refer to the applicable language of the National Casualty Policy.

the NCC and Scottsdale auto liability Policies. The Circuit Court further found that no coverage was afforded Elk Run under the Policies because the accident resulted from the use of mobile equipment, which by policy definition is not a covered auto under the Policies. The Circuit Court also found that while there was no dispute as to the existence of a valid indemnity agreement between Elk Run and Medford or that Elk Run was named as an additional insured under the subject NCC Policy, Elk Run was entitled only to the same coverage afforded under the NCC Policy and nothing more. Petitioner's appeal to this Court followed.

E. STANDARD OF REVIEW

Summary judgment is proper when the record demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. W.Va. R. Civ. P. 56. "Summary judgment is appropriate ... where the non-moving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). A motion for summary judgment shall be granted only when it is clear when that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law. Syl. pt. 2. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) (citations omitted). A circuit court's entry of summary judgment is reviewed *de novo*. *Jochum v. Waste Mgmt. of West Virginia, Inc.*, 224 W.Va. 44, 48, 680 S.E.2d 59, 63 (2009).

II. SUMMARY OF THE ARGUMENT

Respondents respectfully submit that the Circuit Court of Kanawha County correctly granted Respondents summary judgment because the Petitioner Elk Run seeks motor vehicle liability coverage under an automobile liability policy which covered only the vehicle of the underlying Plaintiff, Walker, and which provided no coverage to the mobile equipment operated

by Redden, which was solely and exclusively responsible for Walker's injuries. The key language in the subject NCC insuring agreement is that bodily injury must be "caused by an accident resulting from the use of the covered auto." Thus, for coverage to be triggered under the Policy, the causal connection between the liability and the use of the covered auto must exist that is more than incidental, fortuitous or but for.

The covered Medford truck in the instant case served nothing more than the situs of Walker's injuries. The undisputed facts are that at the time of the accident Walker's truck was parked with him sitting inside with his seatbelt fastened. Redden, having become unconscious, lost control of his end loader, circled in reverse, and struck Walker's truck. Walker's injuries without question were caused solely by Redden's operation of a non-insured end loader. Further, by NCC Policy definition, an "auto" does not include "mobile equipment." As the end loader is mobile equipment, Walker's injuries did not result from the use of a covered auto under the Policy. Finally, coverage is not afforded under the NCC or Scottsdale Policies because of a coverage exclusion for bodily injury resulting from the movement of property by mechanical device unless the device is attached to the covered auto. Because Walker's injuries were solely caused by and through the operation of a mechanical device (i.e., Redden's end loader) this exclusion applies and there is no liability coverage afforded Elk Run under the Policies. In short, there is no genuine issue of material fact and Respondent is entitled to, and the Circuit Court properly granted, Respondents summary judgment as a matter of law.

III. STATEMENT REGARDING ORAL ARGUMENT

Respondents do not believe that oral argument would substantially assist the Court. Pursuant to Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, the record on

appeal and the briefs submitted are sufficient for the Court to rule on the issues presented by this appeal, and oral argument would not significantly aid the decisional process.

IV. ARGUMENT

Elk Run seeks motor vehicle liability coverage under a commercial auto policy which covered only the vehicle of the underlying Plaintiff, Walker, and which provided no coverage to the mobile equipment operated by defendant Eric Redden, who was solely and exclusively responsible for Plaintiff's injuries. There can be no rule of policy construction or interpretation which allows a tortfeasor to substitute his vehicle for the plaintiff's vehicle as a covered auto and thereby seek liability coverage under the Plaintiff's automobile policy. This Court should thus dismiss this Petitioner's Appeal and affirm the Kanawha County Circuit Court's Order granting summary judgment to NCC and Scottsdale because there are no genuine issues of material fact, and Respondents are entitled to judgment as a matter of law.

A. Elk Run Is Not Entitled To Coverage Under The Auto Liability Policies

1. The Circuit Court correctly found that NCC and Scottsdale have no obligation to provide coverage to Elk Run pursuant to the Insuring Agreement because the accident did not result from a covered auto

"Language in an insurance policy should be given its plain, ordinary meaning." Syl. pt. 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W.Va. 430, 345 S.E.2d 33 (1986), overruled in part on other grounds by *National Mut. Ins. Co. v. McMahan & Sons*, 177 W.Va. 734, 356 S.E.2d 488 (1987); *Lindsay v. Attorneys Liability Protection Society, Inc.*, 2013 WL 1776465 (W.Va. April 25, 2013) (unpublished). "Where the provisions of an insurance policy are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Syl. pt. 3, *Soliva*, 345 S.E.2d 33 (citations omitted); *Lindsay*, 2013 WL 1776465 at 3. "In ascertaining the intention of the parties to an insurance

contract, the test is what a reasonable person in the insured's position would have understood the words of the policy to mean." *Id.* at Syl. pt. 4 (citations omitted). "A party to a contract has a duty to read the instrument." *Id.* at Syl. pt. 5. Finally, "[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syl. pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002).

The Circuit Court properly granted Respondents summary judgment because Walker's injuries did not result from the use of a covered auto. The insuring agreement clearly limits coverage to liability for bodily injury that is caused by an accident and resulting from the ownership, maintenance, or use of a covered auto. [JA 1514]. As a designated insured under an Endorsement to the Policy, Elk Run is entitled to coverage no greater than this limited grant. The Medford truck Walker was occupying at the time of this accident was a specifically described covered auto under the subject NCC Policy. The end loader operated by Redden, which caused this accident, was not a covered auto as defined by the Policy. [JA 1514 (*definition of "auto"*); [JA 1525–1526] (*definition of "mobile equipment"*)]. In fact, the end loader was mobile equipment which, by Policy definition, is not an "auto" for purpose of coverage. *Id.* It is undisputed that neither Walker nor Medford did anything to cause the accident and they are without fault. [JA 1434; 1438].

Although counsel has not discovered a West Virginia case interpreting the insurance term "resulting from," the United States District Court for the Northern District of West Virginia, interpreting exclusionary language in a policy under West Virginia law, noted that the terms "arising from" and "resulting from" are synonymous. *Nutter v. St. Paul Fire & Marine Ins.*, 780 F.Supp. 2d 480 (N.D.W.V. 2011). While certain jurisdictions have generally found no significant distinction between the phrases "arising out of" and "resulting from" [See, e.g., *Mork*

Clinic v. Fireman's Fund Ins. Co., 575 N.W.2d 598, 602 (Minn. Ct. App., 1998) (“resulting from has the same ordinary and same meaning as arising out of.”); See also, *Pension Trust Fund v. Federal Ins. Co.*, 307 F.3d 944, 952 (9th Cir. 2002); *Heritage Mut. Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 657 So.2d 925, 927 (Fla. Dist. Ct. App. 1995); and *St. Paul Fire & Marine Ins. Co. v. Antel Corp.*, 387 Ill. App. 3d 158, 326 (2008)], other jurisdictions suggest that “resulting from” requires a narrower or more direct causation analysis. See, *Ohio Cas. Grp. of Ins. Cos. v. Bakarik*, 513 A.2d 462, 465–66 (Pa. 1996) (“resulting from” is narrower than the standard “arising out of” language); *State Farm Mut. Auto Ins. Co. v. Flanary*, 879 S.W.2d 720, 723 (Mo. Ct. App. 1994) (equating “resulting from” to “caused by” rather than “arising out of”).

This Court has construed the phrase “arising out of the ownership, maintenance, or use” in the context of an automobile insurance policy in *Baber v. Fortner*, 186 W.Va. 413, 412 S.E.2d 814 (1991). In *Baber*, the Court confronted the question whether a voluntary manslaughter conviction establishes the element of intent for purposes of determining coverage under an intentional injury exclusion clause in a liability insurance policy. The policyholder in *Baber* fired a gun from within the cab of his pickup truck at his ex-wife’s boyfriend, thinking the boyfriend was approaching him with a weapon in hand. When the boyfriend died as a result of the shot, his Estate sued the policyholder, who in turn attempted to invoke the coverage provided by the policy. The policy required the accident to arise out of the operation, maintenance or use of the insured motor vehicle. The court held that an intentional shooting, which occurs from within the cab of the stationary pickup serving merely as the situs for the shooting, is not an act arising out of the use of the vehicle. *Id.* at 416–418; 817–819. Importantly, the court reasoned that the policyholder’s intentional shooting was not sufficiently linked to the normal use of the vehicle to invoke the policy’s coverage:

[the] causal connection [between the use of the motor vehicle and the injury] must be more than incidental, fortuitous, or but for. The injury must be foreseeably identifiable with the normal use of the vehicle....

Id. at 417; 818 (quoting *Detroit Auto Inter-Ins. Exc. v. Higginbotham* 290 N.W.2d 414, 419 Mich. Ct. App. 213 1980).

The *Detroit Auto Inter-Ins. Exc. v. Higginbotham*, 95 Mich. Ct. App. 213; 290 N.W.2d 414 (1980) decision relied upon by the Court in *Baber*, is further instructive. *Higginbotham* involved injuries sustained during a car chase between husband and wife. The husband forced the wife to the side of the road and shot her several times, severely wounding her. The parties each had separate insurance policies on their respective automobiles issued by the same insurer. One of the issues in *Higginbotham* was whether the wife could pursue coverage for her injuries under the insurance policy covering her auto. *Id.* at 221; 419. Specifically, the wife argued that the fact that she was an occupant of her automobile at the time she sustained the injuries leads to the conclusion that her injuries arose out of the use of her automobile. The Michigan court, however, found this argument simply without merit, stating that the mere “fact that the wife was an occupant of her automobile at the time she sustained injuries would not support a finding that her injuries arose out of the use of her motor vehicle so as to entitle her to ... insurance benefits.” *Id.* at 221–222; 418–419. (citations omitted).

Following the Court’s reasoning in *Baber* and the Michigan Court’s reasoning in *Higginbotham*, it is readily apparent that the mere involvement of a covered auto in a particular misfortune does not mean that the resulting injuries are covered by auto insurance. The law requires that for liability to result from the use of a motor vehicle, there must be a sufficient nexus between its use as a motor vehicle and the accident or injury which is more than incidental, fortuitous, or but for. Put another way, the injury or *liability* must causally flow from

some conduct of the insured motor vehicle. Thus coverage under the subject NCC liability Policy in the instant case cannot be triggered merely because a covered auto served as the situs of an injury, without liability.

Again, the Medford truck served nothing more than the situs of Walker's injuries and there is no evidence that Walker or the truck in any way caused or contributed to this accident. The undisputed facts are that at the time of the accident Walker's truck was parked with him sitting inside with his seatbelt fastened. Redden, having become unconscious, lost control of his end loader, circled completely around the Medford truck in reverse and struck the truck broadside. Elk Run has admitted that Walker was not negligent and, therefore, Walker's injuries were caused solely by Redden's operation of a non-insured end loader; conduct wholly independent of the use of the Medford truck. Accordingly, "but for" the fact that Walker was sitting in the insured truck at the time Mr. Redden lost control of his coal loader is not a sufficient causal nexus to support a finding that Walker's injuries resulted from the use of Walker's insured truck so as to entitle Elk Run to coverage under the NCC policy.

A finding of coverage under the NCC liability Policy based on the facts of this case would produce an absurd result. Affording coverage to Elk Run would be akin to finding (a) liability coverage for a party in a two car accident who is 100% at fault under the auto liability policy of the party who had no fault; or (b) liability coverage for an injured party in an auto accident who is without fault under the injured party's own auto liability policy. As there appears no rule of policy interpretation which would produce such a ridiculous result, the Circuit Court properly granted summary judgment to NCC and Scottsdale.

2. **The Circuit Court correctly found that NCC and Scottsdale have no obligation to provide coverage to Elk Run because the accident was caused by mobile equipment**

As stated, *supra*, coverage is afforded under the Policy only for bodily injury caused by an accident and resulting from the use of a covered auto. By policy definition, an “auto” does not include “mobile equipment.” [JA 1524]. Mobile equipment, as defined by the Policy, includes, among other equipment, bulldozers and any other vehicles designed for use principally off public roads. [JA 1525–1526]. The end loader operated by Redden, unquestionably is mobile equipment as defined by the Policy. Complicated analysis and argument is unnecessary in this regard. Put simply, the accident, and Walker’s resulting injuries, were not caused by the operation of a covered auto, but rather solely by and through the operation of mobile equipment. Given these undisputed facts and the clear Policy language, the Circuit Court appropriately granted summary judgment to NCC and Scottsdale.

B. Coverage is not afforded to Elk Run under the NCC or Scottsdale Policies because bodily injury resulting from the movement of property by a mechanical device is specifically excluded under the Policy.

NCC denied coverage to Elk Run under the Policy, in part, due to the fact that Walker’s injury was the result of movement of property by mechanical device, which the NCC Policy excludes. [JA 1425–1430]. Although the exclusion was not raised in the case below, Elk Run has recognized and otherwise raised this exclusion in its *Brief of Petitioner* noting that NCC’s policy does not provide coverage if the claim arises out of “movement of property by a mechanical device” See, *Brief of Petitioner* at pp. 7 and 32. Respondents thus feel compelled to briefly address this issue.

The NCC Policy expressly and clearly provides as follows:

B. Exclusions

This insurance does not apply to any of the following:

8. Movement Of Property By Mechanical Device

“Bodily injury” or “property damage” resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered auto. [JA 1516-1517].

When an insurance company seeks to avoid its duty to defend, or its duty to provide coverage, through the operation of a policy exclusion, the insurance company bears the burden of proving the facts necessary to trigger the operation of that exclusion. Syl. pt. 7, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987). It is a fundamental principle of law that if the terms and exclusions are plain and not ambiguous, then no interpretation of the language is necessary and a court need only apply the exclusion of the facts presented by the parties. *State Auto Mut. Ins. Co. v. Alpha Engineering Services, Inc.*, 208 W.Va. 713, 542 S.E.2d 876 (2000).

The term “mechanical device” is not defined in the NCC Policy. Nevertheless, Elk Run recognizes “under its plain and common meaning, the front end loader [operated by Redden] is clearly a “mechanical device.” *Brief of Petitioner* at p. 30 (citing, at Footnote 7, that the common, ordinary and accepted definition of the term “mechanical” is “of or relating to machines or machinery.” A “device” is commonly defined as “an object, machine, or piece of equipment that has been made for some special purpose.”) Based upon this position, Elk Run clearly recognizes that the definition of a mechanical device includes the end loader which Redden was operating and which solely caused Walker’s injuries in this case.

The “mechanical device” exclusion plainly excludes any coverage for bodily injury resulting from the movement of property by a mechanical device unless the device is attached to the covered auto. [JA 1516–1517] Elk Run clearly does not dispute that the end loader operated by Redden, is a mechanical device. Further, Elk Run does not dispute that the mechanical device that Mr. Redden was operating at the time of the subject accident was in the process of moving

property, namely coal. (See, *Brief of Petitioner* at p. 8 wherein Elk Run recognized that “... Redden was using the front end loader to load coal into the Medford truck that Mr. Walker was driving. [JA 000028].” Finally, by admission and stipulation, the subject accident resulted solely from the movement of this mechanical device as Walker was not negligent. [JA 1434; 1438]. The language of the exclusion is therefore unambiguous and must be applied and not construed. Thus, Elk Run is provided no coverage for Walker’s injuries under the NCC or Scottsdale policies.

C. The Circuit Court correctly found that the Insuring Agreements Do Not Afford Coverage to Elk Run Under the “Insured Contract” Provisions of the Policy.

Any reliance by Elk Run on “insured contract coverage” under the NCC and Scottsdale Policies pursuant to an indemnity agreement between Elk Run and Medford, is a proverbial “red herring.”³ The Circuit Court correctly held in its Order granting Summary Judgment that although there is a valid indemnity agreement between Elk Run and Medford, this agreement does not expand the limited coverage grant under Medford’s auto liability policy through NCC. [JA 2449–2463]. The fact that Medford Trucking and Elk Run entered into an indemnity agreement does not somehow create contractual coverage for Elk Run or otherwise expand the coverage available to Elk Run under the NCC auto liability policy. Elk Run is only entitled to that coverage available under the Policy (i.e., coverage for bodily injury caused by an accident and resulting from the use of a covered auto).

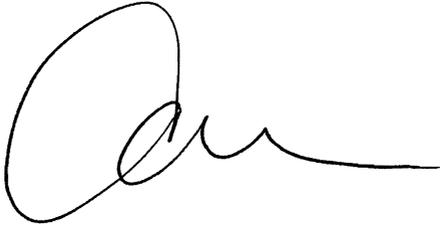
³ Petitioner references in its Brief at p. 7 that the NCC Policy also provided coverage for those sums that that Medford becomes legally obligated to pay by reason of liability that Medford assumes on behalf of a third-party in an insured contract. While Respondent, NCC, does not dispute that there is an “insured contract” provision in its Policy, Petitioner makes no argument in its Brief regarding coverage under NCC’s auto liability policy pursuant to this provision.

In *Nautilus Ins. Co. v. Johnny Clark Trucking, LLC, et al.*, Civil Action No. 2:12-cv-06678 (S.D.W.V. 2014) the named insured under a general liability policy had a broad indemnity agreement with a party that had been named as an additional insured under the policy. The court addressed the issue of whether coverage under the policy to the additional insured extended to all liability indemnified by the named insured even beyond the coverage available for the named insured. In declining to extend the coverage grant, the court recognized the well-established proposition that the rights of additional insureds are limited by the terms and conditions of the policy. See, *Nautilus*, Memorandum Opinion and Order at pp. 18–19; citing *Tidewater Equip. Co., Inc. v. Reliance Ins. Co.*, 650 F.2d 503 (4th Cir. 1981); *9 Couch on Ins. §126; 7* (3d Revised Edition 2008). Similarly in the instant case, Elk Run as an additional insured under Medford's auto liability policy is afforded only that coverage to which Medford is afforded under the NCC and Scottsdale Policies. Therefore, as the Circuit Court correctly found in granting summary judgment to NCC and Scottsdale, the only coverage available to Elk Run under the NCC and Scottsdale policies is auto liability coverage for bodily injury caused by an accident and resulting from the use of a covered auto.

V. CONCLUSION

The Circuit Court's decision granting summary judgment in favor of NCC and Scottsdale was proper and supported by the record in Petitioner's appeal. Petitioner failed to demonstrate the existence of genuine issues of material fact and that NCC and Scottsdale are not otherwise entitled to judgment as a matter of law. Accordingly, the relief sought in the Petition should be denied.

**NATIONAL CASUALTY COMPANY
and
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 14-0723

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

Defendant and Third-Party Plaintiff Below/Petitioner,

v.

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

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

Third-Party Defendants Below/Respondents.

CERTIFICATE OF SERVICE

I, Charles K. Gould, hereby certify that service of the foregoing *Brief of Respondents National Casualty Company and Scottsdale Insurance Company* was made upon counsel of record this 12th day of November, 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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