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THE SUPREME COURT
OF THE STATE OF WASHINGTON

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b/h

INTERNATIONAL MARINE UNDERWRITERS, a division of One Beacon
America Insurance Company, a Massachusetts Insurance Company,
Respondents,

v.

ABCD MARINE, LLC a Washington LLC; ABCD MARINE, a Washington
partnership and ALBERT BOOGAARD, an individual domiciled in
Washington,

Appellants,

v.

ALLIANCE INSURANCE CORP. a/k/a ALLIANCE INSURANCE, INC.,
Respondents

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE SUSAN CRAIGHEAD

PETITIONERS'
APPELLANTS' SUPPLEMENTAL BRIEF

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 ORIGINAL

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- 2. *Hunt v. Ciminelli-Cowper Co., Inc., et al. v. Phoenix Insurance/Merchants Mutual Ins. Co.* in the Supreme Court, Appellate Division, Fourth Department, New York, 939 N.Y.S.2d 781, 93 A.D.3d 1152 (March 16, 2012) ((Appendix 3)....7
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I. INTRODUCTION

Petitioner is requesting that the Court make an important ruling that affects the substantial public interest in providing a remedy for a class of workers in the State of Washington injured by third parties at their job site. Washington law has allowed owners of job sites to require contractors and subcontractors to indemnify the owner against all injuries occurring on the owner's job site, including injuries caused by the negligence of the owner's agents. The insurance industry has responded to this standard construction industry requirement by providing "insured contract" language in their CGL policies that provides automatic indemnity coverage to owners for all injuries arising out of the contractor's work.

In the present case it is undisputed that the site owner and operator, NSI, required the contractor, ABCD, a Washington General Partnership, to provide indemnity coverage in their "Access Agreement." It is also undisputed that ABCD was the named insured on a CGL policy issued by the respondent IMU, and that IMU's CGL policy provided automatic indemnity *coverage to NSI* required by the "Access Agreement" under the "insured contract" provisions of the policy for all injuries arising out of ABCD's work on NSI's property. IMU's CGL policy insured NSI for Boogaard's injuries occurring on its property. Boogaard was a third party to NSI.

Essentially, the trial court and the Court of Appeals ruled that Boogaard was required to personally indemnify NSI for his own injuries leaving him with no remedy for this horrible accident in which he was a

fault free party. The ruling if allowed to stand will leave other workers and small general contractors in the same situation as Boogaard without a remedy for their own injuries at job sites. The ruling also provides a windfall for insurance companies to avoid providing indemnity coverage to owners under the “insured contract” provisions of CGL policies which they charge premiums for, and are a standard requirement in almost all construction contracts.

II. DISCUSSION

A. General Rules of Interpretation of Insurance Contracts

The well settled Washington law of construction of insurance contracts was fully discussed in Appellant’s Opening Brief in the Court of Appeals, pp.19-23. A solid summary was provided in *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn.App. 687, 694, 186 P.3d 1188 (2008):

The courts liberally construe insurance policies to provide coverage wherever possible. “If terms are defined in a policy, then the term should be interpreted in accordance with that policy definition.” If terms are not defined, then they are to be given their “ ‘plain, ordinary, and popular’ meaning.” Any remaining ambiguity must be given a meaning and construction most favorable to the insured. Coverage exclusions “are contrary to the fundamental protective purpose of insurance and will not be extended beyond their clear and unequivocal meaning. Exclusions should also be strictly construed against the insurer.” [footnoted citations omitted]

In the trial court and in the Court of Appeals, IMU continually asserted that the Access Agreement between ABCD and NSI was not an

'insured contract.' Large amounts of ink and time were wasted on this misrepresentation by a national insurance company which had to have known better. At oral argument in the Court of Appeals IMU finally conceded that the requirement in the Access Agreement requiring ABCD to indemnify NSI for NSI's negligent infliction of harm was indeed a classic case of an 'insured contract.' IMU continues to assert that one of ABCD's workers, Boogaard, because he was one of the owners of ABCD was excluded from coverage. That seems to be the only issue left.

There is no exclusion of coverage for a company's worker who is also a partner. Stated another way, the status of ABCD as a legal general partnership instead of another form of business, such as a corporation, cannot be determinative.

B. Coverage for Injuries Under CGL "Insured Contracts"

A summary of the parties and their relationship to each other should be helpful to this court. Northland Services, Inc. (NSI) was the operator of Pier 115 in Seattle doing various marine construction-related projects. NSI hired ABCD Marine (ABCD), a general partnership formed in 2000, to do welding for them on Pier 115. NSI required ABCD to have in effect a standard Commercial General Liability policy (CGL policy). Through a

broker, ABCD purchased such a CGL policy from International Marine Underwriters (IMU). This policy was in effect at all times through and including the date of Albert Boogaard's (Boogaard) injury, October 4, 2004. This form of the CGL policy, including the specific policy provisions at issue in this case, are standard in the construction and marine industries and are in general use all over the United States. The purchaser of the policy and named insured was "ABCD Marine" acknowledged by IMU on page 1 of its policy as a general partnership. The general partners of ABCD are not the named insureds and did not pay for the policy--the partnership paid. In fact, the names of the owners of the company, including Boogaard, are nowhere named in the policy.

There is no evidence at any time from the year 2000 through October 4, 2004, to challenge the fact that ABCD scrupulously maintained its partnership status legally and completely in regard to its work for NSI, in regard to its relationship with IMU, and in regard to its books and records. ABCD was a legal partnership wholly compliant with Washington's version and adoption of the Uniform Partnership Act, RCW 25.05.005 et sequitur. As such the company was separate and apart from its owners. See RCW 25.05.050.

On September 29, 2004, a few days before Boogaard was injured, ABCD, as a condition of continued access to the NSI job site, signed

another contract with NSI. It was labeled an "Access Agreement." It is attached as Exhibit A to the appellants' petition for review.

Boogaard in his "Appellants' Reply Brief" in this Court asserted on page 5: "The results in *Cowan* [*Systems Inc v. Harleysville Mutual Insurance*, 457 F.3d 368 (4th Cir. 2006)] and *BRE* (*Truck Insurance INS Exchange v. BRE Properties Inc.*, 119 Wn. App. 582, 595-596, 81 P.3d 929, 935 (2003)] are uniform throughout the country. **IMU has cited no contrary authority in briefing to the trial court, to the Court of Appeals or to this Supreme Court.** This language presented a challenge to IMU to cite any case in the country that in support of their contention that a CGL policy "insured contract" provision excluded coverage for an injured worker for insured/indemnitor [ABCD herein] when injured by the negligence of an indemnitee [NSI herein]. They failed to cite any such cases.

There are cases, however, that support the position of the Appellant herein. In *Marlin v. Wetzel County Board of Education v. Commercial Union Insurance Company* 212 W. Va. 215, 569 S.E.2d 462 (2002) the Wetzel County Board of Education (Board) acting as its own general contractor, hired Bill Rich Construction to renovate a high school. This is the identical to the relationship between of NSI and ABCD. The contract required indemnification from Bill Rich in favor of the Board in language

almost identical to the “Access Agreement” in the instant case. The wording of that contract can be found on page 465 of S.E. Reporter and on page 218 of the W.Va. Reporter. Bill Rich Construction purchased a liability policy, a CGL policy, from Commercial Union Insurance. Workers of Bill Rich Construction were harmed by asbestos at the construction site and sued the Board. The court held that the indemnity agreement was a classic “insured contract” which in effect and in law covered the liability of the Board for injuries it caused to Bill Rich’s workers. The case is on all fours with the fact pattern of the instant case. An employee of NSI harmed a worker of ABCD Marine after ABCD contractually assumed the liability for NSI’s negligence and ABCD held a standard CGL policy purchased from IMU. The only difference is that Bill Rich Construction was a corporation. IMU is arguing that results should be different where the named insured is a general partnership and the worker injured is a partner not just an employee. For the ease of reading by the court, the opinion is attached as Appendix 1 hereto.

Likewise in a 2004 case arising in the United States District Court for the Southern District of Texas, *XL Specialty Insurance Co. v. Kiewit Offshore Services, LTD*, 336 F.Supp.2d 673 (S.D. Texas), Kiewit retained RBT Welders, Inc. to do welding on a jobsite it controlled. RBT purchased a standard CGL policy which contained the identical “insured

contract” provisions as the policy issued by IMU to ABCD. While working on the Kiewit property an explosion killed an RBT employee. There was an indemnity agreement between Kiewit and RBT that had almost the identical language to the indemnity agreement between NSI and ABCD Marine represented by the “Access Agreement.” RBT had purchased its CGL policy from XL Specialty Insurance Co. XL Insurance denied coverage for the Kiewit negligence. The court found that the contract between Kiewit and RBT was an “insured contract” and therefore the worker’s injuries caused by Kiewit were automatically covered. A copy of that opinion is attached as Appendix 2 for the convenience of the court.

In *Hunt v. Ciminelli-Cowper Co., Inc., et al. v. Phoenix Insurance/Merchants Mutual Ins. Co.* in the Supreme Court, Appellate Division, Fourth Department, New York, 939 N.Y.S.2d 781, 93 A.D.3d 1152 (March 16, 2012), the job site was owned by Jamestown Community College (JCC). JCC hired contractors Ogiony Development Co., Inc. (Ogiony) and Pettit & Pettit, Inc. (Pettit) to do a construction project on the JCC property. Hunt was a worker injured on the JCC’s job site. JCC had required an indemnity agreement, again, in almost the same language as the NSI/ABCD “Access Agreement” from its contractors. JCC required that each of the companies purchase a CGL policy and both of

them did so. Ogiony was insured by Travelers Insurance (erroneously named as Phoenix Ins.) and Pettit was insured by Merchants Mutual. Pettit did not secure additional insured status for JCC and so relied solely on the “insured contract” provisions of its CGL policy. The court found liability against Merchants, i.e., found that the JCC’s negligently caused harm was covered by Pettit’s CLG policy because Pettit was contractually bound to indemnify the negligence of the JCC. A copy of that opinion is attached as Appendix 3.

Just before oral argument in our case before the Court of Appeals, Div. I, the Court asked both parties to consider and compare the facts and the holding in *Cowan Systems, Inc. v. Harleysville Mutual Insurance Co.*, 457 F.3d 368 (4th Cir. 2006) which arose in Maryland. The opinion is attached hereto as Appendix 4. The facts and holding in Cowan is indistinguishable from the facts of the instant case except that the named insured was a corporation and not a legal partnership. Linen N Things hired Cowan Systems to do transportation services. Linen N Things required Cowan to sign an indemnity agreement to assume all tort liability of Linen N Things in words almost identical to the indemnity language in the NSI ‘Access Agreement.’ A Cowan employee slipped and was injured while on the Linen N Things property and so sued Linen N Things who tendered to Cowan under the indemnity agreement. Cowan had purchased

a standard CGL policy from Harleysville Insurance. Like all standard CGL policies it contained an 'insured contract' clause thereby covering the negligence of Linen N Things. The 4th Circuit Court of Appeals found coverage for Linen N Things negligence resulting in the injuries to the Cowan employee.

No one disputed the insurance industry expertise of Robert Sedillo who submitted a declaration to the trial court herein (CP 410-423) a copy of which is attached hereto as Appendix 5 for the convenience of the Court. No one disputed the substance of his testimony. He verified that these CGL policies containing automatic coverage of 'insured contracts' are common and that IMU's representations to the trial court and Court of Appeals were contrary to the way the industry as a whole treated this coverage. In paragraphs 18 and 19 he stated:

"18. Plaintiff, IMU, incorrectly argues that Mr. Boogaard is not a 'third person,' therefore the Access Agreement is not an 'insured contract,' thus Mr. Boogaard's claim is not covered by the IMU policy. The plain, simple truth is that Mr. Boogaard is a 'third person' making the Access Agreement an 'insured contract,' thus triggering the contractual liability coverage under the IMU policy.

19. In the March, 2007 edition of Malecki on Insurance (written by Donald S. Malecki, CPCU and Pet Ligeros, JD) there was a piece, entitled 'Contractual Liability – Tort Liability Assumed – Who is a Third Party?' The question is who can a third party be? The answer is, the one who has sustained injury or damage at the hands of the indemnitee, and that mean is can be almost anyone, even an employee of the indemnitor. Both Mr. Malecki and Mr. Ligeros are

recognized authorities regarding property and casualty coverage issues.”

The decisions below, if left to stand, are in direct contradiction to a case already decided by this Division I in *Truck Insurance Exchange v. BRE Properties, Inc.*, 119 Wn.App. 582, 81 P.3d 929 (2003). BRE was a general contractor. West Star was a company doing subcontracting for BRE. West Star purchased a commercial liability (CGL) policy from Truck Insurance. The policy was practically identical to IMU policy issued to ABCD. An employee of West Star was injured by the negligence of a BRE employee on West Star property. West Star signed a required contract in favor of BRE, indemnifying BRE from all acts of negligence of any BRE employee. The injured West Star employee sued BRE for their negligence. BRE tendered to West Star which tendered to Truck Insurance under the insured contract provision of the Truck CGL policy. The court held that this was a classic “insured contract” and that the employee was entitled to recover as the employee was not excluded as a third party either to BRE or to West Star or to Truck Insurance.

III. CONCLUSION/RELIEF REQUESTED

“Insured contracts” are agreements where a CGL insured has contractually agreed to indemnify the negligence of an indemnitee. IMU

had consistently maintained that the "Access Agreement" signed by ABCD was not an insured contract. At oral argument IMU finally conceded that it was an "insured contract." Therefore, under all of the cases which have considered this fact pattern, the injured worker can recover. Not only the case authority but the standards of the industry, as exemplified in the aforecited *Malecki on Insurance* and the uncontradicted declaration of industry expert Robert Sedillo reaches the same result. The opinion below of the Court of Appeals, therefore, stands in stark contradiction to its decision in BRE, to uniform national authority considering the issue under the standard CGL policy language, and to insurance industry academic standards and the unimpeached declaration of insurance industry expert, Robert Sedillo. The only difference between all the authority and our case is the legal nature of the insured. In this case it is a legal general partnership while in the cited cases the insured was a corporation. The law treats all such entities as separate from their owners.

The decision of the Court of Appeals should be reversed. Boogaard should be entitled to relief for IMU's denial of coverage including, but not limited to, reasonable attorneys' fees under *Olympic Steamship v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and relief under RCW 48.30.015, et. seq. RAP18.1(b).

The failure to act in this case will leave workers such as Boogaard with no remedy for their serious injuries, and give a windfall to insurance companies who charge for coverage they do not have to honor.

DATED this 5th day of October, 2012 at Seattle, Washington.

DAVID J. BALINT, PLLC

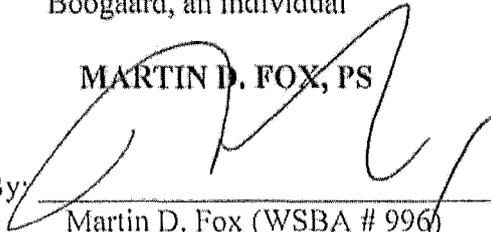
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**DECLARATION OF SERVICE
OF APPELLANTS' REPLY BRIEF**

I certify that on the 5th day of October 2012 I caused a true and correct copy of the APPELLANTS' SUPPLEMENTAL BRIEF to be served on the following in the manner indicated below:

- 1) Counsel for plaintiffs/respondents
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DATED this 5th day of October, 2012 at Seattle, Washington.



Kish Underwood, Paralegal to David J. Balint

Appendix 1

Westlaw

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▷

Supreme Court of Appeals of
 West Virginia.

Jeffrey L. MARLIN, Sr., et al., Plaintiffs Below,
 Appellees,

v.

WETZEL COUNTY BOARD OF EDUCATION, et
 al., Defendants and Third Party Plaintiffs Below,
 Wetzel County Board of Education, Defendant and
 Third Party Plaintiff Below, Appellant,

v.

Commercial Union Insurance Company and North-
 ern Assurance Company of America, a subsidiary
 of Commercial Union Insurance Company, Third-
 Party Defendants Below, Appellees.

No. 30100.

Submitted March 12, 2002.

Decided June 18, 2002.

In personal injury action by subcontractors' employees, property owner filed third-party complaint against general contractor's liability insurer for a declaratory judgment of coverage under commercial general liability (CGL) and umbrella policies. The Circuit Court, Wetzel County, John T. Madden, J., ruled in favor of insurer. Owner appealed. The Supreme Court of Appeals, Starcher, J., held that: (1) the construction contract was an insured contract; (2) the owner stood in the same shoes as the contractor for coverage purposes, could seek coverage directly under the policy, and was entitled to a defense; and (3) agent's misrepresentation in certificate of insurance stating that owner was an additional insured estopped the insurer from denying coverage.

Reversed and remanded.

West Headnotes

[1] Declaratory Judgment 118A ↪393

118A Declaratory Judgment

118AIII Proceedings

118AIII(H) Appeal and Error

118Ak392 Appeal and Error

118Ak393 k. Scope and Extent of Review in General. Most Cited Cases

A circuit court's entry of a declaratory judgment is reviewed de novo.

[2] Appeal and Error 30 ↪1008.1(5)

30 Appeal and Error

30XVI Review

30XVI(1) Questions of Fact, Verdicts, and Findings

30XVI(1)3 Findings of Court

30k1008 Conclusiveness in General

30k1008.1 In General

30k1008.1(5) k. Clearly Erroneous Findings. Most Cited Cases

Any determinations of fact made by the circuit court or jury in reaching its ultimate judgment are reviewed under a clearly erroneous standard.

[3] Appeal and Error 30 ↪893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate Court

30k893(1) k. In General. Most Cited Cases

The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed de novo on appeal.

[4] Insurance 217 ↪2120

217 Insurance

217XV Coverage--in General

217k2120 k. Questions of Law or Fact. Most

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Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.

[5] Insurance 217 ↪2316

217 Insurance

217XVII Coverage--Liability Insurance

217XVII(B) Coverage for Particular Liabilities

217k2316 k. Contractually Assumed Liabilities. Most Cited Cases

In a policy for commercial general liability (CGL) insurance and special employers liability insurance, when a party has an insured contract, that party stands in the same shoes as the insured for coverage purposes.

[6] Insurance 217 ↪2316

217 Insurance

217XVII Coverage--Liability Insurance

217XVII(B) Coverage for Particular Liabilities

217k2316 k. Contractually Assumed Liabilities. Most Cited Cases

The phrase "liability assumed by the insured under any contract" in a liability insurance policy, or words to that effect, refers to liability incurred when an insured promises to indemnify or hold harmless another party and thereby agrees to assume that other party's tort liability.

[7] Insurance 217 ↪2316

217 Insurance

217XVII Coverage--Liability Insurance

217XVII(B) Coverage for Particular Liabilities

217k2316 k. Contractually Assumed Liabilities. Most Cited Cases

Construction contract between property owner and general contractor was an "insured contract" within the meaning of the contractor's commercial general liability (CGL) policy; the contract required

the contractor to indemnify and hold harmless the owner from and against all claims arising from the contractor's performance of the contract.

[8] Insurance 217 ↪2272

217 Insurance

217XVII Coverage--Liability Insurance

217XVII(A) In General

217k2272 k. Persons Covered. Most Cited Cases

Insurance 217 ↪2316

217 Insurance

217XVII Coverage--Liability Insurance

217XVII(B) Coverage for Particular Liabilities

217k2316 k. Contractually Assumed Liabilities. Most Cited Cases

Property owner that had entered into an insured contract requiring the named insured, a general contractor, to indemnify the owner and hold it harmless stood in the same shoes as the named insured for coverage purposes, could seek coverage directly under the policy, and was entitled to a defense from the contractor's commercial general liability (CGL) insurer in a suit by subcontractor's employees.

[9] Insurance 217 ↪3092

217 Insurance

217XXVI Estoppel and Waiver of Insurer's Defenses

217k3092 k. Statements of Officers and Agents in General. Most Cited Cases

Insurance agent's misrepresentation in certificate of insurance stating that property owner was an additional insured under general contractor's commercial general liability (CGL) and umbrella policies estopped the insurer from denying coverage for the owner, despite claim of clerical error.

[10] Insurance 217 ↪1710

217 Insurance

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217XIII Contracts and Policies
 217XIII(A) In General
 217k1710 k. In General. Most Cited Cases

Insurance 217 ↪1727

217 Insurance
 217XIII Contracts and Policies
 217XIII(A) In General
 217k1727 k. Evidence. Most Cited Cases
 A "certificate of insurance" is a form that is completed by an insurance broker at the request of an insurance policyholder and evidences the fact that an insurance policy has been written; it includes a statement of the coverage of the policy in general terms and serves merely as evidence of the insurance and is not a part of the insurance contract.

[11] Estoppel 156 ↪52(1)

156 Estoppel
 156III Equitable Estoppel
 156III(A) Nature and Essentials in General
 156k52 Nature and Application of Estoppel in Pais
 156k52(1) k. In General. Most Cited Cases
 Estoppel applies when a party is induced to act or to refrain from acting to his/her detriment because of reasonable reliance on another party's misrepresentation or concealment of a material fact.

[12] Estoppel 156 ↪52(1)

156 Estoppel
 156III Equitable Estoppel
 156III(A) Nature and Essentials in General
 156k52 Nature and Application of Estoppel in Pais
 156k52(1) k. In General. Most Cited Cases
 Estoppel is properly invoked to prevent a litigant from asserting a claim or a defense against a party who has detrimentally changed its position in reliance upon the litigant's misrepresentation or failure to disclose a material fact.

[13] Estoppel 156 ↪52(1)

156 Estoppel
 156III Equitable Estoppel
 156III(A) Nature and Essentials in General
 156k52 Nature and Application of Estoppel in Pais
 156k52(1) k. In General. Most Cited Cases

The estoppel doctrine is designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience.

[14] Insurance 217 ↪3081

217 Insurance
 217XXVI Estoppel and Waiver of Insurer's Defenses
 217k3081 k. Matters as to Which Assertable. Most Cited Cases
 Generally, the principles of waiver and estoppel are inoperable to extend insurance coverage beyond the terms of an insurance contract.

[15] Insurance 217 ↪3081

217 Insurance
 217XXVI Estoppel and Waiver of Insurer's Defenses
 217k3081 k. Matters as to Which Assertable. Most Cited Cases
 Exceptions to the general rule that the doctrine of estoppel may not be used to extend insurance coverage beyond the terms of an insurance contract, include, but are not necessarily limited to, instances where an insured has been prejudiced because: (1) an insurer's, or its agent's, misrepresentation made at the policy's inception resulted in the insured being prohibited from procuring the coverage s/he desired; (2) an insurer has represented the insured without a reservation of rights; and (3) the insurer has acted in bad faith.

[16] Insurance 217 ↪1710

217 Insurance

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217XIII Contracts and Policies
 217XIII(A) In General
 217k1710 k. In General. Most Cited Cases

Insurance 217 ↪ 1727

217 Insurance
 217XIII Contracts and Policies
 217XIII(A) In General
 217k1727 k. Evidence. Most Cited Cases
 A "certificate of insurance" is evidence of insurance coverage and is not a separate and distinct contract for insurance.

[17] Insurance 217 ↪ 3092

217 Insurance
 217XXVI Estoppel and Waiver of Insurer's Defenses
 217k3092 k. Statements of Officers and Agents in General. Most Cited Cases
 Because a certificate of insurance is an insurance company's written representation that a policyholder has certain insurance coverage in effect at the time the certificate is issued, the insurance company may be estopped from later denying the existence of that coverage when the policyholder or the recipient of a certificate has reasonably relied to its detriment upon a misrepresentation in the certificate.

****464 *217 Syllabus by the Court**

1. "A circuit court's entry of a declaratory judgment is reviewed *de novo*." Syllabus Point 3, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995).

2. "The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgement, shall be reviewed *de novo* on appeal." Syllabus Point 2, *Riffe v. Home Finders Associates, Inc.*, 205 W.Va. 216, 517 S.E.2d 313 (1999).

3. "Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syllabus Point 1, *Tennant v.*

Smallwood, 211 W.Va. 703, 568 S.E.2d 10 (2002).

4. "In a policy for commercial general liability insurance and special employers liability insurance, when a party has an 'insured contract,' that party stands in the same shoes as the insured for coverage purposes." Syllabus Point 7, *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W.Va. 385, 508 S.E.2d 102 (1998).

5. The phrase "liability assumed by the insured under any contract" in an insurance policy, or words to that effect, refers to liability incurred when an insured promises to indemnify or hold harmless another party, and thereby agrees to assume that other party's tort liability.

6. "Estoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact." Syllabus Point 2, in part, *Ara v. Erie Ins. Co.*, 182 W.Va. 266, 387 S.E.2d 320 (1989).

7. "Generally, the principles of waiver and estoppel are inoperable to extend insurance coverage beyond the terms of an insurance contract." Syllabus Point 5, *Potesta v. U.S.F. & G.*, 202 W.Va. 308, 504 S.E.2d 135 (1998).

8. "Exceptions to the general rule that the doctrine of estoppel may not be used to extend insurance coverage beyond the terms of an insurance contract, include, but are not necessarily limited to, instances where an insured has been prejudiced because: (1) an insurer's, or its agent's, misrepresentation made at the policy's inception resulted in the insured being prohibited from procuring the coverage s/he desired; (2) an insurer has represented the insured without a reservation of rights; and (3) the insurer has acted in bad faith." Syllabus Point 7, *Potesta v. U.S.F. & G.*, 202 W.Va. 308, 504 S.E.2d 135 (1998).

9. A certificate of insurance is evidence of insurance coverage, and is not a separate and distinct

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contract for insurance. However, because a certificate of insurance is an insurance company's written representation that a policyholder has certain insurance coverage in effect at the time the certificate is issued, the insurance company may be estopped from later denying the existence of that coverage when the policyholder or the recipient of a certificate has reasonably relied to their detriment upon a misrepresentation in the certificate.

Thomas E. Buck, Esq., James M. Hoffman, Esq., Bailey & Wyant, P.L.L.C., Wheeling, for the Appellant.

John J. Polak, Esq., Rose & Atkinson, Charleston, John C. Falls, Esq., Christie, Pabarue, Mortensen & Young, Philadelphia, PA, for the Appellees.

STARCHER, Justice.

In this declaratory judgment action appealed from the Circuit Court of Wetzel County, the parties dispute whether a property owner is an "additional insured" under two liability insurance policies issued to a **465 *218 general contractor that was hired by the property owner to perform construction work. The property owner seeks the coverage in response to a lawsuit filed against the property owner by employees of various subcontractors of the general contractor, who allege they were exposed to asbestos during the construction work.^{FN1}

FN1. For details of the lawsuit, see *Marlin v. Bill Rich Construction, Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996).

The circuit court issued an order on January 5, 2001, declaring that the property owner was not entitled to coverage under the two policies. As set forth below, we reverse the circuit court's order.

I.

Facts & Background

The appellant is the Wetzel County Board of Education ("Board"). On August 17, 1987, the Board entered into a construction contract with a

general contractor, Bill Rich Construction (doing business as American Contractors), to renovate Hundred High School. The contract required, *inter alia*, that Bill Rich Construction indemnify and hold harmless the Board from and against all claims arising from Bill Rich Construction's performance of the contract.^{FN2} Furthermore, the contract required Bill Rich Construction to purchase and maintain a liability insurance policy, which was to include contractual liability insurance covering its indemnification obligations.^{FN3} The contract also required Bill Rich Construction to have the Board named as an "additional insured" on that liability insurance policy.^{FN4} Lastly, the construction contract required Bill Rich Construction to provide the Board with a "certificate of insurance" indicating that the Board had been added to the policy as an additional insured.

FN2. Concerning indemnification, the contract stated, in part:

4.18.1. To the fullest extent permitted by law, the Contractor [Bill Rich Construction] shall indemnify and hold harmless the Owner [Wetzel County Board of Education] ... and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death ... and (2) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified thereunder....

FN3. Concerning liability insurance, the contract specified, in part:

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11.1 CONTRACTOR'S LIABILITY INSURANCE

11.1.1 The Contractor shall purchase and maintain such insurance as will protect him from claims set forth below which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by himself or by any Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable: ...

.2 claims for damages because of bodily injury, occupational sickness or disease, or death of his employees;

.3 claims for damages because of bodily injury, sickness or disease, or death of any person other than his employees; ...

11.1.3 The insurance required by Subparagraph 11.1.1 shall include contractual liability insurance applicable to the Contractor's obligations under Paragraph 4.18.

FN4. An addendum to the general conditions contained in the contract, entitled Supplemental General and Special Conditions, contains the following provision:

1.6 CONTRACTOR'S AND SUBCONTRACTOR'S INSURANCE

A. In furtherance of Article II of the General Conditions, each contractor furnishing labor and materials ... [shall provide] evidence of the following:

IMPORTANT! FAILURE TO INCLUDE ANY OF THE FOLLOWING REQUIREMENTS MAY CAUSE DELAY IN EXECUTION OF CONTRACTS, ISSUANCE OF NOTICE TO PROCEED, OR REJECTION OF CON-

TRACT BY OWNER.

The ... Owner shall be ADDITIONALLY INSURED on the contractor's policy. The Contractor shall be the NAMED INSURED.

...

7. Certificate of Insurance

a. The Certificate of Insurance shall be provided by the Contractor to the Owner ...

b. The Certificate of Insurance shall contain a provision that coverage afforded will not be cancelled until at least sixty (60) days prior written notice has been given to the Owner ...

c. The Owner shall be the Certificate Holder.

d. The Certificate shall be prepared on "Acord" Form 25 (2/84) or an equivalent form.

e. The Certificate shall indicate that the Owner ... [is an] ADDITIONALLY INSURED.

****466 *219** Bill Rich Construction purchased several liability insurance policies from appellee Commercial Union Insurance Company ("Commercial Union"). During the 1987-1988 contract period, Commercial Union insured the contractor under a commercial general liability policy with \$500,000.00 in coverage for each occurrence, and \$500,000.00 in aggregate coverage. Commercial Union also provided Bill Rich Construction with an umbrella policy with liability limits of \$2,000,000.00 for each occurrence, and \$2,000,000.00 in aggregate coverage.

Bill Rich Construction purchased its insurance coverage through B & W Insurance Agency, a li-

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censed and authorized insurance agent for Commercial Union. In accordance with the requirements in the construction contract, Bill Rich Construction arranged for the insurance agent to issue an "Acord 25 (2/84)" ^{FN5} certificate of insurance that described the Wetzel County Board of Education as an "additionally insured" and as a certificate holder. The record contains the certificate of insurance, which was apparently delivered to the Board.^{FN6}

FN5. Prior to 1976, insurance companies used their own forms for certificates of insurance. In that year, the Agency Company Organized Research Development (ACORD) introduced the first standard certificate of insurance. ACORD certificates are available for insurance companies to provide evidence of property and casualty insurance, and are updated from time to time. ACORD also offers a training guide that provides suggestions for the proper issuance of certificates. Donald S. Malecki, *et al.*, *The Additional Insured Book* 342 (4th Ed.2000).

FN6. The certificate of insurance, issued on September 14, 1987, indicates that American Contractors is the "insured," and Commercial Union Insurance Company is the "compan[y] affording coverage." The certificate certifies that certain "policies of insurance listed below have been issued to the insured named above for the policy period indicated"-including the aforementioned general liability and umbrella policies. Near the bottom of the certificate, in a box titled "Description of operations/locations/vehicles/special items," it states: "Additionally insured Wetzel County Board of Education." The Board is also listed as a "Certificate Holder."

In the Fall of 1987, the renovations to Hundred High School began with Bill Rich Construction as the general contractor for the project. During the renovations, throughout 1988, workers dismantled

ceilings, walls and floors that were constructed of asbestos-containing materials. The workers allege that they were repeatedly exposed to high levels of asbestos dust.

In 1990, many of the workers on the project and their families filed suit against, *inter alia*, the Board and Bill Rich Construction, alleging that the defendants knew or should have known about the presence of asbestos, and that the defendants negligently failed to warn the workers of the existence of asbestos or to protect the workers from harmful levels of asbestos dust. The workers also alleged that the defendants fraudulently, deceitfully and willfully, wantonly and recklessly concealed from the workers the fact that they were being exposed to unsafe levels of asbestos. The workers sought compensation for their fear of contracting an asbestos-related disease in the future, and for medical costs to test for the potential future development of an asbestos-related disease. See *Marlin v. Bill Rich Construction, Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996).

Based upon the indemnification clauses in the contract between the Board and Bill Rich Construction, and upon the certificate of insurance listing the Board as an additional insured on both the general liability and umbrella policies, the Board demanded that Commercial Union assume the Board's legal defense and agree to indemnify the Board in the litigation filed by the workers.

Commercial Union refused to provide coverage, contending that it was only obliged to provide coverage to Bill Rich Construction under the policies. Commercial Union took the position that the indemnification provisions in the construction contract did not change the insurance contract with Bill Rich Construction.

Furthermore, Commercial Union asserted that its agent, B & W Insurance Agency, did not notify Commercial Union that the Board was to be added to the insurance policies as an additional insured. The insurance company asserted that it never re-

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ceived either the certificate of insurance or any other document suggesting the insurance policies **467 *220 needed to be amended. Despite the errors committed by its agent, Commercial Union argued that the certificate of insurance was issued, by its own terms, for "information only," and could not alone modify the policies to extend coverage. Commercial Union points to disclaimer language prominently on the certificate of insurance which states:

This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.

The certificate of insurance also contains the following disclaimer:

This is to certify that [the] policies of insurance listed below have been issued to the insured named above for the policy period indicated. Notwithstanding any requirement, term or condition of any contract or other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies.

Commercial Union contended that there was no coverage available to the Board under the certificate because it issued no amendments or alterations to the actual insurance policy to extend coverage to the Board, and because the certificate, by its own terms, could not amend or alter the policy.

The Board subsequently filed a third-party complaint for a declaratory judgment against Commercial Union, contending that it was an "additional insured" under the policies at issue. After substantial discovery, the parties both filed motions for summary judgment.

In an order dated January 5, 2001, the circuit court denied the Board's motion for summary judgment and granted Commercial Union's motion. The

circuit court concluded that because of the prominent disclaimer language on the certificate of insurance, the Board could not have reasonably expected coverage under the insurance policies at issue. Furthermore, the circuit court concluded that there was no provision in the insurance policies requiring Commercial Union to provide coverage to the Board merely because of the indemnity provisions in the construction contract with Bill Rich Construction.

The Board now appeals the circuit court's January 5, 2001 order.

II.

Standard of Review

[1][2] This Court reviews a circuit court's entry of a declaratory judgment *de novo*, because the principal purpose of a declaratory judgment action is to resolve legal questions. Syllabus Point 3, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995). When a declaratory judgment proceeding involves the determination of an issue of fact, that issue may be tried and determined by a judge or a jury, just as issues of fact are tried and determined in other civil actions. *W.Va.Code*, 55-13-9 [1941].^{FN7} See also, Syllabus Point 16, *Mountain Lodge Ass'n v. Crum & Forster Indem. Co.*, 210 W.Va. 536, 558 S.E.2d 336 (2001) ("West Virginia Code § 55-13-9 and Rules 38, 39 and 57 of the Rules of Civil Procedure, read and considered together, operate to guarantee that any issue triable by a jury as a matter of right in other civil actions cognizable by the circuit courts shall, upon timely demand in a declaratory judgment proceeding, be tried to a jury."). Any determinations of fact made by the circuit court or jury in reaching its ultimate judgment are reviewed under a clearly erroneous standard. *Cox*, 195 W.Va. at 612, 466 S.E.2d at 463.

FN7. *W.Va.Code*, 55-13-9 [1941] states:

When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact

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are tried and determined in other civil actions in the court in which the proceeding is pending.

[3][4] In this case we are asked to review the circuit court's interpretation of an insurance contract. In Syllabus Point 2 of *Riffe v. Home Finders Associates, Inc.*, 205 W.Va. 216, 517 S.E.2d 313 (1999), we stated that "[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination **468 *221 that, like a lower court's grant of summary judgement, shall be reviewed *de novo* on appeal." "Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syllabus Point 1, *Temant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002). See also, *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 482, 509 S.E.2d 1, 6 (1998).

III.

Discussion

The Board is asserting it is entitled to coverage under two policies of insurance issued by Commercial Union: a general liability policy, and an umbrella policy. The Board argues it is entitled to coverage under the general liability policy because the construction contract with Bill Rich Construction was a contract insured by the policy. The Board also argues that because it relied upon the misrepresentation in the certificate of insurance that it was an "additional insured" under both policies, under the doctrine of estoppel Commercial Union cannot now deny coverage.

We consider both of these arguments in turn.

A.

Coverage for an "Insured Contract"

The Board argues that the policy language of Commercial Union's general liability policy issued to Bill Rich Construction clearly contemplates and covers liability assumed by one of its insureds under any written contract or agreement. The Board takes the position that the coverage is therefore extended to the Board directly. Commercial Union,

however, argues that its insurance policy does not contain an "insured contract" provision, and therefore argues it has no direct duty to provide coverage or a defense to the Board.

[5] Our law in this area is clear. We stated in Syllabus Point 7 of *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W.Va. 385, 508 S.E.2d 102 (1998) that:

In a policy for commercial general liability insurance ... when a party has an "insured contract," that party stands in the same shoes as the insured for coverage purposes.

The question we must resolve, therefore, is whether the construction contract between Bill Rich Construction and the Board is an "insured contract" under the Commercial Union general liability policy.

The construction contract between the Board and Bill Rich Construction contained an indemnification provision such that Bill Rich Construction was required to "indemnify and hold harmless" the Board "from and against all claims, damages, losses and expenses including but not limited to attorneys fees, arising out of or resulting from the performance of the Work[.]" West Virginia law allows indemnity provisions in contracts because "indemnity clauses serve our goals of encouraging compromise and settlement by reducing settlement discussions to bilateral discussions, by encouraging adequate levels of insurance, and by allowing the parties to a contract to allocate among themselves the burden of defending claims." *Dalton v. Childress Service Corp.*, 189 W.Va. 428, 431, 432 S.E.2d 98, 101 (1993) (emphasis omitted). Indemnification and hold harmless agreements are a means of shifting the financial consequences of a loss, and are essentially non-insurance contractual risk transfers.

The Commercial Union general liability policy ^{FNR} issued to Bill Rich Construction states that the insurance company will "cover all sums which the insured is legally required to pay as damages be-

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cause of bodily injury or property damage." Commercial Union cites to two policy exclusions that are intended to narrow this coverage; however, neither of these exclusions apply to eliminate coverage for any "liability assumed by the insured under contract." One exclusion from coverage is for any "bodily injury to any employee of the insured ... or to any obligation of the insured to indemnify another because of such injury," but the exclusion goes on to state that it "does not apply to liability assumed by the insured under contract." The other provision**469 *222 excludes coverage for any "liability assumed by the insured under any oral or written contract or agreement," but only "if such injury or damage occurred prior to the execution of such contract or agreement."

FN8. The record suggests the policy was drafted in 1983.

What is meant by the phrase "liability assumed by the insured under contract" in insurance policies has been the topic of litigation in other jurisdictions. An Alaska case- *Olympic, Inc. v. Providence Washington Ins. Co.*, 648 P.2d 1008, 1011 (Alaska 1982)-provides the following explanation for the phrase:

"Liability assumed by the insured under any contract" refers to liability incurred when one promises to indemnify or hold harmless another, and does not refer to the liability that results from breach of contract.

The phrase does not provide coverage for liability caused by a breach of contract; rather, the coverage arises from a specific contract to assume liability for another's negligence. The phrase has been interpreted "to apply only to indemnification and hold-harmless agreements, whereby the insured agrees to 'assume' the tort liability of another." *Gibbs M. Smith, Inc. v. U.S.F. & G.*, 949 P.2d 337, 341 (Utah 1997).

[6] We hold that the phrase "liability assumed by the insured under any contract" in an insurance

policy, or words to that effect, refers to liability incurred when an insured promises to indemnify or hold harmless another party, and thereby agrees to assume that other party's tort liability.

[7][8] Our examination of the language of the construction contract and the general liability insurance policy leads us to conclude that the construction contract between the Board and Bill Rich Construction was an "insured contract." The Commercial Union general liability insurance policy insured any sums which Bill Rich Construction was "legally required to pay as damages because of bodily injury or property damage," including any liability for bodily injury or property damage assumed by Bill Rich Construction under the indemnification provisions of the construction contract. The construction contract clearly shifted legal responsibility for some measure of the plaintiff-workers' alleged tort liability from the Board to Bill Rich Construction, and thereby, to Commercial Union. In accordance with our holding in Syllabus Point 7 of *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, *supra*, because the Board had an "insured contract" with Bill Rich Construction, the Board stands in the same shoes as Bill Rich Construction for coverage purposes.

Accordingly, we hold that because of the language contained in the Commercial Union general liability policy, the Board "stands in the same shoes" as Bill Rich Construction and may directly seek coverage under the policy. We therefore find that the circuit court erred in holding that Commercial Union was not obligated to provide the Board with a legal defense and coverage under the general liability policy at issue.

B.

Coverage under the Certificate of Insurance

[9] The Board argues that it is an "additional insured" under both insurance policies at issue-the general liability policy and the umbrella policy. The Board argues that because an agent for Commercial Union issued a certificate of insurance listing the Board as an additional insured under both policies,

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the Board reasonably relied upon that representation to its detriment and thereby allowed Bill Rich Construction to perform the construction work without adequate insurance coverage. Because the Board relied to its detriment on Commercial Union's misrepresentation of coverage, the Board argues that Commercial Union is now prevented under the doctrine of estoppel from denying the representation made on the certificate.

Commercial Union does not dispute that its agent issued a certificate of insurance listing the Board as an additional insured. Instead, Commercial Union argues that it had no knowledge of the certificate's existence, and therefore could not modify the actual policy to include coverage for the Board. For example, Commercial Union points out that neither the Board nor Bill Rich Construction paid additional premiums for the alleged additional coverage. Commercial**470 *223 Union asserts that disclaimer language on the face of the certificate of insurance should have made clear to any reader—including the Board—that no right to coverage was created by the certificate. In other words, Commercial Union contends that because no firm representation of the existence of coverage was ever made, and the Board could not have reasonably relied on the certificate as evidence of coverage, the doctrine of estoppel does not apply.^{FN9}

FN9. Commercial Union also argues that, because the certificate of insurance states that the general liability and umbrella policies were only valid through January 1, 1988, any injuries to the plaintiffs during 1988 are not covered by the policies. We believe this argument is baseless, because both policies were renewed with identical policy language and coverages through the performance period of the construction contract. The only change was the internal numbering system for the policies in effect used by Commercial Union.

We begin our analysis by considering the purpose of certificates of insurance. As previously

mentioned, parties to a contract may contractually shift a risk of loss through an indemnity provision in the contract. The “indemnitee” in the contract can also require the “indemnitor” to provide some insurance protection for the indemnitee. However, while

[i]ndemnitees can make very specific and comprehensive contractual requirements concerning the protection to be afforded, ... they have very few alternatives for verifying that indemnitors have complied with them....

The certificate of insurance is the primary vehicle for verification that insurance requirements have been met.

Donald S. Malecki, *et al.*, *The Additional Insured Book* 341 (4th Ed., 2000).

[10] A certificate of insurance is a form that is completed by an insurance broker at the request of an insurance policyholder, and is a document evidencing the fact that an insurance policy has been written and includes a statement of the coverage of the policy in general terms. *Black's Law Dictionary* (5th Ed.1979). A certificate of insurance “serves merely as evidence of the insurance and is not a part of the insurance contract.” Richard H. Gluckman, *et al.*, “Additional Insured Endorsements: Their Vital Importance in Construction Defect Litigation,” 21 *Construction Lawyer* 30, 33 (Winter 2001). “[C]ertificates provide evidence that certain general types of policies are in place on the date the certificate is issued and that these policies have the limits and policy periods shown.” Malecki, *supra* at 341.

A problem with certificates of insurance, which appears to be common in indemnification contracts such as that in the instant case,^{FN10} is that insurance agents often issue certificates of insurance detailing a particular form of coverage, but then fail to notify the insurance company of the need to alter or amend the coverage to match the certificate. The result is that the insurance company—like in the in-

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stant case-refuses to provide coverage. As one commentator notes,

FN10. *See, e.g., Lenox Realty Inc. v. Excelsior Ins. Co.*, 255 A.D.2d 644, 679 N.Y.S.2d 749 (1998) (insurance agent listed parking lot owner as an additional insured on certificate of insurance on policy purchased by snow removal subcontractor; although insurance agent stated it was "routine procedure" to send a copy of certificates to the insurance company, coverage was not amended to add parking lot owner to policy); *Zurich Ins. Co. v. White*, 221 A.D.2d 700, 633 N.Y.S.2d 415 (1995) (insurance agent issued certificate of insurance to state department of transportation certifying that there were no deductibles to coverage provided to painting contractor for the state; insurance company later asserted a \$500 per claim deductible for property damage claims caused by painting overspray); *Criterion Leasing Group v. Gulf Coast Plastering & Drywall*, 582 So.2d 799 (Fla.App.1991) (insurance agent issued certificate of insurance listing subcontractor as covered by workers' compensation insurance without amending policy to add workers' compensation coverage); *Bucon, Inc. v. Pennsylvania Mfg. Assoc. Ins. Co.*, 151 A.D.2d 207, 547 N.Y.S.2d 925 (1989) (pursuant to indemnity agreement between contractor and subcontractor, insurance agent issued certificate of insurance listing contractor as an additional insured on subcontractor's policy, but failed to notify insurance company to change policy coverage; insurance company argued that inclusion of contractor on certificate of insurance was a "clerical error").

Although a broker for the subcontractor [policyholder] may have prepared the certificate of insurance, in many cases he or she did not fol-

low through and actually obtain the necessary endorsement.... As **471 *224 a result, although a developer may hold a certificate that states it is named as an additional insured on the subcontractor's policy of insurance, the subcontractor's carrier will deny the tender of defense and contend that the agent did not have express authority to bind the carrier.

Glucksman, at 33.^{FN11}

FN11. In some instances, insurance companies attempt to avoid liability by asserting policy exclusions which are inconsistent with the coverage noted in the certificate of insurance. One commentator indicates that some courts do not give these exclusions effect:

Certificates of insurance are often inconsistent with the related policy, and a prudent indemnitee should assume exclusions in the policy exist that do not appear on the certificate. In some jurisdictions, certificates do not govern coverage while in others, an exclusion of which a certificate holder is unaware will not be given effect.

Douglas R. Richmond, *et al.*, "Expanding Liability Coverage: Insured Contracts and Additional Insureds," 44 Drake L.Rev. 781, 796 (1996). *See also, Brown Mach. Works & Supply Co. v. Ins. Co. of North America*, 659 So.2d 51, 56 (Ala.1995) (holding that an insurance company that does not deliver a policy to a certificate holder is estopped from asserting exclusions contained in the policy but not revealed in the certificate); *Moore v. Energy Mut. Ins. Co.*, 814 P.2d 1141, 1144 (Utah App.1991) (holding that exclusions are invalid unless they are communicated to the certificate holder in writing); *J.M. Corbett Co. v. Ins. Co. of North America*, 43 Ill.App.3d 624, 2 Ill.Dec. 148, 357

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N.E.2d 125 (1976) (holding that because exclusion was not provided to certificate holder, terms of the certificate controlled).

A similar situation occurs in the context of medical, disability or other types of group insurance, where insureds are often given a certificate as evidence of coverage but are never given a copy of the master policy. The majority rule is that the coverage provisions stated in a certificate of coverage furnished to an insured by the insurance company takes precedence over conflicting terms in the master policy. See "Group Insurance: Binding Effects of Limitations on or Exclusions of Coverage Contained in Master Group Policy But Not in Literature Given Individual Insureds," 6 A.L.R.4th 835 (1981). Cf., Syllabus Point 3, *Romano v. New England Mut. Life Ins. Co.*, 178 W.Va. 523, 362 S.E.2d 334 (1987) ("Where an insurer provides sales or promotional materials to an insured under a group insurance policy, which the insurer knows or should know will be relied upon by the insured, any conflict between such materials and the master policy will be resolved in favor of the insured.")

A treatise on "additional insureds" suggests that the fact pattern in the instant case is "the most common area" of conflict involving certificates of insurance. As the treatise states:

Probably the most common area in which certificates of insurance and insurance policies conflict is with respect to additional insured status. Certificate holders are often listed as additional insureds on certificates without the policy actually being endorsed to reflect that intent. An extreme case of this that often occurs is for a copy of an additional insured endorsement to be attached to the certificate but not the policy. This

practice may not provide additional insured status and, thus, is sometimes called the "fictitious insured syndrome."

Sometimes this problem stems from a lack of communication. The insurance agent, for example, may have the authority to add another party to a policy as an additional insured and may issue a certificate indicating that this has been done while forgetting to ask the insurer to issue the endorsement. When the insured later seeks protection, the insurer denies protection, shifting the blame elsewhere.

This, of course, is really a matter of principal-agency liability and should not detrimentally affect the certificate holder. However, concise wording in the certificate's preamble indicating that the certificate is "for information only" fosters an insurance company's opportunity to deny any protection....

The insurance company maintains that it does not matter what the certificate says, it is what the policy states that counts....

Malecki, *supra* at 345-46. The insurance company in this case makes the same argument: it does not matter that the certificate of insurance says that the Board is an additional insured, it is what the policy states-or, more particularly, does not state-that counts.

The Board argues that it reasonably relied to its detriment upon representations of coverage made by Commercial Union in its certificate of insurance, and therefore Commercial Union should be estopped from denying coverage.

**472 *225 [11][12][13] The doctrine of estoppel "applies when a party is induced to act or to refrain from acting to [his/]her detriment because of [his/]her reasonable reliance on another party's misrepresentation or concealment of a material fact." Syllabus Point 2, in part, *Ara v. Erie Ins. Co.*, 182 W.Va. 266, 387 S.E.2d 320 (1989). Estoppel is

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properly invoked to prevent a litigant from asserting a claim or a defense against a party who has detrimentally changed its position in reliance upon the litigant's misrepresentation or failure to disclose a material fact. *Ara*, 182 W.Va. at 270, 387 S.E.2d at 324. The doctrine is "designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience." *White v. Austin*, 172 N.J.Super. 451, 454, 412 A.2d 829, 830 (1980).

[14] In *Potesta v. U.S.F. & G.*, 202 W.Va. 308, 504 S.E.2d 135 (1998), we suggested that the doctrine of estoppel may not be used to create insurance coverage, or increase coverage beyond that provided by the policy. We stated, at Syllabus Point 5, that:

Generally, the principles of waiver and estoppel are inoperable to extend insurance coverage beyond the terms of an insurance contract.

The rationale for this rule is that an insurance company should not be made to pay for a loss for which it has not charged a premium. See "Doctrine of Estoppel or Waiver as Available to Bring Within Coverage of Insurance Policy Risks Not Covered by its Terms or Expressly Excluded Therefrom," 1 A.L.R.3d 1139, 1144 (1965).

[15] There are, however, numerous recognized exceptions to this rule. We held in *Potesta* at Syllabus Point 7 that the some of the exceptions "include, but are not necessarily limited to" the following:

Exceptions to the general rule that the doctrine of estoppel may not be used to extend insurance coverage beyond the terms of an insurance contract, include, but are not necessarily limited to, instances where an insured has been prejudiced because: (1) an insurer's, or its agent's, misrepresentation made at the policy's inception resulted in the insured being prohibited from procuring the coverage s/he desired; (2) an insurer has represented the insured without a reservation of rights;

and (3) the insurer has acted in bad faith.

These exceptions have been used "to create insurance coverage where to refuse to do so would sanction fraud or other injustice." *Crown Life Ins. Co. v. McBride*, 517 So.2d 660, 662 (Fla.1987).

In the instant case we focus our analysis on the first exception, whether the insurer or its agent made a misrepresentation by issuing a certificate of insurance at the inception of coverage which resulted in the Board not having the coverage it desired. Our research indicates that

[i]t is well settled that an insurer may be equitably estopped from denying coverage where the party for whose benefit the insurance was procured reasonably relied upon the provisions of an insurance certificate to that party's detriment.

Lenox v. Excelsior Ins. Co., 255 A.D.2d 644, 645, 679 N.Y.S.2d 749, 750 (1998) (citations omitted). See also, *Zurich Ins. Co. v. White*, 221 A.D.2d 700, 633 N.Y.S.2d 415 (1995) (insurer was estopped from asserting deductibles to liability coverage when certificate of insurance represented there were no deductibles); *Criterion Leasing Group v. Gulf Coast Plastering & Drywall*, 582 So.2d 799 (Fla.App.1991) (under doctrine of promissory estoppel, insurer was prevented from denying workers' compensation coverage to subcontractor's employee when subcontractor was named as a "coinsured" on certificate of insurance); *Bucon, Inc. v. Pennsylvania Mfg. Assoc. Ins. Co.*, 151 A.D.2d 207, 547 N.Y.S.2d 925 (1989) (insurer estopped from denying the existence of plaintiff's coverage after issuing certificate of insurance identifying the plaintiff as an "additional insured"). "A Certificate of Insurance is an insurance company's written statement to its customer that he has insurance coverage, and the insurance company is estopped from denying coverage that the Certificate of Insurance states is in effect." *Blackburn, Nickels & Smith, Inc. v. National Farmers Union Property and Cas. Co.*, 482 N.W.2d 600, 603 (N.D.1992).

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[16][17] We therefore hold that a certificate of insurance is evidence of insurance coverage, and is not a separate and distinct contract for insurance. However, because a **473 *226 certificate of insurance is an insurance company's written representation that a policyholder has certain insurance coverage in effect at the time the certificate is issued, the insurance company may be estopped from later denying the existence of that coverage when the policyholder or the recipient of a certificate has reasonably relied to their detriment upon a misrepresentation in the certificate.

Examining the record, we believe that the elements of estoppel against Commercial Union's denial of coverage have been established by the Board. At the inception of "coverage" for the Board, on September 14, 1987, an agent for Commercial Union prepared a certificate of insurance naming the Board as an additional insured. The insurance company's "bare, conclusory averment that the certificate naming plaintiff [the Board] as an additional insured was the result of 'clerical error' was insufficient to overcome the estoppel effect of its misrepresentation, since even an innocent misleading of another party may bar one from claiming the benefits of his deception." *Bucon, Inc., v. Pennsylvania Mfg. Assoc. Ins. Co.*, 151 A.D.2d 207, 211, 547 N.Y.S.2d 925, 927 (1989). *See also, Potesta v. U.S.F. & G.*, 202 W.Va. at 321, 504 S.E.2d at 148, citing *Harr v. Allstate Ins. Co.*, 54 N.J. 287, 255 A.2d 208 (1969) (finding equitable estoppel is available to broaden coverage when there is a misrepresentation before or at the inception of the insurance contract, even where the misrepresentation is innocent).

The circuit court therefore erred in holding that the certificate of insurance did not create an obligation for Commercial Union to provide the Board with a legal defense and coverage under both the general liability and umbrella policies at issue.

IV.

Conclusion

The circuit court's January 5, 2001 order is re-

versed, and the case is remanded for further proceedings.

Reversed and Remanded.

W.Va., 2002.
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Appendix 2

Westlaw

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v

United States District Court,
S.D. Texas,
Corpus Christi Division.
XL SPECIALTY INSURANCE CO.
v.
KIEWIT OFFSHORE SERVICES, LTD.

No. CIV.A.C-03-246.
Aug. 31, 2004.

Background: Excess marine liability insurer sought declaratory judgment that it had no duty to defend or indemnify its insured's indemnitee in underlying wrongful death cases arising from explosion at indemnitee's facility. Parties sought summary judgment on various claims.

Holdings: The District Court, Head, Chief Judge, held that:

(1) indemnity agreement between insured and indemnitee was enforceable under Texas law, and
(2) excess marine liability policy provided coverage for liability assumed under indemnification agreement.

Motions granted in part and denied in part.

West Headnotes

[1] Indemnity 208 ↪104

208 Indemnity
208V Actions
208k104 k. Questions for jury. Most Cited Cases
Under Texas law, contractual right to indemnity should be determined as a matter of law.

[2] Indemnity 208 ↪30(1)

208 Indemnity
208II Contractual Indemnity
208k26 Requisites and Validity of Contracts

208k30 Indemnitee's Own Negligence or Fault
208k30(1) k. In general. Most Cited Cases

To be enforceable under Texas law, indemnity agreements must meet the fair notice requirement of the "express negligence doctrine," which states that a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract.

[3] Indemnity 208 ↪27

208 Indemnity
208II Contractual Indemnity
208k26 Requisites and Validity of Contracts
208k27 k. In general. Most Cited Cases
To be enforceable under Texas law, indemnity agreements must meet the fair notice requirement of conspicuousness, which mandates that something must appear in the face of the contract to attract the attention of a reasonable person when he looks at it.

[4] Indemnity 208 ↪30(5)

208 Indemnity
208II Contractual Indemnity
208k26 Requisites and Validity of Contracts
208k30 Indemnitee's Own Negligence or Fault
208k30(5) k. Contractors, subcontractors, and owners. Most Cited Cases
Under Texas law, indemnity agreement in subcontract under which indemnitor agreed to indemnify indemnitee for indemnitee's own negligence was enforceable, where agreement was conspicuous, in that it was preceded by word "[i]ndemnification" and set off in contrasting type, and set forth in plain language that indemnitee was seeking indemnification for its active or passive negligence, as long as claims were not caused by its sole negligence.

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[5] Insurance 217  2278(8)

217 Insurance

217XVII Coverage—Liability Insurance

217XVII(A) In General

217k2273 Risks and Losses

217k2278 Common Exclusions

217k2278(8) k. Contractual liabilities. Most Cited Cases

Under Texas law, excess marine liability insurance policy provided coverage for liability its insured assumed under indemnification agreement in subcontract, even though policy excluded liability assumed under contract, where policy also had exception to exclusion if coverage for such liability was afforded under underlying general liability policy, and insured's indemnitee was listed as additional insured in underlying general liability policy that provided coverage for "insured contract[s]."

[6] Insurance 217  2278(8)

217 Insurance

217XVII Coverage—Liability Insurance

217XVII(A) In General

217k2273 Risks and Losses

217k2278 Common Exclusions

217k2278(8) k. Contractual liabilities. Most Cited Cases

Under Texas law, insured's agreement in subcontract to hold contractor harmless from all claims of liability was an "insured contract," defined as agreement under which insured assumed tort liability for another, within meaning of exception to exclusion in general liability insurance policy.

*674 Franklin H. Jones, III, Michael L. McAlpine, Richard A. Cozad, William Scarth Clark, John R. Fitzgerald, McAlpine & Cozad. New Orleans, LA, for XL Specialty Insurance Co.

Andrew T. McKinney, IV, McKinney & Cooper LLP, Houston, TX, for Kiewit Offshore Services, Ltd.

James H. Robichaux, Matthews and Branscomb,

Corpus Christi, TX, for RBT Welders, Inc.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

HEAD, Chief Judge.

XL Specialty Insurance Company issued a Marine Excess Liability Policy to RBT Welders, Inc., which provided coverage from March 1, 2002 to March 1, 2003. RBT then supplied welders to Kiewit Offshore Services, Ltd. for a project in Ingleside, Texas. On January 6, 2003, an explosion at the Kiewit facility resulted in the deaths of Ernesto Moreno (a payroll employee of Kiewit) and Mann Van Nguyen (a payroll employee of RBT). Wrongful death claims were filed against Kiewit by relatives of the decedents. Kiewit sought coverage from XL Specialty for these claims.

Pending before the Court are (1) XL Specialty's Motion for Summary Judgment (D.E.16); (2) Kiewit's Motion for Summary Judgment (D.E.43); (3) XL Specialty's Motion for Summary Judgment Regarding the Third-Party Claim (D.E.56); (4) Kiewit's Motion for Summary Judgment on Indemnity (D.E.62); and (5) Kiewit's Motion for Summary Judgment on Indemnity against RBT (D.E.82). The Court (1) DENIES XL Specialty's Motion for Summary Judgment (D.E.16); (2) DENIES Kiewit's Motion for Summary Judgment (D.E.43); (3) DENIES XL Specialty's Motion for Summary Judgment Regarding the Third-Party Claim (D.E.56); (4) GRANTS Kiewit's Motion for Summary Judgment on Indemnity (D.E.62); and (5) GRANTS Kiewit's Motion for Summary Judgment on Indemnity against RBT (D.E.82).

Ultimately, the parties, in plaintiff's petition and in defendant's counterclaim, seek a declaratory judgment 1) as to whether or not RBT has an obligation to defend and indemnify Kiewit for claims brought against it in the underlying litigation and settlement and 2) as to whether or not XL Specialty's policy provides coverage for any such obligation. The Court finds, as a matter of law, that RBT does have such an obligation and that XL Spe-

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cialty's policy does provide coverage for such obligation—thereby granting Kiewit's Motions for Summary Judgment on Indemnity and denying XL Specialty's Motion for Summary Judgment on the Third-Party Claim.^{FN1}

FN1. The Court notes that had it not been for the indemnification provision in the Kiewit–RBT subcontract, there would have been no coverage under the XL Specialty policy for the claims brought against Kiewit for those reasons stated in plaintiff's Motion for Summary Judgment (D.E.16). However, as the Court is granting Kiewit's Motions for Summary Judgment on Indemnity, the parties' original cross-motions for summary judgment (D.E.16 and 43) must be denied.

1) Does the Kiewit–RBT subcontract require RBT to indemnify Kiewit for its own negligence and if so, is this indemnification provision enforceable?

[1][2][3] A contractual right to indemnity should be determined as a matter of law. *Fisk Elec. Co. v. Constructors & Assoc., Inc.*, 888 S.W.2d 813, 815 (Tex.1994). To be enforceable, indemnity agreements must meet the fair notice requirements of the express negligence doctrine and conspicuousness.*675 *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 509 (Tex.1993). “The express negligence doctrine states that a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract. The conspicuous requirement mandates ‘that something must appear in the face of the [contract] to attract the attention of a reasonable person when he looks at it.’” *Id.* at 508.

[4] The Court finds, as a matter of law, that the indemnification provision of the RBT–Kiewit subcontract is conspicuous. The provision is marked as “Indemnification” and the language of the provision is in contrasting type to the surrounding text. The Court also finds that the provision satisfies the express negligence test as it expresses the intent

that Kiewit is seeking indemnity from the consequences of its own negligence in specific terms within the four corners of the contract. The plain language of the provision is that RBT agrees to indemnify Kiewit for claims whether or not those claims were caused in part by the active or passive negligence or other fault of Kiewit, so long as those claims were not caused by the sole negligence of Kiewit.^{FN2}

FN2. There is Texas case law that interprets almost identical language to the indemnity provision here to mean that the indemnitor promised to indemnify the indemnitee for the indemnitee's own negligence. In *Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex.1990), the provision at issue read: “[Indemnitor] assumes entire responsibility and liability for any claim or actions based on or arising out of injuries, including death, to persons or damages to or destruction of property, sustained or alleged to have been sustained in connection with or to have arisen out of or incidental to the performance of this contract by [indemnitor], its agents and employees, and its subcontractors, their agents and employees, regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of [indemnitee].” The Court stated that “[i]t is clear ... that the contract as a whole is sufficient to define the parties' intent that [the indemnitor] indemnify [the indemnitee] for the consequences of [the indemnitee's] own negligence.” *Id.*

As the indemnification provision meets the fair-notice requirements, the Court finds as a matter of law that RBT did contractually agree to indemnify Kiewit for Kiewit's own negligence as long as Kiewit's negligence was not the sole cause for the claims or liability. XL Specialty, in its pleadings, cites to the negligence of both RBT and Kiewit in the explosion. Therefore, the Court finds that, in

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this instance, RBT was contractually obligated to indemnify Kiewit for the claims resulting from the explosion through the valid and enforceable indemnification provision.

2) *Does the XL policy provide coverage for the indemnity agreement?*

[5] As the Court finds that RBT was contractually obligated to indemnify Kiewit for the claims resulting from the explosion through the valid and enforceable indemnification provision, it must now consider whether the XL policy provides coverage for such indemnity agreement. After an analysis of the language of the XL policy and the Atlantic policy, the Court finds that the XL policy does provide coverage for the indemnity agreement.

The Contractor's Endorsement of the XL policy states:

It is agreed that the insurance afforded by this policy does not apply: 1) To any liability for personal injury or property damage arising out of liability assumed by the Insured under any contract or agreement.... Unless insurance thereof is provided by a policy listed in the underlying insurance schedule, and then only for such coverage as is afforded by the policy.

Thus, the XL policy has an exclusion for liability assumed under any contract or *676 agreement, but it also has an exception to that exclusion if coverage for such liability is afforded under the underlying general liability policy. The general liability policy that RBT procured with Atlantic Insurance Company, in which Kiewit is protected as an Additional Insured, is listed in the XL policy's Endorsement No. 2, Schedule of Underlying Insurances. If the Atlantic policy, the underlying general liability policy, provides coverage for liability assumed by RBT under any contract or agreement, then the XL policy also provides coverage for such liability.

[6] The question next becomes whether the Atlantic policy provides coverage for the valid and enforceable indemnification provision assumed by

RBT under its subcontract with Kiewit. The Atlantic policy, in its Exclusions section, states:

This insurance does not apply to: ... b. 'Bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages.... 2) Assumed in a contract or agreement that is an 'insured contract', provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement.

After review of this language, the more specific question is whether or not the RBT-Kiewit subcontract was an "insured contract," as defined by the Atlantic policy.

The Atlantic policy defines an "insured contract" as

that part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

The indemnification provision of the Kiewit-RBT subcontract, in which RBT promised to save Kiewit harmless from all claims of liability, falls squarely within the definition of insured contract under the Atlantic policy. Thus, the Court finds that the Atlantic policy provides coverage for the liability referenced in the indemnity provision. As such, the Court also finds that the XL policy provides coverage for the indemnity provision.

Thus, the Court grants Kiewit's motions for summary judgment for indemnity, denies XL Specialty's motion for summary judgment on the third-party claim, and ultimately declares judgment on the coverage issue to Kiewit. Further, because the Court has based its ultimate summary judgment of

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coverage for Kiewit upon the indemnification issues, the Court denies XL Specialty's and Kiewit's initial Motions for Summary Judgment (D.E.16, 43).

Therefore, the Court declares that XL Specialty has a duty to defend and indemnify Kiewit for all claims and allegations brought against it in the underlying litigation.

S.D.Tex.,2004.
XL Specialty Ins. Co. v. Kiewit Offshore Service,
Ltd.
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Appendix 3

93 A.D.3d 1152, 939 N.Y.S.2d 781, 2012 N.Y. Slip Op. 01883
(Cite as: 93 A.D.3d 1152, 939 N.Y.S.2d 781)

H

Supreme Court, Appellate Division, Fourth Department, New York.

Richard HUNT, Plaintiff,

v.

CIMINELLI-COWPER CO., INC., et al., Defendants.

Ciminelli-Cowper Co., Inc., Third-Party Plaintiff-Appellant,

v.

The Phoenix Insurance Company, Merchants Mutual Insurance Company, Third-Party Defendants-Respondents, et al., Third-Party Defendant.

March 16, 2012.

Background: In personal injury action brought by construction worker, defendant construction manager brought third party claims against contractors' commercial general liability (CGL) insurers. The Supreme Court, Erie County, Frank A. Sedita, Jr., J., granted insurers summary judgment. Construction manager appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) insurer of one contractor was required to demonstrate prejudice before disclaiming coverage on basis of late notice of claim, and
- (2) contract between project owner and other contractor was "insured contract," within meaning of "Supplementary Payments" section of other contractor's policy.

Reversed.

West Headnotes

[1] Insurance 217 ↪3168**217 Insurance**

- 217XXVII Claims and Settlement Practices
- 217XXVII(B) Claim Procedures
- 217XXVII(B)2 Notice and Proof of Loss

217k3166 Effect of Noncompliance with Requirements

217k3168 k. Prejudice to insurer. Most Cited Cases

Provision of commercial general liability (CGL) policy requiring insurer to demonstrate prejudice before disclaiming on basis of late notice of claim did not just apply to "Named Insured," but rather, applied to additional insured as well; although additional insured endorsement contained no provision requiring it to demonstrate prejudice in order to disclaim on basis of late notice, additional insured enjoyed same protection as named insured.

[2] Insurance 217 ↪2100**217 Insurance**

217XV Coverage—in General

217k2096 Risks Covered and Exclusions

217k2100 k. Persons covered. Most Cited Cases

In absence of unambiguous contractual language to the contrary, additional insured enjoys same protection as named insured.

[3] Insurance 217 ↪1845(1)**217 Insurance**

217XIII Contracts and Policies

217XIII(G) Rules of Construction

217k1838 Materials Related or Attached to Policies

217k1845 Margins or Backs of Policies; Endorsements

217k1845(1) k. In general. Most Cited Cases

Insurance 217 ↪1845(2)**217 Insurance**

217XIII Contracts and Policies

217XIII(G) Rules of Construction

217k1838 Materials Related or Attached to Policies

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217k1845 Margins or Backs of Policies; Endorsements

217k1845(2) k. Conflicts between policies and endorsements. Most Cited Cases

In construing endorsement to insurance policy, endorsement and policy must be read together, and words of policy remain in full force and effect except as altered by words of endorsement.

[4] Insurance 217 ↪ 2316

217 Insurance

217XVII Coverage—Liability Insurance

217XVII(B) Coverage for Particular Liabilities

217k2316 k. Contractually assumed liabilities. Most Cited Cases

Contract between owner of construction project and contractor, which required contractor to indemnify owner against personal injury claims arising out of construction work, was “insured contract,” within meaning of “Supplementary Payments” section of contractor’s commercial general liability (CGL) policy requiring insurer to defend an indemnitee also named in suit against insured if suit sought damages for which insured had assumed liability of indemnitee in contract or agreement that was an “insured contract.”

[5] Insurance 217 ↪ 1729

217 Insurance

217XIII Contracts and Policies

217XIII(B) Formation

217k1729 k. In general. Most Cited Cases

Insurance 217 ↪ 1766

217 Insurance

217XIII Contracts and Policies

217XIII(B) Formation

217k1766 k. Evidence. Most Cited Cases

Insurance 217 ↪ 2119

217 Insurance

217XV Coverage—in General

217k2114 Evidence

217k2119 k. Weight and sufficiency. Most Cited Cases

Although certificate of insurance, by itself, does not confer insurance coverage, it is evidence of carrier’s intent to provide coverage.

**782 Trevett Cristo Salzer & Andolina P.C., Rochester (Eric M. Dolan of Counsel), for Third-Party Plaintiff-Appellant.

Lazare Potter & Giacovas LLP, New York City (Yale Glazer of Counsel), for Third-Party Defendant-Respondent the Phoenix Insurance Company.

Smith, Murphy & Schoepperle, LLP, Buffalo (Frank G. Godson of Counsel), for Third-Party Defendant-Respondent Merchants Mutual Insurance Company.

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

MEMORANDUM:

*1152 Third-party plaintiff, Ciminelli-Cowper Co., Inc. (Ciminelli), commenced this third-party action seeking a declaration that, **783 inter alia, third-party defendants Travelers Property Casualty Company of America, incorrectly sued as The Phoenix Insurance Company (Travelers), and Merchants Mutual Insurance Company (Merchants) are obligated to defend and indemnify it in the underlying personal injury action. Plaintiff commenced the underlying action seeking damages for injuries he sustained when he slipped and fell while performing construction work on property owned by Jamestown Community*1153 College (JCC). Ciminelli served as the construction manager on the project. There was no general contractor, and JCC contracted directly with various prime contractors, including David Ogiony Development Co., Inc. (Ogiony) and Pettit & Pettit, Inc. (Pettit).

JCC’s contracts with Ogiony and Pettit required the contractors to indemnify JCC and Ciminelli

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against claims for personal injury arising from the construction work. The contracts also required Ogiony and Pettit to procure insurance coverage for claims arising out of their obligations under the contracts and to obtain endorsements to their general liability policies naming Ciminelli and JCC as additional insureds on a primary basis. At the time of plaintiff's accident, Ogiony was insured under a commercial general liability policy issued by Travelers (hereafter, Travelers policy), and Pettit was insured under a commercial insurance policy issued by Merchants (hereafter, Merchants policy).

Travelers moved for summary judgment dismissing the third-party complaint and any cross claims against it and declaring that it had "no obligation to defend, indemnify and/or reimburse [Ciminelli] or any other entity for any settlement payments made or defense costs incurred in the underlying ... action." Travelers contended that it had no obligation to provide coverage to Ciminelli because Ciminelli failed to notify it of the claim in a timely manner, in accordance with the terms of the Travelers policy. Merchants also moved for summary judgment dismissing the third-party complaint against it and declaring that it was not obligated to defend or indemnify Ciminelli in the underlying action. Merchants contended that its policy afforded no coverage to Ciminelli.

We agree with Ciminelli that Supreme Court erred in granting the motions of Travelers and Merchants, dismissing the third-party complaint against them and declaring that they had "no obligation to defend, indemnify or reimburse [Ciminelli] for any settlement payments made or defense costs incurred" in the underlying action. We therefore reverse the order and judgment insofar as appealed from, deny the motions of Travelers and Merchants, vacate the first through sixth decretal paragraphs and reinstate the third-party complaint against Travelers and Merchants. "In determining a dispute over insurance coverage, we first look to the language of the policy" (*Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 221, 746

N.Y.S.2d 622, 774 N.E.2d 687). "As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning ..., and the interpretation of such provisions is a question *1154 of law for the court" (*White v. Continental Cas. Co.*, 9 N.Y.3d 264, 267, 848 N.Y.S.2d 603, 878 N.E.2d 1019; see *Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*, 10 N.Y.3d 170, 177, 855 N.Y.S.2d 45, 884 N.E.2d 1044). "If the terms of a policy are ambiguous, however, any ambiguity must be construed in favor of the insured and against the insurer" (*White*, 9 N.Y.3d at 267, 848 N.Y.S.2d 603, 878 N.E.2d 1019; see *United States Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 232, 501 N.Y.S.2d 790, 492 N.E.2d 1206; **784 *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 353, 413 N.Y.S.2d 352, 385 N.E.2d 1280, rearg. denied 46 N.Y.2d 940, 415 N.Y.S.2d 1027, 388 N.E.2d 372).

With respect to the motion of Travelers, we note that the Travelers policy states that its terms "can be amended or waived only by endorsement issued by [Travelers] as part of this policy." The "Commercial General Liability-Contractors Coverage Form" provides that, "[t]hroughout 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" (emphasis added). With respect to notice of claims, the policy provides that the insured must notify Travelers "as soon as practicable of an 'occurrence' or an offense which may result in a claim." The policy further provides that Travelers "will not deny coverage based solely on your delay in reporting an 'occurrence' or offense unless we are prejudiced by your delay."

[1][2][3] Travelers contends that the policy provision requiring it to demonstrate prejudice before disclaiming on the basis of late notice applies only to Ogiony as the "Named Insured." We reject that contention. It is undisputed that Ciminelli qualifies as an additional insured under the Travelers policy. The term additional insured "is a recognized

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term in insurance contracts, and the well-understood meaning of the term is an entity enjoying the same protection as the named insured" (*Kassis v. Ohio Cas. Ins. Co.*, 12 N.Y.3d 595, 599–600, 885 N.Y.S.2d 241, 913 N.E.2d 933 [internal quotation marks omitted]; see *Pecker Iron Works of N.Y. v. Traveler's Ins. Co.*, 99 N.Y.2d 391, 393, 756 N.Y.S.2d 822, 786 N.E.2d 863; *David Christa Constr., Inc. v. American Home Assur. Co.*, 59 A.D.3d 1136, 1138, 873 N.Y.S.2d 409, *lv. denied* 12 N.Y.3d 713, 2009 WL 1620593). Thus, "[i]n the absence of unambiguous contractual language to the contrary, an additional insured 'enjoy [s] the same protection as the named insured'" (*William Floyd School Dist. v. Maxner*, 68 A.D.3d 982, 986, 892 N.Y.S.2d 115 [emphasis added]). It is well settled that, "in construing an endorsement to an insurance policy, the endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement" (*County of Columbia v. Continental Ins. Co.*, 83 N.Y.2d 618, 628, 612 N.Y.S.2d 345, 634 N.E.2d 946 [emphasis added]). Here, the additional insured endorsement modified the coverage provided under the "Commercial *1155 General Liability–Contractors Coverage Part." Specifically, the endorsement provided that the section identifying who is an insured under the policy "is amended to include any person or organization you are required to include as an additional insured on this policy by a written contract or written agreement in effect during this policy period and executed prior to the occurrence of any loss." Although Travelers correctly notes that the endorsement contains no provision requiring it to demonstrate prejudice in order to disclaim on the basis of late notice, we note that the endorsement likewise does not specifically eliminate the prejudice requirement set forth in the policy (see *William Floyd School Dist.*, 68 A.D.3d at 987, 892 N.Y.S.2d 115; see also *Continental Ins. Co.*, 83 N.Y.2d at 628, 612 N.Y.S.2d 345, 634 N.E.2d 946). Thus, at a minimum, the policy creates an ambiguity, which must be resolved against Travelers as the insurer (see *Del Bello v. General Acc. Ins. Co. of*

Am., 185 A.D.2d 691, 692, 585 N.Y.S.2d 918; see generally *Breed*, 46 N.Y.2d at 353, 413 N.Y.S.2d 352, 385 N.E.2d 1280; *Tomco Painting & Contr., Inc. v. Transcontinental Ins. Co.*, 21 A.D.3d 950, 951, 801 N.Y.S.2d 819) and, here, Travelers failed to allege or establish **785 that it was prejudiced by Ciminelli's late notice of the claim.

[4] With respect to Merchants' motion, Merchants correctly notes that the policy it issued to Pettit does not contain an additional insured endorsement. The "Coverages" section of the "Commercial General Liability Coverage Form," however, contains a "Supplementary Payments" section, which states that, "[i]f [Merchants] defend[s] an insured against a 'suit' and an indemnitee of the insured is also named as a party to the 'suit[,] [Merchants] will defend the indemnitee" in the event that certain conditions are met. Those conditions include that "[t]he 'suit' against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an 'insured contract' "; "[the] insurance applies to such liability assumed by the insured"; and "[t]he obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same 'insured contract....'" The Merchants policy defines " 'insured contract' " in relevant part as "[t]hat part of any other contract or agreement pertaining to [the insured's] business (including an indemnification of a municipality in connection with work performed for a municipality) under which [the insured] assume[s] the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement."

[5] We agree with Ciminelli that the contract between JCC and *1156 Pettit, Merchants' insured, constitutes an "insured contract." Specifically, the contract provides that, "[t]o the fullest extent permitted by law, [Pettit] shall indemnify and hold harmless [JCC and its agents] ... from and against

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claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the [w]ork, provided that such claim, damage, loss or expense is attributable to bodily injury...." Although Merchants contends that Ciminelli failed to comply with one or more of the conditions set forth in the "Supplementary Payments" section of the Merchants policy, Ciminelli's compliance with those conditions is a question of fact that precludes summary judgment. We further note that the record contains a certificate of liability insurance issued to Ciminelli, pursuant to which Ciminelli is an "[a]dditional [i]nsured[] on a primar[y] basis" under the Merchants policy issued to Pettit. Although "[i]t is well established that a certificate of insurance, by itself, does not confer insurance coverage," such a certificate is " 'evidence of a carrier's intent to provide coverage' " (*Sevenson Envtl. Servs., Inc. v. Sirius Am. Ins. Co.*, 74 A.D.3d 1751, 1753, 902 N.Y.S.2d 279).

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, the motions of third-party defendants Travelers Property Casualty Company of America, incorrectly sued as The Phoenix Insurance Company, and Merchants Mutual Insurance Company are denied, the first through sixth decretal paragraphs are vacated and the third-party complaint against those third-party defendants is reinstated.

N.Y.A.D. 4 Dept., 2012.

Hunt v. Ciminelli-Cowper Co., Inc.

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Appendix 4

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P

United States Court of Appeals,
Fourth Circuit.
COWAN SYSTEMS, INCORPORATED,
Plaintiff-Appellee,

v.

HARLEYSVILLE MUTUAL INSURANCE COM-
PANY, Defendant-Appellant.

No. 05-2253.
Argued May 23, 2006.
Decided Aug. 8, 2006.

Background: Insured brought action against commercial general liability (CGL) insurer, alleging that insurer breached its duty to defend insured in an action asserted against insured for indemnity arising from a personal injury claim. The United States District Court for the District of Maryland, Catherine C. Blake, J., 2005 WL 2453002, granted summary judgment in favor of insured. Insurer appealed.

Holdings: The Court of Appeals, Niemeyer, Circuit Judge, held that:

- (1) insured's employee who brought personal injury action qualified as a "third person or organization," for purpose of contractual liability clause of CGL policy;
- (2) workers' compensation exclusion did not bar coverage;
- (3) employer's liability exclusion did not bar coverage; and
- (4) automobile exclusion did not bar coverage.

Affirmed.

West Headnotes

[1] Insurance 217 2911

217 Insurance
217XXIII Duty to Defend
217k2911 k. In General; Nature and Source

of Duty. Most Cited Cases

Insurance 217 2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases

Under Maryland law, an insurer's duty to defend is a contractual duty arising out of the terms of a liability insurance policy, and is broader than the duty to indemnify.

[2] Insurance 217 2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases

Under Maryland law, whereas the insurer's duty to indemnify only attaches upon liability, the insurer has a duty to defend its insured for all claims that are potentially covered under the policy.

[3] Insurance 217 2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases

Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

Under Maryland law, to establish whether an insurer has a duty to defend its insured, a two-part inquiry is undertaken, asking: (1) what the coverage is and what the defenses under the terms and requirements of the insurance policy are, and (2)

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whether the allegations in the underlying tort action potentially bring the tort claim within the policy's coverage.

[4] Insurance 217  2915

217 Insurance

217XXIII Duty to Defend

217k2912 Determination of Duty

217k2915 k. Matters Beyond Pleadings.

Most Cited Cases

Under Maryland law, in deciding whether to defend, an insurer may only rely on the language of the policy and the facts alleged in the complaint, and not on outside evidence, as that would risk deciding the question on facts not advanced in the underlying action.

[5] Insurance 217  2913

217 Insurance

217XXIII Duty to Defend

217k2912 Determination of Duty

217k2913 k. In General; Standard. Most

Cited Cases

Under Maryland law, for purpose of determining insurer's duty to defend, any doubts about the potentiality of coverage must be resolved in favor of the insured.

[6] Insurance 217  2278(8)

217 Insurance

217XVII Coverage—Liability Insurance

217XVII(A) In General

217k2273 Risks and Losses

217k2278 Common Exclusions

217k2278(8) k. Contractually Assumed

Liabilities. Most Cited Cases

Under Maryland law, injured employee of insured, who slipped and fell on premises owned by third party, qualified as a "third person or organization," for purpose of contractual liability clause of commercial general liability (CGL) insurance policy, which provided that the policy covered insured insofar as the insured assumed the tort liability

of another party to pay for bodily injury or property damage to a third person or organization; insured contracted with third-party owner to indemnify the third party for torts arising out of the transportation operations conducted by insured, and the third-party owner brought indemnification action against insured, seeking to shift its own tort liability for insured employee's personal injury action to insured.

[7] Insurance 217  2278(12)

217 Insurance

217XVII Coverage—Liability Insurance

217XVII(A) In General

217k2273 Risks and Losses

217k2278 Common Exclusions

217k2278(12) k. Workers' Compensation. Most Cited Cases

Under Maryland law, workers' compensation exclusion in commercial general liability (CGL) policy, barring coverage for any obligation of the insured under a workers' compensation law or any similar law, did not preclude coverage for insured, in action brought by third party, seeking indemnification from insured pursuant to indemnification agreement, in personal injury action brought against third party by insured's employee.

[8] Insurance 217  2278(11)

217 Insurance

217XVII Coverage—Liability Insurance

217XVII(A) In General

217k2273 Risks and Losses

217k2278 Common Exclusions

217k2278(11) k. Employment Related Exclusions. Most Cited Cases

Under Maryland law, employer's liability exclusion in commercial general liability (CGL) policy, barring coverage for bodily injury to insured's employee arising out of employment, regardless of any obligation by insured to share damages with or repay someone else required to pay damages, did not preclude coverage for insured, in action brought by third party, seeking indemnifica-

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tion from insured pursuant to indemnification agreement, in personal injury action brought against third party by insured's employee; the employer's liability exclusion contained an exception for contracts, under which the insured assumed the tort liability of another party to pay for bodily injury or property damage, and the indemnification agreement between insured and third party qualified as such a contract.

[9] Insurance 217  2278(13)

217 Insurance

217XVII Coverage—Liability Insurance

217XVII(A) In General

217k2273 Risks and Losses

217k2278 Common Exclusions

217k2278(13) k. Vehicles and Related Equipment. Most Cited Cases

Under Maryland law, automobile exclusion in commercial general liability (CGL) policy, barring coverage for bodily injury or property damage arising out of the ownership, maintenance, or use of any automobile owned or operated by insured, did not preclude coverage, in action brought by third party, seeking indemnification from insured pursuant to indemnification agreement, in personal injury action brought against third party by insured's truck driver employee, arising from injuries that employee sustained when he slipped and fell on premises owned by third party; personal injury claim did not assert that employee was injured when entering his truck or that the injury otherwise arose out of employee's use of the truck.

***370 ARGUED:** William Carlos Parler, Jr., Parler & Wobber, Towson, Maryland, for Appellant. David A. Skomba, Franklin & Prokopik, Baltimore, Maryland, for Appellee. **ON BRIEF:** Denise E. Mobley, Parler & Wobber, Towson, Maryland, for Appellant. Shannon O. Colvin, Franklin & Prokopik, Baltimore, Maryland, for Appellee.

Before WILKINSON and NIEMEYER, Circuit Judges, and FLOYD, United States District Judge

for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge WILKINSON and Judge FLOYD joined.

NIEMEYER, Circuit Judge.

In this insurance coverage case, we hold that Harleysville Mutual Insurance Company had a contractual duty to provide Cowan Systems, Inc. with a defense in an action commenced against Cowan by Linens N Things, Inc., who, facing a claim for premises liability, sought indemnity from Cowan based on an indemnification provision in a commercial contract between them.

George Shaffer, a tractor-trailer driver for Cowan, was injured while he was delivering an empty Linens N Things trailer to a mud lot leased by Linens N Things. After disconnecting the empty trailer, Shaffer slipped and fell on ice in the mud lot, injuring his knee. Shaffer filed a personal injury action against Linens N Things alleging that Linens N Things had negligently failed to remove ice and snow from the mud lot.

Relying on an indemnity provision in its transportation contract with Cowan, Linens N Things filed a third-party complaint against Cowan to have Cowan indemnify Linens N Things for its premises liability.

When Cowan presented the suit papers to its insurer, Harleysville, Harleysville denied coverage, claiming that it had no duty to defend because of the limited scope of contractual coverage and various exclusions in its policy. Cowan commenced this action for declaratory judgment. In granting Cowan summary judgment, the district court concluded that Linens N Things' claims against Cowan fell within the policy's scope of coverage and that the exclusions relied on by Harleysville were ***371** inapplicable. The court ordered Harleysville to re-

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imburse Cowan for its attorneys fees, costs, and expenses. *Cowan Sys., Inc. v. Harleysville Mut. Ins. Co.*, 2005 WL 2863672 (D.Md.2005), 2005 U.S. Dist. LEXIS 22197, at *35.

For the reasons that follow, we affirm.

I

Cowan, a transportation company based in Baltimore, Maryland, entered into a "Truckload Transportation Agreement" with Linens N Things' Clifton, New Jersey, office to provide transportation services for Linens N Things. George Shaffer worked for Cowan as a shuttle driver, transporting Linens N Things trailers from its depot to a mud lot in Gloucester County, New Jersey, which Linens N Things leased from Erdner Brothers, Inc. for storing its trailers.

On January 9, 2001, after "dropping" a trailer at the mud lot, Shaffer slipped and fell on ice, injuring his knee. Shaffer commenced a personal injury action in the Superior Court of New Jersey in Gloucester County against Linens N Things and Erdner Brothers, alleging that either or both were negligent in failing "to provide for snow and ice removal" at the mud lot. In the same action, Linens N Things filed a third-party complaint against Cowan, alleging that under the "Truckload Transportation Agreement," Cowan had agreed to indemnify Linens N Things

from and against all claims, actions, losses, damages, expenses, judgments, and costs (including attorney's fees and costs) resulting from or arising out of damage or injury to persons (including employees, agents, or subcontractors of Shipper) or property, caused in whole or in part by [Cowan's] performance or nonperformance, including, but not limited to loading, handling, transportation, and unloading for delivery of any shipment hereunder by [Cowan] or any of [Cowan's] directors, officers, employees, agents or subcontractors in the performance of this Agreement.

Cowan forwarded the suit papers to Harleysville, who had issued Cowan a Commercial General Liability ("CGL") insurance policy, and requested that Harleysville provide Cowan with a defense against Linens N Things' third-party complaint. Harleysville refused to provide Cowan with a defense, citing to limitations of coverage and to multiple policy exclusions relating to contract liability, bodily injury suffered by the insured's employee, and bodily injury arising from the use of any auto owned by the insured. Harleysville concluded, "[w]e will not be able to provide for your defense or indemnification for the Third-Party Complaint filed in this matter." Cowan defended itself in the underlying action at its own expense and obtained a summary judgment in its favor.

Cowan commenced this action against Harleysville, seeking a declaratory judgment that Harleysville breached its duty to defend Cowan in the action commenced against it by Linens N Things. Harleysville filed a motion for summary judgment, claiming that it properly denied coverage to Cowan based on limitations in its contractual coverage and exclusions for (1) workers' compensation, (2) employer's liability, and (3) "auto" liability. Cowan filed a cross-motion for summary judgment, arguing to the contrary.

The district court entered summary judgment in favor of Cowan on November 14, 2005, holding that Cowan's indemnification agreement was an insured contract and that none of the asserted exclusions were applicable. It concluded therefore that Harleysville had a duty to defend Cowan in the underlying litigation. The court ordered Harleysville to reimburse *372 Cowan for all of its costs and expenses, including attorneys fees, in defending the underlying litigation, as well as its attorneys fees in prosecuting this declaratory judgment action, as provided by Maryland law. From the district court's judgment, Harleysville filed this appeal.

II

[1][2] Under Maryland law, which the parties agree is controlling, the insurer's duty to defend is a

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"contractual duty arising out of the terms of a liability insurance policy" and is "broader than the duty to indemnify." *Litz v. State Farm Fire & Cas. Co.*, 346 Md. 217, 695 A.2d 566, 569 (1997). Whereas the insurer's duty to indemnify only attaches upon liability, "[a]n insurance company has a duty to defend its insured for all claims that are *potentially* covered under the policy." *Walk v. Hartford Cas. Ins. Co.*, 382 Md. 1, 852 A.2d 98, 106 (2004) (emphasis added); *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842, 850 (1975) ("Even if a tort plaintiff does not allege facts which clearly bring the claim within or without the policy coverage, the insurer must still defend if there is a *potentiality* that the claim could be covered by the policy").

[3][4][5] To establish whether an insurance company has a duty to defend its insured, a two-part inquiry is undertaken, asking:

(1) what is the coverage and what are the defenses under the terms and requirements of the insurance policy? [and] (2) do the allegations in the [underlying] tort action potentially bring the tort claim within the policy's coverage?

Montgomery County Bd. of Educ. v. Horace Mann Ins. Co., 383 Md. 527, 860 A.2d 909, 915 (2004) (first alteration in original) (quoting *St. Paul Fire & Marine Ins. v. Prysieski*, 292 Md. 187, 438 A.2d 282, 285 (1981)). Before the decision in *Aetna Casualty & Surety Co. v. Cochran*, 337 Md. 98, 651 A.2d 859 (1995), Maryland courts answered these two questions by applying the "eight corners" rule, under which only the underlying complaint and the insurance policy could be consulted to determine the potentiality of coverage. In *Cochran*, however, the Maryland Court of Appeals modified the rule to allow insureds to introduce extrinsic evidence for the purpose of demonstrating coverage. The court kept in place an asymmetrical prohibition on the use of extrinsic evidence by the insurer. Thus, in deciding whether to defend, an insurer may only rely on the language of the policy and the facts alleged in the complaint, and not on outside evidence,

as that would risk deciding the question on facts not advanced in the underlying action. *Id.* at 866. Moreover, any doubts about the potentiality of coverage must be resolved in favor of the insured. See *Walk*, 852 A.2d at 106-07 ("If there is any doubt as to whether there is a duty to defend, it is resolved in favor of the insured").

The parties do not dispute that the CGL policy's affirmative insuring provisions afford coverage in specified circumstances for tort liability assumed in a contract. The policy issued by Harleysville to Cowan insures Cowan's contractual liability insofar as Cowan

assume[d] the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

The tort liability alleged in the underlying complaint filed by Shaffer against Linens N Things was Linens N Things' negligence in failing to remove snow and ice from the *373 mud lot, and the contract assuming this tort liability was the Truckload Transportation Agreement between Linens N Things and Cowan, in which Cowan agreed to indemnify Linens N Things for all claims "resulting from or arising out of" injury to persons "caused in whole or in part by [Cowan's] performance of the transportation agreement."

Even though Harleysville agrees that the CGL policy provides Cowan coverage for certain tort liability that Cowan assumed by contract, it argues that the contractual coverage does not insure Cowan's indemnification of liability *to an employee* of Cowan. In addition, Harleysville contends that three policy exclusions apply to deny Cowan coverage in this case: (1) the workers' compensation exclusion; (2) the employer's liability exclusion; and (3) the auto exclusion. We address Harleysville's points *seriatim*.

III

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[6] First, Harleysville contends that its policy's contractual coverage does not extend to Cowan's agreement to indemnify Linens N Things because Linens N Things' liability arose from the claim of Shaffer, who was Cowan's employee and therefore not a "third person or organization" whose claim was covered by the contractual coverage provision. We conclude, however, that Harleysville's contention rests on a misconstruction of who a "third person" is.

Under the Truckload Transportation Agreement between Cowan and Linens N Things, Cowan agreed to indemnify Linens N Things for torts arising out of the transportation operations conducted by Cowan. Thus, Cowan, as the insured, assumed the tort liability of "another party," i.e. Linens N Things. In this case, Linens N Things' liability was based on a breach of its duty to Shaffer, who was a "third person." Shaffer was not its employee and so was a "third person" with respect to it. Moreover, Shaffer was not a party to the Truckload Transportation Agreement and therefore was also a "third person" with respect to the contractual indemnification in that agreement. Because Cowan was assuming Linens N Things' tort liability to Shaffer and because Shaffer was a "third person" with respect to Linens N Things, the conditions of contractual coverage were satisfied. Stated otherwise in the language of the contractual coverage, Shaffer was a third person with respect to Linens N Things, which faced tort liability arising from Shaffer's personal injury suit. In bringing its third-party complaint, Linens N Things sought to shift *its own* tort liability (created by a third person) to Cowan under the indemnity provisions of their "Truckload Transportation Agreement." This is just the circumstance under which the contractual coverage provides insurance to Cowan.

IV

[7] Harleysville next contends that the policy's workers' compensation exclusion applies to deny coverage in this case because Shaffer was an employee who received workers' compensation by

reason of his employment with Cowan. The CGL policy excludes coverage for "[a]ny obligation of the insured [Cowan] under a workers' compensation, disability benefits, or unemployment compensation law or any similar law." Harleysville contends that this provision applies to bar coverage, reasoning that "Shaffer's compensation from Cowan related to an on-the-job injury, as contemplated by the policy, [and] is limited to that which he would receive vis-à-vis the State's statutory workers' compensation scheme." It argues that permitting Shaffer to recover through his employer's insurance would enable him to obtain duplicative *374 recovery—one from workers' compensation and one from Harleysville.

This contention, however, ignores the fact that Cowan was not seeking coverage from Harleysville for a "workers' compensation, disability benefits, or unemployment compensation" claim made against it. Rather, it was seeking coverage for a contractual obligation in which it undertook to indemnify Linens N Things. And Linens N Things was not seeking to pass on to Cowan any workers' compensation liability. It was seeking indemnification from Cowan for its premises liability. In short, no obligation for workers' compensation was involved directly or indirectly, and for that reason, the exclusion is inapplicable.

V

[8] Harleysville also contends that its policy's employer's liability exclusion applies to deny Cowan coverage. The CGL policy excludes coverage for "bodily injury" to an employee that "aris[es] out of and in the course of employment by the insured," and the exclusion applies "(1) whether the insured may be liable as an employer or in any other capacity; and (2) to any obligation to share damages with or repay someone else who must pay damages because of the injury." Because Shaffer was employed by Cowan at the time of his accident, Harleysville contends that this exclusion applies.

This argument might be persuasive but for the fact that the employer's liability exclusion contains

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an exception for "insured contracts." That exception states that the employer's liability "exclusion does not apply to liability assumed by the insured under an 'insured contract.'" "Insured contract" is defined in the policy as

[t]hat part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Given this exception, if an employer enters an agreement to insure another party for its tort liability, then the employer's liability exclusion, which exempts coverage of bodily injury to an employee arising from actions undertaken during the course of employment, is rendered inapplicable. See *Riviera Beach Volunteer Fire Co. v. Fidelity & Cas. Co. of New York*, 388 F.Supp. 1114, 1125 (D.Md.1975) (holding that "where courts have found implied contractual obligations of indemnification between the third party and the employer, as distinguished from mere tort liability, they have required the insurer to defend the employer in the third-party action" (quoting *Kipka v. Chicago & Northwestern Ry.*, 289 F.Supp. 750, 756 (D.Minn.1968))).

As we have already noted, Cowan's indemnification agreement with Linens N Things is an "insured contract," and by this indemnification agreement, Cowan assumed the "tort liability of another party [Linens N Things] to pay for 'bodily injury' ... to a third person [Shaffer]."

VI

[9] Finally, Harleysville contends that the CGL policy's "auto" exclusion applies to deny Cowan coverage. The CGL policy excludes coverage for:

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto," or water-

craft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."

Harleysville argues that this exclusion applies to Shaffer's claims because (1) Shaffer*375 was injured as he was attempting to get back into his truck, and (2) "but for the use of the automobile [i.e. the truck] in the course of his employment, Shaffer would not have been at the mud lot where he sustained his injuries, irrespective of the theory upon which liability rests."

First, we note that Harleysville's argument is based on the assumption that Shaffer was injured as he was attempting to get into his truck. That fact, however, is not alleged in the underlying complaint. The complaint merely states that on January 9, when Shaffer was working for Cowan, delivering an empty trailer to the mud lot, he "slipped and fell, suffering injuries." As for the cause of the slip and fall, Shaffer alleged that

The defendants failed to properly maintain its [sic] site; failed to properly supervise its [sic] site; failed to comply with ordinary and customary safety procedures; carelessly and negligently failed to provide for snow and ice removal, creating an unsafe condition; failed to provide any guards, light or other device to warn of the unsafe conditions; and breached other duties as shall become known in the future.

These allegations state a straightforward claim for premises liability, charging Linens N Things (as well as Erdner Brothers) with the negligent failure to maintain the mud lot in a safe condition.

In arguing that Shaffer was injured as he was entering his truck, Harleysville runs afoul of the Maryland rule which prohibits the insurer from introducing extrinsic evidence to determine the potentiality of coverage. See *Cochran*, 651 A.2d at 862; *Montgomery County*, 860 A.2d at 915. Looking at only the allegations of the underlying complaint and comparing them to the policy of insur-

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ance, there is no basis from which to conclude that this accident arose out of the use of an "auto."

Even if extrinsic evidence concerning the circumstances of Shaffer's injuries are considered, the record demonstrates that Shaffer's tort suit did not "arise out of the ... use" of an "auto." The record shows that Shaffer's injuries were caused by a slip and fall on the snow and ice that covered the mud lot, which occurred as he was attempting to get back into a truck. The presence of the truck, without more, was not a proximate cause of his injuries; rather, if anything, his fall was caused by the condition of the mud lot and his loss of footing on the mud lot. Harleysville has provided us with no authority to support a position that the mere presence of an automobile at the scene of a slip and fall constitutes "use of an auto" sufficient to trigger the auto exclusion.

Harleysville's reliance on *Northern Assurance Company of America v. EDP Floors, Inc.*, 311 Md. 217, 533 A.2d 682 (1987), and *Rubins Contractors, Inc. v. Lumbermens Mutual Insurance Co.*, 821 F.2d 671 (D.C.Cir.1987), is badly misplaced. Those cases stand for the proposition that "use" of an automobile may trigger the auto exclusion "regardless of whether the injury may also be said to have arisen out of other causes further back in the sequence of events." *Northern Assurance*, 533 A.2d at 689. In *Rubins Contractors*, the court held that the exclusion applied to injuries caused by an employee driving a company truck, despite the employer's claim that the accident resulted from negligent entrustment rather than from the employee's "use" of an automobile. The court rejected the employer's position, holding that "[i]t seems an extraordinary *non sequitur* to say that liability has not resulted from ownership or use of an automobile merely because the tort has a component separate from motor vehicle operation." 821 F.2d at 676. The *Rubins* court did *not* hold, however, what *376 would be an equally extraordinary *non sequitur*, namely, that liability results—and the automobile exclusion applies—merely because there was an

automobile at the scene of the accident. As the district court in this case correctly observed, "[h]olding that the operation of the automobile need not be the sole or proximate cause is not the same as saying an automobile need merely be present in order for the exclusion to apply." *Cowan Sys., Inc. v. Harleysville Mutual Ins. Co.*, 2005 WL 2863672, 2005 U.S. Dist. LEXIS 22197 at *17.

* * *

The CGL policy provides coverage for tort liability assumed by Cowan in a contract, and by focusing on the precise nature of the liability claimed in the underlying suit—i.e. the tort liability of Linens N Things and Cowan's contractual liability for indemnification of Linens N Things—coverage *vel non* may be readily determined, as outlined above. The judgment of the district court is

AFFIRMED.

C.A.4 (Md.),2006.
Cowan Systems, Inc. v. Harleysville Mut. Ins. Co.
457 F.3d 368

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Thank you for permission to file the over-size appendices as part of the brief, i.e., the Appellants' Supplemental Brief, which is attached as a PDF to this email for filing with the Court.

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Sincerely
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