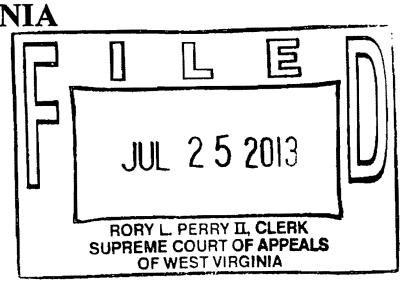
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



NO. 13-0262

John D. Flowers, Inc.,
D/B/A Venom, Inc.,
Petitioner

v.

Max Specialty Insurance Company,
a Virginia corporation,
Respondent

BRIEF OF RESPONDENT MAX SPECIALTY INSURANCE COMPANY

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III. STATEMENT OF THE CASE

Respondent, Max Specialty is an insurance company duly authorized to write insurance coverage in the State of West Virginia. Max Specialty is in the business of providing commercial lines of insurance. On or about August 21, 2009, Max Specialty renewed a commercial lines common policy for the Petitioners, John D. Flowers and Dave Flowers, Inc., d.b.a. Venom, Inc. John D. Flowers is the owner of Venom, Inc., which operated as a nightclub/bar located at 1123 4th Avenue in Huntington, West Virginia.

On or about the night of February 21, 2010, an altercation occurred between patrons of the aforementioned "Venom" night club. During the altercation, an unidentified man allegedly grabbed a gun from his waist and fired inside the "Venom" night club. The altercation and subsequent shooting resulted in three Venom patrons receiving gunshot wounds.

The applicable Max Specialty insurance policy for Venom, Inc., Policy Number MAX012700001936, was a renewal policy effective from 08/21/2009 through 03/23/2010. The policy limits were a $1 million per occurrence limit, a $2 million aggregate limit, and a $5,000.00 medical expense limit for any one person. The applicable policy includes an exclusion for claims arising from "Assault or Battery." However, it also includes an endorsement for "Limited Assault or Battery Coverage." The "Limited Assault or Battery Coverage" endorsement provides coverage up to limits of $25,000.00. The endorsement also states that any supplementary payments made as a result of a claim sounding in assault, battery, and/or physical altercation reduces the $25,000.00 coverage limits.

On or about May 5, 2011, Max Specialty filed its *Amended Complaint for Declaratory Judgment* against John D. Flowers, Dave Flowers, Inc., d.b.a. VENOM, Inc., Robert Daniel Turbeville, Darin Idris Drane, and Kaitlin Grace Marcum. (Appendix, 1-25). In its declaratory judgment action, Max Specialty asserted that it is entitled to a judicial determination, pursuant to Chapter 55, Article 13, *et. seq.* of the West Virginia Code, and respectfully requested that the Circuit Court enter a declaratory judgment determining the applicability of the provisions of the subject insurance policy, determining specifically Max Specialty Insurance Company's rights, liabilities, obligations, and duties concerning insurance coverage. Specifically, Max Specialty sought a declaration that the subject insurance policy provides only up to Twenty-Five Thousand Dollars and No Cents ($25,000.00) in insurance coverage and no coverage for punitive damages, pursuant to the policy's "Limited Assault or Battery" endorsement.

Respondent, Max Specialty filed its Motion for Summary Judgment on July 26, 2011. Responses and replies were filed with the Circuit Court. On February 8, 2013, the Circuit Court entered its Order, holding that the applicable policy of insurance clearly limited coverage under the given facts to $25,000.00. (Appendix, 345). The Circuit Court also held that supplementary payments made by Max Specialty reduce the limits of remaining coverage pursuant to the unambiguous language of the "Limited Assault or Battery Endorsement." Further, the Circuit Court held that Max Specialty's duty to defend VENOM, Inc. ended once the $25,000.00 limits of insurance coverage were exhausted whether through litigation, or settlement of the claims.

Darin I. Drane filed a Notice of Appeal as to the Circuit Court's holding that insurance coverage for the claims is limited by the subject policy language to $25,000.00. Drane's appeal brief was filed on or about June 7, 2013, and is pending on the appeal docket of this Honorable Court as

Appeal No. 13-0317. Max Specialty has previously filed its Response Brief in Appeal No. 13-0317, asking this Honorable Court to uphold the Circuit Court's ruling pursuant to West Virginia law, and the plain language of the subject insurance policy.

John D. Flowers, and Dave Flowers, Inc. D/B/A VENOM, Inc. (hereinafter sometimes referred to as "Venom") noticed the present appeal concerning only the issue of Max Specialty's duty to defend the underlying claims in light of the Circuit Court's ruling as to the applicable policy limits. Venom filed its Petition in the present appeal, Appeal No. 13-0262, on or about June 10, 2013. Venom's Petition addresses only a very narrow portion of the Circuit Court's order concerning the declaratory judgment action. Max Specialty now files its brief in response to the Venom Petition, and respectfully requests this Honorable Court to uphold the findings of the Circuit Court based upon West Virginia law and the plain language of the subject insurance policy.

IV. SUMMARY OF ARGUMENT

The issue currently before this Honorable Court is a very narrow one. Venom concedes that the underlying event is defined as an event of assault, battery, and/or physical altercation, pursuant to the applicable insurance policy. Venom finds no error in the Circuit Court's holding that coverage for the subject claims is limited to $25,000.00. Moreover, Venom finds no error in the Circuit Court's holding that the $25,000.00 coverage is reduced by supplementary payments made by Max Specialty relative to the litigation of the subject claims, including costs and attorney fees. Venom appeals only the Circuit Court's ruling that Max Specialty's duty to defend Venom is terminated once the $25,000.00 policy limit is exhausted.

The Circuit Court did not err in holding that the subject policy's limits are reduced by supplementary payments, including payment of attorney fees and costs, and that Max Specialty's duty to defend Venom is terminated once those limits are exhausted. The Circuit Court's decision is based upon a simple review of the applicable policy endorsement and well settled West Virginia law relative to the interpretation of contracts for insurance.

V. STATEMENT REGARDING ORAL ARGUMENT

Respondent does not believe that oral argument is necessary to decide the case and therefore waives oral argument.

VI. ARGUMENT

A. Standard of Review

The West Virginia Supreme Court "reviews a circuit court's entry of a declaratory judgment *de novo*, since the principal purpose of a declaratory judgment action is to resolve legal questions." Farmers & Mechs. Mut. Ins. Co. v. Cook, 557 S.E.2d 801, 805 (W.Va. 2001), citing Cox v. Amick, 466 S.E.2d 459 (W.Va. 1995).

"Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Farmers & Mechs. Mut. Ins. Co. v. Cook, 557 S.E.2d at 806, quoting Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1, 6 (W.Va. 1998). Therefore, "the interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed *de novo* on appeal." Farmers & Mechs. Mut. Ins. Co. v. Cook, 557 S.E.2d at 806, quoting Syl. Pt. 2, Riffe v. Home Finders Associates, Inc., 517 S.E.2d 313 (W.Va. 1999).

B. Coverage for the Underlying Claims is not Established by the "Commercial General Liability Coverage Part." The Only Coverage Available to Venom is Established by the "Limited Assault or Battery Coverage" Endorsement.

Venom's Petition 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*, "Petitioner's Brief in Support of Appeal," pg. 8. Coverage for the underlying claims is not established by the "Commercial General Liability Coverage Part." In fact, coverage for claims arising from assault, battery, and/or physical altercation are expressly excluded from coverage. The policy in question contains the following policy exclusion for Assault or Battery:

> **ASSAULT OR BATTERY EXCLUSION**
>
> **THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY**
>
> This endorsement modifies the insurance provided under the following:
>
> **COMMERCIAL GENERAL LIABILITY COVERAGE PART**
>
> **COMMERCIAL UMBRELLA LIABILITY COVERAGE PART**
>
> **In consideration of the premium charged, it is understood and agreed that this insurance does not apply to liability for damages because of "bodily injury", "property damage", "personal and advertising injury", "medical expense", arising out of an "assault", "battery", or "physical altercation" that occurs in, or, near, or away from an insured's premises**:
>
> 1. Whether or not caused by, at the instigation of, or with the direct or indirect involvement of an Insured, an Insured's employees, patrons or other persons in, on, near, or away from Insured's premises, or
>
> 2. Whether or not caused by or arising out of an insured's failure to properly supervise or keep an Insured's premises in safe condition, or

3. Whether or not caused by or arising out of any insured's act or omission in connection with prevention, suppression, failure to warn of the "assault", "battery", or "physical altercation", including but not limited to, negligent hiring, training and/or supervision.

4. Whether or not caused by or arising out of negligent, reckless, or wanton conduct by an insured, an insured's employees, patrons or other persons.

DEFINITION:

For purposed of this endorsement:

"Assault" means any attempt or threat to inflict injury to another including any conduct that would reasonably place another in apprehension of such injury.

"Battery" means the intentional or reckless physical contact with or any use of force against a person without his or her consent that entails some injury or offensive touching whether or not the actual injury inflicted is intended or expected. The use of force includes but is not limited to the use of a weapon.

"Physical altercation" means a dispute between individuals in which one or more person sustains bodily injury arising out of the dispute.

All other terms, conditions, definitions and exclusions apply.

The "Assault or Battery Exclusion" plainly states, in all capital, bold-face letters, that the Exclusion changes the "Commercial General Liability Coverage Part." It goes on to wholly exclude coverage for claims arising from assault, battery, and/or physical altercation. Thus, any liability arising from "assault, battery, or physical altercation" is expressly excluded from coverage pursuant to the clear and unambiguous language of the subject policy's "Assault or Battery Exclusion."

Therefore, there typically would be no coverage at all for the underlying gun-shot wound injuries pursuant to the plain language of the "Assault or Battery Exclusion." However, in this case, Venom, the insured, paid an extra $300.00 premium in exchange for "Limited Assault or Battery Coverage." It is only under the "Limited Assault or Battery Coverage" Endorsement that any coverage for the underlying claims is established. Analysis of the coverage available to Venom must be primarily focused on analysis of the "Limited Assault or Battery Coverage" Endorsement, as that is the mechanism through which any coverage is available.

C. The Plain and Unambiguous Language of the Subject "Limited Assault or Battery Coverage" Endorsement Expressly States that Supplementary Payments Made by Max Specialty Reduce the Applicable Policy Limit and that the Applicable Policy Limit is the Most Max Specialty will Pay for both Damages and Supplementary Payments.

The plain and unambiguous language of the "Limited Assault or Battery Coverage" Endorsement expressly states that the $25,000.00 limit in coverage is reduced by supplementary payments, and that the $25,000.00 limit is <u>the most</u> that Max Specialty will pay on a claim for both damages and Supplementary Payments. The Endorsement reads, in pertinent part (with **emphasis** added):

> **LIMITS OF INSURANCE**
>
> **The most we pay** under the COMMERCIAL GENERAL LIABILITY COVERAGE PART, the COMMERCIAL PROFESSIONAL LIABILITY COVERAGE PART, and the LIQUOR LIABILITY COVERAGE PART for damages **and for SUPPLEMENTARY PAYMENTS** for any "assault", "battery", or "physical altercation" is the "per event" limit shown in the Schedule above.
>
> **The amount shown under the Schedule above as the aggregate is the most we will pay for damages and for**

> **SUPPLEMENTARY PAYMENTS** under the COMMERCIAL GENERAL LIABILITY COVERAGE PART, the COMMERCIAL PROFESSIONAL LIABILITY COVERAGE PART, and the LIQUOR LIABILITY COVERAGE PART under paragraph 1 in any one policy period **irrespective of the number of claimants or injuries.**
>
> The Limits of Insurance above shall not be in addition to any other Limits in the policy.
>
> **Any supplementary payments** we make arising out of an "event" of "assault and battery" or "physical altercation" that occurs in, near or away from an insured's premises, **will reduce the Limits of Insurance shown above.**
>
> No other obligation or liability to pay sums or performs [sic] acts or services is covered.

The above cited language from the applicable "Limited Assault or Battery Coverage" Endorsement plainly and unambiguously states that supplementary payments reduce the limits of insurance. Moreover, the cited Endorsement language plainly and unambiguously states that the most Max Specialty will pay under the insurance policy, for both damages and for supplementary payments, is the $25,000.00 limit set forth in the Endorsement. The applicable policy language is clear that: (1) the coverage available to Venom relative to claims of injury as a result of assault, battery, or physical altercation is limited to $25,000.00; (2) Supplementary Payments made by Max Specialty reduce the $25,000.00 limit; and (3) the $25,000.00 limit is <u>the most</u> that Max Specialty will pay, whether for damages or as Supplementary Payments irrespective of the number of claimants involved. If Max Specialty is required to continue the defense of Venom once the $25,000.00 limit is reached, then Max Specialty will be forced to pay <u>more</u> than the $25,000.00 in order to continue to pay the attorney fees requisite in the provision of Venom's defense. Any payment made by Max Specialty above the $25,000.00 limit contradicts the express language of the insurance contract

stating that $25,000.00 is the most Max Specialty will pay. Therefore, the applicable Endorsement is clear that Max Specialty's duty to defend Venom in this matter ends when the $25,000.00 policy limit is exhausted.

D. Supplementary Payments are Plainly and Unambiguously Defined by the Subject Insurance Policy.

The only other section of the policy necessary for analysis of the issues before the Court is the section of the Policy defining the term "Supplementary Payments." It is true that a definition for the term "Supplementary Payments" is not set forth in the applicable "Limited Assault or Battery Coverage" Endorsement. However, that term is defined elsewhere in the policy, and the simple act of seeking out the definition of a term should not, in and of itself, thrust an insurance policy into the realm of being unclear or ambiguous. "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Blake v. State Farm Mut. Auto. Ins. Co., 685 S.E.2d 895, 901 (W.Va. 2009), quoting Syl. Pt. 1, Berkeley County Pub. Serv. Dist. v. Vitro Corp. of America, 162 S.E.2d 189 (W.Va. 1968); Syl. Pt. 4, Pilling v. Nationwide Mut. Fire Ins. Co., 500 S.E.2d 870 (W.Va. 1997).

The insurance policy is certainly not contradictory as to the definition of the term. The pertinent portion of the only definition of "Supplementary Payments" states:

> **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...
>
> d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit,"

> including actual loss of earnings up to $250 a day because of time off from work.
>
> 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....

The first "Supplementary Payment" listed by the policy is "[a]ll expenses we incur." Therefore, all expenses incurred by Max Specialty with respect to any suit against its insured are considered "Supplementary Payments" pursuant to the plain and unambiguous language of the applicable policy of insurance.

Importantly, the policy does not qualify its delineation of "Supplementary Payments." It does not state that some of the expenses incurred by Max Specialty in litigation are "Supplementary Payments." Instead, the policy language clearly states that "**All** expenses we incur" are "Supplementary Payments" for the purpose of the insurance policy (**emphasis supplied**). There is no doubt that the fees of an attorney hired to defend an insured from covered claims is an expense incurred by Max Specialty, and is therefore considered a "Supplementary Payment" pursuant to the unambiguous policy language.

Because all expenses incurred by Max Specialty, including Attorney Fees, are considered Supplementary Payments, Venom's $25,000 coverage limit in this case is reduced by the amount paid by Max Specialty to Venom's attorney for defense from the underlying claims, as well as all other expenses incurred by Max Specialty. Additionally, because the total amount payable by Max Specialty for damages or Supplementary Payments arising from claims for assault, battery, or physical altercation is the $25,000.00 limit, Max Specialty's obligation to pay for a defense for Venom necessarily ends once the $25,000.00 limit is reached.

E. West Virginia Common Law Supports the Circuit Court's Interpretation of the Subject Contract for Insurance. The Limitation on Max Specialty's Duty to Defend is Set Forth in Clear, Direct, and Unambiguous Language.

Venom's Petition asserts that the language of the subject policy provisions is unclear. However, as previously set forth in this Brief, a simple analysis of the plain language of the "Assault or Battery Limited Coverage" Endorsement, along with the definition of the term "Supplementary Payments," demonstrates, clearly and unambiguously, that Venom is entitled only to $25,000.00 of coverage for the underlying claims, inclusive of all costs of defense.

In support of its claim that the duty to defend extends beyond the $25,000.00 limit, Venom cites to Liberty Insurance Underwriters, Inc. v. Camden Clark Memorial Hosp. Corp, 2009 U.S. Dist. LEXIS 114278 (S.D.W.Va. 12-8-2009), an unpublished decision of the United States District Court for the Southern District of West Virginia, Parkersburg Division. Venom's reliance on non-authoritative dicta from an unpublished federal memorandum opinion is unpersuasive. Regardless, the Liberty v. Camden case is clearly distinct from the matters at hand.

The policy at issue in the Liberty v. Camden case was a general policy of insurance, under which no Exclusion, or Limited Coverage Endorsement was triggered. Here, the analysis of the contract language necessarily relies upon analysis of separately bargained-for and agreed upon contract for insurance, namely the "Limited Assault or Battery Coverage" Endorsement. The subject Endorsement states clearly and unambiguously that it changes the provisions of the general policy of insurance. The Endorsement goes on to expressly change the insurance policy to provide a maximum of $25,000.00 in coverage for claims arising from assault, battery, and/or physical altercation. Moreover, the Endorsement expressly changes the insurance policy to provide the

maximum $25,000.00 coverage to be utilized as one finite sum for payment of damages, and defense expense. The Endorsement clearly and unambiguously states that the most Max Specialty will pay on a claim arising from assault, battery, and or physical altercation is the $25,000.00, regardless if that is paid toward settlement, damages, judgment, or expenses incurred by Max Specialty including, but not limited to, cost of defense.

The subject Endorsement provides extra coverage to Venom that would otherwise be unavailable under the General Liability Policy pursuant to the "Assault or Battery Exclusion." This is an important distinction. Venom and Max Specialty entered into a separate agreement for the provision of coverage for claims arising from assault, battery, and/or physical altercation. A separate consideration of a $300.00 premium was paid by Venom for this additional coverage. The only reason any coverage is available to Venom at all is due to this separate and additional contract of insurance. The plain and unambiguous language agreed upon by the parties for the additional insurance endorsement should be enforced according to the bargained-for, express agreement between the parties. "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. Pt. 9, Benson v. AJR, Inc., 698 S.E.2d 638 (W.Va. 2010), quoting Syl. Pt. 1, Cotiga Development Co. v. United Fuel Gas Co., 128 S.E.2d 626 (W.Va. 1962), citing Syl. Pt. 1, Bennett v. Dove, 277 S.E.2d 617 (W.Va. 1981); Syl. Pt. 6, Dan's Carworld, LLC v. Serian, 677 S.E.2d 914 (W.Va. 2009).

Venom goes on to provide examples of language that are not included in the subject policy of insurance. Not only is this exercise unhelpful to the analysis at hand, it is improper as this Honorable Court need not look beyond the four corners of the insurance contract to find clear and unambiguous

language limiting Max Specialty's duty to defend. Simply put, the terms of the limited coverage offered to Venom are set forth clearly and directly by the "Limited Assault and Battery Coverage" Endorsement. The Endorsement should be analyzed based upon the express and plain language found therein, and not by language included in other, non-related policies of insurance. "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... we construe all parts of the document together. We will not rewrite the terms of the policy; instead, we enforce it as written." Payne v. Weston, 466 S.E.2d 161, 166 (W.Va. 1995).

"Language in an insurance policy should be given its plain, ordinary meaning." Mylan Laboratories Inc. v. American Motorists Ins. Co., 700 S.E.2d 518, 524 -525 (W.Va. 2010), citing Syl. Pt. 1, Soliva v. Shand, Morahan & Co., Inc., 345 S.E.2d 33 (W.Va. 1986), *overruled, in part, on other grounds by* National Mut. Ins. Co. v. McMahon & Sons, 356 S.E.2d 488 (W.Va. 1987). "Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Keffer v. Prudential Ins. Co., 172 S.E.2d 714, 715 (W.Va. 1970).

VII. CONCLUSION

In conclusion, the issues set forth in Venom's appeal brief are quite narrow in nature. Venom only seeks the review of this Honorable Court as to the contractual termination of Max Specialty's duty to defend Venom, once the applicable $25,000.00 limit is reached. The termination of that duty is set forth in plain and unambiguous language in the applicable "Assault or Battery Limited Coverage" Endorsement. The Circuit Court did not commit any error in its application of the plain

and unambiguous policy language to the facts at hand. Pursuant to the clear contract language, the limit of coverage available to Venom is $25,000.00. Also pursuant to the clear contract language, that limit is reduced by payment for damages, and by Supplementary Payments, including attorney fees and cost of defense. The contract clearly and unambiguously expresses that the $25,000.00 limit is the most Max Specialty will pay for claims arising from assault, battery, and/or physical altercation, regardless if it is paid as damages, or as Supplementary Payments.

WHEREFORE, for all of the foregoing reasons, Respondent, by counsel, hereby respectfully requests that this Honorable Court AFFIRM the Order of the Circuit Court of Cabell County West Virginia, Entered on February 8, 2013, and hold that insurance coverage in this matter is limited to $25,000.00, and that the $25,000.00 limit is the most Max Specialty is obligated to pay in connection with the claim, whether as damages, settlement, attorney fees, or costs. The Respondent further requests other relief as deemed just and proper by this Honorable Court.

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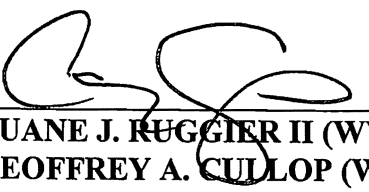
By Counsel,



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v.

Max Specialty Insurance Company,
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Respondent

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, Max Specialty Insurance Company, does hereby certify that a true copy of the foregoing ***"Brief of Respondent Max Specialty Insurance Company"*** was served upon counsel of record via facsimile and by placing the same in an envelope, properly addressed with postage fully paid and depositing the same in the U.S. Mail, on this the **25th day of July, 2013**.

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