IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35223

BERNARD BOGGS, ***Plaintiff-Below***

v.

CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,
Defendant-Below

and

BERNARD BOGGS, ***Plaintiff-Below***

v.

RICHARD A. HAYHURST,
Defendant-Below/Petitioner **and**

CINCINNATI INSURANCE COMPANY,
Defendant-Below/Respondent

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Hon. Thomas C. Evans, III, Special Judge
Circuit Court of Wood County
Civil Action Nos. 05-C-527 and 06-C-401

PETITIONER'S CERTIFIED QUESTION BRIEF

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I. INTRODUCTION

This is a brief upon certified question review of the following questions in a malicious prosecution case arising from a suit against Mr. Hayhurst and his former client, Camden-Clark Memorial Hospital Corporation [Camden-Clark] by an opposing litigant, Bernard Boggs [Mr. Boggs], that Mr. Hayhurst tendered for defense and indemnification to his general business liability and personal umbrella insurance carrier, The Cincinnati Insurance Company [Cincinnati]:

> Do allegations of a malicious prosecution suit against the insured, an attorney, by a client's former opponent in a previous action defended by the insured fall within the scope of a commercial general liability policy of personal umbrella liability policy issued to the attorney wherein the term "personal injury" is defined to include "malicious prosecution"? The Court answers this question in the affirmative.[1]
>
> Under a liability insurance policy wherein the term "personal injury" is defined to include "malicious prosecution," is a malicious prosecution suit against the insured, an attorney, by a client's former opponent in a previous action defended by the insured excluded by policy language that states that "This insurance does not apply to . . . 'personal injury' . . . due to rendering . . . professional services unless professional liability coverage has been endorsed hereon or stated in the Declarations. This includes but is not limited to: (1) Legal, accounting or advertising services"? The Court answers this question in the affirmative.
>
> Under a personal umbrella liability insurance policy wherein the term "personal injury" is defined to include "malicious prosecution." is a malicious prosecution suit against the insured, an attorney, by a client's former opponent in a previous action defended by the insured excluded by policy language that states that "This insurance does not

[1] This question, drafted by Cincinnati, actually should read "within the scope of a commercial general liability policy <u>and a</u> personal umbrella liability policy." Also, this particular issue is really undisputed by the parties, including Cincinnati. Thus, its resolution by this Court will not be necessary. Rather, the crux of the dispute between the parties is whether malicious prosecution coverage expressly provided by both policies has been effectively excluded under the circumstances of this case.

> apply to . . . 'personal injury' arising out of any act, malpractice, error or omission committed by any 'insured' in the conduct of any profession or 'business,' even if covered by 'underlying insurance'"? The Court answers this question in the affirmative.
>
> Do the "professional services" exclusion of the business owners package policy and/or the "professional liability" exclusion of the personal umbrella liability policy apply when the claim asserted against the policyholder for which coverage is sought is not made by a person or entity to whom the policyholder rendered professional services, but by a third-party to whom no professional services were rendered? The Court answers this question in the affirmative.

The circuit court expressly certified these questions for this Court's review because it was uncertain about its rulings. Mr. Hayhurst submits that although the circuit court correctly answered the first certified question, involving whether suits for malicious prosecution were covered by his general business liability and personal umbrella policies, it incorrectly answered the final three certified questions, involving whether Cincinnati's professional services exclusion was effective to preclude coverage for malicious prosecution suits by non-clients. Mr. Hayhurst also submits that the circuit court incorrectly ignored language in the personal umbrella policy providing for "drop down" coverage broader than that contained in the general business liability policy.

At the heart of this case are a policyholder's reasonable expectations when general liability and umbrella policies are purchased to insure the policyholder's professional and business activities. Cincinnati was well aware that Mr. Hayhurst's business was that of a practicing attorney at the time it issued him general liability and umbrella policies. Cincinnati was well aware that its general liability policy specifically contained a provision covering suits for malicious prosecution and that Mr. Hayhurst's business as a practicing attorney might expose Mr. Hayhurst to suit for malicious prosecution. Cincinnati was also well aware that its umbrella policy contained both an "excess" provision, granting coverage over and above, for example, the limits for a suit for malicious

prosecution, and a "drop down" provision, granting coverage broader than that contained in the general business liability policy, particularly where neither of the underlying policies provided any malicious prosecution coverage. Finally, Mr. Hayhurst certainly had a reasonable expectation when he purchased these two policies that if he were the subject of a suit for malicious prosecution as a result in his engaging in the "business" for which Cincinnati agreed to provide him coverage, that coverage would be available.

Accordingly, Mr. Hayhurst requests that this Court vindicate his reasonable expectations of coverage and hold that (1) a lawyer who has been issued general business liability and umbrella policies with malicious prosecution coverage has a reasonable expectation of coverage for a suit by a non-client even where such suit arises from the lawyer's practice of law and (2) an umbrella policy with "drop down" language provides coverage for claims expressly covered by the umbrella policy where those claims are otherwise not covered by the underlying policies.

II. STATEMENT OF FACTS

Mr. Hayhurst was retained to represent Camden-Clark in a medical malpractice action filed by Mr. Boggs arising from the death of Mr. Boggs' wife.[2] During the course of representation, Camden-Clark, represented by Mr. Hayhurst, filed a counterclaim against Mr. Boggs.[3] Eventually, after a period of discovery, the counterclaim was withdrawn and the case proceeded to trial.[4]

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[2] ***SJ Order*** at ¶ 4.

[3] *Id.* at ¶¶ 5, 8.

[4] Id. at ¶¶ 7, 9.

Prior to Mr. Boggs' malpractice suit going to trial, he filed suit against Camden-Clark, alleging that the withdrawn counterclaim had been malicious.[5] Eventually, Mr. Boggs filed a separate suit against Mr. Hayhurst, making the same allegation that the counterclaim had been malicious.[6]

Shortly after suit was filed against Mr. Hayhurst, he tendered coverage to Cincinnati under two policies of insurance: (1) a general business liability policy, number BOP 208 95 50, and (2) a personal umbrella liability policy, number CPC 219 51 31.[7]

With respect to malicious prosecution claims, the general business liability policy provides: "This insurance applies . . . To: 'Personal Injury' caused by an offense arising out of your business" and defines "personal injury" to include "malicious prosecution."[8] Thus, as the circuit court correctly held, suits against Mr. Hayhurst for "malicious prosecution" are expressly covered under Cincinnati's general business liability policy.[9]

With respect to malicious prosecution claims, the personal umbrella policy provides: "We will pay on behalf of the 'insured' the 'ultimate net loss' which the "insured' is legally obligated to pay as damages for . . . 'personal injury'" and defines "personal injury" to include

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[5] *Boggs v. Camden-Clark Memorial Hospital Corp.*, Wood Co. Civil Action No. 05-C-527.

[6] *Boggs v. Hayhurst*, Wood Co. Civil Action No. 06-C-401.

[7] ***SJ Order*** at ¶ 23.

[8] *Id.* at ¶ 27.

[9] ***Certification Order*** at ¶ 9.

"malicious prosecution."[10] Thus, as the circuit court correctly held, suits against Mr. Hayhurst for "malicious prosecution" are expressly covered under Cincinnati's personal umbrella policy.

The crux of the dispute among the parties,[11] however, involves the following exclusionary language in Cincinnati's general business liability policy: "This insurance does not apply to . . . 'personal injury' . . . due to rendering or failure to render professional services . . . ,"[12] and the following exclusionary language in Cincinnati's personal umbrella policy: "This insurance does not apply to . . . 'personal injury' arising out of any act, malpractice, error or omission committed by any 'insured' in the conduct of any profession or 'business', even if covered by 'underlying insurance.'"[13]

Cincinnati takes the position, and the circuit court agreed, that these exclusions, labeled "Professional Services" and "Professional Liability" exclusions, respectively, effectively take away what the policies otherwise provide, i.e., coverage for malicious prosecution claims.

Mr. Hayhurst and Mr. Boggs take the position, however, that these exclusions, particularly the "Professional Liability" exclusion in Cincinnati's umbrella policy, only apply when a policyholder, in this case, Mr. Hayhurst, is sued for "professional liability," i.e., for malpractice arising from his representation of a client by that client.

Obviously, Mr. Hayhurst rendered no "professional services" to Mr. Boggs, who was his client's adversary, and Mr. Boggs does not seek to impose "professional liability" on Mr.

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[10] ***SJ Order*** at ¶ 29.

[11] Mr. Boggs joined in Mr. Hayhurst's motions regarding the availability of coverage under the Cincinnati policies.

[12] ***SJ Order*** at ¶ 27.

[13] *Id.* at ¶ 29.

Hayhurst arising from any "malpractice" because Mr. Boggs was not Mr. Hayhurst's client. Rather, Mr. Boggs seeks to impose liability on Mr. Hayhurst for "malicious prosecution" of a withdrawn counterclaim, which is expressly covered by both Cincinnati's general business liability and personal umbrella policies.

Moreover, the subject "Personal Umbrella Liability Policy" expressly provides "drop down" coverage as follows:

> We will pay on behalf of the "insured" the "ultimate net loss" which the "insured" is legally obligated to pay as damages for "bodily injury", "property damage" or "personal injury" arising out of an "occurrence" to which this insurance applies:
>
> a. Which is in excess of the "underlying insurance"; or
>
> b. Which is either excluded or not covered by "underlying insurance".[14]

Indeed, the "Personal Umbrella Liability Policy" states that it is both "in excess" of the underlying policies and provides stop-gap coverage for claims that may be "excluded or not covered" by the underlying policies. Here, the underlying policies were an automobile liability policy and a homeowners' policy, neither of which provided any "malicious prosecution" coverage and, therefore, the personal umbrella liability policy should have been held to "drop down" to provide coverage for Mr. Boggs' malicious prosecution suit.

In this case, the circuit court applied the wrong standards for review of the two exclusions at issue. Consequently, it incorrectly resolved the scope of those exclusions. Moreover, the circuit court itself expressed concerns about whether its ruling was correct: "I know that puts one of the

[14] ***SJ Order*** at ¶ 29 (emphasis supplied).

litigants in a tight spot, and I am not sure, I don't have [a] whole lot of confidence in my decision, so that it the best I can do here."[15]

Accordingly, Mr. Hayhurst, who is the litigant placed "in a tight spot" by the circuit court's ruling, requests that this Court rule that the "Professional Services" exclusion in the "Businessowners Package Policy" and the "Professional Liability" exclusion in the "Personal Umbrella Liability Policy" do not extend to the suit for malicious prosecution instituted by Mr. Boggs, a non-client, against Mr. Hayhurst, because it did not arise out of "professional services" provided by Mr. Hayhurst to Mr. Boggs, nor is it based upon any "professional liability" by Mr. Hayhurst to Mr. Boggs, who was the adversary of Mr. Hayhurst's client.

Specifically, because a claim for malicious prosecution by the adversary of an attorney's client does not involve an allegation of breach of a professional duty, but an allegation of breach of a common law duty, it is not precluded from coverage under a "professional services" or "professional liability" exclusion in a liability policy as it does not involve the provision of "professional services" to the adversary or give rise to "professional liability" on the part of the attorney to the adversary.

Additionally, Mr. Hayhurst requests that this Court rule that he has coverage under the personal umbrella policy, which provides "drop down" coverage for any claim "[w]hich is either excluded or not covered by 'underlying insurance,'" as neither of the underlying policies provide coverage for malicious prosecution claims. Otherwise, the malicious prosecution coverage under the personal umbrella policy would be rendered virtually meaningless.

[15] Tr., Nov. 5, 2008, at 73 (emphasis supplied).

III. STANDARD OF REVIEW

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*."[16] Applying such standard of review in this case, Mr. Hayhurst requests that coverage for Mr. Boggs' malicious prosecution be found under both the general liability and umbrella policies.

IV. ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT ERRED BY FAILING TO CONSTRUE CONFLICTING AND AMBIGUOUS PROVISIONS IN THE TWO INSURANCE POLICIES IN A LIGHT MOST FAVORABLE TO THE POLICYHOLDER; BY FAILING TO APPLY THE RULE THAT EXCLUSIONS ARE TO BE STRICTY CONSTRUED AGAINST DEFEATING INDEMNITY; AND BY FAILING TO VINDICATE THE POLICYHOLDER'S REASONABLE EXPECTATIONS OF COVERAGE.

In its contemporaneous summary judgment order, which is incorporated by reference into the certified question order, the circuit court applied improper standards, advocated by Cincinnati, for purposes of determining the scope of the exclusions in both the general liability and personal umbrella policies.

The language of these two policies clearly meet the test this Court announced in Syllabus Point 1 of *D'Annuzio v. Security-Connecticut Life Ins. Co.*,[17] that, "When reasonable people can differ about the meaning of an insurance contract, the contract is ambiguous, and all ambiguities will be construed in favor of the insured." Specifically, reasonable minds can differ on the

[16] Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996); see also Syl. pt. 1, *Buckland v. Keith*, 220 W. Va. 295, 647 S.E.2d 731 (2007); Syl. pt. 1, *Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 647 S.E.2d 412 (2007); *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 488, 647 S.E.2d 920, 924 (2007); *Davis v. Eagle Coal and Dock Co.*, 220 W. Va. 18, 22, 640 S.E.2d 81, 85 (2006); Syl. pt. 1, *Copier Word Processing Supply, Inc. v. WesBanco Bank, Inc.*, 220 W. Va. 39, 640 S.E.2d 102 (2006); Syl. pt. 1, *Bias v. Eastern Associated Coal Corp.*, 220 W. Va. 190, 640 S.E.2d 540 (2006); Syl. pt. 1, *Fitzgerald v. Fitzgerald*, 219 W. Va. 774, 639 S.E.2d 866 (2006).

[17] 186 W. Va. 39, 410 S.E.2d 275 (1991) (emphasis supplied).

meaning of inconsistent exclusionary language, particularly in the context of a "Businessowners Package Policy" when Cincinnati knew that Mr. Hayhurst's "business" was the practice of law and a "Personal Umbrella Liability Policy" which was supposed to protect Mr. Hayhurst from "personal liability" in excess and as a supplement to his automobile and homeowners' policies.

The "Businessowners Package Policy" uses the description "Professional Services" exclusion. It reads, "This insurance does not apply to . . . 'personal injury' . . . due to rendering or failure to render professional services . . . ."[18]

The "Personal Umbrella Liability Policy" uses the description "Professional Liability" exclusion, which is different than the language used in the general business liability policy. It reads, "This insurance does not apply to . . . 'personal injury' arising out of any act, malpractice, error or omission committed by any 'insured' in the conduct of any profession or 'business', even if covered by 'underlying insurance,'"[19] which is also different than the language used in the general business liability policy. Moreover, the coverage under the "Personal Umbrella Liability Policy" is much broader:

> We will pay on behalf of the "insured" the "ultimate net loss" which the "insured" is legally obligated to pay as damages for "bodily injury", "property damage" or "<u>personal injury</u>" arising out of an "occurrence" to which this insurance applies:
>
> a. Which is in excess of the "underlying insurance"; <u>or</u>
>
> b. <u>Which is either excluded or not covered by "underlying insurance"</u>.[20]

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[18] ***SJ Order*** at ¶ 27. The exclusion further provides that, "This includes but is not limited to . . . Legal . . . services."

[19] *Id.* at ¶ 29.

[20] ***SJ Order*** at ¶ 29 (emphasis supplied).

Thus, even if coverage may be excluded under the automobile and homeowners' liability policy, it may be covered under the personal umbrella liability policy.

Plainly, even though reasonable persons can differ over the meaning of these policy provisions, particularly as they significantly differ between the two policies, the circuit court, at the behest of Cincinnati, incorrectly applied a "clear and unambiguous" standard.[21] This violated the "well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured."[22] Indeed, nowhere in the circuit court's summary judgment or certified question orders is this standard referenced.

Likewise, West Virginia law provides that, "Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated."[23] For this reason, "An insurance company seeking to avoid liability

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[21] ***Certification Order*** at ¶¶ 43-45.

[22] Syl. pt. 4, *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987); *see also* Syl. pt. 1, *Blessing v. National Engineering & Contracting Co.*, 222 W. Va. 267, 664 S.E.2d 152 (2008); Syl. pt. 4, *Glen Falls Ins. Co. v. Smith*, 217 W. Va. 213, 617 S.E.2d 760 (2005); Syl. pt. 5, *Webster Co. Solid Waste Authority v. Brackenrich & Associates, Inc.*, 217 W. Va. 304, 617 S.E.2d 851 (2005); Syl. pt. 12, *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 651, 609 S.E.2d 895, 912 (2004); Syl. pt. 5, *Wehner v. Weinstein*, 216 W. Va. 309, 607 S.E.2d 415 (2004); Syl. pt. 1, *Farmers Mut. Ins. Co. v. Tucker*, 213 W. Va. 16, 576 S.E.2d 261 (2002); Syl. pt. 4, *Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A.*, 210 W. Va. 223, 557 S.E.2d 277 (2001); Syl. pt. 2, *Change, Inc. v. Westfield Ins. Co.*, 208 W. Va. 654, 542 S.E.2d 475 (2000); Syl. pt. 4, *Riffe v. Home Finders Associates, Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1990); Syl. pt. 3, *Murray v. State Farm Fire and Cas. Co.*, 203 W. Va. 477, 509 S.E.2d 1 (1998); Syl. pt. 4, *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W. Va. 385, 508 S.E.2d 102 (1998); Syl. pt. 1, *Carney v. Erie Ins. Co.*, 189 W. Va. 702, 434 S.E.2d 374 (1993).

[23] Syl. pt. 5, *McMahon & Sons, supra; see also Bender v. Glendenning*, 219 W. Va. 174, 182, 632 S.E.2d 330, 338 (2006); *Jenkins v. State Farm Mut. Auto. Ins. Co.*, 219 W. Va. 190, 194, 632 S.E.2d 346, 350 (2006); *Wehner, supra* at 316, 607 S.E.2d at 422; Syl. pt. 6, *Moore v. CNA Ins. Co.*, 215 W. Va. 286, 599 S.E.2d 709 (2004); Syl. pt. 3, *Horace Mann Ins. Co. v. Adkins*, 215 W. Va. 297, 599 S.E.2d 720 (2004); *Tackett v. American Motorists Ins. Co.*, 213 W. Va. 524, 529, 584 S.E.2d 158, 163 (2003); *American States Ins. Co. v. Tanner*, 211 W. Va. 160, 165, 563 S.E.2d 825, 830 (2002); Syl. pt. 4, *Russell v. Bush & Burchett, Inc.*, 210 W. Va. 699,

through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion."[24] It is the law of this jurisdiction that, "An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured."[25] Finally and perhaps most importantly in this case, "Where ambiguous policy provisions would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted."[26]

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559 S.E.2d 36 (2001); Syl. pt. 4, *Farmers and Mechanics Mut. Ins. Co. of West Virginia v. Cook*, 210 W. Va. 394, 557 S.E.2d 801 (2001); Syl. pt. 2, *Erie Ins. Property and Cas. Co. v. Stage Show Pizza, JTS, Inc.*, 210 W. Va. 63, 553 S.E.2d 257 (2001); Syl. pt. 3, *Ayersman v. Div. of Environmental Protection*, 208 W. Va. 544, 542 S.E.2d 58 (2000); Syl. pt. 1, *West Virginia Ins. Co. v. Lambert*, 193 W. Va. 681, 458 S.E.2d 774 (1995); Syl. pt. 3, *Silk v. Flat Top Const., Inc.*, 192 W. Va. 522, 453 S.E.2d 356 (1994); Syl. pt. 2, *Carney v. Erie Ins. Co., Inc.*, 189 W. Va. 702, 434 S.E.2d 374 (1993).

[24] Syl. pt. 7, *McMahon & Sons, supra; see also Jenkins, supra* at 194, 632 S.E.2d at 350; *Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W. Va. 748, 753, 613 S.E.2d 896, 901 (2005); *Bowyer, supra* at 652, 609 S.E.2d at 913; *Moore, supra* at 292, 599 S.E.2d at 716; *Tanner, supra* at 165, 563 S.E.2d at 830; *Russell, supra* at 705, 559 S.E.2d at 42; Syl. pt. 3, *Cook, supra*; Syl. pt. 4, *Ayersman, supra*; *Alpha Engineering, supra* at 716, 542 S.E.2d at 879; Syl. pt. 7, *Mitchell v. Broadnax*, 208 W. Va. 36, 537 S.E.2d 882 (2000); Syl. pt. 6, *Murray, supra*; *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 314 n.10, 504 S.E.2d 135, 141 n. 10 (1998); Syl. pt. 2, *Smith v. Sears, Roebuck & Co.*, 191 W. Va. 563, 447 S.E.2d 255 (1994).

[25] Syl. pt. 10, *McMahon & Sons, supra; see also* Syl. pt. 5, *Bender, supra*; Syl. pt. 2, *Satterfield v. Erie Ins. Property and Cas.*, 217 W. Va. 474, 618 S.E.2d 483 (2005); Syl. pt. 6, *Webster Co. Solid Waste Auth., supra*; Syl. pt. 2, *Luikart, supra*; Syl. pt. 6, *Wehner, supra*; *Adkins, supra* at 302 n.6, 599 S.E.2d at 725 n.6; *Russell, supra* at 705, 559 S.E.2d at 42; Syl. pt. 6, *Mitchell, supra*; *Marcum Trucking Co., Inc. v. U.S. Fidelity & Guar. Co.*, 190 W. Va. 267, 271, 438 S.E.2d 59, 63 (1993).

[26] Syl. pt. 9, *McMahon & Sons, supra; see also Jenkins, supra* at 196, 632 S.E.2d at 352; *Adkins, supra* at 302, 599 S.E.2d at 725; *Russell, supra* at 705, 559 S.E.2d at 42; *Stage Show Pizza, supra* at 67, 553 S.E.2d at 262; *Riffe, supra* at 222, 517 S.E.2d at 319; Syl. pt. 6, *Consolidation Coal, supra.*

Here, despite the issuance of a general business liability policy and a personal umbrella liability policy to Mr. Hayhurst, whom Cincinnati knew was engaged in the business of the practice of law, expressly providing coverage for malicious prosecution claims, a risk for any policyholder whose business involved the practice of law, the circuit court failed to acknowledge, let alone apply, this Court's rules of construction of ambiguous language and has erroneously permitted such language to nullify the purpose of including malicious prosecution coverage in the subject policies.

In similar circumstances, West Virginia courts, contrary to the circuit court's ruling in this case, have refused to apply "professional services" to exclude coverage where the applicable language is undefined, contradictory, and ambiguous, and where to permit an exclusion to defeat coverage would effectively nullify the purpose of provisions providing coverage to the policyholder.

In *Johnson ex rel. Estate of Johnson v. Acceptance Ins. Co.*,[27] for example, Judge Stamp held that a professional services exclusion was not effective to preclude coverage for a wrongful death action against a behavioral health services agency arising from an accident involving a mentally disabled resident who was struck by a vehicle when he left a facility owned and operated by the agency. In so holding, Judge Stamp stated:

> [T]his Court finds that the services rendered to Mr. Johnson at, and just prior to, the time of his injuries were not professional services to which the policy exclusion would then apply. This Court finds that the services rendered to plaintiff's decedent while he was under BHA's care were merely supervisory and custodial in nature. "An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of the exclusion." *McMahon* at 496. Here, there is no clear indication in the record to suggest that the plaintiff's decedent had previously received services rendered by a medical or psychological professional during the time he was living at the Kountry Kove apartments or on the day he was injured. However, even if there is

[27] 292 F. Supp. 2d 857 (N.D. W. Va. 2003).

> such evidence, there is no indication in the record that the rendering or failure to render a professional service was causally connected to the accident.
>
> Moreover, the term "professional services" is not defined within the policy. Case law supports the proposition that the term "professional services" denotes those services rendered by someone with particularized knowledge or skill in his or her chosen field. . . . In light of this definition of "professional services," the Court finds that plaintiff's decedent's injuries were not the cause of the failure to render any type of professional service as that term is commonly understood and legally defined.
>
> In any event, since the policy does not provide an explicit definition of "professional services," this Court finds that the term "professional services" in this policy is ambiguous. Ambiguities in insurance policies are construed against the insurer. *Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d at 160; *see also Beard v. Indem. Ins. Co.*, 65 W. Va. 283, 64 S.E. 119, 122 (1909) (stating that "the rule is firmly established that limitations on the liability of the company are construed most strongly against the insurer or liberally in favor of the insured"). Therefore, since that term is ambiguous, it must be construed against Acceptance.[28]

Likewise, in this case, although some non-exclusive examples are provided, there are no definitions of the terms "professional services" or "professional liability" and, consequently, the circuit court in this case erred, unlike Judge Stamp in *Johnson*, by failing to construe ambiguities in exclusionary language against Cincinnati that would largely nullify the purpose of indemnifying Mr. Hayhurst and would frustrate his reasonable expectations of coverage.

This Court's seminal opinion in *National Mut. Ins. Co. v. McMahon & Sons, Inc.*,[29] involving the reasonable expectations doctrine, has similar application in this case.

In *McMahon*, National Mutual issued a CGL policy to McMahon & Sons who were in the general contracting and real estate development business. Later, a fire broke out destroying a

[28] *Id.* at 866 (emphasis supplied and citations omitted).

[29] 177 W. Va. 734, 356 S.E.2d 488 (1987).

house while under construction by the company. National Mutual denied coverage, relying on a "care, custody, and control" exclusion. In holding that the trial court erred by failing to review this exclusion in light of the circumstances, this Court stated:

> The final matter to be considered in examining the applicability of the exclusion is whether appellant McMahon and Sons had a reasonable expectation of coverage under the general liability policy. This Court has adopted the doctrine of reasonable expectations. "An insurance contract should be given a construction which a reasonable person standing in the shoes of the insured would expect the language to mean." *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 33, 35-36 (1986); *see Perkins v. Doe*, 177 W. Va. 84, 350 S.E.2d 711 (1986); *Hensley v. Erie Insurance Co.*, 168 W. Va. 172, 283 S.E.2d 227 (1981); *Thompson v. State Automobile Mutual Insurance Co.*, 122 W. Va. 551, 554, 11 S.E.2d 849, 850 (1940). With respect to insurance contracts, the doctrine of reasonable expectations is that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961 (1970).
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> In West Virginia, the doctrine of reasonable expectations is limited to those instances, such as the present case, in which the policy language is ambiguous. *Soliva*, 176 W. Va. at ----, 345 S.E.2d at 36; *contra Estrin*, 612 S.W.2d 413; *Corgatelli v. Globe Life & Accident Insurance Co.*, 96 Idaho 616, 533 P.2d 737 (1975). Where ambiguous policy provisions would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted. *Linden Motor Freight Co. v. Travelers Insurance Co.*, 40 N.J. 511, 193 A.2d 217 (1963); *see Keeton*, 83 Harv. L. Rev. at 976. An exclusion in a general business liability policy should not be so construed as to "strip the insured of protection against risks incurred in the normal operation of his business," especially when the insurer was aware of the nature of the insured's normal operations when the policy was sold. *Chemtec Midwest Services, Inc. v. Insurance Company of North America*, 279 F. Supp. 539 (W.D. Wis. 1968); see Boswell, 38 N.J. Super. 599, 610, 120 A.2d 250, 255.

> Where an insured has a reasonable expectation of coverage under a policy, he should not be subject to technical encumbrances or to hidden pitfalls. *Gerhardt v. Continental Insurance Co.*, 48 N.J. 291, 225 A.2d 328 (1966). An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, *id.* at 298, 225 A.2d at 332, placing them in such a fashion as to make obvious their relationship to other policy terms, *Mills v. Agrichemical Aviation, Inc.*, 250 N.W.2d 663, 673 (N.D. 1977), and must bring such provisions to the attention of the insured, *Young v. Metropolitan Life Insurance Co.*, 20 Cal. App. 3d 777, 98 Cal. Rptr. 77 (1971). Of course, the insurer may avoid liability by proving that the insured read and understood the language in question, or that the insured indicated his understanding through words or conduct. *See Young*, 20 Cal. App. 3d 777, 98 Cal. Rptr. 77; *Aetna Casualty & Surety Co. v. Haas*, 422 S.W.2d 316 (Mo. 1968).
>
> On remand, the circuit court should develop a sufficiently detailed record to allow it to decide whether the care, custody, and control exclusion may equitably be allowed to operate under all the facts of this case.[30]

In other words, because National Union was well aware of McMahon & Sons' business activities, the policyholder had a right to have the "care, custody, and control" exclusion for ambiguities in light of its "reasonable expectation" of coverage.

Following *McMahon*, this Court first expressly applied the reasonable expectation doctrine to find coverage in *Burr v. Nationwide Mut. Ins. Co.*[31]

In *Burr*, the plaintiff was involved in an automobile accident while driving a vehicle owned by another person and insured under that person's garage policy. Although, as a permissive user, Mr. Burr was insured under the garage policy, Nationwide argued that because Mr. Burr was using the vehicle for his own private purposes unrelated to operation of the garage,

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[30] *Id.* at 741-42, 356 S.E.2d 495-96 (emphasis supplied and footnotes omitted).

[31] 178 W. Va. 398, 359 S.E.2d 626 (1987).

there was no coverage under the policy. This Court, however, rejected this argument, holding as follows:

> Other jurisdictions have held, in a variety of contexts, that a garage operations policy extends coverage to nonbusiness uses of insured vehicles. For example, it has been held that coverage is afforded to persons using a "demonstrator" vehicle, regardless of whether its use at the time of the accident was related to the business of the garage. . . . Coverage is also afforded where a prospective buyer drives a garage vehicle with the permission of a salesperson. . . . .
>
> Similarly, where one operates a vehicle which has been loaned or leased to him by a garage, he is covered by the garage's policy even though he uses it for his own purposes. . . . It thus appears that the significant criterion for coverage under a garage operations policy is whether the vehicle involved is an insured vehicle under the policy, and not the nature of its use when the accident occurred.
>
> It is by now a well settled principle of law that insurance policies are to be strictly construed against the insurer. As we said in Syllabus Point 4 of *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987): "It is well settled law in West Virginia that <u>ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured</u>." . . . .
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> <u>We are also obliged to give to an insurance contract that construction which comports with the reasonable expectations of the insured</u>. *National Mut. Ins. Co. v. McMahon & Sons, Inc., supra*; Soliva *v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 33 (1986). Guided by these principles, we conclude that <u>where garage liability coverage is provided for the ownership, maintenance, or use of automobiles, and the insured authorizes a third person to operate a covered vehicle and the policy specifically states that such permissive operation makes the operator an additional insured, then there is coverage for an automobile accident even though it occurs when the automobile is being driven on personal business of the operator</u>. Thus, Mr. Burr, as a permittee, was afforded coverage under the policy.[32]

[32] 178 W. Va. at 402-03, 359 S.E.2d at 630-31 (emphasis supplied and citations omitted).

Because this Court concluded that the policy's definition of "garage operations" was ambiguous as it expressly "include[d] the ownership, maintenance or use of autos," it construed that definition in favor of the policyholder to extend to permissive users, who were also expressly covered under the policy.

Since *McMahon* and *Burr*, this Court has frequently used the doctrine of reasonable expectations where, as in this case, the circumstances indicate that it was reasonable for the policyholder to expect coverage in light of policy language and the circumstances presented.

In *State v. Janicki*,[33] for example, this Court held:

> Application of the reasonable expectations doctrine requires this Court to construe the insurance contract at issue just as "a reasonable person standing in the shoes of the insured would. . . ." *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 433, 345 S.E.2d 33, 35-36 (1986). Dr. Janicki expected that the Continental policy would provide coverage for "any legal action arising out of . . . [his] medical work for the State." The State confirmed Dr. Janicki's expectations when it issued letter 87-47 from the Director of the Division of Vocational Rehabilitation on June 1, 1987, to State employees. Included in that letter, which was issued just over two months before Ms. Richmond's death, is the following language:
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> > 2. Insurance Liability Coverage for Agency Employees. According to the State Board of Risk and Insurance Management and provisions of the West Virginia Code, *state government employees are covered by liability insurance as long as they are acting within the course or scope of employment or official responsibility*. (emphasis supplied)
>
> Continental argues that the director's letter merely "discusses the scope of the coverage that the Continental policy . . . provide[s] for State employees' acts. . ." and does not resolve the issue of whether the Continental policy is excess with respect to the PIE policy.

[33] 188 W. Va. 100, 422 S.E.2d 822 (1992)(emphasis supplied).

> The unequivocal objective of the State's procurement of the Continental policy was to obtain insurance for the acts of its employees which occurred "within the course or scope of employment or official responsibility." The PIE policy carries no similar limitation on its coverage. This is because, unlike the Continental policy, the PIE policy does not assume the risk of insuring Dr. Janicki as a state employee. Under both the facts and policies at issue, we determine that a reasonable person can make but one conclusion--that the risks covered by the two policies are not identical.

Likewise, both this Court and federal courts applying West Virginia law have not infrequently used the doctrine of reasonable expectations to find coverage where circumstances warrant application of the doctrine of estoppel or where policy language is less than a model of clarity.[34]

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[34] *See also Marcum Trucking Co., Inc. v. U.S.F.&G*, 190 W. Va. 267, 271, 438 S.E.2d 59, 63. (1993)("The insureds' expectations of coverage in this instance were not unreasonable. Painstaking study of the policy provisions would not necessarily have negated any expectations of coverage. In fact, it is this Court's opinion that painstaking study of the policy provisions may actually serve only to confuse the reader even more."); *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W. Va. 385, 393, 508 S.E.2d 102, 110 (1998)("In this instance, the BOC policy is ambiguous because it suggests that by virtue of the separately paid premiums, both Heston and Omni have $1,000,000 in coverage. However, if both Heston and Omni caused accidents at the same time, the policy attempts to limit coverage to $1,000,000. If we were to apply this limitation in the policy, we would consequently nullify the meaning and purpose of the 'insured contract' provisions of the policy. Therefore, we hold that in a policy for CGL insurance and SEL insurance, when a party has an 'insured contract,' that party stands in the same shoes as the insured for coverage purposes. Thus, we find that the circuit court erred by finding that the insurance policy provided only $1,000,000 in coverage, instead of $2,000,000 in coverage."); *Murray v. State Farm Fire and Cas. Co.*, 203 W. Va. 477, 491, 509 S.E.2d 1, 15 (1998)("As indicated previously, when an insurance carrier chooses to insure against a loss proximately caused by a particular peril, it may not rely on the mere concurrence of an excluded peril to deny coverage. The excluded peril must itself be the efficient proximate cause of the loss. Because State Farm's lead-in clause conflicts with the reasonable expectations of the parties, it should be construed to allow coverage for losses proximately caused by a covered risk, and deny coverage only when an excepted risk is the efficient proximate cause of the loss."); *Burlington Ins. Co. v. Shipp*, 215 F.3d 1317 at *4 (4th Cir. 2000)("In this case, Shipp inquired as to the scope of her coverage when she applied for the Burlington policy. Bennett told her she was covered for everything except theft and drunk driving. After the incident in which Morris was injured, Shipp went to Bennett to make sure she was covered, and Bennett told her not to worry because the incident was covered by her policy. Shipp's policy containing the assault and battery

exclusion was generated more than three weeks after Morris was injured in the Tavern, and the policy was never sent to Shipp. Bennett's representations to Shipp were sufficient to create a reasonable expectation of coverage. Romano and Keller make clear that Shipp's reasonable expectation of coverage could not be negated as a matter of law by a clear and unambiguous policy exclusion that was never communicated to her. Thus, we find that the district court did not err in permitting Shipp to rely on the doctrine of reasonable expectations to establish coverage for Morris' claim against her.")(footnote omitted); *Erie Ins. Property and Cas. Co. v. Stage Show Pizza, JTS, Inc.*, 210 W. Va. 63, 73-74, 553 S.E.2d 257, 267-68 (2001)("The causes of action filed by the appellant would not create obligations under any workers' compensation law such that the appellant would receive fixed benefits, without regard to the fault of any party, for his allegedly work-related injuries. Our reading of the record suggests that Stage Show Pizza had a reasonable expectation that lawsuits filed by employees would be covered under Erie's 'Employers Liability--Stop Gap Coverage' endorsement."); *Russell v. Bush & Burchett, Inc.*, 210 W. Va. 699, 706, 559 S.E.2d 36, 43 (2001)("Applying the foregoing principles, we believe the circuit judge was correct in concluding that the 'bridge related' exclusionary language of the DOH's policy did not as a matter of law bar the Russells' claim against the DOH. Any negligence in the DOH's bidder selection process was separate and remote in time and place from and anterior to any bridge construction. While bidder selection and retention could be arguably said to be 'related' to bridge construction, such a 'relatedness' connection could also be made to the most distant and tenuous activities. Applying the principles of law that narrowly construe exclusionary language, that favor liability over immunity, and that favor state accountability, we cannot read the DOH policy language as categorically excluding the Russells' claim."); *Edwards v. Bestway Trucking, Inc.*, 212 W. Va. 196, 199-200, 569 S.E.2d 443, 446-47 (2002)("In the present case, Albert Victor Mays testified that it was his understanding and expectation that any person who had permission to drive a vehicle owned by Vision Automotive Group, LLC, was entitled to be protected by the full coverage of the policy issued by John Deere Insurance Company. Common sense suggests that this would be a reasonable and appropriate expectation for an individual with business knowledge who was aware of the existence of insurance and who undertook to drive a vehicle owned by another. . . . When the present policy language is strictly construed against the insurer and in favor of Mr. Mays, the Court believes that it covers the type of accident involved in the present case. Thus, the application of this rule to the language in question also supports a finding that the policy provided coverage to Albert Victor Mays at the time of the accident giving rise to this case."); *Bituminous Cas. Corp. v. Mike Ross, Inc.*, 413 F. Supp. 2d 740, 746 (N.D. W. Va. 2006)("The ambiguities in the policy's definition of 'temporary worker' create a question of fact as to the objectively reasonable expectations of the parties when the insurance contract was entered into. Once these expectations are determined at trial, the factfinder can decide whether Mr. McCartney's situation falls within the boundaries of those expectations for insurance coverage."); *American Safety Indem. Co. v. Stollings Trucking Co., Inc.*, 450 F. Supp. 2d 639, 352 (S.D. W. Va. 2006)("More to the point, the circumstances here fit well within the rationale of *Marcum Trucking*. There the court found ambiguity with respect to the insurance policy's products-completed exclusion of an injury arising out of the transportation of property unless that injury arose from a condition in or on the vehicle that was created by the loading or unloading of it. The insured in *Marcum Trucking*, just as is alleged here, had a role in the loading of the vehicle. The court construed the "unless"

Here, as with the contractor in *McMahon*, the car dealer in *Burr*, the trucking company in *Marcum Trucking*, the homeowners in *Murray*, and the restaurant in *Stage Show Pizza*, Mr. Hayhurst had a reasonable expectation that general liability and umbrella policies expressly providing coverage for malicious prosecution suits would provide such coverage even where he was the subject of a malicious prosecution suit for the only business enterprise in which he was engaged, i.e., the practice of law. Accordingly, the circuit court erred in failing to find coverage for Mr. Boggs' malicious prosecution suit against Mr. Hayhurst under Cincinnati's general liability and umbrella policies.

B. THE CIRCUIT COURT ERRED IN HOLDING THAT A PROFESSIONAL SERVICES EXCLUSION IN A GENERAL LIABILITY POLICY APPLIES TO MALICIOUS PROSECUTION CLAIMS FILED AGAINST AN ATTORNEY BY A CLIENT'S FORMER ADVERSARY.

Other courts have held that where professional services exclusions would effectively preclude any coverage for a policyholder's activities known to the insurer at the time a policy was issued, such exclusions will not be deemed to preclude coverage.

In *Isle of Palms Pest Control v. Monticello Ins. Co.*,[35] for example, the policyholder was sued for an alleged negligent preparation of a termite inspection report. Rejecting the insurer's assertion of a professional services exclusion, the court stated:

> The policy does not define "professional" or "professional services." In a somewhat different context, our Supreme Court has defined a professional act or service as
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> > one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor,

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clause against the insurance company and found that the "products-completed operations hazard" provision provided coverage within the reasonable expectations of the insured. *Marcum Trucking* applies with equal vigor here.").

[35] 319 S.C. 12, 459 S.E.2d 318 (S.C. App. 1994).

> or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.... In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.

South Carolina Medical Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry, 291 S.C. 460, 463-64, 354 S.E.2d 378, 380 (1987). This definition provides no support for Monticello's inspection/extermination distinction. If an inspection is a professional service, then extermination would also be a professional service, given that the same specialized knowledge would be required to properly perform both acts, and given that any extermination would likely involve an inspection as well. Moreover, there is no language in the policy supporting an inspection/extermination distinction, and we find no principled reason to label "inspection" a professional service while labelling "extermination" something other than a professional service. Therefore, to the extent that these services are "professional" services, the professional liability exclusion would preclude coverage for claims arising out of the rendering of any of the services offered by Isle of Palms. For example, a claim for property damage caused by improper treatment arises out of Isle of Palms' rendering of professional services, and thus would not be covered as a result of the exclusion.

Isle of Palms purchased a liability insurance policy to protect itself against claims for damage to property of others caused by its negligence. The declarations page of the policy included "exterminator" in the list of covered general liability hazards, and the premium was based primarily on Isle of Palms' receipts from its exterminating business. To give effect to the professional liability exclusion would render the policy virtually meaningless, because it would exclude coverage for all claims arising from Isle of Palms' exterminating services, the very risk contemplated by the parties. *See Canal Ins. Co. v. Insurance Co. of N. Am.*, 315 S.C. 1, 431 S.E.2d 577 (1993) (refusing to construe exclusion to prohibit coverage for the only vehicle contemplated by the parties). The internal inconsistency created by an exclusion which purports to bar coverage for claims arising out of the very operation sought to be insured renders the policy ambiguous, and we must resolve that ambiguity in favor of coverage. *South Carolina Budget & Control Bd. v. Prince*, 304 S.C. 241, 403 S.E.2d 643 (1991); *Millstead v. Life Ins. Co. of Virginia*, 256 S.C. 449, 182 S.E.2d 867 (1971) (ambiguity in

> exclusion should be resolved in favor of coverage). Accordingly, we refuse to interpret the exclusion so as to bar claims for property damage caused by Isle of Palms' negligence in performing its exterminating services.[36]

Likewise, in the instant case, Cincinnati sold Mr. Hayhurst a "Businessowners Package Policy." knowing Mr. Hayhurst's "business" was the practice of law.[37] Because to give sweeping effect to the professional services exclusion advocated by Cincinnati renders its policy virtually meaningless, the circuit court erred in failing to recognize its inherent ambiguity and strictly construe it in favor of Mr. Hayhurst, particularly where the subject suit for "malicious prosecution" is expressly covered under the "personal injury" provisions of the policy.

Merely because a cause of action arises from a policyholder's business activities does not necessarily trigger the application of a professional services exclusion.

In *S.T. Hudson Engineers, Inc. v. Pennsylvania Nat. Mut. Cas. Co.*,[38] for example, an engineering firm was sued for negligent misrepresentation of the condition of a pier and negligent failure to warn of a pier collapse. In holding that these claims were covered despite the insurer's assertion of a professional services exclusion, the court stated:

> Penn National also argues that its products-completed operations coverage is subject to the professional services exclusion and thus any injuries arising out of the engineer's failure to warn fall within that exclusion. Again, we disagree. Penn National's professional services liability exclusions define professional services as including "[t]he preparing, approving, or failing to prepare or approve" maps, drawings, opinions, reports, surveys, field orders, change orders, designs or specifications, and supervisory, inspection, architectural or

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[36] *Id.* at 19, 459 S.E.2d at 321 (emphasis supplied).

[37] Indeed, when Cincinnati's corporate representative was asked, "So at all times that The Cincinnati Insurance Company has been dealing with me [Mr. Hayhurst], it has know that I am attorney at law?," he responded, "That's correct." Hayhurst SJ Motion, Exhibit A at 19.

[38] 388 N.J. Super. 592, 909 A.2d 1156 (2006).

> engineering services and activities. The exclusions speak in terms of the various professional services actually performed or conducted.
>
> By contrast, the products-completed operations coverage, for the failure to provide warnings, does not emanate from the performance or failure to perform actual professional services, but from the giving or failure to provide information. The nature of the act or omission in each is different. It is the nature of the act or omission, not the nature of the resulting damage that is determinative of coverage. *Search EDP, Inc. v. Am. Home Assurance Co.*, 267 N.J .Super. 537, 545, 632 A.2d 286 (App. Div. 1993), *certif. denied*, 135 N.J. 466, 640 A.2d 848 (1994). The excluded acts in the CGL policy are the actual professional services, whereas the acts that fall within products-completed operations coverage relate to the giving of information, i.e., instructions and warnings, albeit, resulting from either the performance or non-performance of the contracted-for professional services. Moreover, the Agricultural policy's expressed reference to the inclusion of completed operations coverage in the CGL shows that the two were intended to complement each other. To come to a different conclusion would frustrate the reasonable expectations of the insured. Thus, we conclude that liability for property damage and personal injury resulting from the failure to warn or give instructions was not excluded by the professional services exclusion in the CGL policy.[39]

Likewise, in the instant case, Mr. Hayhurst provided no professional services to Mr. Boggs. Rather, the professional services were provided to Camden-Clark. The "act or omission" that gives rise to Mr. Boggs' suit is alleged "malicious prosecution" of a counterclaim, which is expressly covered. The section of the subject policy is entitled, "Business Liability." The address listed in the declarations is not Mr. Hayhurst's home address, but his business address, as the policy provides coverage for Mr. Hayhurst's business activities, not his personal activities.

With respect to malicious prosecution claims, the Businessowners Package Policy expressly provides: "This insurance applies . . . To: 'Personal Injury' caused by an offense

[39] *Id.* at 604-05, 909 A.2d at 1164 (emphasis supplied).

arising out of your business" and defines "personal injury" to include "malicious prosecution."[40] The policy further states, "This insurance applies . . . To 'personal and advertising injury; only if . . . caused by an offense arising out of your business."[41]

Mr. Hayhurst's "business" out of which a claim for "malicious prosecution" could "arise" and for which the policy states it "applies" was the practice of law. To accept Cincinnati's argument that any malicious prosecution claim against Mr. Hayhurst is barred by the professional services exclusion if it arises from his "business" as an attorney would be to accept the argument that the "personal liability" coverage for "malicious prosecution" would never apply as it could only arise and be covered if it arose from Mr. Hayhurst's "business" activities, which are the practice of law. Thus, the circuit court erred in holding that coverage was precluded by the professional services exclusion.

This is not a case like *Webster Co. Solid Waste Authority v. Brackenrich & Associates, Inc.*,[42] where an engineering firm was sued by its client for professional negligence, or *State Auto. Mut. Ins. Co. v. Alpha Engineering Services, Inc.*,[43] where an engineering company was sued by its client for professional negligence, where this Court has affirmed the application of professional services exclusions. Indeed, Mr. Hayhurst concedes that had Camden-Clark sued him for professional negligence such claim would be barred by the professional services exclusion of his general business liability policy. Rather, this is a case where a non-client has instituted a cause of

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[40] ***SJ Order*** at ¶ 27 (emphasis supplied).

[41] Policy at 50 (emphasis supplied).

[42] 217 W. Va. 304, 617 S.E.2d 851 (2005).

[43] 208 W. Va. 713, 542 S.E.2d 876 (2000).

action for which the policy expressly provides coverage upon which Mr. Hayhurst reasonably relied in purchasing the policy.

Where the claims against a policyholder do not involve an allegation of breach of a professional standard of care, courts have held that professional services exclusions do not apply.

In *Utica Nat. Ins. Co. of Texas v. American Indem. Co.*,[44] for example, a number of patients sued a physicians' group after being infected with hepatitis allegedly as a result of the negligent storage of drugs that were injected by a group employee who then concealed his theft by re-wrapping the drug containers. Rejecting the application of a professional services exclusion for those claims predicated upon the negligent storage of drugs, the court stated:

> We conclude that Utica's general liability policy excluded coverage for any injury caused by the breach of a professional standard of care. Because the plaintiffs' pleadings in the underlying dispute alleged a cause of action that could establish liability for the doctors' association even in the absence of such a breach, we affirm that part of the court of appeals' judgment holding that Utica had a duty to defend the case.[45]

In the instant case, Mr. Boggs' has not sued Mr. Hayhurst for any breach of a professional standard of care. Indeed, in Syllabus Points 1 and 2 of *Clark v. Druckman*,[46] this Court held, "The litigation privilege is generally applicable to bar a civil litigant's claim for civil damages against an opposing party's attorney if the alleged act of the attorney occurs in the course of the attorney's representation of an opposing party and is conduct related to the civil action" and "An attorney for a party in a civil lawsuit does not owe a duty of care to that party's adversary in the lawsuit such that the adversary may assert a cause of action for negligence against the opposing attorney."

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[44] 141 S.W.3d 197 (Tex. 2004).

[45] *Id.* at 205 (emphasis supplied).

[46] 218 W. Va. 427, 624 S.E.2d 864 (2005).

Rather, Mr. Boggs has sued Mr. Hayhurst for breach of a common law standard of cares that applies to everyone, regardless of profession. In fact, Mr. Boggs has sued not only Mr. Hayhurst, but Camden-Clark, for the same malicious prosecution cause of action. Thus, the circuit court was incorrect when it ruled that coverage for Mr. Boggs' common law claim was precluded by an exclusion that applies to professional negligence claims.

Courts have specifically held, under various circumstances, that malicious prosecution claims are not subject to professional services exclusions.

In *Finnie v. LeBlanc*,[47] for example, a patient brought suit against a counselor for malicious prosecution arising from an allegation by the counselor that the patient had stolen certain records. Even though the interactions between the patient and counselor arose in the context of the latter's provision of professional services, the court held:

> Finnie's complaints of malicious prosecution and defamation partially relate to activities pertaining to LeBlanc's professional services, i.e., he falsely alleged that she stole her records from his office. However, this connection is insufficient to find an exclusion under the professional services heading. A similar issue was addressed in *Treadway v. Vaughn*, 633 So.2d 626 (La. App. 1 Cir. 1993), writ denied, 94-293 (La.3/25/94), 635 So.2d 233, where the insurer claimed the professional services exclusion was applicable and excluded coverage for its insured's defamatory statements. In Treadway, the exclusion stated that the insurance "does not apply to 'bodily injury,' 'property damage,' 'personal injury,' or 'advertising injury' due to the rendering or failure to render any professional services." The court held:
>
>> A liberal interpretation of the pertinent allegations of the Treadway petition would be that the plaintiffs breached the general duty not to defame a person or to invade that person's privacy, owed by all, which does not arise strictly out of Mr. Vaughn's profession. . . . . Therefore, under a liberal construction of the

[47] 856 So. 2d 208 (La. Ct. App. 2003), *writ denied*, 869 So. 2d 849 (La. 2004).

> allegations of the Treadway petition, the exclusion is not applicable and the allegations of the plaintiff's petition do not unambiguously exclude coverage.

Id. at 629.

> We agree with the reasoning of our colleagues on the first circuit and find that the professional services exclusions do not apply to bar coverage in this case.[48]

Likewise, as previously noted, Mr. Boggs' malicious prosecution claim against Mr. Hayhurst "does not strictly arise out of [Mr. Hayhurst's] profession" and, properly construing the general liability policy in a light most favorable to Mr. Hayhurst, the policyholder, the circuit court should have found that there was coverage.

Although there are a few cases which hold that a professional services exclusion is effective to preclude coverage for a malicious prosecution claim against an attorney, they are either poorly reasoned or distinguishable.

In *Harad v. Aetna Cas. and Sur. Co.*,[49] for example, the court held that a general business liability policy did not cover a claim for malicious prosecution against an attorney, but the attorney, unlike Mr. Hayhurst in this case, conceded that the particular policy provisions were not ambiguous.[50] Likewise, unlike the instant case, the *Harad* case did not involve two separate policies with separate and undefined terms, but involved a single policy which more expressly provided, "This insurance does not apply . . . When this policy is issued to a[n] . . . Attorney . . . so engaged to . . . personal injury arising out of the rendering or failure to render any professional

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[48] *Id.* at 212 (emphasis supplied).

[49] 839 F.2d 979 (3rd Cir. 1988).

[50] *Id.* at 982 n.4.

service . . . ."[51] Because the policyholder in *Harad* did not assert that this language was ambiguous, the court applied a different standard which does not apply in the instant case. Finally, Judge Sloviter's dissent is more consistent with West Virginia law, particularly where, as in the instant case, ambiguous and conflicting policy provisions are at issue:

> I differ with the majority . . . in their conclusion that Aetna's policy excluded Harad's claim against it. Although the majority's construction of the policy language is not an unreasonable one, it is not the only possible construction. *See Little v. MGIC Indemnity Corp.*, 836 F.2d 789, 794-95 (3d Cir.1987). Therefore, I agree with Chief Judge Fullam who decided this case in the district court that, at best, the Aetna policy was ambiguous, containing two contradictory provisions. Under Pennsylvania law, ambiguity in an insurance contract is to be resolved against the insurer. Therefore, the judgment against Aetna, which was the insurer in this case, should be affirmed.
>
> The Aetna policy is a Business Owners Policy, sets forth that Harad's business is that of an Attorney at Law, and provides, *inter alia*, coverage for damages arising out of claims for personal injury. The definition of personal injury applicable to the "Personal Injury And Advertising Offense Liability Coverage" expressly includes malicious prosecution: "[p]ersonal injury means injury arising out of the offense of . . . malicious prosecution." App. at 91. The majority concludes that notwithstanding this embracive inclusion, Aetna need not defend the malicious prosecution suit brought by Catania against Harad because the policy excludes "personal injury arising out of the rendering or failure to render any professional service" if the policy is issued to an attorney, or certain other named professionals. App. at 95.
>
> The district court held that this exclusion for rendering or failing to render professional services had no application to Harad's potential liability to Catania, who was an adverse party to Harad's client and to whom he rendered no professional services. In concluding that the district court erred, the majority refers to cases in other jurisdictions construing the term "professional services." See Maj. at 984. However, in almost all of the relevant cases, the term has been construed to extend liability coverage for the insured, and not to

[51] *Id.* at 983.

contract it. *See, e.g., Bank of California, N.A. v. Opie*, 663 F.2d 977 (9th Cir. 1981); *St. Paul Fire & Marine Ins. Co. v. Three "D" Sales, Inc.*, 518 F. Supp. 305, 310 (D. N.D. 1981); *Noyes Supervision, Inc. v. Canadian Indem. Co.*, 487 F. Supp. 433, 438 (D. Colo.1980). It is particularly significant that the Pennsylvania courts, to whom we must look for the construction of Pennsylvania law, have viewed the term "professional services" to be ambiguous, *see Danyo v. Argonaut Insurance Companies*, 318 Pa. Super. 28, 464 A.2d 501, 502 (1983), and have upheld coverage based on the ambiguity in the policy.

Aetna's policy does not define the term "professional services" as used in the exclusion or elsewhere. This court faced a similar situation in *Pacific Indemnity Co. v. Linn*, 766 F.2d 754, 763 (3d Cir. 1985), where we held that when the term "professional services" is not defined within the policy and is subject to more than one reasonable interpretation, the term is ambiguous. A term is ambiguous under the law "if reasonably intelligent men on considering it in the context of the entire policy would honestly differ as to its meaning." *Celley v. Mutual Benefit Health and Accident Association*, 229 Pa. Super. 475, 324 A.2d 430, 434 (1974).

In *Linn*, we referred to the well settled principle under Pennsylvania law that "where ambiguous, exceptions to an insurer's general liability are to be strictly construed against the insurer." 766 F.2d at 763. Accordingly, we held that the exclusion from coverage for injuries resulting from the rendering or failure to render professional services was inapplicable to exclude coverage for claims based on the insured physician's alleged liability arising out of a diet book he authored. We stated in *Linn* that "[a]lthough Aetna's reading of the exclusion is plausible, i.e., professional services are not covered, under Pennsylvania law the ambiguity must be resolved in favor of the insured." Id. I see no reason why the same result should not follow in this case.

There is yet another reason why Aetna's claim that this coverage is excluded should fail. Aetna knew when it provided business insurance for Harad that his business was that of an attorney. Insurance companies should not be allowed to give coverage with the right hand and then take it away with the left. I cannot agree with the niggardly approach taken by Aetna, and accepted by the majority, that the Business Owners Policy is intended to cover only the "non-professional" business activities of an attorney, such as renting office space, purchasing supplies, and hiring and firing staff. Such an approach is particularly inappropriate here because the Aetna policy

> expressly includes coverage for malicious prosecution, which is different in essence from the ministerial activities to which Aetna claims it is limited. It is difficult to conceive of the type of malicious prosecution suit brought against an attorney to which the express coverage would apply under Aetna's construction. If it wanted to exclude the defense of attorneys in malicious prosecution suits, it should have done so expressly.[52]

Mr. Hayhurst submits that this reasoning is sound and, if the test truly is "When reasonable people can differ about the meaning of an insurance contract, the contract is ambiguous," as this Court announced in Syllabus Point 1 of *D'Annuzio v. Security-Connecticut Life Ins. Co.*,[53] Cincinnati surely cannot seriously contend that Judge Sloviter is not a "reasonable person." Indeed, after *Harad*, Pennsylvania state courts have rejected the majority's analysis.[54] Consequently, the circuit court erred in failing to construe the inconsistent, ambiguous, and undefined "professional services" exclusion in the "Businessowners Package Policy" against Cincinnati, particularly where, as noted by Judge Sloviter, a contrary construction would render illusory the malicious prosecution coverage expressly provided.[55]

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[52] *Id.* at 986-87 (emphasis supplied, citations omitted, footnotes omitted).

[53] *Supra.*

[54] Specifically, in *Biborosch v. Transamerica Ins. Co.*, 412 Pa. Super. 505, 515, 603 A.2d 1050, 1055 (1992), the court held: "While we might agree with the statements of the *Harad* court in a case that presented the same issue as was presented there, we nevertheless do not agree that the Harad court's observations are apposite to this case. *Harad* did not involve the policy at issue here, which contains its own expansive definition of 'professional services,' specifically including all acts 'necessary or incidental' to the conduct of the insured's insurance business and administration in connection therewith."

[55] Cincinnati also relies upon the case of *Vogelsang v. Allstate Ins. Co.*, 46 F. Supp. 2d 1319 (S.D. Fla. 1999), which in turn relied upon the *Harad* decision. Like the majority in *Harad*, however, the *Vogelsang* judge's interpretation of policy language was inconsistent with West Virginia law, which requires ambiguities to be construed in favor of the policyholder. Indeed, nowhere in *Vogelsang* is this standard referenced.

C. THE CIRCUIT COURT ERRED IN HOLDING THAT A PROFESSIONAL LIABILITY EXCLUSION IN A "DROP DOWN" PERSONAL UMBRELLA POLICY APPLIES TO MALICIOUS PROSECUTION CLAIMS FILED AGAINST AN ATTORNEY BY A CLIENT'S FORMER ADVERSARY.

The second policy at issue in this case is a "Personal Umbrella Liability Policy." It was not acquired as an endorsement to the "Businessowners Package Policy,"[56] but was acquired separately. The "underlying insurance" identified in the declarations on the "Personal Umbrella Policy" is not the "Businessowners Package Policy," but Mr. Hayhurst's automobile liability and homeowners' policies. Thus, the personal umbrella liability policy is completely separate and independent from the general business liability policy. It is what is known as a "drop down" policy.[57] In other words, it "drops down" to cover claims that are "either excluded or not covered by 'underlying insurance.'" Here, there is no dispute that neither Mr. Hayhurst's automobile liability nor homeowners' liability

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Additionally, the other case relied upon by Cincinnati, and cited by the circuit court, was *Gould & Ratner v. Vigilant Ins. Co.*, 336 Ill. App. 3d 401, 782 N.E.2d 749, 752 (2002), but that case does not involve a suit by a third-party like Mr. Boggs, but "Carmell was a client of Gould & Ratner." Obviously, if Mr. Boggs had sued Mr. Hayhurst for professional negligence, Mr. Hayhurst would not contend that such suit was covered by a general business, as opposed to a professional negligence liability policy.

[56] Cincinnati's Summary Judgment Memorandum, Exhibits E and F.

[57] In this case, the personal umbrella policy was both excess – "We will pay . . . 'the ultimate net loss' which the 'insured' is legally obligated to pay . . . [w]hich is in excess of the 'underlying insurance'" and primary – "We will pay . . . 'the ultimate net loss' which the 'insured' is legally obligated to pay . . . [w]hich is either excluded or not covered by 'underlying insurance.'" With respect to the latter, it has been noted, "Unlike excess policies, however, umbrella policies often provide primary coverage for risks that the underlying policy does not cover." 15 COUCH ON INS. § 220:32 (2008); *see also Dolly v. Old Republic Ins. Co.*, 200 F. Supp. 2d 823, 840 (N.D. Ohio 2002)("An excess policy may also provide 'umbrella' coverage, as is the case here. Umbrella policies are different from simple excess policies because they are intended to fill gaps in coverage, both vertically (by providing excess coverage) and horizontally (by providing additional primary coverage). In other words, '[t]he vertical coverage provides additional coverage above the limits of the insured's underlying primary insurance, <u>whereas the horizontal coverage is said to "drop down" to provide primary coverage for situations where the underlying insurance provides no coverage at all</u>.' *A-Best Products, Inc.*, 975 F. Supp. at 1022.")(emphasis supplied).

policies provide coverage for "personal injury" claims, including malicious prosecution. Therefore, Mr. Hayhurst is entitled to "drop down" coverage under the personal umbrella policy.

In *Duff Supply Co. v. Crum & Forster Ins. Co.*,[58] for example, the policyholder sought coverage for an employment discrimination claim. There was no dispute that this claim was not covered pursuant to the underlying policy, but the umbrella policy, as in this case, provided that, "We will have the . . . duty to defend any 'Claim' or 'Suit' seeking damages . . . when . . . [d]amages are sought for . . . 'Personal Injury' or 'Advertising Injury' which are not covered by 'Underlying Insurance' or other insurance."[59] The court's reasoning, which is equally applicable in this case, was as follows:

> Applying this standard, the Court determines that plaintiffs' "bodily injury" claim is excluded by Exclusion 2.e. All of the factual allegations in the underlying complaint indicate that McLean's "bodily injury" arose out of in the course of her employment. The factual allegations manifestly demonstrate that plaintiffs' allegedly wrongful conduct occurred at work, thus any bodily injury which McLean suffered as a result of plaintiff's conduct could only be found to have arisen out of and in the course of employment of the insured. There is a causal connection between McLean's injuries and her employment. Thus, the Primary Policy expressly excludes coverage for any "bodily injury" claims asserted by McLean against plaintiffs.
>
> The Umbrella Policy issued by USF "drops down" to cover those bodily injuries not covered specifically by the underlying Primary Policy. The Umbrella Policy, at Section II.(1)(b) states the following with respect to this issue:
>
>> (1) We will have the right and duty to defend any "Claim" or "Suit" seeking damages covered by the terms and conditions of this policy when:

[58] 1997 WL 255483 (E.D. Pa. 1997).

[59] Id. at *16.

> B. Damages are sought for "Bodily Injury", "Property Damage", "Personal Injury" or "Advertising injury" which are not covered by "Underlying Insurance" or other insurance.
>
> Since the underlying Primary Policy does not include coverage for "bodily injury", the above-quoted provision contained within the Umbrella Policy issued by USF mandates that USF agreed to provide such coverage for "bodily injury" claims as long as such "bodily injury" claims are not excluded under the terms of the Umbrella Policy.
>
> The Court finds that any "bodily injury" claims asserted by McLean against plaintiffs are not excluded from coverage under the Umbrella Policy by any limitation. With respect to "bodily injury" under the Umbrella Policy, defendants argue that coverage is precluded because no "occurrence" was alleged in underlying complaint and the injury to McLean was "expected or intended" by the insured. The Court, however, has already rejected these arguments with respect to the Primary Policy, thus the Court also refuses to accept these arguments with respect to the Umbrella Policy for the reasons stated above. Therefore, the Court finds that a coverage obligation was owed by USF to plaintiffs under the terms of the Umbrella Policy.[60]

This analysis applies with equal force in the instant case due to the "drop down" nature of Cincinnati's personal umbrella policy; the fact that it expressly provides coverage for malicious prosecution claims; the fact that none of the underlying policies provide any malicious prosecution coverage; and the inherently ambiguous nature of the umbrella policy's "professional liability" exclusion where there is no question that Mr. Boggs' suit seeks to impose no "professional liability" on Mr. Hayhurst.

Similarly, in *Clark-Peterson Co., Inc. v. Independent Ins. Associates, Ltd.*,[61] which as in this case involved a Cincinnati "drop down" umbrella policy, the court held there was coverage under the umbrella policy because there was no coverage under any of the underlying policies.

[60] *Id.* at *15-16 (emphasis supplied and footnote omitted).

[61] 492 N.W.2d 675 (Iowa 1992).

Specifically, the court held that to accept Cincinnati's argument that there was no coverage under the umbrella policy would be to eviscerate coverage expressly provided:

> Under the special circumstances here, we agree with respect to the second ground; the exclusion effectively guts the discrimination coverage previously agreed to. The insurer contends that evisceration is not complete and therefore not achieved because a form of discrimination (disparate impact) can be imagined which, it is said, would be covered under the policy. So doing, the insurer calls upon us to hold for liability in a situation not supported by the facts here; this is not a disparate impact case.
>
> We decline to speculate on the policy's coverage for liability arising from disparate impact because we believe evisceration can occur on something less than total obliteration of all possibilities of coverage. "Eviscerate," according to its dictionary meaning, is to disembowel- or to gut. Webster's New International Dictionary (3d ed. 1964). To qualify under the definition, it is enough if an exclusion deprives coverage in a vital and substantial way. Disemboweling is the taking of a vital organ, not the taking of all of them.
>
> To deny discrimination coverage in the present case would be to withdraw with the policy's left hand what is given with its right. In a fundamental sense, of course, this is the proper function of any exclusion clause in an insurance policy. The reasonable expectations doctrine does no violence to this proper function by its limited intrusion into it. The doctrine means only that when, within its metes and bounds definition, an exclusion acts in technical ways to withdraw a promised coverage, it must do so forthrightly, with words that are, if not flashing, at least sufficient to assure that a reasonable policy purchaser will not be caught unawares.
>
> The reasonable expectations doctrine is a recognition that insurance policies are sold on the basis of the coverage they promise. When later exclusions work to eat up all, or even substantially all, of a vital coverage, they cannot rest on technical wording, obscure to the average insurance purchaser. At some point fairness demands that the coverage clause itself be self-limiting. Clark-Peterson's claim could not have arisen if the coverage promised in the coverage clause had been clearly worded so as to extend coverage only as far as the insurer contends it does extend. The difficulty arises because a much broader coverage is promised, but an attempt is made to withdraw it in violation of the doctrine of reasonable expectations.

> We agree with the district court that the special facts here qualify for application of reasonable expectations on the second ground for the doctrine. The exclusions upon which the insurer relies would eviscerate the discrimination coverage explicitly agreed to.[62]

Likewise, in *Davidson v. Cincinnati Ins. Co.*,[63] the court rejected an argument by Cincinnati that it was not required to defend a malicious prosecution claim under an umbrella policy with the same language as in the instant case. As in the *Clark-Peterson* case, the court reasoned that to allow the particular exclusion involved to avoid coverage would be to eviscerate coverage otherwise expressly extended:

> The umbrella policies, like the basic policies, are identical in their pertinent parts. The basic insuring clause reads:
>
> > "We will pay on behalf of the Insured the ultimate net loss for occurrences during the policy period in excess of the underlying insurance or for occurrences covered by this policy <u>which are either excluded or not covered by underlying insurance</u> because of Personal Injury, Property Damage, Advertising Liability, or Professional Liability anywhere in the world." . . .
>
> As said before, most cases involving malicious prosecution and slander are a result of an intentional wrongdoing. Therefore, <u>it was reasonable for Davidson to have assumed that if he were accused of malicious prosecution or slander, he would be covered under his policy which insured for personal injury (i.e., malicious prosecution and slander</u>).
>
> Provisions in an insurance policy, which are unambiguous when read within the policy as a whole, but in effect, provide only illusory coverage, <u>should be enforced to satisfy the reasonable expectations of the insured</u>. <u>Since Davidson could have reasonably expected Cincinnati to defend him in the action brought by Hardin against him, in part, for malicious prosecution and slander, Cincinnati should</u>

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[62] *Id.* at 678-79 (emphasis supplied and footnotes omitted).

[63] 572 N.E.2d 502 (Ind. Ct. App. 1991).

> have to provide a defense for him. The trial court erred in granting summary judgment in favor of Cincinnati and is hereby reversed.[64]

Again, this analysis applies with equal force to the instant case. The personal umbrella policy expressly "drops down" to fill any gaps in liability coverage. The personal umbrella policy expressly provides coverage for "malicious prosecution" claims. The exclusion is labeled "professional liability" and there can be no legitimate argument that Mr. Boggs seeks to impose "professional liability" on Mr. Hayhurst. Finally, Mr. Hayhurst could have reasonably expected Cincinnati to defend him for malicious prosecution when its personal umbrella policy expressly provided coverage for such claim.

Cincinnati did not prevail on its arguments in the *Clark-Peterson* and *Davidson* cases and, similarly, should not prevail in this case. In contrast to the clear language of the personal umbrella policy which expressly provides coverage for "personal injury" including "malicious prosecution," the exclusion relied upon by Cincinnati ambiguously states:

> **13. Professional Liability**
>
> "Bodily injury", "property damage" or "personal injury" arising out of any act, malpractice, error or omission committed by any "insured" in the conduct of any profession or "business", even if covered by "underlying insurance."

It is well-settled in the insurance industry that "Professional liability insurance covers members of various professions, with both the premium and the articulation of coverage based on the specific profession involved."[65] The "Medical Professional Liability Act" is a statute governing the imposition of civil liability of health care providers for their acts, malpractice, errors, or omissions

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[64] *Id.* at 506-08 (emphasis supplied).

[65] 1 COUCH ON INS. § 1:35 (2008)(footnote omitted).

committed in the conduct of their professional obligations.[66] The term "medical professional liability insurance" is defined in the Act as "a contract of insurance or any actuarially sound self-funding program that pays for the legal liability of a health care facility or health care provider arising from a claim of medical professional liability."[67] This Court has recognized that "professional liability insurance" is designed to provide a defense and indemnification for claims made by the clients and customers of professionals who allege breach of a professional, rather than a common law standard of care.[68]

Through its use of the terms "professional liability," "malpractice," "error," and "omission," the exclusion relied upon by Cincinnati reasonably conveys that the personal umbrella policy would not apply to "professional liability" claims, for example, by Mr. Hayhurst's clients. Clearly, however, this language does not reasonably convey that it would extend beyond "professional liability claims" to "common law claims" for "malicious prosecution," which are expressly covered.

IV. CONCLUSION

The circuit court acknowledged its uncertainty about the issues presented in this case when it stated during the hearing, "I don't have [a] whole lot of confidence in my decision."[69] Consequently, it deferred ruling on the underlying cross-motions for summary judgment, continued

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[66] W. Va. Code §§ 55-7B-1, et seq.

[67] W. Va. Code § 55-7B-2(j).

[68] *Webster Co. Solid Waste Auth., supra* at 312 n.9, 617 S.E.2d at 859 n. 9 ("an errors and omission policy is the type of insurance policy that Brackenrich would have procured had it wanted to protect itself from assertions of professional liability."); *see also Bruceton Bank v. U.S. Fidelity & Guar. Ins. Co.*, 199 W. Va. 548, 550 n.2, 486 S.E.2d 19, 21 n.2 (1997)("According to USF & G, a professional liability policy typically covers the liability of bank officers and executives for misrepresentations and, here, would more closely cover the type of risk presented by the Cueto claim.").

[69] Tr., Nov. 5, 2008, at 73.

the trial, stayed the underlying proceedings, and certified questions to this Court. As set forth in this petition, Mr. Hayhurst submits that the circuit court committed three errors in resolving the questions certified.

First, because the circuit court failed to apply the proper standards for determining the scope of the two exclusions at issue, it reached the incorrect result. Specifically, it failed to construe the conflicting, undefined, and ambiguous provisions in the two policies in a light most favorable to Mr. Hayhurst; failed to apply the rule that exclusions are to be strictly construed against defeating indemnity; and failed to apply the doctrine of reasonable expectations. Had the circuit court correctly applied these standards, Mr. Hayhurst submits that its rulings on the questions certified would have been different.

Second, the circuit court erred in holding that a "professional services" exclusion in a general liability policy applies to malicious prosecution claims filed against an attorney by a client's former adversary. At the time of issuance of a "Businessowners Package Policy," which expressly provides coverage for malicious prosecution claims, Cincinnati knew that Mr. Hayhurst's "business" was the practice of law. To accept Cincinnati's argument that any malicious prosecution claim against Mr. Hayhurst is barred by the professional services exclusion if it arises from his "business" as an attorney would be to accept the argument that the "personal liability" coverage for "malicious prosecution" would never apply as it could only arise and be covered if it arose from Mr. Hayhurst's "business" activities, which are the practice of law. As the *Finnie* court held, where a cause of action against a policyholder is predicated not upon the breach of any professional obligation, but upon breach of common law duties, a professional services exclusion is insufficient to defeat coverage. Likewise, as this Court held in *McMahon*, *Burr*, *Marcum Trucking*, *Murray*,

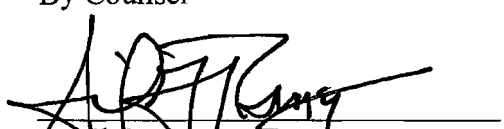
and *Stage Show Pizza*, where policy language is ambiguous, a policyholder's reasonable expectations as to coverage should be vindicated.

Finally, the personal umbrella policy purchased by Mr. Hayhurst "drops down" to fill any gaps in liability coverage; expressly provides coverage for "malicious prosecution" claims; the subject exclusion is labeled "professional liability" and references "malpractice," "error," and "omissions;" and Mr. Hayhurst could have reasonably expected Cincinnati to defend him under this policy, particularly as neither of the underlying policies provided any coverage for malicious prosecution claims. Indeed, the analysis of the courts in the *Clark-Peterson* and *Davidson* cases, both involving Cincinnati umbrella policies, support Mr. Hayhurst's position.

WHEREFORE, the petitioner, Richard A. Hayhurst, respectfully requests that this Court reverse the judgment of the Circuit Court of Wood County and find coverage for the malicious prosecution suit against him by Bernard Boggs, for the reasons stated herein, under both the general business liability and umbrella policies.

RICHARD A. HAYHURST

By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2009, I served the foregoing Petitioner's Certified Question Brief upon all counsel of record, by depositing a true copy thereof in the United States Mail, postage prepaid, in envelopes addressed as follows:

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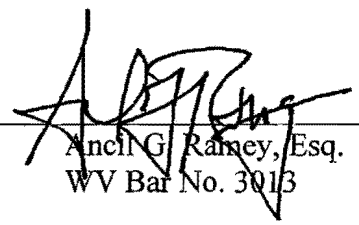

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