IN THE CIRCUIT COURT OF MONONGAIA COUNTY, WEST VIRGINIA

JENNY M. NEICE, as Administratrix of the ESTATE OF JEREMY R. NEICE,

Plaintiff,

v.

CIVIL ACTION NO. 17-C-483
Judge Phillip D. Gaujot

DANA MINING COMPANY OF PENNSYLVANIA, LLC,

Defendant,

and

DANA MINING COMPANY OF PENNSYLVANIA, LLC,

Third-Party Plaintiff,

v.

BRICKSTREET MUTAL INSURANCE COMPANY and FEDERAL INSURANCE COMPANY,

Third-Party Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE COMPLAINT FOR DECLARATORY RELIEF AGAINST THIRD-PARTY DEFENDANT FEDERAL INSURANCE COMPANY AS TO THE DUTY TO INDEMNIFY AND DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT OF FEDERAL INSURANCE COMPANY

On the 8th day of April, 2021, this matter came before the Court on Plaintiff's Motion for Partial Summary Judgment on the Complaint for Declaratory Relief against Third-party Defendant Federal Insurance Company as to the Duty to Indemnify ("Plaintiff's Motion for Partial Summary Judgment") and Motion for Partial Summary Judgment of Federal Insurance Company ("Federal's Motion for Partial Summary Judgment"). All parties appeared before the Court, by counsel, and

were permitted a full and fair opportunity to argue their respective positions. Based on the argument of counsel and the following findings of fact and conclusions of law, Plaintiff's Motion for Partial Summary Judgment is hereby **GRANTED** and Federal's Motion for Partial Summary Judgment is hereby **DENIED**:

I. RELEVANT FACTS AND PROCEDURAL HISTORY

1) On April 5, 2019, Defendant/Third-Party Plaintiff Dana Mining Company of Pennsylvania, LLC ("Dana Mining") filed its Third-Party Complaint for Declaratory Relief against Third-Party Defendants Brickstreet Mutual Insurance Company and Federal Insurance Company[1] (the "Complaint for Declaratory Relief"). The Complaint for Declaratory Relief sought, among other things, a declaration that "Federal owed Dana Mining an obligation to defend and indemnify for Plaintiff's underlying claim against Dana Mining."

2) On August 22, 2019, Plaintiff filed a joinder in the Complaint for Declaratory Relief insofar as it related to Federal's duty to defend and indemnify Dana Mining.

3) On October 15, 2019, Dana Mining filed a Motion for Summary Judgment on the Complaint for Declaratory Relief on the duty to defend, only. Plaintiff joined in said motion on November 13, 2019, insofar as it related to Federal's duty to defend and indemnify Dana Mining. Federal filed its Response in Opposition to the Motion for Summary Judgment on November 14, 2019, and a supplemental brief on November 18, 2019.

4) By Order dated February 18, 2020, the Court denied the Motion for Summary Judgment due to the existence of certain genuine issues of material fact that precluded summary judgment.

[1] Hereinafter, "Federal"

5) After the factual record was further developed, Dana Mining filed a Renewed Motion for Summary Judgment as to the Duty to Defend on January 16, 2020, in which Plaintiff joined on January 31, 2020, insofar as it related to Federal's duty to defend Dana Mining. Federal filed its Brief in Opposition to the Renewed Motion for Summary Judgment on January 31, 2020.

6) By Order dated March 4, 2020, Judge Susan B. Tucker granted Dana Mining's Renewed Motion for Summary Judgment as to the Duty to Defend, finding, among other things, that neither the "Expected or Intended Injury" nor the "Employer's Liability Exclusion" applied to preclude a duty to defend. Thus, Judge Tucker properly and adequately determined that there is an obligation and duty to defend.

7) On March 13, 2020, Federal filed a Motion asking the Court to certify the March 4, 2020, Order immediately appealable pursuant to W. Va. R. Civ. Pro. 54(b). The Court denied that Motion by Order dated September 24, 2020, finding, in part, that the Order did not meet the legal standard for certification under W. Va. R. Civ. Pro. 54(b) because the Order disposed of only the first part of the claim for Declaratory Relief: i.e., the determination that Federal owed Dana Mining a defense in the underlying action.

8) The only remaining issue regarding the Complaint for Declaratory Relief is Federal's duty to indemnify Dana Mining, in the event that Plaintiff prevails on her underlying claim.

9) Plaintiff filed her Motion for Partial Summary Judgment on November 18, 2020, in which Dana Mining joined on January 15, 2021. Federal filed its response in opposition on January 11, 2021. Plaintiff filed her reply on January 15, 2021

10) Federal filed its Motion for Partial Summary Judgment on December 23, 2020. Plaintiff filed her response in opposition on January 15, 2021. Dana Mining filed its response in opposition on January 19, 2021. Federal insurance filed its reply on January 25, 2021.

Based on the facts and law discussed below, Plaintiff's Motion for Summary Partial Summary Judgment is hereby **GRANTED** and Federal's Motion for Partial Summary Judgment is hereby **DENIED.**

II. STANDARD OF REVIEW

1) Summary judgment should be granted "when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Rule 56 of the West Virginia Rules of Civil Procedure is designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if there essentially "is no real dispute as to salient facts" or if it only involves a question of law. *Hanks v. Beckley Newspapers Corp.*, 153 W. Va. 834, 836-37, 172 S.E.2d 816, 817 (1970).

2) At the summary judgment stage, the circuit court's function is to determine whether a genuine issue exists for trial. *E.g.*, Syl. Pt. 4, *Gooch v. West Virginia Dep't of Pub. Safety*, 195 W. Va. 357, 465 S.E.2d 628 (1995); Syl. Pt. 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). A genuine issue does not arise for purposes of summary judgment unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict for that party. *E.g.*, Syl. Pt. 5, *Kelly v. City of Williamson*, 221 W. Va. 506, 655 S.E.2d 528 (2007); Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995). The nonmoving party cannot create a genuine issue of material fact through mere speculation or building of one inference upon another. *Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 254, 685 S.E.2d 219, 227 (2009).

3) "[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Terra Firma Co. v. Morgan*, 223 W. Va. 329, 333, 674 S.E.2d 190, 194 (2008). At the summary judgment stage, "[t]he movant's burden is only to point to the absence of evidence supporting the nonmoving party's case." *Merrill v. W. Va. Dep't of Health & Human Res.*, 219 W. Va. 151, 632 S.E.2d 307, 317 (2006).

4) At the summary judgment stage, the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party; however, the nonmoving party must nonetheless offer some concrete evidence from which a reasonable juror could return a verdict in the non-moving party's favor. *See Painter v. Peavy*, 192 W. Va. 189, 193, 451 S.E.2d 755 (1994).

III. CONCLUSIONS OF LAW

1) Pennsylvania law controls the Complaint for Declaratory Relief. Pennsylvania's Declaratory Judgment Act states, in pertinent part, that, "Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree." 42 Pa. C.S. § 7532.

2) With regard to insurance disputes, the Supreme Court of Pennsylvania has stated that, "[t]he Declaratory Judgments Act may be invoked to interpret the obligations of the parties under an insurance contract, including the question of whether an insurer has a duty to defend and/or a duty to indemnify a party making a claim under the policy. *Liberty Mutual Insurance Company v. S.G.S. Company*, 456 Pa. 94, 318 A.2d 906 (1974); *Redevelopment Authority of*

Cambria County v. International Insurance Company, 394 Pa. Super. 625, 569 A.2d 1380 (1996)." *General Accident Ins. Co. of Am. v. Allen*, 547 Pa. 693, 692 A.2d 1089 (1997).

3) "'An insurance policy [...] is a contract between the parties, and is to be interpreted by the same rules governing any other contract, and must give effect to the mutual intention of the parties as it existed at the time of contracting, so far as such intention is ascertainable.' *McCaffrey v. Knights of Columbia*, 213 Pa. 609, 63 A. 189." *Potts v. Metropolitan Life Ins. Co.*, 133 Pa. Super. 397,403, 2 A.2d 870 (1938 Pa. Super.). "If left undefined, the words of a contract are to be given their ordinary meaning. *Pines Plaza Bowling, Inc. v. Rossview, Inc.*, 394 Pa. 124, 145 A.2d 672 (Pa. 1958)." *Kripp v. Kripp*, 578 Pa. 82, 90, 849 A.2d 1159 (2004).

4) With regard to declaratory judgments related to an insurer's obligations to an insured under a policy of insurance, the Pennsylvania Supreme Court has explained that:

> A court's first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy's coverage. *Lucker Manufacturing v. Home Insurance Company*, 23 F.3d 808 (3d Cir. 1994); *see also Erie Insurance Exchange v. Transamerica Insurance Company*, 516 Pa. 574, 533 A.2d 1363 (1987). After determining the scope of coverage, the court must examine the complaint in the underlying action to ascertain if it triggers coverage. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover. **The duty to defend also carries with it a conditional obligation to indemnify in the event the insured is held liable for a claim covered by the policy**. *Pacific Indemnity Company v. Linn*, 766 F.2d 754 (3d Cir. 1985). Although the duty to defend is separate from and broader than the duty to indemnify, **both duties flow from a determination that the complaint triggers coverage**.

Allen, 547 Pa. 693, 706 (emphasis added).

5) On August 1, 2017, Federal issued a letter to Dana Mining denying both a defense and indemnification for Plaintiff's claims against Dana Mining in the underlying action (the "Denial Letter"). The Denial Letter states as follows: "First, **none** of Plaintiff's allegations meet the definition of **Property Damage** caused by an **Occurrence** or an **Advertising Injury** or

Personal Injury caused by an offense. Second, the *Employer's Liability, Except for Written Contract or Agreement Exclusion Endorsement* serves to preclude coverage for this loss in its entirety since the exclusion precludes coverage for **Bodily Injury** to an **Employee** of any **Insured** arising out of and in the course of employment by any **Insured** or performing duties related to the conduct of any **Insured's** business. . . Finally, to the extent there are allegations that the injuries to Jeremy Richard Neice were caused intentionally, the *Expected Or Intended Injury* exclusion would preclude any potential for coverage for damages alleged to have been committed intentionally." (Bold and italics in original).

6) Plaintiff now moves for summary judgment on Federal's duty to indemnify Dana Mining and specifically regarding whether or not the incident giving rise to Plaintiff's claim was an "**Occurrence**" under the terms of the Federal Policy.

7) According to the Federal Policy, "**Occurrence** means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Federal Policy does not define the term "accident." However, the Pennsylvania Supreme Court has:

> . . . established that the term "accident" within insurance polices [sic] refers to an unexpected and undesirable event occurring unintentionally, and that the key term in the definition of the "accident" is "unexpected" which implies a degree of fortuity. *Kvaerner*, 589 Pa. at 333, 908 A.2d at 898. An injury therefore is not "accidental" if the injury was the natural and expected result of the insured's actions. *See Lower Paxton Twp. v. U.S. Fidelity and Guar. Co.*, 383 Pa. Super. 558, 567, 557 A.2d 393, 398 (1989) ("[An] [a]ccident is an event that takes place without one's foresight or expectation. It is an undesigned, unexpected event. The term accident within the meaning of an insurance policy is an event happening by chance unexpectedly taking place. It is the opposite of something likely to occur, foreseeable in due course."). *See also Minnesota Fire and Cas. Co. v. Greenfield*, 579 Pa. 333, 359, 855 A.2d 854, 870 (2004) ("'Accident' has been defined in the context of insurance contracts as an event or happening without human agency or, if happening through such agency, an event which, under circumstances, is unusual and not expected by the person to whom it happens.") (citations omitted).

Donegal Mut. Ins. Co. v. Baumhammers, 595 Pa. 147, 938 A.2d 286 (2007).

8) With respect to the first step of the *Allen* analysis, this Court has already concluded that neither the Expected or Intended Injury nor Employer's Liability Exclusions apply to Plaintiff's claim against Dana Mining. Under the second step of the *Allen* analysis, the Court is required to, ". . . examine the complaint in the underlying action to ascertain if it triggers coverage. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered . . ." *Id.*

9) In the present action, Plaintiff alleges a single cause of action against Dana Mining: negligence. In support of this cause of action, Plaintiff alleges the following in the Amended Complaint:

> 17. The MSHA report dated June 1, 2016 root cause analysis of the accident determined that the mine operator (Dana) failed to adequately support or otherwise control the mine ribs and hazardous mining conditions were not identified during pre-shift examinations.
>
> 18. Further, the MSHA report concluded that the mine operator (Dana) failed to identify and effectively control adverse rib conditions present on a working section (of mine). A continuous mining machine operator (Decedent) received fatal crushing injuries when the mine rib rolled away from the coal block and pinned him (Decedent) to the mine floor. Deteriorating conditions existed prior to the accident indicating rib support was needed to protect miners from hazards relating to falls of mine ribs.
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> 19. MSHA issued a violation to Dana of Federal regulation 30 CFR 75.360(b)(11)(i) which requires that this examination include identifying hazards from roof and rib [30 CFR 75.202(a)], and that the approved Roof Control Plan is being followed [30 CFR 75.220(a)(1)]. MSHA issued violation No. 7030882 for an inadequate pre-shift exam which failed to identify existing rib hazards. This examination took place only a few hours prior to the incident. MSHA assessed the Mine a penalty of $68,300.00. MSHA stated that **"These conditions were obvious and extensive."**
>
> 20. Further, Dana failed to install proper roof and rib supports prior to the incident, and both MSHA and the Pennsylvania Bureau of Mine Safety each issued roof and rib control violations. MSHA issued violation No. 7030883 for Federal regulation 30 CFR 75.202(a) Protection From Falls of Roof, Face, and Ribs, and

> MSHA assessed a penalty of $68,300.00 to Dana. MSHA stated that the **"Mine operator failed to adequately support or control the ribs to protect miners from hazards of rib falls. Contributing to the accident was the failure of the operator to recognize and support deteriorating ribs in high stress areas."** MSHA concluded that the **"Mine operator failed to identify and protect miners from hazards relating to injuries from rib failure."**
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> . . .
>
> 23. As the owner and operator of the 4 West Mine, Dana owed Decedent the duty of providing him with a reasonably safe place to work and the duty to exercise ordinary care for Decedent's safety.
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> 24. Upon information and belief, Dana's officers, employees and/or agents maintained a regular presence at the 4 West Mine, observed and/or, through the exercise of reasonable diligence, should have observed the unsafe operations and conditions of the 4 West Mine.

Amended Complaint at pp. 3-4 (bold and underline in original).

10) Under the *Allen* analysis, the only remaining issue for the Court to decide is whether or not Plaintiff's allegations against Dana Mining constitute an "Occurrence" as defined by the Policy. In other words, do Plaintiff's allegations against Dana Mining show that Decedent's death resulted from an "accident." Under Pennsylvania law, the term "accident" is defined as an ". . . unexpected and undesirable event occurring unintentionally . . ." *Baumhammers*, 595 Pa. 158. Furthermore, an accident ". . . is an event that takes place without one's foresight or expectation. It is an undesigned, unexpected event." *Id.* In other words, an accident is an ". . . event or happening without human agency or, if happening through such agency, an event which, under circumstances, is unusual and not expected by the person to whom it happens." *Id.*

11) In the present case, Plaintiff's factual allegations are based largely on the MSHA report related to Decedent's death. Specifically, Plaintiff alleges that Dana Mining failed to identify hazardous mining conditions during pre-shift examinations and failed to adequately support or otherwise control the mine ribs. These allegations clearly fall within the definition of an "accident" under Pennsylvania law. Based on Dana Mining's alleged failure to identify the

dangerous conditions in the mine, the rib roll that killed Decedent was unexpected and unintended. Moreover, the death of a miner is always an undesirable event. Additionally, the allegations show that the rib roll happened without human agency as it was the lack of rib supports that caused Decedent's death. In other words, Decedent's death was not caused by the actions of another person. *See Baumhammers, supra.*

12) In its responses to Plaintiff's Second Set of Request for Admission, Dana Mining admitted that: (1) the rib roll resulting in Decedent's death was completely and totally unexpected from Dana Mining's perspective; (2) the rib roll resulting in Decedent's death was an undesirable event; (3) Dana Mining undertook no deliberate acts that caused the rib roll to occur; (4) the rib roll resulting in Decedent's death was unforeseen, involuntary, unexpected and unusual from Dana Mining's perspective; and (5) Dana Mining did not intend for the rib roll resulting in Decedent's death to occur. Simply put, Plaintiff's allegations and Dana Mining's admissions meet every facet of the Pennsylvania definition of the word "accident." *See Baumhammers, supra.*

13) Based on the foregoing allegations, undisputed facts and controlling Pennsylvania legal authority above, Plaintiff's allegations against Dana Mining constitute an "**Occurrence**" under the terms of the Policy. *See Allen, supra.* Consequently, Federal Insurance has a conditional duty to indemnify Dana Mining in the underlying action.

14) As noted by the Pennsylvania Supreme Court, "**[t]he duty to defend also carries with it a conditional obligation to indemnify in the event the insured is held liable for a claim covered by the policy**. . . Although the duty to defend is separate from and broader than the duty to indemnify, **both duties flow from a determination that the complaint triggers coverage.**" *Id.* (internal citation omitted).

15) In the present case, it is undisputed that Plaintiff's allegations trigger coverage under the Federal Policy because Decedent's death was the result of an "occurrence." Consequently, Federal owes Dana Mining both a defense and indemnification in the event that Plaintiff prevails on her negligence claim against Dana Mining.

16) In its response to Plaintiff's Motion for Partial Summary Judgment and in its own Motion for Partial Summary Judgment, Federal argues that the Policy's Legal Action Against Us Condition (the "No Action Clause") requires Federal's dismissal from this action. The Court disagrees.

17) The No Action Clause states that, "[n]o person or organization has a right under this insurance to join us as a party or otherwise bring us into a **suit** asking for damages from an **insured**; or to sue us on this insurance unless all of its terms have been fully complied with."

18) Plaintiff and Dana Mining argue that, as the forum Court, West Virginia procedural law applies to this case and that Federal's joinder to this action was procedurally proper under West Virginia law. The Court agrees.

19) It is axiomatic that in a case involving choice of law doctrines, the forum court always applies its own procedural rules. The Supreme Court of Appeals of West Virginia recognized this axiom in *McKinney v. Fairchild Int'l*, 199 W. Va. 718, 487 S.E.2d 913 (1997):

> "**It is traditional that a forum court always applies its own procedural rules and practices, regardless of the procedure that might be employed if the case were tried at the place were [sic] the cause of action arose.** (footnote omitted)." American Conflicts Law, *supra* § 121; *Vest*, *supra*, 182 W. Va. at 229-30, 387 S.E.2d at 283-84 (holding notice requirement of Virginia's statute on medical malpractice review panels to be a procedural rule); Restatement (Second) of Conflict of Laws § 122 (1971) ("A court usually applies its own local law rules prescribing how litigation shall be conducted. . .").

McKinney, 199 W. Va. 727 (emphasis added).

20) The West Virginia Supreme Court's opinion in *Vest v. St. Albans Psychiatric Hosp.*, 182 W. Va. 228, 387 S.E.2d 282 (1989), provides an example of this axiom in action:

> In tort cases, West Virginia courts apply the traditional choice-of-law rule, *lex loci delicti*; that is, the substantive rights between the parties are determined by the law of the place of injury. *Paul v. National Life*, 177 W. Va. 427, 352 S.E.2d 550 (1986). There is no dispute that the substantive law to be applied in this case is the law of Virginia. **It is just as clear that West Virginia procedure applies in all cases before West Virginia state courts, and a merely procedural rule of Virginia law would be ignored here.**

Vest, 182 W. Va. 229 (emphasis added).

21) With the source of the applicable procedural law conclusively determined to be West Virginia, only one question remains: does West Virginia procedural law allow Plaintiff to join Federal to this action. Once again, West Virginia law provides a conclusive answer.

22) Pursuant to Syllabus Point 4 of *Christian v. Sizemore*, 181 W. Va. 628, 383 S.E.2d 810 (1989), "[a] declaratory judgment claim with regard to the defendant's insurance coverage **may be brought in the original personal injury suit rather than by way of a separate action.**" *Id.* at Syl. Pt. 4 (emphasis added). This rule of West Virginia law is purely procedural; therefore, Syllabus Point 4 of *Christian* specifically permits Federal to be joined to the underlying tort action.

23) Plaintiff and Dana Mining further argue that Federal has waived its reliance on the No-Action Clause because Federal failed to assert the No-Action Clause until the summary judgment stage.

24) Dana Mining filed its Complaint for Declaratory Relief against Federal in this civil action on April 5, 2019. On May 21, 2019, Federal moved to dismiss the Complaint for Declaratory Relief. While Federal did raise the No Action Clause in the Motion to Dismiss, Federal never sought a hearing on the Motion.

25) On October 15, 2019, Dana Mining filed its Motion for Summary Judgment on Federal's duty to defend. Federal filed its Response in Opposition to said Motion November 14, 2019. In its Response, Federal neither mentioned its previously filed Motion to Dismiss nor raised the No Action Clause as a defense.

26) On November 18, 2019, Federal filed a Supplemental Response that again neither mentioned its previously filed Motion to Dismiss nor raised the No Action Clause as a defense.

27) Oral arguments were held before the Court on November 19, 2019 and again on February 12, 2020. Despite being present for both arguments, Federal's counsel again neither mentioned its previously filed Motion to Dismiss nor raised the No Action Clause as a defense.

28) In fact, since the filing of the Motion to Dismiss on May 21, 2019 and until the filing of its most recent pleadings in December 2020, Federal has made absolutely no mention of the No-Action Clause.

29) Under Pennsylvania law, "[w]aiver is the voluntary and intentional abandonment or relinquishment of a known right. *Samuel J. Marranca General Contracting Co., Inc. v. Amerimar Cherry Hill Associates Ltd. Partnership*, 416 Pa. Super. 45, 610 A.2d 499 (Pa.Super. 1992). '**Waiver may be established by** a party's express declaration or by **a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary**.' *Id.* at 501." *Prime Medica Assocs. v. Valley Forge Ins. Co.*, 2009 PA Super 39, 970 A.2d 1149 (Pa. Super. 2009) (emphasis added).

30) In the present case, Federal's undisputed acts and language in the continued litigation of this action for over eighteen months are entirely inconsistent with the No Action Clause upon which Federal now relies because the entire purpose of the No Action Clause is to excuse Federal from participation in this litigation. Federal was obviously aware of the existence

of the No Action Clause eighteen months ago as evidenced by the reference to the clause in Federal's Motion to Dismiss. So too then was Federal's right to enforce the clause voluntarily relinquished. It is concerning to this Court that Federal waited almost two years to raise the No-Action Clause, and this Court believes that, even under Pennsylvania law, that would be considered a voluntary waiver.

31) In its response to Plaintiff's Motion for Partial Summary Judgment and in its own Motion for Partial Summary Judgment, Federal argues that Plaintiff's Motion for Partial Summary Judgment is premature because the underlying wrongful death action has not yet been resolved. The Court disagrees.

32) With regard to declaratory judgments related to an insurer's obligations to an insured under a policy of insurance, the Pennsylvania Supreme Court has explained that:

> If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover. **The duty to defend also carries with it a conditional obligation to indemnify in the event the insured is held liable for a claim covered by the policy**. *Pacific Indemnity Company v. Linn*, 766 F.2d 754 (3d Cir. 1985). Although the duty to defend is separate from and broader than the duty to indemnify, **both duties flow from a determination that the complaint triggers coverage**.

Allen, 547 Pa. 693, 706 (emphasis added).

33) In the present case, sufficient allegations have been made and sufficient evidence has been adduced to trigger insurance coverage and eliminate the application of any exclusion. In short, the facts in the underlying action are simply not in dispute and Plaintiff's claims fall squarely within the risks for which Federal contractually agreed to defend and conditionally indemnify Dana Mining.

34) In the event that Dana Mining is ultimately found to be liable in the underlying action, the condition for indemnity will be satisfied and Federal's obligation to indemnify Dana

Mining will be become ripe. If Dana Mining is ultimately found not to be liable in the underlying action, the condition for indemnity will not be satisfied and Federal's duty to indemnify Dana Mining will be eliminated.

35) West Virginia law specifically permits Plaintiff to find out whether Federal's conditional obligation to indemnify Dana Mining exists before going through the entire process of determining Dana Mining's liability in the underlying action:

> The Supreme Court of Virginia addressed a related issue in *Reisen v. Aetna Life & Casualty Co.*, 225 Va. 327, 302 S.E.2d 529 (1983), where the defendant's insurance carrier brought a declaratory judgment suit, contending that its policy did not cover the automobile accident in which the plaintiff had been injured. The plaintiff argued that declaratory judgment was premature because there had been no judgment against the insured. In dismissing this argument, the Virginia court quoted extensively from E. Borchard, Declaratory Judgments (2d ed. 1941):
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> > "Some courts have erroneously assumed, 'contrary to overwhelming authority, that the issue between the company and the injured person is not ripe for adjudication because no judgment has yet been obtained by or against the insured or because there is only a "contingent future possibility of disputes.'" *Id.* at 636-37.
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> > > "'**This is to defeat one of the main purposes of the declaratory judgment, namely, to remove clouds from legal relations before they have become completed attacks or "disputes already ripened**." If there is human probability that danger or jeopardy or prejudice impends from a certain quarter, a sufficient legal interest has been created to warrant a removal of the danger or threat. Naturally, some perspicacity is required to determine whether such danger is hypothetical or imaginary only or whether it is actual and material.' *Id.* at 637."
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> > 225 Va. at 334-35, 302 S.E.2d at 533.
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> The statement in *Reisen* is similar to the language of this Court in *Board of Education of Wyoming County v. Board of Public Works*, 144 W. Va. 593, 599-600, 109 S.E.2d 552, 556 (1959):
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> > "**The purpose of a declaratory judgment proceeding . . . . is to anticipate the actual accrual of causes for equitable relief or rights of action by anticipatory orders which adjudicate real controversies before violation or breach results in loss to one or**

> **the other of the persons involved**. *See West Virginia-Pittsburgh Coal Company v. Strong*, 129 W. Va. 832, 42 S.E.2d 46; *Crank v. McLaughlin*, 125 W. Va. 126, 23 S.E.2d 56. Future and contingent events, however, will not be considered in a declaratory judgment proceeding and a declaration of rights will not be based on a future contingency. *The Town of South Charleston v. The Board of Education of the County of Kanawha*, 132 W. Va. 77, 50 S.E.2d 880."

Moreover, the result reached by the Supreme Court of Virginia appears to be in accord with decisions in other jurisdictions which permit an injured plaintiff to bring a declaratory judgment action against the defendant's insurance carrier to determine if there is policy coverage **before obtaining a judgment against the defendant in the personal injury action where the defendant's insurer has denied coverage**. *See Beeson v. State Auto. & Casualty Underwriters*, 32 Colo. App. 62, 508 P.2d 402, aff'd, 183 Colo. 284, 516 P.2d 623 (1973); *Atkinson v. Atkinson*, 254 Ga. 70, 326 S.E.2d 206 (1985); *Reagor v. Travelers Ins. Co.*, 92 Ill. App. 3d 99, 47 Ill. Dec. 507, 415 N.E.2d 512 (1980); *Baca v. New Mexico State Highway Dep't*, 82 N.M. 689, 486 P.2d 625 (1971). See generally 22A Am. Jur. 2d Declaratory Judgments § 124 (1988).

We believe that such a rule is consistent with the remedial purposes of the Uniform Declaratory Judgments Act. In cases such as this, there is an actual controversy between the insurance carrier and the injured plaintiff because of the very real possibility that the plaintiff will look to the insurer for payment. See *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 85 L. Ed. 826, 61 S. Ct. 510 (1941); *Government Employees Ins. Co. v. LeBleu*, 272 F. Supp. 421 (E.D. La. 1967); *Reagor v. Travelers Ins. Co., supra*; *Standard Casualty Co. v. Boyd*, 75 S.D. 617, 71 N.W.2d 450 (1955). **Permitting an adjudication of the respective rights and duties of the parties in the same proceeding as the underlying tort action also enhances judicial economy by avoiding multiple lawsuits and the possibility, as here, of separate proceedings in different courts**. *See Maryland Casualty Co. v. Pacific Coal & Oil Co., supra*; *Independent Fire Ins. Co. v. Huggins*, 404 F. Supp. 865 (D.S.C. 1975). **Declaratory judgment also provides a prompt means of resolving policy coverage disputes so that the parties may know in advance of the personal injury trial whether coverage exists.** This facilitates the possibility of settlements and avoids potential future litigation as to whether the insurer was acting improperly in denying coverage. Moreover, as this case demonstrates, the use of declaratory judgment protects the plaintiff from an insured who has no independent assets and is not concerned about insurance coverage. See Federal Kemper Ins. Co. v. Rauscher, 807 F.2d 345 (3d Cir. 1986); Hawkeye-Security Ins. Co. v. Schulte, 302 F.2d 174 (7th Cir. 1962).

Christian, 181 W. Va. 628, 383 S.E.2d 810 (1989) (emphasis added).

36) Federal seeks to avoid the application of this law by arguing that Plaintiff seeks a declaration that Federal currently owes Dana Mining an absolute duty of indemnification in the underlying action. This argument is incorrect.

37) Plaintiff, in accordance with controlling Pennsylvania substantive law and West Virginia procedural law, merely seeks a declaration that Federal owes Dana Mining a conditional duty of indemnification in the underlying action. For these reasons, Plaintiff's Motion for Summary Judgment on Federal's duty of indemnification is ripe for adjudication.

38) Federal further argues that Plaintiff's Motion for Partial Summary Judgment is premature because a jury could find that Dana Mining's culpability could fall somewhere between accidental and intentional thereby precluding coverage.

39) Under Pennsylvania law, the insured has the initial burden of establishing that the claim or suit falls within the coverage granting portions of the policy. *See CGU Ins. v. Tyson Assocs.*, 140 F. Supp. 2d 415, 419 (E.D. Pa. 2001). Once this burden is satisfied, the insurer has the burden of establishing that policy exclusions preclude coverage. *Id.*

40) Furthermore, under West Virginia procedural law, "[t]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Morgan*, 223 W. Va. 333.

41) In support of its argument, Federal points to the fact that Plaintiff's negligence claim is based largely on the findings contained in the MSHA Report and the violations issued by MSHA to Dana Mining (the "Violations"), as set forth in ¶ 9 above.

42) The relevant parts of the MSHA Report and Citations are set forth in Plaintiff's Amended Complaint and, for ease of reference, are restated below:

17. The MSHA report dated June 1, 2016 root cause analysis of the accident determined that the mine operator (Dana) failed to adequately support or otherwise control the mine ribs and hazardous mining conditions were not identified during pre-shift examinations.

18. Further, the MSHA report concluded that the mine operator (Dana) failed to identify and effectively control adverse rib conditions present on a working section (of mine). A continuous mining machine operator (Decedent) received fatal crushing injuries when the mine rib rolled away from the coal block and pinned him (Decedent) to the mine floor. Deteriorating conditions existed prior to the accident indicating rib support was needed to protect miners from hazards relating to falls of mine ribs.

19. MSHA issued a violation to Dana of Federal regulation 30 CFR 75.360(b)(11)(i) which requires that this examination include identifying hazards from roof and rib [30 CFR 75.202(a)], and that the approved Roof Control Plan is being followed [30 CFR 75.220(a)(1)]. MSHA issued violation No. 7030882 for an inadequate pre-shift exam which failed to identify existing rib hazards. This examination took place only a few hours prior to the incident. MSHA assessed the Mine a penalty of $68,300.00. MSHA stated that **"These conditions were obvious and extensive."**

20. Further, Dana failed to install proper roof and rib supports prior to the incident, and both MSHA and the Pennsylvania Bureau of Mine Safety each issued roof and rib control violations. MSHA issued violation No. 7030883 for Federal regulation 30 CFR 75.202(a) Protection From Falls of Roof, Face, and Ribs, and MSHA assessed a penalty of $68,300.00 to Dana. MSHA stated that the **"Mine operator failed to adequately support or control the ribs to protect miners from hazards of rib falls. Contributing to the accident was the failure of the operator to recognize and support deteriorating ribs in high stress areas."** MSHA concluded that the **"Mine operator failed to identify and protect miners from hazards relating to injuries from rib failure."**

Amended Complaint at ¶¶ 17-20 (emphasis in original).

43) As explained above, Plaintiff has demonstrated that her negligence claim against Dana Mining falls within the scope of the coverage granted by the Federal Policy. Consequently, the burden shifted to Federal to come forward with some evidence to support the application of a policy exclusion.

44) Since being joined to this action, Federal has conducted absolutely no discovery whatsoever despite being granted a full and fair opportunity to do so. In fact, the only evidence upon which Federal relies to support a policy exclusion is the MSHA Report and Violations. According to Federal's argument, a jury could conclude that this evidence shows that Dana Mining's acts and omissions constituted something more than mere negligence, as alleged by Plaintiff. The Court disagrees.

44) The Court **FINDS**, as a matter of law, that the MSHA Report and Violations, viewed in the light most favorable to Federal, constitute nothing more than simple negligence.

45) Federal also moved for summary judgment on the ground that it has no obligation to indemnify Dana Mining for the Neice Action due to the Employer's Liability Exclusion. On this issue, this Court has reviewed the March 4, 2020 Order. After review of the March 4 Order, this Court elects not to disturb the rulings in the March 4 Order with respect to the Employer's Liability Exclusion. Accordingly, the March 4, 2020 Order is hereby **INCORPORATED BY REFERENCE**, as if fully restated herein, and the Employer's Liability Exclusion does not preclude Federal's duty to indemnify Dana Mining in connection with the underlying negligence action.

WHEREFORE, based upon the written papers, the argument of counsel, the foregoing findings of fact and conclusions of law, Plaintiff's Motion for Partial Summary Judgment is hereby **GRANTED** and Federal's Motion for Partial Summary Judgment is hereby **DENIED**.

This Order is hereby **CERTIFIED** as final pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure as all aspects of Dana Mining and Plaintiff's Complaint for Declaratory Relief against Federal have been adjudicated and the Court has determined that there is no just

reason for delay in the entry of summary judgment in favor of Dana Mining and Plaintiff's Complaint for Declaratory Relief.

The objections and exceptions of the parties are preserved unto them.

The Court **DIRECTS** the Clerk to transmit a copy of this Order to counsel of record herein.

ENTERED this 19th day of August, 2021.

Hon. Phillip D. Gaujot
Monongalia County Circuit Judge

ENTERED: Aug 19, 2021
DOCKET LINE 234 Jean Friend, Clerk

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STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.

Jean Friend, Circuit Clerk

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