IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0735

FEDERAL INSURANCE COMPANY,

Third Party Defendant Below, Petitioner

vs.

DANA MINING COMPANY OF PENNSYLVANIA, LLC,

Defendant Below, Respondent,

And

Jenny M. Neice, Administratrix of the Estate of Jeremy R. Neice,

Plaintiff Below, Respondent.

FEDERAL INSURANCE COMPANY THIRD PARTY DEFENDANT BELOW, PETITIONER'S BRIEF

Ronald P. Schiller, Esq.
Bonnie M. Hoffman, Esq.
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
rschiller@hangley.com
bhoffman@hangley.com
(215) 568-6200 (telephone)
(215) 568-0300 (facsimile)

Charles R. Bailey, Esq.
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
P.O. Box 3710
Charleston, WV 25337-3710
cbailey@baileywyant.com
(304) 345-4222 (telephone)
(304) 343-3133 (facsimile)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ASSIGNMENT OF ERRORS

This is an insurance coverage dispute in which all parties agree Pennsylvania law controls interpretation of the insurance policy. In the matter below, the circuit court erred in finding that Federal Insurance Company ("Federal" or "Insurer") had a duty to defend and indemnify Dana Mining Company of Pennsylvania, LLC ("Dana Mining" or "Insured") in connection with a wrongful death suit brought against it. Specifically, the circuit court made three errors in reaching this conclusion.

First, the circuit court erred when it found that an exclusion in the Federal Policy, which expressly excludes coverage for loss as a result of injury or damages sustained by "any employee…of *any* insured arising out of and in the course of employment by *any* insured," regardless of whether such suit for damages related to such injuries is brought by an employee of *the* insured seeking coverage or *any other* insured (the "Employer's Liability Exclusion"), did not apply even though the suit against Dana Mining seeks damages for injuries to an employee of an insured arising out of and in the course of his employment by an insured.

Second, the circuit court erred when it found that Dana Mining's joinder of Federal to this action was proper under West Virginia procedural law despite the Policy's Legal Action Against Us Condition (the "No-Action Clause"), which states: "[n]o person or organization has a right under the insurance to join [the insurer] as a party or otherwise bring [the insurer] into a **suit** seeking damages from an **insured**[.]" It is undisputed that in this action, plaintiff below Jenny M. Neice, Administratrix of the Estate of Jeremy R. Neice ("Neice"), seeks damages from Dana Mining, an **insured**, under the Policy.

Third, the circuit court erred when it found Federal waived the No-Action Clause even though Federal asserted the No-Action Clause in its Motion to Dismiss the Third-Party Complaint and again in its Motion for Summary Judgment.

STATEMENT OF THE CASE

I. The Federal Policy

Federal issued Mining Industries Insurance Coverage Policy No. 3711-31-31 PIT to Mepco Holdings, LLC ("Mepco") for the June 1, 2015 to June 1, 2016 policy period (the "Federal Policy" or "Policy"). (Policy, Declarations) (JA 44). Dana Mining, the insured seeking coverage in this Action, was added as a Named Insured to the Policy through endorsement. (Policy, Named Insured Endorsement) (JA 46). The Policy has a $1 million per occurrence limit and $2 million general aggregate limit. (Policy, Declarations) (JA 44).

The Policy's Bodily Injury and Property Damage Liability Coverage Part provides in pertinent part:

> Subject to all of the terms and conditions of this insurance, we will pay damages that the **insured** becomes legally obligated to pay by reason of liability:
>
> - imposed by law; or
> - assumed in an **insured contract**;
>
> for **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies. ...

(Policy, at 3 of 30) (JA 66).

The Policy also contains the Employer's Liability Exclusion Endorsement, which provides:

> A. With respect to all coverages under this contract, this insurance does not apply to any damages, loss, cost or expense arising out of any injury or damage sustained at any time by any:
>
> 1. **employee** or **temporary worker** of any **insured** arising out of and in the course of:
>
> a. employment by any **insured**; or
>
> b. performing duties related to the conduct of any **insured**'s business.

2. spouse, child, parent, brother or sister of any person sustaining injury or damage (as described in subparagraph A.1.a or A.1.b above) as a consequence of any of the foregoing.

B. This exclusion applies:

1. regardless of the capacity in which any **insured** may be liable;

2. to any **insured** against whom a claim or **suit** is brought, regardless of whether such claim or **suit** is brought by an **employee** or **temporary worker** of:

a. such **insured**; or

b. any other **insured**; and

3. to any obligation to share any damages, loss, cost or expense with or to repay any person or organization who must pay any damages, loss, cost or **expense** because of any of the foregoing.

(Policy, Employer's Liability Exclusion Endorsement) (JA 120). Notably, this version of the Exclusion, which was amended by Endorsement on the Policy, replaced the version in the Policy that excluded coverage for "**bodily injury** to an **employee** of *the* **insured** arising out of and in the course of[] [] employment by *the* **insured**[.]" (italics added). (*Compare* (Policy, at 12 of 30) JA 75 *with* (Policy, at Endorsement) JA 120). Further, as relevant to this appeal, the Policy contains a common provision called the "Separation Of Insureds" Provision, which provides that "this insurance applies: as if each named **insured** were the only named **insured**; and separately to each **insured** against whom **claim** is made or **suit** is brought." (Policy, at 22 of 30) (JA 85).

Finally, the Policy contains the No-Action Clause that states, "[n]o person or organization has a right under this insurance to: join [the insurer] as a party or otherwise bring [the insurer] into a **suit** seeking damages from an **insured**[.]" (Policy, at 20 of 30) (JA 83)

II. This Action

On January 16, 2016, while working at the "4 West Mine," an underground coal mine owned by Dana Mining in Greene County, Pennsylvania, Jeremy Neice was fatally injured. It is

undisputed that, at the time of his death, Jeremy Neice was an employee of Mepco – the insured to which Federal issued the Policy. (Am. Compl. (Dec. 6, 2018) at ¶ 9) (JA 162).

On or about December 20, 2017, Jenny M. Neice, as Administratrix of the Estate of Jeremy Neice, filed suit against Dana Mining alleging wrongful death (the "Neice Complaint"). Dana Mining tendered the Neice Complaint to Federal under the Policy, seeking defense and indemnity. On August 1, 2017, Federal denied coverage, citing the Employer's Liability Exclusion. (Aug. 1, 2017 Letter from Chubb to B. Osborn) (JA 787-89). On April 8, 2019, Dana Mining filed a third-party complaint in this action against Federal seeking a declaratory judgment that Federal "owes an obligation to Dana Mining to provide a defense and indemnification for the Neice Complaint." (Third-Party Compl. (Apr. 8, 2019) at Prayer for Relief) (JA 169-79).[1]

On May 21, 2019, Federal Insurance Company moved to dismiss Dana Mining's third-party complaint under Rule 12(b)(6) based on the Policy's No-Action Clause. Specifically, Federal argued that the plain meaning of the No-Action Clause precluded Dana Mining from joining Federal as a third-party defendant in the tort action and that no West Virginia statute permitted Dana Mining to circumvent the plain terms of the Policy. (Federal's Motion to Dismiss) (JA 180-92).

In October 2019, before the circuit court ruled on Federal's motion to dismiss or Federal even answered the third-party complaint, Dana Mining filed a Motion for Summary Judgment as to the Duty to Defend and then a Renewed Motion for Summary Judgment as to the Duty to Defend on January 16, 2020. (Dana Mining's Renewed Mot. for Summ. J. as to Duty to Defend

[1] On August 22, 2019, Neice filed a joinder in Dana Mining's third-party complaint against Federal.

("Dana Mining's Renewed MSJ on DTD") (JA 316-43). On March 4, 2020, the circuit court signed a written order granting the Renewed Motion and finding that Federal had a duty to defend Dana Mining in connection with the Neice Complaint (the "March 4 Order"). (JA 1-17). Despite the plain language of the Employer's Liability Exclusion, the circuit court found that the Separation of Insureds Provision required it to interpret the phrase "*any* insured" to mean "*the* insured" seeking coverage and treat any other insureds as if they did not exist. (March 4 Order, at 14-15) (JA 14-15). On that basis, and because the Neice Complaint was not brought by an employee of Dana Mining, the circuit court found that the Employer's Liability Exclusion did not apply. (*Id.*). In reaching this conclusion, the circuit court relied exclusively on the Pennsylvania Supreme Court's decision in *Mutual Benefit Insurance Co. v. Politsopoulos,* 631 Pa. 628, 115 A.3d 844 (2015). (*Id.*) Notably, the policy language at issue in *Politsopoulos* was different than at issue here in a critical respect, as the exclusion in *Politsopoulos* precluded coverage for injuries to employees of "*the* insured" rather than "*any* insured." (*Id.* at 10-15); (JA 10-15).[2]

Neice subsequently moved for summary judgment in the circuit court seeking a declaration that Federal also owed Dana Mining indemnity for any liability found with respect to the Neice Complaint; Dana Mining joined that motion. (Plaintiff's Motion for Partial Summary Judgment; Dana Mining's Combined Joinder in Plaintiff's Motion for Partial Summary Judgment and Reply to Federal's Opposition to Plaintiff's Motion) (JA 777-98; 1508-23). Federal also moved for summary judgment on all remaining parts of Dana Mining's Third-Party

[2] Following the circuit court's issuance of the March 4 Order, Federal filed a notice of appeal to this Court. Dana Mining moved to dismiss Federal's appeal on the grounds that the March 4 Order was not a final order subject to appeal at that time. On August 27, 2020, by a vote of 3-2, this Court granted Dana Mining's motion and dismissed Federal's appeal.

Complaint. (Federal's Motion for Partial Summary Judgment) (JA 799-1230). Federal argued that the Employer's Liability Exclusion precluded indemnity to Dana Mining and, further, that the No-Action Clause in the Federal Policy prohibited Dana Mining's Third-Party Complaint against Federal. (*Id.*)

On August 19, 2021, the circuit court issued an order finding, *inter alia* that: (1) the Employer's Liability Exclusion did not apply, such that Federal owed not only a defense but indemnity to Dana Mining for any potential judgment against it; (2) despite all parties agreeing that Pennsylvania law governed the coverage dispute, West Virginia procedural law, which allows an insurer to be brought into a tort action for damages, applied and negated the Policy's clear and unambiguous No-Action Clause; and (3) in any event, Federal waived the No-Action Clause despite raising it in a Motion to Dismiss and again on Summary Judgment. (the "August 19 Order") (JA 18-38).

SUMMARY OF ARGUMENT

The facts at issue are undisputed and straightforward. The estate of Mr. Neice, an employee of an **insured**, Mepco, commenced this wrongful death action against another **insured**, Dana Mining, after Mr. Neice was fatally injured in the course of his employment with Mepco. The Employer's Liability Exclusion precludes coverage for loss as a result of injury or damages sustained by "*any* employee…of *any* insured arising out of and in the course of[] employment by *any* insured…regardless of the capacity in which any insured may be liable[.]" (Policy, Employer's Liability Exclusion) (JA 120-21) (emphasis added). Because Mr. Neice was an employee of "any insured" (Mepco), was injured during the course of his employment by "any insured" (Mepco), and this suit sought damages resulting from that injury, there is no potential for coverage under the Policy and thus no duty to defend or indemnify Dana Mining as a matter of law.

The circuit court ignored the plain and unambiguous language of the Exclusion and erred in reading the Separation of Insureds Provision in the Policy to allow coverage. (March 4 Order, at 14-15, adopted in the August 19 Order, at 19) (JA 12-15, 36). As the majority of courts have held, including the Pennsylvania Supreme Court and this Court, the Separation of Insureds Provision does not modify the terms of the unambiguous language of the Exclusion and does not change "any insured" to "the insured."

Further, despite the No-Action Clause in the Policy, which provides that "[n]o person or organization has a right under this insurance: to join [Federal] as a party or otherwise bring [Federal] into a **suit** seeking damages from an **insured**[,]" Dana Mining brought Federal into this action by means of its third-party complaint. The circuit court erred in holding that West Virginia procedural law, which, according to the circuit court, allows an insured to bring its insurer into an underlying tort action against the insured, trumped the Policy's No-Action clause and sanctioned Dana Mining's third-party complaint against Federal. (August 19 Order, at 12) (JA 29). But, the interpretation of rights and duties under a policy is governed by the applicable substantive law, and under Pennsylvania law, which all parties agree applies, these clauses are valid and enforceable.

Finally, contrary to the circuit court's order, Federal did not waive the No-Action Clause. (August 19 Order, at 12-14) (JA 29-31). Federal asserted the No-Action Clause in its Motion to Dismiss the Third-Party Complaint and again in its Motion for Summary Judgment, which conduct demonstrates the opposite of that required to waive a known right.

Thus, Federal respectfully requests that this Court reverse the circuit court's summary judgment rulings and find that (1) Federal has no duty to defend or indemnify Dana Mining in

connection with the Neice Complaint; and (2) Dana Mining violated the No-Action Clause by bringing Federal into this Action and that Federal did not waive it.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellant Federal asserts that oral argument is necessary pursuant to the criteria in Rule 18(a). Further, the case should be set for a Rule 19 argument as it involves an assignment of error in the application of settled law and a narrow issue of law and is appropriate for disposition by memorandum decision.

STANDARD OF REVIEW

This Court's review of a circuit court's entry of summary judgment is de novo. *Toth v. Bd. of Parks & Recreation Comm'rs*, 215 W. Va. 51, 53, 593 S.E.2d 576, 578 (2003). As such, this Court applies the same standard as the circuit court. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995).

The facts of this case are undisputed. On summary judgment, both parties agreed that the decedent Mr. Neice was employed by Mepco and sustained bodily injury during the course of his employment and that Dana Mining brought Federal into this action by means of its third-party complaint. As such, the circuit court's opinion was a legal conclusion based on its interpretation of the insurance policy and applicable law. The standard of review on appeal of a question of law is de novo. *Charleston Area Med. Ctr., Inc. v. State Tax Dep't of W. Virginia*, 224 W. Va. 591, 595, 687 S.E.2d 374, 378 (2009).

ARGUMENT

I. The Employer's Liability Exclusion Precludes Coverage for the Neice Complaint

A. The application of the Exclusion to the facts here could not be plainer.

The Federal Policy contains an Employer's Liability Exclusion that precludes coverage for "any damages, loss, cost or expense arising out of any injury or damage sustained at any time

by any[] **employee** or **temporary worker** 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." (Policy, Employer's Liability Exclusion Endorsement) (JA 120). The Exclusion applies "regardless of the capacity in which any **insured** may be liable; [] to any **insured** against whom a claim or **suit** is brought, regardless of whether such claim or **suit** is brought by an **employee** or **temporary worker** of[] such **insured**; or [] any other **insured**[.]" (Policy, Employer's Liability Exclusion Endorsement) (JA 121).

Here, it is undisputed that (1) Jeremy Neice was an employee of Mepco; (2) Mepco is an **insured** as defined in the Policy; and (3) Mr. Neice's death arose out of and in the course of his employment by Mepco. Even though the Neice Complaint was not brought against Mepco and Mepco did not seek coverage under the Policy, the Exclusion bars coverage to Dana Mining all the same because it expressly excludes coverage for loss as a result of injury or damages sustained by "any employee...of *any* insured arising out of and in the course of employment by *any* insured," and applies "to any **insured** [Dana Mining] against whom a claim or **suit** is brought, regardless of whether such claim or **suit** is brought by an **employee** or **temporary worker** of[] *such* **insured** [Dana Mining]; *or [] any other* **insured** [Mepco][.]" (*Id.*) (emphasis added)).

B. "Any insured" as opposed to "the insured" exclusions preclude coverage for *all* insureds if one insured satisfies the proscribed language in the Exclusion.

This conclusion is consistent with Pennsylvania law[3] and the findings of courts across the country holding that exclusions that use "any insured," as opposed to "the insured," eliminate

[3] As set forth above, the parties agree that Pennsylvania law governs interpretation of the Policy. (August 19 Order, at 5) (JA 22).

coverage for *all* insureds if one insured triggers the exclusion or otherwise engages in the proscribed action. *See e.g.:*

- *McAllister v. Millville Mut. Ins. Co.*, 640 A.2d 1283, 1289 (Pa. 1994) (Pennsylvania law) (finding that insurer had no coverage obligations to an innocent insured for loss as a result of arson committed by another insured where policy excluded coverage for loss resulting from neglect by "any insured" or from intentional acts of "an insured");

- *Spezialetti v. Pacific Emp'r Ins. Co.*, 759 F.2d 1139, 1142 (3d Cir. 1985) (Pennsylvania law) (applying "any insured" exclusion to mean anyone covered by the policy);

- *Westminster Am. Ins. Co. v. Security Nat'l Ins. Co.*, No. CV-20-2195, 2021 WL 3630464, at *5 (E.D. Pa. Aug. 16, 2021) (Pennsylvania law) (noting "[c]ourts have held that the use of 'any insured' language in a policy's [employer's liability] exclusion is construed to bar coverage to all insureds when the exclusion is triggered");

- *TIG Specialty Ins. Co. v. Pinkmonkey.com Inc.*, 375 F.3d 365, 371 (5th Cir. 2004) (because personal profit exclusion written as an "any insured" exclusion, not a "the insured" exclusion, "coverage is excluded for all Insureds, not merely the Insured who profited");

- *Medill v. Westport Ins. Corp.*, 49 Cal. Rptr. 3d 570, 580 (Cal. Ct. App. 2d Dist. 2006) ("phrases 'any insured' or 'an insured' [in exclusion] unambiguously preclude coverage to all persons covered by the policy if any one of them engages in excludable conduct");

- *Michael Carbone, Inc. v. Gen. Acc. Ins. Co.*, 937 F. Supp. 413, 422 (E.D. Pa. 1996) (collecting cases and finding "the bulk of the courts which have addressed the issue have held that an exclusion worded 'any insured' unambiguously expresses a contractual intent to create joint obligations and preclude coverage to innocent co-insureds.").

Indeed, the use of the phrase "*any* insured" as opposed to "*the* insured" means something different and in practice merits different outcomes. *See Mutual Benefit Insurance Co. v. Politsopoulos,* 631 Pa. 628, 115 A.3d 844 (2015) (finding that where a policy "variously makes

use of the terms 'the insured' and 'any insured'" the two phrases have distinct meanings).[4] The majority of courts across the country have similarly concluded that the phrases have different meanings. *See e.g., McAllister v. Millville Mut. Ins. Co.*, 433 Pa. Super. 330, 341, 640 A.2d 1283, 1289 (1994) (noting distinction between the term "any" and "the" and holding that exclusion using phrase "any insured," "clearly indicate[s] that the insureds' obligations under the policy's neglect and intentional provisions are joint, not several"); *J&J Holdings, Inc. v. Great Am. E&S Ins. Co.*, 420 F. Supp. 3d 998, 1011 (C.D. Cal. 2019) ("California courts recognize that there is a meaningful distinction between 'the insured' and 'any insured' in the context of insurance policy coverage exclusions."); 13A Couch on Ins. § 197:38 (noting that in general where a policy precludes recovery as a result of the actions of "the insured," recovery is precluded only as to the insured who committed the act; on the other hand, where a policy precludes coverage as a result of the actions of "any insured", the effect of the acts of one insured preclude recovery as to all insureds).

C. A separation of insureds provision does not negate or modify "any insured" exclusions.

The circuit court ignored the Exclusion's plain language, and the plethora of case law cited above, reasoning that the Policy's Separation of Insureds Provision required it to construe the Exclusion as applying only if the underlying suit was brought by an employee of "the" insured against whom suit was filed and seeking coverage. (March 4 Order, 14-16, adopted in the August 19 Order, at 19) (JA 14-16, 36). In other words, the circuit court rewrote the Exclusion to apply only if the injury occurred to "an **employee** of *the* **insured** arising out of and in the course

[4] In fact, as the *Politsopoulos* Court noted, even the Policyholder *Amici* in that case argued that there was a difference between "any insured" and "the insured" language and that the policy at issue employed each of the phrases "to achieve distinct aims and effects." *Politsopoulos*, 115 A.3d at 849.

of[] [] employment by *the* **insured**" and found that it did not apply here because Dana Mining was not Neice's employer. (*Id.*).

However, this directly contradicts Pennsylvania law, which holds that a separation of insureds clause does *not* alter the plain meaning of a policy exclusion. *Politsopoulos*, 115 A.3d at 850 ("neither a separation-of-insureds clause nor its analogue, a severability-of-interests provision, is to be interpreted in a manner that would subvert otherwise clear and unambiguous policy exclusions"). This Court, too, interpreting West Virginia law, reached the same conclusion, emphasizing that the purpose of a separation of insureds or severability clause does not negate plainly worded exclusions. *American Nat'l Prop. & Cas. Co. v. Clendenen*, 238 W.Va. 249, 793 S.E.2d 899, 912 (2016).

In *Clendenen*, this Court answered certified questions from the Northern District of West Virginia, including whether "unambiguous severability clauses in the insurance policies, which state that the insurance applies separately to each insured, prevail over the exclusions and require the insurers to apply the exclusions separately to each insured, despite the intentional and criminal actions of co-insureds." *Id.* at 902. This Court – after extensive analysis and citing cases from various jurisdictions, including analyzing "any insured" versus "the insured" in various contexts and in conjunction with separation clauses – ultimately joined the majority of jurisdictions in holding that even an unambiguous severability clause, which stated that the insurance applies separately to each insured "do[es] not prevail over the unambiguous intentional/criminal acts exclusions." *Id.* at 918.

Not surprisingly, this interpretation is consistent with cases across the country. *See e.g.*:

- *Travelers Home & Marine Ins. Co. v. Stahley*, 239 F. Supp. 3d 866, 874 (E.D. Pa. 2017) (interpreting Pennsylvania law) (noting that "the bulk of courts which have addressed the issue have held that an exclusion worded 'any insured' unambiguously expresses a contractual intent to create joint obligations and [to]

preclude coverage to innocent co-insureds," regardless of the existence of a severability clause in the policy);

- *Michael Carbone, Inc. v. Gen. Accident Ins. Co.*, 937 F. Supp. 413, 419 (E.D. Pa. 1996) (applying automobile exclusion phrased in terms of "any insured" and holding that such exclusion is unaltered by the separation of insureds clause)

- *American Family Mut. Ins. Co. v. White*, 65 P.3d 449, 456 (Ariz. Ct App. 2003) ("Most courts that have construed the phrase 'any insured' in an exclusion have found that it bars coverage for any claim attributable to the excludable acts of any insured, even if the policy contains a severability clause. We join that majority.");

- *Ohio Cas. Ins. Co. v. Holcim (US),* 744 F. Supp. 2d 1251, 1272 (S.D. Ala. 2010) (collecting cases and explaining that "courts from many jurisdictions have emphasized that a separation of insureds provision is not designed to, and does not have the effect of, negating plainly-worded exclusions");

- *Evanston Ins. Co. v. OEA, Inc.*, No. CIV-S-02-1505 DFL PAN, 2005 WL 1828796, at *7 (E.D. Cal. July 25, 2005), *aff'd*, 566 F.3d 915 (9th Cir. 2009) (finding that a separation of insureds clause only affects exclusions referring to "the insured," noting that with this interpretation, the separation of insureds clause and employment exclusion clause are consistent with one another and neither is rendered meaningless).

D. The circuit court's interpretation also violated basic principles of contract construction.

Not only did the circuit court adopt an interpretation here that is contrary to Pennsylvania law, West Virginia law, and a majority of other courts, but the circuit court's interpretation also violated basic rules of contract interpretation and rendered certain language in the exclusion superfluous. *See Com. ex rel. Kane v. UPMC*, 634 Pa. 97, 135, 129 A.3d 441, 464 (2015) (holding that "a contract must be interpreted to give effect to all of its provisions," and not "in a manner which results in another portion being annulled."). Specifically, the circuit court's interpretation rendered the entirety of Sections B(1) and (2) of the Exclusion meaningless. Section B of the Employer's Liability Exclusion states that the Exclusion applies:

1. regardless of the capacity in which any **insured** may be liable;

2. to any **insured** against whom a claim or **suit** is brought, regardless of whether such claim or **suit** is brought by an **employee** or **temporary worker** of:

   a. such **insured**; or

   b. any other **insured**; and

(Policy, Employer's Liability Exclusion) (JA 120-21).

The court in *J&J Holdings* reached the same conclusion. The employer's liability exclusion at issue in the *J&J Holdings* case contained similar "regardless of" language as in B(1) above. Specifically, the *J&J Holdings* exclusion provided that it applied "whether the Insured may be liable as an employer or in any other capacity." 420 F. Supp. 3d at 1003. The court held that the exclusion applied to "any insured," particularly because the language specified that it applied whether the insured seeking coverage may be liable in its capacity as an employer or in any other non-employer capacity. *Id.* at 1013. The *J&J Holdings* Court reasoned that reading the exclusion to eliminate coverage only for employers of the injured party would render the "in any other capacity" language "practically meaningless." *Id.* If the exclusion applied only to the insured *employer* of the injured party, the employer's liability would of course be in its capacity as an employer and not in any other capacity. *Id.* Likewise, if the Exclusion here applied only to the insured employer (Mepco), the employer's liability would obviously be in its capacity as an employer and "not in any other capacity."

The circuit court's interpretation similarly rendered Section B(2) meaningless. If the Exclusion only applied to employer-insureds, the section of the Employer's Liability Exclusion providing that it applies "to any **insured**...regardless of whether such claim or suit is brought by an **employee** or **temporary worker** of: a. such **insured**; *or b. any other* ***insured***" would have no effect. In other words, under the circuit court's interpretation, the Exclusion would only apply to preclude coverage for a claim or suit brought by an **employee** or **temporary worker** of *the*

insured seeking coverage. But this renders the "any other **insured**" language mere surplusage, which would violate the well-settled rule of contract interpretation that all words should be given effect. *See UPMC*, 129 A.3d at 464 (holding that "a contract must be interpreted to give effect to all of its provisions," and not "in a manner which results in another portion being annulled."); *Indalex Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2013 PA Super 311, 83 A.3d 418, 421 (2013) ("[W]e do not treat the words in the policy as mere surplusage and, if at all possible, we construe the policy in a manner that gives effect to all of the policy's language.").

When giving effect to the entire provision, the Exclusion plainly applies and bars coverage to any **insured** against whom a **claim** or **suit** is brought – here, Dana Mining – regardless of whether the **claim** or **suit** is brought by an **employee** of such **insured** or an **employee** of *any other* ***insured***, as was the case here. Indeed, it is undisputed that while Neice was not employed by Dana Mining, he was employed by Mepco (*i.e.*, any other **insured**).

E. *Politsopoulos* is factually distinguishable and, if it is relevant at all, supports the view that the Exclusion bars coverage here.

The circuit court misapplied the Pennsylvania Supreme Court's decision in *Mutual Benefit Insurance Co. v. Politsopoulos*, 631 Pa. 628, 115 A.3d 844 (2015), in reaching its conclusion that the Exclusion does not bar coverage to Dana Mining. (March 4 Order, at 10-14, adopted in the August 19 Order, at 19) (JA 10-14, 36). In *Politsopoulos*, a restaurant owner obtained a policy containing an employer's liability exclusion for injury to "[a]n 'employee' of ***the*** insured arising out of and in the course of...[e]mployment by ***the*** insured[.]" 115 A.3d at 845 (emphasis added). The policy also contained a separation of insureds provision that provided, like the Federal Policy, that "this insurance applies...as if each **named insured** were the only **named insured;** and [s]eparately to each **insured** against whom **claim** is made or **suit** is brought." *Id.*; *Mutual Benefit Insurance Co. v. Politopoulos*, 2013 PA Super 250, 75 A.3d 528,

535 (2013). Pursuant to the terms of their lease, the restaurant owners were required to add the property owners as additional insureds under the policy. 115 A.3d at 846. The property owners were not designated on the declarations page, but the policy extended coverage to unidentified persons doing business with the restaurant for whom the restaurant agreed in writing to provide insurance. *Id.* An employee of the restaurant commenced a negligence action against the property owners after falling at work. *Id.* The insurer disclaimed coverage to the property owners based on the employer's liability exclusion and asked the court to interpret "the insured" to apply as if it said "any insureds;" *id.* – that is, to do the opposite of what the Policy language requires here. In response, the property owners pointed to the separation of insureds provision and argued the exclusion did not apply. *Id.*

Ultimately, the Superior Court in *Politsopoulos* interpreted the separation of insureds provision to evaluate coverage as if the property owners were the "only named insured" under the policy and the restaurant owner-employer did not exist. *Id.* at 850. The Pennsylvania Supreme Court, however, stated that this was error because, under the policy at issue, the property owners were merely insureds or additional insureds and there was no evidence at all that they were "named insured[s]." *Id.* Thus, according to the Pennsylvania Supreme Court, the first part of the separation of insureds provision in the *Politsopoulos* policy providing that the insurance applied "as if each named insured were the only named insured," was inapplicable. *Id.* Instead, the Supreme Court recognized the distinction between "*the* insured" and "*any* insured" and found that the appropriate focus was less on the specific wording of the separation of insureds provision than the specific terms of the employer's liability exclusion. *Id.* at 851.

The Pennsylvania Supreme Court also noted that the purpose of a separation of insureds provision is ***not*** to negate plainly worded exclusions (which is exactly what the circuit court did

here by reading "any insured" as "the insured."). *See Politsopoulos*, 115 A.3d at 852 n.5 (noting that "[t]he great majority of courts . . . merely apply the rule that a separation-of-insureds clause does not negate the effect of a plainly worded exclusion") (citing Allan D. Windt, 3 INS. CLAIMS AND DISPUTES § 11:8 (6th ed. 2014) (citing cases and explaining that, "as applied even independently to each insured, an 'any insured' exclusion unambiguously eliminates coverage for each and every insured")). Thus, *Politsopoulos* in fact supports Federal's interpretation and application of the Employer's Liability Exclusion.

The circuit court, however, ignored the Pennsylvania Supreme Court's repeated direction that "any insured" should be read to preclude coverage to all insureds and that the purpose of separation of insureds provisions is not to negate plainly worded exclusions, and in fact did the opposite. The circuit court relied on the intermediate appellate court's opinion in *Politsopoulos* to apply the Separation of Insureds Clause to misconstrue the plain meaning of the Employer's Liability Exclusion. (March 4 Order, at 14; adopted in the August 19 Order, at 19) (JA 14, 36). But the circuit court's reliance is misplaced. As an initial matter, the employer's liability exclusion at issue in *Politsopoulos* used the phrase "the insured," whereas the Employer's Liability Exclusion in the Federal Policy uses the phrase "any insured." *Politsopoulos*, 115 A.3d at 845. This is a major distinction, yet the circuit court's opinion is devoid of any recognition of this and, instead, claims that the factual circumstances of this case and those presented in *Politsopoulos* are completely analogous. (March 4 Order, at 14, adopted in the August 19 Order, at 19) (JA 14, 36). Obviously, the very different policy language rebuts this conclusion. There can be no dispute that the circuit court's finding that the Separation of Insured Clause requires reading the Policy as if Dana Mining were "the only named insured" is plainly wrong. (March 4 Order, at 14, adopted in the August 19 Order, at 19) (JA 14, 36). As mentioned above, the

Pennsylvania Supreme Court completely rejected the intermediate court's interpretation of the separation of insureds provision and focus on the "named insured" issue. 115 A.3d at 850.

Other courts have rejected the circuit court's notion that the Exclusion should be read differently with respect to a named insured. For example, in *J&J Holdings*, the court addressed an almost identical situation as here and precluded coverage to a non-employer named insured, despite a separation of insureds provision. In that case, the employer's liability exclusion precluded coverage for "[b]odily injury to: (1) an 'employee' of any insured arising out of and in the course of: (a) employment by any insured...." 420 F. Supp. 3d at 1003. The policy contained an identical separation of insureds provision providing the insurance applied "as if each named insured were the only named insured; and [] separately to each insured against whom claim is made or 'suit' is brought." *Id.* at 1002. A worker of a named insured was injured while on the lot of another named insured and brought suit against both the named insured employer and the named insured lot owner. *Id.* at 1003. The insurer denied coverage to both insureds on the ground that the employer's liability exclusion barred the claims for bodily injury. *Id.* The court concluded that the phrase "to an employee of *any* insured arising out of and in the course of employment by *any* insured" meant that the policy eliminated coverage for bodily injury suffered by an employee of either the named insured employer or the named insured lot owner regardless of which insured employed the injured worker. *Id.* at 1013. The *J&J Holdings* Court rejected the position employed by the circuit court here that the exclusion should be read to preclude coverage only to the named insured employer based on the separation of insureds clause and, instead, held that the clause did not "nullify" the "any insured" language. *Id.* at 1012.

Similarly, in *Bituminous Casualty Corp. v. Maxey*, 110 S.W.3d 203, 209 (Tex. App. 2003), the policy's auto exclusion precluded coverage for bodily injury arising from the

ownership, maintenance, or entrustment of an automobile to "any insured." 110 S.W.3d at 209. Two companies, Triple L ("Named Insured One") and L & R ("Named Insured Two"), were both identified as named insureds under the policy, and employees were included as insureds for acts within the scope of their employment. *Id.* An employee of Named Insured One struck a woman with his truck. *Id.* Named Insured Two's employee was responsible for maintenance of the brakes of the truck. *Id.* Named Insured One, Named Insured Two, and their employees were sued. *Id.* The underlying plaintiff, who entered into a settlement with Named Insured One, argued that, based on the separation of insureds provision, the auto exclusion excluded only damages arising out of Named Insured Two's negligence, not damages arising out of Named Insured One's negligence. 110 S.W.3d at 210-11.

The Texas Court of Appeals rejected the argument that the separation of insured clause, which provided the insurance applied "[a]s if each Named Insured were the only Named Insured; and [s]eparately as to each insured against whom claim is made or 'suit' is brought," be read as if Named Insured Two were the only Named Insured. *Id.* at 210, 214. In reaching its conclusion, the court determined that the only effect of the separation of insureds clause is to alter the meaning of the term "the insured" to reflect who is seeking coverage, but where the exclusionary clause uses the term "any insured," then application of the separation of insureds clause has no effect on the exclusion clause. *Id.* at 214. To hold otherwise, the court noted, "would collapse the distinction between the terms 'the insured' and 'any insured' in an insurance policy exclusion clause, making the distinction meaningless." *Id.* Ultimately, the court held that there was no coverage under the policy for the underlying plaintiff's injuries because the "injury arose from maintenance of the truck and trailer by [Named Insured Two], a named insured, and its employee...also an insured, as well as from the operation of the vehicle by...an employee of

[Named Insured One], also a named insured, the auto exclusion clause applies." *Id.* at 215. *See also Evanston Ins. Co. v. OEA, Inc.*, No. CIV-S-02-1505 DFL PAN, 2005 WL 1828796, at *1 (E.D. Cal. July 25, 2005), *aff'd*, 566 F.3d 915 (9th Cir. 2009) (construing policy exclusion with "any insured" language to preclude coverage for named insured and reasoning that construing the term "any" to mean "the" in an exclusionary clause when an insurance policy contains a separation of insureds clause "would require a tortured reasoning of the terms of the policy[,]" and "would invite collusion among insureds, whereby any one insured could make a claim for coverage of damages caused by any other insured.").

F. Applying the Exclusion as written does not render the Separation of Insureds Provision meaningless.

The circuit court attempts to justify its reading of the Exclusion by claiming that interpreting it as written would render the Separation of Insureds Provision "meaningless." (March 4 Order, at 15, adopted in the August 19 Order, at 19) (JA 15, 36). This is wrong.

The Separation of Insureds Provision would still be applied to the Policy's other exclusions that do not use the "any insured" language – and there are many. For example, the Expected or Intended Injury Exclusion precludes coverage for "**bodily injury** or **property damage** arising out of an act that: is intended by *the **insured***; or would be expected from the standpoint of a reasonable person in the circumstances of *the **insured***[.]" (Policy, at 12 of 30) (JA 75) (emphasis added). Similarly, the Crime or Fraud Exclusion precludes coverage for "**advertising injury** or **personal injury** arising out of any criminal or fraudulent conduct committed by or with the consent or knowledge of *the **insured.***" (Policy, at 13 of 30) (JA 76) (emphasis added). Thus, here, the Separation of Insureds Provision clarifies that "the insured" means "the insured seeking coverage." Given the Separation of Insureds Provision's effect on these policy provisions, the Provision is not rendered "meaningless." *See Vivify Constr., LLC v.*

Nautilus Ins. Co., 2017 IL App. (1st) 170192, 419 Ill. Dec. 743, 750, 94 N.E.3d 281, 288 (App. Ct. 1st Dist. 2018) (applying "any insured" as written despite severability clause and holding "interpretation does not render the separation of insureds provision meaningless, as that provision must still be applied to the policy's other exclusions"); *see also Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.*, 842 F. Supp. 1151 (W.D. Ark.), *aff'd*, 33 F.3d 1476 (8th Cir. 1994) (policy exclusion for willful violations of penal statute by or with consent of insured did not apply to action against insured for negligent hiring and supervision of employee who sexually molested a child; under separation of insureds provision, acts of "the insured" were viewed independently of acts of any additional insureds).

This interpretation, unlike the circuit court's interpretation, gives effect to all provisions of the Policy. Any other construction renders some provisions or language in the Federal policy meaningless.

II. The Policy's No-Action Clause Prohibits Dana Mining's Third-Party Complaint Against Federal

A. West Virginia procedural law does not negate the Policy's clear language prohibiting the Insured from bringing the Insurer into the underlying tort action.

The circuit court erroneously found that West Virginia procedural law applied to trump the Policy's clear language prohibiting the insured from bringing the insurer into the underlying tort action. (August 19 Order, at 12) (JA 29). The Policy's No-Action Clause bars Dana Mining's third-party complaint against Federal: "No person or organization has a right under this insurance to: join us as a party or otherwise bring us into a **suit** seeking damages from an **insured**...." (Policy at 20 of 30) (JA 83). In this suit, plaintiff seeks damages from Dana Mining, an **insured** under the Policy. Dana Mining brought Federal into this suit by means of its third-party complaint.

The parties agreed, and always have agreed, that Pennsylvania law applies to policy interpretation here. (August 19 Order, at 5) (JA 22). However, with respect to whether the No-Action Clause barred Dana Mining's Third-Party Complaint against Federal, the circuit court incorrectly accepted Neice and Dana Mining's contention that West Virginia procedural law applied to sanction Dana Mining bringing Federal into this suit. (August 19 Order, at 12) (JA 29).

Contrary to the circuit court's opinion, this is not a procedural issue but rather presents a substantive issue of the right to sue under an insurance contract and interpretation of a policy provision. Here, the parties expressly and affirmatively agreed to the policy language precluding the insured from bringing the insurer into the underlying tort action. This is an enforceable contractual promise that is not contingent on where suit is brought. Rather, the interpretation of rights and duties under a policy is plainly an issue of policy interpretation to be governed by the applicable substantive law. *See Apalucci v. Agora Syndicate, Inc.*, 145 F.3d 630, 632 (3d Cir. 1998) (applying Pennsylvania substantive law, as opposed to federal procedural law, to the issues of "the right to sue under the insurance contract and the contract's 'no action clause'").

As such, under the applicable substantive Pennsylvania law, clauses prescribing the manner in which suit against an insurer may be brought are valid and enforceable. *See Burks v. Fed. Ins. Co.*, 2005 PA Super 297, ¶ 17, 883 A.2d 1086, 1091 (2005) (relying on no-action clause in policy in finding injured claimant may not bring direct action against insurer because the legal action provision of the policy, which set forth the circumstances under which a party could bring a suit against the insurer, demonstrated that the legal action provision insulated the insurer from direct causes of action by a third party).

Even if West Virginia procedural law did apply (and it does not), the case of *Christian v. Sizemore*, 383 S.E.2d 810 (W. Va. 1989), which the circuit court relied on in reaching its decision that Dana Mining's Third-Party Complaint was proper, is not applicable here. That case does not provide that an insurer can be brought into the underlying action by its insured despite the presence of a specific no-action clause that the insured and insurer agreed to in the insurance contract. In fact, *Christian v. Sizemore* does not discuss no-action clauses, nor any other policy provisions prescribing the manner in which suit against an insurer may be brought, at all.

West Virginia Code Section 55-13-12 also does not defeat the Policy language. That section of the code addresses the purpose and construction of West Virginia's Declaratory Judgments Act: "[t]his article is declared to be remedial; its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." It does not provide that a party can demand a declaratory judgment anywhere, anytime, without any conditions, or negate otherwise applicable contract provisions that affect whether and how a party can be sued – contract provisions that Dana Mining agreed to as a condition of the insurance policy. Indeed, under West Virginia law, "[w]here the parties to a contract have specified therein the conditions upon which an action upon the contract may be maintained, such conditions precedent generally must be complied with before an action for breach of contract may be properly brought." *Mimi's Inc. v. BAI Riverwalk, L.P.*, No. 18-0775, 2020 WL 1487804, at *4 (W. Va. Mar. 23, 2020) (citing Syl. Pt. 1, *Vaughan Constr. Co. v. Va. Ry. Co.*, 82 W. Va. 658, 97 S.E. 278 (1918)).

Moreover, parties are free to negotiate and agree on whichever terms and provisions they deemed acceptable at the time of contracting, even if these provisions contradict otherwise applicable state law. *See Mimi's Inc*, 2020 WL 1487804, at *4 ("There is no more firmly rooted

principle of law than that these parties had a right to make whatever contract they pleased[.]) (citing *Watzman v. Harry L. Unatin*, 101 W. Va. 41, 51, 131 S.E. 874, 878 (1926)); *John B. Conomos, Inc. v. Sun Co. (R&M)*, 2003 PA Super 310, ¶ 17, 831 A.2d 696, 706 (2003) (noting the "right of parties to contract as they wish" and that "[w]ithin any limits the law permits contracts to be made, the law will enforce, according to its terms, any contract made (except as to 'unconscionable provisions'")).

The circuit court's August 19 Order that West Virginia procedural law applied to trump the parties' contractually agreed language is contrary to the terms of the Policy, choice of law principles, and invites forum shopping. That is, if the circuit court is correct that the law of the forum dictates whether an insurer can be brought into the underlying tort action despite a provision in an insurance contract expressly prohibiting it, then the insured simply has to sue in a jurisdiction that has such procedural law allowing it to bypass the plain and unambiguous terms of the insurance contract. The clear and unambiguous policy language barring an insured from bringing the insurer into an underlying action is not conditional or dependent on what state an action is brought in.

B. Federal did not waive the No-Action Clause.

After finding under West Virginia Procedural law that Federal never had the right to invoke the No-Action Clause to begin with, the circuit court compounded the error by ruling that Federal waived the right to invoke the Clause under Pennsylvania substantive law. (August 19 Order, at 13-14) (JA 30-31).

Under Pennsylvania law, waiver is the voluntary and intentional relinquishment of a known right established by a party's express declaration or undisputed acts or language so inconsistent with a purpose of stand on the contractual provision "as to leave no opportunity for a reasonable inference to the contrary." *Prime Medica Assocs. v. Valley Forge Ins. Co.*, 2009 PA

Super 39, ¶ 18, 970 A.2d 1149, 1157 (2009). Federal's conduct did not demonstrate any intention to waive the No-Action Clause "as to leave no opportunity for a reasonable inference to the contrary." *Id.* In fact, Federal never expressed a declaration of waiver or acted as if it had waived the no action clause. To the contrary, at the first opportunity Federal raised the No-Action Clause in its Motion to Dismiss the Third-Party Complaint. (Federal's Motion to Dismiss) (JA 187-89).

In finding waiver, the circuit court noted that Federal did not include in its opposition to Dana Mining's Renewed Motion for Summary Judgment the fact that it had previously raised the No-Action Clause in its Motion to Dismiss and that Federal did not raise this fact at oral argument on the Renewed Motion. (August 19 Order, at 13) (JA 30). But, Federal's Motion to Dismiss remained pending at the time. That the circuit court had not ruled on the Motion to Dismiss when Dana Mining filed its Renewed Motion does not result in waiver. Nor does the fact that Federal was obligated to and did continue to participate in the litigation to which it had been made a party suggest a waiver.[5] Federal had no choice to respond to the further motions being filed. Federal then again raised the No-Action Clause in its Motion for Partial Summary Judgment – the very next time it sought affirmative relief. (JA 810-12). Federal's conduct in raising the Clause throughout this case demonstrates the exact opposite of an intent to waive the provision.

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court's summary judgment rulings and find that (1) Federal has no duty to defend or indemnify Dana Mining in

[5] The circuit court noted that litigation continued for eighteen months but for over six of those months, the case had been on appeal to this Court.

connection with the Neice Complaint; and (2) Dana Mining violated the No-Action Clause by bringing Federal into this Action and that Federal did not waive it.[6]

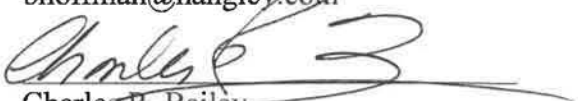
Dated: December 20, 2021

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

By: */s/ Ronald P. Schiller*

Ronald P. Schiller (*pro hac vice*)
Bonnie M. Hoffman (*pro hac vice*)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200 (telephone)
(215) 568-0300 (facsimile)
rschiller@hangley.com
bhoffman@hangley.com



Charles R. Bailey
WV Bar # 0202
Bailey & Wyant, PLLC
500 Virginia St East, Suite 600
Charleston, WV 25301
Telephone: (304) 345-4222
Facsimile: (304) 343-3133
cbailey@baileywyant.com

Counsel for Federal Insurance Company, Third-Party Defendant Below, Petitioner

[6] If this Court reaches the No-Action Clause only and reverses the circuit court on that issue, this Court should further vacate the circuit court's orders dated March 4, 2020 and August 19, 2021 for lack of jurisdiction to issue those orders in the Neice Action.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief was served upon the following counsel of record via U.S. First-Class mail, postage prepaid on this the 20th day of December, 2021, addressed as follows:

Tiffany R. Durst, Esquire
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, West Virginia 26508
(Counsel for Respondent Dana Mining)

Scott S. Segal, Esq. (WVSB #4717)
Jason P. Foster, Esq. (WVSB #10593)
C. Edward Amos, II, Esq. (WVSB #12362)
THE SEGAL LAW FIRM
A Legal Corporation
810 Kanawha Boulevard, East
Charleston, West Virginia 25301
Telephone: (304) 344-9100
Facsimile: (304) 344-9105
(Counsel for Respondent Jeremy R. Neice)

Charles R. Bailey
WV Bar # 0202
Bailey & Wyant, PLLC
500 Virginia St East, Suite 600
Charleston, WV 25301
Telephone: (304) 345-4222
Facsimile: (304) 343-3133
cbailey@baileywyant.com