In The

# Supreme Court of Virginia

**RECORD NO. 102138**

## KEVIN CHRISTY,

***Appellant*,**

**v.**

## MERCURY CASUALTY COMPANY,

***Appellee.***

## BRIEF OF APPELLANT

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## *OPENING BRIEF OF APPELLANT*

Pursuant to Rule 5:26 of the Rules of the Supreme Court of Virginia, the plaintiff/appellant, Kevin Christy ("Mr. Christy"), submits this Opening Brief of Appellant.

## III. Statement of the Case and Material Proceedings Below

This case involves the disputed interpretation and application of an exclusion to the medical expense coverage of Mr. Christy's automobile liability policy issued by Mercury Casualty Company ("Mercury"), the defendant. (Appendix 189). On November 23, 2005, Mr. Christy was injured in an automobile accident ("the Accident"). (Appendix 187). On April 20, 2009, Mr. Christy submitted to Mercury his claim for medical expenses. (Appendix 189). On June 12, 2009, Mercury denied Mr. Christy's claim. (Appendix 189). Mr. Christy filed suit against Mercury and prevailed in the Washington County General District Court. (Appendix 189).

Mercury appealed to the Circuit Court. (Appendix 189). Both the plaintiff and the defendant filed Motions for Summary Judgment. (Appendix 58 and 93). By letter opinion dated April 29, 2010, the Circuit Court found for Mercury based on its policy exclusion and granted Mercury's Motion for Summary Judgment. (Appendix 171). Mr. Christy

filed his Motion to Reconsider, (Appendix 173) which was denied by the Circuit Court by letter opinion dated July 28, 2010. (Appendix 182). On August 12, 2010, the Circuit Court entered judgment in favor of Mercury. (Appendix 184). On September 9, 2010, Mr. Christy filed his Notice of Appeal. (Appendix 186). On October 4, 2010, Mr. Christy filed the Agreed Statement of Facts. On October 7, 2010, the Circuit Court signed the Agreed Statement of Facts. (Appendix 187).

## IV. Statement of Facts

The parties entered into and the Circuit Court signed an Agreed Statement of Facts. (Appendix 187-191).

Mr. Christy was insured by Mercury Casualty Company, under Policy No. VA 01020992, with policy dates from February 19, 2005 through February 19, 2006. Agreed Statement of Facts ¶ 1 [hereinafter "Facts"]. The policy insured two vehicles (a 1984 Saab Sedan and a 2005 Chevrolet Suburban) with medical payments coverage of $5,000.00 for each person. Facts ¶ 1.

On November 23, 2005, Mr. Christy, a Town of Abingdon Police Officer, was a passenger in a police vehicle owned by Washington County and being driven by a Washington County deputy sheriff. Facts ¶ 2. This police vehicle was rear-ended by a vehicle operated by Kevin Tiller of

Russell County, Virginia. Facts ¶ 2. During this crash, Mr. Christy suffered injuries. Facts ¶ 3. The parties disagree as to the extent of these injuries. Facts ¶ 3.

Mr. Christy obtained medical treatment for his injuries, including surgery to repair a tear to the labrum of his left shoulder (a SLAP tear). Facts ¶ 4. The orthopedic surgeon who surgically repaired Mr. Christy's SLAP tear, Dr. Timothy G. McGarry, opined on April 6, 2006, within a degree of medical certainty, that Mr. Christy's SLAP tear was caused by the November 23, 2005 accident and was not a pre-existing condition. Facts ¶ 5.

The Town of Abingdon workers' compensation carrier (VML) paid for Mr. Christy's initial treatment ($1,815.68), but did not agree with Dr. McGarry and denied coverage for the treatment for Mr. Christy's shoulder, claiming it was pre-existing. Facts ¶ 6. Mr. Christy did not pursue a claim against VML for payment of the medical bills he incurred for treatment of his shoulder. Facts ¶ 7.

The total medical expenses that Mr. Christy incurred, including treatment for his shoulder, is $16,564.00. Facts ¶ 8. The workers' compensation carrier paid $1,815.68 of Mr. Christy's medical bills for his initial treatment. Facts ¶ 9. Subtracting from $16,564.00 the payments

made by the workers' compensation carrier leaves a balance of $14,748.32. Facts ¶ 10. Mr. Christy's health care providers applied workers compensation adjustments totaling $1,290.05 toward their respective balances. Facts ¶ 11. Subtracting from $14,748.32 the workers' compensation adjustments made by Mr. Christy's health care providers leaves a balance of $13,458.27. Facts ¶ 12. This balance of $13,458.27 was further reduced by adjustments applied by Mr. Christy's health care insurer and the remaining balance was paid or otherwise resolved by Mr. Christy and his health care insurer. Facts ¶ 13.

Mr. Christy's counsel originally submitted this claim to Mercury by letter of April 20, 2009. Facts ¶ 14. On June 12, 2009, Mercury denied Mr. Christy's claim. Facts ¶ 15. Mercury's denial letter to Mr. Christy's counsel states:

> "Mercury respectfully declines the medical expense claim you have made on behalf of Mr. Christy in this case.
>
> Exclusion B (p. 5) in Mercury's policy (Medical Expense section) states that "This insurance does not apply:[…](b) to bodily injury sustained by any person to the extent that benefits therefore are in whole or in part payable under any workmen's compensation law."
>
> The bills in this case were, at least in part, "payable" under the workers' compensation law. In fact, part of Mr. Christy's medical expenses was paid by Mr. Christy's worker's compensation carrier. Mr. Christy was on the job when he was injured and Virginia law mandated payment by Workers'

> Compensation. The fact that the benefits were "payable" triggers Mercury's exclusion."

Facts ¶ 15. Appendix 189.

Mr. Christy filed suit against Mercury and prevailed in the Washington County General District Court. Facts ¶ 16. Mercury appealed to the Circuit Court. Facts ¶ 17. There were five possible outcomes in the Circuit Court:

i. Judgment for Mercury Casualty Company, based on Mercury's policy exclusion.

ii. Judgment for Mercury Casualty Company based on a finding that Mr. Christy's shoulder treatment was for a pre-existing condition. This issue was deferred by agreement of counsel for resolution by jury trial.

iii. Subject to a favorable ruling on causation, judgment for Mr. Christy in the amount of $6,999.60, based on the finding that Mercury's exclusion applies only to the extent that benefits were payable by the workers' compensation carrier, and that the reductions in Virginia Code § 38.2-2201-A.3.b. apply to all bills.

iv. Subject to a favorable ruling on causation, judgment for Mr. Christy in the amount of $9,500.82, based on

the finding that Mercury's exclusion applies only to the extent that benefits were payable by the workers' compensation carrier and that the reductions in Virginia Code section § 38.2-2201-A.3.b. apply to all bills except the Johnston Memorial Hospital bill, which was previously the subject of the litigation *Johnston Memorial Hospital v. Kevin Christy*, Washington County General District Court Case No. GV08-922 and *Kevin Christy v. United Health Care*, Washington County General District Court Case No. GV08-1713 in the General District Court of Washington County, Virginia. This bill was paid pursuant to the Settlement Agreement and Release dated November 13, 2008 and attached as an exhibit to the March 10, 2010 letter to Judge Lowe from Mr. Christy's counsel.

v. Subject to a favorable ruling on causation, judgment for Mr. Christy in the amount of $10,000.00 based on the finding that Mercury's exclusion applies only

> to the extent that benefits were payable by the workers' compensation carrier and that Virginia Code § 38.2-2201-A.3.b. does not apply to any of the bills.

Facts ¶ 18. The Circuit Court found for Mercury based on Mercury's policy exclusion. See the Court's opinion letter of April 29, 2010. Facts ¶ 19. (Appendix 171).

Mr. Christy filed his Motion to Reconsider (Appendix 173) which Motion was denied by the Circuit Court. See the Circuit Court's opinion letter of July 28, 2010. Facts ¶ 20. (Appendix 182). On August 12, 2010, the Circuit Court entered judgment in favor of Mercury. Facts ¶ 21. (Appendix 184). On September 9, 2010, Mr. Christy filed his Notice of Appeal. Facts ¶ 22. (Appendix 186).

## V. Assignments of Error

The Circuit Court erred in granting summary judgment for Mercury and in denying Mr. Christy's Motion for Summary Judgment and Mr. Christy's Motion to Re-Consider because Mercury's policy language, as a matter of law, provides the coverage sought by Mr. Christy. The Circuit Court erred as follows:

A. The Circuit Court granted Mercury's Motion for Summary Judgment, applying Mercury's policy exclusion and ruling that Mercury owes Mr. Christy none of its $10,000.00 medical expense coverage. Circuit Court Letter Opinion dated April 29, 2010. Mr. Christy's objection to this ruling is preserved by Mr. Christy's Motion to Re-Consider (Appendix

173) and by counsel's endorsement to the Circuit Court's August 12 Final Order. (Appendix 184).

B. The Circuit Court did not grant Mr. Christy's Motion for Summary Judgment. The Circuit Court should have ruled that Mercury's policy exclusion applied only "to the extent" and in the amount that workers compensation benefits were payable. Circuit Court Letter Opinion dated April 29, 2010. Mr. Christy's objection to this ruling is preserved by Mr. Christy's Motion to Re-consider (Appendix 173) and by counsel's endorsement to the Circuit Court's August 12 Final Order. (Appendix 184).

C. The Circuit Court did not grant Mr. Christy's Motion to Re-consider. The Circuit Court should have ruled that Mercury's policy exclusion applied only "to the extent" and in the amount that workers compensation benefits were payable. Circuit Court Letter Opinion dated July 28, 2010. Mr. Christy's objection to this ruling is preserved by counsel's endorsement to the Circuit Court's August 12 Final Order. (Appendix 184).

D. The Circuit Court should have ruled that Virginia Code § 38.2-2201-A.3.b. does not apply to the March 24, 2006 Johnston Memorial Hospital bill, in the amount of $6,172.00 which bill was the subject of litigation and which bill was paid pursuant to settlement of that litigation. Mr. Christy's objection to this ruling is preserved by Mr. Christy's Motion to Re-consider (Appendix 173) and by counsel's endorsement to the Circuit Court's August 12 Final Order. (Appendix 184).

## VI. Authorities and Argument

### A. Standard of Review.

Under well-settled principles, the Supreme Court of Virginia reviews the record applying the same standard a trial court must adopt in reviewing a motion for summary judgment, accepting as true those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason. *Dickerson v. Fatehi*,

253 Va. 324, 327, 484 S.E.2d 880, 882 (1997); *Carson v. LeBlanc*, 245 Va. 135, 139-40, 427 S.E.2d 189, 192 (1993).

When the trial court grants summary judgment on facts stipulated by the parties, the Court conducts a review of the trial court's application of law to the undisputed facts. *Virginia College Building Authority v. Lynn*, 260 Va. 608, 622, 538 S.E.2d 682, 688 (2000). Therefore, the appellant's assignment of error "are questions of law which [the Court] review[s] de novo." *Davenport v. Little-Bowser*, 269 Va. 546, 552, 611 S.E.2d 366, 369 (2005).

**B. The policy exclusion at issue in this case applies only to the extent that workers' compensation benefits were in whole or in part payable to Mr. Christy.**

Mercury's exclusion applies only "**to the extent**" that workers' compensation benefits were "payable", whether those benefits were payable "in whole or in part". (Appendix 189).

By using the phrase "**to the extent**", Mercury has limited the scope of its policy exclusion. "Extent" has been defined as "the point, degree, or limit to which something extends." Merriam-Webster's Dictionary, *available at* Merriam-Webster.com (2010). Courts interpreting the phrase "to the extent" in other contexts have deemed "to the extent" to be "a term of limitation." *Clement, et al. v. Consol. Rail Corp., et al*., 745 F. Supp. 266,

268 (D. N.J. 1990). The phrase "to the extent" has also been equated with "as to the portion of" and "in an amount equivalent to the proportion." *FDIC v. Citizens State Bank of Niangua, et al.*, 130 F.2d 102, 103 (8th Cir. 1942); *Clement, et al. v. Consol. Rail Corp., et al*., 963 F.2d 599, 602 (3d Cir. 1992).

In Virginia, this Court recently decided a case, *Landmark HHH, LLC v. Park*, 277 Va. 50, 671 S.E.2d 143 (2009), involving a commercial lease with a provision exempting the landlord from losses incurred by the tenant. The lease required the tenant to absolve the landlord from any losses the tenant sustained "to the extent of the insurance proceeds payable" on such losses. *Id*. at 57. This lease provision did not absolve the landlord of any loss suffered by the tenant, just prohibited a double recovery by the tenant on a loss sustained. *Id.* The phrase "to the extent" specifically limited the scope of the provision to which it applied.

While the cases cited above do not deal with medical expense coverage in insurance policies, they are illustrative of how the phrase "to the extent" should be interpreted in contractual provisions in general and in this case in particular.

Black's Law Dictionary Revised Fourth Edition, defines "**payable**" to mean "legally enforceable". BLACK'S LAW DICTIONARY 1285 (Rev. 4th ed.

1968). "A sum of money is said to be payable when a person is under an obligation to pay it." *Id*. The law in Virginia has been clear since 1871 that "payable" means "to be paid", not "may be paid". *Dungan v. Henderlite*, 62 Va. 149, 1871 Va. Lexis 73, 21 Gratt 149 (1871).

VML voluntarily paid $1,815.68 for Mr. Christy's initial treatment, denied that it owed any more, and was never "under an obligation" to pay any more. Mr. Christy's workers' compensation claim against VML for the balance of his medical bills was never reduced to judgment. There was no adjudication that VML was responsible for payment of these bills and therefore no legal basis to hold that these bills were "to be paid" by VML.

In fact, Mercury has never made the argument that all of Mr. Christy's bills were "payable" by the workers' compensation carrier. In its June 12th denial letter, (Appendix 189) Mercury admits that Mr. Christy's bills were only payable in part under workers' compensation law and that only part of his expenses was actually paid by his worker's compensation carrier. If Mercury took the position that all of Mr. Christy's medical bills were "payable" by workers' compensation, Mercury would be conceding that the shoulder injury was caused by the November 2005 car crash. Mercury does not want to take a position that might be inconsistent with Mercury's "back-up" defense that the shoulder injury was not caused by the Accident.

Instead, Mercury argues that since workers' compensation benefits were payable "in part", then the Mercury exclusion applies as if the workers' compensation benefits were payable "in whole." According to Mercury's interpretation of the exclusion language, even the payment of one dollar in workers' compensation benefits relieves Mercury from any payment whatsoever. (Appendix 119, lines 14-21).

Mercury's argument does not address the meaning of the words "**to the extent**". And the Circuit Court did not address the meaning of these words in either of its opinion letters. (Appendix 171 and Appendix 182).

Mercury agrees that "the bills in this care were, at least in part, payable under the workers' compensation law" [in the amount of $1,815.68]. Facts ¶ 15. But Mercury wants to ignore the language in its own exclusion that payment of its medical expense insurance is excluded only "**to the extent**" that workers' compensation benefits were payable to Mr. Christy. (emphasis added).

Because the workers' compensation benefits were payable "at least in part" and only "**to the extent**" of $1,815.68, Mercury's exclusion does not apply to the balance of the medical bills ($14,748.32). The balance of the medical bills ($14,748.32) was never "payable" under workers' compensation, and Mercury's denial does not take the position that the

balance was "payable" under the workers' compensation law. Mercury takes the position that since "part" of the medical bills ($1,815.68) was payable by workers' compensation, Mercury's exclusion allows it to avoid its own liability for payment of any and all of its own coverage. This is a patently unfair result, which is not supported by the language of Mercury's own exclusion.

**C. Previous case law has applied this exclusion only when benefits were payable in whole under worker's compensation law.**

This case is distinguished from this Court's decisions in *Scarbrow v. State Farm Mut. Auto. Ins. Co.*, 256 Va. 357, 504 S.E.2d 860 (1998), and *Baker v. State Farm Mut. Auto. Ins. Co.*, 242 Va. 74, 405 S.E.2d 624 (1991). In *Scarbrow* and in *Baker*, the appellants were asking the Court to void the exclusion. The Court held that the exclusion, like the one at issue in this case, was enforceable "to the extent" that the benefits were payable. However, since the workers' compensation benefits in those two cases were payable "in whole" (for all of the insureds' medical expenses), the exclusion excluded payment of any medical expense coverage.

In this case, Mr. Christy is not asking this Court to void the exclusion. Mr. Christy is asking that this Court enforce the Mercury exclusion according to its clear and unambiguous terms. The terms of Mercury's exclusion exclude payment of Mercury's medical expense insurance "**to**

**the extent**" that benefits were payable under workers' compensation law, whether those benefits were payable in "whole or in part". The workers' compensation benefits were only payable to Mr. Christy "in part", and the Mercury exclusion is only triggered in part ("**to the extent**" that the benefits were payable - $1,815.68).

Therefore, Mercury should only be able exclude payment of its coverage on the part of Mr. Christy's bills ($1,815.68) that was payable and actually paid by his worker's compensation carrier, and not on the part of his medical bills that was not payable and not actually paid ($14,748.32).

**D. The language of the policy exclusion is ambiguous and should be strictly construed against Mercury in favor of coverage.**

Exclusionary language in an insurance policy will be construed most strongly against the insurer. *Transcon. Ins. Co. v. RBMX, Inc.*, 262 Va. 502, 551 S.E.2d 313 (2001). Ambiguities are construed strictly against the insurer and in favor of coverage. *Lower Chesapeake Assoc. v. Valley Forge Ins.*, 260 Va. 77, 532 S.E.2d 325 (2006). Mercury could have clearly worded its exclusion to reach the result it argues for here by using the word "**if**" instead of the words "**to the extent**". The exclusion would then read:

> "This insurance does not apply: [_ _ _] (b) to bodily injury sustained by any person [***if***] benefits therefore are in whole or in part payable under any workers' compensation law."

By using the words "**to the extent**" instead of the word "**if**", Mercury has worded its exclusion in a way that does not support the outcome Mercury argues for here. Therefore, the exclusionary provision should be construed against Mercury in favor of coverage for Mr. Christy's medical bills.

**E. Virginia Code § 38.2-2201-A.3.b. applies to expenses that are paid "pursuant to a negotiated contract" with the health care provider; not to expenses that are paid by the health care provider to settle pending litigation.**

At the time of the accident in question, Virginia Code § 38.2-2201-A.3.b. provided in regard to medical expenses incurred by an insured that:

> 3. An expense described in subdivision 1 shall be deemed to have been incurred:
>
> b. If the expense is paid by (i) a health care insurer pursuant to a negotiated contract with the health care provider or (ii) Medicaid or Medicare, where the actual payment with reference to the medical bill rendered by the provider is less than or equal to the provider's usual and customary fee, **in the amount of the actual payment**; however, if the insured is required to make a payment in addition to the actual payment by the health care insurer or Medicaid or Medicare, the amount shall be increased by the payment made by the insured. (emphasis added).

At the oral argument on the cross motions for summary judgment (Appendix 126-127) and in his counsel's March 10, 2010 letter to the Circuit Court (Appendix 129-130), Mr. Christy argued that the expense he incurred on March 24, 2006 with Johnston Memorial Hospital ("the Hospital") for the surgery to his shoulder in the amount of $6,172.00 was not governed by

Va. Code § 38.2-2201-A.3.b. The Hospital sued Mr. Christy for this amount plus interest, costs, and attorney's fees. (Appendix 156).

Mr. Christy in turn then sued his health insurer, United Healthcare Plan of the River Valley, Inc., ("United Healthcare") claiming that: 1) the Hospital bill was covered and should also have been paid by United Healthcare under his plan and that: 2) other bills should have been paid by United Healthcare under his plan. (Appendix 159-162).

The *Johnston Memorial Hospital v. Christy* case was settled and the agreed amount ($3,751.78) was paid in part ($3,401.78) by United Healthcare (Appendix 148) and in part ($350.00) by Mr. Christy (Appendix 145-146). The settlement is documented in counsel's November 13, 2008 letter (Appendix 151) and in the November 14, 2008 Settlement Agreement and Release produced pursuant to Order of the General District Court and attached to counsel's March 10, 2010 letter to the Circuit Court. (Appendix 147-149).

The *Christy v. United Healthcare* case was later nonsuited. (Appendix 144).

The amount paid by United Healthcare was paid in settlement of pending litigation, not "pursuant to a negotiated contract with the heath care provider" as contemplated by Va. Code § 38.2-2201-A.3.b. The Hospital

bill was therefore “incurred” in the amount of $6,172.00, not in the amount “of the actual payment” to the Hospital by United Healthcare.

The Circuit Court should have granted Mr. Christy’s Motion for Summary Judgment or his Motion to Re-consider and, subject to a favorable ruling on causation, entered judgment in favor of Mr. Christy against Mercury Casualty Company in the amount of $9,500.82, interest and costs.

## VII. Conclusion

Mr. Christy moves this Court to rule that, as a matter of law, under the agreed facts, Mercury’s policy language provides the medical payments coverage sought by Mr. Christy. Mr. Christy is not trying to “double-dip”. He is not trying to get the same bills paid twice. He is not trying to get the same bills paid by the workers’ compensation carrier AND by Mercury. He is trying to get Mercury to pay the bills that the workers’ compensation carrier did not pay. And he is entitled to recover payment of those bills from Mercury pursuant to the language of Mercury’s policy.

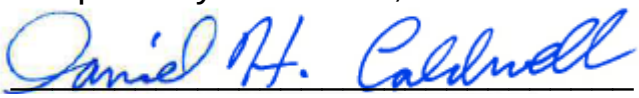
Mr. Christy moves the Court to enforce the Mercury exclusion according to its clear and unambiguous terms and to exclude payment of medical expense coverage only “**to the extent**” that workers’ compensation benefits were payable ($1,815.68) and, subject to a favorable ruling on

remand on the issue of causation, to enter judgment in favor of Mr. Christy against Mercury Casualty Company in the amount of $9,500.82, interest and costs.

In the alternative, Mr. Christy moves the Court to construe any and all ambiguities in the exclusion against Mercury and in favor of coverage and, subject to a favorable ruling on remand on the issue of causation, to enter judgment in favor of Mr. Christy against Mercury Casualty Company in the amount of $9,500.82, interest and costs.

And Mr. Christy moves this Court to rule that, as a matter of law, Virginia Code § 38.2-2201-A.3.b. does not apply to the March 24, 2006 Johnston Memorial Hospital bill in the amount of $6,172.00. The payment by United Healthcare to Johnston Memorial Hospital was made to settle pending litigation and not "pursuant to a negotiated contract". The Hospital bill was "incurred" in the amount of $6,172.00, not in the amount "of the actual payment" by United Healthcare to the Hospital.

Respectfully Submitted,



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## VIII. Rule 5:26(h) Certificate

Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, counsel for the plaintiff/appellant certifies compliance with this Rule as follows:

(1) Appellant: Kevin Christy

Appellee: Mercury Casualty Company

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(2) Fifteen paper copies of the Brief of Appellant along with ten paper copies of the Joint Appendix and ten electronic copies on CDs were hand-filed with the Clerk of the Supreme Court of Virginia and the required number of paper copies of the same were served, via UPS Ground Transportation, to opposing counsel this 8th day of April, 2011.

KEVIN CHRISTY

By Daniel H. Caldwell
Counsel