IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0735

FEDERAL INSURANCE COMPANY,

Petitioner (Third-Party Defendant below),

v.

DANA MINING COMPANY OF PENNSYLVANIA, LLC

Respondent (Defendant and Third-Party Plaintiff below).

(On Appeal from the Circuit Court of Monongalia County, West Virginia, Civil Action No. 17-C-483)

RESPONSE BRIEF ON BEHALF OF RESPONDENT, DANA MINING COMPANY OF PENNSYLVANIA, LLC

Tiffany R. Durst
West Virginia State Bar Id. 7441
Nathaniel D. Griffith
West Virginia State Bar Id. 11362
PULLIN, FOWLER, FLANAGAN, BROWN & POE PLLC
2414 Cranberry Square, Morgantown, West Virginia 26508
Telephone: (304) 225-2200 | Facsimile: (304) 225-2214
Counsel for Respondent, Dana Mining Company of Pennsylvania, LLC

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I. STATEMENT OF THE CASE

A. Allegations of Underlying Complaint

The Amended Complaint in this case was filed by Plaintiff, Jenny M. Neice, Administratrix of the Estate of Jeremy R. Neice (hereinafter "Plaintiff" and "Decedent" respectively). *JA161.*[1] The sole defendant named in the Amended Complaint is Dana Mining Company of Pennsylvania, LLC (hereinafter "Dana Mining"). *JA161.* The Amended Complaint asserts that "[a]t all times relevant [...] Decedent was employed by Mepco, LLC" (hereinafter "Mepco") as a continuous mining machine operator. *JA162 at ¶ 9.* The Amended Complaint includes as an exhibit Decedent's 2016 W-2, identifying Mepco as Decedent's employer. *JA166.* Mepco is not named as a Defendant in the Amended Complaint.

The Amended Complaint generally asserts that, on January 16, 2016, Decedent began his shift at the 4 West Mine, "an underground coal mine owned and operated by Dana, located in Greene County, Pennsylvania." *JA162 at ¶ 13.* The Amended Complaint alleges that the Decedent suffered fatal injuries when a rib rolled away from the coal block and pinned the Decedent to the mine floor. *JA163 at ¶¶ 15-16.* For its sole cause of action, the Amended Complaint asserts a negligence claim against Dana Mining, brought pursuant to Pennsylvania's wrongful death act, 42 Pa. C.S. § 8301. *JA163 at ¶¶ 22-25.*

B. The Federal Policy and Coverage Denial

Federal Insurance Company (hereinafter "Federal") issued a policy of insurance identified as Policy Number 3711-31-31, which was in effect from June 1, 2015 to June 1, 2016 (hereinafter "Policy" or "Federal Policy"). *JA39-JA160.* The Policy names both Dana Mining and Mepco as named insureds. *JA46.* The Policy provides coverage for "damages that the insured

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[1] "JA" refers to the Joint Appendix.

becomes legally obligated to pay by reason of liability [...] imposed by law [...] for bodily injury or property damage caused by an occurrence to which this coverage applies." *JA66 (bold terms omitted).*

After receiving the Complaint, Dana Mining tendered the same to Federal, seeking defense and indemnification under the Policy. By correspondence dated August 1, 2017, Federal denied coverage, claiming that it had no duty to defend or indemnify Dana Mining with respect to the Complaint:

> First, none of the 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. In the Claim, it is alleged that Jeremy Richard Neice was killed while in the course and scope of his employment by Mepco, LLC. This exclusion includes a spouse or child that claims to have sustained injury or damage as a consequence of [the Decedent's] injuries and resulting death.
>
> Finally, there are allegations that the injuries to [the Decedent] were caused intentionally, the *Expected or Intended Injury* exclusion would preclude any potential coverage for damages alleged to have been committed intentionally.

JA573 (boldface and italic type in original).[2]

Buried within the one hundred and fifty-four (154) page Policy is an endorsement titled Employer's Liability, Except for Written Contract or Agreement (hereinafter "Employer's Liability Exclusion"). The Employer's Liability Exclusion relied upon by Federal provides, in pertinent part, as follows:

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[2]Federal has since apparently withdrawn its assertion that the allegations in the underlying suit do not meet the definitions of an "occurrence" or "personal injury" within the Policy and that the *Expected or Intended Injury Exclusion* precludes coverage. Therefore, the only coverage defenses upon which Federal now relies are the *Employer's Liability, Except for Written Contract or Agreement Exclusion Endorsement* and the No Action Clause.

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 replay any person or organization who must pay any damages, loss, cost or expense because of any of the foregoing.

C. This exclusion does not apply to liability for damages assumed by the **insured** in a written contract or agreement pertaining to your business in which you assume the tort liability of another to pay damages for **bodily injury**, to which this insurance applies.

JA120-JA121 (boldface type in original).

Importantly, however, the Federal Policy also contains a Separation of Insureds Clause, which states as follows:

Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this insurance to the first named **insured**, 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.

JA85 (boldface type in original).

The Policy also contains a No Action Clause, which states:

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**; or
- sue us on this insurance unless all of the terms and conditions of this insurance have been fully complied with.

JA83 (boldface type in original).

C. Relevant Procedural History

After Federal denied coverage for the underlying suit, Dana Mining filed its *Third-Party Complaint for Declaratory Relief* (hereinafter *Third-Party Complaint*) against Federal on April 5, 2019.[3] *JA169-JA179.* The *Third-Party Complaint* sought a declaration that Federal owes an obligation to provide defense and indemnification for the underlying action to Dana Mining.[4] *JA169-JA179.*

On May 21, 2019, Federal filed its *Motion to Dismiss Pursuant to Rule 12(b)* (hereinafter *Motion to Dismiss")* with a supporting memorandum. *JA181-JA315.* Therein, Federal

[3]The *Third-Party Complaint for Declaratory Relief* was also filed against another insurer of Dana Mining, Brickstreet Mutual Insurance Company. Brickstreet Mutual Insurance Company ("Brickstreet") issued a workers' compensation insurance policy to Dana Mining. However, the Circuit Court granted summary judgment in favor of Brickstreet by Order entered March 20, 2020. The Circuit Court found that the Brickstreet policy did not provide coverage because the Decedent's injury did not arise out of and in the course of the Decedent's employment by Dana Mining.

[4]Plaintiff later filed a *Joinder of Plaintiff in Dana Mining Company of Pennsylvania, LLC's Third-Party Complaint for Declaratory Relief* on August 22, 2019.

claimed, *inter alia*, that the No Action Clause precluded Dana Mining from joining Federal as a Third-Party Defendant in the underlying matter. *JA189.* Notably, despite now arguing that Pennsylvania law governs the application of the No Action Clause, Federal cited West Virginia law in support of its argument that the No Action Clause required the dismissal of the *Third-Party Complaint.*[5] *JA188-JA190.* However, Federal did not request a hearing from the Circuit Court or otherwise seek a ruling on its *Motion to Dismiss. JA29 at ¶ 24.* Instead, as explained further herein, Federal litigated the case for nearly two (2) more years without asserting the No Action Clause or seeking a ruling from the Circuit Court on its *Motion to Dismiss*.

On June 24, 2019, Dana Mining filed its *Response in Opposition to Third-Party Defendant, Federal Insurance Company's Motion to Dismiss Pursuant to Rule 12(b).* In said *Response*, Dana Mining argued that the policy language at issue does not preclude the *Third-Party Complaint* as the language at issue applies to a scenario where a plaintiff names a defendant and the defendant's insurer in a personal injury action where there is no coverage dispute. Additionally, Dana Mining argued that even if the policy language at issue were applicable to the instant scenario, the same would be contrary to legal authority, which permits an insurer to be joined in a personal injury action by way of a declaratory judgment action. Even after Dana Mining filed its *Response in Opposition to Third-Party Defendant, Federal Insurance Company's Motion to Dismiss Pursuant to Rule 12(b)*, Federal did not request a hearing on its *Motion to Dismiss* from the Circuit Court and did not otherwise attempt to secure a ruling from the Circuit Court regarding the No Action Clause.

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[5]All parties agree that the substantive law of Pennsylvania applies to the interpretation of the Federal Policy. *See Petitioner's Brief at 1.* However, Dana Mining and Plaintiff assert that the procedural law of West Virginia governs the applicable of the No Action Clause. Despite citing to West Virginia law in its *Motion to Dismiss*, Federal now asserts that Pennsylvania law governs the application of the No Action Clause. *Petitioner's Brief at 21-24.*

On January 16, 2020, Dana Mining filed its *Renewed Motion for Summary Judgment as to Federal Insurance Company's Duty to Defend with Incorporated Memorandum of Law. JA3320-JA408.* Therein, Dana Mining argued that Federal was required to provide a defense to Dana Mining for the underlying action and the Employer's Liability Exclusion relied upon by Federal is ambiguous and not applicable to the allegations of the *Amended Complaint.*[6] Plaintiff joined in said *Renewed Motion for Summary Judgment. JA409-JA413.* In Federal's *Brief in Opposition to Third-Party Plaintiff, Dana Mining Company of Pennsylvania, LLC's Renewed Motion for Summary Judgment*, Federal did not assert the No Action Clause on which it now relies. *JA414-JA767.*

After the matter was fully briefed and argued, the Circuit Court entered its *Order Granting Third-Party Plaintiff Dana Mining Company of Pennsylvania, LLC's Renewed Motion for Summary Judgment as to Federal Insurance Company's Duty to Defend*, on March 4, 2020. *JA1-JA17.* The Circuit Court found that Federal was required to provide a defense to Dana Mining in this matter pursuant to the terms of the Policy. In said *Order*, the Circuit Court found that Employer's Liability Exclusion was inapplicable to the facts of the case at hand as a matter of law because the Separation of Insureds Clause required Dana Mining to be treated as if it was the only insured and Dana Mining did not employ the Decedent. *JA10-JA16.*

Federal appealed the Circuit Court's decision to this Court. In its *Petitioner's Brief*, Federal again failed to argue that the No Action Clause precluded Dana Mining's *Third Party Complaint.*[7] On July 13, 2020, Dana Mining filed its *Motion to Dismiss Appeal*, arguing that

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[6]The *Renewed Motion for Summary Judgment as to Federal Insurance Company's Duty to Defend with Incorporated Memorandum of Law* also argued that the Expected or Intended Injury Exclusion was inapplicable to the allegations of the *Amended Complaint.* However, Federal has now apparently abandoned its argument that the Expected or Intended Injury Exclusion precludes coverage herein as it has not raised this issue on appeal.

[7]Federal's prior appeal was designated No. 20-0232.

Federal's appeal was premature. By order entered August 27, 2020, this Court dismissed Federal's appeal.

On November 18, 2020, Plaintiff filed its *Motion for Partial Summary Judgment on the Complaint for Declaratory Relief Against Third-Party Defendant Federal Insurance Company as to the Duty to Indemnify. JA777-798.* Federal filed its *Motion for Partial Summary Judgment* on December 23, 2020, arguing that it owed no duty to indemnify Dana Mining. *JA799-JA1230.* For the first time since filing its *Motion to Dismiss Pursuant to Rule 12(b)(6)* nearly two (2) years prior, Federal sought to resurrect its argument that the No Action Clause prohibited it being joined as a third-party defendant in the instant suit. *JA810-JA812.*

On January 15, 2021, Dana Mining filed its *Combined Joinder in 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 Reply to Federal Insurance Company's Opposition to Plaintiff's Motion for Partial Summary Judgment as to the Duty to Indemnify. JA1508-JA1523.*

After these motions were fully briefed and argued, the Circuit Court entered its *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 August 19, 2021 (hereinafter "the Order"). *JA18-JA38.* The Circuit Court found that Federal owes Dana Mining both defense and indemnification in the event that Plaintiff prevails on her negligence claim against Dana Mining. It is from this August 19, 2021 Order, which Federal now appeals.

II. SUMMARY OF ARGUMENT

The Circuit Court's March 4, 2020 and August 19, 2021 Orders finding that Federal is required to defend and indemnify Dana Mining under the terms of the Policy should be affirmed for a number of reasons.

The Employer's Liability Exclusion, upon which Federal relies, does not apply to the accident at hand because the Separation of Insureds Clause requires that Dana Mining be treated as though it "were the only insured" and further requires that the Policy apply "separately to each insured against whom [...] suit is brought." It is undisputed that Dana Mining did not employ the Decedent; rather, Decedent was employed by Mepco. Because the Policy applies separately to Dana Mining and as though Dana Mining were the only insured, Decedent's employment by Mepco is irrelevant to the analysis and the Employer's Liability Exclusion is not triggered.

Furthermore, even where an employer's liability exclusion uses the term "any insured" as opposed to "the insured," the exclusion still only applies to exclude coverage for claims brought by an employee of the insured against whom suit is brought as demonstrated by several cases outlined below which have addressed analogous situations. Moreover, despite Federal's argument to the contrary, the Circuit Court's interpretation of the Policy did not violate basic principles of contract by rendering the Employer's Liability Exclusion meaningless. Rather, as explained in further detail below, the Circuit Court's ruling gives effect to both the Employer's Liability Exclusion and the Separation of Insureds Clause. The term "any" insured in the Employer's Liability Exclusion can still be given effect even if the only insured is considered to be Dana Mining, the insured against whom suit has been brought. A reasonable interpretation of

the exclusion could be that it applies only to "any employee" of "any insured" that is seeking coverage under the Policy.

The Circuit Court was also correct in finding that *Mut. Benefit Ins. Co. v. Politsopoulos*, 631 Pa. 628, 630, 115 A.3d 844, 846 (2015) supports its conclusion that the Employer's Liability Exclusion was inapplicable herein. In *Politsopoulos*, the court was unable to apply the separation of insureds clause at issue because said clause was limited to "named insureds" and the insured seeking coverage was not a named insured. Therefore, the Circuit Court was able to do in this case what the court in *Politsopoulos* was unable to do: apply the Separation of Insureds Clause, which requires the Policy to be treated as though Dana Mining was the only named insured.

Furthermore, interpreting the Separation of Insureds Clause in the manner sought by Federal would render the Separation of Insureds Clause meaningless with respect to the Employer's Liability Exclusion. The Circuit Court's conclusion that the Employer's Liability Exclusion is inapplicable is also consistent with the purpose of said Exclusion and the parties' expectations. The purpose of the Employer's Liability Exclusion is to avoid duplication of coverage provided under worker's compensation policies. However, there is no concern of duplicate coverage here as Dana Mining's worker's compensation policy does not provide coverage since Decedent was not injured in the course of employment with Dana Mining as he was employed by Mepco.

Federal's argument that the No Action Clause precludes the instant declaratory judgment action also fails. First, West Virginia's procedural law governs this matter and permits a declaratory judgment action to be brought in the original personal injury suit rather than by way of separate action. Moreover, Federal waived the No Action Clause by failing to seek a ruling on

its *Motion to Dismiss* and failing to assert the No Action Clause for the following nineteen (19) months. Last, even if Pennsylvania substantive law applies to the application of the No Action Clause, the No Action Clause does not preclude an insured from seeking a declaration that an insurance policy provides coverage.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Dana Mining submits that although this Court may have not previously addressed some of the matters at issue herein, the same involve the application of settled Pennsylvania law, which all parties agree controls the substantive issues before the Court. Therefore, Dana Mining asserts that oral argument is unnecessary, pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, as the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

However, if the Court believes oral argument is warranted, Dana Mining submits that any such argument would be appropriate, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, as this case involves the application of settled Pennsylvania law.

IV. STANDARD OF REVIEW

Generally, "[a] circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). The interpretation of an insurance contract is a legal determination. *Payne v. Weston*, 195 W.Va. 502, 506-7, 466 S.E.2d 161, 165-66 (1995). Further, the extent of coverage provided by an insurance contract, when the facts are not in dispute such as the case at hand, is a question of law. *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 482, 509 S.E.2d 1, 6 (1998).

V. ARGUMENT

A. The Circuit Court correctly found that the Employer's Liability Exclusion does not preclude coverage as the Decedent was not employed by Dana Mining, the only named Defendant, and the Separation of Insureds Clause requires that Dana Mining be treated as if it were the only insured.

1. The Employer's Liability Exclusion is inapplicable where Decedent was not employed by Dana Mining and the Separation of Insureds Clause requires that Dana Mining be treated as if it were the only insured.

Under Pennsylvania law, "[a]n 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 (1906).

"[T]he insurer has the burden of establishing that policy exclusions preclude coverage." *CGU Ins. v. Tyson Assocs.*, 140 F. Supp. 2d 415, 419 (E.D. Pa. 2001). Furthermore, policy exclusions are strictly construed against the insurer. *Id.* Language within an insurance policy is ambiguous "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." *Fed. Ins. Co. v. Cont'l Cas. Co.*, No. 2:05-cv-305, 2006 U.S. Dist. LEXIS 85323, at *55 (W.D. Pa. Nov. 22, 2006). The requirement that ambiguities be construed against the insurer and in favor of the insured "is especially true should the ambiguity exist as an exception to general liability," such as the Employer's Liability Exclusion relied upon by Federal in this case. *Id.* Moreover, although the duty to defend is separate from and broader than the duty to indemnify, "[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" because "both duties flow from a determination that the complaint triggers coverage." *Gen. Accident Ins. Co. of Am. v. Allen,* 547 Pa. 693, 706, 692 A.2d 1089, 1095 (1997).

In this case, the Employer's Liability Exclusion relied upon by Federal is not applicable to the allegations of the Amended Complaint. The Employer's Liability Exclusion relied upon by Federal states, in part, that coverage is excluded for damages sustained by any "employee [...] of any insured arising out of and in the course of [...] employment by any insured[.]" *JA99-JA100.* However, the Employer's Liability Exclusion cannot be read in isolation. *PNC Fin. Servs. Grp., Inc. v. Hous. Cas. Co.*, 647 F. App'x 112, 118 (3d Cir. 2016)(applying Pennsylvania law)("Exclusions are not read in isolation[.]"); *Harbor Ins. Co. v. Lewis,* 562 F. Supp. 800 (E.D. Pa. 1983 (applying Pennsylvania law)("A party cannot lift one clause out of an insurance contract and attach a meaning to it considered in isolation.");, *Inc. v. Ryder Truck Rental, Inc.*, 836 F.2d 163, 169 (3d Cir. 1987)(applying Pennsylvania law)("The meaning of a particular phrase is not properly determined by considering the phrase in isolation but by reading it in harmony with the rest of the contract.").

As noted above, the Separation of Insureds Clause states as follows:

> *Separation Of Insureds*
>
> Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this insurance to the first named **insured**, 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.

JA85.

Thus, the Employer's Liability Exclusion within the Federal Policy 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." *JA85.* In this case, suit was brought solely against Dana Mining; suit has not been brought against Mepco. Accordingly, by operation of the Separation of Insureds clause, the Employer's Liability Exclusion applies as if Dana Mining is the only insured. Because

the Decedent was not an employee of Dana Mining, the Employer's Liability Exclusion is inapplicable in this scenario and it is irrelevant whether the Decedent was an employee of another insured, such as Mepco.

At the very least, the Separation of Insureds clause renders the Employer's Liability Exclusion ambiguous. The Separation of Insureds clause specifically states that it does not apply to the "Limits of Insurance," but fails to state that it does not apply to the Employer's Liability Exclusion endorsement. The contractual interpretation maxim *expression unius est exclusion alterius* holds that the express inclusion of certain things implies the exclusion of other things. *Greenwood Gaming & Entm't, Inc. v. Commonwealth*, No. 19 MAP 2020, 2021 Pa. LEXIS 3990, at *16 (Nov. 17, 2021). With this maxim in mind, a reasonable interpretation of these two (2) clauses would be that the Separation of Insureds Clause does indeed apply to the Employer's Liability Exclusion and the use of the term "any insured" since the Policy created an exception within the Separation of Insureds clause for the Limits of Insurance but not for the Employer's Liability Exclusion or the use of the term "any insured." *See Fed. Ins. Co. v. Cont'l Cas. Co.*, No. 2:05-cv-305, 2006 U.S. Dist. LEXIS 85323, at *55 (W.D. Pa. Nov. 22, 2006)(insurance policy is ambiguous "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense"). Because exclusions and ambiguities must be strictly construed against the insurer and in favor of the insured, the exclusion is not applicable in this matter where the Decedent was not an employee of the only named Defendant, Dana Mining.

Thus, the Employer's Liability Exclusion is inapplicable because by operation of the Separation of Insureds Clause, Dana Mining is considered the only insured and did not employ the Decedent.

2. Even where an employer's liability exclusion uses the term "any insured" as opposed to "the insured," the exclusion still only applies to exclude coverage for claims brought by an employee of the insured against whom suit is brought.

Federal cites several non-binding cases, which do not involve Pennsylvania law in support of its erroneous position that the Employer's Liability Exclusion precludes coverage in this case due to its use of the phrase "any insured." However, several other courts around the country have found that even where an employer's liability exclusion uses the term "any insured" as opposed to "the insured," the exclusion still only applies to exclude coverage for claims brought by an employee of the insured against whom suit is brought. For example, in *Cyprus*, the United States District Court for the District of Utah noted that although the dictionary definition of the term "any" may weigh in favor of the insurer's interpretation of the policy, the court's role in interpreting the language of the exclusion is "to determine whether there is an ambiguity in the context of the specific insurance policy." *Cyprus Plateau Mining Corp. v. Commonwealth Ins. Co.*, 972 F. Supp. 1379, 1384 (D. Utah 1997). Moreover, the court noted that the purpose of the employer's liability exclusion "was to avoid duplicative coverage" under general liability policies and workers' compensation policies. *Id.* at 1385. The court also found that the general purpose of the policy was served by finding the employer's liability exclusion inapplicable:

> [G]iven the purposes of the Commonwealth policies--to protect the insured from claims brought by persons other than their own employees and to avoid coverage that duplicated the worker's compensation coverage already available--and the circumstances in which Cyprus was named as an additional insured--to increase rather than decrease its coverage--it cannot be said that the language of the exclusion can be interpreted only to mean that any claim of any employee of any insured against any insured is excluded from coverage.

Id. The Court ultimately found that the exclusion was ambiguous as it was subject to more than one reasonable interpretation. Accordingly, the court found the exclusion should be interpreted against the insurer and in favor of the insured to provide coverage. *Id.* at 1386.

In *Transport Indem. Co. v. Wyatt*, the court also addressed an employer's liability exclusion that excluded coverage for bodily injury to "any employee of any insured[.]" 417 So. 2d 568, 569 (Ala. 1982). The court found that the term "any insured" in this context was ambiguous. "The wording could be interpreted either to mean only singularly 'any one of the insureds' or could apply collectively to whole group of insureds." *Id.* at 571.

Likewise, the court in *Pac. Indem. Co. v. Transp. Indem. Co.* addressed an exclusion which stated that the policy did not apply to bodily injury of "any employee of any insured[.]" 81 Cal. App. 3d 649, 146 Cal. Rptr. 648, 653 (1978). Like Federal, the insurer argued that "while an exclusion for injuries to an employee of 'the' insured may be ambiguous, an exclusion for injuries to 'any' insured absolves it of liability whenever the injured party is an employee of any insured within the policy, regardless of whether that insured is seeking the policy's protection." *Id.* at 656. The court rejected this argument and found that the exclusion was ambiguous:

> The phrase "any employee of any insured" is susceptible to two interpretations: it could mean any employee of any insured who is seeking protection under the policy or it could mean any employee of any insured under the contract, whether or not that insured is seeking protection under the policy. It is unnecessary to show which interpretation is more logical. Since the clause is susceptible to more than one interpretation, it should be construed narrowly to provide for coverage.

Id.

An employer's liability exclusion disclaiming coverage for bodily injury to "any employee of any insured" was also addressed in *Shelby Realty LLC v. Nat'l Sur. Corp.*, 2007 U.S. Dist. LEXIS 29482 (S.D.N.Y. Apr. 10, 2007). The court found that the exclusion was not applicable to the scenario at hand for several reasons. The court noted that when read in conjunction with the separation of insureds clause, the exclusion does not apply to the insured seeking coverage under the policy unless that insured's employee is injured during the course of

his employment. *Id.* at *10-*11. Furthermore, the court reasoned that "this result makes logical sense in a real world context" since the exclusion "recognizes that general liability coverage is unnecessary for an employer whose employee is injured in the course of his employment since the workman's compensation system (and the required workman's compensation insurance coverage) covers such an injury." *Id.* at *11-*12. However, a "non-employer needs general liability coverage if sued by someone else's employee":

> [T]he Employee Exclusion precludes over-coverage (where an employer has both workman's compensation insurance and commercial liability insurance for an employee's injury) by excluding claims stemming from an employee's bodily injury sustained "in the course of his employment", and the Separation of Insureds Clause precludes under-coverage (where a party is left without either workman's compensation insurance or commercial liability insurance) by limiting the Employee Exclusion to the actual employer of the injured party.

Id. at *12.

The United States Court of Appeals for the Eleventh Circuit also addressed this issue in *Evanston Ins. Co. v. Design Build Interamerican, Inc.*, 569 F. App'x 739 (11th Cir. 2014). The court found the employer's liability exclusion not applicable where the insured seeking coverage is not the employer of the plaintiff:

> [H]ere, [the insurance policy] contains an exclusion for bodily injury to "an employee of any insured," meaning that coverage is excluded only "for the separate insurable interest of that insured" who is the employer of the individual who suffered the injury. Essentially, the exclusion's use of the term "any insured" when read in conjunction with the severability clause creates a class of insureds who are excluded from coverage, i.e., employers of the injured claimant. Accordingly, as to other insureds who are not in the class of excludable insureds, but against whom a claim could be asserted, i.e., non-employers of the injured claimant, coverage is not precluded.

Id. at 743-44.

Moreover, the cases on which Federal relies are distinguishable. Federal cites *McAllister* in arguing that the phrase "any insured" or "an insured" eliminates coverage for all

insureds if one insured falls within the exclusion.[8] *McAllister v. Millville Mut. Ins. Co.*, 433 Pa. Super. 330, 640 A.2d 1283 (1994). However, in *McAllister*, the insurance policy at issue contained a severability clause – not a separation of insureds clause. The severability clause merely stated that "each person [...] is a separate insured under this policy." *Id.* at 341, 1289. In *Politsopoulos*, the court recognized that a separation of insured clause, which requires that each insured be considered the only insured is "clearer and stronger" than "a severability clause that simply identifies the insureds as 'several' rather than 'joint.'" *Mut. Benefit Ins. Co. v. Politsopoulos*, 631 Pa. 628, 634 (Pa. May 26, 2015). Accordingly, *McAllister* is inapplicable as the Separation of Insureds Clause at issue mandates a different outcome as it states that the Policy applies "as if each named insured were the only named insured."[9] *JA68.*

Federal's reliance on *Stahley* is misplaced for the same reason. In *Stahley*, the policy contained a severability clause (not a separation of insureds clause) which only stated that "this insurance applies separately to each 'insured.'" *Travelers Home & Marine Ins. Co. v. Stahley*, 239 F. Supp. 3d 866, 874 (E.D. Pa. 2017). Likewise, in *White*, the Policy contained a severability clause, which only stated that "[t]his insurance applies separately to each insured." *Am. Family Mut. Ins. Co. v. White*, 204 Ariz. 500, 507, 65 P.3d 449, 456 (Ct. App. 2003).

Federal also cites *Spezialetti*, *Westminster*, *TIG Specialty*, and *Medill* in support of its argument that the phrase "any insured" used in an exclusion means anyone covered by the policy. However, in these cases the insurance policy at issue apparently did not contain a separation of insureds clause or severability clause as there is no discussion of the same within the

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[8] *See Petitioner's Brief at 10.*

[9] Additionally, *McAllister* involved a fire insurance policy and an intentional act exclusion contained therein – not an Employer's Liability Exclusion as is before the Court.

opinions.[10] *Spezialetti v. Pac. Emp'rs Ins. Co.*, 759 F.2d 1139 (3d Cir. 1985); *Westminster Am. Ins. Co. v. Sec. Nat'l Ins. Co.*, No. 20-2195, 2021 U.S. Dist. LEXIS 154065 (E.D. Pa. Aug. 16, 2021); *TIG Specialty Ins. Co v. Pinkmonkey.com, Inc.*, 375 F.3d 365 (5th Cir. 2004); *Medill v. Westport Ins. Corp.*, 143 Cal. App. 4th 819, 49 Cal. Rptr. 3d 570 (2006).

Federal additionally relies on *Michael Carbone v. Gen. Accident Ins. Co.*, 937 F. Supp. 413 (E.D. Pa. 1996). However, in *Carbone*, the court was applying New Jersey law – not Pennsylvania law. Moreover, the exclusion at issue in *Carbone* was an automobile exclusion – not an employer's liability exclusion. *Id.* at 417. Thus, the *Carbone* decision is distinguishable and not binding. However, to the extent this Court gives any weight to the *Carbone* decision, its reasoning actually supports finding the Employer's Liability Exclusion inapplicable in the case at hand:

> In cases involving employee exclusions, this interpretation of separation of insureds clauses [i.e. finding that it applies separately to each insured] is logical because it avoids duplication with workers compensation schemes. Consider, for example, the facts of *Erdo*, in which a subcontractor's employee sued the general contractor. In that case, the New Jersey Superior Court held that the employee exclusion was inapplicable to situations where there was no employer-employee relationship between the person bringing suit and the party seeking coverage. Therefore, the employee exclusion did not apply when an employee of the subcontractor sued the general contractor. If, in contrast, an employee of the general contractor had sued the general contractor, the employee exclusion would have applied, and the CGL insurer would not have had to indemnify the general contractor. This makes sense because the employee's claim would be covered by a typical workers compensation scheme, which provides an exclusive remedy in a suit against an employer. The suit by the employee of the subcontractor, however, falls outside of the workers compensation system. Firms need to protect themselves from such liabilities, which is one of the reasons they purchase commercial general liability policies. *Cf. Float-Away Door Co. v. Continental Casualty Co.*, 372 F.2d 701, 708 (5th Cir.), cert. denied, 389 U.S. 823, 19 L. Ed. 2d 76, 88 S. Ct. 58 (1967), (stating that "the primary objective of [employee exclusions] is to avoid duplication of coverage with respect to compensation insurance"); *Phoenix Assurance Co.*, 488 P.2d at 208. This insight

[10] *Spezialetti* involved a fire insurance policy, which contained an intentional act exclusion – not an Employer's Liability Exclusion. *TIG Specialty* involved a Director and Officer Liability Insurance Policy, which contained a Personal Profit Exclusion – not an Employer's Liability Exclusion. *Medill* involved a bond issuance exclusion – not an Employer's Liability Exclusion.

> is significant since the bulk of the cases which elaborate on the impact of severability clauses on exclusions do so in the context of employee exclusions contained in either automobile or commercial general liability policies.
>
> Taken together, *Erdo*, *Maryland Casualty*, and other similar cases stand for three propositions. First, a separation of insureds clause may alter the meaning of exclusions contained within a policy. Second, the impact of the clause depends upon a pedantic reading of the exact wording of the exclusion as applied to each separate insured. *See, e.g., American Nat'l Fire Ins. Co. v. Estate of Fournelle*, 472 N.W.2d 292 (Minn. 1991) (pedantic reading of exclusion of household residents from home insurance policy in light of severability clause); *Travelers Ins. Co. v. Auto-Owners Ins. Co.*, 1 Ohio App. 2d 65, 203 N.E.2d 846 (Ohio Ct. App. 1964) (applying separability of insureds doctrine to nullify effect of employee exclusion where employee of named insured sought coverage). And third, in determining the scope of an exclusion courts may look at how the policy at issue interacts with other available forms of insurance.

Id. at 419-420.

In this case, the purpose of the Employer's Liability Exclusion, as recognized by *Carbone*, is not served by applying the Employer's Liability Exclusion since there is no concern of a duplication of workers' compensation benefits.[11] Moreover, when the Court examines "how the policy at issue interacts with other available forms of insurance," as *Carbone* suggests, Federal's position is untenable as it creates an inherent gap between workers' compensation coverage and general liability coverage.

Therefore, despite its use of the term "any insured," the Employer's Liability Exclusion still only applies to exclude coverage for claims brought by an employee of any insured against whom suit is brought.

[11]As noted above, the Circuit Court found that the workers' compensation policy issued to Dana Mining by Brickstreet did not provide coverage because the Decedent's injury did not arise out of and in the course of the Decedent's employment by Dana Mining. *See Order Granting Brickstreet Mutual Insurance Company's Motion for Summary Judgment (entered March 20, 2020).*

3. The Circuit Court did not violate basic principles of contract construction.

Federal argues that the Circuit Court's interpretation of the Policy rendered the following language of the Policy meaningless:

> 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**;

JA120-JA121 (boldface type in original).

However, contrary to Federal's argument, the Circuit Court's ruling gives effect to both the Employer's Liability Exclusion and the Separation of Insureds Clause. The term "any" insured in the Employer's Liability Exclusion can still be given effect even if the only insured is considered to be Dana Mining, the insured against whom suit has been brought. A reasonable interpretation of the exclusion could be that it applies only to "any employee" of "any insured" that is seeking coverage under the Federal Policy. *Transport Indem. Co.*, 417 So. 2d at 569 (finding the phrase "any insured" ambiguous because "[t]he wording could be interpreted either to mean only singularly 'any one of the insureds' or could apply collectively to whole group of insureds."); *Pac. Indem. Co.*, 146 Cal. Rptr. at 653 ("The phrase 'any employee of any insured' is susceptible to two interpretations: it could mean any employee of any insured who is seeking protection under the policy or it could mean any employee of any insured under the contract, whether or not that insured is seeking protection under the policy."). *Evanston Ins. Co.*, 569 F. App'x 739 ("[T]he exclusion's use of the term "any insured" when read in conjunction with the severability clause

creates a class of insureds who are excluded from coverage, i.e., employers of the injured claimant[.]")

Also, the Policy offers several definitions of the term "insured." For example, with respect to Limited Liability Companies, such as Dana Mining, the Federal Policy states as follows:

> If you are a limited liability company, you are an **insured.** Your members and their spouses are **insureds,** but they are **insureds** only with respect to the conduct of your business. Your managers are **insureds,** but they are **insureds** only with respect to their duties as your managers.

JA69 (boldface type in original). When the Policy is interpreted to give effect to both the Employer's Liability Exclusion and the Separation of Insureds Clause, coverage is excluded for damages sustained by "any" employee of Dana Mining, Dana Mining's members and spouses, and Dana Mining's managers. In other words, "any" of these insureds or classes of insureds would be subject to the Employer's Liability Exclusion. Accordingly, the Circuit Court's holding did not negate subsection (b)(1) of the Employer's Liability Exclusion the Separation of Insureds Clause.

4. Although factually distinguishable in some respects, the *Politsopoulos* case supports the Circuit Court's conclusion that the Employer's Liability Exclusion does not preclude coverage.

In *Politsopoulos*, a property owner leased a property to a restaurant. *Mut. Benefit Ins. Co. v. Politsopoulos, supra*. The lease agreement required the restaurant to name the property owners as additional insureds on the restaurant owner's liability policy issued by the insurer. *Id.* Although the restaurant did not explicitly name the property owners as either named or additional insureds on the policy, the terms of the policy provided coverage to unnamed persons doing business with the restaurant owner and for whom the restaurant owner agreed in writing to provide insurance. *Id.*

An employee of the restaurant fell on a set of stairs located on the property leased to the restaurant brought suit against only the property owners for negligently failing to maintain

the stairs in a safe condition. *Id.* at 630-631, 846. The property owners tendered the claim to the insurer, seeking defense and indemnification. The insurer then filed a declaratory judgment action, asserting that an employer's liability exclusion within the policy precluded coverage for the employee's suit. *Id.* at 631, 846. The employer's liability exclusion stated that the policy did not provide coverage for injury to "[a]n 'employee' of the insured arising out of and in the course of ... [e]mployment by the insured[.]" *Id.* at 630, 845.

The trial court felt that it was bound by precedent with which it did not agree and found in favor of the insurer. The trial found that under *Pa. Mfrs' Ass'n Ins. Co. v. Aetna Cas. & Sur. Ins. Co.*, 426 Pa. 453, 233 A.2d 548 (1967) ("*PMA*"), the term "the insured" in the context of an employer's liability exclusion includes the named insured, regardless of whether coverage was sought by a different insured. *Id.* at 631-632, 846. Based on *PMA*, the trial court found that the employer's liability exclusion in the policy barred coverage for the employee's injury because she was an employee of the named insured (*i.e.* the restaurant), and her injuries arose in the course of her employment, even though suit was brought against additional insureds (*i.e.*, the property owners). *Id.* at 631-632, 846. Additionally, the trial court recognized that *PMA* "rejected the argument that a severability of interests clause – which provided that 'the term 'the insured' is used severally and not collectively,' representing an analogue to the separation-of-insureds provision presently in issue – applied in a way that would undermine a broad application of the employer's liability exclusion relative to claims asserted by employees of a named insured." *Id.* at 632, 846-847.

The property owners appealed the trial court's ruling to the Superior Court of Pennsylvania, which ultimately reversed the trial court's ruling. *Id.* at 633, 847. The Superior Court reasoned that the property owners were named insureds under the policy and distinguished

PMA in light of the fact that the insureds seeking coverage were not named insureds in *PMA*. *Id.* at 633, 847. In light of this distinction, the Superior Court found that the separation of insured's clause in the policy moved the claim outside of the scope of the employer's liability exclusion. *Id.* at 633-634, 847-848.

The Separation of Insureds clause in *Politsopoulos* stated that "this insurance applies ... [a]s if each named insured were the only named insured[.]" *Id.* at 633-634, 848. The Superior Court analyzed the effect of the separation of insureds clause as follows:

> [w]hen determining coverage as to any one insured, the policy must be applied as though there were only one insured, i.e., the one as to which coverage is to be determined.
>
> * * *
>
> The plain, unambiguous language of the "Separation of Insureds" clause directs us to evaluate whether [the property] Owners are insured under the Umbrella Policy as though they are the only named insured, an analytic conceit that is both clearer and stronger than a severability clause that simply identifies the insureds as "several" rather than "joint." In no uncertain terms, the policy language directs us to evaluate coverage as though Employer does not exist.
>
> * * *
>
> An insured who does not exist cannot employ anyone. Thus, if the person injured is not employed by the lone insured as to whom coverage is to be tested, the Employers' Exclusion simply does not come into play.

Id. at 634, 848.

On appeal, the Pennsylvania Supreme Court ultimately concluded that the policy's employer's liability policy was ambiguous. However, it rejected the Superior Court's finding that the property owners were named insureds under the policy. *Id.* at 637-638, 850. The Supreme Court reversed the Superior Court because there was no basis on which to designate the property owners as named insureds and that error skewed the remainder of the Superior Court's analysis:

> Upon our review, preliminarily, we find that the Superior Court's decision cannot be sustained on its terms, for the reasons explained by Appellant and set forth above. There simply is no basis in the umbrella policy to support the intermediate court's treatment of the Property Owners as named insureds. Furthermore, the court's broader analysis is clouded by this mislabeling and the court's corresponding invocation of an inapplicable subparagraph of the separation-of-insureds clause.

Id. However, importantly for the case *sub judice*, the Supreme Court of Pennsylvania did not find that the Superior Court erred in its analysis of the operation of the separation of insureds clause.

As the Circuit Court found, *Politsopoulos* is analogous to the case at hand in several respects. *JA14.* As in *Politsopoulos*, both Dana Mining and Mepco are covered by the same Policy that contains both a Separation of Insureds Clause and an Employer's Liability Exclusion. The Decedent was injured through his employment with Mepco, but was not employed by Dana Mining. The suit was brought on behalf of the Decedent solely against Dana Mining, but not against Mepco.

However, the key distinction in this case is that unlike *Politsopoulos*, both Mepco and Dana Mining are named insureds. Thus, unlike *Politsopoulos*, where the separation of insureds clause was inapplicable because the property owner was not a named insured, the Separation of Insureds Clause at issue must be given full force and effect. When the Separation of Insureds Clause is applied to the case at hand, it requires that the Policy apply "as if each named insured were the only named insured" and "separately to each insured against whom claim is made or suit is brought." *JA85.* Accordingly, the Policy is interpreted as though Dana Mining is the only named insured. Because Dana Mining is considered the only named insured and it is undisputed that Dana Mining did not employ the Decedent, the Employer's Liability Exclusion is inapplicable.

Additionally, in *Politsopoulos*, the court specifically recognized that "the construction of [a separation of insureds] clause in conjunction with a particular contractual exclusion turns on the exclusion's precise wording." *Id.* at 639, 851 (quoting *Ohio Cas. Ins. Co. v. Holcim (US), Inc.*, 744 F. Supp. 2d 1251 (S.D. Ala. 2010)). In the case at hand, the Separation of Insureds Clause is more robust than that at issue in *Politsopoulos*. In *Politsopoulos*, the Separation of Insureds clause merely stated that the insurance applied "[s]eparately to each insured against whom claim is made or suit is brought." *Id.* at 630, 845-846. In this case, the Separation of Insureds Clause contains additional language and states that it also applies "as if each named insured were the only named insured[.]." *JA85.*

Moreover, another Pennsylvania court, applying Pennsylvania law, has rejected the argument advanced by Federal in a similar case. *United States Steel Corp. v. Nat'l Fire Ins.*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 488. In *United States Steel*, the employer's liability exclusion applied to "the insured" as opposed to "any insured" as it does in this case. However, the decision was not based solely on the use of the word "the" as opposed to the word "any." Rather, the court found that because there were two named insureds under the policy "it would have been the expectation of each insured that it would be covered if sued for injuries to an employee of the other named insured." *Id.* at *17. The court also reasoned that if the employer's liability exclusion applied then by paying extra money to have an additional entity named as an additional insured, the insureds had actually "now lost coverage for claims brought by injured [employees of the additional insured] against [another insured]." *Id.* at *19. Thus, the court concluded that the employer's liability exclusion was inapplicable and only applied to the insured against whom suit was brought.

For all these reasons, the Politsopoulos case supports the Circuit Court's conclusion that the Employer's Liability Exclusion does not preclude coverage.

5. Interpreting the Employer's Liability Exclusion in the manner sought by Federal would render the Separation of Insureds Clause meaningless.

It is a fundamental principle of contract interpretation that "a contract should be read so as to give meaning to all of its terms when read as an entirety." *Contrans, Inc. v. Ryder Truck Rental, Inc.*, 836 F.2d 163, 169 (3d Cir. 1987)(applying Pennsylvania law). Therefore, "a construction which neutralizes any provision of a contract should never be adopted if the contract can be so construed as to give effect to all the provisions." *Id.* (quoting 13 Appleman, *Insurance Law and Practice*, § 7383 at 34-37 (1976)). Thus, in construing a portion of an insurance policy, the Court "must be careful not to render superfluous another part of the policy." *Id.* If the Policy is interpreted in the manner sought by Federal so as to preclude coverage to the situation at hand, this would render the Separation of Insureds clause meaningless in relation to the Employer's Liability Exclusion. By giving effect to the Employer's Liability Exclusion in this scenario, Dana Mining is not being treated as the "only named insured" as Mepco's employment of the Decedent is being taken into consideration and, thus, the Separation of Insureds Clause is neutralized. On the other hand, interpreting the Policy to find the Employer's Liability Exclusion not applicable to the facts at hand gives effect every portion of the Policy as explained *supra*.[12]

Federal argues that 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 of [] employment by *the* insured[.]" However, this is simply incorrect, as noted above, the Circuit Court simply gave effect to the Separation of Insureds Clause which mandates that "[e]xcept with respect to the Limits of Insurance, and any rights or duties specifically assigned in this insurance to the first named

[12]*See Section V.A.3.*

insured, 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." *JA85*. If Federal's interpretation of the Policy were adopted, the Separation of Insureds Clause would be effectively rewritten to include an additional exception: "Except with respect to the Limits of Insurance [and any exclusion using the phrase 'any insured'], and any rights or duties specifically assigned in this insurance to the first named insured, 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." However, Federal, as the drafter of the Policy, did not create a carve out from the Separation of Insureds Clause for the Employer's Liability Exclusion or for exclusions that utilize the phrase "any insured," as it expressly did with the Limits of Insurance. Therefore, the only reasonable interpretation is that the Separation of Insureds Clause indeed applies to the Employer's Liability Exclusion.

6. Interpreting the Employer's Liability Exclusion in the manner sought by Federal would be inconsistent with the purpose of said Exclusion and the parties' expectations.

"The courts' task in insurance policy interpretation and construction is centered on ascertaining the intent of the parties to the agreement." *Politsopoulos*, 631 Pa. at 640 n.6, 115 A.3d 852. In order to ascertain the intent of the parties to the agreement, a brief review of the interplay of the different types of insurance at hand in this case is necessary.

> [I]nsurers of employers generally offer three types of insurance: (1) workers' compensation insurance to cover an insured's liabilities under state workers' compensation statutes; (2) employers' liability insurance to cover an insured's liabilities to employees for work-related injuries that do not fall within the ambit of workers' compensation statutes; and (3) commercial general liability insurance to cover other liabilities not covered by the first two products. The first two types of insurance are generally sold bundled in a single insurance product termed a workers' compensation and employers' liability policy, while the commercial general liability policy is usually sold separately.

Devine v. Great Divide Ins. Co., 350 P.3d 782, 786 (Alaska 2015). "The insurance products are drafted to ensure that there is no overlap and no gap in coverage among the three types of insurance." *Id.* "The intent of the employment exclusion in a general liability policy appears to be to avoid duplication of coverage provided under Workers' Compensation and Employer's Liability policies." *Id.*

Similarly, in *Shelby*, the court found that the exclusion "recognizes that general liability coverage is unnecessary for an employer whose employee is injured in the course of his employment since the workman's compensation system (and the required workman's compensation insurance coverage) covers such an injury." *Shelby, 2007 U.S. Dist. LEXIS 29482*, *11-*12. However, a "non-employer needs general liability coverage if sued by someone else's employee."[13] *Id.* at *12.

In this case, there is no concern of duplicate coverage if the Policy is interpreted in the manner sought by Dana Mining. On the other hand, interpreting the Policy in the manner sought by Federal creates a gap in coverage as, Brickstreet, Dana Mining's workers' compensation insurer, denied coverage based on the fact that Dana Mining was not Decedent's employer and was granted summary judgment by the Circuit Court, which found that the Brickstreet policy did not provide coverage.

Also, finding the Employer's Liability Exclusion inapplicable in the instant case is also congruent with the intentions and expectations of the parties in relation to naming of additional insureds on the Policy. The purpose of adding additional named insureds to an insurance policy is to increase coverage. *Cyprus*, 972 F.Supp. at 1385 ("Given [...]the circumstances in which

[13]*See also Cyprus Plateau Mining Corp. v. Commonwealth Ins. Co.*, 972 F. Supp. 1379, 1384 (D. Utah 1997)(given the purpose of the employer's liability exclusion, "it cannot be said that the language of the exclusion can be interpreted only to mean that any claim of any employee of any insured against any insured is excluded from coverage"); *Michael Carbone v. Gen. Accident Ins. Co.*, 937 F. Supp. 413 (E.D. Pa. 1996).

Cyprus was named as an additional insured--to increase rather than decrease its coverage--it cannot be said that the language of the exclusion can be interpreted only to mean that any claim of any employee of any insured against any insured is excluded from coverage."); *United States Steel Corp.*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 488, *18-*19 ("Under National Fire/Continental's construction of the policy, by paying the extra money to have U.S. Steel included as an additional insured, Power Piping has now lost coverage for claims brought by injured U.S. Steel employees against Power Piping."). However, by Federal's interpretation of the Policy, each time an additional named insured is added to the Policy, coverage under the Policy is decreased as all insureds have now lost coverage for the employees of the additional named insured.

Accordingly, the intent and expectations of the parties also weighs in favor of finding the Employer's Liability Exclusion inapplicable.

B. The Circuit Court correctly found that the No Action Clause did not preclude Dana Mining's declaratory judgment action.

1. West Virginia procedural law permits the instant declaratory judgment action.

As the Circuit Court recognized, "[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 [where] the cause of action arose." *McKinney v. Fairchild Int'l*, 199 W. Va. 718, 727, 487 S.E.2d 913, 922 (1997); *see also Vest v. St. Albans Psychiatric Hosp.*, 182 W. Va. 228, 229-230, 387 S.E.2d 282, 283-284 (1989)("West Virginia procedure applies in all cases before West Virginia state courts[.]").

Joining an insurance company in a declaratory judgment action has been expressly authorized by this Court:

> 3. An injured plaintiff may 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.

4. 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.

Syl. Pts. 3-4, *Christian v. Sizemore*, 181 W. Va. 628, 628–29, 383 S.E.2d 810, 810–11 (1989).

Moreover, Federal is not prejudiced by being joined as a third-party defendant in the underlying action as coverage will be decided prior to the underlying personal injury litigation as there are no material facts in dispute in relation to coverage:

> Nor does the pendency of the declaratory judgment action necessarily require the disclosure of insurance coverage in the personal injury action. Generally, the decision to entertain a declaratory judgment action is addressed to the discretion of the trial court. Where the coverage question is separable from the issues in the underlying tort action, it should ordinarily be decided first, as it often may be dispositive of the personal injury litigation. Where, however, the facts involving the coverage question are intimately tied to the personal injury litigation, declaratory relief may and should be postponed or denied. Adherence to these concepts should obviate any need to inject the insurance question into the personal injury action, thereby avoiding one of the underlying concerns in Davis v. Robertson, supra.

Id. at 632–33, 814–15 (1989) (citations omitted). Furthermore, to the extent a trial would somehow be necessary on the issue of insurance coverage, the Court can hold separate trials with respect to the declaratory judgment action and the negligence action. *Id.* at 633, 815.

Additionally, the language of the No Action Clause is simply inapplicable to the instant scenario. The No Action Clause states: "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[.]" *JA83.* This language is not applicable to a declaratory judgment action but instead would apply to a scenario where a plaintiff names a defendant and the defendant's insurer in a personal injury action where there is no coverage dispute. As the Court in *Christian* recognized, in a declaratory judgment action the insured is not seeking to recover damages against the

insurance carrier, but is instead seeking a declaration that the insurer is required to provide coverage in the personal injury suit, which is "entirely ancillary to the personal injury suit for damages against the defendants." *Id.* at 631, 813.

Federal now contends that the Circuit Court erred in applying West Virginia procedural law instead of Pennsylvania's substantive law to find that the No Action Clause did not bar the declaratory judgment action at issue. However, when it raised the No Action Clause in its *Motion to Dismiss*, Federal cited West Virginia law in support of its argument that the No Action Clause required the dismissal of the *Third-Party Complaint.*[14] *JA188-JA190.*

Regardless of Federal's inconsistent position on this topic, it is clear that the right to join an insurance company in the original personal injury suit rather than by way of a separate action is a procedural issue and not substantive. The right to join an insurance company in the original personal injury suit governs the procedure by which the declaratory judgment action is litigated (*i.e.* in the underlying personal injury suit or in a separate suit) and not the substance of how the declaratory judgment action itself is ruled upon (*i.e.* whether or not the policy ultimately provides coverage). Moreover, pursuant to *Vest*, this issue should be considered procedural because it governs access to courts:

> [One] type of rule often called procedural actually is designed to govern access to courts, and necessarily governs access only to courts of the state having the rule. A state can control access to its own courts but it cannot prevent courts of another state, if they have jurisdiction, from proceeding to exercise it.

[14]In its *Motion to Dismiss*, Federal relied practically exclusively on *Davis v. Robertson*, 175 W. Va. 364, 332 S.E.2d 819 (1985). *JA180-192.* However, the holding in *Davis* was specific to motor vehicle accidents as at the time the underinsured motorist statute, *W. Va. Code § 33-6-31*, did not authorize a direct action against the insurance company providing uninsured motorist coverage until a judgment has been obtained against the uninsured motorist. *Id.* at Syl. Pts. 1, 2. Moreover, *Davis* was subsequently overruled by *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 156–57, 451 S.E.2d 721, 722–23 (1994).

Vest, 182 W.Va. at 230, 387 S.E.2d at 284 (1989)(quoting R. Leflar, *American Conflicts Law*, 243 44 (3d ed. 1977)).

Thus, the Circuit Court correctly found that the instant declaratory judgment action was permitted under West Virginia procedural law and the Circuit Court's ruling on this issue should, therefore, be affirmed.

2. Federal waived the No-Action Clause by failing to seek a ruling on its Motion to Dismiss and failing to assert the No Action Clause at any point thereafter for approximately nineteen (19) months.

As the Circuit Court recognized, under Pennsylvania law, "[w]aiver is the voluntary and intentional and abandonment of a known right." *Samuel J. Marranca Gen. Contracting Co. v. Amerimar Cherry Hill Assocs. Ltd. P'ship*, 416 Pa. Super. 45, 49, 610 A.2d 499, 501 (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." *Prime Medica Assocs. v. Valley Forge Ins. Co.*, 2009 PA Super 39, ¶ 18, 970 A.2d 1149, 1157.

As noted above, Federal filed its *Motion to Dismiss* with a supporting memorandum on May 21, 2019 and asserted that the No Action Clause precluded Dana Mining's Third-Party Complaint. *JA180-JA315*. The Circuit Court found (and Federal does not appear to dispute) that Federal never requested a hearing on its Motion to Dismiss. *JA29*.

Not only did Federal not request a hearing on its Motion to Dismiss at any point after it was filed, Federal failed to raise the No Action Clause or mention its previously filed *Motion to Dismiss* in its *Brief in Opposition to Third-Party Plaintiff, Dana Mining Company of Pennsylvania, LLC's Renewed Motion for Summary Judgment* filed on January 31, 2020. *JA414-JA767*. Federal filed a *Supplemental Brief in Opposition to Third-Party Plaintiff, Dana Mining*

Company of Pennsylvania, LLC's Motion for Summary Judgment on November 18, 2019 and again failed to assert the No Action Clause and failed to mention its previously filed Motion to Dismiss. *JA30*. Oral arguments were held before the Circuit Court on November 18, 2019 and again on February 12, 2020. Federal's counsel did not raise the No Action Clause as a defense during arguments or mention its previously filed Motion to Dismiss. *JA30 at ¶ 27.*

After the Circuit Court found that Federal was required to provide a defense to Dana Mining, Federal appealed the Circuit Court's decision to this Court. In its Notice of Appeal, Federal did not raise the "No Action Clause." In its *Petitioner's Brief*, Federal again failed to argue that the No Action Clause precluded Dana Mining's *Third Party Complaint* and failed to mention its previously filed Motion to Dismiss.[15]

On July 13, 2020, Dana Mining filed its Motion to Dismiss Appeal, arguing that Federal's appeal was premature. Federal filed its *Response in Opposition to Dana Mining Company of Pennsylvania, LLC's Motion to Dismiss Appeal* before this Court on July 30, 2020 and did not mention the No Action Clause or the previously filed Motion to Dismiss.[16]

Indeed, Federal did not mention the No Action Clause at any point after filing the Motion to Dismiss on May 21, 2019 until it filed its *Motion for Partial Summary Judgment* on December 23, 2020. *JA799-JA1230*. On these undisputed facts, it is clear that the Circuit Court was correct in concluding that Federal waived the No Action Clause under Pennsylvania law by

[15]Federal's appeal was designated No. 20-0232.

[16]In fact, Federal made several assertions throughout its *Response* that are contrary to its current reliance on the No Action Clause. For example, Federal stated that "[u]nder the facts and circumstances of this case, the March 4 Order likely resolved the whole case between Dana Mining and Federal, including as to Federal's duty to indemnify Dana Mining for any damages assessed against it in the wrongful death action." *See Response in Opposition to Dana Mining Company of Pennsylvania, LLC's Motion to Dismiss Appeal at p. 1.*

failing to seek a ruling on its *Motion to Dismiss* and failing to assert the No Action Clause at any point thereafter for approximately nineteen (19) months.

3. Contrary to Federal's argument, under Pennsylvania law the No Action Clause does not preclude an insured from seeking a declaration that an insurance policy provides coverage.

Federal cites only two (2) cases applying Pennsylvania law in support of its argument that the No Action Clause is enforceable Pennsylvania law.[17] Federal cites *Apalucci* for the parenthetical proposition that Pennsylvania substantive law applies to the issues of the right to sue under the contract and the contract's No Action Clause. However, Federal fails to mention the outcome of the *Apalucci* case. In *Apalucci*, the plaintiff obtained a default judgment against the insured as the insurer had failed to defend the suit. *Apalucci v. Agora Syndicate*, 145 F.3d 630, 631 (3d Cir. 1998). The plaintiff then sought payment of the judgment from the insurer as a third-party beneficiary of the insurance policy at issue and eventually filed suit against the insurer for bad faith and breach of contract in refusing to defend the insured and make payment to the plaintiff. The district court granted a motion for summary judgment filed by the insurer, which was appealed to the United States Court of Appeals for the Third Circuit. *Id.*

On appeal, the Third Circuit applied Pennsylvania law to the dispute. The central issue addressed by the decision was whether a no-action clause prevented the suit. The no-action clause contained the same language upon which Federal relies in the instant matter:

> No person or organization has a right . . . :

[17]Before the Circuit Court, Dana Mining argued that the No Action Clause did not preclude a declaratory judgment action by an insured under Pennsylvania law. *JA1531-JA1533.* The Circuit Court did not reach this issue as it found that the declaratory judgment action was permitted by West Virginia procedural law and further found that Federal waived its right to assert the No Action Clause. *JA28-JA31.* Regardless, it is axiomatic that this Court can sustain a grant of summary judgment on any basis supported by the record, including bases different or grounds other than those relied upon by the Circuit Court. *Gentry v. Mangum*, 195 W. Va. 512, 519, 466 S.E.2d 171, 178 (1995).

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us . . . unless all . . . terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial.

Id. at 633. The court found that under Pennsylvania law, where an insurer initially refuses to provide a defense to its insured, "the insurance company's initial repudiation of the contract in denying liability under the policy relieves the insured of strict performance of those provisions intended for the protection of the insurer [if the insurer is in fact obligated to defend the insured]." *Id.* at 634 (quoting *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 371 A.2d 193 (Pa. 1977)). In other words, because the insurer's refusal to defend "cut at the very root of the mutual obligation, [it] put an end to its right to demand further compliance with the [...] term of the contract." *Id.* The court further found that this result "comports with elementary principles of fairness and equity" because "[a]s a general rule, when one party to a contract unilaterally prevents the performance of a condition upon which his own liability depends, the culpable party may not then capitalize on that failure." *Id.*

Here, Federal refused to provide a defense to Dana Mining prior to the Circuit Court entering its *Order Granting Third-Party Plaintiff Dana Mining Company of Pennsylvania, LLC's Renewed Motion for Summary Judgment as to Federal Insurance Company's Duty to Defend. JA1-JA18.* Therefore, pursuant to *Apalucci*, because Federal failed to provide a defense to Dana Mining, Federal can no longer demand compliance with the No Action Clause.

The second case applying Pennsylvania law to a No Action Clause cited by Federal is *Burks v. Fed. Ins. Co.*, 2005 PA Super 297, 883, A2d 1086 (2005). Federal cites *Burks* for the proposition that "under the applicable substantive Pennsylvania law, clauses prescribing the

manner in which suit against an insurer may be brought are valid and enforceable." However, *Burks* is easily distinguishable from the case at hand and actually lends no support to Federal's argument. In *Burks*, a plaintiff fell and was injured on the insured's premises. The plaintiff brought suit against the insured and obtained a judgment in her favor for falling at the insured's premises. After the judgment was satisfied, the plaintiff then filed suit against the insurer directly, seeking to collect payment for her medical bills under the policy issued to the insured. *Id.* at ¶¶ 3-4.

The insurer filed a motion to dismiss arguing that the insured was not a third-party beneficiary to the insurance contract and the trial court agreed. On appeal, the Pennsylvania Superior Court considered whether the insured was a third-party beneficiary to the insurance contract. *Id.* at ¶¶ 4-5. The court ultimately found that the plaintiff was not a third-party beneficiary. The sole reference to a no action clause in the case states:

> Likewise, there is nothing in the insurance policy or the circumstances surrounding this case that would indicate that Federal intended to permit a direct claim against itself for medical payment coverage. In fact, the insurance policy contains a provision that sets forth the circumstances under which a party may bring legal action against Federal. It does not state that an individual may directly sue Federal for payment of medical bills under the medical coverage provision, which demonstrates that the legal action provision was written with the intent of insulating Federal from direct causes of action, intending instead to divert these claims to proceed directly against PNC, for which Federal may then be liable under its policy with PNC.

Id. at ¶ 17. As such, the holding of *Burks* is inapposite. First, *Burks* relied on certain policy language to support its holding that a third-party to the insurance policy could not maintain a direct action against the insurer to collect medical payment coverage monies. Second, *Burks* did not involve a declaratory judgment action filed by an insured against its insurer to seek a ruling that an insurance policy provides coverage, such as the matter at bar.

Other cases demonstrate that Federal's position that the No Action Clause bars the instant suit is inconsistent with the substantive law of Pennsylvania. In *Tesler*, the insured filed a declaratory judgment action seeking a declaration of his rights under an insurance policy issued to a debtor in a bankruptcy proceeding. *Tesler v. Certain Underwriters at Lloyd's, London (In re Spree.com Corp.)*, Chapter 11, Bankruptcy No. 00-34433DWS, Adversary No. 02-0278, 2002 Bankr. LEXIS 742 (Bankr. E.D. Pa. June 20, 2002). The insurer argued that a no-action clause within the policy barred the suit.[18] The court, applying Pennsylvania law, found that the no-action clause does not apply to an insured seeking a declaration of coverage. *Id.* at *28-*29. Additionally, the court reasoned that a declaratory judgment action that the existence of insurance coverage "is separate and apart from the merits of the underlying action and is a dispute ripe for adjudication." *Id.* at *30.

In *Foster*, the Commonwealth Court of Pennsylvania noted that many cases distinguish between actions by third parties and actions by insureds under the policy and hold that the latter type of actions are not barred by "no action" clauses. *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 154 Pa. Commw. 356, 361, 623 A.2d 928, 930 (1993). The court also recognized a distinction drawn in those cases between actions for damages against an insurer and declaratory actions that adjudicate issues of coverage and defense. *Id.* at 361, 930. The court agreed that no action clauses do not bar an action by insureds for declaratory relief. *Id.* at 361, 930-931.

[18]The no-action clause at issue stated: "No action shall lie against Underwriters unless, as a condition precedent thereto, . . . the amount of the [Insured]'s obligation to pay shall have been fully and finally determined either by judgment against them or by written agreement between them, the claimant and Underwriters." *Tesler v. Certain Underwriters at Lloyd's, London (In re Spree.com Corp.)*, Chapter 11, Bankruptcy No. 00-34433DWS, Adversary No. 02-0278, 2002 Bankr. LEXIS 742, at *23 (Bankr. E.D. Pa. June 20, 2002).

Pennsylvania law is not unique in this regard as courts in many jurisdictions have found that a no action clause applies to suits filed by third-parties against insurers, but does not preclude actions by an insured seeking a declaration of coverage. *Wilbanks Sec., Inc. v. Scottsdale Ins. Co.*, 215 F. Supp. 3d 1196, 1200-01 (W.D. Okla. 2016)(collecting cases and finding that no action clause "applies to the claims of third parties, not the insured, where, as here, the issue is the duty to defend"); *Eureka Fed. Sav. And Loan Ass'n v. Amer. Cas. Co. of Reading*, 873 F.2d 229, 233 (9th Cir. 1989)("no action clauses do not apply to bar declaratory actions that adjudicate issues of coverage and defense."); *Mid-Continent Cas. Co. v. Advantage Med. Elecs, LLC*, 196 So. 3d 238, 250 (Ala. 2015)(no action clause not applicable to insured's declaratory judgment action).

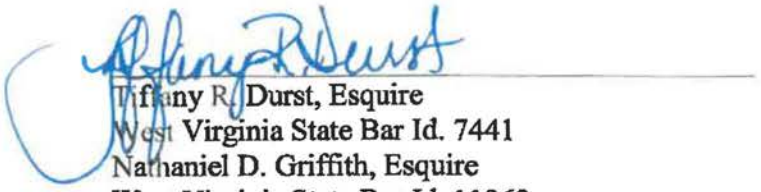
Therefore, even if Pennsylvania law applies to the interpretation of the No Action Clause as alleged by Federal, the No Action Clause does not operate to bar a declaratory judgment action such as the matter before the Court. Accordingly, even assuming *arguendo* that the Circuit Court erred in applying West Virginia's procedural law to the instant declaratory judgment action (it did not), the Circuit Court's conclusion that the No Action Clause does not bar the instant declaratory judgment action is consistent with Pennsylvania law and should therefore be affirmed.

VI. CONCLUSION

For all the reasons set forth above and any others apparent to the Court, Dana Mining respectfully requests that this Court affirm the Circuit Court's March 4, 2020 and August 19, 2021 Orders finding that Federal is required to defend and indemnify Dana Mining under the terms of the Policy.

Dated this 3rd day of February, 2022.

RESPONDENT, DANA MINING COMPANY OF PENNSYLVANIA, BY COUNSEL:



Tiffany R. Durst, Esquire
West Virginia State Bar Id. 7441
Nathaniel D. Griffith, Esquire
West Virginia State Bar Id. 11362
PULLIN, FOWLER, FLANAGAN, BROWN & POE PLLC
2414 Cranberry Square
Morgantown, West Virginia 26508
Telephone: (304) 225-2200
Facsimile: (304) 225-2214

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0232

FEDERAL INSURANCE COMPANY,

Petitioner (Third-Party Defendant below),

v.

DANA MINING COMPANY OF PENNSYLVANIA, LLC

Respondent (Defendant and Third-Party Plaintiff below).

(On Appeal from the Circuit Court of Monongalia County, West Virginia, Civil Action No. 17-C-483)

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondent, Dana Mining, LLC, does hereby certify on this 3rd day of February, 2022, that a true copy of the foregoing "***RESPONSE BRIEF ON BEHALF OF RESPONDENT, DANA MINING COMPANY OF PENNSYLVANIA, LLC***" was served upon via facsimile and U.S. First Class Mail to counsel as follows:

Bruce Rende, Esq.
Robb, Leonard, Mulvihill
BNY Mellon Center
500 Grant Street, Suite 2300
Pittsburgh, Pennsylvania 15219
Fax: (412) 281-3711

Lee Murray Hall, Esq.
Jenkins Fenstermaker PLLC
325 8th Street
Huntington, WV 25701
Fax: (304) 523-2347

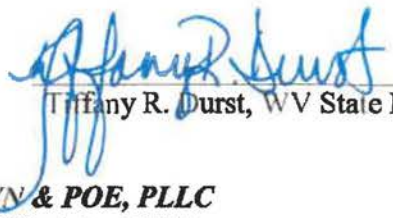
Seth P. Hayes, Esq.
Jackson Kelly PLLC
P.O. Box 619
Morgantown, West Virginia 26508
Fax: (304) 284-4142

Scott S. Segal, Esq.
The Segal Law Firm
810 Kanawha Blvd. East
Charleston, West Virginia 25301
Fax: (304) 344-9105

Bonnie M. Hoffman, Esq.
Hangley Aronchick Segal Pudlin & Schiller
One Logan Sq 27th Fl
Philadelphia. Pennsylvania 19103
Fax: (215) 568-0300

Ronald P. Schiller, Esq.
Hangley Aronchick Segal Pudlin & Schiller
One Logan Sq 27th Fl
Philadelphia. Pennsylvania 19103
Fax: (215) 851-1020

Charles R. Bailey, Esq.
Bailey & Wyant, PLLC
500 Virginia Street, East, Suite 600
P.O. Box 3710
Charleston, West Virginia 25337
Fax: (304) 343-3133



Tiffany R. Durst, WV State Bar No. 7441

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
2414 Cranberry Square, Morgantown, West Virginia 26508
Telephone: (304) 225-2200 | Facsimile: (304) 225-2214