

13-0262

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

MAX SPECIALTY INSURANCE
COMPANY, a Virginia corporation,

Plaintiff,

v.

CIVIL ACTION NO.: 11-C-216
HON. DAVID M. PANCAKE

JOHN D. FLOWERS, DAVE FLOWERS,
INC. d.b.a. VENOM, INC., ROBERT
TURBEVILLE, DARIN DRANE, and
KAITLIN GRACE MARCUM,

Defendants.

and

JOHN D. FLOWERS, DAVE FLOWERS,
INC., d.b.a. VENOM, INC.,

Third-Party Plaintiffs,

v.

YOUNG INSURANCE COMPANY, a West
Virginia corporation, and JOHN P.
YOUNG,

Third-Party Defendants.

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CIRCUIT CLERK
CABELL CO., WV

ORDER GRANTING MOTION FOR DECLARATORY JUDGMENT

CAME BEFORE this Honorable Court on the 27th day of November, 2012, the named parties, Max Specialty Insurance Company by counsel Duane J. Ruggier II; Robert Turbeville by counsel Thomas A. Rist; Darin Drane by counsel Scott W. Andrews; John D. Flowers, Dave Flowers, Inc. d.b.a. Venom, Inc. by counsel Thomas H. Peyton; Kaitlin Marcum by counsel Dana F. Eddy; Highlawn Holding by counsel J. Todd Bergstrom; and Young Insurance Company, John P.

Young by counsel Albert C. Dunn Jr. for a hearing on Max Specialty Insurance Company's Motion for Summary Judgment. After review of written briefs filed by the parties, and after hearing oral argument relative to the same, for the reasons set forth below, this Honorable Court hereby GRANTS in part and DENIES in part Max Specialty Insurance Company's Motion for Summary Judgment.

FACTUAL BACKGROUND

Defendant John D. Flowers is or was the owner of Dave Flowers, Inc. d/b/a Venom, Inc. Venom, Inc., also known as Club Venom, a nightclub and/or bar located at 1123 4th Avenue in Huntington, West Virginia. According to the initial Complaint, the Defendants Turbeville, Drane, and Marcum were all patrons at the club on February 21, 2010. That night, an unidentified male allegedly brought a gun into Club Venom. The unidentified male opened fire, at which time Mr. Turbeville, Mr. Drane, and Ms. Marcum each suffered injuries resulting in hospitalization.

The Defendants Mr. Flowers and Dave Flowers, Inc. had a commercial lines common policy insurance policy for Club Venom through Plaintiff Max Specialty Insurance Company (hereinafter sometimes "Max Specialty"). The policy was a renewal policy with a policy number of MAX012700001936. The policy effective dates were August 21, 2009 through March 23, 2010. The policy limits were \$1 million per occurrence, a \$2 million aggregate limit, and a \$5,000 medical expense limit for any one person.

After receiving notice from Mr. Turbeville's attorney, Thomas A. Rist, that Mr. Turbeville would be filing a civil complaint against the owners of Venom, Max Specialty filed a Declaratory Judgment action. It asserts that it is entitled to judicial determination of the applicability of the provisions of the subject insurance policy pursuant to W.Va. Code 55, Article 13, et seq., of the

Uniform Declaratory Judgments Act.

Generally, Max Specialty asks the Court to enter declaratory judgment determining its rights, liabilities, obligations, and duties concerning insurance coverage. Specifically, Max Specialty seeks a declaration that the policy in question will only provide \$25,000.00 in insurance coverage and will provide no coverage for punitive damages with respect to all demands or future demands made by Mr. Turbeville, Mr. Drane, and Ms. Marcum against Mr. Flowers and Dave Flowers, Inc.

MAX SPECIALTY'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Max Specialty filed its Motion for Summary Judgment July 26, 2011. In its motion, it asks the Court to enter an Order finding as a matter of law that the Max Specialty Insurance Policy MAX012700001936 will only provide up to \$25,000 in insurance coverage and no coverage for punitive damages, and further that Max Specialty has no duty to indemnify, nor duty further to defend with respect thereto. Plaintiff argues that the terms, conditions, limitations, and exclusions in that policy collectively demonstrate (1) there's only \$25,000 available to pay out for any damages as a result of the above referenced incident; and (2) there is no duty and/or obligation to provide coverage for punitive damages resulting from the February 21, 2010 shooting at Club Venom.

**JOHN FLOWERS AND DAVE FLOWERS, INC.'S
MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT**

The Defendants John Flowers and Dave Flowers, Inc. d/b/a Venom, Inc. filed their memorandum brief in opposition to the Plaintiff's Motion for Summary Judgment, along with Defendant's Cross Motion for Summary Judgment on September 17, 2012. Although Defendants style their motion as including the Cross Motion for Summary Judgment, it appears that, in the end, the Defendants opt against filing a formal cross-motion as there was no formal evidence or argument

set forth in the brief which would support a finding that the Defendants are entitled to judgment as a matter of law.

Responding to Plaintiff's Motion for Summary Judgment, the Defendants argue (1) the assault or battery exclusion does not apply because Plaintiff has not met the burden of proving facts which would fall under the exclusion, and (2) even assuming that the assault or battery exclusion in the limited assault or battery coverage endorsements do apply, Plaintiff has a duty to defend beyond the \$25,000 limit of insurance. The Defendants ask the Court to (1) deny the Plaintiff's Motion for Summary Judgment; (2) enter an order declaring that there is coverage for the subject occurrence in the amount of \$1,000,000; (3) enter an order declaring that any coverage available to Flowers is not reduced by attorney fees and costs incurred in the defense of the underlying tort actions; and (4) enter an order declaring the Plaintiff has a duty to defend Defendants Flowers and Flowers, Inc. in the underlying tort action until such time as the tort actions are settled or policy limits paid to satisfy a judgment or judgments resulting from the aforementioned tort actions.

MAX SPECIALTY'S REPLY BRIEF

Plaintiff's Reply Brief was formally filed in the circuit clerk's office on October 17th, 2012. In its Reply, the Plaintiff argues (1) that there is no question of fact and the limited assault or battery coverage is applicable to this claim for gunshot injuries; (2) that the assault and battery exclusion plainly and unambiguously state that "supplementary payments" reduce the applicable policy limits; and (3) that the Court need not consider matters outside of the applicable policy language as the policy language clearly and unambiguously supports the position of the Plaintiff.

STANDARD FOR SUMMARY JUDGMENT

West Virginia Rule of Civil Procedure 56(a) provides, inter alia, that a party seeking to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor. See, W.Va. R. of Civ. Pro. 56(a); Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, 4th ed. (2012), at 1214. Summary Judgment is proper when the record demonstrates that there is no genuine issue as to any material fact and that the party moving is entitled to judgment as a matter of law. See, Short v. Appalachian OH-9, Inc., 203 W.Va. 246, 249, 507 S.E.2d 124, 127 (1998). The question to be decided on a motion for summary judgment is whether there is a genuine issue of material fact and not how that issue should be determined. See, Syl.Pt. 3, Tritchler v. West Virginia Newspaper Pub. Co., Inc., 156 W.Va. 335, 193 S.E.2d 146 (1972).

By its terms, the Rule 56 standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Cleckley at 1220. The mere contention that issues are disputable is not sufficient to deter a trial court from granting summary judgment. See, Brady v. Reiner, 157 W.Va. 10, 198 S.E.2d 812 (1973), overruled on other grounds by Board of Church Extension v. Eads, 159 W.Va. 943, 230 S.E.2d 911 (1976). However, a party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances. Daniel v. Stevens, 183 W.Va. 95, 394 S.E.2d 79 (1990); and Cleckley at 1220.

Furthermore, where such facts are established "summary judgment is not a remedy to be exercised at the court's option; it must be granted when there is no genuine disputed issue of material fact." Powderidge Unit Owners Association v. Highland Properties, Ltd., 196 W.Va. 692, 698, 474 S.E.2d 872, 878 (1996). The initial burden of showing that there is no genuine issue of material fact in dispute is, of course, on the moving party. It is thus incumbent upon the moving party to inform the court of the specific evidence which entitles the party to judgment as a matter of law. Once the movant makes a showing that no genuine issue of material fact is in dispute, the nonmovant must contradict that showing by pointing to specific facts demonstrating that there is, indeed, a trial worthy issue. Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995); and Cleckley at 1221.

Importantly, any doubt as to the existence of a genuine issue of material fact in dispute is resolved against the movant for such judgment. Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 (1995). Inferences to be drawn from the underlying affidavits, exhibits, and other evidence must be viewed in the light most favorable to the party opposing the motion. Id. Hence, summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case, but only as to the conclusions to be drawn therefrom. Bailey v. Kentucky Nat. Ins. Co., 201 W.Va. 220, 496 S.E.2d 170 (1997). Nevertheless, Justice Cleckley writing for the Court in Williams vs. Precision Coil, Inc., made it a point to stress that "while the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some concrete evidence from which a reasonable finder of fact could return a verdict in its favor or other significant probative evidence tending to support the complaint." Williams vs. Precision Coil, Inc., 194 W.Va. 52, 59-60, 459 S.E.2d 329, 336-337 (1995).

Finally, it is beyond dispute that "Rule 56 does not impose upon the circuit court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." Powderidge Unit Owners Association v. Highland Properties, Ltd., 196 W. Va. 700, 474 S.E.2d, 880 (1996). That duty, of course, rests with the party opposing summary judgment.

WEST VIRGINIA INSURANCE CONTRACTS

The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination. Syl. Pt. 2, Riffe v. Home Finders Associates, Inc., 205 W. Va. 216, 517 S.E.2d 313 (1999); Payne v. Weston, 195 W. Va. 502, 506-507, 466 S.E.2d 161, 165-166 (1995). Similarly "determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Murray v. State Farm Fire & Cas. Co., 203 W. Va. 477, 482, 509 S.E.2d 1, 6 (1998). With regard to a court's interpretation of an insurance contract's policy language, our Supreme Court of Appeals has held that, "in West Virginia, insurance policies are controlled by the rules of construction that are applicable to contracts generally. We recognize the well-settled principle of law that this Court will apply, and not interpret, the plain and ordinary meaning of an insurance contract in the absence of ambiguity or some other compelling reason. Our primary concern is to give effect to the plain meaning of the policy and, in doing so we construe all parts of the document together. We will not rewrite the terms of a policy; instead, we will enforce it as written." Payne v. Weston, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995).

It is well-settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured. See, Mylan Laboratories, Inc. v. Am. Motorists Ins. Co., 226 W. Va. 307, 309, 700 S.E.2d 518, 520 (2010). Insurance policy language is ambiguous when it is reasonably susceptible of two different meanings

or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning. *See*, Syl.Pt. 1, Prete v. Merchants Property Ins. Co. of Indiana, 159 W.Va. 508, 223 S.E.2d 441 (1976).

With respect to exclusions in insurance policies in West Virginia, "an insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation and of that exclusion." Syl.Pt. 7, National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987), overruled on other grounds by Potesta v. U.S. Fidelity & Guaranty Co.; 202 W.Va. 308, 504 S.E.2d 135 (1998); *See also*, Farmers and Mechanics Mut. Ins. v. Cook, 210 W.Va. 394, 399, 557 S.E.2d 801, 806 (2001). Further, "where the policy language involved is exclusionary, it will be strictly construed against the insured in order that the purpose of the providing indemnity not be defeated." Syl.Pt. 2, Erie Ins. Prop. & Cas. Co. v. Stage Show Pizza. JTS, Inc., 210 W.Va. 63, 65, 553 S.E.2d 257, 259 (2001). In addition, "an insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such fashion as to make obvious their relationship to the other policy terms, and must bring such provisions to the attention of the insured." Syl.Pt. 7, National Mut. Ins. Co. v. McMahon & Sons, Inc., *supra*.

LEGAL ANALYSIS

Prior to addressing the arguments of the parties, the Court notes that slightly differing versions of the amendments and exclusions to the insurance policy in question "Commercial Lines Common Policy No. MAX012700001936" have been submitted with the parties' pleadings. Specifically, the versions of the "Assault or Battery Exclusion" and the "Limited Assault or Battery Coverage" submitted by Plaintiff Max Specialty, the insurer, omit what appears to be control

numbers, MXG108 and MXG143, respectively, and dates following those numbers, April 2007 and February 2009, respectively. These ostensible control numbers and dates are, however, present on the bottom left corner of the versions of the "Assault or Battery Exclusion" and the "Limited Assault or Battery Coverage" submitted by Defendants. For the purposes of Plaintiff's Motion for Summary Judgment, the Court deems the Defendants', as the non-moving party, versions of the exclusions and amendments are to be controlling.

Limited Assault or Battery Coverage Endorsement

As to the applicable insurance policy's "Limited Assault or Battery Coverage Endorsement," Max Specialty argues that the Defendants' alleged injuries and damages are not covered under the applicable policy and, therefore, Plaintiff is under no obligation to insure the Defendants against such injuries and damages. The Court disagrees with the Plaintiff's blanket assertion. The plain language of the "Limited Assault or Battery Coverage Endorsement" explains that, in exchange for a \$300.00 premium paid by the insured, limited coverage would thereafter be applied to the policy. Indeed, the plain language specifically states that "the MXG108 - Assault or Battery Exclusion is inapplicable." Thus, the Plaintiff's assertion that "all coverage" is "precluded" is itself precluded by the plain language of the policy issued to the Defendants.

By the same token, coverage available to the Defendants is limited by the "Limited Assault or Battery Coverage Endorsement." Specifically, the endorsement states that, rather than the Assault or Battery Exclusion, the "limit of insurance shown in the above schedule applies." The limit of insurance shown is "\$25,000.00 per event" and "\$25,000.00 aggregate."

Finally, it is undisputed in this case that certain patrons inside of Club Venom were injured as a result of gunshot wounds fired by an unknown gunman during the incident in question. These patrons, of course, are the Defendants in the present declaratory judgment action. Importantly, the amendments and exclusions to the insurance policy at issue expressly state that the insurer, the Plaintiff "will pay sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or medical expense, arising out of an 'event' of assault, battery, or physical altercation that occurs in, on, near or away from an insured's premises." In addition definitions are provided by the policy. Battery is defined as "any use of force against a person without his or her consent that entails some injury, whether or not the actual injury inflicted is intended or expected. The use of force includes but is not limited to use of a weapon." Physical altercation is defined as "a dispute between individuals in which one or more persons sustained bodily injury arising out of the dispute." Finally, an event "may be comprised of one or more incidents of an assault or battery taking place in one 24 hour period."

The undisputed facts demonstrate that the patrons who are now involved in this case suffered bodily injuries and/or medical expenses arising out of an event of battery or physical altercation that occurred in the insured's premises. Therefore, the Limited Assault or Battery Coverage applies to the undisputed facts of the case. For these reasons, the Court finds that the insurance policy applies. Thus, coverage is not clearly excluded. Nevertheless, it is also clear that coverage for the alleged injuries and damages is limited to \$25,000.00.

Reduction of Limits by Supplementary Payments

Max Specialty also argues that any supplementary payment that it has made (or will make) reduce (or will) reduce the limits of the insurance policy at issue. The Court's review of the record indicates that the plain language of the policy does provide some support to the Plaintiff's broad assertion. The "Limited Assault or Battery Coverage Endorsement," for instance, expressly states that "any supplementary payments the insurer makes arising out of an event of assault and battery or physical altercation that occurs in, on, near or away from the insured's premises, will reduce the limits of insurance shown above." However, elsewhere, namely, on page 8 of the Commercial General Liability Coverage Form, the policy at issue provides as follows, and it's in heavy bold type:

SUPPLEMENTARY PAYMENTS-COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend:

a. All expenses we incur...

e. All court costs taxed against the insured in the suit. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured...

These payments will not reduce the limits of insurance.

Defendants Flowers argues that the above language controls as to the issue of supplementary payments and to the extent there's any ambiguity in this language, and/or this language when read in conjunction with the endorsements, it must be strictly construed against the insurer, the drafter of the policy. The Court disagrees. As stated above, the question of whether insurance policy language is ambiguous is a legal question for the Court. *See*, Syl. Pt. 2, Riffe v. Home Finders Associates, Inc., *supra*. Here, an objective reading of the policy and the policy's subsequent endorsement reveals that

it is quite evident and unambiguous that the "Limited Assault or Battery Coverage Endorsement" changes the policy and modifies the insurance provided under the Commercial General Liability Coverage Form. Hence, the "Supplementary Payments" language in the CGL Coverage form is modified and superseded by the endorsement, the language of which the Court finds to be unambiguous as a matter of law.

Punitive Damages

Plaintiff, beginning with its initial complaint in this declaratory judgment action and continuing with this latest motion before the Court, has argued that the insurance policy in question expressly excludes coverage for punitive damages. Were it clear that the policy did, in fact, exclude punitive damages, that would likely be the end of the matter. For the Supreme Court of Appeals has recognized, albeit in dicta, that "an insurance company may decline to insure against punitive damages by an express exclusion in its policy to that effect and to the extent that insurance company exercises this option it's protected against payment of punitive damages." Hensley v. Erie Ins. Co., 168 W.Va. 172, 184, 283 S.E.2d 227, 233 (1981).

Nevertheless, each time Plaintiff has made the argument the policy in question excludes punitive damages, it has referred to a certain "Exhibit 6," and I'll refer generally to Plaintiff's Complaint for Declaratory Judgment and Plaintiff's Motion for Summary Judgment. Plaintiff has at various times referred to this purported exhibit as "an Assault or Battery Exclusion," a "Punitive Damages Exclusion," and simply as "Exclusion - Liquor Liability." Plaintiff has also purported to quote from this exhibit, stating, for instance, it excludes coverage for punitive damages. Curiously, however, none of the Plaintiff's pleadings filed with this Court referencing this Exhibit 6 actually contain any document marked as Exhibit 6. Therefore, the Court cannot and will not declare that the

insurance policy at issue excludes punitive damages based on this missing exhibit. Subsequent to the hearing, the Plaintiff provided the Court it's Exhibit 6 and the Court withholds ruling on the Exhibit until such time as the Court has time to adequately review the Exhibit 6.

Plaintiff's Duty to Indemnify or Defend Defendants

The Plaintiff contends that because the Court should grant its Motion for Summary Judgment, finding, as a matter of law, that the policy at issue precludes any coverage for the incident in question, the Court should also enter a finding that the Plaintiff has no duty to indemnify and no further duty to defend the Defendants in any actions arising out of the incident. Of course, in light of the above, this argument is moot, as the Court has already ruled that the policy in question does not preclude all coverage for the incident. Alternatively, Plaintiff implicitly argues that to the extent it has a duty to indemnify or defend Defendants in this case, such duty is limited to providing "monies only up to \$25,000.00 in order to pay out for any and all alleged damages as a result of the February 2010 shooting at Club Venom in Huntington, West Virginia." The Court declines to grant the Plaintiff's Motion for Summary Judgment on its declaratory judgment action on this ground. Nevertheless, the Court finds that in the event that the \$25,000 limit is reduced to zero, whether through settlement and compromise, or through supplementary payments and defense costs, the Plaintiff no longer has a duty to indemnify and defend the insured relative to the underlying claims.

CONCLUSION

Plaintiff Max Specialty's Motion for Summary Judgment is GRANTED, in part, and DENIED, in part. Specifically, it is hereby ORDERED: (1) Plaintiff's Motion with respect to its claim that the policy limits applicable to the case are \$25,000.00 is GRANTED; (2) Plaintiff's Motion with respect to the claim that "supplementary payments" reduce the limits of insurance policy

is GRANTED; (3) Plaintiff's Motion with respect to its claim that the insurance policy excludes coverage for punitive damages is DENIED at this time pending review of Exhibit 6; and (4) Plaintiff's Motion with respect to its claim that it has no duty to indemnify or defend Defendants in the case is DENIED, however the Court HOLDS that Plaintiff's duty to defend ends once the \$25,000 is exhausted, whether through damages, settlement, or supplementary payments.

The exceptions and objections of Defendants are preserved and made part of the record.

Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, this Court FINDS that this Order granting Max Specialty Insurance Company summary judgment on its motion for declaratory judgment is FINAL and appealable, as the Court determines there is no just reason for delay and directs judgment in favor of Max Specialty Insurance Company as indicated herein.

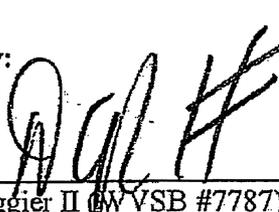
The Court further ORDERS that the Circuit Clerk of Cabell County shall provide an attested copy of this Order to all counsel of record.

ENTERED this 8th day of February, 2013.



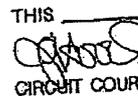
HONORABLE DAVID PANCAKE

Prepared by:

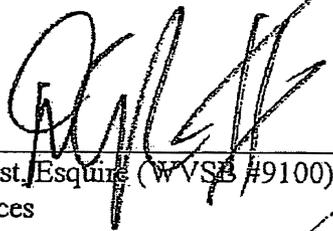


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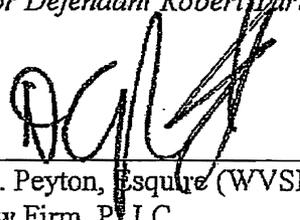
STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON 2/8/13
GIVEN UNDER MY HAND AND SEAL OF SAID COURT

THIS 2/8/13
 CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

Approved by:

 w/permission

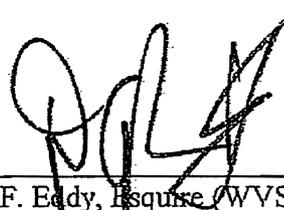
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