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IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

BERNARD BOGGS,

CIVIL ACTION NO. 05-C-527

Plaintiff,

v.

Judge Thomas C. Evans, III

CAMDEN-CLARK MEMORIAL
HOSPITAL CORPORATION,

Defendant.

BERNARD BOGGS,

CIVIL ACTION NO. 06-C-401

Plaintiff,

v.

RICHARD A. HAYHURST and
CINCINNATI INSURANCE COMPANY,

Defendants.

**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**

On November 5, 2008, the Court presided over oral arguments on Defendant, The Cincinnati Insurance Company's Motion for Summary Judgment, Plaintiff, Bernard Boggs' Motion for Summary Judgment and Defendant, Richard A. Hayhurst's Motion for Summary Judgment as to the issues of insurance coverage under liability insurance policies issued by Defendant, The Cincinnati Insurance Company to Defendant, Richard A. Hayhurst with respect to the allegations asserted by Plaintiff, Bernard Boggs against Defendant, Richard A. Hayhurst in this civil action.

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CAROLE JONES
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Upon consideration of the filings submitted in support of and in opposition to each aforementioned motion for summary judgment, and the oral arguments of counsel presented on November 5, 2008, the Court makes the following Findings of Fact and Conclusions of Law in support of the Court's decision to **GRANT** Defendant, The Cincinnati Insurance Company's Motion for Summary Judgment and to **DENY** the Motions for Summary Judgment of Plaintiff, Bernard Boggs and Defendant, Richard A. Hayhurst, respectively:

I. FINDINGS OF FACT

1. The issues of insurance coverage presented to the Court are:

a. Whether The Cincinnati Insurance Company owes a duty to defend and indemnify Richard A. Hayhurst under Businessowners Package Policy, number BOP 208 95 50, in effect for the coverage periods of May 20, 2002 to May 20, 2005, and May 20, 2005 to May 20, 2006, against the allegations and claims presented by Bernard R. Boggs against Richard A. Hayhurst in the civil matter filed in the Circuit Court of Wood County, West Virginia, civil action number 06-C-401, and styled Bernard R. Boggs, Plaintiff v. Richard A. Hayhurst, Esq., Defendant (consolidated under civil action number 05-C-527); and,

b. Whether The Cincinnati Insurance Company owes a duty to defend and indemnify Richard A. Hayhurst under Personal Umbrella Liability policy, number CPC 219 51 31, in effect for the coverage periods of September 23, 2001 to September 23, 2004, and September 23, 2004 to September 23, 2007, against the allegations and claims presented by Bernard R. Boggs against Richard A. Hayhurst in the civil matter filed in the Circuit Court of Wood County, West Virginia, civil action number 06-C-401, and

styled Bernard R. Boggs, Plaintiff v. Richard A. Hayhurst, Esq., Defendant (consolidated under civil action number 05-C-527).

2. The allegations by Plaintiff, Bernard Boggs against Defendant, Richard A. Hayhurst are set forth in the First Amended Complaint, wherein Plaintiff seeks the recovery of compensatory and punitive damages from Defendant Hayhurst for malicious prosecution, abuse of process and intentional infliction of emotional distress relative to the filing of two (2) separate counterclaims and motions for sanctions in litigation previously filed by Plaintiff in Wood County, West Virginia at docket numbers 03-C-296 and 03-C-623.

A. FIRST AMENDED COMPLAINT¹

3. At all times relevant, Defendant Hayhurst was an attorney licensed under the laws of the state of West Virginia and the rules governing attorneys adopted by the West Virginia Supreme Court of Appeals. See First Am. Compl., ¶2.

4. At all times material and relevant, Defendant Hayhurst represented Camden-Clark Memorial Hospital (“CCMH”) in litigation filed by Plaintiff in the Circuit Court of Wood County, West Virginia, at docket numbers 03-C-296 and 03-C-623. See First Am. Compl., ¶ 4.

5. On or about May 4, 2004, Defendant Hayhurst filed a cause of action in the form of a counterclaim against Plaintiff at docket number 03-C-623. See First Am. Compl., ¶ 27. This counterclaim was unsupported by reasonable or probable cause. See First Am. Compl., ¶ 28.

¹ As will be addressed by the Court in the “Conclusions of Law” Section, for purposes of determining the coverage issues presented by the motions for summary judgment, the allegations set forth in the First Amended Complaint are taken at face value (i.e., without regard to the truth or falsity of the averments) and, therefore, the Court’s recitation of the allegations set forth in the First Amended Complaint is for the sole purpose of resolving this coverage dispute, and is not intended to be and is not to be interpreted as a judicial finding as to the merits of said allegations. The issues of whether the allegations in the First Amended Complaint are supported by the evidence and whether Plaintiff can meet his burden of proof on all issues of liability and damages are not the subject of the Court’s Findings of Fact and Conclusions of Law and, thus, are left for another day.

6. On May 12, 2004, Hayhurst filed on behalf of his client, CCMH, a motion for summary judgment pursuant to Rule 56(b) of the West Virginia Rules of Civil Procedure, which contained the same assertions and allegations set forth in the counterclaim and requested summary judgment in favor of CCMH on all claims raised by Plaintiff in his Complaint filed at docket number 03-C-623. See First Am. Compl., ¶¶ 29, 30. A hearing on the motion was held by the Court on June 14, 2004, and the motion was denied. See First Am. Compl., ¶ 31.

7. On June 10, 2005, Plaintiff filed a motion to dismiss the counterclaim. See First Am. Compl., ¶ 34. On August 3, 2005, the Court held a hearing on Plaintiff's motion to dismiss. See First Am. Compl., ¶ 35. At the outset of that hearing, prior to the hearing of Plaintiff's motion to dismiss, Defendant Hayhurst abandoned the counterclaim filed by him and the counterclaim was dismissed by the Court by Order dated August 31, 2005. See First Am. Compl., ¶ 36.

8. On or about May 23, 2005, Defendant Hayhurst caused to be filed a second cause of action against Plaintiff in the form of a counterclaim at docket number 03-C-296. See First Am. Compl., ¶ 32. This counterclaim was unsupported by reasonable or probable cause. See First Am. Compl., ¶ 33.

9. At the pre-trial conference held in that litigation, Defendant Hayhurst expressly conceded, and the court found, that the claims advanced by Plaintiff in the action filed at docket number 03-C-296 were non-frivolous and presented, at a minimum, legitimate issues for trial. See First Am. Compl., ¶ 37.

10. Following verdict in the matter filed at docket number 03-C-296, the Court consolidated both cases as they presented substantially the same issues and facts. See First Am. Compl., ¶ 38. The consolidation of those two (2) lawsuits effectively terminated the

counterclaim asserted at docket number 03-C-296 in Plaintiff's favor. See First Am. Compl., ¶ 39.

11. Before the termination of the counterclaims in Plaintiff's favor, Defendant Hayhurst also filed motions for sanctions, in substantially the same form as the counterclaims, against Plaintiff and his counsel. See First Am. Compl., ¶ 40. The counterclaims have terminated favorably to Plaintiff. See First Am. Compl., ¶ 41.

12. The counterclaims were factually inaccurate in material ways. See First Am. Compl., ¶ 42. Defendant Hayhurst conducted the prosecution of the counterclaims against Plaintiff, in part, by means of false allegations and statements or allegations and statements made with reckless disregard for the truth, to Plaintiff and to the Court. See First Am. Compl., ¶ 43. Defendant Hayhurst filed the counterclaims without reasonable or probable cause with the intent to harm Plaintiff. See First Am. Compl., ¶ 44. Defendant Hayhurst had knowledge that the allegations and statements to Plaintiff and the Court were false or, in the alternative, made such allegations and statements with reckless disregard for the truth. See First Am. Compl., ¶ 45.

13. Defendant Hayhurst, at the time of filing the counterclaims, had no evidence that the claims asserted against CCMH at docket number 03-C-296 and 03-C-623 were frivolous within the meaning of State ex rel. Daily Gazette Co., Inc. v. Canady, or Rule 11 of the West Virginia Rules of Civil Procedure. See First Am. Compl., ¶ 46.

14. Defendant Hayhurst, at the time of filing the counterclaims, had no evidence that the causes of action asserted against CCMH at docket numbers 03-C-296 and 03-C-623 were being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. See First Am. Compl., ¶ 48.

15. Defendant Hayhurst had no probable or reasonable cause to file the counterclaims against Plaintiff. See First Am. Compl., ¶ 42, 48, 49.

16. The filing of the counterclaims, without reasonable or probable cause, were intentional and wrongful acts of Defendant Hayhurst done without just cause or excuse and showed an intent to inflict an injury on Plaintiff in the form of recovering alleged monetary damages and imposing additional, unnecessary litigation costs. See First Am. Compl., ¶ 50. Based on a lack of any factual basis for the filing of the counterclaims by Defendant Hayhurst, it appears reasonably likely that such filings were made with the wholly improper purpose under law of intimidating Plaintiff from continuing prosecution the actions filed at docket numbers 03-C-296 and 03-C-623. See First Am. Compl., ¶ 51.

17. Defendant Hayhurst's conduct in filing and prosecution of the counterclaims was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency. See First Am. Compl., ¶ 52.

18. Defendant Hayhurst's conduct in tortiously filing and prosecution of the counterclaims was done with the intent to inflict emotion distress or was done with reckless disregard to the infliction of emotional distress when such acts were certain or substantially certain to cause emotional distress. See First Am. Compl., ¶ 53.

19. Defendant Hayhurst's conduct in the filing and prosecution of the counterclaims were substantially certain to cause injury and without just cause or excuse. See First Am. Compl., ¶ 54.

20. Defendant Hayhurst's conduct in filing and prosecution of the counterclaims caused Plaintiff to suffer emotional distress because Defendant Hayhurst's action was so severe that no reasonable person could be expected to endure it. See First Am. Compl., ¶¶ 55, 56.

21. Defendant Hayhurst's conduct in filing and prosecution of the counterclaims required Plaintiff's attorney's to expend time and effort defending such claims. See First Am. Compl., ¶ 57.

22. Defendant Hayhurst's conduct with respect to his malicious prosecution of the counterclaims against Plaintiff was so malicious, intentional, willful or wanton as to justify an award of punitive damages. See First Am. Compl., ¶ 58.

B. DEFENDANT HAYHURST'S TENDER OF COVERAGE TO DEFENDANT CINCINNATI

23. On February 9, 2007, Defendant Hayhurst tendered coverage to Defendant Cincinnati under two (2) policies of liability insurance: (1) a businessowners package policy, number BOP 208 95 50, and (2) a personal umbrella liability policy, number CPC 219 51 31. See February 9, 2007 letter from Defendant Hayhurst to Defendant Cincinnati.

24. Defendant Hayhurst sought coverage on the grounds that Plaintiff's lawsuit involved a claim for malicious prosecution "caused by the rendering or failure to render professional services". See February 9, 2007 letter from Defendant Hayhurst to Defendant Cincinnati.

25. Defendant Hayhurst asserted in support of the claim for coverage under the businessowners package policy that the "insured entity is a law office" and, therefore, "coverage applies". See February 9, 2007 letter from Defendant Hayhurst to Defendant Cincinnati.

C. DEFENDANT HAYHURST'S CROSSCLAIM AGAINST DEFENDANT CINCINNATI

26. Defendant Hayhurst admits that at all times relevant to the underlying proceedings in question, he was an attorney-at-law duly licensed and admitted to practice the

profession of law in the Courts of the State of West Virginia. See Crossclaim of Defendant, Richard A. Hayhurst Against Defendant The Cincinnati Insurance Company, p. 3, ¶ B.

D. INSURANCE POLICIES ISSUED BY DEFENDANT CINCINNATI TO DEFENDANT HAYHURST

1. Businessowners Package Policy

27. Defendant Cincinnati issued Defendant Hayhurst a Businessowners Package policy, number BOP 208 95 50, with policy periods of May 20, 2002 to May 20, 2005 and May 20, 2005 to May 20, 2006, subject to the terms and conditions set forth therein. The main form for this policy is "**Businessowners Package Policy**", Form IB 101 04 99, which states in relevant part with respect to business liability coverage:

SECTION II - BUSINESS LIABILITY

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

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

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

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

A. Coverages

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to

defend the insured against any "suit" seeking damages for "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" or offense and settle any claim or "suit" that may result. But:

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

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

b. This insurance applies:

* * *

(2) To:

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

* * *

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

* * *

B. Exclusions

1. Applicable to Business Liability Coverage

This insurance does not apply to:

* * *

j. Professional Services

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

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

F. **Liability and Medical Expenses Definitions**
* * *

13. "Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses:
- a. False arrest, detention or imprisonment;
 - b. Malicious prosecution;
 - c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
 - d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
 - e. Oral or written publication of material that violates a person's right of privacy.

See Form IB 101 04/99, pp. 41, 46, 56.

28. The Businessowners Package Policy Declarations indicates that Defendant Hayhurst did not purchase the optional "professional liability" insurance coverage from Cincinnati as part of the policy. See Businessowners Package Policy Declarations for May 20, 2002 to May 20, 2005, Optional Coverages; Businessowners Package Policy Declarations for May 20, 2005 to May 20, 2006, Optional Coverages.

2. **Personal Umbrella Liability**

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

PERSONAL UMBRELLA LIABILITY POLICY

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

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

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

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

SECTION I - COVERAGE

A. Insuring Agreement

1. We will provide the insurance described in this policy. You agree to pay the premium and to comply with the provisions and conditions of this policy.
2. We will pay on behalf of the "insured" the "ultimate net loss" which the "insured" is legally obligated to pay as damages for "bodily injury", "property damage" or "personal injury" arising out of an "occurrence" to which this insurance applies:
 - a. Which is in excess of the "underlying insurance"; or
 - b. Which is either excluded or not covered by "underlying insurance".
3. This insurance applies to "bodily injury", "property damage" and "personal injury" only if:
 - a. The "bodily injury", "property damage" or "personal injury" is caused by an "occurrence" that takes place in the "coverage territory"; and
 - b. The "bodily injury" or "property damage" occurs during the policy period; or
 - c. The "personal injury" results from an "occurrence" that takes place during the policy period.
4. The amount we will pay for damages is limited as described in the LIMIT OF INSURANCE (SECTION II).

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

* * *

B. Exclusions

This insurance does not apply to:

* * *

13. Professional Liability

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

* * *

SECTION IV - DEFINITIONS

* * *

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

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

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

* * *

H. "Occurrence" means:

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

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

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

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

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

5. Invasion of privacy.

See Form UX 101 UM (1/01), pp. 1, 3, 9, 10.

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

E. **DEFENDANT HAYHURST'S PROFESSIONAL LIABILITY POLICY**

31. On August 8, 2006, Defendant Hayhurst tendered a request for defense and indemnity against Plaintiff's original Complaint to Liberty Insurance Underwriters, Inc., his professional liability insurance carrier. See August 8, 2008 letter from Richard A. Hayhurst to Liberty Insurance Underwriters, Inc.

32. For the policy period of November 11, 2005 to November 11, 2006, Defendant Hayhurst was insured by Liberty Insurance Underwriters, Inc. under a Lawyers Professional Liability Policy, number LPA196319-014, which affords coverage for malicious prosecution which arises out of the rendering or failure to render professional services, including legal services and activities performed for others as a lawyer. See Lawyers Professional Liability Policy, form LIU 3000 Ed. 04 02, pp. 1, 2, 3.

33. On September 6, 2006, Liberty International Underwriters, Inc. responded to Defendant Hayhurst's August 8, 2006 letter, assigning defense counsel for Defendant Hayhurst and outlining a reservation of rights under the policy. See September 6, 2006 letter from Barbara C. Sweeney to Richard A. Hayhurst.

II. **CONCLUSIONS OF LAW**

A. **LEGAL STANDARDS APPLICABLE TO SUMMARY JUDGMENT MOTIONS AND INTERPRETATION OF INSURANCE CONTRACTS**

34. Motions for summary judgment are governed by Rule 56 of the West Virginia Rules of Civil Procedure, which states in relevant part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law.

See W.Va.R.C.P. 56(c).

35. In West Virginia, a motion for summary judgment should be granted when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. See Vankirk v. Green Constr. Co., 195 W.Va. 714, 466 S.E.2d 782 (1995), *cert. denied* 518 U.S. 1028, 135 L.Ed.2d 1087, 116 S.Ct. 2571 (1996).

36. A party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact. Aetna Cas. & Sur. Co. v. Federal Ins. Co. of N.Y., 148 W.Va. 160, 133 S.E.2d 770 (1963); Dawson v. Norfolk & Western Ry. Co., 197 W.Va. 10, 475 S.E.2d 10 (1996).

37. If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary. Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329, 337 (1995).

38. To defeat summary judgment, the nonmoving party must satisfy its burden of proof by offering more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in the nonmoving party's favor. Browning v. Halle, 219 W.Va. 89, 632 S.E.2d 29, 34 (2005).

39. A genuine issue arises only when there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. See Dawson, 475 S.E.2d at 14. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. Id.

40. Any doubt as to existence of such issue is resolved against the movant for such judgment. See Aetna Cas. & Sur. Co., 133 S.E.2d at 777.

41. Summary judgment must be granted, however, if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Id.

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

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

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

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

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

47. An insurance company has a duty to defend an action against its insured only if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers. See Bowyer v. Hi-Lad, Inc., 216 W.Va. 634, 609 S.E.2d 895 (2004). If, however, the causes of action alleged in plaintiff's complaint are entirely foreign to the risks covered by the insurance policy, then the insurance company is relieved of its duties under the policy. Id.

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

B. DEFENDANT CINCINNATI DOES NOT OWE A DUTY TO DEFEND OR INDEMNIFY DEFENDANT HAYHURST UNDER THE BUSINESSOWNERS PACKAGE POLICY

49. The Court finds that the allegations asserted against Defendant Hayhurst in the First Amended Complaint fall within the definition of the term “personal injury” set forth in the Businessowners Package Policy on the grounds that First Amended Complaint avers allegations in support of a claim for malicious prosecution. However, this finding is not determinative of the issue of Defendant Cincinnati’s duty to defend or indemnify Defendant Hayhurst under the policy.

50. The next step in the determination of coverage is whether the policy includes any provisions that excludes from the policy coverage the allegations set forth in the First Amended Complaint. Defendant Cincinnati asserts, and the Court agrees, that coverage under the policy is excluded by operation of the “Professional Services” exclusion, which operates in relevant part to exclude coverage for:

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

- (1) Legal, accounting or advertising services

51. The Court finds that under West Virginia law, professional liability exclusions are valid and enforceable as a matter of law. Specifically, the West Virginia Supreme Court of Appeals stated in Webster County Solid Waste Auth. v. Brackenrich & Assocs., Inc., 217 W.Va. 304, 617 S.E.2d 851 (2005) that “a clear line of authority from this Court recognize[es] the validity of professional liability exclusionary language”. See 617 S.E.2d at 857 (citing to State Auto. Mut. Ins. Co. v. Alpha Eng’g Servs., Inc., 208 W.Va. 713, 542 S.E.2d 876 (2000), wherein the Court addressed and upheld the application of a professional liability exclusion contained in a

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

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

Id. at Syl. Pt. 4.

52. While the West Virginia Supreme Court of Appeals has yet to publish an opinion that specifically addresses the coverage issue raised by the allegations asserted against Defendant Hayhurst in the First Amended Complaint - - whether a claim for malicious prosecution brought by a third party against an attorney due to the attorney’s rendering of legal services to a client in prior litigation between the third party and the client falls within the scope of a professional liability exclusion that excludes coverage for malicious prosecution “due to the rendering or failure to render professional services” - - this Court is of the opinion that the language of the “Professional Services” exclusion contained in the Businessowners Package Policy is clear and unambiguous and applies to the allegations asserted against Defendant Hayhurst in the First Amended Complaint.

53. Specifically, there is no genuine issue of material fact that Plaintiff’s claim against Defendant Hayhurst in this matter as set forth in the First Amended Complaint seeks compensation for malicious prosecution due to Defendant Hayhurst’s rendering of professional legal services to his client, CCMH, in the civil matters filed in the Circuit Court of Wood County, West Virginia, at docket numbers 03-C-296 and 03-C-623. There is no genuine issue of material fact that Defendant Hayhurst could only have rendered such services to CCMH in his professional capacity, as opposed to an individual or non-professional capacity.

54. Plaintiff and Defendant Hayhurst argue that the “Professional Services” exclusion must be read narrowly and, as such, the exclusion should only apply to claims for “personal injury” brought against Defendant Hayhurst by his own clients. Plaintiff and Defendant Hayhurst argue that claims brought against Defendant Hayhurst by third parties should not be included within the scope of the “Professional Services” exclusion. The Court finds that this argument is not supported by the clear and unambiguous language of the insurance policy, which as a matter of law does not include any language that allows this Court to limit the application of the exclusion to only those claims brought against Defendant Hayhurst by his clients.

55. The Court also notes that the “Professional Services” exclusion expressly states that coverage is not available for professional liability claims unless Defendant Hayhurst has purchased his professional liability insurance coverage from Defendant Cincinnati. There is no genuine issue of material fact that at all times relevant Defendant Hayhurst had professional liability insurance coverage in place with another insurance carrier, Liberty Insurance Underwriters, Inc., and not Defendant Cincinnati. Thus, the Court finds that the exception to the “Professional Services” exclusion is not satisfied and, therefore, the policy coverage does not apply to the allegations set forth against Defendant Hayhurst in the First Amended Complaint as a matter of law.

56. The Court’s interpretation of the “Professional Services” exclusion is consistent and in keeping with Syllabus Point 4 of the Webster decision, which recognizes and approves of the use of professional liability exclusions in general liability policies, such as the Businessowners Package Policy in question, as a mechanism of shifting the risk of liability for claims arising in connection with the performance of professional services away from the general liability insurance carrier and onto the professional.

57. While not binding, the Court is persuaded by the legal analysis set forth in several decisions rendered in other jurisdictions that have addressed the very coverage issue presented in this action. These jurisdictions have unanimously rejected the very argument posed by Plaintiff and Defendant Hayhurst that professional liability exclusions are limited in application to claims brought against professionals by their clients. In light of the decisions rendered in Webster County Solid Waste Auth. v. Brackenrich & Assocs., Inc. and State Auto. Mut. Ins. Co. v. Alpha Eng'g Servs., Inc., this Court is of the opinion that the West Virginia Supreme Court of Appeals would likewise reject Plaintiff's and Defendant Hayhurst's argument.

58. In Harad v. Aetna Cas. & Sur. Co., 839 F.2d 979 (C.A.3 1988), the Third Circuit held that a professional services exclusion operated to bar coverage under a businessowners package policy issued to an attorney-policyholder when the attorney was sued for malicious prosecution by a third party following the attorney's representation of a client in a prior lawsuit involving the third party and the attorney's client. The attorney was alleged to have signed a verification to an answer and counterclaim filed on behalf of his client, wherein the client asserted that the third party conspired and/or contrived to defraud the client by concealing and/or misrepresenting the fact that vehicles owned by the third party and insured by the client were for personal rather than business use. The professional liability exclusion stated:

This insurance does not apply:

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

Id. at 983 (emphasis in original).

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

59. In Vogelsang v. Allstate Ins. Co., 46 F.Supp.2d 1319 (S.D. Fla. 1999), the Southern District of Florida addressed the issue of coverage under a business insurance policy for a lawsuit brought against an attorney and his law firm by a third party for malicious prosecution, slander, defamation, and intentional infliction of emotional distress arising out of the attorney’s representation of the third party’s former wife in a dissolution of marriage proceeding against the third party. Vogelsang, 46 F.Supp.2d at 1320. The third party alleged that the attorney drafted on behalf of his client a complaint which contained allegations of fraud against the third party based on facts that the attorney knew were false and without merit. Id.

The court held that the policy did not afford coverage by operation of the following exclusionary language:

Exclusions-Liabilities We Do Not Cover

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

Id. at 1321 (emphasis added).

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

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

Id. at 1323 (citation omitted).

60. In Gould & Ratner v. Vigilant Ins. Co., 782 M.E.2d 749 (Ill. App. Ct. 2002), the Illinois Court of Appeals addressed a claim for coverage by the policyholder, a law firm, under a commercial insurance policy when it and one of its partners were sued by a third party for defamation and breach of fiduciary duty arising out of the law firm's representation of a client in a bankruptcy proceeding. See Gould & Ratner, 782 N.E.2d at 752. The third party was once a client of the law firm and accused the law firm of utilizing information that was protected by the

attorney-client privilege during the cross-examination of the third party. *Id.* The court held that the policy did not afford any coverage for the claim by operation of the following exclusion:

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

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

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

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

Id. at 751 (Emphasis in original).

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

61. This Court also observes that other jurisdictions have held that professional services exclusions are not limited to situations where a client is suing the professional-policyholder. See Pekin Ins. Co. v. L.J. Shaw & Co., 684 M.E.2d 853 (Ill. App. Ct. 1997) (held that professional services exclusion was not limited to injuries caused to clients of the policyholder); Erie Ins. Group v. Alliance Environmental, Inc., 921 F.Supp. 537 (S.D. Ind. 1996) (held that professional services exclusion to a general business liability policy is not limited only to claims by clients or those in privity with the policyholder); Hurst-Rosche Engineers, Inc. v. Commercial Union Ins. Co., 51 F.3d 1336 (7th Cir. 1995) (applying a professional services exclusion to a third party claim against the policyholder).

62. There is no genuine issue of material fact that upon learning of Plaintiff’s lawsuit, Defendant Hayhurst turned immediately to his professional liability insurance carrier for

coverage, and not Defendant Cincinnati. This evidence demonstrates that Defendant Hayhurst recognized that he was being sued in his “professional” capacity, and not his “commercial” capacity, and as such the Businessowners Package Policy issued by Defendant Cincinnati did not apply.

63. Based upon the undisputed material allegations against Defendant Hayhurst set forth in Plaintiff’s First Amended Complaint and the clear and unambiguous language of the “Professional Services” exclusion, the Court declares that Defendant Cincinnati owes no duty to defend and indemnify Richard A. Hayhurst under Businessowners Package Policy, number BOP 208 95 50, in effect for the coverage periods of May 20, 2002 to May 20, 2005, and May 20, 2005 to May 20, 2006, against the allegations and claims presented by Bernard R. Boggs against Richard A. Hayhurst in the civil matter filed in the Circuit Court of Wood County, West Virginia, civil action number 06-C-401, and styled Bernard R. Boggs, Plaintiff v. Richard A. Hayhurst, Esq., Defendant (consolidated under civil action number 05-C-527) and is entitled to summary judgment as a matter of law.

C. **DEFENDANT CINCINNATI DOES NOT OWE A DUTY TO DEFEND OR INDEMNIFY DEFENDANT HAYHURST UNDER THE PERSONAL UMBRELLA LIABILITY POLICY**

64. The Court concludes that the allegations asserted against Defendant Hayhurst in the First Amended Complaint fall within the definition of the term “personal injury” set forth in the Personal Umbrella Liability Policy on the grounds that Plaintiff avers allegations in support of a claim for malicious prosecution. However, this finding is not determinative of the issue of Defendant Cincinnati’s duty to defend or indemnify Defendant Hayhurst under the policy.

65. The next step in the determination of coverage is whether the policy includes any provisions that exclude from the policy coverage the allegations set forth in the First Amended

Complaint. Defendant Cincinnati asserts, and this Court agrees, that coverage under the policy is excluded by operation of the “Professional Liability” exclusion, which operates in relevant part to exclude coverage for:

“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”.

66. In light of this Court’s discussion above regarding the validity and enforceability of professional liability exclusions under West Virginia law, this Court is of the opinion that the language of the “Professional Liability” exclusion contained in the Personal Umbrella Liability Policy is clear and unambiguous and applies to the allegations asserted against Defendant Hayhurst in the First Amended Complaint.

67. There is no genuine issue of material fact that Plaintiff’s claim against Defendant Hayhurst in this matter as set forth in the First Amended Complaint involves a claim for malicious prosecution arising out of acts committed by Defendant Hayhurst in the conduct of his profession as an attorney, in this case the filing of counterclaims and motions for sanctions on behalf of his client, CCMH, against Plaintiff in the civil matters filed in the Circuit Court of Wood County, West Virginia, at docket numbers 03-C-296 and 03-C-623. There is no genuine issue of material fact that Defendant Hayhurst could only commit such acts in his professional capacity, as opposed to an individual or non-professional capacity.

68. Plaintiff and Defendant Hayhurst argue that the “Professional Liability” exclusion must be read narrowly and, as such, the exclusion should only apply to claims for “personal injury” brought against Defendant Hayhurst by his own clients. Plaintiff and Defendant Hayhurst argue that claims brought against Defendant Hayhurst by third parties should not be included within the scope of the “Professional Liability” exclusion. The Court finds that this

argument is not supported by the clear and unambiguous language of the insurance policy, which as a matter of law does not include any language that allows this Court to limit the application of the exclusion to only those claims brought against Defendant Hayhurst by his clients.

69. The Court's interpretation of the "Professional Liability" exclusion is consistent and in keeping with Syllabus Point 4 of the Webster decision, which recognizes and approves of the use of professional liability exclusions in general liability policies, such as the Personal Umbrella Liability Policy in question, as a mechanism of shifting the risk of liability for claims arising in connection with the performance of professional services away from the general liability insurance carrier and onto the professional.

70. Based upon the undisputed material allegations against Defendant Hayhurst set forth in Plaintiff's First Amended Complaint and the clear and unambiguous language of the "Professional Liability" exclusion, the Court declares that Defendant Cincinnati owes no duty to defend and indemnify Richard A. Hayhurst under Personal Umbrella Liability policy, number CPC 219 51 31, in effect for the coverage periods of September 23, 2001 to September 23, 2004, and September 23, 2004 to September 23, 2007, against the allegations and claims presented by Bernard R. Boggs against Richard A. Hayhurst in the civil matter filed in the Circuit Court of Wood County, West Virginia, civil action number 06-C-401, and styled Bernard R. Boggs, Plaintiff v. Richard A. Hayhurst, Esq., Defendant (consolidated under civil action number 05-C-527) and is entitled to summary judgment as a matter of law.

III. ORDER OF COURT

For the reasons set forth above, this Court hereby **ORDERS**:

1. Defendant, The Cincinnati Insurance Company's Motion for Summary Judgment is **GRANTED** and Plaintiff's First Amended Complaint is

**DISMISSED WITH PREJUDICE AS TO DEFENDANT, THE
CINCINNATI INSURANCE COMPANY;**

2. Plaintiff, Bernard Boggs's Motion for Summary Judgment on the issue of coverage is **DENIED**; and,
3. Defendant, Richard A. Hayhurst's Motion for Summary Judgment on the issue of coverage is **DENIED**.

For the reasons set forth above, this Court hereby **DECLARES AND ORDERS**:

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

R. Boggs, Plaintiff v. Richard A. Hayhurst, Esq., Defendant (consolidated
under civil action number 05-C-527).

The Circuit Clerk is directed to serve a certified copy of this Order to all counsel of
record and *pro se* litigants.

ENTERED this 20th day of March, 2009.



Judge Thomas C. Evans, III

Prepared by:

Adam M. Barnes, Esq. (WV ID 8778)
Counsel for Defendant
The Cincinnati Insurance Company

05 C 527
06 C 401

Approved as to form:

Christopher R. Regan, Esquire (WV ID 8593)
Counsel for Plaintiff
Bernard Boggs

Richard A. Hayhurst, Esquire (WV ID 1648)
Counsel for Defendant/Pro Se Defendant

Ancil G. Ramey, Esquire (WV ID 3013)
Counsel for Defendant
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Dino S. Colombo, Esquire (WV ID 5066)
Counsel for Defendant
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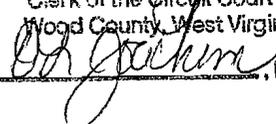
STATE OF WEST VIRGINIA,
COUNTY OF WOOD, TO-WIT:

I, CAROLE JONES, Clerk of the Circuit Court of
Wood County, West Virginia, hereby certify that
the foregoing is a true and complete copy of an
order entered in said Court, on the 23rd day of
March, 2009, as fully as the same appears
to me of record.

Given under my hand and seal of said Circuit
Court, this the 24th day of March, 2009.



Clerk of the Circuit Court of
Wood County, West Virginia

By: , Deputy