

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 16-0290

AMERICAN NATIONAL PROPERTY
AND CASUALTY COMPANY

Petitioner,

v.

TARA CLENDENEN, JAMES CLENDENEN,
MARY A. NEESE, Administratrix and Personal
Representative of the Estate of Skyler Neese, deceased,
DAVID NEESE, AND MARY A. NEESE, individually,

Respondents,

and

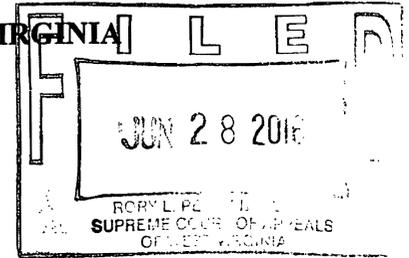
ERIE INSURANCE PROPERTY AND
CASUALTY COMPANY,

Petitioner,

v.

MARY A. NEESE, individually and as
Administratrix of the Estate of Skyler Neese,
DAVID NEESE, TARA CLENDENEN, and
PATRICIA SHOAF,

Respondents.



BRIEF OF PETITIONER
ERIE INSURANCE PROPERTY AND CASUALTY COMPANY

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I. INTRODUCTION

Petitioner Erie Insurance Property and Casualty Company (“Erie”) submits this brief on two questions certified by the United States District Court for the Northern District of West Virginia, under the Uniform Certification of Questions of Law Act, W. Va. Code § 51-1A-1, *et seq.* The District Court has certified the following questions:

1. Applying West Virginia public policy and rules of contract construction, do the unambiguous exclusions in American National’s policy for bodily injury or property damage “which is expected or intended by any insured even if the actual injury or damage is different than expected or intended,” and “arising out of any criminal act committed by or at the direction of any insured,” and the unambiguous exclusion in Erie’s policy for “[b]odily injury, property damage, or personal injury expected or intended by ‘anyone we protect’ . . .,” preclude liability coverage for insureds who did not commit any intentional or criminal act?
2. If so, do the unambiguous severability clauses in the insurance policies, which state that the insurance applies separately to each insured, prevail over the exclusions and require the insurers to apply the exclusions separately to each insured, despite the intentional and criminal actions of co-insureds?

This Court should answer the first question in the affirmative and hold that the unambiguous exclusion for bodily injury “expected or intended by ‘anyone we protect’” in Erie’s homeowner insurance policy precludes coverage for the claim in the underlying case brought by Respondents Mary A. Neese, individually and as administratrix of the Estate of Skylar Neese, and David Neese against Respondent Patricia Shoaf, who is Erie’s insured, because the murder of Skylar Neese was expected or intended by Rachel Shoaf, who is a co-insured. The Court should further answer the second question in the negative and hold that the unambiguous severability clause in Erie’s policy does not prevail over the unambiguous exclusion for bodily injury “expected or intended by ‘anyone we protect’” and require Erie to apply the exclusion separately to each insured, despite the intentional and criminal act of Rachel Shoaf.

II. STATEMENT OF THE CASE¹

A. The Underlying Case

The underlying case arises from the murder of sixteen-year-old Skylar Neese (“Skylar”), who, prior to her death, was a close friend of Shelia Eddy (“Eddy”) and Rachel Shoaf (“Shoaf”) (Dkt. No. 1-5 at 6) (A.R. at 95). In the spring and summer of 2012, the teenagers began to drift apart, and Eddy and Shoaf decided to end their friendship with Skylar. *Id.* Fearing that she would publicly disclose sensitive and embarrassing information about them, Eddy and Shoaf embarked on a plan to murder Skylar. *Id.*

In furtherance of their plan, Eddy and Shoaf arranged to meet Skylar on the night of July 5, 2012, after she completed her work shift. *Id.* When Skylar sneaked out of her parents’ house, Eddy and Shoaf picked her up in a 2006 Toyota Camry owned by Eddy’s mother, Tara Clendenen. *Id.* at 10 (A.R. at 99). The friends then traveled from Morgantown, West Virginia, to a “rural, sparsely populated area” outside of Brave, Pennsylvania, where they parked, left the car, and began smoking marijuana. *Id.* at 6 (A.R. at 95). While Skylar had her back turned, Eddy and Shoaf “violently and repeatedly” stabbed her in the neck and back with kitchen knives they had previously taped to their torsos and concealed under clothing. *Id.* at 7 (A.R. at 96).

Although Eddy and Shoaf killed Skylar in the early morning hours of July 6, 2012, her body was not discovered until January, 2013, more than six months after her disappearance. *Id.* at 7-8 (A.R. at 96-97). Eventually, Eddy pleaded guilty to first degree murder and was sentenced

¹The statement of the case is taken verbatim from the District Court’s Order of Certification. *See Barefield v. DPIC Cos., Inc.*, 215 W. Va. 544, 600 S.E.2d 256, 262 (2004) (explaining that Court does not sit as appellate court under the Uniform Certification of Questions of Law Act, but simply answers questions of law and will assume that the findings of fact by the certifying court are correct). Unless otherwise noted, all citations in the Northern District of West Virginia’s factual background refer to the lead case, 1:14CV155. Citations to the Appendix Record (“A.R.”) have been added to the District Court’s docket citations.

to life in prison with mercy. (Dkt. No. 1 at 3) (A.R. at 17). Shoaf pleaded guilty to second degree murder and was sentenced to thirty years in prison. *Id.*

On June 4, 2014, Skylar's parents, David and Mary Neese ("the Neeses"), filed a complaint in the Circuit Court of Monongalia County, West Virginia ("the state court action"), against Eddy and Shoaf, as well as Tara Clendenen ("Mrs. Clendenen"), and Shoaf's mother, Patricia Shoaf ("Mrs. Shoaf") (Dkt. No. 1-5 at 3) (A.R. at 92). At the time of Skylar's murder, Eddy lived with Mrs. Clendenen, and Shoaf lived with Mrs. Shoaf. *Id.*

In Counts I and II of the complaint, the Neeses seek damages from Eddy and Shoaf.² *Id.* at 7-9 (A.R. at 96-98). In Count III, "Negligent Supervision/Entrustment," they allege that Mrs. Clendenen and Mrs. Shoaf, as parents, guardians, and custodians of Eddy and Shoaf, "were negligent and careless in their supervision and guidance of their daughters." *Id.* at 9 (A.R. at 98).

At the time of Skylar's murder, American National Property and Casualty Company ("American National") insured Mrs. Clendenen under both a homeowner's policy and an automobile policy (Dkt. No. 1 at 3) (A.R. at 17).³ Following Mrs. Clendenen's demand for coverage, it has been defending her in the state court action pursuant to a reservation of rights. *Id.* at 4 (A.R. at 18). Similarly, at the time of Skylar's death, Erie insured Mrs. Shoaf under both its homeowner's and automobile policies (Case No. 1:14CV172, Dkt. No. 1 at 2) (A.R. at 105).⁴ Following her demand for coverage, it has been defending Mrs. Shoaf pursuant to a reservation of rights. *Id.*

²In Count I, "Murder," the Neeses seek compensatory and punitive damages from Eddy and Shoaf (Dkt. No. 1-5 at 7-8) (A.R. at 96-97). In Count II, "Negligence/Reckless Concealment," the Neeses seek damages for concealing Skylar's body and providing false and misleading information regarding her disappearance." *Id.* at 8-9 (A.R. at 97-98).

³Mrs. Clendenen's American National automobile policy did not cover the 2006 Toyota Camry and is not at issue in this litigation.

⁴In addition to insuring Mrs. Shoaf under an automobile policy, Erie provided automobile coverage to Mrs. Clendenen for her 2006 Toyota Camry (Case No. 1:14CV172, Dkt. No. 1 at 2) (A.R. at 105). The parties have agreed that the Erie automobile policies are not at issue because Skylar's death did not arise out of the operation of a motor vehicle (Dkt. No. 56 at 10) (A.R. at 504).

B. The Declaratory Judgment Action

Although American National and Erie are not parties to the state court action, they have each filed suit in [District Court] seeking a declaration that, under their respective policies, they have no duty to defend and cover Mrs. Clendenen and Mrs. Shoaf in the Neeses' state court action. American National's complaint specifically seeks a declaratory judgment that Mrs. Clendenen is not covered under either her automobile or homeowner's policies, and that American National has no duty to defend or indemnify her in the state court action (Dkt. No. 1 at 8) (A.R. at 22). Similarly, Erie seeks a declaratory judgment that Eddy, Shoaf, Mrs. Clendenen, and Mrs. Shoaf are not covered under any of Erie's policies and therefore not entitled to a defense or indemnification in the state court action (Case No. 1:14CV172, Dkt. No. 1 at 18) (A.R. at 121). The Court has consolidated the cases, designating 1:14CV155, the American National case, as the lead case (Dkt. No. 24) (A.R. at 269).

Both American National and Erie have moved for summary judgment (Dkt. Nos. 40, 42) (A.R. at 286, 316), while the Neeses have filed a combined cross-motion for partial summary judgment and brief in opposition to American National and Erie's motions (Dkt. No. 45) (A.R. at 347). The Clendenens have joined the Neeses' cross-motion for summary judgment (Dkt. No. 47) (A.R. at 377), and Mrs. Shoaf has filed her own combined cross-motion for summary judgment and brief in response (Dkt. No. 48) (A.R. at 383). On March 21, 2016, pursuant to the joint motion of American National and Erie, the Court dismissed Shelia Eddy and Rachel Shoaf as defendants (Dkt. No. 65) (A.R. at 10).

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court has scheduled this case for oral argument pursuant to West Virginia Rule of Appellate Procedure 20. Currently, oral argument is scheduled for September 21, 2016.

IV. STANDARD OF REVIEW

Pursuant to West Virginia Code § 51-1A-3, “the Supreme Court of Appeals of West Virginia may answer a question of law certified to it by any court of the United States or by the highest appellate court or the intermediate appellate court of another state or of a tribe of Canada, a Canadian province or territory, Mexico or a Mexican state, if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state.” W. Va. Code § 51-1A-3.

In *Valentine v. Sugar Rock, Inc.*, 234 W. Va. 526, 766 S.E.2d 785 (2014), this Court articulated the standard of review for reviewing a certified question from a federal court as follows:

1. “A de novo standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court.” Syllabus Point 1, *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 506 S.E.2d 64 (1998).
2. When reviewing a question certified from a federal district or appellate court, this Court will give the question plenary review, and may consider any portions of the federal court’s record that are relevant to the question of law to be answered.

Id. at Syl. Pts. 1-2.

Moreover, in *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993), this Court recognized:

3. When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in W. Va. Code, 51-1A-1, *et seq.* and W. Va. Code, 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court.

Id. at Syl. Pt. 3.

V. **SUMMARY OF THE ARGUMENT**

This Court should answer the first question in the affirmative and hold that applying West Virginia public policy and rules of contract construction the unambiguous exclusion for bodily injury “expected or intended by ‘anyone we protect’” in Erie’s homeowner insurance policy precludes coverage for the claim of negligent supervision in the underlying case brought by the Neeses against Patricia Shoaf, who is Erie’s insured, because the murder of Skylar Neese was expected or intended by Rachel Shoaf, who is a co-insured. West Virginia public policy and rules of construction allow courts to apply family exclusions and similar exclusions, which exclude coverage for an innocent insured based on the acts of a co-insured, in a homeowner or umbrella policy. In addition, West Virginia public policy and rules of construction require courts to apply intentional acts exclusions to torts based on intentional acts even when the claims are couched in terms of negligence. Moreover, the majority of jurisdictions to consider the question apply intentional acts exclusions, similar to the exclusion in Erie’s policy, to preclude coverage to an insured based on the intentional or criminal acts of a co-insured.

The Court should further answer the second question in the negative and hold that the unambiguous severability clause in Erie’s policy does not prevail over the unambiguous intentional acts exclusion and require Erie to apply the exclusion separately to each insured, despite the intentional and criminal acts of Rachel Shoaf. The Court has held that a severability clause does not defeat a family exclusion. Moreover, the majority of jurisdictions to consider the question have held that a severability clause does not change the meaning of an intentional acts exclusion that precludes coverage for intentional and criminal acts of any insured.

The Court should adopt the holdings of the majority of courts to consider these questions because they are consistent with West Virginia public policy and rules of contract construction.

VI. ARGUMENT

A. **Applying West Virginia Public Policy and Rules of Contract Construction, the Unambiguous Exclusion in Erie's Policy for "Bodily injury, property damage, or personal injury expected or intended by 'anyone we protect' . . .," Precludes Liability Coverage for Insureds Who Did Not Commit any Intentional Act.**

The Court should answer the first certified question in the affirmative. Applying West Virginia public policy and rules of contract construction, the unambiguous exclusion in Erie's homeowner policy for "[b]odily injury, property damage, or personal injury expected or intended by 'anyone we protect' . . .,"⁵ precludes liability coverage for Erie's insured, Patricia Shoaf, because the murder of Skylar Neese was expected or intended by a co-insured, Rachel Shoaf.

1. **West Virginia public policy and rules of construction allow courts to apply family exclusions and similar exclusions, which exclude coverage for an innocent insured based on the acts of a co-insured, in a homeowner or umbrella policy.**

West Virginia public policy and rules of construction allow courts to apply family exclusions and similar exclusions, which exclude coverage for an innocent insured based on the acts of a co-insured, in a homeowner or umbrella policy. For example, in *Rich v. Allstate Insurance Co.*, 191 W. Va. 308, 445 S.E.2d 249 (1994), this Court held:

1. "“Where provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed,” Syl., *Farmers' &*

⁵The exclusion in Erie's policy states in full:

We do not cover under *Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury Liability Coverage and Medical Payments To Others Coverage:*

1. **Bodily injury, property damage or personal injury expected or intended by anyone we protect even if:**
 - a. the degree, kind or quality of the injury or damage is different than what was expected or intended; or
 - b. a different person, entity, real or personal property sustained the injury or damage than was expected or intended.

A.R. at 150 (emphasis in original).

Merchants' Bank v. Balboa Insurance Co., 171 W. Va. 390, 299 S.E.2d 1 (1982), quoting syl., *Tynes v. Supreme Life Insurance Co.*, 158 W. Va. 188, 209 S.E.2d 567 (1974).” Syl. pt. 2, *Shamblin v. Nationwide Mutual Ins. Co.*, 175 W. Va. 337, 332 S.E.2d 639 (1985).

...

3. When a homeowner’s insurance policy excludes coverage to an “insured person” and defines an “insured person” as a resident of the named insured’s household and a dependent person in the named insured’s care, a minor child who sustains bodily injury as a result of the negligence of the named insured on the named insured’s premises, such minor child also being a resident of the named insured’s household and who is a dependent person in the named insured’s care, is not covered under the homeowner’s insurance policy. Such exclusionary language within the homeowner’s insurance policy is not violative of the public policy of this state.

Id. at Syl. Pts. 1, 3.

In *Rich*, the Court upheld the validity of an insurer’s homeowner policy exclusion that excluded “bodily injury to an insured person . . . whenever any benefit of this coverage would accrue directly or indirectly to *an insured person.*” *Id.*, 445 S.E.2d at 251 (emphasis added). In that case, an insured person was defined in the policy as “[the named insured] and, if a resident of your household: (a) any relative; and (b) any dependent person in your care.” *Id.* The Court agreed with the insurer that the language of the policy was clear and that it “unmistakably exclude[d] *any ‘insured person’* from coverage for bodily injury.” *Id.* (emphasis added). The Court expressly rejected an argument made by a minor child that the exclusionary language in the policy, particularly to the extent that it excluded coverage for a minor child in the care of the named insured, was contrary to the public policy of West Virginia. *Id.* The Court reasoned:

The important distinction to recognize here is that the requirements for automobile insurance are dictated by statute. There is no legislative declaration regarding the requirements of homeowner’s insurance coverage. Therefore, the parties must rely exclusively upon the policy language in order to determine whether there is coverage in this instance.

Moreover, this type of exclusionary language in homeowner's insurance policies has been held not to be violative of public policy in other jurisdictions. In *State Farm Fire & Casualty Co. v. Clendening*, 150 Cal. App. 3d 40, 197 Cal. Rptr. 377 (1983), the court therein was faced with the same question before this Court: Whether the family exclusion clause in the homeowner's policy was void as against public policy. The policy provisions in that case were comparable to the provisions in the case now before us, and the court held, "[w]here, as here, the exclusionary clause is clear, plain and unambiguous and there is no statutory prohibition, there is no public policy reason to prohibit insurance contracts such as these." *Id.* 197 Cal. Rptr. at 378 (citations omitted). *Accord*, *State Farm Gen. Ins. Co. v. Emerson*, 102 Wash. 2d 477, 687 P.2d 1139, 1143 (1984) ("Absent prior expression of public policy from either the Legislature or prior court decisions, our inquiry as to whether the family exclusion clause clearly offends the public good, must be answered in the negative. . . . We shall not invoke public policy to override an otherwise proper contract even though its terms may be harsh and its necessity doubtful."); *Groff v. State Farm Fire and Casualty Co.*, 646 F. Supp. 973, 974-75 (E.D. Pa. 1986) ("[T]he policy unambiguously excludes coverage. . . . [I]n view of the clear language of the policy and the state of the decisional law of Pennsylvania, [the court] need not explore [the public] policy considerations.")

In *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325, 325 S.E.2d 111, 114 (1984), we have previously determined the following language particularly helpful as to what the public policy is in West Virginia:

'Much has been written by text writers and by the courts as to the meaning of the phrase "public policy." All are agreed that its meaning is as "variable" as it is "vague," and that there is no absolute rule by which courts may determine what contracts contravene the public policy of the state. The rule of law, most generally stated, is that "public policy" is that principle of law which holds that "no person can lawfully do that which has a tendency to be injurious to the public or against public good * * *" even though "no actual injury" may have resulted therefrom in a particular case "to the public." It is a question of law which the court must decide in light of the particular circumstances of each case.

The sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government – with us – is factually established.'

(quoting *Allen v. Commercial Casualty Ins. Co.*, 131 N.J.L. 475, 37 A.2d 37, 38-39 (1944)). The appellant has failed to establish that the exclusionary language within the homeowner's insurance policy tended to be "injurious to the public or against the public good."

Id. at 251-52 (emphasis added) (footnotes omitted).⁶

More recently, in *Sayre v. State Farm Fire & Casualty Co.*, No. 11-0962, 2012 WL 3079148 (W. Va. May 25, 2012),⁷ this Court upheld the validity of a family exclusion in a homeowner policy, which excluded liability coverage for bodily injury to "'you [the named insured] or any insured[.]'" *Id.* at *1 (emphasis added). In that case, Gary Culp, who was a named insured on the policy, killed his wife, Linda Culp, who was also a named insured. In denying insurance coverage for the estate's wrongful death claim, the Court explained: "Linda Culp was a named insured and there was no liability coverage in the homeowner's policy for bodily injury of an insured." *Id.* at *2.

Similarly, in *Berkhouse v. Great American Assurance Co.*, No. 13-0264, 2013 WL 6152414 (W. Va. Nov. 22, 2013), this Court held that an umbrella policy's liquor liability exclusion, which excluded "[a]ny liability of any 'Insured,'" excluded coverage for negligent training and supervision claims against the Charleston Moose Lodge. *Id.* at * 4 (emphasis added). The Court explained that the exclusion was plain and unambiguous and that accordingly there was no basis to apply the reasonable expectations doctrine as follows:

The liquor liability exclusion expressly excludes coverage for lodges for "[a]ny liability of any 'Insured' by reason of: (1) causing or contributing to the intoxication of any person; or (2) the furnishing of alcoholic beverages to a person . . . under the influence of alcohol[.]" We find nothing ambiguous in this language. . . . Finally, *all of the claims that Mr. Berkhouse asserts against the Charleston Moose Lodge are subject to this exclusion, including his claim of negligent training and supervision of employees.* The alleged deficiency in the

⁶As noted above, the Erie automobile policies are not at issue.

⁷This Court has recognized that it is appropriate to cite to its memorandum decisions and that they have precedential value, particularly in an action such as this where there is no published opinion on point. See *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303, Syl. Pts. 4-5 (2014).

employees' training and supervision specifically pertains to their furnishing of alcohol to persons under the influence of alcohol. Thus, pursuant to the plain and unambiguous policy exclusion, there is no coverage under the umbrella policy for Mr. Berkhouse's claims.

Next, Mr. Berkhouse argues that the doctrine of reasonable expectations applies to require coverage under the umbrella policy. We find no merit to this argument. First we have no record evidence as to what the Charleston Moose Lodge's expectations were. Second, *in West Virginia the doctrine of reasonable expectations is limited to those instances in which the policy language is ambiguous. National Mut. Ins. Co. [v. McMahon & Sons, Inc., 177 W. Va. 734, 356 S.E.2d 488, 496 (1987), overruled on other grounds by Potesta v. U.S. Fidelity & Guar. Co., 202 W. Va. 308, 504 S.E.2d 135 (1998)], citing Solvia [v. Shand, Morahan & Co., Inc., 176 W. Va. 430, 345 S.E.2d 33, 36 (1986), abrogated on other grounds by National Mut. Ins. Co., 356 S.E.2d at 495 n.6]. The doctrine is essentially a rule of construction, and unambiguous contracts do not require construction by the courts. National Mut. Ins. Co., 177 W. Va. at 742 n.7, 356 S.E.2d at 496 n.7. The liquor liability exclusion in this case is plain and unambiguous, thus the reasonable expectations doctrine need not be applied.*

Id. at *4 (emphasis added).

Rich establishes that West Virginia public policy and rules of construction allow courts to apply unambiguous exclusions, which preclude coverage for bodily injury to *an insured person*, to preclude coverage for *any insured person*. *Sayre* applied an unambiguous exclusion for liability coverage for bodily injury to *any insured* to preclude coverage for a co-insured, and *Berkhouse* applied an unambiguous exclusion to preclude coverage for negligent training and supervision claims where the policy excluded liability of *any insured*. Read together, these cases support the conclusion that West Virginia public policy and rules of contract construction allow courts to apply the unambiguous exclusion in Erie's policy for "bodily injury, property damage, or personal injury expected or intended by 'anyone we protect' . . .," to preclude liability coverage for the claim of negligent supervision against Patricia Shoaf in the underlying case based on the intentional act of Rachel Shoaf in murdering Skylar Neese.

2. **West Virginia public policy and rules of construction require courts to apply intentional acts exclusions to torts based on intentional acts even when the claims are couched in terms of negligence.**

West Virginia public policy and rules of construction require courts to apply intentional acts exclusions to torts based on intentional acts even when the claims are couched in terms of negligence. For example, in *Horace Mann Insurance Co. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988), this Court held on certified questions as follows:

There is neither a duty to defend an insured in this action for, nor a duty to pay for, damages allegedly caused by the sexual misconduct of an insured, when the liability insurance policy contains a so-called “intentional injury” exclusion. In such a case the intent of an insured to cause some injury will be inferred as a matter of law.

Id. at Syl. Pt.

In *Leeber*, the Court adopted the majority rule, which rejects insurance coverage in sexual misconduct liability insurance cases, explaining that the rule is consistent with the doctrine of reasonable expectations because “the insured under a homeowner’s insurance policy does not reasonably expect the insurer to defend an action against the insured for, and to pay for, damages alleged to have been caused by the sexual misconduct of the insured.” *Id.*, 376 S.E.2d at 587. The Court expressly rejected the minority approach because it is inconsistent with public policy, observing that “[m]ost courts conclude that it is against public policy to permit insurance coverage for a purposeful or intentional tort [, meaning a tort involving the intent to act and to cause some harm].” *Id.* at 586 (citation omitted). The Court reached this result despite the fact that the language of the complaint was couched in terms of both intentional and negligent acts. In rejecting the insured's attempt to bootstrap coverage by alleging negligence, the court stated:

[T]he allegations of “negligence” in the complaint are “a transparent attempt to trigger insurance coverage by characterizing allegations of [intentional] tortious conduct under the guise of ‘negligent’ activity. Our review of the complaint

reveals that [the plaintiff in the underlying action] seeks recovery for the alleged intentional acts committed by [the insured]. Thus, there was no duty [on the insurer] to defend[.]”

Id. at 587 (citation omitted).

In addition, in *Smith v. Animal Urgent Care, Inc.*, 208 W. Va. 664, 542 S.E.2d 827 (2000), the Court applied *Leeber* to preclude insurance coverage to an insured corporation where the underlying case against the corporation and one of its employees was based on the employee’s sexual harassment of another employee, rejecting the corporation’s argument that coverage was required because of the negligence-type allegations in the claims against the corporation. In addition to citing the Syllabus Point in *Leeber*, the Court held:

4. The inclusion of negligence-type allegations in a complaint that is at its essence a sexual harassment claim will not prevent the operation of an “intentional acts” exclusion contained in an insurance liability policy which is defined as excluding “bodily injury” “expected or intended from the standpoint of the insured.”

Id. at Syl. Pt. 4.

In *Smith*, the Court explained:

Other courts have similarly determined that inclusion of negligence-type allegations in complaints that are essentially sexual harassment claims will not defeat the application of an “intentional acts” exclusion. *See Bilstein Corp. v. Federal Ins. Co.*, 168 F.3d 497, 1999 WL 96438, at *1 (9th Cir. 1999) (finding no duty to defend sexual harassment case that included claims of negligence and defamation under intentional act exclusion since non-harassment claims were “inseparable” from intentional harassment conduct); *Medallion Indus., Inc. v. Atlantic Mut. Ins. Co.*, 152 F.3d 927, 1998 WL 403338, at *2 (9th Cir. 1998) (upholding district court’s determination of no coverage in sexual harassment case including count of negligent supervision, reasoning that mere labeling does not create negligence especially where Oregon law requires proof of employer’s knowledge of employee’s wrongful act); *Green Chimneys Sch. For Little Folk v. National Union Fire Ins. Co.*, 244 A.D.2d 387, 664 N.Y.S.2d 320, 321 (N.Y. App. Div. 1997) (affirming denial of coverage for sexual harassment claim because claim did not constitute “occurrence” under policy definition and ruling that “inclusion in the underlying complaint of causes of action sounding in negligent hiring and supervision does not alter the fact that “the operative act[s] giving rise to any recovery [are] the [intentional sexual]assault[s]”); *Board of*

Educ. v. Continental Ins. Co., 198 A.D.2d 816, 604 N.Y.S.2d 399, 400 (N.Y. App. Div. 1993) (finding no coverage for teacher's claim against school district for failing to prohibit sexual harassment by principal, creating offensive work environment, and wrongful termination and observing that inclusion of "knew or should have known" language did "not change the gravamen of the complaint from one alleging intentional acts . . . to one involving negligent conduct").

Id., 542 S.E.2d at 834.

Moreover, in *West Virginia Fire & Casualty Co. v. Stanley*, 216 W. Va. 40, 602 S.E.2d 483 (2004), the Court applied *Leeber* and *Smith* to claims in an underlying case against a husband and wife, who were insureds under a homeowner policy, in an action arising from the alleged sexual misconduct of an their minor son, who was a co-insured, and held:

7. The inferred-intent rule set forth in *Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988), applies to minors so that there is neither a duty to defend an insured in an action for, nor a duty to pay for, damages allegedly caused by the sexual misconduct of an insured who is a minor, when the liability insurance policy contains a co-called "intentional injury/acts" exclusion. In such a case, the intent of the minor insured to cause some injury will be inferred as a matter of law.

...

10. "The inclusion of negligence-type allegations in a complaint that is at its essence a sexual harassment claim will not prevent the operation of an 'intentional acts' exclusion contained in an insurance liability policy which is defined as excluding 'bodily injury' 'expected or intended from the standpoint of the insured.'" Syllabus Point 4, *Smith v. Animal Urgent Care, Inc.*, 208 W. Va. 664, 542 S.E.2d 827 (2000).

Id. at Syl. Pts. 7, 10.

Applying West Virginia law, in *Westfield Insurance Co. v. Merrifield*, No. 2:07-cv-00034, 2008 WL 336789, **5-6 (S.D.W. Va. Feb. 5, 2008), the Court held that a homeowner insurance policy did not provide coverage for negligence claims brought against insured parents whose son was convicted of first degree murder, death of a child by guardian or custodian, and sexual abuse by a guardian. The policy contained an exclusion for bodily injury "arising out of sexual molestation, corporal punishment or physical or mental abuse." The Court rejected the

mother's argument that *Columbia Casualty Co. v. Westfield Insurance Co.*, 217 W. Va. 250, 617 S.E.2d 797 (2005),⁸ should be extended to require the policy exclusions – as opposed to the insuring language involved in *Columbia Casualty* – to be viewed from the perspective of the mother. The Court reasoned that the policy unambiguously barred coverage for injuries arising out of sexual molestation. Because the only harm alleged in the underlying complaint was the death of a child caused by his physical and sexual abuse, the “bodily injury” arose from sexual molestation by Michael Merrifield, not from the negligent or intentional acts of his parents. *Merrifield*, 2008 WL 336789 at **5-6.

Leeber establishes that West Virginia public policy and rules of construction require courts to apply intentional acts exclusions to torts based on intentional acts even when the claims are couched in terms of negligence. Subsequently, *Smith* precluded insurance coverage for claims couched in terms of negligence against an insured corporation because they were based on the intentional acts of the corporation's employee. *Stanley* further precluded insurance coverage for claims couched in terms of negligence against a husband and wife, who were insureds in an action arising from the alleged sexual misconduct of their co-insured minor son. Read together, these cases support the conclusion that West Virginia public policy and rules of construction require application of Erie's intentional acts exclusion to preclude liability coverage for the claim of negligent supervision against Patricia Shoaf in the underlying case based on the intentional act of Rachel Shoaf in murdering Skylar Neese.

⁸In *Columbia Casualty* the Fourth Circuit certified a question to this Court as to whether two inmate deaths by suicide in the Randolph County Jail were “occurrences” under an insurance policy issued to the Randolph County Commission. The Court concluded that there was potential insurance coverage for the claims made against the Randolph County Commission by the estates of the two inmates who committed suicide because when the policy language was applied to and from the perspective or standpoint of the county commission the deaths were “occurrences” under the insurance policy terms. *Columbia Casualty*, 617 S.E.2d at 797-98. The Court noted that because of the specific language used in the Fourth Circuit's certified question, it need not discuss the relationship between the terms “occurrence” and “accident” in the insurance policy at issue, or the exclusionary language in the policy relating to intentional acts, except to say that no other language in the policy appeared to be inconsistent with its holding. *Id.*, 617 S.E.2d at 799 n.2.

3. **The majority of jurisdictions to consider the question apply intentional acts exclusions, similar to the exclusion in Erie’s policy, to preclude coverage to an insured based on the intentional or criminal acts of a co-insured.**

Although this Court has not considered the precise question certified by the District Court, the majority of jurisdictions that have decided the issue allow intentional acts exclusions, similar to the exclusion in Erie’s homeowner policy, to preclude coverage to an insured based on the intentional acts of any co-insured. For example, in *Postell v. American Family Mutual Insurance Co.*, 823 N.W.2d 35 (Iowa 2012), the Court held that an innocent insured spouse whose co-insured husband started a house fire in a suicide attempt could not recover under a homeowner insurance policy that included an exclusion for intentional loss “by or at the direction of *any insured*”. *Id.* at 45 (emphasis added). In that case, the Court reasoned:

It is well-settled law in this state that the use of the words, “*any insured*,” is an unambiguous phrase that precludes coverage for *all* insureds, including an innocent coinsured spouse. In *Vance [v. Pekin Insurance Company]*, 457 N.W.2d 589 (Iowa 1990), we went so far as to encourage insurance companies to purge their fire insurance policies of ambiguity by replacing the exclusion of language of “the” insured with “a,” “any,” or “an” insured. 457 N.W.2d at 593. (citing Leane English Cerven, *The Problem of the Innocent Co-insured Spouse: Three Theories on Recovery*, 17 Val. U.L. Rev. 849, 872 (1983)). This rule is consistent with other jurisdictions.

...

Therefore, under our long-standing rule of construing “any insured” in insurance policies as barring recovery to the innocent coinsured spouse, American Family properly denied coverage . . . under the intentional loss exclusion.

Id., 823 N.W.2d at 45-46 (emphasis in original) (citations omitted) (footnote omitted).

The Court noted that many jurisdictions follow this well-settled law as follows:

See Chacon v. Am. Family Mut. Ins. Co., 788 P.2d 748, 752 (Colo. 1990) (finding “any insured” created a joint obligation under the policy’s intentional acts exclusion applying to the insured innocent parents and insured minor son who committed vandalism); *Trinity Universal Ins. Co. v. Kirsling*, 139 Idaho 89, 73 P.3d 102, 105 (2003) (holding that an intentional acts exclusion which excluded “any loss” arising out of any act committed by or at the direction of “an insured”

and “with the intent to cause a loss” barred coverage); *Woodhouse v. Farmers Union Mut. Ins. Co.*, 241 Mont. 69, 785 P.2d 192, 194 (1990) (holding “an insured” unambiguously bars coverage to an innocent coinsured); *McAllister v. Millville Mut. Ins. Co.*, 433 Pa. Super. 330, 640 A.2d 1283, 1289 (1994) (denying coverage to innocent coinsured when other insured committed arson and policy included an intentional acts provision referring to “an insured” and a neglect exclusion referring to “any insured”); *Dolcy v. R.I Joint Reins. Ass’n*, 589 A.2d 313, 316 (R.I. 1991) (holding that the policy’s intentional loss exclusion referring to “an insured” imposes a joint obligation); *Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685, 688 (Utah 1999) (finding the intentional loss exclusion referring to “an insured” denied coverage to innocent coinsured when the other coinsured burned down the house); see also *Century-Nat’l Ins. Co. v. Garcia*, 51 Cal. 4th 564, 568-69, 120 Cal. Rptr. 3d 541, 246 P.3d 621 (2011) (recognizing that statutory language of “any insured” increasing the hazard of loss or concealing fraud refers to joint or collective liability, not several as when the standard policy refers to “the insured”).

Id. at 45-46 n.6.⁹

In addition, in *Co-operative Insurance Cos v. Woodward*, 2012 VT 22, 45 A.3d 89 (2012), the Court held that an exclusion in the insured’s homeowner policy for loss caused by the intentional acts of “an insured” applied to both insureds under the policy and precluded coverage for claims of the insured wife’s negligent supervision of her husband who kidnapped, drugged, sexually assaulted, and killed his niece. The Court noted that the claim for negligent supervision did not allege injuries that were distinct from those associated with the insured husband’s intentional and criminal conduct and concluded that “[p]ublic policy weighs against coverage for such damages where the parties likely did not contemplate that the insurance policy would cover sexual abuse of children.” *Id.*, 45 A.3d at 93 n.1. The Court reasoned:

¶ 14. Where an insured’s tortious acts are intentional, a policy exclusion for intentional acts by “an insured” generally bars coverage for claims made by any insured under the same policy. *N. Sec. Ins. Co. v. Perrone*, 172 Vt. 204, 220, 777 A.2d 151, 163 (2001)]. If the exclusion precludes coverage for certain acts by “the insured,” noncoverage of one insured does not affect coverage for claims against other insureds. *Id.* at 221-22, 777 A.2d at 163. To illustrate, the insurance

⁹Although *Postell* involved a claim by an innocent insured spouse for property damage based on an intentionally set fire, *Postell* the cases cited therein demonstrate that courts do not distinguish between first-party property claims and liability claims in this context. See 3 Allan D. Windt, *Insurance Claims and Disputes* § 11:8 (6th ed.).

contract in *Perrone* contained an intentional-acts exclusion that precluded coverage for certain acts by “the insured.” *Id.* at 220, 777 A.2d at 162-63. We held that when an exclusion uses the article “the,” “the provision applies only to claims brought against the particular insured named in the claim” *Id.* at 220, 777 A.2d at 162. Had it used “an insured,” we noted in dicta. the relevant act would have been the intentional tortfeasor’s abuse, and if no coverage was found for those actions, the other insureds were similarly uncovered. *Id.* at 221-22, 777 A.2d at 163-64. We stated that where a policy excludes coverage when “an insured” commits an intentional act, the exclusion applies to “all claims which arise from the intentional acts of any one insured, even though the claims are stated against another insured.” *Id.* at 220, 777 A.2d at 163 (noting courts have uniformly concluded the same). We later pointed out that there is no “meaningful difference” between the terms “an insured” and “any insured.” [*Allstate Ins. Co. v. Vose*, 2004 VT 121, ¶ 22, 177 Vt. 412, 869 A.2d 97 (2004)]. In other words, such language has a collective effect and bars all insureds from coverage. Having already concluded that uncle’s actions were intentional under the terms of the policy, homeowner would also normally be barred from coverage because the policy at issue uses the collective term “an insured.”

Id., 45 A.3d at 94.

Similarly, in *Villa v. Short*, 195 N.J. 15, 947 A.2d 1217 (2008), the Court held that an intentional acts exclusion unambiguously excluded liability coverage for claims against all insureds based on the intentional acts of any insured where the insureds were sued in connection with sexual assaults committed by their son. *Id.*, 947 A.2d at 1219. In denying liability coverage to the innocent insureds, the Court reasoned:

We are in accord with the views expressed by the Appellate Division We agree that the phrase “an insured” in insurance policy exclusions is not ambiguous. In the present case, the policy language excludes all insureds from coverage for damages caused by the intentional or criminal acts of an insured. We will not search for ambiguities where there are none. *See, e.g., Allstate Ins. Co. v. Gilbert*, 852 F.2d 449, 454 (9th Cir. 1988) (“We hold that by excluding insurance coverage for injury or damage intentionally caused by ‘an insured person,’ Allstate unambiguously excluded coverage for damages caused by the intentional wrongful act of any insured under the policies.”); *Allstate Ins. Co. v. Stamp*, 134 N.H. 59, 588 A.2d 363, 365 (1991) (noting that “Allstate’s use of the indefinite article ‘an,’ rather than the definite ‘the,’ before ‘insured’ is a clear reference to *any* insured who commits an intentional act resulting in damages, regardless of whether or not he is the particular insured seeking coverage”). *But see Brumley v. Lee*, 265 Kan. 810, 963 P.2d 1224, 1227 (1998) (holding that the words “an” and “any” in insurance policy exclusions “are inherently indefinite

and ambiguous”). Nor do we find that because other words could be perceived as making the language in the exclusion clauses clearer, “the language that was chosen [is] ambiguous.”

...

... In sum, Allstate’s use of the words “an insured” eliminated the ambiguity that is inherent in the words “the insured.” The policy exclusion for intentional or criminal acts of “an insured” is not ambiguous. Such language plainly excludes coverage for all insureds when any insured commits an intentional or criminal act.

Id., 947 A.2d at 1223-24 (citations omitted).

In *J.G. v. Wangard*, 753 N.W.2d 475 (Wis. 2008), the Court held that an exclusion for any damages arising out of an act intended by “any covered person” unambiguously barred liability coverage for wife Deborah Wangard’s alleged negligence in failing to prevent her husband Steven Wangard’s intentional sexual assaults of a minor. *Id.* at 488. The Court reasoned:

¶ 45 We . . . conclude that Great Northern and Pacific’s use of the phrase “any covered person” in the policies’ intentional acts exclusions, like the phrase “any insured” . . . unambiguously precludes coverage for all insureds.

¶ 46 The express language of the two homeowner’s policies in question broadly excludes from coverage “any damages *arising out of* an act intended by *any covered person* to cause personal injury or property damage.” (Emphasis added.) Without considering whether Deborah’s negligent conduct was itself “intentional,” . . . it is clear that J.G.’s and R.G.’s alleged damages arose out of Steven’s intentional wrongful conduct. For this reason, the exclusion plainly bars coverage as to Steven and to Deborah if, as is undisputed, J.G. and R.G.’s personal injury damages arose out of Steven’s intentional sexual contact with J.G.

Id. (citations omitted).

The Court in *Wangard* rejected the insured wife’s argument regarding the doctrine of reasonable expectations, reasoning:

¶ 56 . . . As noted above, the policies in question unambiguously state that personal injury damages “arising out of” the intentional acts of “any covered person” are excluded from coverage. Deborah cannot reasonably argue that this

policy language should be construed to cover the damages arising out of the intentional sexual contact with J.G. by her husband Steven, a covered person.

¶ 57 In addition, . . . an insured cannot reasonably expect coverage for harms resulting from sexual assaults committed by one's spouse. . . . "[T]he average person purchasing homeowner's insurance would cringe at the very suggestion that [the person] was paying for such coverage. And certainly [the person] would not want to share that type of risk with other homeowner's policyholders."

Id., 753 N.W.2d at 490-91 (citations omitted).

In *Utah Farm Bureau Insurance Co. v. Crook*, 1999 UT 47, 980 P.2d 685 (1999), the Court held that an unambiguous exclusion in a homeowner policy, which excluded coverage based on intentional acts of "an insured," precluded insurance coverage to an innocent co-insured wife, Ms. Crook, whose insured husband intentionally set fire to their house. *Id.* at 688. The Court expressly rejected the wife's argument that reading the policy to preclude coverage for an innocent co-insured was unfair and contrary to public policy, reasoning that "'the general judicial attitude toward insurance policies is to sustain them on grounds of public policy wherever possible.'" *Id.* (citation omitted). The Court distinguished its prior holding in *Error v. Western Home Insurance Co.*, 762 P.2d 1077 (Utah 1988), reasoning as follows:

¶ 14 Ms. Crook would read the public policy in *Error* as allowing an innocent co-insured to recover despite a directly applicable policy exclusion. However, *Error* cannot be read that broadly because there was no directly applicable exclusion in that case. . . . *Error* held that when an insurance policy does not contain an exclusion that clearly and unambiguously denies coverage, public policy requires that an insured who is not personally responsible for causing a loss can recover. This public policy does not extend to cases in which an insurance policy contains a specific, unambiguous provision that applies to exclude coverage. Ms. Crook's Policy contains an exclusion that clearly excludes coverage when an insured commits an intentional act; therefore, we hold that the public policy articulated in *Error* does not apply to her case.

Id. at 689.

In *Johnson v. Allstate Insurance Co.*, 1997 ME 3, 687 A.2d 642 (1997), the Court answered in the negative a certified question as to whether a homeowners' policy provided

liability coverage to one named insured for damages arising out of criminal child abuse by another named insured, where the allegation against the first insured was negligence in allowing the abuse to occur and where the policy excluded coverage for injury “intentionally caused by *an* insured person.” The Court reasoned:

The issue presented by the certified question is whether the exclusion for intentional acts bars coverage for damages negligently caused by one insured when the damages are the same as the damages caused by the intentional acts of another insured. Based on the language of the policy, we hold that by excluding coverage for damages intentionally caused by “an insured person,” Allstate unambiguously excluded coverage for damages intentionally caused by *any* insured person under the policy. “An” is an indefinite article routinely used in the sense of “any” in referring to more than one individual object. *Allstate Ins. Co. v. Freeman*, 432 Mich. 656, 443 N.W.2d 734, 754 (1989) (“relying upon a correct usage of the English language”). . . .

Our conclusion is consistent with the common usage of the English language, as well as the overwhelming majority of appellate opinions from other jurisdictions. “Adherence to a correct usage of the English language in insurance contract construction promotes a uniform, reliable, and reasonable foundation upon which policyholders and insurers may rely when they enter into a contractual agreement.” *Id.* Other courts have equated “an insured” with “any insured” in exclusionary clauses and have held that excluded conduct on the part of one insured bars coverage for each insured under the policy.

Id. at 644 (footnote omitted).

In *Noland v. Farmers Insurance Co.*, 319 Ark. 449, 892 S.W.2d 271 (1995), the Court held that a homeowner policy’s intentional acts exclusion, which excluded coverage for “any other insured” for the act of “any insured” causing or arranging for a loss, precluded coverage for innocent co-insured where the insured wife set fire to their house. *Id.*, 892 S.W.2d at 273. In that case, the Court expressly rejected the innocent co-insured’s argument that exclusion was contrary to public policy. *Id.*

In *Dolcy v. Rhode Island Joint Reinsurance Association*, 589 A.2d 313 (R.I. 1991), the Court held that a homeowner policy’s intentional acts exclusion for intentional losses committed

by or at direction of “an” insured unambiguously precluded coverage and did not violate public policy even though it precluded the innocent wife from recovering for fire intentionally set by husband. In that case, the Court reasoned as follows:

We find no ambiguity in the exclusion clause. Both insureds had a joint obligation to refrain from causing intentional loss because the Association did not insure for such a loss. We also reject the plaintiff’s argument that such joint-obligation exclusion clauses violate public policy. Presumably the insurer’s lower exposure to liability because of the joint obligations of named insureds is reflected in lower premiums, and if the insured is dissatisfied with the result, he or she is free to purchase another policy naming that person individually as an insured.

Id. at 316.

In *Chacon v. American Family Mutual Insurance Co.*, 788 P.2d 748 (Colo. 1990) (*en banc*), the Court found the reasoning of the majority of courts persuasive and held that an intentional acts exclusion for property damage “which is expected or intended by any insured” clearly and unambiguously expressed an intention to deny coverage to insured parents based on damage that was intended or expected by their co-insured minor son, who committed acts of vandalism at an elementary school. *Id.* at 752. The Court reasoned:

Initially, the “intentional act” exclusion contained in the Chacon’s homeowner’s policy referring to the actions of “any insured,” must be distinguished from those policies which refer to the actions of “the insured.” The majority of courts which have considered this issue have held that “unlike the phrase ‘the insured,’ the phrase ‘any insured’ unambiguously expresses a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured.”

Id. at 748 (citation omitted) (footnote omitted).

In this action as well, this Court should find the reasoning of the majority of courts persuasive and hold that Erie’s unambiguous intentional acts exclusion for bodily injury “expected or intended by ‘anyone we protect’” precludes liability coverage for the claims against Patricia Shoaf based on the intentional act of Rachel Shoaf, who is also an insured, in murdering Skylar Neese.

B. The Unambiguous Severability Clause in Erie’s Policy, which States that the Insurance Applies Separately to Each Insured, Does Not Prevail over the Exclusion or otherwise Require Erie to Apply the Exclusion Separately to Each Insured, Despite the Intentional Actions of a Co-insured.

This Court should answer the second certified question in the negative. Erie’s unambiguous Limits of Protection provision,¹⁰ which the District Court has labeled a severability clause, does not prevail over the unambiguous intentional acts exclusion or otherwise require Erie to apply the exclusion separately to Patricia Shoaf, despite the intentional actions of Rachel Shoaf in murdering Skylar Neese.

1. This Court has held that a severability clause does not defeat a family exclusion.

This Court has held that a severability clause does not defeat a family exclusion. In *Sayre v. State Farm Fire & Casualty Co.*, No. 11-0962, 2012 WL 3079148 (W. Va. May 25, 2012), this Court rejected the insured’s argument that a severability clause in the “Conditions” section of a homeowner’s policy created an ambiguity that defeated a family exclusion. In *Sayre*, the Court agreed with the circuit court’s conclusion that the severability clause had no application and concluded that summary judgment was proper for State Farm. *Id.* at *2. Although *Sayre* did not decide the question presented in this action, it supports the conclusion that a severability clause does not defeat an unambiguous intentional acts exclusion because it is consistent with the majority of jurisdictions to have considered the question.

¹⁰The Limits of Protection provision in Erie’s policy expressly states in pertinent part:

This insurance applies separately to **anyone we protect**. Regardless of the number of people we protect, claims made or persons injured, **our** total liability under *Personal Liability Coverage* for damages resulting from one **occurrence**, offense, claim or suit will not exceed the amount shown on the **Declarations** for *Personal Liability Coverage*. All **bodily injury, property damage and personal injury** resulting from one accident or from continuous or repeated exposure to the same general conditions is considered the result of one **occurrence**, offense, claim or suit.

A.R. at 152 (emphasis in original).

2. The majority of jurisdictions to consider the question have held that a severability clause does not change the meaning of an intentional acts exclusion that precludes coverage for intentional and criminal acts of any insured.

The majority of jurisdictions to consider the question have held that a severability clause does not change the meaning of an intentional acts exclusion that precludes liability coverage for intentional and criminal acts of any insured. For example, in *American Family Mutual Insurance Co. v. Wheeler*, 287 Neb. 250, 842 N.W.2d 100 (2014), the Court adopted the majority position that a severability clause stating that the insurance applied separately to each insured did not change the meaning of an exclusion that precluded liability coverage for injuries, among other things, intentionally caused by “any insured.” *Id.*, 842 N.W.2d at 108. The Court reasoned:

Summed up, the majority position emphasizes the plain meaning of the “an insured” or “any insured” language in a particular exclusion. It emphasizes that the severability clause’s command to apply the insurance separately to each insured does not change the exclusion’s plain language or create ambiguity in its application. The minority position, on the other hand, concludes that the severability clause’s command to apply the insurance separately to each insured requires that each insured’s conduct be analyzed as if he or she were the only insured under the policy. Or, at the very least, such an interpretation is a reasonable one, making the policy ambiguous, which a court must construe in favor of coverage.

We find the majority position more persuasive and adopt it here. It is consistent with our oft-stated approach to give language in an insurance contract its plain meaning. We have in the past concluded that the “an insured” language, and implicitly the “any insured” language, is clear and unambiguous. Such language means what it says, and the severability clause does not operate to override this clear and unambiguous language. In other words, applying the insurance separately to each insured, as the severability clause requires, does not change that the exclusions reference “an insured” or “any insured.” As one appellate court explained, “The act of applying the policy separately to each insured does not alter or create ambiguity in the substance or sweep of the exclusion.”

Our goal in interpreting insurance policy language is to give effect to each provision of the contract. Adopting the minority position would render the “an” or “any” language superfluous, while adopting the majority position would not. Further, we do not agree with the . . . argument that the majority position renders the severability clause meaningless. First, the severability clause affects the

interpretation of exclusions referencing “the insured.” There are such exclusions in these policies, such as the “Illegal Consumption of Alcohol” exclusion. And second, as American Family explained at oral argument, the severability clause still has application outside of its role in interpreting the scope of exclusion.

Id. at 107-08 (footnotes omitted).

In addition, in *Postell v American Family Mutual Insurance Co.*, 823 N.W.2d 35 (Iowa 2012), the Court rejected the innocent insured’s argument that a severability clause in the definitions section of the homeowner policy provided her coverage. The Court reasoned:

We have already considered the question of what effect severability-of-interest clauses have on insurance policy exclusions. The answer – none. We reach this conclusion by first recognizing that “the purpose of severability clauses is to spread protection, to the limits of coverage, among all of the named insureds. The purpose is not to negate bargained-for exclusions which are plainly worded.” Here, the policy illustrates this fact because after the severability clause, it states, “This does not increase our limit.”

In addition, we found such clauses serve as a conduit by which the insurance company can communicate that, under the policy, the term insured does not always mean “any” insured person, but sometimes, only “the” insured claiming coverage. Thus, the severability clause serves to reinforce the language differentiating between joint obligations (“any” or “an” insured) and separate obligations (“the” insured).

Moreover, in construing the language of this policy, the severability clause does not create ambiguity. Throughout the policy, we find “the insured.” However, it unambiguously refers to “any insured” in other sections, namely the exclusions provisions. Thus, the severability clause operates to set apart these provisions.

Furthermore, if we construe all references to “any” or “the” insured as a “separate insured,” this renders the exclusion’s express language imposing joint obligations a nullity. Our rule remains consistent with the majority position of other jurisdictions.

Id. at 46-47 (citations omitted).

Again, the Court noted that many jurisdictions follow this well-settled law as follows:

See EMCASCO Ins. Co. v. Diedrich, 394 F.3d 1091, 1097-98 (8th Cir. 2005) (imposing joint obligations under South Dakota law for an intentional acts exclusion referring to “one or more insureds,” despite the severability clause); *Standard Fire Ins. Co. v. Proctor*, 286 F. Supp. 2d 567, 574-75 (D. Md. 2003)

(indicating that “any” is not ambiguous under Maryland law and exclusions is collective, regardless of severability clause); *Allstate Ins. Co. v. Kim*, 121 F. Supp. 2d 1301, 1308 (D. Hawaii 2000) (finding “an insured” is unambiguous, applies to innocent coinsureds, and is not affected by the severability clause); *Chicon [v. Am. Family Mut. Ins. Co.]*, 788 P.2d 748, 752 (Colo. 1990)] (preferring to give full effect to exclusions referring to “any insured,” despite a severability clause, in order to respect the party’s contractual expectations and enforce the court’s contractual analysis); *Johnson v. Allstate Ins. Co.*, 687 A.2d 642, 644-45 (Me. 1997) (finding severability clauses do not change the collective effect of an intentional acts exclusion referring to “an insured”); *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 328-29 (Minn. Ct. App. 2008) (holding that the severability clause did not make the criminal acts exclusion referring to “any” insured ambiguous); *Am. Family Mut. Ins. Co. v. Copeland-Williams*, 941 S.W.2d 625, 627-29 (Mo. Ct. App. 1997) (holding that “any insured” in the exclusionary clause is unambiguously collective rather than several, despite severability clause); *Villa v. Short*, 195 N.J. 15, 947 A.2d 1217, 1224-25 (2008) (finding that a severability clause does not inject ambiguity or remove the joint obligation imposed by intentional and criminal acts exclusions referring to either “an insured” or “any insured”); *Safeco Ins. Co. of Am. v. White*, 122 Ohio St. 3d 562, 913 N.E.2d 426, 441-42 (2009) (holding that a severability clause does not affect the plain meaning and application of “an insured” or “any insured” in the exclusions denying coverage to innocent coinsureds); *McAllister [v. Millville Mut. Ins. Co.]*, 433 Pa. Super. 330, 640 A.2d 1283, 1289 (1994)] (finding joint obligations under the exclusion even though the policy defined each named insured as a “separate insured”); *Great Cent. Ins. Co. v. Roemmich*, 291 N.W.2d 772, 774-75 (S.D. 1980) (establishing that an exclusion applying to “any insured” is unambiguous and unaffected by a severability clause); *Mut. Of Enumclaw Ins. Co. v. Cross*, 103 Wash. App. 52, 10 P.3d 440, 445 (2000) (establishing that a severability clause does not affect the meaning an “an insured” as used in an intentional acts exclusion); *J.G. v. Wangard*, 313 Wis. 2d 329, 753 N.W.2d 475, 488 (2008) (denying coverage to all coinsureds under the intentional acts exclusion referring to “any” insured, despite the severability clause).

Id. at 47 n.7.

In *Co-operative Insurance Cos. v. Woodward*, 2012 VT 22, 45 A.3d 89 (2012), the Court noted a division among the jurisdictions that have considered whether a severability clause conflicts with an intentional-acts exclusion, and concluded:

¶ 16. Assuming, without deciding, that the provision at issue is a severability clause, we conclude that this clause has no effect on – and cannot override – the intentional-acts exclusion for certain acts committed by “an insured.” . . . Even if each insured – in this case, uncle and homeowner – is treated as having separate coverage, the exclusionary language remains unambiguous because “an” is

collective. Father's contention that the two provisions "simply cannot be reconciled" is therefore without merit. A majority of courts reach the same result. See, e.g., *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 329 (Minn. Ct. App. 2008) ("Use of phrase 'any insured' in [insurer's] severability clause does not create ambiguity when applying the exclusion."); *J.G. v. Wangard*, 2008 WI 99, ¶¶ 46-49, 313 Wis. 2d 329, 753 N.W.2d 475 (holding severability clause did not render "any insured" exclusion ambiguous); *Mut. Of Enumclaw Ins. Co. v. Cross*, 103 Wash. App. 52, 10 P.3d 440, 444-45 (2000) (holding that "an insured" exclusion was "clear and specific language [that] prevail[ed] over a severability clause, i.e., that an exclusion is not negated by or rendered ambiguous by a severability clause"); *Johnson v. Allstate Ins. Co.*, 1997 ME 3, ¶ 8, 687 A.2d 642 ("An unambiguous exclusion is not negated by a severability clause."); see also *Safeco Ins. Co. of Am. v. White*, 2009-Ohio-3718, 122 Ohio St. 3d 562, 913 N.E.2d 426, ¶ 71 (O'Donnell, J., concurring and dissenting) (collecting cases with majority view). Because exclusions for "an insured" serve to collectively bar all insureds, and because of the weight of decisional authority, we conclude that the clause at issue does not create ambiguity when read in conjunction with an intentional-acts exclusion referring to "an insured."

Id. at 95 (citations omitted).

Moreover, in *Villa v. Short*, 195 N.J. 15, 947 A.2d 1217 (2008), the Court held with regard to the operation of the severability clause as follows:

We view [the severability clause] as merely informing the policy holder that all insureds under the policy are entitled to equal coverage up to the total policy limit on the declaration page, rather than one insured receiving coverage and possibly leaving no insurance for the other insured. Our Appellate Division adopted that same interpretation of a similar clause. See *Argent [v. Brady]*, 386 N.J. Super. [343,] 355, 901 A.2d 419 (noting majority view that severability clauses are "designed solely to render the coverage actually provided by the insuring provisions of the policy applicable to all insureds equally, up to coverage limits"); see also *Nw. G.F. Mut. Ins. Co. v. Norgard*, 518 N.W.2d 179, 183 (N.D. 1994) (noting "purpose of severability clauses is to spread protection, to the limits of coverage, among all of the . . . insureds . . . [and] not to negate bargained-for exclusions which are plainly worded"). But see *Worcester Mut. Ins. Co. v. Marnell*, 398 Mass. 240, 496 N.E.2d 158, 161 (1986).

In sum, we do not read the severability clause to infuse ambiguity into the plain language of the policy exclusion for the intentional or criminal acts of an insured. The severability provision merely makes the coverage available to each insured who is entitled to it up to the limits on the declarations page. The provision does not affect the unambiguous exclusion for intentional or criminal acts of an insured.

Id. at 1225 (citations omitted).

In *J.G. v. Wangard*, 753 N.W.2d 475 (Wis. 2008), the Court reasoned as follows with regard to the severability clause:

¶ 47 We also agree with the reasoning . . . that the existence of a severability clause does not change th[e] analysis. “[O]ur objective is to further the insured’s reasonable expectations of coverage while meeting the intent of both parties to the contract.” It is inescapable that the policies, even when applied separately to Steven and Deborah as if they were distinct contracts, would include Steven Wangard, either explicitly by name or implicitly by status in their Coverage Summary. Steven would continue to fall under “any insured” for purposes of the intentional acts exclusion in Deborah’s “separate” policies. It is not reasonable to suggest that “separate” policies owned by Deborah that explicitly name Steven as an insured in their Coverage Summary under the heading “Name and address of Insured,” would not regard Steven as an insured subject to the intentional acts exclusion. (Emphasis added.) Furthermore, the policies state that the “You” that constitutes a “covered person” under the policies “means the person named in the Coverage Summary.” The severability clause cannot reasonably be interpreted to eliminate express language in the policies referencing Steven by name in the Coverage Summary.”

¶ 48 Under this construction we therefore reject Deborah’s contention that the policies are contextually ambiguous Use of “any covered person” in the exclusion, coupled with the fact that Steven is a named insured even if coverage is applied separately to Deborah, leads us to conclude that a reasonable interpretation of the Wangards’ policies excludes coverage for both Steven and Deborah on these facts.

Id., 753 N.W.2d at 488-89 (citations omitted) (footnotes omitted).

In *Johnson v. Allstate Insurance Co.*, 1997 ME 3, 687 A.2d 642 (1997), the Court rejected the argument that a severability clause found elsewhere in the policy either negated the effect of the exclusion or produced an ambiguity. The Court reasoned:

Assuming, without deciding, that the clause creates separate interests under the insurance policy rather than merely stating the limits of liability, we conclude that plaintiff overstates the significance of a “severability clause.” An unambiguous exclusion is not negated by a severability clause.

The primary case relied on by plaintiff, *Worcester Mut. Ins. Co. v. Marnell*, 398 Mass. 240, 496 N.E.2d 158 (1986), demonstrates the defect in plaintiff’s argument. The Marnells sought coverage under their homeowner’s policy for

wrongful death damages arising from negligent supervision of their underage son. The son, also an insured under the policy, left a party at the Marnell house in a drunken state and crashed his car, resulting in the death of a passenger. The policy excluded coverage for bodily injury arising out of the use of a motor vehicle owned or operated by *any* insured person. The court ruled that the severability clause mandated coverage for the Marnells's negligent supervision, despite the plain language of the exclusion precluding it. To reach this result the *Marnell* court acknowledged that it rendered the term "any" in the exclusionary clause meaningless. *Id.* at 245, 496 N.E.2d 158. Because this approach ignores and does violence to the plain language of the insurance contract, we decline to follow it. Although ambiguous language is to be construed against the insurer, we will not rewrite the contract when the language of the policy is unambiguous.

Id., 687 A.2d at 645 (citations omitted).

In *Chacon v. American Family Mutual Insurance Co.*, 788 P.2d 748 (Colo. 1990) (*en banc*), the Court found the reasoning of the majority of the courts persuasive and held that a severability clause does not defeat an intentional acts exclusion. *Id.* at 751-52. The Court noted:

The inclusion of a severability clause within the contract is not inconsistent with the creation of a blanket exclusion for intentional acts. Instead, the inquiry is whether the contract indicates that the parties intended such a result.

Id. at 752 n.6. See also 3 Allan D. Windt, *Insurance Claims and Disputes* § 11:8 (6th ed.).

This Court should find the reasoning of the majority of courts persuasive as well. *Wheeler* stressed that a severability clause's command to apply the insurance separately to each insured does not alter an exclusion's plain meaning or create ambiguity in its application. In other words, even if insurance is applied separately to Patricia Shoaf, Erie's exclusion for intentional acts of any insured is still part of the policy. As explained in *Postell* and *Villa*, the purpose of severability clauses is to spread protection, to the limits of coverage, among all of the insureds. The purpose is not to negate unambiguous exclusions. Moreover, *Wheeler* recognized that adopting the minority position would render the language in the exclusion meaningless, while adopting the majority position would not because the severability clause has meaning independent of the exclusion.

VII. CONCLUSION

For all of the foregoing reasons, this Court should answer the first certified question in the affirmative and hold that the unambiguous exclusion for bodily injury “expected or intended by ‘anyone we protect’” in Erie’s homeowner insurance policy precludes liability coverage to Patricia Shoaf for the claims in the underlying case brought by Respondents Mary A. Neese, individually and as administratrix of the Estate of Skylar Neese, and David Neese against Respondent Patricia Shoaf, who is Erie’s insured, because the murder of Skylar Neese was expected or intended by Rachel Shoaf, who is a co-insured. This Court should further answer the second certified question in the negative and hold that the unambiguous severability clause in Erie’s policy does not prevail over the unambiguous exclusion for bodily injury “expected or intended by ‘anyone we protect’” and require Erie to apply the exclusion as though Patricia Shoaf is the only insured under Erie’s policy, despite the intentional and criminal acts of co-insured Rachel Shoaf.

Respectfully submitted this 28th day of June 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June 2016, I caused the foregoing "***Brief of Petitioner Erie Insurance Property and Casualty Company***" to be served on counsel of record via U.S. Mail in a postage-paid envelope addressed as follows:

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