

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***

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

PETITIONER'S REPLY BRIEF

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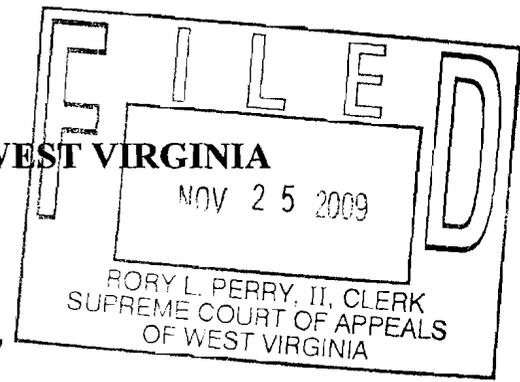


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I. INTRODUCTION

This is a reply brief upon review of certified questions raising the issues of whether (1) the reasonable expectations of the petitioner, Richard A. Hayhurst, that his commercial general liability policy would provide coverage for claims of malicious prosecution will be vindicated and (2) a personal umbrella policy with “drop down” coverage provides malicious prosecution coverage when the underlying policies provide no malicious prosecution coverage.

Based upon the policy language, circumstances, and applicable law, Mr. Hayhurst submits that (1) coverage for malicious prosecution claims was not clearly and unambiguously excluded under his commercial general liability policy and (2) because neither of the underlying policies provided any malicious prosecution coverage, he is also entitled to malicious prosecution coverage expressly provided in his personal umbrella policy.

II. STATEMENT OF FACTS

By stating allegations as fact, Cincinnati’s brief contains repeated misrepresentations. For example, Cincinnati’s brief states as fact the following: “This counterclaim was unsupported by reasonable or probable cause,”¹ but there obviously has never been such a finding. Indeed, the summary judgment order expressly states:

The allegations by Plaintiff . . . against Defendant, Richard A. Hayhurst are set forth in the First Amended Complaint . . . As will be addressed by the Court in the ‘Conclusions of Law’ Section, for purposes of determining the coverage issues presented by the motions for summary judgment, the allegations set forth in the First Amended Complaint are taken at face value (i.e., without regard to the truth or falsity of the averments) and, therefore, the Court’s recitation of the allegations set forth in the First Amended Complaint is for the sole purpose of resolving this coverage dispute, and is not

¹ Cincinnati’s Brief at 3.

intended to be and is not to be interpreted as a judicial finding as to the merits of said allegations."²

Frankly, Mr. Hayhurst is shocked that his own insurance company would turn on him to the degree of representing allegations as facts when Mr. Hayhurst's motion for summary judgment is not only pending in the underlying case, but was reserved in the summary judgment order:³

The issues of whether the allegations in the First Amended Complaint are supported by the evidence and whether Plaintiff can meet his burden of proof on all issues of liability and damages are not the subject of the Court's Findings of Fact and Conclusions of Law and, thus, are left for another day.⁴

Thus, Mr. Hayhurst suggests that this Court disregard Section II.A of Cincinnati's brief which inaccurately represents allegations as facts and that those facts are somehow uncontested by Mr. Hayhurst when, indeed, Mr. Hayhurst vehemently disputes the existence of any genuine issue of material facts that would support any viable claim of malicious prosecution against him.

In addition to representing allegations as facts somehow adjudicated by the circuit court, Cincinnati also repeatedly represents its characterizations as facts. For example, it states, "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.*'"⁵ In fact, Mr. Hayhurst simply tendered his defense to Cincinnati under its two policies that expressly provided

² Summary Judgment Order at ¶2 and n.1 (emphasis supplied).

³ Cincinnati's misrepresentations are all the more disconcerting because it drafted the summary judgment order entered by the circuit court that properly distinguished between allegations and facts. Indeed, the Court may notice that some of Cincinnati's statement of facts appears to have been cut and pasted from the summary judgment order it drafted. Thus, it is hard to understand why fails to properly differentiate between allegations and facts in its brief.

⁴ *Id.* at n.1 (emphasis supplied).

⁵ Cincinnati's Brief at 6 (emphasis in original).

coverage for malicious prosecution claims against Mr. Hayhurst just as he tendered his defense to his professional liability carrier with a policy that, likewise, expressly provided coverage for malicious prosecution claims. The only difference has been that Mr. Hayhurst's professional liability carrier did not attempt to negate Mr. Hayhurst's reasonable expectations of coverage, whereas Cincinnati has denied him coverage.

The only pertinent facts to this case are the language of the two policies; the assertion of a claim of malicious prosecution against Mr. Hayhurst by a non-client; and Mr. Hayhurst's reasonable expectations of coverage. Under those facts, Mr. Hayhurst submits that he is entitled to coverage both under Cincinnati's CGL and umbrella policies.

III. STANDARD OF REVIEW

Both parties agree that, "The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*."⁶ Applying such standard of review in this case, Mr. Hayhurst requests that coverage for Mr. Boggs' malicious prosecution be found under both the commercial general liability and umbrella policies, and that Cincinnati's arguments to avoid providing him with the defense and indemnification he reasonably expected should be rejected.

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 STRICTLY CONSTRUED AGAINST DEFEATING INDEMNITY; AND BY FAILING TO VINDICATE THE POLICYHOLDER'S REASONABLE EXPECTATIONS OF COVERAGE.

The flaw in Cincinnati's reasoning concerning the circuit court's failure to apply the appropriate standards is illustrated by its statement: "The fact that the memorandum opinion does

⁶ Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996).

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.”⁷ This “‘absence’ does not exclude ‘presence’” argument is both illogical and contrary to the rule that “a court speaks only through its orders.”⁸ Likewise, Cincinnati’s argument that the record contains insufficient “evidence” on ambiguity⁹ makes no sense because the issue is one of law, not of fact: “The question as to whether a contract is ambiguous is a question of law to be determined by the court.”¹⁰

“Whenever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning,” this Court has repeatedly held, “it is ambiguous.”¹¹ More specifically,

⁷ Cincinnati Brief at 14.

⁸ *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 671, 535 S.E.2d 727, 736 (2000) (citations omitted); see also *Davis v. Mound View Health Care, Inc.*, 220 W. Va. 28, 32, 640 S.E.2d 91, 95 (2006); *Legg v. Felinton*, 219 W. Va. 478, 483, 637 S.E.2d 576, 581 (2006); *McDaniel v. Division of Labor*, 214 W. Va. 719, 724 n.8, 591 S.E.2d 277, 282 n.8 (2003); *State ex rel. Brooks v. Zakaib*, 214 W. Va. 253, 266, 588 S.E.2d 418, 431 (2003).

⁹ Cincinnati’s Brief at 14-15.

¹⁰ Syl. pt. 6, *McGraw v. American Tobacco Co.*, No. 33873 (W. Va. June 22, 2009); see also Syl. pt. 4, *Dan’s Carworld, LLC v. Serian*, 223 W. Va. 478, 677 S.E.2d 914 (2009); Syl. pt. 6, *Certain Underwriters at Lloyd’s v. Pinnoak Resources, LLC*, 223 W. Va. 336, 674 S.E.2d 197 (2008); Syl. pt. 5, *Estate of Tawney v. Columbia Natural Resources, LLC*, 219 W. Va. 266, 633 S.E.2d 22 (2006); Syl. pt. 2, *State ex rel. Kaufman, supra*; Syl. pt. 4, *Flanagan v. Stalnaker*, 216 W. Va. 436, 607 S.E.2d 765 (2004); Syl. pt. 4, *West Virginia Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 602 S.E.2d 483 (2004); Syl. pt. 3, *Energy Development Corp. v. Moss*, 214 W. Va. 577, 591 S.E.2d 135 (2003); Syl. pt. 2, *In re Joseph G.*, 214 W. Va. 365, 589 S.E.2d 507 (2003); Syl. pt. 2, *Supervalu Operations, Inc. v. Center Design, Inc.*, 206 W. Va. 311, 524 S.E.2d 666 (1999); Syl. pt. 1, *Jessee v. Aycoth*, 202 W. Va. 215, 503 S.E.2d 528 (1998); Syl. pt. 1, *Berkeley County Public Service District v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968);

¹¹ Syl. pt. 1, *Prete v. Merchants Property Ins. Co.*, 159 W. Va. 508, 223 S.E.2d 441 (1976); see also Syl. pt. 3, *Glen Falls Ins. Co. v. Smith*, 217 W. Va. 213, 617 S.E.2d 760 (2005); Syl. pt. 3, *Stanley, supra*; Syl. pt. 5, *Riffe v. Home Finders Associates, Inc.*, 205 W. Va. 216, 517

“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.”¹² 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.”¹³

Obviously, Mr. Hayhurst would never contend that his commercial general liability policy or personal umbrella policy provided coverage for professional negligence. Indeed, that is why he separately purchased professional liability insurance coverage.

He reasonably did anticipate, however, that if he were the subject of a malicious prosecution, defamation, or other suit by a non-client expressly covered under the “personal injury”

S.E.2d 313 (1999); Syl. pt. 2, *Murray v. State Farm Fire and Cas. Co.*, 203 W. Va. 477, 509 S.E.2d 1 (1998); Syl. pt. 3, *Pilling v. Nationwide Mut. Fire Ins. Co.*, 201 W. Va. 757, 500 S.E.2d 870 (1997); Syl. pt. 5, *Hamric v. Doe*, 201 W. Va. 615, 499 S.E.2d 619 (1997); Syl. pt. 1, *State v. Janicki*, 188 W. Va. 100, 422 S.E.2d 822 (1992); Syl. pt. 2, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986); Syl. pt. 2, *Huggins v. Tri-County Bonding Co.*, 175 W. Va. 643, 337 S.E.2d 12 (1985); Syl. pt. 1, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W. Va. 337, 332 S.E.2d 639 (1985).

¹² Syl. pt. 10, *Nat’l Mut. Ins. Co. v. McMahan & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998); *see also* 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 Authority v. Brackenridge & Associates, Inc.*, 217 W. Va. 304, 617 S.E.2d 851 (2005); Syl. pt. 2, *Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W. Va. 748, 613 S.E.2d 896 (2005); Syl. pt. 8, *Mitchell v. Broadnax*, 208 W. Va. 36, 537 S.E.2d 882 (2000); Syl. pt. 2, *Marcum Trucking Co., Inc. v. U.S. Fidelity & Guar. Co.*, 190 W. Va. 267, 438 S.E.2d 59 (1993).

¹³ Syl. pt. 9, *McMahan & Sons, supra*; *see also* *Jenkins v. State Farm Mut. Auto. Ins. Co.*, 219 W. Va. 190, 196, 632 S.E.2d 346, 352 (2006); *Horace Mann Ins. Co. v. Adkins*, 215 W. Va. 297, 302, 599 S.E.2d 720, 725 (2004); *Russell v. Bush & Burchett, Inc.*, 210 W. Va. 699, 705, 559 S.E.2d 36, 42 (2001); *Erie Ins. Property and Cas. Co. v. Stage Show Pizza, JTS, Inc.*, 210 W. Va. 63, 67, 553 S.E.2d 257, 262 (2001); *Riffe, supra* at 222, 517 S.E.2d at 319; Syl. pt. 6, *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W. Va. 385, 508 S.E.2d 102 (1998).

sections of his commercial general liability and personal umbrella policies, Cincinnati would not renege on its promise by claiming that, because he was serving as an attorney when he engaged in the activities that resulted in the malicious prosecution suit, the “malicious prosecution” coverage expressly provided was excluded.

Indeed, if Cincinnati’s argument prevails, what would prevent a lawyer’s automobile liability insurer from arguing that no coverage would be provided if the lawyer was involved in an automobile accident while driving with a client to a hearing?

As noted in Mr. Hayhurst’s initial brief, 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.¹⁴

In this case, however, Cincinnati was successful in diverting the circuit court’s attention from the guiding principles this Court has established for examining exclusionary language in an insurance policy and Mr. Hayhurst submits that application of those principles compels the conclusion that he enjoys coverage for malicious prosecution suits by non-clients both under his commercial general liability and personal umbrella coverage policies.

¹⁴ See, e.g., *Johnson ex rel. Estate of Johnson v. Acceptance Ins. Co.*, 292 F. Supp. 2d 857, 866 (N.D. W. Va. 2003) (“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 ‘he 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.”).

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.

Mr. Hayhurst agrees with this Court's holding in Syllabus Point 4 of *Brackenridge*¹⁵ 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," but the circumstances of this case are much different than in *Brackenridge*.

In *Brackenridge*, unlike in the instant case, the negligence claims made against the insured engineering firm were not expressly covered under the commercial general liability policy at issue.¹⁶ Here, the commercial general liability policy expressly, by its terms, affirmatively provides coverage for "malicious prosecution" claims.¹⁷

Moreover, in *Brackenridge*, unlike the instant case, no umbrella policy with "drop down" coverage was at issue.¹⁸ Rather, this Court correctly held, "All of the allegations of negligence related to the provision of professional services provided by Brackenrich are framed in terms of duties owed by an ordinary, reasonable, prudent engineer."¹⁹ Otherwise, the entire commercial general liability policy at issue would have been converted to a professional liability insurance

¹⁵ *Supra* note 11.

¹⁶ *Id.* at 307, 617 S.E.2d at 854.

¹⁷ *Exhibit A.*

¹⁸ *Id.*

¹⁹ *Id.* at 312, 617 S.E.2d at 859.

policy. In this case, however, Mr. Hayhurst is not seeking coverage for a professional negligence claim, like the one in *Brackenridge*, because he has not been sued for professional negligence, but is seeking coverage for a malicious prosecution claim, which is expressly covered by the subject policy for which he was sued by a non-client.

One need look no further than to the allegations of the amended complaint against Mr. Hayhurst to see that Mr. Boggs is asserting something other than professional negligence against him:

28. Counterclaim I, as filed by Defendant, Richard A. Hayhurst, was unsupported by reasonable or probable cause. . . .

33. Counterclaim II was unsupported by reasonable or probable cause. . . .

43. Richard A. Hayhurst conducted the prosecution of Counterclaim I and Counterclaim II against the Plaintiff, in part, by means of false allegations and statements or allegations and statements made with reckless disregard for the truth, to the Plaintiff and to the Wood County Circuit Court.

44. Richard A. Hayhurst filed Counterclaims I and II without reasonable or probable cause with intent to harm Plaintiff herein.

45. Richard A. Hayhurst had knowledge of that the allegations and statements to the Plaintiff and to the Wood County Circuit Court, referenced in Paragraph 43, were false or, in the alternative, made such allegations and statements with reckless disregard for the truth.

46. Richard A. Hayhurst [sic], at the time of filing Counterclaim I and Counterclaim II, had no evidence that the claims asserted against Camden-Clark . . . were frivolous

50. The filing of Counterclaim I and II . . . were intentional and wrongful acts of Richard A. Hayhurst done without just cause and showed an intent to inflict an injury on Plaintiff in the form of recovering alleged monetary damages and imposing additional, unnecessary litigation costs. . . .

52. Richard A. Hayhurst's conduct in the filing and prosecution of Counterclaim I and Counterclaim II was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency.

53. Richard A. Hayhurst's conduct in tortiously filing and prosecution [sic] of Counterclaim I and Counterclaim II was done with intent to inflict emotional 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. . . .

58. Richard A. Hayhurst's conduct with respect to its [sic] malicious prosecution of Counterclaim I and Counterclaim II against the Plaintiff was so malicious, intentional, willful or wanton as to justify an award of punitive damages in this matter.²⁰

Obviously, although Mr. Hayhurst vehemently disputes these allegations, they do not involve a claim, as in *Breckenridge*, that a policyholder was negligent in providing professional services to the plaintiff. Rather, they are precisely the type of allegations for which "personal injury" and/or "advertising injury" provisions, that customarily extend to claims for malicious prosecution, defamation, false arrest, false imprisonment, and similar intentional torts, applies.

In *Insurance Company of North America v. Milberg Weiss Bershad Specthrie & Lerach*,²¹ for example, the law firm of Milberg Weiss was sued by an economic consulting firm and a defense expert for malicious prosecution, abuse of process, tortious interference, defamation, and commercial disparagement.

As in this case, Milberg Weiss' general liability carrier, INA, asserted that the suit, otherwise covered by the "personal injury" provisions of the CGL policies involved, were excluded by the "professional services" exclusion as the allegedly tortious acts committed by Milberg Weiss

²⁰ *Exhibit B*.

²¹ 1996 WL 520902 (S.D.N.Y).

were in furtherance of the representation of their clients, just as the allegedly tortious acts committed by Mr. Hayhurst were in furtherance of the representation of his client.

Rejecting INA's assertion of its "professional services" exclusion, the court held:

To avoid its duty to defend, an insurer has the burden of showing that the allegations in a complaint are "solely and entirely" within the policy's exclusions. *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1149 (2d Cir. 1989). A court should not excuse an insurer from its duty to defend unless there is no possible factual or legal basis on which the insurer might eventually be held to indemnify the insured. *Id.*

The policies do not define professional services. Courts have stated that in determining whether an act is of a professional nature, a court must look not to the title of the person performing it, but to the act itself. *See Marx v. Hartford Accident and Indemnity Co.*, 157 N.W.2d 870, 872 (Sup. Ct. Neb. 1983). "Something more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind." *Id.*

The *Lexecon* defamation claims based on Milberg's statements to the press and to colleagues at a conference are not wholly and absolutely within the professional services exclusion. While the statements were made against a background of litigation, they were of a kind which could have been made by any competitor or antagonist, lay or otherwise. The criticisms of *Lexecon* and *Fischel* for concluding that *Lincoln* was financially sound did not require legal training, nor derive solely from the provision of legal services such as the giving of advice or preparation of legal papers, or representation in court. The animus motivating the statements could have inspired any non-lawyer, nonprofessional speaker. The connection between the statements and Milberg's rendering of professional services to the plaintiff classes in *Shields* or *Apple Computer* is not close enough to fall wholly within the exclusion.

Accordingly, INA had a duty to defend Milberg against the *Lexecon* claims.²²

²² *Id.* at *5-6 (emphasis supplied).

Likewise, in this case, Mr. Boggs has not only sued Mr. Hayhurst's client, Camden-Clark, for malicious prosecution, alleging that it bore animus towards him, but he has also sued Mr. Hayhurst, alleging that he separately bore animus towards him. Again, although Mr. Hayhurst denies this allegation, because it is not "solely and entirely" within Cincinnati's "professional services" exclusion, this Court, like the court in *Milberg Weiss*, should rule that he is covered for Mr. Boggs' malicious prosecution claim.

Moreover, because Cincinnati knew that Mr. Hayhurst's "business" for which it sold him a "Businessowners Package Policy" was as a practicing attorney who might need "malicious prosecution" coverage, it should not be able to disclaim coverage for such claim.

In *Isle of Palms Pest Control v. Monticello Ins. Co.*,²³ 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:

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

²³ 319 S.C. 12, 459 S.E.2d 318 (S.C. App. 1994).

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.²⁴

Because to give sweeping effect to the professional services exclusion advocated by Cincinnati renders its policy virtually meaningless,²⁵ 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.

With respect to the dissenting opinion in *Harad v. Aetna Cas. and Sur. Co.*,²⁶ relied upon by Mr. Hayhurst, it is self-evident for Cincinnati to argue that it "did not carry the day,"²⁷ but Mr. Hayhurst reiterates that its analysis is more consistent with this Court's jurisprudence:

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

²⁴ *Id.* at 19, 459 S.E.2d at 321 (emphasis supplied).

²⁵ Cincinnati's ability to theorize as to limited circumstances under which it might concede the existence of malicious prosecution coverage is unavailing. 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*, there are hypothetical facts under which the insurers in those cases would have conceded coverage. For example, in *McMahon*, where a "care, custody, or control" exclusion was involved, the insurer would not have disputed coverage where one of its employees negligently injured a passerby with a nail gun even its use occurred while constructing a house. The test is not, as Cincinnati describes it, whether coverage would be rendered wholly illusory by an exclusion, but rather whether the exclusion "would largely nullify the purpose of indemnifying the insured." *McMahon, supra* at 742, 356 S.E.2d at 496 (emphasis supplied and citation omitted); *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 261; *Riffe, supra* at 222, 517 S.E.2d at 319; Syl. pt. 6, *Consolidation Coal, supra*. Here, of course, to deny "malicious prosecution" coverage based upon an undefined "professional services" exclusion "would largely nullify the purpose of indemnifying the insured" and, thus, the circuit court respectfully erred.

²⁶ 839 F.2d 979 (3rd Cir. 1988).

²⁷ Cincinnati Brief at 26.

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 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.²⁸

Mr. Hayhurst submits that this reasoning is sound. Moreover, Mr. Hayhurst stands by his argument that after *Harad*, Pennsylvania state courts have rejected the majority’s analysis in *Harad* where

²⁸ *Supra* note 22 at 986-87 (emphasis supplied, citations omitted, footnotes omitted).

the policy, as in the instant case, did not contain a definition of the term “professional services.”²⁹

Mr. Hayhurst also stands by the cases cited in his initial brief that support his position concerning interpretation and application of a professional services exclusion in this context and requests that this Court hold that the professional services exclusion does not apply to avoid coverage for Mr. Boggs’ malicious prosecution claim which is expressly covered under both Cincinnati’s CGL and umbrella policies.

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.

Cincinnati concedes that in *Clark-Peterson Co., Inc. v. Independent Ins. Associates, Ltd.*,³⁰ which as in this case involved a Cincinnati “drop down” umbrella 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.”³¹ As a result, Cincinnati admits that “the court refused to enforce the exclusionary provisions because to do so would go against the policyholder’s reasonable

²⁹ 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.” (emphasis supplied).

³⁰ 492 N.W.2d 675 (Iowa 1992).

³¹ Cincinnati Brief at 35.

expectations of coverage.”³² Its sole argument, however, is that *Clark-Peterson* is not applicable because “the policy exclusion for ‘professional liability’ exposure does not take away any coverage that was expressly provided in the insuring agreement,”³³ but this is simply incorrect.

As noted in its own brief, the umbrella policy expressly provides coverage for “personal injury” claims which are expressly defined to include claims for “Malicious prosecution.”³⁴ Moreover, *Cincinnati* does, despite its protestations to the contrary, argue that the policy exclusion takes away this coverage, just as it unsuccessfully made the same argument in *Clark-Peterson*: “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”³⁵ Consequently, just as the court held in *Clark-Peterson*, “the exclusion effectively guts the . . . coverage previously agreed to,” “[t]o deny coverage . . . would be to withdraw with the policy’s left hand what is given with its right,” and “[t]he 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.”³⁶

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 11. Indeed, as noted by Mr. Hayhurst in his initial brief, the court held in *Davidson v. Cincinnati Ins. Co.*, 572 N.E.2d 502 (Ind. Ct. App. 1991), that the policy was entitled to coverage for a malicious prosecution claim under a personal umbrella policy with language identical to the pertinent language in this case.

³⁵ *Id.* at 36.

³⁶ 492 N.W.2d at 678-79.

Finally, the very language of the “professional services” exclusion in the personal umbrella policy,³⁷ relied upon by Cincinnati, supports Mr. Hayhurst’s position because it excludes claims for “‘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.’”³⁸ In other words, Mr. Hayhurst’s “personal umbrella policy” was not a “legal malpractice policy” and provided no coverage for legal malpractice claims by his clients. Here, of course, Mr. Boggs has not asserted a claim against Mr. Hayhurst for “malpractice,” which the policy excludes, but for “malicious prosecution,” which the policy covers.

IV. CONCLUSION

As noted in Mr. Hayhurst’s initial brief, 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.”³⁹ Consequently, it deferred ruling on the underlying cross-motions for summary judgment, continued the trial, stayed the underlying proceedings, and certified questions to this Court.

Mr. Hayhurst submits that, at Cincinnati’s urging, 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

³⁷ *Exhibit C.*

³⁸ Obviously, by use of the language “even if covered by ‘underlying insurance,’” this was both an umbrella and an excess policy, i.e., it provides primary coverage when there is no coverage under the underlying policies, and it provides excess coverage when, by its own provisions, it covers a claim that is also covered by one or more of the underlying policies.

³⁹ Tr., Nov. 5, 2008, at 73.

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.

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.

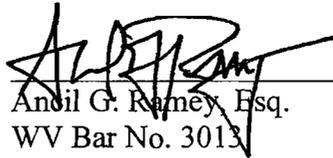
Finally, the personal umbrella policy purchased by Mr. Hayhurst “drops down” to fill any gaps in liability coverage; expressly provides coverage for “malicious prosecution” claims; the subject exclusion is labeled “professional liability” and references “malpractice,” “error,” and “omissions;” and Mr. 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 court in the *Clark-Peterson* case, in particular, involving a Cincinnati umbrella policy, supports 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 CGL and umbrella policies.

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2009, I served the foregoing Petitioner's Reply Brief upon all counsel of record, by depositing a true copy thereof in the United States Mail, postage prepaid, in envelopes addressed as follows:

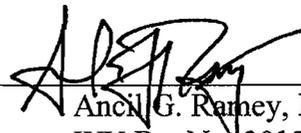
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EXHIBITS

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