

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35223

BERNARD BOGGS, *Plaintiff-Below*

v.

**CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,
*Defendant-Below***

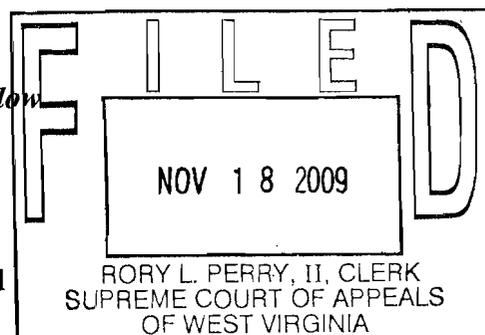
and

BERNARD BOGGS, *Plaintiff-Below*

v.

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

**CINCINNATI INSURANCE COMPANY,
*Defendant-Below/Appellee***



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

RESPONSE TO APPELLANT HAYHURST'S CERTIFIED QUESTION BRIEF

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I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

On November 5, 2008, the Circuit Court of Wood County presided over Motions for Summary Judgment filed on behalf of The Cincinnati Insurance Company [“Cincinnati”], Bernard Boggs [“Boggs”] and Richard A. Hayhurst [“Hayhurst”] as to the issue of insurance coverage available under liability insurance policies issued by Cincinnati to Hayhurst. Specifically, whether the Cincinnati insurance policies afforded coverage for allegations asserted by Boggs against Hayhurst in support of a claim for malicious prosecution relative to Hayhurst’s representation of Camden-Clark Memorial Hospital [“CCMH”] in civil actions filed in connection with a medical malpractice claim arising out of the treatment of Boggs’ wife.

On March 23, 2009, the circuit court entered an order granting Cincinnati’s Motion for Summary Judgment and denying the Motions for Summary Judgment filed on behalf of Boggs and Hayhurst, respectively. The circuit court declared and ordered:

1. The Cincinnati Insurance Company owes no duty to defend and indemnify Richard A. Hayhurst under Businessowners Package Policy, number BOP 208 95 50, in effect for the coverage periods of May 20, 2002 to May 20, 2005, and May 20, 2005 to May 20, 2006, against the allegations and claims presented by Bernard R. Boggs against Richard A. Hayhurst in the civil matter filed in the Circuit Court of Wood County, West Virginia, civil action number 06-C-401, and styled Bernard R. Boggs, Plaintiff v. Richard A. Hayhurst, Esq., Defendant (consolidated under civil action number 05-C-527); and,
2. The Cincinnati Insurance Company owes no duty to defend and indemnify Richard A. Hayhurst under Personal Umbrella Liability policy, number CPC 219 51 31, in effect for the coverage periods of September 23, 2001 to September 23, 2004, and September 23, 2004 to September 23, 2007, against the allegations and claims presented by Bernard R. Boggs against Richard A. Hayhurst in the civil matter filed in the Circuit Court of Wood County, West Virginia, civil action number 06-C-401, and styled Bernard R. Boggs, Plaintiff v. Richard A. Hayhurst, Esq., Defendant (consolidated under civil action number 05-C-527).

On March 23, 2009, the circuit court also issued a Certification Order, wherein it certified four (4) questions for this Court's review, each of which have been quoted in the Petition. The circuit court issued the Certification Order for the following reasons:

1. there is no controlling precedent in the State of West Virginia regarding whether a professional services exclusion in a commercial general liability or umbrella policy excludes coverage for a malicious prosecution suit against an attorney arising from the attorney's filing a counterclaim in a suit in which the attorney represented a client;
2. there is precedent in other jurisdictions suggesting that such exclusion may be effective, in certain circumstances, to exclude coverage otherwise available in such malicious prosecution;
3. there is no way for the Court to determine with any certainty how the Supreme Court of Appeals may rule on the coverage issues presented; and,
4. it is in the interest of justice and fairness that such coverage issues be certified by this Court to the Supreme Court of Appeals for interlocutory appellate review.

Contrary to Hayhurst's contentions, the circuit court correctly answered each of the certified questions posed in the Certification Order. In doing so, the circuit court properly considered the allegations set forth in Boggs' Amended Complaint and applied the allegations to the entirety of the language of the insurance policies in question. The circuit court recognized that neither insurance policy insured Hayhurst for professional liability exposure. The record amply demonstrates that Hayhurst's liability exposure to Boggs is limited to Hayhurst's professional conduct as a lawyer, and that Hayhurst did not purchase professional liability coverage from Cincinnati but from another liability insurer. Hayhurst's professional liability insurer accepted Hayhurst's request for a defense has been defending Hayhurst in the underlying matter. However, because Hayhurst's liability exposure exceeds the liability limits of his professional liability policy, Hayhurst now attempts to rewrite the Cincinnati insurance policies to obtain coverage he clearly did not purchase. Hayhurst's contention that the doctrine of "reasonable expectations" is applicable to this claim is not substantiated by the record.

II. STATEMENT OF FACTS

The Court's consideration of the Petition must start with a review of the circuit court's factual findings. As Hayhurst did not discuss the Circuit Court's factual findings in any detail, the following is a recitation of the circuit court's comprehensive Findings of Fact. Please note, Hayhurst did not identify any errors with the Findings of Fact.

A. FIRST AMENDED COMPLAINT

At all times relevant, Hayhurst was an attorney licensed under the laws of the state of West Virginia and the rules governing attorneys adopted by the West Virginia Supreme Court of Appeals, and represented Camden-Clark Memorial Hospital ("CCMH") in litigation filed by Boggs in the Circuit Court of Wood County, West Virginia, at docket numbers 03-C-296 and 03-C-623. See SJ Order at ¶¶ 3, 4.

On or about May 4, 2004, Hayhurst filed a cause of action in the form of a counterclaim against Boggs at docket number 03-C-623. See SJ Order at ¶ 5. This counterclaim was unsupported by reasonable or probable cause. See SJ Order at ¶ 5. On May 12, 2004, Hayhurst filed on behalf of his client, CCMH, a motion for summary judgment pursuant to Rule 56(b) of the West Virginia Rules of Civil Procedure, which contained the same assertions and allegations set forth in the counterclaim and requested summary judgment in favor of CCMH on all claims raised by Boggs in his Complaint filed at docket number 03-C-623. See SJ Order at ¶ 6. A hearing on the motion was held by the Court on June 14, 2004, and the motion was denied. See SJ Order at ¶ 6. On June 10, 2005, Boggs filed a motion to dismiss the counterclaim. See SJ Order at ¶ 7. On August 3, 2005, the Court held a hearing on Boggs' motion to dismiss. See SJ Order at ¶ 7. At the outset of that hearing, prior to the hearing of Boggs' motion to dismiss,

Hayhurst abandoned the counterclaim filed by him and the counterclaim was dismissed by the Court by Order dated August 31, 2005. See SJ Order at ¶ 7.

On or about May 23, 2005, Hayhurst caused to be filed a second cause of action against Boggs in the form of a counterclaim at docket number 03-C-296. See SJ Order at ¶ 8. This counterclaim was unsupported by reasonable or probable cause. See SJ Order at ¶ 8. At the pre-trial conference held in that litigation, Hayhurst expressly conceded, and the court found, that the claims advanced by Boggs in the action filed at docket number 03-C-296 were non-frivolous and presented, at a minimum, legitimate issues for trial. See SJ Order at ¶ 9.

Following verdict in the matter filed at docket number 03-C-296, the Court consolidated both cases as they presented substantially the same issues and facts. See SJ Order at ¶ 10. The consolidation of those two (2) lawsuits effectively terminated the counterclaim asserted at docket number 03-C-296 in Boggs' favor. See SJ Order at ¶ 10. Before the termination of the counterclaims in Boggs' favor, Hayhurst also filed motions for sanctions, in substantially the same form as the counterclaims, against Boggs and his counsel. See SJ Order at ¶ 11. The counterclaims have terminated favorably to Boggs. See SJ Order at ¶ 11.

The counterclaims were factually inaccurate in material ways. See SJ Order at ¶ 12. Hayhurst conducted the prosecution of the counterclaims against Boggs, in part, by means of false allegations and statements or allegations and statements made with reckless disregard for the truth, to Boggs and to the Court. See SJ Order at ¶ 12. Hayhurst filed the counterclaims without reasonable or probable cause with the intent to harm Boggs. See SJ Order at ¶ 12. Hayhurst had knowledge that the allegations and statements to Boggs and the Court were false or, in the alternative, made such allegations and statements with reckless disregard for the truth. See SJ Order at ¶ 12. Hayhurst, at the time of filing the counterclaims, had no evidence that the

claims asserted against CCMH at docket number 03-C-296 and 03-C-623 were frivolous within the meaning of State ex rel. Daily Gazette Co., Inc. v. Canady, or Rule 11 of the West Virginia Rules of Civil Procedure. See SJ Order at ¶ 13. Hayhurst, at the time of filing the counterclaims, had no evidence that the causes of action asserted against CCMH at docket numbers 03-C-296 and 03-C-623 were being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. See SJ Order at ¶ 14. Hayhurst had no probable or reasonable cause to file the counterclaims against Boggs. See SJ Order at ¶ 15.

The filing of the counterclaims, without reasonable or probable cause, were intentional and wrongful acts of Hayhurst done without just cause or excuse and showed an intent to inflict an injury on Boggs in the form of recovering alleged monetary damages and imposing additional, unnecessary litigation costs. See SJ Order at ¶ 16. Based on a lack of any factual basis for the filing of the counterclaims by Hayhurst, it appears reasonably likely that such filings were made with the wholly improper purpose under law of intimidating Boggs from continuing prosecution the actions filed at docket numbers 03-C-296 and 03-C-623. See SJ Order at ¶ 16.

Hayhurst's conduct in filing and prosecution of the counterclaims was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency. See SJ Order at ¶ 17. Hayhurst's conduct in tortiously filing and prosecution of the counterclaims was done with the intent to inflict emotion distress or was done with reckless disregard to the infliction of emotional distress when such acts were certain or substantially certain to cause emotional distress. See SJ Order at ¶ 18. Hayhurst's conduct in the filing and prosecution of the counterclaims were substantially certain to cause injury and without just cause or excuse. See SJ Order at ¶ 19. Hayhurst's conduct in filing and prosecution of the counterclaims caused Boggs

to suffer emotional distress because Hayhurst's action was so severe that no reasonable person could be expected to endure it. See SJ Order at ¶ 20. Hayhurst's conduct in filing and prosecution of the counterclaims required Boggs' attorney's to expend time and effort defending such claims. See SJ Order at ¶ 21. Hayhurst's conduct with respect to his malicious prosecution of the counterclaims against Boggs was so malicious, intentional, willful or wanton as to justify an award of punitive damages. See SJ Order at ¶ 22.

B. HAYHURST'S TENDER OF COVERAGE TO CINCINNATI

On February 9, 2007, Hayhurst tendered coverage to Cincinnati under two (2) policies of liability insurance: (1) a Businessowners Package policy, number BOP 208 95 50, and (2) a Personal Umbrella Liability policy, number CPC 219 51 31. See SJ Order at ¶ 23. Hayhurst sought coverage on the grounds that Boggs' lawsuit involved a claim for malicious prosecution "caused by the rendering or failure to render professional services". See SJ Order at ¶ 24 (emphasis added). Hayhurst asserted in support of the claim for coverage under the businessowners package policy that the "insured entity is a law office" and, therefore, "coverage applies". See SJ Order at ¶ 25.

C. HAYHURST'S CROSSCLAIM AGAINST CINCINNATI

Hayhurst admits that at all times relevant to the underlying proceedings in question, he was an attorney-at-law duly licensed and admitted to practice the profession of law in the Courts of the State of West Virginia. See SJ Order at ¶ 26.

D. INSURANCE POLICIES ISSUED BY CINCINNATI TO HAYHURST

1. Businessowners Package Policy

Cincinnati issued Hayhurst a Businessowners Package policy, number BOP 208 95 50, with policy periods of May 20, 2002 to May 20, 2005 and May 20, 2005 to May 20, 2006,

subject to the terms and conditions set forth therein. The main form for this policy is “**Businessowners Package Policy**”, Form IB 101 04 99, which states in relevant part with respect to business liability coverage:

SECTION II - BUSINESS LIABILITY

Various provisions in **SECTION II** of this policy restrict this insurance. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout **SECTION II** of this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under **SECTION II - BUSINESS LIABILITY, C. Who is an Insured.**

Other words and phrases that appear in quotation marks have special meaning. Refer to **SECTION II - BUSINESS LIABILITY, F. Liability and Medical Expenses Definitions.**

A. Coverages

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" or offense and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in **Section D. Liability and Medical Expenses Limits of Insurance**; and
- (2) Our right and duty to defend end when we have used up the applicable Limit of

Insurance in the payment of judgments or settlements or medical expenses.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under e. **Coverage Extension - Supplementary Payments.**

b. This insurance applies:

* * *

(2) To:

(a) "Personal Injury" caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you; and

* * *

but only if the offense was committed in the "coverage territory" during the Policy Period.

* * *

B. Exclusions

1. Applicable to Business Liability Coverage

This insurance does not apply to:

* * *

j. Professional Services

"Bodily injury", "property damage", "personal injury" or "advertising injury", due to rendering or failure to render 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;

* * *

F. Liability and Medical Expenses Definitions

* * *

13. "Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;

- d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
- e. Oral or written publication of material that violates a person's right of privacy.

See SJ Order at ¶ 27.

The Businessowners Package Policy Declarations indicates that Hayhurst did not purchase the optional "professional liability" insurance coverage from Cincinnati as part of the policy. See SJ Order at ¶ 28.

2. Personal Umbrella Liability

Cincinnati issued Hayhurst a Personal Umbrella Liability policy, number CPC 219 51 31, with policy periods of September 23, 2001 to September 23, 2004 and September 23, 2004 to September 23, 2007, subject to the terms and conditions set forth therein. The main form for this policy is "**Personal Umbrella Liability Policy**", Form UX 101 UM (1/01), which states in relevant part with respect to personal umbrella liability coverage:

PERSONAL UMBRELLA LIABILITY POLICY

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the person named in the Declarations as the Named Insured and their legally recognized spouse, if a resident of the same household. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under the definition of "insured". Refer to DEFINITIONS (SECTION IV).

Other words and phrases that appear in quotation marks have special meaning. Refer to DEFINITIONS (SECTION IV).

SECTION I - COVERAGE

A. Insuring Agreement

1. We will provide the insurance described in this policy. You agree to pay the premium and to comply with the provisions and conditions of this policy.
2. 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".
3. This insurance applies to "bodily injury", "property damage" and "personal injury" only if:
 - a. The "bodily injury", "property damage" or "personal injury" is caused by an "occurrence" that takes place in the "coverage territory"; and
 - b. The "bodily injury" or "property damage" occurs during the policy period; or
 - c. The "personal injury" results from an "occurrence" that takes place during the policy period.
4. The amount we will pay for damages is limited as described in the LIMIT OF INSURANCE (SECTION II).

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Defense and Supplementary Payments.

* * *

B. Exclusions

This insurance does not apply to:

* * *

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".

* * *

SECTION IV - DEFINITIONS

* * *

- B.** "Business" includes, but is not limited to, a trade, occupation, profession or other activity engaged in as a means of livelihood or from which you or a "relative" intend to derive income (other than farming).

The following activities and similar "business" activities by a resident of your household who is a minor will not be considered a "business":

1. Newspaper delivery;
2. Baby-sitting;
3. Caddying; or
4. Lawncare.

* * *

H. "Occurrence" means:

1. An accident, including continuous or repeated exposure to substantially the same general harmful conditions, that results in "bodily injury" or "property damage"; or
2. An offense that results in "personal injury".

All damages arising from the same accident, continuous or repeated exposure to substantially the same general conditions, act or offense shall be deemed to arise from one "occurrence" regardless of:

- (a) The frequency of repetition;
- (b) The number or kind of media used; or
- (c) The number of claimants.

I. "Personal injury" means injury other than "bodily injury" arising out of one or more of the following offenses:

1. Libel, slander, defamation of character;
2. False arrest, willful or false detention or imprisonment;
3. Wrongful eviction or entry;
4. Malicious prosecution; or
5. Invasion of privacy.

See SJ Order at ¶ 29.

The parties are in agreement that the interpretation of the insurance policies in question is governed by the substantive law of the State of West Virginia. See SJ Order at ¶ 30.

E. HAYHURST'S PROFESSIONAL LIABILITY POLICY

On August 8, 2006, Hayhurst tendered a request for defense and indemnity against Boggs' original Complaint to Liberty Insurance Underwriters, Inc., his professional liability insurance carrier. See SJ Order at ¶ 31. For the policy period of November 11, 2005 to November 11, 2006, Hayhurst was insured by Liberty Insurance Underwriters, Inc. under a

Lawyers Professional Liability Policy, number LPA196319-014, which affords coverage for malicious prosecution which arises out of the rendering or failure to render professional services, including legal services and activities performed for others as a lawyer. See **SJ Order at ¶ 32** (emphasis added). On September 6, 2006, Liberty International Underwriters, Inc. responded to Hayhurst's August 8, 2006 letter, assigning defense counsel for Hayhurst and outlining a reservation of rights under the policy. See **SJ Order at ¶ 33**.

Presented with the above undisputed facts, the circuit court applied the facts to the language of the insurance policies. As will be discussed below, Hayhurst's objection with the circuit court's rulings focuses upon the application of the express language of the insurance policies, which the Circuit Court found as a matter of law to be clear and unambiguous.

III. STANDARD OF REVIEW

Cincinnati agrees that the standard of review of questions of law answered and certified by a circuit court is *de novo*. Applying such standard of review in this case, Cincinnati requests that the Court affirm the circuit court's determination that Cincinnati does not owe a duty to defend or indemnify Hayhurst against the allegations in the Amended Complaint under the Businessowners Package Policy or the Personal Umbrella Liability Policy.

IV. HAYHURST'S ASSIGNMENTS OF ERROR

- A. HAYHURST CONTENDS 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 AND BY FAILING TO APPLY THE RULE THAT EXCLUSIONS ARE TO BE STRICTLY CONSTRUED AGAINST DEFEATING INDEMNITY; AND BY FAILING TO VINDICATE THE POLICYHOLDER'S REASONABLE EXPECTATIONS OF COVERAGE.**

Hayhurst contends that the Circuit Court applied improper standards for purposes of determining the scope of the exclusions in both the general liability and personal umbrella policies. His contention is without merit.

The circuit court's March 23, 2009 Findings of Fact and Conclusions of Law set forth the following standard with respect to interpreting insurance contracts under West Virginia law:

42. Under West Virginia law, the determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law. Syl. Pt. 1, Tennant v. Smallwood, 211 W.Va. 703, 568 S.E.2d 10 (2002).

43. The language in an insurance policy should be given its plain, ordinary meaning. Syl. Pt. 1, American States Ins. Co. v. Tanner, 211 W.Va. 160, 563 S.E.2d 825 (2002). Where the provisions in an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended. Syl. Pt. 3, Id.

44. When interpreting an insurance policy, the law requires the terms of the insurance policy to be read as a whole, as opposed to taking portions of the policy out of context. See Soliva v. Shand, Morahan & Co., Inc., 176 W.Va. 430, 432, 345 S.E.2d 33, 35 (1986) *overruled in part on other grounds* National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987).

45. The language of the insurance policy should not be unreasonably applied to contravene the object and plain intent of the parties. Syl. Pt. 6, Hamric v. Doe, 201 W.Va. 615, 499 S.E.2d 619 (1997). A contract of insurance should never be interpreted to create an absurd result, but should instead receive a reasonable interpretation. See Glen Falls Ins. Co. v. Smith, 217 W.Va. 213, 617 S.E.2d 760, 768 (2005). The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. See Syl. Pt. 1, Berkeley County Public Service Dist. v. Vitro Corp. of America, 152 W.Va. 252, 162 S.E.2d 189 (1968).

46. Under West Virginia law, the duty to defend is tested by whether the allegations in plaintiff's complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy. See Aetna Cas. & Sur. Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986).

47. An insurance company has a duty to defend an action against its insured only if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers. See Bowyer v. Hi-Lad, Inc., 216 W.Va. 634, 609 S.E.2d 895 (2004). If, however, the causes of action

alleged in plaintiff's complaint are entirely foreign to the risks covered by the insurance policy, then the insurance company is relieved of its duties under the policy. Id.

48. Determination of the duty to defend does not require a court to adjudicate the facts underlying the claim against the insured. See West Virginia Fire & Cas. Co. v. Stanley, 216 W.Va. 40, 602 S.E.2d 483 (2004).

See SJ Order at ¶¶ 42-48.

Hayhurst contends that the circuit court incorrectly applied a "clear and unambiguous" standard and directs the Court to Paragraph Nos. 43-45 of the circuit court's memorandum opinion. Hayhurst's further argues that the circuit court failed to recite any case law regarding the interpretation of allegedly ambiguous provisions of an insurance policy. When viewed in the full context of the circuit court's review of the matter, Hayhurst's argument fails.

A review of Paragraph Nos. 42-48 of the circuit court's memorandum opinion demonstrates that the circuit court applied the proper standard for interpreting an insurance policy, particularly in light of the fact that the circuit court found the insurance policy language at issue to be clear and unambiguous. The fact that the memorandum opinion does not include any reference to the standard to be applied for ambiguous policy language is not evidence that the circuit court did not consider this standard in its analysis and decision.

The fact is the circuit court did consider the issue of ambiguity; however, since the circuit court did not find the policy language to be ambiguous, there was no need to include a recitation of the legal standard. There can be no dispute that the "ambiguity" argument was fully briefed by Hayhurst [and Boggs]. Likewise, there can be no dispute that Hayhurst [and Boggs] was afforded a full opportunity to expand upon his "ambiguity" argument during the November 5, 2008 hearing. Hayhurst has not presented the Court with any evidence that the circuit court

failed to take evidence, hear argument or weigh the merits of the “ambiguity” argument. The fact is the circuit court did not find the argument credible.

Furthermore, Hayhurst and his counsel had ample opportunity to review drafts of the proposed Findings of Fact and Conclusions of Law and (a) never objected to the lack of language concerning interpretation of allegedly ambiguous provisions of an insurance policy and (b) never requested that any such language be included in the proposed Findings of Fact and Conclusions of Law. To now claim that the lack of such legal citations is a sufficient basis to accept the Petition is disingenuous.

The omission of any citation to the standard for interpreting ambiguous policy language does not merit the reversal of the circuit court’s insurance policy interpretation and coverage determination.

Next, Hayhurst fails to articulate how the exclusionary language of the insurance policies is inconsistent or ambiguous. Hayhurst bases his argument on the fact that the “professional services” exclusion in the Businessowners Package policy and the “professional liability” exclusion in the Personal Umbrella Liability policy do not mirror each other in the language used and, therefore, this purportedly creates an ambiguity in favor of coverage. As will be addressed below, Hayhurst’s argument suffers the fatal flaw that has been present throughout this entire matter: the failure to apply the allegations in Boggs’ First Amended Complaint to the entirety of the language of the insurance policies. The circuit court did perform this analysis and reached the correct conclusions. The mere fact that Hayhurst disagrees with the circuit court’s application of the allegations to the express provisions of the insurance policies does not, as a matter of law, compel a finding that the insurance policy exclusions are ambiguous.

Hayhurst contends that the circuit court erred by failing to strictly construe exclusionary policy language against Cincinnati in order that achieve the purpose of providing indemnity. Hayhurst's argument fails to demonstrate how the circuit court failed to adhere to this standard. As discussed below, the circuit court interpreted the relevant provisions of the insurance policies as a whole, in context and in accordance with the intended purpose of the exclusions.

Hayhurst cites to the standard that Cincinnati has the burden of proving the facts necessary to the operation of the exclusions at issue, but offers no evidence that Cincinnati failed to meet this standard. Hayhurst has not identified any genuine issue as to any fact material to resolving the coverage issues at hand. The circuit court correctly concluded that the application of the undisputed material facts to the language of the insurance policies clearly and unambiguously excluded coverage for this claim.

Hayhurst broaches upon the legal standard that an insurer wishing to avoid liability on a policy 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 the provisions to the attention of the insured. However, Hayhurst fails to explain to the Court how the exclusionary provisions in question failed to meet this standard.

The relevant portions of each insurance policy, Form IB 101 04 99 of the Businessowners Package policy and Form UX 101 UM (1/01) of the Personal Umbrella Liability policy, have been reproduced in the Statement of Facts. The circuit court correctly rejected Hayhurst's argument. The exclusionary language is conspicuous, plain and clear as the exclusionary provisions are highlighted within each policy form and clearly delineated by a section heading for "Exclusions" and sub-headings designating each exclusion. The headings are bolded, making obvious the relationship of the exclusionary language to the Insuring Agreement and the rest of

the policy language. Additionally, the Insuring Agreement language and the exclusionary language are all set forth in one (1) form.

Hayhurst argues that the doctrine of “reasonable expectations” should be applied in this case and that application of the doctrine mandates coverage under the insurance policies. Once again, Hayhurst pursues an argument that is not supported by the facts on record.

With respect to insurance contracts, the doctrine of reasonable expectations is that the 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. See National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987). The goal of this doctrine is to give an insurance contract a construction which a reasonable person standing in the shoes of the insured would expect the language to mean. Id. However, the doctrine of reasonable expectations is limited to those instances in which the policy language is ambiguous. Id. An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear and placing them in such a fashion as to make obvious their relationship to other policy terms. Id.

As argued above and more fully below, the policy language in question is not ambiguous. The exclusionary clauses contained in each policy are conspicuous, plain and clear and placed in such a fashion as to make obvious their relationship to other policy terms. Furthermore, the undisputed evidence in this case demonstrates that the circuit court’s interpretation of the insurance policies meets the reasonable expectations of a person standing in Hayhurst’s shoes.

Hayhurst cites to numerous cases interpreting the doctrine of “reasonable expectations”, but fails to offer any evidence as to why the doctrine should apply in this instance. The fact that

Cincinnati knew Hayhurst was engaged in the legal profession at the time the insurance policies were issued does not compel coverage under the doctrine of “reasonable expectations”. The totality of the evidence presented to the circuit court demonstrates that a reasonable person standing in Hayhurst’s shoes has no expectation of coverage for professional liability exposure.

First, in addition to the exclusionary provisions that are at the heart of this coverage dispute, both policies clearly state that Hayhurst did not purchase professional liability insurance coverage from Cincinnati. The Declarations page for the Businessowners Package policy clearly indicates that Hayhurst did not purchase the optional professional liability coverage part. As for the umbrella policy, Hayhurst purchased a personal umbrella policy, not a professional umbrella policy.

Second, Hayhurst clearly understood that he was not and did not purchase professional liability coverage from Cincinnati as evidenced by the fact that he purchased professional liability insurance coverage from Liberty Insurance Underwriters, Inc., albeit in an amount that may not be sufficient to answer Boggs’ claim - - a risk assumed by Hayhurst, not Cincinnati.

Third, Hayhurst clearly understood the difference between the risks insured by the Cincinnati policies and the risks insured by the Liberty policy. When Hayhurst learned in late July or early August 2007 that he had been sued by Boggs for malicious prosecution, he requested a defense and indemnity from Liberty, not Cincinnati. Hayhurst clearly recognized that the allegations against him involved professional liability exposure for which he had coverage with Liberty, but not with Cincinnati. Hayhurst never contacted Cincinnati to request coverage under the insurance policies until after the case had been in litigation for over six (6) months.

When Hayhurst submitted his request for coverage to Cincinnati, he expressly represented that the claim for malicious prosecution was “caused by the rendering or failure to render professional services”. The Businessowners Package policy clearly and unambiguously states that there is no coverage for “personal injury” “due to rendering or failure to render professional services unless professional liability coverage has been endorsed hereon or stated in the Declarations”. Significantly, the Liberty policy states that there is coverage for a malicious prosecution claim which “arises out of the rendering or failure to render professional services”. Clearly, Hayhurst understood the nature of the claim being asserted against him and this is why he immediately tendered the claim to Liberty. His tender to Cincinnati was nothing more than an afterthought after the case had been in litigation for several months.

The significance of the existence of the Liberty professional liability insurance policy cannot be overstated. The Court must recognize that this coverage action does not involve a situation where Hayhurst purchased the Businessowners Package policy because he was led to believe that the policy afforded coverage for professional liability exposure and as a result he did not purchase a professional liability insurance policy. Hayhurst’s purchase of professional liability insurance from Liberty is proof that Hayhurst (a) recognized the distinction between general liability policies and professional liability policies and (b) made a conscious choice to purchase his non-professional liability coverage from Cincinnati and his professional liability coverage from Liberty. Hayhurst had no reasonable expectation that the Businessowners Package policy insures against professional liability exposure. A reasonable person in Hayhurst’s shoes would not expect coverage to be afforded under the insurance policies in question for the allegations against Hayhurst set forth in the Amended Complaint.

B. HAYHURST CONTENDS 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 CLIENTT’S FORMER ADVERSARY.

Hayhurst contends that the circuit court erred when it concluded that the “professional services” exclusion precluded coverage under the Businessowners Package policy for the allegations against Hayhurst. Hayhurst continues to ignore the clear and unambiguous language of the insurance policy and as a consequence his argument is meritless.

The “professional services” provides as follows:

B. Exclusions

1. Applicable to Business Liability Coverage

This insurance does not apply to:

* * *

j. Professional Services

“Bodily injury”, “property damage”, “personal injury” or “advertising injury”, due to rendering or failure to render professional services unless professional liability coverage has been endorsed hereon or stated in the Declarations. This includes but is not limited to:

IV. Legal, accounting or advertising services;....

(Emphasis added).

There is no genuine issue of material fact that Hayhurst never purchased optional professional liability insurance as part of the Businessowners Package policy. Instead, Hayhurst purchased his professional liability coverage through Liberty, which accepted Hayhurst’s tender of coverage relative to Boggs’ allegations.

The allegations in the First Amended Complaint against Hayhurst involve malicious prosecution, which falls within the policy definition of “personal injury”. However, the “professional services” exclusion expressly states that the insurance does not apply to malicious

prosecution due to rendering professional services, including but not limited to legal services. The circuit court correctly found the language to be clear and unambiguous and that Hayhurst's liability exposure is due to rendering professional legal services to CCMH. As discussed above, Hayhurst acknowledged to Cincinnati back in February 2007 that his liability exposure is due to the rendering of professional legal services.

Hayhurst's argument that the exclusionary language is ambiguous focuses upon the meaning of "professional services". Hayhurst argues that the circuit court erred by failing to limit the application of the exclusion to situations where Hayhurst is sued by his client, as opposed to the current matter where Hayhurst is being sued by an adversary of his client. Hayhurst's distinction is not supported by the language of the insurance policy or the case law interpreting this type of exclusionary language.

A review of the language of the exclusion demonstrates that the provision contains no "privity" requirement. Nothing in the language of the exclusion limits application only to claims asserted against Hayhurst by his client.

Turning to case law, a review of the published decisions of the Court demonstrates that there are no cases directly on point; however, the Court has passed judgment on the validity and purpose of professional services/liability exclusions. Specifically, the Court stated in Webster County Solid Waste Auth. v. Brackenrich & Assocs., Inc., 217 W.Va. 304, 617 S.E.2d 851 (2005) that "a clear line of authority from this Court recognize[es] the validity of professional liability exclusionary language". See 617 S.E.2d at 857 (citing to State Auto. Mut. Ins. Co. v. Alpha Eng'g Servs., Inc., 208 W.Va. 713, 542 S.E.2d 876 (2000), wherein the Court addressed and upheld the application of a professional liability exclusion contained in a general liability

policy for liability “due to rendering or failure to render any professional service”). The Court further recognized that:

“The inclusion in a standard commercial general liability policy of language that excludes coverage for “professional liability” is specifically designed to shift the risk of liability for claims arising in connection with the performance of professional services away from the insurance carrier and onto the professional.”

Id. at Syl. Pt. 4.

Taking the Court’s cue that the purpose of the “professional services” exclusion is to shift the risk of liability for Boggs’ claim from Cincinnati to Hayhurst, the circuit court correctly rejected Hayhurst’s attempt to limit the application of such provisions only to claims brought against him by third parties. It cannot be overstated that the Businessowners Package policy clearly and unmistakably informed Hayhurst that Cincinnati would not afford any coverage for professional liability exposure unless Hayhurst purchased professional liability coverage from Cincinnati. There is no dispute between the parties that Hayhurst did not purchase professional liability coverage from Cincinnati. Instead, he purchased his professional liability coverage from Liberty.

The circuit court’s interpretation of the “professional services” exclusion is in accord with all of the other jurisdictions that have been presented with similar fact scenarios, which have unanimously rejected Hayhurst’s “privity” argument. These cases are in line with the Court’s stated view of the purpose of professional services/liability exclusions. The circuit court focused primarily upon three (3) decisions.

In Harad v. Aetna Cas. & Sur. Co., 839 F.2d 979 (C.A.3 1988), the Third Circuit held that a professional services exclusion operated to bar coverage under a businessowners package policy issued to an attorney-policyholder when the attorney was sued for malicious prosecution

by a third party following the attorney's representation of a client in a prior lawsuit involving the third party and the attorney's client. The attorney was alleged to have signed a verification to an answer and counterclaim filed on behalf of his client, wherein the client asserted that the third party conspired and/or contrived to defraud the client by concealing and/or misrepresenting the fact that vehicles owned by the third party and insured by the client were for personal rather than business use. The professional liability exclusion stated:

This insurance does not apply:

1. When this policy is issued to a Medical Doctor, Dentist, Osteopath, Veterinarian, Nurse, Psychologist, Chiropractor, Funeral Director, X-Ray Technician, Appraiser, Optometrist, Optician, Attorney or accountant or to a business so engaged to bodily injury, medical payments, property damage or personal injury arising out of the rendering or failure to render any professional service....

Id. at 983 (emphasis in original).

The Third Circuit held that the exclusion applied, finding that the express language of the exclusion did not require "privity" between the claimant and the attorney for the exclusion to be applicable. Id. at 984. The Court concluded that the nature of the services rendered by the attorney was purely professional. Id. The Court concluded that its analysis of the professional liability exclusion was consistent with the policy when examined as a whole, observing the businessowners package policy was intended only to cover liability arising out of the commercial operations aspect of the business, which involved the setting up and running of the business (i.e., securing office space, hiring staff, paying bills and collecting on accounts receivable, etc.). Id. at 985. As an example, the Court explained that the businessowners policy was intended to afford coverage for premises liability if an attorney, while hosting a real estate closing in his office, places his briefcase on the floor and a colleague trips on it, which would be a liability exposure arising from the operation of the business. Id. The Court further observed that the attorney

recognized the distinction between the professional operations of his business and the commercial operations of his business as evidenced by the fact that he purchased a separate professional liability policy. Id.

The Harad decision is significant in light of Hayhurst's argument that the Businessowners Package policy coverage for "malicious prosecution" is illusory. This argument was addressed by the circuit court and rejected. Hayhurst's argument misses the mark as it ignores the fact that there are situations where the insurance policy affords coverage for claims against Hayhurst for malicious prosecution for conduct engaged in by Hayhurst in his business (i.e., non-professional) capacity.

The distinction between a policyholder's professional acts and business acts was articulated by the Third Circuit in the Harad decision:

"Aetna's policy was entitled "Business Owners Policy (Deluxe)," which implies that the policy was intended to cover liability arising from the operation of a business. The terms of the policy purport to cover such business liability, but not professional liability. Harad and Home argue that Harad's business is the practice of law. However, the practice of law, as other similarly regulated professional activity in today's world, has two very different and often overlooked components—the professional and the commercial. The professional aspect of a law practice obviously involves the rendering of legal advice to and advocacy on behalf of clients for which the attorney is held to a certain minimum professional and ethical standards. The commercial aspect involves the setting up and running of a business, i.e., securing office space, hiring staff, paying bills and collecting on accounts receivable, etc., in which capacity the attorney acting as businessperson is held to the same reasonable person standard as any other. Indeed, the professional services and the business distinction drawn by the two policies and Harad's recognition of the limitations inherent in each is manifested by the fact that Harad purchased a separate professional liability policy from Home."

See Harad, 839 F.2d at 985 (emphasis added).

The dichotomy identified by the Harad court is at play in this case. The policy in question is a Businessowners Package policy, which was intended to cover liability arising from

Hayhurst's business operations, and not his professional operations. This distinction is clearly provided for in the policy as the policy is expressly identified as a "businessowners" policy and the Declarations and "professional services" exclusion clearly state that professional liability exposure will only be covered if Hayhurst purchases professional liability coverage from Cincinnati. It is undisputable that Hayhurst made the deliberate choice to forgo purchasing his professional liability coverage from Cincinnati.

Contrary to Hayhurst's contention, the policy in question does not afford illusory coverage. During the briefing to the circuit court, Cincinnati produced the deposition testimony of two (2) Cincinnati representatives, Norman Kirkpatrick and Richard Hill, both of whom acknowledged that depending upon the specific allegations of a particular claim the policy will afford coverage for malicious prosecution claims arising out of Hayhurst's business operations. Specifically, Mr. Kirkpatrick testified that he believes there would be coverage under the policy if Hayhurst on his own behalf filed an action against a painter for faulty workmanship and the painter in turn filed a claim against Hayhurst for malicious prosecution. Mr. Hill testified that depending upon the specific allegations, there is a possibility that coverage would be afforded under the policy if Hayhurst sued a contractor hired to do some additional construction onto Hayhurst's building for faulty workmanship and the contractor in turn filed a claim against Hayhurst for malicious prosecution. Mr. Hill further explained that Hayhurst paid for the protection of Hayhurst's business from bodily injury, property damage, personal injury and advertising injury outside of Hayhurst's professional capacity as an attorney.

Contrary to what Hayhurst would like the Court to believe, Cincinnati did not deny coverage to Hayhurst on the grounds that a claim for malicious prosecution was never covered under the policy by operation of the "professional services" exclusion. Cincinnati denied

coverage to Hayhurst because the specific allegations against Hayhurst fell within the scope of the “professional services” exclusion such that the policy did not afford coverage for the specific fact scenario at issue.

Hayhurst’s next attack on the Harad decision is that the Court should adopt the dissenting opinion authored by Judge Sloviter because the reasoning of the dissent is more consistent with West Virginia law and Judge Sloviter should be recognized as a “reasonable person”. The Court should reject Hayhurst’s argument. Judge Sloviter’s dissenting opinion did not carry the day with the Third Circuit and, therefore, has no legal effect. The legal standard for interpreting exclusionary language under Pennsylvania law (applied by the Harad court) is no different than the standard applied under West Virginia law and, therefore, there is no basis for rejecting the majority decision. Furthermore, Judge Sloviter’s dissenting argument has not been adopted by any state or federal jurisdiction faced with the question of whether a professional services/liability exclusion has a “privity” requirement, despite the fact that the argument has been raised in favor of coverage. Hayhurst wants this Court to ignore its own case law and the uniform decisions of other jurisdictions in favor of a lone dissent authored over 20 years ago that has failed to persuade any other court that has been faced with this issue. The Court should reject Hayhurst’s invitation.

Hayhurst’s final attack on the Harad decision is based upon the incorrect contention that the Harad decision has not been followed by Pennsylvania state courts. Hayhurst cites to the decision rendered in Biborosch v. Transamerica Ins. Co., 412 Pa.Super. 505, 603 A.2d 1050 (1992); however, a review of the Biborosch decision demonstrates that the Pennsylvania Superior Court did not reject the holding or legal analysis rendered by the Third Circuit in Harad. The Biborosch court chose not to apply the Harad decision to the case at hand because the

insurance policies involved in the two (2) cases were entirely different. As the circuit court was required to do, the Third Circuit in Harad addressed the application of a “professional services” exclusion to a businessowners package policy that insured an attorney. In Biborosch, the Pennsylvania Superior Court addressed the scope of coverage afforded by a professional liability insurance policy for a claim against a general manager of a business. The dispute between the policyholder and the insurance company centered on whether the conduct at issue qualified as a “professional” act or a non-“professional” act. The insurance company cited to the Harad decision for the Third Circuit’s discussion of what a “professional” act means under Pennsylvania law. Given the factual differences between the Harad case and the Biborosch case, most notably the fact that the Harad case did not construe a policy that insures against liability arising from the performance of professional services, the Pennsylvania Superior Court decided against applying the Harad case. The choice not to follow a case that involves the interpretation of a wholly separate and distinct liability policy is not the equivalent of a rejection of that case’s holding or underlying legal analysis. In fact, the court stated that “we might agree with the statements of the *Harad* court in a case that presented the same issue as was presented there”. Id. at 1055.

In Vogelsang v. Allstate Ins. Co., 46 F.Supp.2d 1319 (S.D. Fla. 1999), the Southern District of Florida addressed the issue of coverage under a business insurance policy for a lawsuit brought against an attorney and his law firm by a third party for malicious prosecution, slander, defamation, and intentional infliction of emotional distress arising out of the attorney’s representation of the third party’s former wife in a dissolution of marriage proceeding against the third party. Vogelsang, 46 F.Supp.2d at 1320. The third party alleged that the attorney drafted on behalf of his client a complaint which contained allegations of fraud against the third party

based on facts that the attorney knew were false and without merit. Id. The court held that the policy did not afford coverage by operation of the following exclusionary language:

Exclusions-Liabilities We Do Not Cover

Any accidental event, personal injury, or advertising injury, arising out of the rendering of or the failure to render scientific or professional services, or consulting business or technical services....

Id. at 1321 (emphasis added).

The court rejected the argument that the exclusion did not apply because the attorney had never rendered professional services to the third party. Id. The court observed that other jurisdictions have reasoned that nothing in the language of the professional services exclusion limits the exclusion to claims brought by clients of the professional and that those courts refused to impose a limitation that is not expressly set forth in the policy itself. Id. The court also referenced the following discussion contrasting general liability policies and professional liability policies:

“Commercial general liability (CGL) coverage and professional liability coverage ‘serve significantly different functions within the insurance industry.’ [CGL] offers comprehensive coverage to the insured and may even cover the provision of services in general, a professional liability policy ‘is designed to insure members of a particular professional group from the practice of liability arising out of a special risk inherent in the practice of the profession.’”

Id. at 1323 (citation omitted). Hayhurst claims that because this decision does not cite to a standard that ambiguities are to be interpreted in favor of the policyholder the Court should refuse to follow the analysis set forth therein. Once again, Hayhurst misses the point that the court found the language to be clear and unambiguous and, therefore, it is not surprising and certainly not fatal that the court chose not to engage in any discussion of how to interpret ambiguous policy language.

In Gould & Ratner v. Vigilant Ins. Co., 782 M.E.2d 749 (Ill. App. Ct. 2002), the Illinois Court of Appeals addressed a claim for coverage by the policyholder, a law firm, under a commercial insurance policy when it and one of its partners were sued by a third party for defamation and breach of fiduciary duty arising out of the law firm's representation of a client in a bankruptcy proceeding. See Gould & Ratner, 782 N.E.2d at 752. The third party was once a client of the law firm and accused the law firm of utilizing information that was protected by the attorney-client privilege during the cross-examination of the third party. Id. The court held that the policy did not afford any coverage for the claim by operation of the following exclusion:

“With respect to *bodily injury, property damage, personal injury or advertising injury* or any obligations assumed by contract:

This insurance does not apply to any claim or suit against the Insured for:

- a. rendering or failing to render written or oral professional legal services or advice; or
- b. rendering or failing to render any other written or oral services or advice that are not ordinary to the practice of law;

whether or not the Insured is acting in the capacity of a lawyer.”

Id. at 751 (Emphasis added).

The court rejected the law firm's argument that the exclusion applies only when a client is suing his or her lawyer for malpractice or some other misconduct. Id. at 757.

The circuit court also observed that other jurisdictions have held that professional services exclusions are not limited to situations where a client is suing the professional-policyholder. See Pekin Ins. Co. v. L.J. Shaw & Co., 684 M.E.2d 853 (Ill. App. Ct. 1997) (held that professional services exclusion was not limited to injuries caused to clients of the policyholder); Erie Ins. Group v. Alliance Environmental, Inc., 921 F.Supp. 537 (S.D. Ind. 1996)

(held that professional services exclusion to a general business liability policy is not limited only to claims by clients or those in privity with the policyholder); Hurst-Rosche Engineers, Inc. v. Commercial Union Ins. Co., 51 F.3d 1336 (7th Cir. 1995) (applying a professional services exclusion to a third party claim against the policyholder).

Hayhurst has not and does not cite to any case law demonstrating that his “privity” argument has been accepted by any jurisdiction. There can be no doubt that the courts that have addressed the “privity” argument have come to the same conclusion - - that general liability insurance policies are not designed to protect professionals from their professional liability exposure and as such it is appropriate to apply the exclusion so as to exclude from coverage an entire area of liability exposure, regardless of whether the claim is being pursued by a client or a third party.

Hayhurst cites to the decision rendered by the Third Circuit of the Louisiana Court of Appeals in Finnie v. LeBlanc, 856 So.2d 208 (La. App. 3 Cir. 2003) for the proposition that the court rejected an assertion that the “professional services” exclusion at issue in that case denied coverage for malicious prosecution and defamation claims. Hayhurst’s representation is not correct. The court determined that the “professional services” exclusion did not apply to the allegations brought by a client against a professional counselor on the grounds that the offensive conduct at issue - - the counselor’s lying about the existence of a sexual relationship between the client and the counselor and the counselor’s lying about the client stealing records from the counselor’s office - - did not fall within the realm of professional therapeutic services. In other words, the court refused to apply the professional services exclusion on the grounds that the allegations against the counselor did not involve the rendering of professional services, which was a threshold issue for application of the exclusion. The court was not asked to address, nor

did it address, the issue of whether the application of the exclusion turns on whether the claimant is the professional's client or a third party harmed by the professional's rendering of professional services to a client.

Hayhurst also cites to Utica Nat'l Ins. Co. of Texas v. American Indemn. Co., 141 S.W.3d 198 (Tex. 2004) for the contention that a "professional services" exclusion should only apply when the policyholder is alleged to have breached a professional standard of care. The court was presented with the issue of whether the negligent storage of anesthetics that became contaminated, which were later injected into patients, falls within the scope of "professional services". As the claim was being presented by patients, the issue of "privity" was never implicated and, this decision has no meaningful application to this coverage dispute.

Likewise, Hayhurst's citation to the decisions rendered in Johnson ex rel. Estate of Johnson v. Acceptance Ins. Co., 292 F.Supp.2d 857 (N.D. W.Va. 2003) (finding that services rendered to a group home resident were merely supervisory and custodial in nature and thus not "professional services"), and S.T. Hudson Engineers, Inc. v. Pennsylvania Nat'l Mut. Cas. Co., 909 A.2d 1156 (N.J.Super. 2006) (finding that liability exposure for failure to warn or give instructions did not fall within scope of "professional services" exclusion) are immaterial to the coverage dispute at hand. These cases deal with situations where there was a dispute between the policyholder and the insurance company over whether the conduct attributed to the policyholder was "professional" in nature.

These cases are not material to the determination of coverage in this matter because there is no genuine issue of material fact that Hayhurst is being sued in his capacity as an attorney licensed under the laws of the State of West Virginia for conduct engaged in by Hayhurst while representing the legal interests of CCMH in the underlying medical negligence litigation. There

has never been a dispute among the parties, nor could there be, that at all times relevant Hayhurst's conduct occurred in his "professional" capacity as a lawyer. In fact, Hayhurst admitted to Cincinnati back in February 2007 that Boggs' lawsuit involved a claim for malicious prosecution caused by the rendering or failure to render professional legal services. There is no genuine issue of material fact that Hayhurst could only have rendered such services to CCMH in his professional capacity, as opposed to an individual or non-professional capacity and, therefore, the Court does not need to conduct any analysis as to whether Hayhurst's conduct falls within the scope of "professional services".

Hayhurst cites to the decision rendered in Isle of Palms Pest Control v. Monticello Ins. Co., 459 S.E.2d 318 (S.C.App. 1994), wherein the court held that the professional liability exclusion was not applicable to extermination services rendered by the policyholder because such services were listed on the declarations as a covered hazard and, thus, to treat extermination services as "professional services" would render the policy coverage virtually meaningless, because it would exclude coverage for all claims arising from the policyholder's exterminating services, the very risk contemplated by the parties. Id. at 321.

This is not the situation presented by Hayhurst's coverage claim. As discussed above, Hayhurst did not seek or purchase coverage from Cincinnati for his professional risk exposure - - that coverage was purchased from Liberty. Hayhurst only purchased coverage for the business/non-professional risks attendant with the operation of his office, as evidenced by the policy declarations and the express language of the insurance policy. Thus, Hayhurst claim that the "professional services" exclusion takes away coverage that was expressly provided for this claim is without merit.

Ultimately, Hayhurst’s argument comes down to asking the Court to accept Hayhurst’s interpretation of the policy because Hayhurst’s interpretation results in coverage under the insurance policies. However, that is not the standard to be applied by the Court, as the mere fact that the parties do not agree as to the construction of the insurance policy does not render the insurance policy language ambiguous. See Syl. Pt. 1, Berkeley County Public Service Dist. v. Vitro Corp. of America, 152 W.Va. 252, 162 S.E.2d 189 (1968).

As demonstrated above, the “professional services” exclusion of the Businessowners Package policy is clear and unambiguous and valid and enforceable under West Virginia law. The circuit court correctly concluded that Cincinnati was entitled to summary judgment and a finding that it owed no duty to defend and indemnify Hayhurst under the policies as a matter of law.

C. HAYHURST CONTENDS 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.

Hayhurst contends that the Circuit Court erred when it concluded that the “professional liability” exclusion precluded coverage under the Personal Umbrella Liability policy for the allegations against Hayhurst. Hayhurst’s argument is misplaced and once again ignores the clear and unambiguous language of the insurance policy.

Hayhurst first contends that coverage under the Personal Umbrella Liability policy is owed because the underlying insurance policies (i.e., Hayhurst’s automobile liability policy and homeowners liability policy) do not afford coverage for “personal injury” claims, including malicious prosecution. Hayhurst’s discussion of the Personal Umbrella Liability policy being a “drop down” policy is curious in light of the fact that Cincinnati’s denial of coverage is not based

upon the mechanics of how or when the policy “drops down”, but rather based upon the application of the allegations in the First Amended Complaint to the clear and unambiguous terms of the policy itself.

The fact that the policy “drops down” does not negate the fact that the policy contains exclusionary provisions that can be enforced to bar coverage for the specific facts of a particular claim. The decision rendered by the Eastern District of Pennsylvania in Duff Supply Co. v. Crum & Forster Ins. Co., 1997 WL 255483 (E.D. Pa. 1997) expressly recognizes that coverage under a “drop down” umbrella policy is contingent upon the claim not being excluded under the terms of the umbrella policy. Thus, the issue remains whether the “professional liability” exclusion is applicable to the allegations against Hayhurst.

Next, Hayhurst argues that any exclusion in an umbrella policy that operates to exclude coverage when the policy “drops down” effectively eviscerates coverage otherwise expressly extended. Hayhurst does not cite to any policy language to support this argument nor does he offer any case law to support the contention that an umbrella policy is not permitted to include exclusionary provisions to limit the scope of coverage afforded. As discussed below, the policy never insured Hayhurst for his professional liability exposure.

Hayhurst cites to the Iowa Supreme Court decision in Clark-Peterson Co., Inc. v. Associates, Ltd., 492 N.W.2d 675 (Iowa 1992) and the Indiana Court of Appeals decision in Davidson v. Cincinnati Ins. Co., 572 N.E.2d 502 (Ind.Ct.App. 1991) in support of his argument. However, a review of these decisions reveals the courts were unwilling to apply exclusions contained in the policies at issue when the exclusions, as applied to the facts of the claims, would result in illusory coverage. Neither case is on point with respect to the “professional liability” exclusion under the Personal Umbrella Liability policy.

The decision rendered in Clark-Peterson Co., Inc. v. Independent Ins. Associates, Ltd., 492 N.W.2d 675 (Iowa 1992) does not compel coverage for Hayhurst under the policy. The Iowa Supreme Court determined that the policy expressly afforded coverage for employment discrimination claims but then included exclusionary provisions that all but precluded coverage for employment discrimination claims. As a result, the court refused to enforce the exclusionary provisions because to do so would go against the policyholder's reasonable expectations of coverage. The present case is distinguishable as the umbrella policy - - a personal umbrella liability policy - - includes no language that would create a reasonable expectation that Hayhurst would be insured against his professional liability exposure and, therefore, the policy exclusion for "professional liability" exposure does not take away any coverage that was expressly provided in the insuring agreement.

The decision rendered in Davidson v. Cincinnati Ins. Co., 572 N.E.2d 502 (Ind. Ct. App. 1991) is also distinguishable. In that case, the policyholder was sued for malicious prosecution and the issue presented was whether the allegations met the policy requirement of an "occurrence", which was defined to by the policy to mean "an accident, or a happening or event ... which occurs during the policy period which unexpectedly or unintentionally results in personal injury ...". The court concluded that it was reasonable for the policyholder to assume that if he were accused of malicious prosecution that it would meet the "occurrence" definition and be covered under the policy. The coverage issue presented did not involve the application of any exclusionary provision. This decision has no bearing on the present matter as Cincinnati's coverage decision is not based on the argument that the allegations against Hayhurst do not meet the policy requirement of an "occurrence" within the policy period.

Turning to the exclusionary language in the Personal Umbrella Liability policy, the policy clearly and unambiguously provides by operation of the “professional liability” exclusion that the insurance coverage does not apply to:

“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”. (Emphasis added).

The circuit court correctly concluded that there is no genuine issue of material fact that Boggs’ claim against Hayhurst involves a claim for malicious prosecution arising out of an act(s) committed by Hayhurst in the conduct of his profession as an attorney; i.e., the filing of counterclaims and motions for sanctions on behalf of his client, CCMH, against Boggs in the civil matters filed in the Circuit Court of Wood County, West Virginia, at docket numbers 03-C-296 and 03-C-623. Again, the purpose of the exclusion to exclude from coverage an entire area of liability exposure, regardless of whether the claim is being pursued by a client or a third party. The circuit court correctly concluded that there is no genuine issue of material fact that Hayhurst could only commit such acts in his professional capacity, as opposed to an individual or non-professional capacity.

Clearly, the allegations against Hayhurst fall within the scope of the plain and ordinary meaning of the words employed in the exclusion. The circuit court correctly concluded that the clear and unambiguous exclusionary language does not limit the scope of the exclusion to only those claims brought against Hayhurst by his clients as the exclusion contains no “privity” requirement. Hayhurst fails to substantiate his argument that he “reasonably expected” to be insured under the Personal Umbrella Liability policy for a malicious prosecution claim brought by a client’s former adversary when the “professional liability” exclusion made clear that there would be no coverage afforded under the policy for liability arising out of any act committed by

Hayhurst in the conduct of any profession or “business”, even if covered by “underlying insurance”. It cannot be over-stated that the insurance policy is a personal umbrella policy, not a professional umbrella policy. The circuit court correctly concluded that the purpose of the exclusion is to shift Hayhurst’s liability exposure for his professional acts onto himself and away from Cincinnati. Hayhurst, in turn, chose to insure such risk with Liberty and not Cincinnati.

V. CONCLUSION

With the benefit of a full view of the facts, issues and arguments surrounding this coverage dispute, the Court should recognize that the Circuit Court of Wood County properly applied the allegations in the First Amended Complaint to the express terms of the Businessowners Package policy and the Personal Umbrella Liability policy, utilizing the standards under West Virginia law for the interpretation of insurance policies and coverage exclusions. The Court should affirm the decision of the Circuit Court of Wood County.

WHEREFORE, Appellee, The Cincinnati Insurance Company, respectfully requests this Honorable Court to enter an order affirming the Circuit Court of Wood County’s “Findings of Fact and Conclusions of Law in Support of the Order Granting Defendant, The Cincinnati Insurance Company’s Motion for Summary Judgment and Denying the Motions for Summary Judgment of Plaintiff, Bernard Boggs and Defendant, Richard A. Hayhurst”, entered on March 23, 2009.

Respectfully submitted,

WALSH, COLLIS & BLACKMER, P.C.

By: 
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The Cincinnati Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **RESPONSE TO APPELLANT HAYHURST'S CERTIFIED QUESTION BRIEF** has been mailed by U.S. Mail to counsel of record via first class mail, postage pre-paid, this 10th day of November, 2009.

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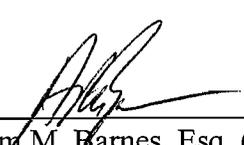
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