IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0232

FEDERAL INSURANCE COMPANY, PETITIONER,

vs.

DANA MINING COMPANY OF PENNSYLVANIA, LLC, AND JENNY M. NEICE, as Administratrix of the ESTATE OF JEREMY R. NEICE, RESPONDENTS,

RESPONSE OF JENNY M. NEICE, as Administratrix of the ESTATE OF JEREMY R. NEICE TO PETITIONER'S BRIEF

From the Circuit Court of Monongalia County,
Case No. 17-C-483

COUNSEL FOR RESPONDENT
JENNY M. NEICE, as Administratrix of the
ESTATE OF JEREMY R. NEICE:

Scott S. Segal, Esq. (WV Bar #4717)
Jason P. Foster, Esq. (WV Bar #10593)
THE SEGAL LAW FIRM
A Legal Corporation
810 Kanawha Boulevard, East
Charleston, West Virginia 25301
Telephone: (304) 344-9100
Facsimile: (304) 344-9105

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... i - iii

RESPONSE TO ASSIGNMENT OF ERROR 1

STATEMENT OF THE CASE 2

I. The Federal Policy 3

A. The Four Buckets 3

I. The First Named Insured Bucket (1) 3

ii. The Named Insureds Bucket (2) 3

iii. The Relational Insureds Bucket (3) 4

iv. The Non-Insured Bucket (4) 6

B. The Separation of Insureds Clause 7

C. The Employers Liability Exclusion 8

II. This Action 10

SUMMARY OF ARGUMENT 12

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 13

ARGUMENT 13

I. The Employer's Liability Exclusion does not Bar Coverage for the Underlying Wrongful Death Action 14

A. The Employer's Liability Exclusion clearly does not apply to the facts of the underlying wrongful death action 14

i. The Policy's Separation of Insureds Clause mandates that the Policy be Construed as if "each named insured were the only named insured." 15

ii. It is Undisputed that Dana Mining was not Decedent's Employer; therefore, the Employer's Liability Exclusion is Inapplicable 34

B. Federal's "the insured" vs. "any insured" argument is a red herring. 37

C. The Circuit Court's Interpretation of the Separation of Insured clause neither negates nor modifies the Employer's Liability Exclusion . 39

D. The Circuit Court properly applied all controlling tenets of Pennsylvania insurance law. 42

E. The *Politsopoulos* case, which is almost completely factually analogous to the present action, is the most relevant Pennsylvania case to the present action and clearly indicates that Federal owes a duty to defend and conditionally indemnify Dana Mining in the underlying wrongful death action. 44

F. Applying the Employer's Liability Exclusion in the manner asserted by Federal impermissibly renders the Separation of Insureds Clause meaningless. 46

II. The Policy's No-Action Clause does not Prohibit Niece's Third-Party Complaint Against Federal. 47

A. West Virginia procedural law expressly permits Niece to join Federal to the underlying wrongful death action 47

B. Federal waived the No-Action Clause 49

CONCLUSION 50

CERTIFICATE OF SERVICE 52

TABLE OF AUTHORITIES

Cases — Page(s)

Am. Wrecking Corp. v. Burlington Ins. Co., 400 N.J. Super. 276, 946 A.2d 1084, 1089 (N.J. Super. 2008) 16-17, 18, 25, 26-28, 29, 30, 31

Apalucci v. Agora Syndicate, 145 F.3d 630 (3rd Cir. 1998) 1998 U.S. App. LEXIS 11629 49

Appleman, *Insurance Law and Practice*, § 7383 at 34-37 (1976) 44

Atl. Cas. Ins. Co. v. Zymblosky, 2016 Pa. Dist. & Cnty. Dec. LEXIS 19421 41

Bituminous Cas. Corp. v. Maxey, 110 S.W.3d 203, NO. 01-01-01111-CV, 2003 Tex. App. LEXIS 4377 (Tex. App.—Houston [1st Dist.] May 22, 2003) 16

Burks v. Fed. Ins. Co., 2005 PA Super 297, 883 A.2d 1086, 2005 Pa. Super. LEXIS 2924 (Pa. Super. 2005) 49

Michael Carbone v. General Accident Ins. Co., 937 F. Supp. 413, 1996 U.S. Dist. LEXIS 11529 37-38

Christian v. Sizemore, 181 W. Va. 628, 383 S.E.2d 810 (1989) 48-49

CPB Int'l, Inc., 562 F.3d 591, 595-96 ..... 33, 46-47

CGU Ins. v. Tyson Assocs., 140 F. Supp. 2d 415, 419 (E.D. Pa. 2001)." JA 9 43

Contrans, Inc. v. Ryder Truck Rental, Inc., 836 F.2d 163, 169 (3d Cir. 1987) 33, 39, 44, 46-47

Devine v. Great Divide Ins. Co., 350 P.3d 782 (2015) 35, 47

Erie Ins. Exch. v. Muff, 2004 PA Super 177, ¶ 8, 851 A.2d 919, 925-26. JA 7-8 42-43

Erdo v. Torcon Const. Co., Inc., 275 N.J. Super. 117, 123, 645 A.2d 806 (N.J. Super. 1994) 35

Evanston Ins. Co. v. OEA, Inc., 2005 U.S. Dist. LEXIS 39412 (E.D. Cal. July 25, 2005) 33

Folmar v. Shaffer, 232 Pa. Super. 22, 332 A.2d 821 1974 Pa. Super. LEXIS 1292 (Pa. Super. 1974) 49

Gardner v. State Farm Fire & Cas. Co., *544* F.3d 553, 558 (3d Cir. 2008). JA 7 42

Great Am. Ins. Co. v. St. Farm Mut. Automobile Ins. Co., 412 Pa. 538, 194 A. 2d 903 (1963) 21-22, 26, 36

J&J Holdings, Inc. v. Great Am. E&S Ins. Co., 420 F. Supp. 3d 998 (C. Dist. Ca. 2019) 33

James River Ins. Co. v. Ultratec Special Effects, Inc., 449 F. Supp. 3d 1157 (N.D. Al. 2020) 29, 31-33, 39-40

Kiely ex rel. Feinstein v. Phila. Contributionship Ins. Co., 2019 PA Super 90, 206 A.3d 1140, 1146 (Pa. Super. Ct. 2019) 43

Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 589 Pa. 317, 331, 908 A.2d 888, 896 (2006) 42-43

McAllister v. Millville Mut. Ins. Co., 640 A.2d 1283, 433 Pa. Super. 330 (1994) .. 37-38

McKinney v. Fairchild Int'l, 199 W. Va. 718, 487 S.E.2d 913 (1997) 47-48

Samuel J. Marranca General Contracting Co., Inc. v. Amerimar Cherry Hill Associates Ltd. Partnership, 416 Pa. Super. 45, 610 A.2d 499 (Pa.Super. 1992) 49

Medill v. Westport Ins. Corp., 49 Cal. Rptr. 3d 570, 143 Cal. App. 4th 819 (Ct. of App. Ca., 2nd App. Dist., Div. 2, 2006) 37-38

Mut. Benefit Ins. Co. v. Politsopoulos, 631 Pa. 628, 638, 115 A.3d 844 (2015) 16-17, 18, 25-31, 42, 44-46

Nationwide Mut. Ins. Co. v. CPB Int'l, Inc., 562 F.3d 591, 595-96 (3d Cir. 2009) .. 15, 43

Nationwide Mut. Ins. Co. v. Pools by Design, Inc., 2009 Conn. Super. LEXIS 1416, 2009 WL 16639349A 34-35

Ohio Cas. Ins. Co. v. Holcim (US), Inc., 744 F. Supp. 2d 1251, 1271 n.28 (S.D. Al. 2010) 28-29, 46

Pa. Mfrs' Ass'n Ins. Co. v. Aetna Cas. & Sur. Ins. Co., 426 Pa. 453, 233 A.2d 548 (1967) 18-21, 26-27

Patton v. Patton, 413 Pa. 566, 575, 198 A.2d 578 (1964) 22-26

Piatt v. Ind. Lumbermen's Mut. Ins. Co., 461 S.W.3d 788 (Mo. 2015) 17

Prime Medica Assocs. v. Valley Forge Ins. Co., 2009 PA Super 39, 970 A.2d 1149 (Pa. Super. 2009) 49

L. Russ & T. Segalla, Couch on Insurance (3d Ed. 2005) §129:10, p. 23-24 34-35

Sacharko v. Center Equities Ltd. Partnership, 2 Conn. App. 439, 479 A.2d 1219 (1984) 35

Sikirica v. Nationwide Ins. Co., 416 F.3d 214, 225 (3d Cir. 2005) 42

Spezialetti v. Pacific Employers Ins. Co., 759 F.2d 1139 (3rd Cir. 1985) 37-38

Taylor v. Admiral Ins. Co., 187 So. 3d 258 (Fla. App. 2016) 33

TIG Specialty Ins. Co v. Pinkmonkey.com, Inc., 375 F.3d 365 (5th Cir. 2004) 37-38

Travelers Home & Marine Ins. Co. v. Stahley, 239 F. Supp. 3d 866 (E.D. Pa. 2017) 33-34

Vest v. St. Albans Psychiatric Hosp., 182 W. Va. 228, 387 S.E.2d 282 (1989) 48

Westminster Am. Ins. Co. v. Sec. Nat'l Ins. Co., (E.D. Pa. 2021), 2021 U.S. Dist. LEXIS 154065, 2021 WL 3630464 37-38

Other

13 Appleman, *Insurance Law and Practice*, § 7383 at 34-37 (1976) 44

21 Eric Mills Holmes, Holmes' Appleman on Insurance note 14, § 132.5 [C][1], at 66-67 (2d ed. 1996) 35

Rules

W. Va. R. App. Pro. 10(c)(4) 11
W. Va. R. App. Pro. 10(d) 2, 11
W. Va. R. App. Pro. 20(a) 13
W. Va. R. App. Pro. 20(a)(1) 13

RESPONSE TO ASSIGNMENT OF ERRORS

First, the Circuit Court correctly found that the Employer's Liability Exclusion did not apply under the facts of the underlying wrongful death action because Respondent Dana Mining Company of Pennsylvania, LLC ("Dana Mining") was not Jeremy M. Neice's ("Decedent") employer. There are three relevant parties to the coverage analysis in this appeal: (1) Decedent; (2) Decedent's employer, Mepco, LLC ("Mepco"); and (3) Dana Mining. While both Mepco and Dana Mining are named insureds under the Mining Industries Insurance Coverage policy (the "Policy") issued by Petitioner Federal Insurance Company ("Federal"), Respondent Jenny Neice, as Administrator of Decedent's Estate ("Neice") sued only Dana Mining in the underlying wrongful death action.

Specifically, the Circuit Court correctly found that the Policy's Separation of Insureds Clause requires the Policy to be analyzed as if "each named insured were the only named insured." The two dispositive facts at issue in this appeal are not disputed: (1) Dana Mining was not Decedent's employer; and (2) Neice sued only Dana Mining. Consequently, pursuant to the Separation of Insured's Clause, the Policy must be read as if Dana Mining is the only named insured. Because Dana Mining was not Decedent's employer, the Circuit Court correctly found that the Employer's Liability Exclusion is inapplicable and that Federal has a duty to defend and a conditional duty to indemnify Dana Mining.

Second, the Circuit Court correctly found that Neice properly joined Federal to the underlying wrongful death action pursuant to West Virginia procedural law.

Third, the Circuit Court correctly found that Federal waived the No-Action Clause contained in the Policy.

STATEMENT OF THE CASE[1]

Not one, but two, Circuit Court Judges scrupulously analyzed the coverage issue in this case and both correctly concluded that the Employer's Liability Exclusion does not apply to the underlying wrongful death action because Dana Mining was not Decedent's employer. JA 1-38. In the underlying action, Neice filed suit against only Dana Mining, alleging a negligence claim under Pennsylvania's Wrongful Death Act. JA 161-168. Neice alleges that Decedent was employed by Mepco as a continuous mining machine operator at the time of his death. *Id.* Neice further alleges that at the time of his death, Decedent was working in a mine owned and operated by Dana Mining. *Id.* The Amended Complaint alleges that Decedent suffered fatal injuries when a rib rolled away from the coal block and pinned Decedent to the mine floor. *Id.*

Federal goes a long way to make a remarkably simple analysis overly complicated. The analysis in this case does not require this Court to venture into the grammatical morass created by the Policy's varying use of definite and indefinite articles. The fact that both Mepco and Dana Mining are named insureds under the Policy allows this Court to cut the Gordian Knot and analyze Federal's duties to Dana Mining as if Dana Mining was the only named insured under the Policy. Because it is undisputed that Dana Mining was not Decedent's employer, the both Circuit Court Judges correctly concluded that the Employer's Liability Exclusion simply does not apply to the underlying wrongful death action.

---

[1] Pursuant to W. Va. R. App. Pro. 10(d), Respondent Neice is addressing only the inaccuracies and omissions in Petitioner's Statement of the Case.

I. The Federal Policy

Under the clear and unambiguous terms of the Policy, each person and/or business entity falls into one of four buckets: (1) the **First Named Insured** bucket; (2) the **Named Insured** bucket; (3) the **Relational Insured** bucket; and (4) the **Non-insured** bucket. Federal's contractual duties and obligations are determined by the bucket into which a person and/or business entity falls. Once each of the various entities at issue in this case are placed into their proper bucket, it becomes crystal clear that the Circuit Court correctly found that Federal owes Dana Mining a defense and conditional indemnification in the underlying wrongful death action.

A. The Four Buckets

As noted above, the Policy separates persons and/or business entities into four buckets: (1) the **First Named Insured** bucket (JA 59); (2) the **Named Insureds** bucket (JA 46-47 and 66); (3) the **Relational Insureds** bucket (JA 68-70, 87 and 136); and (4) the **Non-insureds** bucket (JA 71). Each of these buckets is explained below.

i. The First Named Insured Bucket (1)

The First Named Insured is accorded certain duties and benefits under the Policy. For example, under the Policy's Premium Payment provision, "The First Named Insured shown in the Declarations is responsible for the payment of all premiums and will be the payee for any return premiums we pay." JA 59. Mepco Holdings, LLC, is identified in the Policy as the First Named Insured. JA 46-47.

ii. The Named Insureds Bucket (2)

The "Contract" provision of the Policy states that:

> Throughout this contract the words "you" and "your" refer to the *Named* ***Insured*** shown in the Declarations and other persons or organizations qualifying as a Named **Insured** under this contract."

JA 66 (bold in original) (italics added). The Policy Declarations, as amended by endorsement, specifically names thirty-four (34) Named Insureds, including Mepco and Dana Mining. JA 46-47.

iii. The Relational Insureds Bucket (3)

The "Contract" provision of the Policy also includes a critical distinction between **Named Insureds** and other entities that may qualify as insureds:

> *In addition to the Named* ***Insured***, other persons or organizations may qualify as **insureds**. Those persons or organizations and the conditions under which they qualify are identified in the Who Is An Insured section of this contract.

JA 66 (bold in original) (italics added). Thus, the Policy clearly delineates a distinct difference between **Named Insureds** and **Relational Insureds**. Federal's entire argument is based on the false premise that all insureds are evaluated under the same standards in all circumstances. The Policy clearly and unambiguously states that they are not. This distinction will prove to be dispositive under the Separation of Insureds Clause which will be discussed in depth below.

The "Definitions" section of the Policy defines the generic term "insured" as follows:

> **Insured** means a person or organization qualifying as an **insured** in the Who Is An Insured section of this contract.

JA 87 (bold in original). The Policy's "Who Is an Insured" provision identifies, among other things, several classifications of **Relational Insureds** based on the nature of the business entity identified as a named insured. JA 68-70. For example, in the present case, Dana Mining, a **Named Insured**, is a limited liability company. JA 46. The subsection for "Limited Liability Companies" under the "Who Is An Insured" provision states that:

> 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.

JA 69 (bold in original). The Policy also identifies the **Relational Insureds** for other **Named Insured** business entities such as sole proprietorships, partnerships or joint ventures, and other organizations (JA 68-70). Coverage under these provisions is extended variously to the **Named Insured** business entities' respective directors, officers, members, managers, partners and their spouses. *Id.*

In addition to insureds who are covered under the Policy based on their position within the corporate structure of a named insured business entity, the Policy goes on to identify the following categories of **Relational Insureds** related to **Named Insured** business entities: employees; volunteers; real estate managers; permissive users of mobile equipment; and lessors of premises. *Id.* Based on these foregoing designations, there may be numerous **Relational Insureds** under the Policy that are not **Named Insureds** but are covered nonetheless based on their relationship to a **Named Insured**.

In addition to the categories of **Relational Insureds** listed above, the Policy provides coverage for the liability of yet others assumed by an insured under the terms of an insured contract:

> This insurance does not apply to **bodily injury** or **property damage** for which the **insured** is obligated to pay damages by reason of assumption of liability in a contract or agreement.
>
> This exclusion does not apply to liability for damages:
>
> - that such **insured** would have in the absence of such contract or agreement; or
> - assumed in an oral or written contract or agreement that is an **insured contract**, provided the **bodily injury** or

> **property damage**, to which this insurance applies, occurs after the execution of such contract or agreement.

JA 73 (bold in original).[2] According to the "Blanket Additional Insured" Endorsement, effective June 1, 2015, the "Who Is an Insured" section of the Policy was amended: ". . . to include any person or organization you are required by written contract to include as an insured." JA 136.

By operation of these provisions, a person or entity, such as an independent contractor, may qualify as a **Relational Insured** merely by entering into an insured contract with an insured.

iv. The Non-Insured Bucket (4)

In addition to identifying the **First Named Insured**, **Named Insureds** and **Relational Insureds**, the Policy also identifies who is not an insured: **Non-Insureds**. According to paragraph A of the "Limitations on Who Is An Insured" provision:

> Except to the extent provided under the Newly Acquired Or Formed Organizations provision above, *no person or organization is an* ***insured*** with respect to the conduct of any person or organization *that is not shown as a named* ***insured*** *in the Declarations.*

JA 71 (bold in original) (italics added). Under this provision, no person or organization is an insured unless that person or organization is affiliated with a **Named Insured** in some capacity and only to the extent that such person or entity is conducting business on behalf of a **Named Insured**.

---

[2] The Policy defines the term "insured contract", in pertinent part, as: ". . . any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for such municipality) in which you assume the tort liability of another person or organization to pay damages, to which this insurance applies, sustained by a third person or organization." JA 87.

B. The Separation of Insureds Clause

The Separation of Insureds Clause, read in conjunction with the distinctions among the four buckets identified above, conclusively demonstrates that the Circuit Court correctly found that Federal owes Dana Mining a defense and conditional indemnification in the underlying wrongful death action. The Separation of Insureds Clause states that:

> 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.

JA 85 (bold in original) (italics and underline added). The syntax of the Separation of Insureds Clause is significant because it highlights and maintains the critical distinction between the **Named Insureds** Bucket under the first bullet point and the **Relational Insureds** Bucket under the second bullet point. *Id.* By operation of this clear and unambiguous clause, the Policy must be analyzed "as if each named insured were the only named insured." *Id.* Below in Figure A is a generic graphical representation of the four buckets created by the express terms of the Policy:

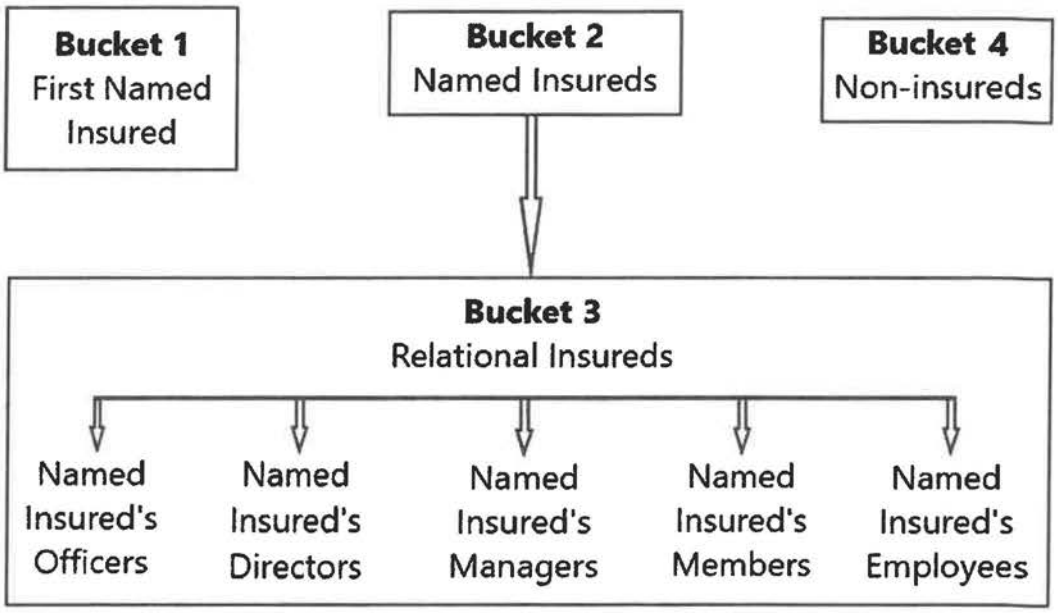

Figure A

In insurance policies that include multiple **Named Insureds**, like the Policy at issue in the present matter, the Separation of Insureds Clause mandates that the insurer's duties are determined as if the **Named Insured** against whom a claim is made is the only **Named Insured** in the policy.

C. The Employers Liability Exclusion

The Policy also includes an employer's liability exclusion (the "Employer's Liability Exclusion").[3] As discussed in depth below, the Circuit Court properly concluded that the Employer's Liability Exclusion does not apply in this case because it is undisputed that Dana Mining was not Decedent's employer. The Employer's Liability Exclusion states, in pertinent part:

> The following exclusion is added to this policy and *replaces any similar exclusion contained therein*. The use of the words damages, loss, cost or

[3] The Policy contains the standard employer's liability exclusion. JA 75. This standard version was replaced by an Endorsement to said exclusion. JA 120-121. The phrase "Employer's Liability Exclusion" refers to the Endorsement to said exclusion.

expense in any exclusion does not expand any coverages under this contract.

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.

All other terms and conditions remain unchanged.

JA 120-121 (bold in original) (italics and underline added). By its explicit terms, the Employer's Liability Exclusion replaces only similar exclusions contained in the Policy

and all other terms and conditions, including the Separation of Insureds Clause, remain unchanged.

II. This Action

On Page 4 of the Petitioner's Brief, Federal incorrectly states that "... Jeremy Neice was an employee of Mepco – the insured to which Federal issued the Policy." This error typifies Federal's repeated failure to respect the distinctions amongst the different classifications of insureds mandated by the Policy. Federal issued the Policy to Mepco Holdings, LLC. JA 46 and 62. Thus, Mepco Holdings, LLC, falls into the **First Named Insured** Bucket. JA 59. Decedent was employed by Mepco, LLC, an entity that is separate and distinct from Mepco Holdings, LLC. *Id.* at 162. Mepco, LLC, is a **Named Insured** under the Policy; therefore, Mepco, LLC falls into its own separate and distinct **Named Insured** bucket. *Id.* at 46. As explained in detail below, the coverage analysis in the case requires the accurate and consistent identification of relevant insureds to maintain the critical distinctions among them.

Additionally, Federal mentions Neice's joinder in the declaratory judgment action in only a footnote. Petitioner's Brief at p. 4. As explained below, Neice's claims against Federal are the very basis for the proper joinder of Federal in the underlying wrongful death action pursuant to West Virginia law: a fact that requires far more emphasis than mere mention in a footnote.

Federal also glosses over its inexplicable delay in asserting the "No Action" Clause. Dana Mining filed its Complaint for Declaratory Relief against Federal in this civil action on April 5, 2019. JA 169-179. On May 21, 2019, Federal moved to dismiss the Complaint for Declaratory Relief. JA 180. While Federal did raise the "No Action" Clause in the Motion to Dismiss, Federal never sought a hearing on the Motion. On October 15, 2019,

Dana Mining filed its Motion for Summary Judgment on Federal's duty to defend. Federal filed its Response in Opposition to said Motion November 14, 2019. In its Response, Federal neither mentioned its previously filed Motion to Dismiss nor raised the "No Action" Clause as a defense. On November 18, 2019, Federal filed a Supplemental Response that again neither mentioned its previously filed Motion to Dismiss nor raised the "No Action" Clause as a defense. Oral arguments were held before the Circuit Court on November 19, 2019 and February 12, 2020. Despite being present for both arguments, Federal's counsel again neither mentioned its previously filed Motion to Dismiss nor raised the "No Action" Clause as a defense. Federal's next mention of the "No Action" Clause did not appear until the filing of its Motion for Partial Summary Judgment on December 23, 2020. JA 799. Thus, from May 21, 2019 until December 23, 2020, a period of almost nineteen (19) months, Federal actively participated in the litigation of the underlying matter and made absolutely no mention of the "No Action" Clause.

While W. Va. R. App. Pro. 10(c)(4) confines the Statement of the Case to procedural and factual issues, Federal uses subsection II of its Statement of Facts to argue that the Circuit Court incorrectly found that Federal owes a duty to defend and conditional duty to indemnify Dana Mining in the underlying wrongful death action. Subsection II of Federal's Brief grossly misrepresents the nature and extent of the Circuit Court's analysis and application of Pennsylvania law. Neice addresses Federal's arguments and misrepresentations more fully below. Federal's argument and misrepresentations are mentioned here in order to comply with W. Va. R. App. Pro. 10(d). Neice again reiterates that the Circuit Court correctly applied Pennsylvania law and correctly determined that Federal owes Dana Mining both a defense and a conditional duty to indemnify under the clear and unambiguous terms of the Policy.

SUMMARY OF ARGUMENT

The purpose of an Employer's Liability Exclusion is to prevent the duplication of coverage that would occur when the employee of a named insured, already covered by workers' compensation, sues the named insured under a liability insurance policy. The purpose of a Separation of Insureds Clause is to spread coverage to all of the named insureds under a single policy so that when a claim is made against a single named insured, coverage is analyzed from the perspective of only that named insured. The Policy at issue in this case includes both provisions and the Circuit Court properly concluded that, by operation of the Separation of Insureds Clause, the Employer's Liability Exclusion did not apply to Neice's claim against Dana Mining.

In the underlying wrongful death action, both Circuit Court Judges correctly placed each of the relevant parties into the proper bucket pursuant to the terms of the Policy. Specifically, the Circuit Court correctly found that both Decedent's employer (Mepco) and Dana Mining originally fell into the **Named Insureds** bucket. The Circuit then properly concluded that Neice filed suit against only Dana Mining. Next, the Circuit Court properly applied the Separation of Insureds Clause and analyzed the Policy as if Dana Mining were the only Named Insured in the **Named Insured** Bucket. In so doing, Mepco moved out of the **Named Insured** Bucket and into the **Non-insured** bucket because Mepco is a wholly separate corporate entity from Dana Mining. Thereafter, the Circuit Court recognized the undisputed fact that Decedent was not Dana Mining's employee.

The Circuit Court then correctly determined that the Employer's Liability Exclusion did not apply because Dana Mining was not Decedent's employer. The Circuit Court's ruling complied with all applicable tenets of Pennsylvania insurance law and is

entirely consistent with the Pennsylvania Supreme Court's analysis of separation of insureds clauses vis-à-vis employer liability exclusions.

Additionally, the Circuit Court correctly applied West Virginia procedural law in finding that Federal was properly joined by Neice to the underlying personal injury action.

Finally, the Circuit Court properly found that Federal waived the "No Action" Clause as Federal actively participated in the litigation of the underlying wrongful death action for nearly nineteen (19) months without seeking to enforce said Clause.

For these reasons, as discussed more fully below, Neice respectfully requests that this Court affirm the Circuit Courts' respective Orders finding that Federal owes Dana Mining a defense and a conditional duty to indemnify in the underlying wrongful death action.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument under Rule 20(a)(1) of the West Virginia Rules of Appellate Procedure because it involves an issue of first impression. This case is also appropriate for oral argument under Rule 20(a) of the West Virginia Rules of Appellate Procedure because it involves an important question related to the interpretation of Pennsylvania law.

ARGUMENT

The Circuit Court correctly applied the Separation of Insureds Clause and placed each relevant party into the proper bucket. Once Neice filed suit against Dana Mining, every entity in the **Named Insured** Bucket, including Mepco, was removed, except for Dana Mining. Because Decedent was not employed by Dana Mining, Decedent was never in Dana Mining's **Relational Insured** Bucket. Instead, Decedent was in Mepco's **Relational Insured** Bucket. By suing only Dana Mining, Mepco was transferred into

the **Non-insured** Bucket. Because the Decedent was never employed by Dana Mining, the Employer's Liability Exclusion is simply inapplicable. For these reasons, as explained more fully below, this Court should affirm the Circuit Courts' respective Orders requiring Federal to provide Dana Mining with a defense and a conditional indemnification in the underlying wrongful death action.

I. The Employer's Liability Exclusion does not Bar Coverage for the Underlying Wrongful Death Action

In order to assess the Circuit Courts' respective rulings, this Court need answer only two questions: (1) what entity did Neice sue; and (2) was that entity Decedent's employer? The Circuit Court correctly found that Neice sued only Dana Mining and that Dana Mining was not Decedent's employer. Based on these answers, the Circuit Court correctly found that Federal owes Dana Mining a duty to defend and a conditional duty to indemnify in the underlying wrongful death action.

A. The Employer's Liability Exclusion clearly does not apply to the facts of the underlying wrongful death action.

As explained above, there are four buckets into which persons and/or entities fall under the Terms of the Policy. In Bucket 1 is the **First Named Insured**: Mepco Holdings, LLC. JA 46-47, and 59.

Bucket 2 is comprised of **Named Insureds**. The Policy states, in pertinent part, that **Named Insureds** appear on the Policy Declarations. JA 66. The Policy Declarations, as amended by endorsement, specifically names thirty-four (34) **Named Insureds**, including Mepco and Dana Mining. JA 46-47.

Bucket 3 contains **Relational Insureds** and is comprised of persons and/or entities that are afforded coverage under the Policy based on their relationship to a

Named Insured. JA 68-70, 73 and 136. **Relational Insureds** are not specifically named anywhere in the Policy.

Bucket 4 is comprised of **Non-insureds**. According to the terms of the Policy, **Non-insureds** are those persons and/or entities who do not conduct any activities on behalf of a named insured appearing the Policy's Declarations. JA 71.

The Policy goes to great lengths to maintain these four distinctions. In fact, maintaining the separation and distinctions among the four buckets plays a significant role in determining the amount of risk against which Federal insures. Federal asks this Court to disregard these distinctions in the present case in a blatant attempt to avoid its contractual obligations. Essentially, Federal argues that all insureds are treated equally under the Policy under all circumstances, regardless of who is making the claim and against whom the claim is asserted. Controlling Pennsylvania insurance law expressly prohibits such an argument. Instead, when the language of an insurance policy is clear and unambiguous, courts must give effect to that language. *See Nationwide Mut. Ins. Co. v. CPB Int'l, Inc.*, 562 F.3d 591, 595-96 (3d Cir. 2009) (applying Pennsylvania law).

i. The Policy's Separation of Insureds Clause mandates that the Policy be Construed as if "each named insured were the only named insured."

Under the terms of the Policy, the filing of a lawsuit can potentially move insureds from one bucket to another. The most pertinent example of this phenomena can be seen in the case at bar. As noted above, in a vacuum, there are thirty-four entities in the Policy's **Named Insured** Bucket. However, the Policy's Separation of Insureds Clause altered the classification of these insureds once Neice filed suit. The Separation of Insureds Clause states that:

> 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.

JA 85 (bold in original) (italics and underline added). Thus, pursuant to this express and unambiguous clause, coverage under the Policy must be interpreted as if Dana Mining were the only **Named Insured**. Consequently, the applicability of all portions of the Policy, including exclusions, must be confined to Dana Mining and its **Relational Insureds**.

This result is supported by the very title and intent of the Separation of Insureds Clause. For example, in *Bituminous Cas. Corp. v. Maxey*, 110 S.W.3d 203, NO. 01-01-01111-CV, 2003 Tex. App. LEXIS 4377 (Tex. App.—Houston [1st Dist.] May 22, 2003), the court succinctly observed that:

> . . . when an insurance policy has a separation of insureds or severability of interests clause, **each insured against whom a claim is brought is treated as if it was the only insured under the policy**. *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451, 455-56 (Tex. App.--Houston [1st Dist.] 1999, pet. denied). **The intent of the severability clause is to provide each insured with separate coverage, as if each were separately insured with a distinct policy**, subject to the liability limits of the policy. *Utica Mut. Ins. Co. v. Emmco Ins. Co.*, 309 Minn. 21, 243 N.W.2d 134, 142 (Minn. 1976).

Maxey, 110 S.W.3d 203, 210 (emphasis added).

In fact, the Supreme Court of Pennsylvania has observed that, ". . . a separation-of-insureds clause does not create ambiguity, but merely **spreads protection among insureds**, without negating plainly-worded exclusions[]." *Mut. Benefit Ins. Co. v. Politsopoulos*, 631 Pa. 628, 638, 115 A.3d 844 (2015) (citing *Am. Wrecking Corp. v.*

Burlington Ins. Co., 400 N.J. Super. 276, 946 A.2d 1084, 1089 (N.J. Super. 2008) (emphasis added).

This intent is critical, especially where, as in the present matter, an employee of one named insured sues another named insured under the same policy. As the Supreme Court of Missouri observed in *Piatt v. Ind. Lumbermen's Mut. Ins. Co.*, 461 S.W.3d 788 (Mo. 2015):

> Insureds are treated separately in CGL policies to prevent an insurer from invoking an employee exclusion on the ground that the injured person's employer happens to qualify as an insured. In other words, **without a separation-of-insureds provision, an insurer could avoid liability under an employee exclusion just because some insured was the injured person's employer, regardless of who is seeking coverage. Separation-of-insureds language prevents this by confining the protections offered by employee exclusions to situations where the employer is actually claiming the benefit of the policy.**

Id. at 795 (emphasis added) (internal citations omitted).

Under the plain and unambiguous terms of the Policy's Separation of Insureds Clause, upon the filing of suit, thirty-three named insureds were removed from the **Named Insureds** Bucket, including Decedent's employer, Mepco. Only one entity remained in the **Named Insured** Bucket: Dana Mining. Based on the operation of the Separation of Insureds Clause and the fact that Neice sued only Dana Mining, the generic representation in Figure A above can now be tailored to this specific case as shown in Figure B below:

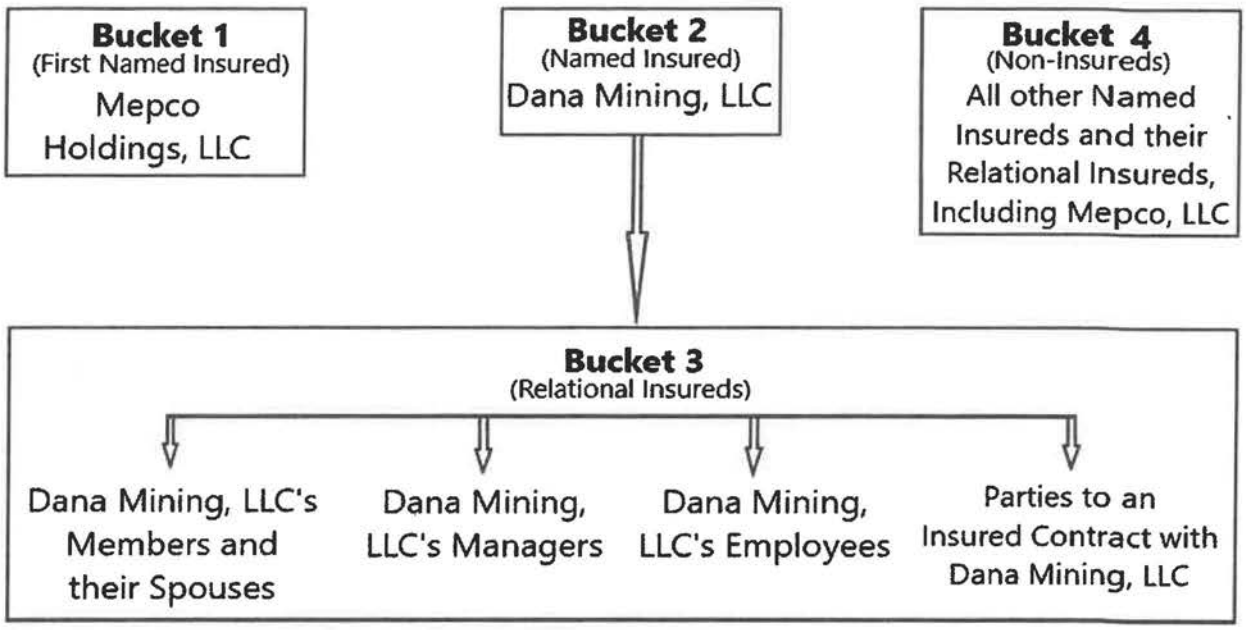

Figure B

Figure B shows that, consistent with the Separation of Insureds Clause, Dana Mining is the only entity in the **Named Insured** Bucket in the present case. Figure B also shows the potential for numerous additional insureds in the **Relational Insured** Bucket which is derived from Dana Mining's business relationship to other persons/and or entities.

While the Supreme Court of Pennsylvania's decision in *Politsopoulos* does not reach the ultimate issue in the present case, the *Politsopoulos* decision is highly instructive and illuminating. Instead of jumping directly into the *Politsopoulos* decision, it is helpful to first examine the line of cases upon which the *Politsopoulos* decision is based.

The first case in that line is *Pa. Mfrs' Ass'n Ins. Co. v. Aetna Cas. & Sur. Ins. Co.*, 426 Pa. 453, 233 A.2d 548 (1967) ("PMA"). In *PMA*, Pennsylvania Manufacturers' Association Insurance Company ("PMA") issued both an automobile liability and

workmen's compensation policy to Harry B. Niehaus ("Niehaus"). Aetna issued a comprehensive general liability policy to Delaware Valley Wool Scouring Company ("Delaware"). The Aetna policy had a provision that made the Aetna policy excess coverage in the event that Delaware was covered by other insurance for a loss that arose from a non-owned automobile.

A Niehaus employee was injured when a Delaware employee was unloading a Niehaus truck with a forklift. The injured Niehaus employee filed suit against Delaware and obtained a settlement. PMA and Aetna agreed to submit the issue of indemnification to the court as a matter of law. PMA and Aetna agreed that Delaware was an insured under the PMA auto policy by virtue of the policy's omnibus clause. The Pennsylvania Supreme Court thus framed the issue in this way:

> The question for this court is limited to **whether the employee exclusion clause of the PMA policy excludes liability to an employee of Niehaus, the named insured, in an action against Delaware, the omnibus-insured**. Exclusion (d) provides that the policy does not apply: ". . . to bodily injury . . . of any employee of the insured . . ." (Emphasis added). The dispute centers upon the meaning of "insured". Appellee, PMA, contends that the exclusion applies, pointing to the definition of insured in the policy: "III. Definition of Insured: (a) **With respect to the insurance for bodily injury liability . . . the unqualified word 'insured' includes the named insured.**"
>
> Aetna, on the other hand claims that "insured" in the employee exclusion must be confined to mean the particular insured claiming coverage, here Delaware. Since Skinner [the Delaware employee forklift operator] is not an employee of Delaware, the exclusionary clause would be inoperative, and PMA would be liable under the policy.

PMA, at 455 (emphasis added).

Aetna's argument was based on the policy's severability-of-interests clause. Under Aetna's interpretation of that clause, the term "the insured" was used severally and not collectively, thereby permitting a restrictive definition of the term "insured"; i.e., only the

insured seeking coverage. In essence, Aetna argued that the severability-of-interests clause permitted the court to ignore the **Named Insured** Bucket and permitted coverage to be determined solely from the perspective of the **Relational Insured** Bucket. In rejecting this argument, the Pennsylvania Supreme Court stated:

> Neither the court below nor this court is reading the Severability of Interests clause out of the policy. What we are doing is interpreting the unambiguous language of the contract. That is one more reason why the interpretation of the insurance industry spokesmen does not sway us. As appellee points out, in *Topkis v. Rosenzweig*, 333 Pa. 529, 5 A. 2d 100 (1939), this court said: "It is settled that where the language of the policy is clear and unambiguous it cannot be construed to mean otherwise than what it says. It must be given the plain and ordinary meaning of the terms used: . . ." When the language is "the unqualified word 'insured' includes the named insured", there is no room to seek the interpretation of industry spokesmen.

PMA, at 457.

The Supreme Court of Pennsylvania affirmed the lower court's ruling that PMA's employer's liability exclusion applied to bar coverage under the PMA policy because the injured employee was employed by Niehaus: the named insured. *See id.*, at 456. In addition to finding that the term "insured" included Niehaus, the named insured, the Pennsylvania Supreme Court went on to observe that:

> Furthermore, were we to go outside the four corners of the instrument, just as reasonable a place to look would be the intention of the parties to the contract. Appellee [PMA] makes the compelling argument that Niehaus, the named-insured, would not intend coverage for his employee in these circumstances. **Niehaus had already covered his employees with a workmen's compensation policy. It would be unreasonable for Niehaus to pay for duplicating coverage benefiting an unknown third person (Delaware).**

PMA, at 457 (bold added). The upshot of PMA is clear: the definition of the term "insured" cannot be manipulated to require an employer to provide coverage for an injury to its own employee under a third-party liability policy that contains an employer's liability

exclusion. Such a ruling makes sense because employers usually provide coverage to their respective employees via workmen's compensation insurance.

The next case of significance is *Great Am. Ins. Co. v. St. Farm Mut. Automobile Ins. Co.*, 412 Pa. 538, 194 A. 2d 903 (1963). In that case, an automobile owner permitted his son's friend (the "friend") to operate a Plymouth insured by State Farm. While the friend was driving the Plymouth, the automobile owner's son (the "owner's son") was riding as a passenger in the Plymouth. At some point, the Plymouth left the road and crashed, injuring the owner's son. The friend was insured under an automobile policy issued by the Great American Insurance Company ("Great American") to the friend's father. The Great American policy contained a provision that covered the friend while driving other cars. State Farm and Great American subsequently sought a declaration from the court regarding coverage for the injuries to the owner's son.

The State Farm policy contained an exclusion for, among other things, ". . . bodily injury to the insured or any member of the family of the insured residing in the same household as the insured: ..." (the "Resident Family Exclusion") *Great Am. Ins.* Co, 412 Pa. 540. State Farm argued that the Resident Family Exclusion barred coverage because the owner of the Plymouth was the named insured and the owner's son resided with him in the same household. Great American argued that the State Farm policy had to be read as if the friend was "the insured" and that because the owner of the Plymouth was not a member of the friend's household, the Resident Family Exclusion was inapplicable. The lower court found that the Resident Family Exclusion applied and Great American appealed.

In affirming the lower court's ruling, the Pennsylvania Supreme Court stated as follows:

> The general rule is that an insurance policy must be strictly construed against the party who has written the policy. However, the words contained in the policy must be given a reasonable and normal interpretation. There does not seem to be any ambiguity in the State Farm policy in that the policy states under the paragraph referring to the "insured" that the word "insured" includes the named insured. **Thus the named insured Robert Stauffer, Sr. [the automobile owner] is not covered by his liability policy for injuries sustained by members of his family who are members of his household as they are excluded from coverage by the terms of the policy.**

Great Am. Ins. Co, 412 Pa. 541 (emphasis added). To put a fine point on its decision, the Pennsylvania Supreme Court went on to state that, "[i]t is clear from a reading of the policy that the language excludes the members of the named insured's family, who are also members of his household, from recovery. **The policy is a liability policy, not an accident policy.**" *Id.* at 543 (emphasis added). The upshot of *Great American* is that a policyholder's third-party automobile liability insurance could not be transformed into first-party coverage by reading out of the policy the clear and unambiguous definition of the term "insured."

The third case of significance is *Patton v. Patton*, 413 Pa. 566, 575, 198 A.2d 578 (1964), which involved another coverage dispute related to the use of an automobile by a permissive driver. In that case, John Patton ("Patton") was insured under a State Farm automobile liability policy. Patton allowed George Derr ("Derr") to use his car. Both Patton's wife, Esther Patton, and Derr's wife Mary Derr, were riding as passengers in Patton's automobile when it was involved in a collision with another vehicle. Both Esther and Mary brought suit against John Patton, George Derr and the driver of the other vehicle. The jury returned a verdict in favor of both Esther and Mary.

To recover on their respective judgments, both Esther and Mary issued attachment executions against State Farm. The trial court entered judgment on the pleadings in favor of both Esther and Mary. State Farm subsequently appealed both rulings.

On appeal, the Pennsylvania Supreme Court summarized the trial court's rationale as follows:

> Appellee's contention, and the rationale of the court below, is that the words "the insured" in the exclusionary clause, *supra*, must be construed to refer only to the particular insured "from whom a recovery is sought". That is to say: (1) as to Esther Patton's claim, she not being a member of the family of, and residing in the same household as, Derr against whom she seeks to recover damages, her claim falls within the policy coverage A; (2) as to Mary Derr's claim, she not being a member of the family of, and residing in the same household as, Patton against whom she sought to recover damages, her claims falls within the policy coverage A.

Patton at 570.

Before analyzing these claims, the Pennsylvania Supreme Court first identified the relevant portions of the State Farm policy. Under the policy, the term "insured" included: the named insured; the named insured's spouse as long as the spouse resided in the same household; and permissive users. *Id.* at 570, 198 A.2d 578. The State Farm policy excluded coverage for, ". . . bodily injury to the insured or any member of the family of the insured residing in the same household as the insured." *Id.*

With respect to Esther's claim, the Pennsylvania Supreme Court concluded that, as the co-resident spouse of John Patton, Esther was an insured under the policy's omnibus clause. For this reason, the Pennsylvania Supreme Court held that:

> . . . to permit her [Esther] to recover under the provisions of this policy against Derr, the additional insured, would extend policy coverage to damage claims of an "insured" vis-a-vis an "insured", **a result completely at variance with the obvious intent and purpose of the parties to this insurance contract**. Not only as a co-resident member of the named insured's family but as an "insured" under the policy, the claim of Esther

> Patton against Derr, the additional insured, is not within the policy coverage.

Id. at 572, 198 A.2d 578 (emphasis added).

The Pennsylvania Supreme Court came to a different conclusion with respect to Mary's claim. Specifically, Mary argued that in purchasing the State Farm policy, John Patton sought to insure himself against claims made by co-resident members of the respective families of permissive users. *Id.*

> In considering the definition of "insured" in the "omnibus clause" we must bear in mind both the purpose and the language of that clause. **The purpose of the "omnibus clause" was the extension of coverage, i.e., extension of protection against legal liability for damages for bodily injury, to a person or persons, other than the named insured and spouse, i.e., to a permissive user or users of the insured automobile. The language in the "omnibus clause" is highly significant; it does not constitute a blanket definition of "insured" for all purposes or as the word "insured" might appear elsewhere in other portions of the policy** for the language distinctly and clearly states that "with respect to the insurance afforded under coverages A and B, [Bodily Injury Liability and Property Damage Liability] the unqualified word 'insured' includes", etc. and to such the definition is limited and restricted. What the purchaser and seller of this policy clearly intended was that, through the medium of the "omnibus clause", the person or persons to be protected were to be identified but not the person or persons against whose claims they were to be protected. Both the language and the purpose of the "omnibus clause" reveal that the word "insured" was defined for use only for a qualified and restricted purpose, to wit, the identification of the parties to whom protection under the policy was granted.
>
> On the other hand, **the purpose of the exclusionary clause was the denial of coverage under the policy to damage claims on the part of members of a certain restricted class, i.e., the members of the family of the *named insured and the named insured's spouse*. Unlike the "omnibus clause", the exclusionary clause delineated a certain class of individuals for the payment of whose damages claims for bodily injury no protection under the policy would be allowed.**

Id. at 574, 198 A.2d 578 (italics in original) (bold added). Against this analytical backdrop, the Pennsylvania Supreme Court found that:

> To deny the claim of Mary Derr against Patton, the named insured, would result in a holding that Patton, who sought and bought protection and coverage under this policy against all claims of the public generally save only for claims of his own family and employees, is personally liable for the payment of a judgment obtained against him because the judgment holder is the wife of an additional insured. **To reach that result perverts the basic purpose of the "omnibus clause", i.e., the extension of coverage to a person or persons other than the named insured and spouse, into a denial of coverage to the named insured by introducing into a clause intended to exclude from coverage a definition of "insured" from a clause intended to extend coverage. Such an introduction ignores the plain language and purpose of each clause and results in a deprivation of an essential protection for which the named insured bargained and paid.**
>
> The definition of "insured" under the "omnibus clause" must be confined, as its language so confines it, to a definition of the persons who are to receive policy coverage, while the definition of "the insured" under the exclusionary clause is to be confined to an identification of the class of persons from whom no damage claims will be countenanced under the policy coverage. Such a construction preserves the true intent on the part of the insurer and the person purchasing such insurance and preserves the language and the separate purposes of both the "omnibus clause" and the exclusionary clause. **Nowhere in this policy is language from which it can be inferred that protection to a named insured is withdrawn against liability to co-resident members of the family of the additional insured. In our view, this construction of the instant policy affords and permits a more sensible and just solution than had we engaged in the semantical merry-go-round of the sort necessary to afford no coverage to Patton.**

Id. at 574. The upshot of *Patton* is clear. A claimant cannot alter the definition of the term "insured" to either create coverage under a policy where none exists or deny coverage where it is proper.

With these three cases in mind, the stage is now set for analysis of the Pennsylvania Supreme Court's decision in *Politsopoulos*. In that case, certain property owners (the "Property Owners") leased a property to the owner of the Leola Restaurant ("Leola"). The lease agreement required Leola to name the Property Owners as additional insureds on the restaurant owner's liability policy issued by Mutual Benefit Insurance Company

("MBIC"). While Leola did not explicitly name the Property Owners as either named or additional insureds on the MBIC policy, the policy extended coverage to unidentified persons doing business with the restaurant owner and for whom Leola agreed in writing to provide insurance.

An employee of Leola fell from a set of outdoor stairs located on the property leased to Leola and suffered personal injuries. The Leola employee then filed a civil action against only the Property Owners alleging that the Property Owners were negligent for failing to maintain the stairs in a safe condition. The Property Owners tendered the claim to MBIC seeking a defense and indemnification. In turn, MBIC filed a declaratory judgment action seeking a declaration that the policy's employer's liability exclusion applied to the claim of the Leola employee.

Based on *PMA*, *Great Am. Ins. Co.*, and *Patton*, *supra*, the trial court found that the employer's liability exclusion in the MBIC policy barred coverage for the Leola employee's injuries because she was an employee of the named insured (*i.e.*, Leola), and her injuries arose in the course of her employment, even though suit was brought against additional insureds (*i.e.*, the Property Owners). *Politsopoulos* at 631.

The trial court further noted that the Court in *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." *Politsopoulos* at 632.

The Property Owners appealed the trial court's decision to the Superior Court of Pennsylvania, which reversed the trial court's ruling. In reaching its decision, the Superior

Court concluded, among other things, that the Property Owners were named insureds under the MBIC policy and distinguished *PMA* on the basis that the insureds seeking coverage in that case were not named insureds. Based on this distinction, the Superior Court concluded that the separation of insured's clause in the MBIC policy moved the Leola employee's injury claim outside of the scope the employer's liability exclusion. *Politsopoulos* at 633.

Like the Separation of Insureds Clause at issue in the case at bar, the separation of insureds clause at issue in *Politsopoulos* stated that "[T]his insurance applies . . . [a]s if each named insured were the only named insured[.]" *Id.* at 633.

In analyzing the operation of this separation of insureds clause, the Pennsylvania Superior Court stated 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.**

Politsopoulos at 634 (bold added).

MBIC appealed the Superior Court's decision to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court ultimately found the MBIC policy's employer's liability exclusion was ambiguous due to the policy's varied use of the definite and indefinite articles "the" and "any" with respect to insureds. *Politsopoulos* at 633-634.

Additionally, the Pennsylvania Supreme rejected the Superior Court's finding that the Property Owners were named insureds under the MBIC policy because there was no factual support for the designation. According to the Pennsylvania Supreme Court, this misclassification tainted 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.

Politsopoulos at 637. However, the Supreme Court of Pennsylvania did not find that the Superior Court's analysis of the operation of the separation of insureds clause was incorrect.

To emphasize this conclusion, the Pennsylvania Supreme Court in *Politsopoulos* cited to *Ohio Cas. Ins. Co. v. Holcim (US), Inc.*, 744 F. Supp. 2d 1251, 1271 n.28 (S.D. Al. 2010) (applying Alabama substantive law), which states that, "[t]he portion of [a separation-of-insureds] clause stating that the insurance applies 'as if each Named Insured were the only Named Insured' **has no conceivable bearing' on disputes involving persons and entities who are, at most, insureds or additional**

insureds but not named insureds (citation omitted))." (Emphasis added.)[4] Thus, the converse is also true: such a clause does bear on disputes between named insureds.

From a factual standpoint, *Politsopoulos* is almost completely analogous to the present matter:

- In *Politsopoulos*, the Property Owners leased property to Leola who operated a restaurant business on the leased property. In the present case, Dana Mining owned and operated the 4 West Mine and Mepco employees actually mined the coal.

- In *Politsopoulos*, Leola and the Property Owners were covered by the same liability policy that contained both a separation of insureds clause and employer's liability exclusion. In the present case, Dana Mining and Mepco are covered by the same liability policy that contains both a Separation of Insureds Clause and an Employer's Liability Exclusion.

- In *Politsopoulos*, Leola's employee was injured on the job due to an unsafe condition on the property: unsafe stairs. In the present case, Mepco's deceased employee was injured on the job due to an unsafe condition on the property: unsafe mine ribs.

- In *Politsopoulos*, the Leola employee sued only the Property Owners, alleging that the Property Owners failed to maintain the premises in a safe condition. In the present case, Neice sued only Dana Mining, the mine owner and operator, alleging that Dana Mining failed to maintain the 4 West Mine in a safe condition.

- The critical factual distinction between *Politsopoulos* and the case at bar is this: in *Politsopoulos*, the restaurant owner was a named insured under the MBIC policy but the property owner was not.

Based on these facts, the generic graphical representation in Figure A can be tailored to the *Politspoulos* case as follows:

---

[4] Aside from the dicta quoted above, the *Holcim* case is inapplicable to the present case for two critical reasons. First, a question of fact existed with regard to the status of one of the parties as an additional insured. Second, the district court focused on the second clause of the separation of insureds provision providing that insurance applied "separately to each Insured against whom claim is made or suit is brought." *Id.* at 1270-1271. That provision is not at issue in this case. Furthermore, *James River Ins. Co. v. Ultratec Special Effects, Inc.*, 449 F. Supp. 3d 1157 (N.D. Al. 2020) (applying Alabama substantive law post-dates *Holcim*, is nearly completely analogous to the present action and supports both Judge Tucker and Judge Gaujot's respective Orders.

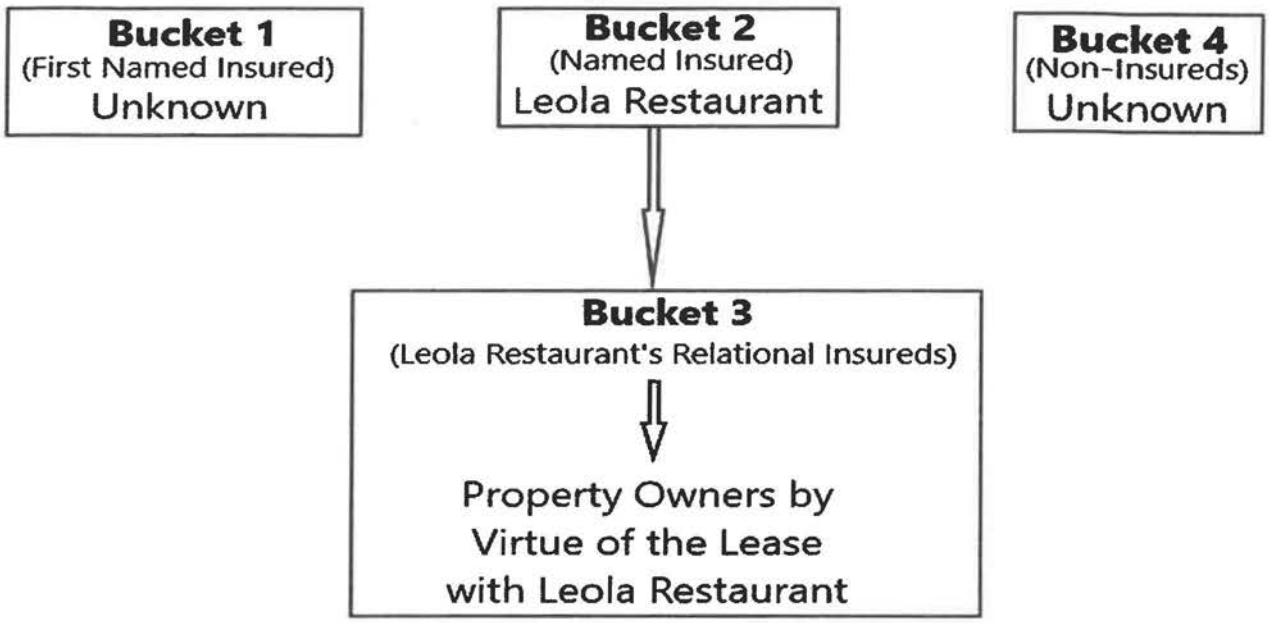

Figure C

In the present case, both Mepco (the Decedent's employer), and Dana Mining are **Named Insureds**. As explained above, once Neice filed suit, the Separation of Insureds Clause removed Mepco from the **Named Insureds** Bucket leaving only Dana Mining in the **Named Insured** Bucket. In *Politsopoulos*, the filing of suit against Leola had no effect on the Property Owners' status as Leola Restaurant's relational insureds under Leola's Named Insured Bucket because the separation of insured's clause applied to only named insureds.

Based on this critical distinction, the Circuit Court in this case was able to do what the Superior Court in *Politsopoulos* could not: apply the Separation of Insureds Clause to interpret the Federal Policy as if Dana Mining was the only **Named Insured** in the **Named Insured** Bucket. Thus, under the Separation of Insureds Clause, when determining coverage as to Dana Mining, the Federal Policy must be applied as though Dana Mining is the only entity in the **Named Insured** Bucket.

The Separation of Insureds Clause directs the Court to evaluate coverage under the Policy as though Mepco, the Decedent's employer, does not exist. As the Pennsylvania Superior Court observed in *Politsopoulos*, "**[a]n insured who does not exist cannot employ anyone.**" *Id.* 634 (emphasis added). Because Decedent was not employed by Dana Mining (the lone **Named Insured** as to which the duty to defend and indemnify is to be tested) the Employers' Liability Exclusion simply does not come into play.

In *James River Ins. Co. v. Ultratec Special Effects, Inc.*, 449 F. Supp. 3d 1157 (N.D. Al. 2020), the United States District Court for the Northern District of Alabama evaluated a coverage dispute in a factually analogous case involving virtually identical policy language. In that case, James River Insurance ("JRI") issued commercial general liability policy to Ultratec HSV ("Ultratec"). One of Ultratec's subsidiaries, Ultratec Special Effects, Inc. (the "Subsidiary"), was added to the JRI policy as a named insured.

The Subsidiary operated a fireworks manufacturing facility that it leased from a company named MST. There was an explosion at the facility that killed two of Ultratec's employees and injured a third (the "Employees"). The Employees filed suit against Ultratec, the Subsidiary, the facility owner, and several other defendants.

JRI filed a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify, among others, the Subsidiary based on an employer's liability exclusion virtually identical to the one at issue in the case at bar: "[t]his insurance does not apply to any claim, suit, cost or expense arising out of "bodily injury" to: [] Any employee of any Insured arising out of and in the course of: (1) Employment by any insured; or, (2) Performing duties related to the conduct of any insured's business . . . ." *Id.* at Fn 9. The policy also contained a separation of insureds clause virtually identical to the one at issue in the present matter. *Id.* at Fn 7.

In finding that the employer's liability exclusion did not apply to the Employee's claims, the District Court, applying the separation of insureds clause, assigned each of the insureds seeking coverage to their proper bucket and then analyzed the application of the employer's liability exclusion from the perspective of each individual insured:

> First, "construction of [a separation of insureds clause] in conjunction with a particular contractual provision turns on the exclusion's precise wording." *Ohio Cas. Ins. Co.*, 744 F. Supp. 2d at 1271. And, in that respect, the language of the employer's liability exclusion and separation of insureds provision in *Evanston* is virtually identical to the language in the Endorsement and Provision at issue here. See docs. 137-4; 156-1. Indeed, the Separation of Insureds Provision's requires that the Policy "applies [] [a]s if each Named Insured were the only Named Insured; and [] [s]eparately to each insured against whom claim is made or 'suit is brought," doc. 137-4 at 17, which indicates as the *Evanston* court held, that **"each insured has separate insurance coverage" under the Policy**, 569 F. App'x at 743 (citation omitted). Second, that conclusion comports with Alabama law, which provides that a policy's "**severability of interests provision requires consideration of each insured separately, independently of every other insured whether named or unnamed.**" *McCormick*, 243 So. 2d at 375. Consequently, based on Alabama law and the Separation of Insureds Provision's express terms, the court must read the Policy, including its exclusions, as if coverage is only for Ultratec, or only for Thouin, or only for MST. As a result, the court finds that when the EL Exclusion Endorsement is read in conjunction with the Separation of Insureds Provision, **the Endorsement does not preclude coverage for the Employees' claims against Ultratec, Thouin, or MST because those insureds are not the Employees' employer.**
>
> . . .
>
> In summary, because the Court must construe the Policy as a whole and read the EL Exclusion Endorsement in conjunction with the Separation of Insureds Provision, the Endorsement does not preclude coverage for the Employees' claims against Ultratec, MST, and Thouin. As a result, James River has a duty to defend these defendants in the underlying action.

Ultratec, 449 F. Supp. 3d 1170 (emphasis added).[5] *See also Taylor v. Admiral Ins. Co.*, 187 So. 3d 258 (Fla. App. 2016) (finding same involving an employer's liability exclusion and separation of insureds clause nearly identical to those at issue in the present).

Notably, Federal does not cite to a single Pennsylvania Supreme Court case that supports its contention that the Employer's Liability Exclusion applies in the underlying wrongful death action. Instead, Federal urges this Court to reject Pennsylvania law and follow California law expressed in *J&J Holdings, Inc. v. Great Am. E&S Ins. Co.*, 420 F. Supp. 3d 998 (C. Dist. Ca. 2019).[6] In addition to the fact that this California case is not binding on this Court in its application of Pennsylvania law, *J&J Holdings* runs counter to controlling Pennsylvania law. Moreover, the insurer's arguments in *J&J Holdings* were virtually unchallenged by the insured. *See CPB Int'l, Inc.*, 562 F.3d 591, 595-96; and *Contrans, Inc.*, 836 F.2d 163, 169, *supra*.

Moreover, Federal's reliance on *Travelers Home & Marine Ins. Co. v. Stahley, 239* F. Supp. 3d 866 (E.D. Pa. 2017), is misplaced for two critical reasons. First, *Stahley* is factually distinguishable because it involved the application of an intentional acts exclusion in a homeowner's policy where the underlying claim involved a murder. Second, and most importantly, the policy did not contain a separation of insureds clause. Instead, it contained a severability of interests clause stating merely that "[t]his insurance applies separately to each 'insured.' This condition will not increase our limit of liability for any

---

[5] The District Court's analysis in *Ultratec* comports with all controlling tenets of Pennsylvania insurance law.

[6] Federal's reliance on *Evanston Ins. Co. v. OEA, Inc.*, 2005 U.S. Dist. LEXIS 39412 (E.D. Cal. July 25, 2005), is also unavailing because it applies non-binding California law that runs counter to controlling Pennsylvania law. Furthermore, while Federal Insurance's brief indicates that the *Evanston* opinion was affirmed on appeal, it should also be noted that it was affirmed on issues unrelated to the separation of insureds clause.

one 'occurrence.'" *Id.* at 874. These differences render *Stahley* wholly inapplicable to the present action.

ii. It is Undisputed that Dana Mining was not Decedent's Employer; therefore, the Employer's Liability Exclusion is Inapplicable

Now that Dana Mining has been properly fixed as the only entity in the **Named Insured** Bucket and the different categories of Dana Mining's Relational Insureds have been identified, the question then becomes: do either Mepco or Decedent fall into Dana Mining's **Relational Insureds** Bucket? The answer as to both entities is undisputedly "No." To fall into Dana Mining's **Relational Insured** Bucket, a person or entity must have one of the relationships to Dana Mining identified in the Policy. In the present case, it is undisputed that neither Mepco nor Decedent were Dana Mining's members, managers, employees, nor were they parties to an insured contract with Dana Mining. In fact, as noted above, Mepco is a Named Insured and is therefore confined to its own individual, separate and distinct **Named Insured** Bucket. Accordingly, both Mepco and Decedent fall outside of Dana Mining's **Relational Insureds** Bucket. Having established these facts, examination of the Employer's Liability Exclusion demonstrates that said Exclusion does not apply to the underlying wrongful death action.

Before examining the Employer's Liability Exclusion at issue in this case, it is first important to understand the scope of an employer's liability in the context of a commercial general liability policy like the Policy at issue in this appeal:

> A commercial general liability policy is designed and intended to provide coverage to the insured for tort liability for physical injury to the person or property of others. An employer accordingly obtains a commercial general liability policy for purposes of providing coverage for the employer's liability to the general public for the negligence of the employer's agents, servants, and employees pursuant to the doctrine of respondeat superior. **A commercial general liability policy is not designed to provide**

> **coverage for an employer's liability for injuries to its employees. Instead, the compliance of an employer with a respective jurisdiction's workers' compensation statute constitutes the full extent of an employer's liability for any injuries sustained by its employees, arising out of and in the course of their employment.** The standard commercial general liability policy therefore expressly excludes coverage for any obligation of the insured under a workers' compensation law or any similar law.

Nationwide Mut. Ins. Co. v. Pools by Design, Inc., 2009 Conn. Super. LEXIS 1416, 2009 WL 16639349A (citing L. Russ & T. Segalla, Couch on Insurance (3d Ed. 2005) §129:10, p. 23-24) (emphasis added).[7] Thus, the Supreme Court of Alaska has observed that:

> The intent of the employment exclusion [in a commercial general liability policy] appears to be to **avoid duplication of coverage provided under Workers' Compensation and Employers Liability policies.** Accordingly, any interpretation of the commercial general liability exclusion that bars coverage for claims not covered under a Workers' Compensation and Employers Liability policy **would appear to deny coverage erroneously and to create a gap in coverage that almost surely was not intended by the policyholder.**

Devine v. Great Divide Ins. Co., 350 P.3d 782 (2015) (citing 21 Eric Mills Holmes, Holmes' Appleman on Insurance note 14, § 132.5 [C][1], at 66-67 (2d ed. 1996)) (emphasis added). *See also Erdo v. Torcon Const. Co., Inc.*, 275 N.J. Super. 117, 123, 645 A.2d 806 (N.J. Super. 1994) (stating that, "[t]he primary objective of an employee's exclusion is to avoid duplication of coverage with an employer's workers' compensation coverage.") (*Citing Sacharko v. Center Equities Ltd. Partnership*, 2 Conn. App. 439, 479 A.2d 1219 (1984)).

Turning now to the Employer's Liability Exclusion at issue in the present matter, it must first be noted that the original Employer's Liability Exclusion was modified by the Employer's Liability Exclusion Endorsement which is provided above in Section I(C). See

[7] The Policy at issue in this case contains a "Workers' Compensation or Similar Laws" exclusion. JA 61.

JA 120-121. However, the Endorsement replaced only the original Employer's Liability Exclusion: all other terms and conditions remained unchanged. *Id.* Consequently, the Endorsement had no effect whatsoever on either the interpretation or operation of the Separation of Insureds Clause.

Paragraph A of the Employer's Liability Exclusion states, in pertinent part:

> 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.

JA 120 (bold in original). Consistent with the clear and unambiguous terms of the Policy and controlling Pennsylvania case law, the unrestricted term "insured" includes both the entity in the **Named Insured** Bucket and all other persons/entities in that Named Insured's **Relational Insured** Bucket. JA 68-70, 87 and 136 and *Great Am. Ins. Co. v. St. Farm Mut. Automobile Ins. Co.*, 412 Pa. 538, 194 A. 2d 903 (1963). Returning to Figure B above, the phrase "any insured" appearing in the Employer's Liability Exclusion applies to both Dana Mining (the Named Insured), and all of Dana Mining's **Relational Insureds**. It is undisputed that Decedent was not employed by Dana Mining. Moreover, Dana Mining and Mepco never entered into an insured contract. For these reasons, Decedent does not fall into Dana Mining's **Relational Insureds** Bucket thereby rendering the Employer's Liability Exclusion inapplicable in the present case.

Furthermore, pursuant to paragraph A of the Policy's "Limitations on Who Is An Insured" provision, neither Mepco nor Decedent were acting on Dana Mining's behalf at

the time of Decedent's death. JA 71. Consequently, both Mepco and Decedent fall into the **Non-insured** Bucket vis-à-vis the claims asserted by Neice against Dana Mining. This analysis further confirms that Federal owes Dana Mining a defense and conditional indemnification in the underlying wrongful death action.

Federal also argues that Paragraph B of the Employer's Liability Exclusion supports a finding of no coverage. That Paragraph states, in pertinent part, that:

> 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** . . .

JA 120-121 (bold in original). Once again, Federal ignores the critical distinctions among insureds. By operation of the Separation of Insureds Clause, Dana Mining is the only entity in the **Named Insureds** Bucket and Dana Mining's members, managers and their spouses, etc., are the only entities that fall into the **Relational Insureds** Bucket. Both Mepco and Decedent fall into the **Non-insureds** Buckets. Consequently, like Paragraph A of the Employer's Liability Exclusion, Paragraph B is also inapplicable.

B. Federal's "the insured" vs. "any insured" argument is a red herring.

Federal goes to great lengths to convince this Court that there is a meaningful distinction between the phrases "the insured" and "any insured," citing to six cases to prove the point: *McAllister v. Millville Mut. Ins. Co.*, 640 A.2d 1283, 433 Pa. Super. 330 (1994); *Spezialetti v. Pacific Employers Ins. Co.*, 759 F.2d 1139 (3rd Cir. 1985);

Westminster Am. Ins. Co. v. Sec. Nat'l Ins. Co., (E.D. Pa. 2021), 2021 U.S. Dist. LEXIS 154065, 2021 WL 3630464; *TIG Specialty Ins. Co v. Pinkmonkey.com, Inc.*, 375 F.3d 365 (5th Cir. 2004); *Medill v. Westport Ins. Corp.*, 49 Cal. Rptr. 3d 570, 143 Cal. App. 4th 819 (Ct. of App. Ca., 2nd App. Dist., Div. 2, 2006); and *Michael Carbone v. General Accident Ins. Co.*, 937 F. Supp. 413, 1996 U.S. Dist. LEXIS 11529.[8]

Neice has never argued otherwise and agrees that there is an important distinction between those two phrases. That distinction, however, simply does not come into play in this case for two critical reasons. First, the insured seeking coverage, Dana Mining, was not Decedent's employer. Second, neither Mepco nor Decedent fall into Dana Mining's **Relational Insured** Bucket. In fact, Mepco has its own separate and distinct **Named Insured** Bucket under which Decedent qualifies as a **Relational Insured**.

As explained above, the use of the phrase "any insured" in the Employer's Liability Exclusion means both "the" specific **Named Insured** and "any" of the **Relational Insureds** associated with that specific **Named Insured**. In the present matter, under the proper analysis conducted by both Judge Tucker and Judge Gaujot, the Employer's Liability Exclusion would still apply to preclude coverage for claims brought by employees of Dana Mining ("the" **Named Insured**) and the employees of "any" of Dana Mining's **Relational Insureds**. See Figure B above.

To interpret the phrase "any insured" to mean all of the **Named Insureds** in the Policy and all of their respective **Relational Insureds** would be to entirely negate the

---

[8] Each of these cases is also factually distinguishable from the present matter for several material reasons. For example, *McAllister* and *Spezialetti* involved residential fire policies; *Westminster* did not involve in the operation of a separation of insureds clause; *Pinkmonkey.com* involved a director and officer liability policy and the application of a personal profit exclusion; *Medill* involved a nonprofit organization liability insurance policy and the application of exclusions for violations of the Securities Act of 1933 and failure to honor certain financial obligations; and *Carbone* involved an automobile usage exclusion and it was undisputed that the at-fault driver was an employee of the named insured seeking coverage.

Separation of Insureds Clause in violation of black letter Pennsylvania law. *See Contrans, Inc. v. Ryder Truck Rental, Inc.*, 836 F.2d 163, 169 (3d Cir. 1987) (applying Pennsylvania law) (stating that, "**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.**") (emphasis added).

C. The Circuit Court's Interpretation of the Separation of Insured clause neither negates nor modifies the Employer's Liability Exclusion.

Federal incorrectly argues that application of the Separation of Insureds Clause as written defeats the Employer's Liability Exclusion. The District Court considered and rejected this exact same argument made by JRI in *Ultratec, supra*, based on the following analysis:

> James River attempts to avoid that conclusion [that the EL Exclusion Endorsement does not apply because was the Employees' employer] by arguing that this interpretation renders the EL Exclusion Endorsement meaningless. Doc. 150 at 3. But, the Eleventh Circuit rejected a similar argument in *Evanston*, noting that its reading of a policy with a nearly identical exclusion did not "render the inclusion of the employer's liability exclusion superfluous because [] the exclusion [still] applies to DBI . . . ." 569 F. App'x at 743. Similarly here, the court's reading of the Endorsement does not render it superfluous because the Exclusion still applies to Ultratec HSV. And, relatedly, the court rejects the contention that its construction of the EL Exclusion Endorsement wreaks havoc on the Policy because, contrary to James Rivers' contention otherwise, the court's construction does not delete every reference in the Policy to "any insured." Rather, it simply requires that those references be read carefully and in conjunction with the Separation of Insureds Provision. Moreover, the court's interpretation of the Endorsement in conjunction with the Provision finds support from the Policy's exclusion endorsements, which expressly provide that "all other terms and conditions of the Policy remain unchanged," i.e., including the Separation of Insureds Provision. See doc. 137-4 at 64-84 (emphasis added, capitalization in original omitted). Finally, the court's construction of the Endorsement is consistent with Alabama law requiring courts to interpret exclusions "as narrowly as possible in order to provide maximum coverage for the insured." *Nationwide Mut. Ins. Co.*, 103 So. 3d at 805 (quotation omitted).

Ultratec, 449 F. Supp. 3d 1171 (emphasis added).

Thus, contrary to Federal's legally unsupported argument, limiting the coverage analysis to each Named Insured as if they were the only Named Insured as required by the Separation of Insureds Clause harmonizes perfectly with each provision of the Employer's Liability Exclusion. As demonstrated in Figure A above, the Separation of Insureds Clause limits the application of the Policy to "the" **Named Insured** and "any" of its **Relational Insureds**.

In the present case, as shown in Figure B, the Separation of Insureds Clause limits the coverage analysis under the Policy to Dana Mining (the **Named Insured**) and its **Relational Insureds**. However, the Employer's Liability Exclusion bars defense and indemnity for claims against Dana Mining by its own employees and the employees of Dana Mining's **Relational Insureds**. For example, if Dana Mining had entered into an insured contract with Mepco, Dana Mining would remain in the **Named Insured** Bucket and Mepco would fall under Dana Mining's **Relational Insureds** Bucket. Under such an arrangement, the Employer's Liability Exclusion would apply to bar any claims made by either Dana Mining's employees or Mepco's employees based on Mepco's status as a **Relational Insured**. See Figure B.

According to Federal's argument, the Employer's Liability Exclusion bars defense and coverage any time an employee of <u>any one</u> of the thirty-four (34) **Named Insureds** (or their **Relational insureds**) sues <u>any</u> of the other **Named Insureds** (or their additional insureds) even though those other insureds are not the employee's employer. Such a broad and expansive interpretation begs the question: what does the Policy cover? Fortunately, Pennsylvania public policy prevents insurers from prevailing on such arguments.

As the Common Pleas Court of Lackawanna County, Pennsylvania, summarized in *Atl. Cas. Ins. Co. v. Zymblosky*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 19421:

> An exclusion provision in an insurance policy may be found void as against public policy if the subject provision is found to be illusory. *Heller*, 32 A.3d at 1213. **The relevant inquiry regarding illusory provisions in insurance policies is "whether a particular coverage provision is swallowed-up by an exclusion, not whether the policy as a whole provides some degree of coverage despite the existence of an exclusion.**" *TIG Ins. Co. v. Tyco Int'l Ltd.*, 919 F. Supp. 2d 439, 466 (M.D. Pa. 2013), amended (Apr. 8, 2013) (quoting *Great N. Ins. Co. v. Greenwich Ins.* 2008 U.S. Dist. LEXIS 39567, 2008 WL 2048354 (W.D, Pa. 2008); *See also Westfield Ins. Co. v. Astra Foods Inc.*, 2016 PA Super 31, 134 A.3d 1045 (2016).

Zymblosky at 49 (emphasis added). Under Federal's argument, the Employer's Liability Exclusion would swallow up the coverage afforded to non-employer insureds under the Policy, such as Dana Mining.

On the other hand, the Employer's Liability Exclusion does not violate Pennsylvania public policy when applied in accordance with the mandates of the Separation of Insureds Clause. Based on that clause, non-employer policyholders such as Dana Mining are afforded coverage because the employer policyholder, Mepco, is excluded from the defense/coverage analysis.

The only way to give effect and meaning to each and every provision of the Policy, as required by Pennsylvania law, is to treat Dana Mining as if it is the only **Named Insured**. This methodology gives effect to both the Separation of Insureds Clause and the Employer's Liability Exclusion. Accordingly, the Court should affirm the Circuit Court's order requiring Federal to provide a defense to Dana Mining in the underlying wrongful death action. In light of the foregoing, this Court should reject Federal's interpretation because it violates Pennsylvania's public policy.

D. The Circuit Court properly applied all controlling tenets of Pennsylvania insurance law.

Contrary to Federal's patently false argument that the Circuit Court relied solely on the Pennsylvania intermediate appellate court's decision in *Politsopoulos*, the Circuit Court scrupulously applied all controlling tenets of Pennsylvania insurance law. Specifically, the Circuit Court correctly held that under Pennsylvania law, the "interpretation of an insurance contract regarding the existence or non-existence of coverage is generally performed by the court." *Gardner v. State Farm Fire & Cas. Co.*, 544 F.3d 553, 558 (3d Cir. 2008). JA 7.

The Order also correctly states that, "[a]n insurer has a duty to defend if the complaint filed by the injured party potentially comes within the policy's coverage." *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 225 (3d Cir. 2005). JA 7. Furthermore, the Circuit Court correctly found that under Pennsylvania law, "[a]n insurer's duty to defend is a distinct obligation, different from and broader than its duty to indemnify. An insured has purchased not only the insurer's duty to indemnify successful claims which fall within the policy's coverage, but also protection against those groundless, false, or fraudulent claims regardless of the insurer's ultimate liability to pay." *Erie Ins. Exch. v. Muff*, 2004 PA Super 177, ¶ 8, 851 A.2d 919, 925-26. JA 7-8.

Additionally, the Circuit Court correctly found that, "[l]ike West Virginia, Pennsylvania applies the 'four corners' rule to determine whether an insured has a duty to defend a suit. In other words, an insurer's duty to defend is triggered by the factual averments contained in the 'four corners' of the complaint itself. *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 589 Pa. 317, 331, 908 A.2d 888, 896 (2006) ('We find no reason to expand upon the well-reasoned and long-standing rule that

an insurer's duty to defend is triggered, if at all, by the factual averments contained in the complaint itself.'). 'The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint. We do not consider extrinsic evidence.' *Kiely ex rel. Feinstein v. Phila. Contributionship Ins. Co.*, 2019 PA Super 90, 206 A.3d 1140, 1146 (Pa. Super. Ct. 2019). Stated differently, '[t]he insurer is obligated to defend if the factual allegations of the complaint on its face comprehend an injury which is actually or potentially within the scope of the policy.' *Muff, supra*, at 8." JA 8.

The Circuit Court further correctly held that, "Pennsylvania law applies the following process to determine if an insurer has a duty to defend a complaint:

> We look first to the terms of the policy which are a manifestation of the intent of the parties. When the language of the policy is clear and unambiguous, we must give effect to that language. However, when a provision in the policy is ambiguous, the policy is to be construed in favor of the insured. Next, we compare the terms of the policy to the allegations in the underlying claim. It is well established that an insurer's duties under an insurance policy are triggered by the language of the complaint against the insured. In determining the existence of a duty to defend, the factual allegations of the underlying complaint against the insured are to be taken as true and liberally construed in favor of the insured.

Nationwide Mut. Ins. Co. v. CPB Int'l, Inc., 562 F.3d 591, 595-96 (3d Cir. 2009) (citations, brackets, and ellipses omitted for clarity)." JA 8.

Moreover, the Circuit Court correctly observed that, "[w]hile the insured has the initial burden of establishing that the claim or suit falls within the coverage granting portions of the policy, the 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)." JA 9.

Additionally, the Circuit Court recognized and properly applied the fundamental Pennsylvania ". . . 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.*, 836 F.2d 169 (emphasis added). 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) (emphasis added). Thus, in construing a portion of an insurance policy, the Court 'must be careful not to render superfluous another part of the policy.' *Id.*" JA 15.

E. The *Politsopoulos* case, which is almost completely factually analogous to the present action, is the most relevant Pennsylvania case to the present action and clearly indicates that Federal owes a duty to defend and conditionally indemnify Dana Mining in the underlying wrongful death action.

The Pennsylvania Supreme Court's decision in *Politsopoulos* gives the clearest indication of how that Court would rule in the present matter because nearly every aspect of that case lines up with the present dispute. See Argument Section I(A)(i). And yet Federal urges this Court to disregard *Politsopoulos*. Why? Because the employer's liability exclusion at issue in that case used the phrase "the insured" as opposed to "any insured." But, as explained above in Argument Section I(B), this distinction is a red herring in the present matter because the distinction is important only when analyzing coverage issues where the insured claiming coverage falls into the **Relational Insured** Bucket of a **Named Insured**. That was precisely the confounding issue in *Politsopoulos*. That confounding issue in not present in the case at bar because neither Decedent nor Mepco fall into Dana Mining's Relational Insured Bucket. Instead, Mepco has its own, separate

and distinct **Named Insured** Bucket, under which Decedent qualifies as one of Mepco's **Relational Insureds**.

Federal also argues that both Judge Tucker and Judge Gaujot ". . . 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 negate plainly worded exclusions . . ." Petitioner's Brief at p. 17. The first half of this argument grossly misstates the Supreme Court of Pennsylvania's analysis of the phrase "any insured." The second part is patently false.

With respect to the first argument, the Court in *Politsopoulos* never repeatedly directed that the phrase "any insured" be read to preclude coverage to all insureds. In fact, the Court in *Politsopoulos* never stated that once. Instead, the Pennsylvania Supreme Court was ". . . persuaded that, at least where a commercial general liability policy makes varied use of the definite and indefinite articles, this, as a general rule, creates an ambiguity relative to the former, such that 'the insured' may be reasonably taken as signifying the particular insured against whom a claim is asserted." *Id.* at 642. This was framed as a general rule, ". . . because **other indications and contextual cues appearing in an insurance policy may serve to render the meaning of 'the insured'** more apparent." *Id.* at Fn 8 (emphasis added).

In this case, there are "other indications and contextual cues" appearing in the Federal Policy that render the meaning of "any insured" more apparent. In fact, two of these indications and contextual cues appear in the Employer's Liability Exclusion itself. First, said Exclusion explicitly states that its only effect on the Policy as a whole is to replace any similar exclusion contained therein. See JA 120. Second, said Exclusion states that, "**[a]ll other terms and conditions remain unchanged.**" *Id.* at 121 (emphasis

added). The significance of these explicit terms contained within the Employer's Liability Exclusion cannot be overstated because, ". . . the appropriate focus here is less upon the specific wording of the separation-of-insureds clause **than on the terms of the employer's liability exclusion.**" *Politsopoulos*, at 638 (citing *Holcim*, 744 F. Supp. 2d 1271) (emphasis added). For these reasons, the Employer's Liability Exclusion has no effect whatsoever on the operation of the Separation of Insureds Clause.

With respect to the second argument, neither Judge Tucker nor Judge Gaujot ruled that the Separation of Insureds Clause negated the Employer's Liability Exclusion. They merely followed controlling Pennsylvania law, gave meaning to each relevant Policy provision and determined that Employer's Liability Exclusion did not apply to the underlying personal injury action because Dana Mining simply was not Decedent's employer. Accordingly, this Court should affirm the Circuit Courts' respective Orders.

F. Applying the Employer's Liability Exclusion in the manner asserted by Federal impermissibly renders the Separation of Insureds Clause meaningless.

Federal would have this Court ignore Pennsylvania law and read the Separation of Insureds Clause completely out of the Policy vis-à-vis the Employer's Liability Exclusion. In fact, Federal blithely argues that simply ignoring the Separation of Insureds Clause is okay in this case because "[t]he 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." Petitioner's Brief at p. 20. Under this legally defective artifice, Federal contends that the Employer's Liability Exclusion applies to <u>all</u> thirty-four (34) **Named Insureds** <u>and</u> their **Relational Insureds** thereby eviscerating the Separation of Insured's Clause.

As noted above, Pennsylvania law forbids any reading of an insurance policy that would render any provision meaningless or superfluous. *See CPB Int'l, Inc.*, 562 F.3d 591,

595-96; and *Contrans, Inc.*, 836 F.2d 163, 169, *supra*. Moreover, Federal's interpretation of the Policy creates the very type of gap in coverage that almost surely was not intended by a non-employer policyholder such as Mepco. *See Devine*, 350 P.3d 787. Adherence to Pennsylvania law precludes Federal's flawed interpretation of the effect of the Separation of Insureds Clause on the Employer's Liability Exclusion. Accordingly, this Court should affirm the Circuit Court's order finding that Federal owes Dana Mining a defense and a conditional indemnification in the underlying wrongful death action.

II. The Policy's No-Action Clause does not Prohibit Neice's Third-Party Complaint Against Federal.

The Circuit Court correctly ruled that the Policy's No-action clause did not bar Neice's joiner of Federal to the underlying wrongful death action on two grounds. First, West Virginia procedural law expressly permits Neice to join Federal to the underlying wrongful death action. Second, Federal waived the No-action by actively participating in the underlying litigation for nearly nineteen (19) months without ever asserting the application of said clause.

A. West Virginia procedural law expressly permits Neice to join Federal to the underlying wrongful death action.

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

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

> Laws § 122 (1971) ("A court usually applies its own local law rules prescribing how litigation shall be conducted. . .").

McKinney, 199 W. Va. 727 (emphasis added). The West Virginia Supreme Court's opinion in *Vest v. St. Albans Psychiatric Hosp.*, 182 W. Va. 228, 387 S.E.2d 282 (1989), provides an example of this axiom in action:

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

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

With the source of the applicable procedural law conclusively determined to be West Virginia, only one question remains: does West Virginia procedural law allow Neice to join Federal to this action. Once again, West Virginia law provides a conclusive answer. Pursuant to Syllabus Point 4 of *Christian v. Sizemore*, 181 W. Va. 628, 383 S.E.2d 810 (1989), "[a] declaratory judgment claim with regard to the defendant's insurance coverage **may be brought in the original personal injury suit rather than by way of a separate action.**" *Id.* at Syl. Pt. 4 (emphasis added). This rule of West Virginia law is purely procedural; therefore, Syllabus Point 4 of *Christian* specifically permits Federal to be joined to the underlying wrongful death action.

Federal would have this Court believe that only Dana Mining brought Federal into this action by filing the initial complaint for declaratory judgment in the underlying wrongful death action. In reality, Neice also brought Federal into the underlying wrongful death action by joining in the complaint for declaratory judgment and actively

participating in the litigation of the coverage issues.[9] Because Neice was not a signatory to the Policy, the No-Action Clause simply does not apply to her claims against Federal. Instead, West Virginia common law provides the procedural rules governing Neice's claims against Federal. That law specifically permits Neice to join Federal to the underlying wrongful death action, regardless of any Policy provisions that may apply vis-à-vis Federal and Dana Mining. *See Christian, supra.*[10]

B. Federal waived the No-Action Clause.

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

---

[9] Federal's reliance on *Apalucci v. Agora Syndicate*, 145 F.3d 630 (3rd Cir. 1998) 1998 U.S. App. LEXIS 11629 is unavailing for several reasons. First, there is no federal procedural rule regarding the joinder of insurance companies to underlying personal injury actions. Second, regardless of how Pennsylvania courts frame their rules, West Virginia courts deem an injured person's right to join the tortfeasor's insurance company to the personal injury action is procedural in nature. *See Christian, supra.* Third, the rule discussed in *Aplalucci* is rooted in *Folmar v. Shaffer*, 232 Pa. Super. 22, 332 A.2d 821 1974 Pa. Super. LEXIS 1292 (Pa. Super. 1974), which states that "[t]he law is settled that 'in the absence of a statute or a policy provision on which such right may be predicated, a person may not maintain a suit directly against the insurer **to recover on a judgment rendered against the insured.**" Id. at 24 (internal citation omitted) (emphasis added). In the present matter, Neice is not seeking to recover on a judgment against Federal, she is merely seeking a declaration of Federal's duties and obligations under the Policy as expressly permitted by West Virginia procedural law.

[10] Federal's reliance on *Burks v. Fed. Ins. Co.*, 2005 PA Super 297, 883 A.2d 1086, 2005 Pa. Super. LEXIS 2924 (Pa. Super. 2005), is equally unavailing because the injured person in that case also sought a direct recovery against the insurance company.

As noted above, from May 21, 2019 until December 23, 2020, a period of almost nineteen months, Federal actively participated in the litigation of the underlying matter and made absolutely no mention of the "No Action" Clause. Federal's undisputed acts and language in the continued litigation of this action for nearly nineteen months are entirely inconsistent with the "No Action" Clause upon which Federal now relies because the entire purpose of the "No Action" Clause is to excuse Federal from participation in this litigation. Federal was obviously aware of the existence of the "No Action" clause as of May 21, 2019, as evidenced by the reference to the clause in Federal's Motion to Dismiss. By opting not to assert the "No Action" Clause and actively participating in the underlying litigation for nearly nineteen months, Federal voluntarily relinquished its right to enforce the "No Action" Clause.

CONCLUSION

Pennsylvania law requires courts to apply the plain and unambiguous terms of an insurance contract. That is precisely what the Circuit Court did when it found that Federal had a duty to defend Dana Mining in the underlying wrongful death action. Specifically, the Circuit Court correctly applied the Separation of Insureds Clause and evaluated the Policy as if Dana Mining were the only named insured. The Circuit Court then properly concluded that the Employer's Liability Exclusion did not apply because Decedent was not Dana Mining's employee. The Circuit Court's ruling complied with all aspects of Pennsylvania insurance law and is consistent with the purpose of both the Separation of Insureds Clause (i.e., spread coverage amongst the named insureds) and the Employer's Liability Exclusion (i.e., prevent duplication of coverage under both the Policy and worker's compensation). For these reasons, Neice respectfully requests that this Court affirm the Circuit Courts' respective Orders finding that Federal owes a duty to defend

and a conditional duty to indemnify Dana Mining in the underlying wrongful death action.

Dated this 2nd day of February, 2022.

JENNY M. NEICE, as Administratrix of the ESTATE OF JEREMY R. NEICE,
Respondent,
By Counsel:

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

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET 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, as Administratrix of the ESTATE OF JEREMY R. NEICE, Plaintiff Below, RESPONDENT,

RESPONSE OF JENNY M. NEICE, as Administratrix of the ESTATE OF JEREMY R. NEICE TO PETITIONER'S BRIEF

From the Circuit Court of Monongalia County,
Case No. 17-C-483

CERTIFICATE OF SERVICE

I, Jason P. Foster, do hereby certify that I have caused to be served a true and accurate copy of the foregoing "**RESPONSE OF JENNY M.NEICE, AS ADMINISTRATRIX OF THE ESTATE OF JEREMY R. NEICE TO PETITIONER'S BRIEF**" upon the following counsel of record this 2nd day of February, 2022, via United States Mail, postage prepaid, addressed as follows:

Seth P. Hayes, Esq.
David R. Stone, Esq.
JACKSON KELLY, PLLC
150 Clay St., Suite 500
Morgantown, WV 26507
Counsel for Dana Mining Company of Pennsylvania, LLC

Tiffany R. Durst, Esq.
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
2414 Cranberry Square
Morgantown, WV 26508
Counsel for Dana Mining Company of Pennsylvania, LLC

Charles R. Bailey, Esq.
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
P.O. Box 3710
Charleston, WV 25337-3710
Counsel for Federal Insurance Company

Ronald P. Schiller, Esq.
Bonnie M. Hoffman, Esq.
HANGLEY ARONCHICK SEGAL PULLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
Counsel for Federal Insurance Company

Scott S. Segal (WV Bar I.D. #4717)
C. Edward Amos, II (WV Bar I.D. #12362)
Jason P. Foster (WV Bar I.D. #10593)
THE SEGAL LAW FIRM
A Legal Corporation
810 Kanawha Boulevard, East
Charleston, West Virginia 25301
Telephone: (304) 344-9100
Facsimile: (304) 344-9105