

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35223

BERNARD BOGGS, *Plaintiff-Below*

v.

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

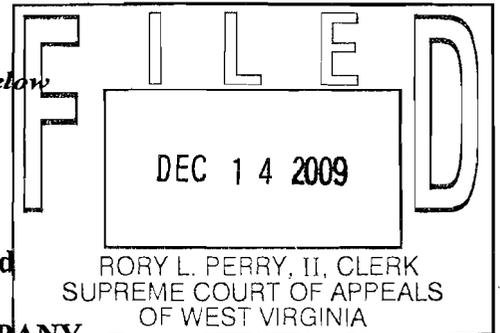
and

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

Reply Brief
RESPONSE TO RESPONDENT BOGGS' BRIEF

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

Cincinnati refers to and incorporates in full by reference the discussion set forth in its previously filed “Response to Appellant Hayhurst’s Certified Question Brief”.

II. **STATEMENT OF FACTS**

Cincinnati refers to and incorporates in full by reference the discussion set forth in its previously filed “Response to Appellant Hayhurst’s Certified Question Brief”.

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. **BOGGS’ ASSIGNMENTS OF ERROR**

A. **BOGGS CONTENDS THE CIRCUIT COURT ERRONEOUSLY DETERMINED THAT THE PROFESSIONAL SERVICES EXCLUSION IN THE BUSINESSOWNERS PACKAGE POLICY WAS APPLICABLE AND ENFORCEABLE BECAUSE IT STRIPS HAYHURST OF ANY BENEFICIAL COVERAGE UNDER THE TERMS OF THE BUSINESSOWNERS PACKAGE POLICY, RENDERING THE POLICY TERMS, INCLUDING THE PROFESSIONAL SERVICES EXCLUSION AMBIGUOUS.**

Boggs contends that Cincinnati’s knowledge that Hayhurst was a practicing lawyer precludes the enforcement of the “professional services” exclusion as to enforce the exclusion is to deny Hayhurst any beneficial coverage under the policy. This contention is without merit.

Boggs' 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 and, thus, it is wholly appropriate to exclude from coverage an entire realm of liability that is the specific scope of professional liability insurance. 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). Boggs offers the Court no legal authority to reject the Harad analysis. Cincinnati refers to and incorporates in full by reference its discussion of the Harad case and the line of cases from other jurisdictions following that decision set forth in its previously filed “Response to Appellant Hayhurst’s Certified Question Brief”.

That dichotomy is at play in this case. The policy in question is a Businessowners Package Policy, which was intended to cover liability arising from the operations of Hayhurst’s business operation, and not his professional operations. Hayhurst clearly recognized this distinction as manifested by the fact that Hayhurst purchased a separate professional liability

policy from another insurance carrier and refused to accept the option of purchasing professional liability coverage from Cincinnati under the very policy at issue. There simply is no evidence that Hayhurst purchased the Businessowners Package Policy from Cincinnati to protect himself against professional liability exposure.

Contrary to Boggs' contention, the policy in question does not afford illusory coverage. Two (2) Cincinnati representatives, Norman Kirkpatrick and Richard Hill, have acknowledged that depending upon the specific allegations of a particular claim the policy does 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. See Depo. Tr. of Norman Kirkpatrick, p. 15, lines 5-18. 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. See Depo Tr. of Richard Hill, p. 21, line 21 through p. 24, line 14. 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. See id., p. 24, lines 15-21.

Boggs' argument ignores the position adopted by the Court with respect to professional liability exclusions. Cincinnati reiterates that the Supreme Court of Appeals in the decisions rendered in State Auto. Mut. Ins. Co. v. Alpha Eng'g Servs., Inc., 208 W.Va. 713, 542 S.E.2d 876 (2000) and Webster County Solid Waste Auth. v. Brackenrich & Assocs., Inc., 217 W.Va.

304, 617 S.E.2d 851 (2005) has accepted the validity of professional liability exclusions, going so far as to affirmatively acknowledge in the Webster decision “a clear line of authority from this Court recognizing the validity of professional liability exclusionary language” and issuing a Syllabus Point 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.”

Webster, Syl. Pt. 4, 617 S.E.2d at 857 (emphasis added).

Contrary to Boggs’ argument, the Court has accepted as a matter of general liability insurance coverage law that when it comes to liability exposure for professional conduct, professionals such as Hayhurst bear the risk of liability arising in connection with Hayhurst’s performance of his legal services, regardless of whether Hayhurst is being sued by his client or a third party, unless Hayhurst has specifically purchased professional liability coverage from the insurer. A review of these cases demonstrates that the Court did not condition its holdings upon whether the claimant was a client or a third party, nor did the Court suggest that its view of the professional services/professional liability exclusion was contingent upon a relationship between the claimant and the insured-professional. Boggs’ argument ignores the fact that the Court reached its decisions regarding the application of professional services/professional liability exclusions with the recognition and understanding of the legal standards for interpretation and application of policy exclusions.

Syllabus Point 4 of the Webster decision is a deliberative, far-reaching holding that unequivocally recognizes the right of an insurance company to exclude an entire category of legal liability from a general liability policy. The clear import is that professionals such as Hayhurst must specifically purchase professional liability coverage, either by endorsement

(which Hayhurst deliberately chose not to do) or through a separate and distinct professional liability policy (which Hayhurst did through Liberty Underwriters Insurance, Inc.).

In sum, the Court acknowledges that professional liability insurance exists and is available for professionals seeking such protection and that general liability carriers are within their right to exclude coverage for professional liability exposure. Clearly, Cincinnati excluded from the Businessowners Package Policy liability due to the rendering of professional legal services by Hayhurst, regardless of whether the claimant is a client or a third party. As a matter of law, based upon the allegations against Hayhurst set forth in the First Amended Complaint and the plain, clear and unambiguous language of the Businessowners Package Policy, Cincinnati is not obligated to provide a defense or indemnification to Hayhurst in this matter.

The significance of the existence of the LIU 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 LIU 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 LIU. Hayhurst had no reasonable expectation that the Businessowners Package policy would insure him against professional liability exposure.

B. BOGGS CONTENDS THE CIRCUIT COURT ERRONEOUSLY DETERMINED THAT THE PROFESSIONAL SERVICES EXCLUSION IN THE BUSINESSOWNERS PACKAGE POLICY WAS APPLICABLE BECAUSE THERE IS NO EVIDENCE THAT THE PROFESSIONAL SERVICES EXCLUSION AT ISSUE WAS CONSPICUOUS, PLAIN AND CLEAR AND THAT THE PROVISION WAS NOT BROUGHT TO HAYHURST'S ATTENTION.

Boggs' contention that the "professional services" exclusion was not conspicuous, plain and clear is premised on the fact that the exclusion is contained on page 46 of a 61 page document. The Court should reject this argument because the issue is not determined by where the exclusion appears in the policy but how the exclusion is presented in the policy.

A review of Form IB 101 04 99 of the policy demonstrates that the "professional services" exclusion is conspicuous, plain and clear. First, the form includes a table of contents that advised Hayhurst that the exclusions for the liability coverage began on page 42. Second, the form itself clearly highlights the section containing "Exclusions" with a bolded heading. The "Exclusions" section starts with a bolded statement "**Applicable to Business Liability Coverage**" (a direct reference to the preceding titled section) that is immediately followed by the statement "this insurance does not apply to" that leads into the specifically enumerated exclusions. Third, each exclusion includes a separate sub-heading that is bolded, including the sub-heading "**J. Professional Services**". Fourth, the relationship of the exclusion to the insuring agreement is obvious and, furthermore, the provisions are all contained within a span of four (4) pages within the same policy form. Fifth, the Declarations page clearly indicates that Hayhurst did not purchase professional liability coverage from Cincinnati, which Hayhurst concedes.

Boggs offers Hayhurst's Affidavit that was produced in a companion coverage matter filed in the Southern District of West Virginia to suggest that Hayhurst was never advised by his insurance broker that the "professional services" exclusion would not cover the type of malicious

prosecution claim being asserted by Boggs in this matter. The Court should be aware that the Affidavit was prepared by Hayhurst almost two (2) months after his discovery deposition in this matter during which he never testified that he expected coverage for this claim based upon the representations of his insurance broker. See Transcript of Deposition of Richard Hayhurst, dated August 22, 2008, marked hereto as Exhibit 1. Clearly, the affidavit was not prepared by Hayhurst to clarify ambiguous or confusing testimony or to address newly discovered evidence and, therefore, the Court is free to disregard the proffered testimony. See Kiser v. Caudill, 215 W.Va. 403, 599 S.E.2d 826 (2004). Significantly, Hayhurst himself does not even cite the Affidavit in support of his appeal of the circuit court's decision. Finally, there is no evidence that Hayhurst did not receive a copy of the insurance policy or that he was otherwise denied any opportunity to read the policy.

C. **BOGGS CONTENDS THE CIRCUIT COURT ERRONEOUSLY DETERMINED THAT THE TERMS OF THE PROFESSIONAL SERVICES EXCLUSION IN THE BUSINESSOWNERS PACKAGE POLICY WERE CLEAR AND UNAMBIGUOUS.**

Boggs contends the circuit court misconstrued the Court's decisions in Webster County Solid Waste Auth. v. Brackenrich & Assocs., Inc., 217 W.Va. 304, 617 S.E.2d 851 (2005) and State Auto. Mut. Ins. Co. v. Alpha Eng'g Servs., Inc., 208 W.Va. 713, 542 S.E.2d 876 (2000). However, Boggs ignores the fact that the exclusionary language reviewed by the Court applied to liability "due to rendering or failure to render any professional service", which is the same operative language at issue in the "professional services" exclusion. Again, Boggs fails to recognize that the Court's Syllabus Point #4 in the Webster decision clearly recognized the validity and purpose behind professional services/liability exclusions.

That the present case is not "on all fours" with the factual scenarios presented by the Webster and Alpha cases is not fatal. The Court clearly did not attempt to limit the validity of

professional liability exclusions to negligent or faulty workmanship or services claims or impose a privity requirement. The obvious import of the Court's holding is that professional liability coverage is not included within a general liability policy unless the insured affirmatively purchases the coverage under the policy.

Boggs' contention that the decisions rendered in Harad, Vogelsang and Gould & Ratner are distinguishable because the language of the professional services exclusions in those cases are materially different than the "professional services" exclusion presented in this matter is without merit. The exclusionary provisions in the three (3) cited cases all address liability due to or arising from rendering or failing to render professional services.

The provision in the Harad case provides:

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...

Harad at 983 (emphasis in original).

The exclusion in the Vogelsang case provides:

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....

Voegelsang at 1321 (emphasis added).

The exclusion in the Gould & Ratner case provides:

"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.”

Gould & Ratner at 751 (Emphasis added).

Furthermore, as discussed at great length in Cincinnati’s Response to Appellant Hayhurst’s Certified Question Brief, which is incorporated fully herein by reference, each of these three (3) cases involved claims against a lawyer brought by the client’s opponent in an underlying related action for conducted engaged in by the lawyer in the underlying related action, and in each of these cases the presiding courts rejected the argument that the exclusion must include a privity requirement.

Boggs seems to argue that the use of the phrase “due to” in the “professional services” exclusion limits the application of the exclusion to claims brought against Hayhurst by his clients. As was argued before and accepted by the circuit court, the term “due to” is commonly defined to mean “as a result of” and “because of”. *See Merriam-Webster Online Dictionary*. Applying this reasonable definition of the term “due to” to the exclusion, the “professional services” exclusion applies to malicious prosecution as a result of/because of Hayhurst’s rendering (or failure to render) professional legal services. There can be no genuine material dispute between the parties that Boggs’ allegations against Hayhurst involve malicious prosecution as a result of/because of Hayhurst’s rendering professional legal services to CCMH. As such, Boggs’ argument must fail.

Of course, the “professional services” exclusion includes additional language that emphasizes that no coverage will lie for malicious prosecution claims due to Hayhurst rendering professional legal services unless professional liability coverage has been endorsed hereon or stated in the Declarations. There is no dispute between the parties that Hayhurst did not purchase professional liability coverage from Cincinnati. Contrary to Boggs’ contention, the inclusion of this condition precedent does not create any ambiguity; rather, the condition precedent provides additional clarity that the policy does not cover liability due to Hayhurst rendering professional legal services.

Boggs claims that deposition testimony from Norman Kirkpatrick and Richard Hill demonstrates the terms of the policy are “cloudy” with respect to certain scenarios involving clients who are in direct privity with Hayhurst. Nothing could be further from the truth. Mr. Kirkpatrick and Mr. Hill were presented various hypothetical scenarios devoid of developed factual details during their depositions to which they attempted to provide responses, despite the lack of detail that typically accompanies a claim decision. Furthermore, the testimony cited by Boggs does nothing more than demonstrate that Cincinnati recognizes that each claim is different and requires that the specific facts of the claim be analyzed when determining coverage, which sometimes necessitates a legal opinion from counsel. The desire to have legal counsel review a potential coverage decision does not compel a finding that the policy language in question is ambiguous. Finally, uncertainty as to how vague hypothetical scenarios might be handled under the policy does not create any uncertainty as to the correctness of the circuit court’s application of the “professional services” exclusion to the specific, detailed allegations asserted against Hayhurst in the First Amended Complaint.

Boggs next asserts that the lack of a policy definition for “professional services” requires the definition found in Hayhurst’s professional liability policy to be inserted into the Businessowners Package Policy. Boggs further argues that the result of such a policy interpretation is to limit the application of the exclusion to services performed by Hayhurst in a lawyer-client relationship. Cincinnati disagrees with Boggs’ approach and Boggs has offered the Court no legal authority for attempting to interpret the policy in this fashion. However, to the extent the Court is willing to entertain Boggs’ argument, Boggs’ approach does not present an argument for coverage under the policy. Applying Boggs’ policy construction, the exclusion still applies and the provision excludes coverage when Hayhurst is being sued for malicious prosecution due to [as a result of or because of] rendering legal services and activities for CCMH in a lawyer-client relationship. Nothing in Boggs’ redefinition of the exclusion restricts the application of the exclusion only to claims brought against Hayhurst by clients. Rather, the key issue for application of the exclusion is whether Hayhurst’s conduct was performed for CCMH in the context of professional legal capacity, which has never been in dispute in this matter.

The Court must remember that Hayhurst is being defended by LIU under his professional liability policy, which clearly demonstrates that a professional liability policy is the very type of policy designed to protect Hayhurst from a malicious prosecution due to the rendering of professional legal services to CCMH - - there is no privity requirement for the professional liability coverage just as there is no privity requirement for the application of the “professional services” exclusion.

D. BOGGS CONTENDS THE CIRCUIT COURT ERRONEOUSLY DETERMINED THAT THE PROFESSIONAL LIABILITY EXCLUSION IN THE PERSONAL UMBRELLA LIABILITY POLICY WAS CLEAR AND UNAMBIGUOUS AND EXCLUDED COVERAGE.

Boggs contends that the “professional liability” exclusion in the Personal Umbrella Liability policy is ambiguous under the theory that the language only applies to claims of legal malpractice from one of Hayhurst’s clients. This argument ignores the clear and unambiguous language of the exclusion.

Again, the language of the “professional liability” exclusion provides 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. It is nonsensical to argue that the exclusion is only limited to malpractice claims asserted by clients against Hayhurst as the express language of the exclusion goes beyond the realm of malpractice to include any act. 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 LIU and not Cincinnati.

Boggs further contends that Cincinnati's request from Hayhurst for additional information from Hayhurst regarding the potential application of the "Business or Business Property Limitation" exclusion is evidence that Cincinnati never believed the "professional liability" exclusion applied to this claim. Nothing could be further from the truth.

The policy states in relevant part with respect to the "Business or Business Property Limitation" exclusion:

SECTION II - BUSINESS LIABILITY

* * *

B. Exclusions

This insurance does not apply to:

* * *

3. Business or Business Property Limitation

"Bodily injury", "property damage" or "personal injury" arising out of a "business" or "business property", unless such liability is covered by valid and collectible "underlying insurance" as listed in Schedule A - Schedule Of Underlying Insurance, and then only for such hazards for which coverage is afforded by such "underlying insurance", unless otherwise excluded by this policy.

However, we will cover you or a "relative" for the "business" use of a private passenger "automobile", as long as it is not being used, at the time of the "occurrence", as a taxicab or for hire. We do cover expense sharing or car pooling arrangements.

* * *

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.

* * *

- 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.

As the Court can see, in addition to excluding coverage for professional liability, the policy also excludes coverage for a claim of malicious prosecution arising out of Hayhurst's business. Given the potential for two (2) exclusions to be applicable to this claim, Cincinnati sought to determine if the second exclusion also barred coverage for the claim. To argue that Cincinnati's desire to evaluate all possible policy defenses evidences doubt as to the undeniable application of the "professional liability" exclusion is unfounded. Cincinnati made it clear to Hayhurst that its inquiry into the potential application of the "Business or Business Property Limitation" exclusion did not waive its denial under the "Professional Liability" exclusion.

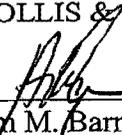
V. CONCLUSION

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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Counsel for Defendant-Below/Respondent
The Cincinnati Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **RESPONSE TO RESPONDENT BOGGS' BRIEF** has been mailed by U.S. Mail to counsel of record via first class mail, postage pre-paid, this 11th day of December, 2009.

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE