

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35223

BERNARD BOGGS, *Plaintiff-Below/Respondent*

v.

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

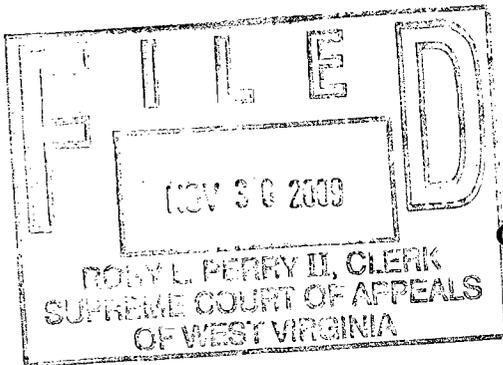
and

BERNARD BOGGS, *Plaintiff-Below/Respondent*

v.

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

RESPONSE TO APPELLANT HAYHURST'S CERTIFIED QUESTION BRIEF

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

In this case, the Respondent, Bernard Boggs ("Mr. Boggs") has sued the Appellant, Richard A. Hayhurst ("Mr. Hayhurst") and Defendant-below, Camden-Clark Memorial Hospital Corporation ("Camden-Clark"), for malicious prosecution. Mr. Hayhurst filed, on Camden-Clark's behalf, counterclaims against Mr. Boggs in a medical malpractice and fraud case he filed against Camden-Clark. The counterclaims alleged that Mr. Boggs case was unsupported by the facts, was an attempted fraud on the court and demanded that Mr. Boggs pay Camden-Clark's litigation costs. The counterclaims specifically called Mr. Boggs a coward¹ for filing his medical malpractice complaint and demanded punitive damages be paid by Mr. Boggs, a widower by Camden-Clark's hands, and a West Virginia forester, by occupation, to Camden Clark as well.

Respondent, Cincinnati Insurance Company ("CIC") insured Mr. Hayhurst pursuant to two policies: (1) a businessowners policy and (2) a personal umbrella policy. Both policies specifically and expressly included liability coverage for "malicious prosecution." Mr. Hayhurst and Mr. Boggs contended below that these policies cover the torts alleged against Mr. Hayhurst which spring from his malicious prosecution of Mr. Boggs. The Circuit Court disagreed, holding that because Mr. Hayhurst, an attorney, was acting as an attorney when the malicious prosecution was committed, coverage was excluded under applicable provisions of the businessowners policy excluding liability for "professional services" and of the personal umbrella policy excluding liability for "professional liability."

¹ The actual word used was "craven."

Mr. Hayhurst seeks reversal of the Circuit Court's determinations with respect to the second, third, and fourth certified questions submitted by the Circuit Court. Mr. Boggs files this response in support of Mr. Hayhurst's brief regarding the certified questions submitted by the Circuit Court and, for the reasons stated herein as well as for the reasons set forth in Mr. Hayhurst's Certified Question Brief filed with this Court on or about October 28, 2009, urges this Court to reverse the determinations made by the Circuit Court as to the second, third, and fourth certified questions and find that Mr. Hayhurst has defense and indemnity coverage with respect to the insurance policies at issue in this case.

II. STATEMENT OF FACTS

At all material and relevant times, Mr. Hayhurst was an attorney licensed to practice law in the State of West Virginia.

While licensed as such, Mr. Hayhurst obtained two insurance policies from CIC, a Businessowners Package Policy and a Personal Umbrella Policy. At the time that Mr. Hayhurst applied for and CIC issued these policies to Mr. Hayhurst, CIC knew that Mr. Hayhurst was an attorney and that the business that he owned was a law firm.²

A. The Businessowners Package Policy ("BPP")

CIC issued Mr. Hayhurst a Businessowners Package Policy, number BOP 208 95 50, Form 1B 101 04 99, with policy periods of May 2002, to May 20, 2005, and May 20, 2005, to May 20, 2006, subject to the terms and conditions set forth therein.

In general, this policy provided the following forms of coverage:

1. Each Occurrence Limit - \$1,000,000 any one occurrence
2. General Aggregate Limit - \$2,000,000

² See Memorandum of Law in Support of Motion of Defendant Richard A. Hayhurst for Summary Judgment Against Defendant CIC dated October 1, 2008, at Exhibit A, Page 13 and 19.

3. Products – Completed Operations Aggregate Limit - \$2,000,000
4. Personal and Advertising Injury Limit - \$1,000,000 for any one person or organization
5. Damages to Premises Rented to You Limit - \$1,000,000 any one premises
6. Medical Expenses Limit \$5,000 any one person

The insuring agreement of this policy states, in pertinent part, as follows:

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

...

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;*³

The BPP defines the term "Personal Injury" as:

"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;*

³ See Memorandum of Law in Support of Defendant CIC's Motion for Summary Judgment dated June 20, 2008, at Exhibit D, Page 41 of 61, Section II, BUSINESS LIABILITY, Paragraph A.1.a. (emphasis supplied).

- 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.⁴

Finally, the BPP provides an Exclusion of material importance in this matter and states, in pertinent part as follows:

This insurance does not apply to:

...

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

*(1) Legal, accounting or advertising services;*⁵

The BPP Declarations indicate that Mr. Hayhurst did not purchase the optional "professional liability" insurance coverage from CIC as part of the policy.⁶

Of material importance to the analysis herein, there is no evidence to indicate that Mr. Hayhurst was offered this optional coverage by CIC or that the exclusion from coverage outlined in Section II, Paragraph B.1.j. of the BPP was brought to Mr. Hayhurst's attention by any representative of CIC. In fact, Mr. Hayhurst has indicated that he was not aware of the referenced exclusion at the time of the issuance of this policy.

B. The Personal Umbrella Policy ("PUP")

In addition to the BPP, CIC also issued Mr. Hayhurst a Personal Umbrella Policy, number CPC 219 51 31, Main Form UX 101 UM (1/01), with policy periods of September

⁴ *Id.* at Exhibit D, Page 56 of 61, Section II, BUSINESS LIABILITY, Paragraph F.13. (emphasis supplied).

⁵ *Id.* at Exhibit D, Page 46 of 61, Section II, BUSINESS LIABILITY, Paragraph B.1.j. (emphasis supplied).

⁶ *Id.* at Exhibit E, BPP Declarations for May 20, 2002 to May 20, 2005, Optional Coverages, and Exhibit F, BPP Declarations for May 20, 2005, to May 20, 2006, Optional Coverages.

23, 2001, to September 23, 2004, and September 23, 2004, to September 23, 2007, subject to the terms and conditions set forth therein.

In general, this policy provides for coverage to Mr. Hayhurst up to \$5,000,000 per occurrence.

The insuring agreement of this policy states, in pertinent part, as follows:

We will pay on behalf of the "insured" the "ultimate net loss" which the "insured" is legally obligated to pay as damages for "bodily injury", "property damage" or "personal injury" 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"*⁷

The PUP defines the term "Personal Injury" as:

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

- a. *Libel, slander, defamation of character;*
- b. *False arrest, willful or false detention or imprisonment;*
- c. *Wrongful eviction nor entry;*
- d. **Malicious prosecution; or**
- e. *Invasion of privacy*⁸.

Finally, like the BPP, the PUP provides certain exclusions of material importance in this matter and states, in pertinent part as follows:

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

⁷ *Id.* at Exhibit G, Page 1 of 10, Section I, COVERAGE, Paragraph A.2. of PUP (emphasis supplied).

⁸ *Id.* at Exhibit G, Page 10 of 10, Section IV, DEFINITIONS, Paragraph I (emphasis supplied).

– 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.

...
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”.⁹

With respect to these exclusions, the PUP provides the following definitions, in pertinent part, of certain material terms highlighted in quotation marks within the policy:

“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)...¹⁰

...
“Underlying insurance” means the policies of insurance listed in Schedule A – Schedule of Underlying Insurance and the insurance available to the “insured” under all other insurance policies applicable to the “occurrence.”
“Underlying insurance” also includes any type of self-insurance or alternative method by which the “insured” arranges for funding of legal liabilities which would also be insured under this policy.¹¹

Of material importance to the analysis herein, there is no evidence to indicate that the exclusions from coverage outlined in Section I, Paragraph B.3. and B.13. of the PUP were brought to Mr. Hayhurst’s attention by any representative of CIC. In fact, Mr. Hayhurst has indicated that he was not aware of the referenced exclusion at the time of the issuance of this policy.

In addition, at the time CIC issued the PUP to Mr. Hayhurst, Mr. Hayhurst had professional liability insurance in force and effect through Liberty Insurance Underwriters,

⁹ Id. at Exhibit G, Pages 2 and 3 of 10, Section I, COVERAGE, Paragraphs B.3. and B.13, respectively (emphasis supplied).

¹⁰ Id. at Exhibit G, Page 8 of 10, Section IV, DEFINITIONS, Paragraph B (emphasis supplied).

¹¹ Id. at Exhibit G, Page 10 of 10, Section IV, DEFINITIONS, Paragraph P (emphasis supplied).

Inc.¹² However, there is no Schedule A attached to the PUP indicating the existence or non-existence of any other applicable insurances maintained by Mr. Hayhurst.

C. The Coverage Dispute

On or about July 26, 2006, Bernard R. Boggs ("Mr. Boggs") initiated a lawsuit against Mr. Hayhurst under Wood County Civil Action No. 06-C-401 for the purpose of seeking recovery of compensatory and punitive damages from Mr. Hayhurst for malicious prosecution of two (2) separate counterclaims and motions for sanctions in litigation previously filed by Mr. Hayhurst against Mr. Boggs in Wood County Civil Action Nos. 03-C-296 and 03-C-623. In March of 2008, Mr. Boggs filed his First Amended Complaint, wherein the allegations against Mr. Hayhurst remained substantively unchanged.¹³

On August 8, 2006, Mr. Hayhurst tendered a request for defense and indemnity against Mr. Boggs' original complaint to Liberty Insurance Underwriters, Inc. ("LIU"), his professional liability insurance carrier.¹⁴ On September 6, 2006, LIU responded to Mr. Hayhurst's request by assigning defense counsel to represent Mr. Hayhurst and by outlining a reservation of rights under Mr. Hayhurst's policy.¹⁵

On February 9, 2007, Mr. Hayhurst tendered a request for defense and indemnity against Mr. Boggs' complaints to CIC under the BPP and the PUP.¹⁶

¹² Id. at Exhibit I.

¹³ For a thorough recitation of the claims made by Mr. Boggs against Mr. Hayhurst, see Pages 3-7 of the Circuit Court's Findings of Fact and Conclusions of Law in Support of the Order Granting Defendant, CIC's Motion for Summary Judgment and Denying the Motions for Summary Judgment of Plaintiff, Bernard Boggs and Defendant, Richard A. Hayhurst dated March 23, 2009.

¹⁴ See Memorandum of Law in Support of Defendant CIC's Motion for Summary Judgment dated June 20, 2008, at Exhibit H. In addition, it is also Mr. Boggs' understanding that Mr. Hayhurst tendered defense of this matter to Ohio Farmers Insurance Company, which had issued a comprehensive general liability policy to Mr. Hayhurst incident to insuring his home against fire and other casualty. However, it appears that Ohio Farmers Insurance Company has denied Mr. Hayhurst coverage for Mr. Boggs' claims because the claim does not relate to Mr. Hayhurst's residential premises. The matters involving Ohio Farmers Insurance Company are immaterial to the instant dispute.

¹⁵ Id. at Exhibit J.

¹⁶ Id. at Exhibit B.

On or about February 19, 2007, Richard D. Hill ("Mr. Hill"), casualty claims supervisor for CIC, reviewed Mr. Hayhurst's request for defense and indemnity under the terms and conditions of the BPP and the PUP in relation to Mr. Boggs' complaints. In reviewing Mr. Hayhurst's claim for defense and indemnity, Mr. Hill only reviewed Mr. Hayhurst's letter, the complaint filed by Mr. Boggs against Mr. Hayhurst, the policy language of the BPP and PUP and the exclusions contained in such policies.¹⁷ Mr. Hill made no independent inquiry of Mr. Hayhurst or of Mr. Hayhurst's claim outside of these documents.¹⁸ Based upon his review, Mr. Hill determined there was no coverage available for Mr. Boggs' claims under either the BPP or the PUP.¹⁹ This decision was based upon the professional exclusion contained in the policies.²⁰

On approximately March 8, 2007, CIC communicated its decision to Mr. Hayhurst by telephone.

On March 26, 2007, CIC issued a coverage determination letter to Mr. Hayhurst in which it states that CIC had determined that Mr. Hayhurst's claim was not covered under either the BPP or the PUP and therefore, his request for defense and indemnity was denied.²¹ According to this coverage determination, coverage under the BPP was not available due to the Professional Services exclusion contained in Section II, Paragraph B.1.j of the BPP and the lack of a professional liability endorsement onto the BPP or a statement of professional liability coverage in the Declarations of the BPP.²² Likewise, coverage under the PUP was

¹⁷ See Memorandum of Law in Support of Motion of Defendant Richard A. Hayhurst for Summary Judgment Against Defendant CIC dated October 1, 2008, at Exhibit A, Page 13.

¹⁸ *Id.* at Page 19.

¹⁹ *Id.* at Page 13.

²⁰ *Id.* at Page 21.

²¹ See Reply of Defendant, CIC, in Support of Its Motion for Summary Judgment, dated October 28, 2008, at Exhibit 1, Page 1.

²² *Id.* at Page 9.

not available due to the Professional Liability exclusion contained in Section I, Paragraph B.13. of the PUP.

Ironically, and material to the issues discussed herein, in its coverage determination letter, CIC requested, after denying Mr. Hayhurst coverage under the BPP and the PUP, that Mr. Hayhurst provide it with a copy of 'any and all "underlying insurance" scheduled by [Mr. Hayhurst] under the [PUP] ... so as to permit [CIC] the opportunity to fully evaluate the application of the "Business or Business Property Limitation" to this claim', as such limitation is articulated in Section I, Paragraph 3 of the PUP.²³

On June 5, June 27, and July 12, 2007, CIC made additional requests for copies of any underlying insurance maintained by Mr. Hayhurst.²⁴

On July 16, 2007, Mr. Hayhurst inquired of CIC why it required information related to underlying insurance after it had denied coverage to him under the terms of the BPP and the PUP.²⁵

On July 19, 2007, CIC responded to Mr. Hayhurst's inquiry by indicating it wanted additional information regarding Mr. Hayhurst's underlying insurance to fully evaluate the application of the "Business or Business Property Limitation" set forth in the PUP. It further indicated that its request did not amount to a waiver of the disclaimer of coverage issued on March 26, 2007, and did not alter the clear terms of the disclaimer set forth therein.²⁶

D. Procedural History

On or about October 19, 2007, CIC filed a declaratory judgment action in the U.S. District Court for the Southern District of West Virginia seeking a determination that it owed

²³ Id. at Page 10.

²⁴ Id. at Exhibits 2 -- 4.

²⁵ Id. at Exhibit 5.

²⁶ Id. at Exhibit 6.

no duty of defense or indemnity to Mr. Hayhurst. At the time that it filed its declaratory judgment action, CIC did not name Mr. Boggs as a defendant to such action.

Thereafter, on approximately March 10, 2008, Mr. Boggs was granted leave by the Wood County Circuit Court to file an amended complaint to add a claim for declaratory judgment against CIC related to the ongoing insurance coverage dispute involving Mr. Hayhurst and CIC.

The parties conducted discovery in this matter throughout the summer of 2008 and submitted respective motions for summary judgment on or about October 1, 2008. A hearing was conducted by the Court was conducted on November 5, 2008, at which time the Court granted CIC's motion for summary judgment. The Court entered its Order granting CIC's motion for summary judgment on March 23, 2009.

In addition to its Order granting summary judgment to CIC, the Circuit Court also entered a Certification Order certifying four questions to this Court regarding the coverage issues in dispute between Mr. Hayhurst, CIC, and Mr. Boggs. The questions certified to this Court are:

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

3. Under a personal umbrella liability insurance policy wherein the term “personal injury” is defined to include “malicious prosecution,” is a malicious prosecution suit against the insured, an attorney, by a client’s former opponent in a previous action defended by the insured excluded by policy language that “This insurance does not apply to ... ‘personal injury’ arising out of any act, malpractice, error or omission committed by any ‘insured’ in the conduct of any profession or ‘business,’ even if covered by ‘underlying insurance’”?
4. Do the “professional services” exclusion of the business owners package policy and/or the “professional liability” exclusion of the personal umbrella liability policy apply when the claim asserted against the policyholder for which coverage is sought is not made by a person or entity to whom the policyholder rendered professional services, but by a third-party to whom no professional services were rendered?

The Circuit Court answered all of these questions in the affirmative.²⁷

On or about May 15, 2009, Mr. Hayhurst filed a Petition for Certified Question Review with this Court seeking to reverse the Circuit Court’s determinations made in the second, third, and fourth questions. This Court granted Mr. Hayhurst’s Petition on or about September 24, 2009.

III. STANDARD OF REVIEW

A. Standard of Review as to Insurance Contracts

1. Interpretation of Insurance Contracts in General

The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court's review of certified questions, is reviewed *de novo*. Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995).

In West Virginia, insurance policies are controlled by the rules of construction that are applicable to contracts generally. Thus, the language in an insurance policy should be given

²⁷ See Certification Order dated March 23, 2009, at 4-6. The Circuit Court’s Certification Order also incorporated its order granting summary judgment to CIC by reference.

its plain, ordinary meaning. Syl. pt. 1, American States Ins. Co. v. Tanner, 211 W.Va. 160, 563 S.E.2d 825 (2002). 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). 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).

2. Interpretation of Ambiguous Exclusions in Insurance Contracts

With regard to the applicability of exclusions contained within insurance contracts, this Court has permitted enforcement of such exclusions where such exclusions are not ambiguous.

Where a Court finds that a purported exclusion or the general language of an insurance policy is ambiguous, this Court has adopted the doctrine of reasonable expectations in regard to coverage under general liability policies. See National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 741; 356 S.E.2d 488, 495 (1987). That is, “[a]n insurance contract should be given a construction which a reasonable person standing in the shoes of the insured would expect the language to mean.” Soliva v. Shand, Morahan & Co., 176 W.Va. 430, 345 S.E.2d 33, 35-36 (1986). See also Perkins v. Doe, 177 W.Va. 84, 350 S.E.2d 711 (1986); Hensley v. Erie Insurance Co., 168 W.Va. 172, 283 S.E.2d 227 (1981); Thompson v. State Automobile Mutual Insurance Co., 122 W.Va. 551, 554, 11 S.E.2d 849, 850 (1940).

Regarding insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of the insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. See National Mut. Ins. Co. at 741, 495, quoting Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961 (1970).

In addition, where ambiguous policy provisions would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted. Furthermore, exclusions should not be so construed as to strip the insured of protection against risks incurred in the normal operation of his business, especially when the insurer was aware of the nature of the insured's normal operations when the policy was sold. Id.

Accordingly, this Court has determined, with regard to exclusions, that where an insured has a reasonable expectation of coverage under a policy, he should not be subject to technical encumbrances or to hidden pitfalls. Id. Thus, if an insurer wishes to avoid liability on a policy purporting to give general or comprehensive coverage based upon the existence of an exclusion to such coverage, the insurer must make exclusionary clauses conspicuous, plain and clear. Id. Furthermore, if an insurer wishes to avoid liability on a policy purporting to give general or comprehensive coverage based upon the existence of an exclusion to such coverage, the insurer must bring such exclusionary provisions to the attention of the insured. Id. This Court has noted that an insurer may avoid liability by proving that the insured read and understood the language in question or indicated his or her understanding through words or conduct. Id.

IV. LAW AND ARGUMENT

As an initial starting point of the analysis in this case, the Circuit Court has determined as a matter of law, and there is no dispute among the parties, that the allegations asserted against Mr. Hayhurst in Mr. Boggs' complaint fall within the definition of "personal injury" set forth in the BPP and the PUP.²⁸ Therefore, absent an enforceable and applicable exclusion, Mr. Hayhurst is entitled to defense and indemnity under the terms of the BPP and the PUP.

- A. The Circuit Court erroneously determined that the professional services exclusion in the BPP was applicable and enforceable because it strips Mr. Hayhurst of any beneficial coverage under the terms of the BPP, rendering the policy terms, including the professional services exclusion ambiguous.**

In reviewing exclusions related to insurance coverage, this Court has been clear:

An exclusion in a general liability policy should not be construed as to 'strip the insured of protection against risks incurred in the normal operation of his business,' especially when the insurer was aware of the nature of the insured's normal operations when the policy was sold.²⁹

There is no dispute that at the time CIC sold the BPP to Mr. Hayhurst, it knew Mr. Hayhurst's business was that of an attorney-at-law.³⁰ Accordingly, any exclusion contained within the BPP must be construed so as not to strip Mr. Hayhurst of protection against risks incurred in the normal operation of his business, particularly where CIC knew of Mr. Hayhurst's business at the time it sold the BPP policy to him.

The Court needs to look no further regarding the lack of any beneficial coverage provided to Mr. Hayhurst under the terms of the BPP than the deposition of Richard D. Hill, the claims supervisor for CIC who made the coverage determination regarding Mr. Hayhurst's

²⁸ See ¶49 of the Circuit Court's Findings of Fact and Conclusions of Law in Support of the Order Granting Defendant, CIC's Motion for Summary Judgment and Denying the Motions for Summary Judgment of Plaintiff, Mr. Boggs, and Defendant, Mr. Hayhurst.

²⁹ See *National Mut. Ins. Co.* at 742, 496.

³⁰ See, e.g., Memorandum of Law in Support of Motion of Defendant Richard A. Hayhurst for Summary Judgment Against Defendant CIC dated October 1, 2008, at Exhibit A, Page 19.

claims. When questioned as to what types of claims Mr. Hayhurst would be covered, Mr. Hill had to 'stretch' to determine what kinds of actions Mr. Hayhurst might be covered for under the terms of the BPP:

Q: ...What activities could I have engaged in being a lawyer that constitutes malicious prosecution that's covered under your policy?

...

Q: What could I have done that you would have covered:

A: Well, again I'm stretching for a hypothetical because we're going beyond the facts of this case. Let's say, as your business, Richard Hayhurst, attorney at law –

Q: Yes.

A: -- you hire a contractor to do some additional construction onto your building.

Q: Yes.

A: And maybe the building, he didn't do the work properly so you sued him for that.

Q: Yes.

A: And then he disagreed, but in turn sued you for malicious prosecution, that's a possibility. But again, without seeing the exact complaint, factual circumstances, and comparing it to your policy as we did in this case, I can't tell you 100 percent for sure.³¹

Clearly, Mr. Hayhurst's business is not that of constructing or painting his office building and such activities are not normal operations of his business.

The normal operation of Mr. Hayhurst's business is conducting the practice of law. CIC knew Mr. Hayhurst engaged in the practice of law at the time that it sold him the BPP policy. The policy provisions clearly provide defense and indemnity coverage for the claim Mr. Boggs has made against Mr. Hayhurst – it expressly mentions "malicious prosecution." Because the professional services exclusion effectively strips Mr. Hayhurst of any beneficial protection under the terms of the BPP, it negates the purpose for which Mr. Hayhurst obtained the policy in the first place – that is, to insure against risks incurred in the normal operation of his law business. Mr. Hill's testimony stretching to provide a highly remote example of

³¹ Id. at Exhibit A, Pages 23-24.

where Mr. Hayhurst **might** be covered is direct evidence of the lack of beneficial protections provided to Mr. Hayhurst under the terms of the BPP. CIC should not be able to charge Mr. Hayhurst not insignificant sums of money for insurance policies related to his business and then strip him of coverage for defense and indemnity through an exclusion it specifically and knowingly designed to knowingly strip Mr. Hayhurst of coverage associated with the normal operations of his business, especially when such exclusion was never brought to Mr. Hayhurst's attention by representatives of CIC.

Accordingly, the Court should determine that the BPP, with the professional services exclusion is ambiguous, at least as to Mr. Hayhurst, and strips Mr. Hayhurst of any meaningful coverage under its terms. This Court should therefore reverse the Circuit Court's determination regarding the second and fourth certified questions and find that Mr. Hayhurst does have coverage for defense and indemnity under the provisions of the BPP.

B. The Circuit Court erroneously determined that the professional services exclusion in the BPP was applicable because there is no evidence that the professional services exclusion at issue was conspicuous, plain, and clear.

An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear.³²

The Circuit Court erroneously determined that the professional services exclusion in the BPP was enforceable because there is no evidence that the professional services exclusion at issue was conspicuous, plain, and clear. In fact, the evidence is quite to the contrary.

The BPP policy at issue contains twenty pages of documentation within a sixty-one page document.³³ Page 41 of this document is entitled "Section II – Business Liability" and

³² See *National Mut. Ins. Co.* at 742, 496.

³³ See Memorandum of Law in Support of Defendant CIC's Motion for Summary Judgment dated June 20, 2008, at Exhibit D.

contains the insuring agreement as to business liability in Section A.1.a.³⁴ Damages from personal injury are covered by this policy.³⁵ However, in order to determine what ‘personal injury’ means, an insured has to review Page 56 of this document to determine that malicious prosecution is covered within the definition of ‘personal injury.’³⁶

Thus, an insured would assume that one is covered for damages resulting from claims of malicious prosecution under the terms of the BPP – that is, until he or she wades through the exclusions starting on Page 42 of this document. It isn’t until the insured reaches Page 46 of this document that it will find the Professional Services exclusion contained in Section II.B.1.j., the professional services exclusion at issue in this case.³⁷

Furthermore, the exclusion refers to “professional services rendered” – i.e. what Mr. Hayhurst does for his clients. The exclusion does not mention or even hint that it defeats claims by non-clients. The parties are agreed that Mr. Hayhurst owed Mr. Boggs no professional duties, (such that Mr. Boggs could sue him for malpractice), but instead only the ordinary duties applicable to all to refrain from acting tortiously towards him.³⁸ The claim for malicious prosecution against Hayhurst is therefore not a claim for the breach of any professional duty or for any failure to render “professional services;” it is a straightforward tort claim not relying on professional duty.

Of course, the exclusion in the BPP policy specifically mentions that coverage will lie for breach of professional duties only if professional liability coverage has been purchased. That is the BPP policy says, in English, “malpractice claims are excluded under the umbrella

³⁴ Id. at Exhibit D, Page 41 of 61.

³⁵ Id.

³⁶ Id. at Exhibit D, Page 56 of 61.

³⁷ Id. at Exhibit D, Page 46 of 61.

³⁸ See Clark v. Druckman, 218 W.Va. 427, 435 (2005) (“In the instant matter, we find that an attorney does not owe an opposing party a duty of care . . .”)

unless you buy your underlying malpractice insurance from us.” And that is sensible, so long as the professional services exclusion is read as excluding malpractice claims. But applying it to Mr. Boggs’ claims makes no sense since his claims wouldn’t be covered under a malpractice policy anyway, since Mr. Hayhurst owes him no professional duty of care.³⁹

Based upon the foregoing, and much like the factual circumstances in this Court’s positive reliance on Gerhardt v. Continental Insurance Co., 48 N.J. 291, 225 A.2d 328 (1966), in National Mut. Ins. Co., the exclusion in this case is not conspicuous, plain, and clear.

First, the policy form at issue was prepared by CIC and was sold on a mass basis as affording broad coverage for business liability. Specifically, on the face page of Section II, the policy states that it will pay those sums that the insured becomes legally obligated to pay as damages because of personal injury caused by an offense arising out of the insured’s business. Surely, a reasonable business owner, reading all of this on the face page, would have assumed that his or her business would be covered in the event that they were sued for malicious prosecution arising out of the business. Mr. Hayhurst certainly did.

Second, the exclusion at issue is found on Page 46 of 61 of the policy, and is the tenth (10th) of nineteen (19) exclusions contained within this policy. All of the exclusions are virtually identical in typeface and size and nothing distinguishes the professional services exclusion from any other exclusion. Thus, the professional services exclusion is found after exclusions which seemingly would not apply to Mr. Hayhurst’s business at all, including “Liquor Liability,” found at Section II.B.c.; “Pollutant,” found at Section II.B.f.; “Aircraft, Auto, or Watercraft,” found at Section II.B.g.; and “War,” found at Section II.B.i.

Third, CIC’s interpretation of the professional services exclusion of the BPP policy was not even clear to the agents of CIC who sold the policy to Mr. Hayhurst. As Mr.

³⁹ Id.

Hayhurst has testified, the only exception brought to his attention by CIC's agent(s) was that the BPP did not cover claims of legal malpractice.⁴⁰ However, as the Circuit Court's order denotes, after Mr. Boggs' claim against Mr. Hayhurst was filed, CIC altered its interpretation of the professional services exclusion and argues that the exclusion extends beyond legal malpractice claims brought by clients of Mr. Hayhurst. Thus, it is clear that CIC's own agents, at the time they sold the policy to Mr. Hayhurst, did not even understand the professional services exclusion to be as broad and sweeping as CIC and the Circuit Court later determined it to be.

Fourth, the terms of the exclusion itself are ambiguous, as discussed herein.

In National Mut. Ins. Co., this Court recognized that with regard to insurance contracts, such as the one at issue, such contracts are largely contracts of adhesion, offered on a take-it-or-leave-it-basis, often signed unseen until the premium is paid and accepted, full of complicated language. Furthermore, the Court concurred that it is generally recognized that the insured will not read the detailed, cross-referenced, standardized, mass-produced insurance form, nor understand it if he does, and that an insured will not be presumed to know the contents of an adhesion-type insurance policy delivered to him. Id. at FN 6.

As a result, it can hardly be said that the professional services exclusion in the BPP is conspicuous, plain and clear or that Mr. Hayhurst was aware of the same. If CIC had acted fairly in the effort to exclude coverage of personal injury claims arising out of businesses which practice law, unless a professional liability policy was endorsed onto the BPP policy or stated in the declarations, it would have given Mr. Hayhurst clear notice to that effect on the

⁴⁰ See Affidavit of Richard A. Hayhurst dated October 15, 2008, at Page 3-4, and filed in the federal companion case to this matter with the United States District Court for the Southern District of West Virginia, captioned as Cincinnati Insurance Company v. Richard A. Hayhurst, Civil Action File No. 6:07-0658(G). Said Affidavit is attached as Exhibit I hereto.

face page of the policy, would have attached a slip attached to the face page, or would have specifically brought the exclusion to the attention of Mr. Hayhurst at the time of the issuance of the policy. If CIC had done that, it may readily be assumed that the Mr. Hayhurst would have taken suitable steps to obtain broader coverage, available at relatively minor cost, by endorsing professional liability coverage on the policy itself or stating such coverage in the declarations. CIC took none of these actions with respect to Mr. Hayhurst, and it appears its agents were not even aware of CIC's interpretation of the professional services exclusion in the first place so that they could properly advise Mr. Hayhurst as to CIC's interpretation of the same.

Therefore, this Court should find that the professional services exclusion is unenforceable as to Mr. Hayhurst because it was not conspicuous, plain and clear and reverse the determinations made by the Circuit Court as to the second and fourth certified questions.

C. The Circuit Court erroneously determined that the professional services exclusion in the BPP was enforceable because there is no evidence that the professional services exclusion was brought to the attention of the insured, Mr. Hayhurst.

An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must...bring such provisions to the attention of the insured.⁴¹

There is no dispute that Mr. Hayhurst was not aware of the professional services exclusion at the time CIC sold him the BPP policy. As he testified in an Affidavit filed as part of a federal court action involving these same issues:

At the time of the issuance of the two policies of insurance by [CIC] to [me], and at the time of the issuance of their predecessor policies, [I] understood that [I] was purchasing insurance under both policies for a number of different risks, including the risk of being sued for malicious prosecution. At no time prior to tender of defense by [me] vis-à-vis Wood County Civil Action No. 06-C-401(E) has [CIC], or any agent purporting to act for and on behalf of [CIC],

⁴¹ See National Mut. Ins. Co. at 742, 496.

advised [me] that such coverage would be excluded because he was an attorney-at-law or operating a law practice or occupying a law office. The only exception called to [my] attention...was that the two policies did not provide coverage for claims of legal malpractice and [I] never understood either of those two policies to provide insurance against claims of legal malpractice.⁴²

This testimony is undisputed by any other testimony or evidence in this case, and Mr. Hayhurst's tender of this matter to CIC reinforces his understanding that he was afforded defense and indemnity coverage for the claims asserted by Mr. Boggs by the BPP policy.

Therefore, in accordance with this Court's prior holding in National Mut. Ins. Co., the determinations made by the Circuit Court as to the second and fourth certified questions should be reversed since CIC never brought the professional services exclusion to the attention of Mr. Hayhurst at the time of the issuance of the BPP policy.

D. The Circuit Court erroneously determined that the terms of the Professional Services exclusion in the BPP were clear and unambiguous

Contrary to the summary judgment decision of the Circuit Court below and the arguments of CIC, the issues presented by the facts of this case are ones of first impression in the state of West Virginia. That is, this court has never determined whether a professional services exclusion, such as the one presented by the facts of this case, is enforceable in the state of West Virginia.

a. Reliance on certain West Virginia case law is misplaced.

The Circuit Court found and CIC argued that this Court has established a clear line of legal authority that 'professional services' exclusions are valid and enforceable in West Virginia.⁴³ Furthermore, the Circuit Court and CIC relied exclusively on this Court's

⁴² See Exhibit 1 at 3-4.

⁴³ See, e.g., ¶51 of the Circuit Court'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

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), for this proposition.

However, both the Circuit Court and CIC misconstrued this Court's rulings in regards to the line of authority established by Webster and Alpha. The line of authority established by these cases was articulated by this Court in Webster:

This argument, which casts coverage in terms of the negligent acts of Brackenrich, is significantly at odds with the clear line of authority from this Court recognizing the validity of professional liability exclusionary language that exempts faulty or negligent service or workmanship claims from the coverages provided by a commercial general liability policy. *See State Auto. Mut. Ins. Co. v. Alpha Eng'g Servs., Inc.*, 208 W.Va. 713, 542 S.E.2d 876 (2000) (applying professional services exclusion to deny coverage in connection with claims predicated on provision of negligent surveying, mapping, and engineering services).

Id. at 857, 310. As this language plainly demonstrates, the clear line of authority approving of professional exclusions in West Virginia relates to claims involving acts of negligent or faulty workmanship or services by two parties who were in privity of contract with each other. "Faulty workmanship" by an engineering company or manufacturer is analogous to malpractice by a professional. It has nothing to do with intentional torts committed against non-customers, i.e. those who are not in privity of contract with each other.

This case does not present a similar fact pattern as Webster and Alpha. To the contrary, this case presents a claim by Mr. Boggs for malicious prosecution against the insured, Mr. Hayhurst – an intentional act alleged to have been done to cause harm to Mr. Boggs. Unlike Webster and Alpha, Mr. Boggs' claims do not include claims for faulty or negligent service or workmanship arising out of Mr. Hayhurst's representation of Mr. Boggs –

of course, Hayhurst never represented Boggs. Nor does Mr. Boggs' claim allege any privity of contract between Mr. Boggs and Mr. Hayhurst. Thus, to the extent that the Circuit Court's decisions are premised on the considerations and rulings of Webster and Alpha, such reliance is misplaced.⁴⁴

b. *The Circuit Court's reliance on the legal analysis set forth in several decisions rendered in other jurisdictions is distinguishable from the facts of this case and is, therefore, misplaced.*

As with Webster and Alpha, the Circuit Court and CIC relied on legal analysis provided by several other courts who construed professional services exclusions in commercial general liability insurance policies.⁴⁵ The analysis set forth in these cases is clearly distinguishable from the instant case and, as a result, any reliance on the analysis set forth in these cases is misplaced.

The primary reason the cases discussed by and relied upon by the Circuit Court and CIC are distinguishable from this case is because the language of the professional services exclusion in those cases are materially different than the professional services exclusion presented by this case. The cases cited and discussed by the Circuit Court and CIC involved the following professional services exclusions:

“This insurance does not apply:

1. When the 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”

⁴⁴ However, to the extent the cases are applicable to the instant case, it is for the purpose of reinforcing what professional services exclusion provisions are enforceable in West Virginia, and that would be those exclusions addressing claims between two parties in privity of contract such as a client and a professional services provider.

⁴⁵ The cases discussed by the Circuit Court and CIC include Harad v. Aetna Cas. & Sur. Co., 839 F.2d 979 (C.A.3 1988); Vogelsang v. Allstate Ins. Co., 46 F.Supp.2d 1319 (S.D. Fla. 1999), and Gould & Ratner v. Vigilant Ins. Co., 782 M.E.2d.749 (Ill. App. Ct. 2002)

See Harad at 893.

“Exclusions – Liabilities We Do Not Cover

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

See Vogelsang at 1321.

“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 failure 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.”

See Gould & Ratner at 751.

These exclusions, as found by the respective courts, exclude coverage of attorneys for claims that arise out of situations where they are providing professional services on behalf of clients. The respective courts reached this conclusion, in part, because of the recognition that commercial general liability insurance and professional liability insurance serve two very different purposes. In fact, this Court recognized this distinction in Syllabus Point 4 of Webster in discussing the approval of certain professional services exclusions in commercial general liability policies:

“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.”

See Webster at Syl. Pt. 4.

However, as the language of the professional services exclusion in this case demonstrates, CIC did not attempt to shift the risk of liability for claims “arising in” connection with the performance of professional services by Mr. Hayhurst. It simply restricted how coverage under the terms of the BPP would apply to professional services rendered by Mr. Hayhurst. Specifically the professional services exclusion in this case states:

This insurance does not apply to:

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

(1) *Legal, accounting or advertising services;*

That is, coverage under the BPP will be afforded to Mr. Hayhurst when he provides professional services under certain circumstances. It is those circumstances under which coverage will be afforded to Mr. Hayhurst that is in dispute.

What should not be in dispute is this: Mr. Hayhurst never rendered “professional services” to Mr. Boggs, nor did he have any duty to do so, nor does his putative liability to Mr. Boggs depend on any professional duty of Mr. Hayhurst. He is alleged to be a garden-variety tortfeasor in this case, and not professionally negligent.⁴⁶

Because the language presented by this professional services exclusion has never been addressed by this Court or by any other jurisdiction, the professional services exclusionary

⁴⁶ The complaint herein, for example, does not allege that Mr. Hayhurst “failed to render professional services with the degree of skill expected of a reasonable attorney under the circumstances,” nor that he rendered professional services negligently” or any equivalent. His status as an attorney and his professional duties are not elements of Mr. Boggs’ claims.

language and legal analysis from other jurisdictions relied upon by both CIC and the Circuit Court below are misplaced.

c. *The terms of the Professional Services exclusion contained within the BPP are, if not clearly inapplicable here, at least ambiguous.*

This Court has determined that the term "ambiguity" is defined as language "reasonably susceptible of two different meanings" or language "of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning[.]" Syl. pt. 1, in part, Shamblin v. Nationwide Mut. Ins. Co., 175 W. Va. 337, 332 S.E.2d 639 (1985).

In this case, the BPP provides coverage to Mr. Hayhurst unless personal injury arises "due to the rendering or failure to render professional services" unless professional liability coverage is endorsed on the BPP policy or stated in the declarations. It is undisputed that Mr. Hayhurst neither endorsed professional liability coverage on the BPP nor stated it in the declarations. Thus, the phrase "due to the rendering or failure to render professional services" must be construed to determine exactly what such phrasing means.

Both CIC and the Circuit Court concluded that the language is clear and applies to all situations wherein Mr. Hayhurst acted in his professional capacity, regardless of whether the claimant was a former client of Mr. Hayhurst or an unrelated third party. Mr. Boggs disagrees.

As Mr. Hayhurst and Mr. Boggs argue, CIC has created the ambiguity in this matter by permitting coverage under the terms of the BPP for professional services when Mr. Hayhurst endorses or states in the declarations professional liability coverage. As is generally understood, professional liability coverage generally provides insurance coverage for professionals in direct privity of contract with their clients. It generally does not provide

coverage for non-clients because, as with Mr. Hayhurst, professionals owe no duty of care to their non-clients and are not generally in direct privity of contract with non-clients.

Thus, the question becomes: What coverage applies under the terms of the BPP with respect to non-clients? Is Mr. Hayhurst afforded coverage in general with regard to non-clients under the terms of the BPP? Or, are non-clients not covered at all by virtue of application of the professional services exclusion? Or, does Mr. Hayhurst need to endorse a professional liability policy on the BPP in order to secure coverage for non-clients? Or do non-clients need to be in direct privity of contract with Mr. Hayhurst? Mr. Hill's testimony suggest that non-clients may be covered in certain situations involving Mr. Hayhurst's business but makes a distinction when one of those non-clients is involved in a case in which Mr. Hayhurst participated as a lawyer.

However, Norman S. Kirkpatrick, CIC's regional casualty claims manager and Mr. Hills' supervisor, also testified that the terms of the BPP are 'cloudy' with respect to certain scenarios involving clients who are in direct privity with Mr. Hayhurst:

Q: I filed it as a business owner employing my right of access to the Court as an individual litigant, even though I am a lawyer, and the claim arose in the context of my representing a client, the claim for unpaid fees. Am I covered or not?

A: I'd probably seek advice of counsel on that.

Q: Why?

A: Because it's a cloudy area. You're – number one, if you were an individual filing the complaint pro se and not an attorney, I don't believe there would be any problem with coverage. But that fact that you are an attorney and you are filing it as an attorney, I'd want some research done on that, in fairness to you and us.⁴⁷

Thus, as is demonstrated by CIC's own testimony, their own officials are unsure as to what claims are covered by the terms of the professional services exclusion. Such confusion

⁴⁷ See Deposition Transcript of Norman S. Kirkpatrick dated July 15, 2008, in CIC v. Hayhurst, United States Southern District of West Virginia Case No. 6:07CV0658(G) at 17.

subjects the exclusion to multiple reasonable interpretations, rendering it ambiguous under West Virginia law.

Mr. Boggs and Mr. Hayhurst assert that, from its most reasonable interpretation, the language included within the professional services exclusion applies only to those situations where a client of Mr. Hayhurst attempts to sue Mr. Hayhurst due to his rendering or failing to render professional services.

The term 'professional services' is not defined within the terms of the BPP, and this Court has never defined what such a term means. However, the BPP does provide some direction as to the meaning of this term when it states that it will only provide coverage for professional services if a professional liability policy is endorsed hereon.

While Mr. Hayhurst did not specifically endorse his professional liability policy onto the BPP policy or state it in the Declarations of the BPP policy, he did maintain a professional liability policy with Liberty Insurance Underwriters, Inc ("LIU"). The LIU policy does define the term 'professional legal services' as follows:

professional legal services means legal services and activities performed for others...Services performed by you in a lawyer-client relationship on behalf of one or more clients shall be deemed for the purpose of this section to be professional services in your capacity as a lawyer, although such services could be performed wholly or in part by nonlawyers.⁴⁸

Thus, restating the professional services exclusion in the BPP with this definition results in:

This insurance does not apply to:

...
"Bodily injury", "property damage", "personal injury" or "advertising injury", due to rendering or failure to render legal services and activities for others in a lawyer-client relationship unless professional liability coverage has been endorsed hereon or stated in the Declaration.

⁴⁸ See Memorandum of Law in Support of Defendant CIC's Motion for Summary Judgment dated June 20, 2008, at Exhibit I, Lawyers Professional Liability Policy, Page 3 of 13.

As restated, this language does not clearly exclude coverage for actions toward non-clients, as further evidenced by the representations made to Mr. Hayhurst at the time he obtained the BPP policy and the testimony of Mr. Hill and Mr. Kirkpatrick.

One interpretation is that reached by CIC and the Circuit Court as related to the arguments and decision for Summary Judgment. That is, the professional services exclusion applies to all damages due to Mr. Hayhurst's activities in a professional capacity regardless of whether a lawyer-client relationship exists between the claimant and Mr. Hayhurst.

The second interpretation is that which was represented to Mr. Hayhurst by CIC's agents at the time he obtained the policy. That is, the professional services exclusion only applies to situations where legal malpractice has been alleged by a client. This interpretation is supported by the notion that one must obtain, endorse, or state professional liability coverage, which routinely cover claims for legal malpractice, in order for the BPP coverage terms to apply.

Because CIC itself has represented that the BPP would apply to Mr. Hayhurst's activities in two or three entirely different manners, there can be no argument that the professional services exclusion in the BPP is susceptible to more than one interpretation. Accordingly, this Court should determine that the professional services exclusion is ambiguous.

Where a provision of an insurance policy is ambiguous, it is construed against the drafter especially when dealing with exceptions and words of limitation. See Syl. pt. 1, West Virginia Ins. Co. v. Lambert, 193 W. Va. 681, 458 S.E.2d 774 (1995). Furthermore, because the ambiguous provision of the professional services exclusion contained within the BPP would largely nullify the purpose of indemnifying Mr. Hayhurst, the application of this

provision should be severely restricted. See National Mutual Ins. Co. at 742, 496. Accordingly, because the professional services exclusion contained in the BPP is ambiguous it should be construed against CIC, coverage should be found in favor of Mr. Hayhurst and the determinations of the Circuit Court as to the second and fourth certified questions should be reversed.

E. The Circuit Court erroneously determined that the Professional Liability exclusion in the PUP was clear and unambiguous and excluded coverage.

As with the analysis of the exclusion in the BPP, this Court has determined that the term "ambiguity" is defined as language "reasonably susceptible of two different meanings" or language "of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning[.]" Syl. pt. 1, in part, Shamblin v. Nationwide Mut. Ins. Co., 175 W. Va. 337, 332 S.E.2d 639 (1985).

In this case, the PUP provides coverage to Mr. Hayhurst unless personal injury arises "out of any act, malpractice, error or omission committed by any insured in the conduct of any profession or business, even if covered by underlying insurance." The Circuit Court and CIC have taken the position that this exclusionary language prevents any coverage to Mr. Hayhurst under the terms of the PUP. Mr. Boggs and Mr. Hayhurst argue that this language is at best ambiguous for CIC as it appears to relate solely to claims of legal malpractice from one of Mr. Hayhurst's clients.

As this Court has noted, the actions, words, and conduct of the parties to an insurance contract are important indicators of the understanding of the parties with respect to that particular contract. See National Mut. Ins. Co. at 742, 496 ("Of Course, the insurer may avoid liability by proving that the insured read and understood the language in question, or that the insured indicated his understanding through words or conduct.") The actions of CIC

at the time the policy was issued and in determining coverage in this matter demonstrate that the language in the Professional Liability exclusion of the PUP is ambiguous.

First, as stated before, Mr. Hayhurst has provided uncontroverted evidence that CIC represented to him that the only claims related to his business that are excluded from coverage under the terms of the BPP or the PUP were those for legal malpractice.⁴⁹ Since Mr. Hayhurst and Mr. Boggs are not in privity of contract, Mr. Boggs cannot bring a legal malpractice claim against Mr. Hayhurst nor has he.

Second, and more importantly, CIC requested additional information from Mr. Hayhurst in its coverage determination correspondence which denied him coverage under the Professional Liability exclusion contained within the PUP. Specifically, CIC requested that Mr. Hayhurst provide it with a copy of any and all underlying insurance or homeowners insurance policies so that CIC could fully evaluate the application of the Business or Business Property Limitation exclusion contained within the PUP at Section I.B.3. The question is: Why would CIC request additional information from Mr. Hayhurst in the same correspondence in which it denied him coverage under the terms of the PUP? If, in fact, CIC believed the Professional Liability exclusion denied coverage to Mr. Hayhurst due to the claim arising out of his business, then there would be no need for CIC to collect additional information from Mr. Hayhurst to evaluate other potential exclusions. If, however, CIC did not truly believe the Professional Liability exclusion did not apply to deny Mr. Hayhurst coverage under the terms of the PUP, it would certainly be more reasonable to request additional information from Mr. Hayhurst in order to evaluate whether other exclusions would prevent coverage to Mr. Hayhurst, and the only other potential exclusion that would apply would appear to be the Business or Business Property Limitation exclusion.

⁴⁹ See Exhibit 1.

Regardless, the fact that CIC requested additional information in its coverage denial determination correspondence is uncontroverted evidence that CIC was unsure as to whether the Professional Liability exclusion was valid and enforceable to deny Mr. Hayhurst coverage. It is uncontroverted evidence that CIC was searching for additional bases to deny Mr. Hayhurst coverage in the event that a court of competent jurisdiction would determine that the Professional Liability exclusion was not applicable to the facts of this case. These actions, combined with the representations of CIC's agents at the time it sold Mr. Hayhurst the policy certainly demonstrate that the terms of the Professional Liability exclusion contained within the PUP are ambiguous.

Furthermore, the actions of Mr. Hayhurst were clear. He submitted a claim to CIC for coverage of this claim under the terms of the PUP. Thus, he believed that the PUP was applicable to Mr. Boggs' claims.

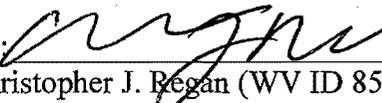
Therefore, in accordance with the analysis set forth with respect to the BPP regarding ambiguous provisions of insurance contracts, this Court should construe the Professional Liability exclusion in the PUP against CIC and find that there is coverage for Mr. Hayhurst under the terms of the PUP. Accordingly, this Court should reverse the determinations made by the Circuit Court as to the third and fourth certified questions.

V. CONCLUSION

For the reasons stated herein and for the additional reasons set forth in Mr. Hayhurst's Certified Question Brief, Mr. Boggs respectfully requests that this Court (1) reverse the Circuit Court's answers to the second, third, and fourth certified questions submitted to this Court, and (3) find that Mr. Hayhurst has applicable defense and indemnity coverage pursuant to the terms of the BPP and the PUP.

Respectfully Submitted,

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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 25th day of November, 2009.

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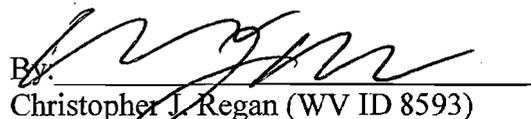
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