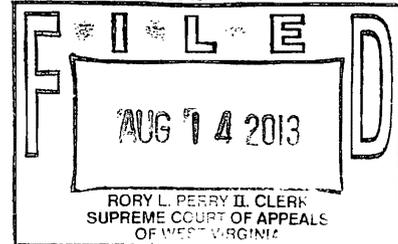


**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

No. 13-0262



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

Petitioner,

v.

**MAX SPECIALTY INSURANCE COMPANY, a  
Virginia corporation,**

Respondent.

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**REPLY BRIEF OF PETITIONER,  
JOHN D. FLOWERS, DAVE FLOWERS, INC.,  
D/B/A VENOM, INC.**

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Date: August 14, 2013

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DAVE FLOWERS, INC., D/B/A VENOM, INC.**

Now comes the Petitioner and hereby offers the following as his reply to the Brief of Respondent Max Specialty Insurance Company:

**I. ARGUMENT**

**A. Respondent's Summary of Argument misrepresents Petitioner's position.**

The Respondent makes certain assertions in its Brief which contain inaccuracies. First, on page 7 of its Brief, the Respondent devotes a paragraph which expressly and erroneously asserts that Petitioner "finds no error in the Circuit Court's holding that coverage for the subject claims is limited to \$25,000.00." Although the Petitioner did not appeal this portion of the Circuit Court's ruling, Petitioner did object to the Circuit Court's ruling on this point and filed a response brief with the Circuit Court. Simply because the Petitioner has limited his appeal to one issue does not mean that Petitioner finds no error in the Circuit Court's ruling on this point.

An alleged tort victim and the third-party defendant have filed appropriate appellate briefs regarding this issue. (Appeal No. 13-0317) There are various strategic reasons for Petitioner to file his appeal on the duty to defend issue only. To the extent the Circuit Court's ruling was based solely upon the facts of the occurrence as applied to the policy language, the alleged tort victim clearly has standing to appeal the Circuit Court's ruling on the amount of liability coverage available for his claim. To clarify, the Petitioner herein does find error in the Circuit Court's ruling on the amount of coverage available and expressly adopts the position of the alleged tort victim and the third-party defendant in their respective appellate briefs.

Further, to the extent Respondent asserts that Petitioner agrees that coverage is reduced by defense costs and attorney fees, its assertion is incorrect. Petitioner does not agree that the respondent may pay defense costs and attorney fees in the amount of \$25,000.00 then withdraw its defense of the Petitioner. If the facts establish assault or battery, coverage is \$25,000.00 and the duty to defend continues until \$25,000.00 is paid toward settlements or judgments.

**B. Coverage for the underlying claims is established by the General Liability Coverage Form.**

Respondent states that Petitioner's position is "inherently flawed in that it begins with an improper assertion that coverage for the underlying claims is established by the 'Commercial General Liability Coverage Part.'" (See page 9 of Respondent's Brief) Again, assuming for the purpose of argument that the Respondent proved the underlying facts establish an assault or battery, the claims are covered under the Commercial General Liability Coverage Part. Petitioner assumed the Respondent's position was that coverage applies because the underlying facts establish an occurrence under the General Liability Coverage Part; a separate exclusion then effectively removes all coverage for "Assault or Battery"; and the "Limited Assault or

Battery Coverage” endorsement then provides limited coverage for an “Assault or Battery” pursuant to the terms of the Commercial General Liability Coverage Form.

The “Limited Assault or Battery Coverage” endorsement expressly states that the Respondent will pay “under the Commercial General Liability Coverage Part” for “assault, battery or physical altercation” the limit shown in the endorsement’s schedule. Clearly, the Limited Assault or Battery Coverage endorsement is not a stand alone policy. It must be read in conjunction with the Commercial General Liability Coverage Form in order for it to make any sense whatsoever. The Endorsement does not expressly state that it overrides the provisions of the General Liability Coverage Part or the Supplementary Payments section of the general liability policy. In fact, the Endorsement does the opposite by directing the insured to these portions of the policy for the purpose of determining coverage.

Despite directing the insured back to the general liability portions of the policy, the Respondent now asks this Court to ignore pertinent provisions of that same policy. The Endorsement is just that, an endorsement, not a stand alone insurance policy as asserted by the Respondent. For example, the Endorsement states the Respondent will “pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury[.]’” However, the only definition of “bodily injury” is contained within the 16 page Commercial General Liability Coverage Form and not within the Endorsement. If the Endorsement expressly, clearly, and unambiguously overrides the entire general liability insurance policy, then it would not refer back to the General Liability Coverage Form or rely on terms which are only defined within the General Liability Coverage Form.

If the Endorsement was read as a stand alone policy, then the Respondent may not have any duty to defend because the Endorsement does not address the Respondent’s duty in this

regard. The Endorsement obligates the insurer to pay “damages” because of bodily injury or “medical expenses”, but there is no mandatory language within the Endorsement requiring the Respondent to defend the insured. The Respondent cannot simply ignore pertinent provisions of the General Liability Coverage Form for the convenience of its current position. The Respondent clearly chose indirect and unclear language for the Endorsement.

If the insurer wanted to clearly restrict its duty to defend, the Endorsement could have said:

The statement in the Supplementary Payments section that payments will not reduce the limits of insurance is now overridden by this endorsement. The insurer’s right and duty to defend ends when the insurer has used up the applicable limit of insurance shown above for payment of judgments, settlements or cost of defense, including attorney fees.

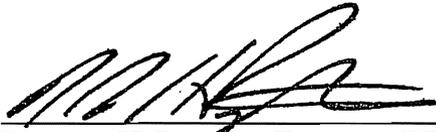
*See Nat’l Union v. Lake Acad.*, 548 F.3d 8 (1<sup>st</sup> Cir. 2008) (discussing similar policy language.)

The Respondent decided to use unclear and indirect language at its own peril.

## II. CONCLUSION

While the Respondent argues the Endorsement clearly and unambiguously addresses its duty to defend, a plain reading of the Endorsement demonstrates that it does not expressly or directly reference the duty to defend. The insured is left to cross reference the Endorsement with the Commercial General Liability Policy Form which more clearly addresses the insurer’s limit on its duty to defend. The Respondent, not the insured, should bear the risk of unclear and indirect policy language regarding the duty to defend.

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**CERTIFICATE OF SERVICE**

I, Thomas H. Peyton, counsel for the Petitioner, do hereby certify that on the 14<sup>th</sup> day of August, 2013, I served a true and accurate copy of the foregoing **“REPLY BRIEF OF PETITIONER, JOHN D. FLOWERS, DAVE FLOWERS, INC., D/B/A VENOM, INC.”** upon all parties of record by mailing the same to each of them by first class United States Mail, postage prepaid, properly addressed as follows:

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