

I. TABLE OF CONTENTS

| | |
|----------------------------|----|
| Table of Authorities..... | 3 |
| Assignments of Error..... | 4 |
| Statement of the Case..... | 4 |
| Summary of Argument..... | 6 |
| Argument..... | 7 |
| Conclusion..... | 14 |

II. TABLE OF AUTHORITIES

Case law

| | |
|---|----|
| <u>Mt Vernon Fire Insurance Company v. Dobbs</u> , 873 F.Supp.2d. 762, (Dis. Ct. W.Va. 2012) | 9 |
| <u>Sphere Drake. P.L.C. v. 101 Variety, Inc.</u> , 35 F.Supp.2d 421, (Dis. Ct. Pa. 1999) | 12 |
| <u>Gawrieh v. Scottsdale Insurance Co.</u> , 83 Ark. App. 59, 117 S.W.3d 634 (2003)..... | 13 |
| <u>Liquor Liability Joint Underwriting Association of Massachusetts v. hermitage Insurance Company</u> , 419 Mass. 316, 644 N.E.2d 964 (1995) | 13 |

III. ASSIGNMENTS OF ERROR

1. **The Circuit Court committed clear error when it granted Max Specialty's motion for summary judgment on its declaratory judgment action and held that the civil complaints filed by Plaintiffs Drane, Marcum and Turbeville did not present causes of action that should be covered by Max Specialty's Commercial General Liability insurance policy purchased by and issued to Defendant Flowers on the basis that the factual allegations alleged only give rise to coverage under a Limited Assault and Battery Endorsement to the CGL policy.**

IV. STATEMENT OF THE CASE

This case arises out of three shootings that occurred on or about February 21, 2010, at a bar in Huntington called Venom, owned and operated at the time, by Defendant John Flowers. Upon opening the bar, and in effect at the time of the shooting, Flowers had purchased a Commercial General Liability (CGL) policy of insurance with a policy limit of \$1,000,000.00 through max Specialties. This CGL policy had an exclusion for Assault and Battery. However, Flowers further purchased with this policy, an additional endorsement for coverage for Assault and Battery with limits of \$25,000.00. There is no dispute that this policy was in full force and effect at the time of the incidents which give rise to the current lawsuits.

On February 21, 2010, Plaintiffs Kaitlin Marcum, Darin Drane and Robert Turbeville were patrons of Venom, although not together. The limited evidence developed through discovery in this underlying case is that, late in this evening, an unidentified male approached Plaintiff Drane and made some comment about being present in the bar.¹ After Plaintiff Drane walked away from this unknown male, three shots were fired and the three Plaintiffs were hit at various, different locations within the bar. The shooter

¹ No depositions of the Plaintiffs have been taken in the case, the limited evidence of record related to what happened on this night have come from affidavits of the three Plaintiffs.

was never identified, apprehended, charged or otherwise. None of the Plaintiffs knew the shooter; no one knows why or how the shots were fired or who were the intended targets, or even of the shooting was intentional or accidental. There is no evidence in the record in this underlying case that establishes a factual basis for determining how or why the shots were fired by this unidentified male; there is no evidence one way or the other from which it can be concluded that the shots were fired intentionally or accidentally; or, if the shots were fired intentionally, who were the expected target(s).

After the incident, Flowers placed its insurer Max Specialties (Max) on notice of the claims. Max issued a reservation of rights to Flowers; assigned defense counsel to represent Flowers and the Bar, and then filed a Declaratory Judgment Action before the lower Court requesting a ruling as to its rights and obligations to its insured under the CGL policy of insurance. Max filed a Motion for Summary Judgment on the Declaratory Judgment Action and the lower Court, by Order dated February 8, 2013, granted the MSJ by finding, in pertinent part, as follows: 1) That the applicable language of the CGL policy was clear and unambiguous; 2) That the factual allegations in the Complaints give rise to a finding that the incident on February 21, 2010, amounted to a battery on Marcum, Drane and Turbeville; 3) That the CGL policy had a clear and unambiguous exclusion for claims for assault and/or battery; and therefore, 4) The limited Assault and Battery Endorsement purchased with the policy was applicable to the civil claims presented by the three Plaintiffs and that the limits of that endorsement, \$25,000.00, was also an eroding limit after defense costs, fees and expenses or any settlement of claims are deducted.

This appeal has been filed by Drane challenging the appropriateness of the lower Court's ruling that the \$1,000,000.00 limits of the CGL policy is not applicable to the allegations in the three Complaints; and, the Limited Assault and Battery Endorsement is applicable to the claims. Further, Defendant Flowers has also filed an appeal of the lower Court's Order, Docket Number 13-0262, contending that the lower Court was incorrect when it determined that the Max's duty to defend its insured terminates after the eroding \$25,000.00 limits are expended.

V. SUMMARY OF ARGUMENT

The trial Court committed a clear and substantial error when it determined that the allegations and causes of action contained within the three Complaints of Marcum, Drane and Turbeville, give rise to the application of the \$25,000.00 policy limits of the Limited Endorsement for Assault and Battery to the CGL policy and not the general indemnity provisions of the CGL policy providing \$1,000,000.00 million dollars in coverage for an "occurrence" that resulted in an allegation of "bodily injury" to the Plaintiffs.

The crux of the lower Court's erroneous decision was a finding that the shooting of Plaintiffs by the unidentified male was the result of an intentional act of battery upon the Plaintiffs. Therefore, the exclusion for Battery under the CGL and the limited coverage of the Endorsement for Battery was applicable to the claims presented in this case, even though there is absolutely no factual basis in the record of this case as to who committed the shootings; why the shots were fired; how the shots were fired; who were the targets of the shots; etc. Simply stated, there is no factual basis on the record to permit this Court, a jury or anyone else to conclude whether the discharge of the gun was intentional or

accidental. This unknown fact as to how and why the shots were fired is and will likely be an unanswered question of fact. At a minimum, therefore, the lower Court's determination that the discharge of the gun was intentional; thereby giving rise to a finding of battery; and as a result, triggering the Assault and Battery limited endorsement, was clearly wrong as there is at least a material issue of fact that precludes the granting of Max's summary judgment. Second, Plaintiff's Complaint sets forth claims for negligence against Flowers and not claims for battery, therefore, the causes of action bring forth claims that would fall within the definition of an occurrence under the CGL policy and not battery under the exclusion or endorsement. In the alternative, the language of the endorsement when read together with the CGL policy is ambiguous as to coverage for these claims pled and, as a result, the policy provisions should be construed liberally, in favor of coverage for the insured.

VI. ARGUMENT

- A. There is no evidence of record to support a factual finding that the shooting in this case was intentional. Therefore, the lower Court improperly determined that the Battery Endorsement of Max's CGL policy was applicable.**

In the lower Court's Order granting Max's MSJ, under the Factual Background section, the Court stated in the first paragraph that an unidentified male allegedly brought a gun into Club Venom and opened fire, at which time Plaintiffs each suffered injuries. On page ten, second paragraph of the Order, the Court further stated that the undisputed facts demonstrate that the patrons who are now involved in this case suffered bodily injuries arising out of an event of battery or physical altercation. On this basis alone, the Court concluded that the shooting was a battery; therefore, because there was an Assault and Battery Exclusion to the policy but also a limited Assault and Battery endorsement

added, the Court determined that this endorsement was applicable to the Plaintiffs' claims against Flowers. The Court did not cite to any evidence developed in discovery in the case to support this factual finding; and, also did not address the allegations or causes of action in the Complaints to determine what provisions of the CGL policy would be triggered by the legal claims. The Court simply assumed that the basic facts undisputed in the case, that there was a discharge of a gun in a bar, resulting in three people being shot, amounted to a battery; and therefore, that the CGL policy of Max contained a limited endorsement providing coverage for battery. The Court did not consider the negligence claims in the Complaints and what provisions of the policy those claims would trigger. The Court did not perform any analysis of the existence of an occurrence under the policy causing bodily injury in compared to coverage for the intentional act of battery.

It is clear that in interpreting the CGL policy, said policy excludes coverage for assaults, battery and/or physical altercation as those terms are defined; however, the separate endorsement then provides coverage for that conduct. The Endorsement completely renders the exclusion irrelevant, other than the fact that the endorsement limits the coverage to \$25,000.00 instead of \$1,000,000.00 under the CGL. Under the endorsement to the policy, it would seem obvious that an assault did not occur nor did a physical altercation occur. And, under the endorsement, a "battery" is defined as "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." Was the shooting intentional in this case? There is no evidence one

way or the other. Was the shooting the result of reckless conduct? Again, while it seems easy to say that it was, there really is no factual basis to decide same as there is no evidence from which the actions of the unknown assailant can be judged; other than the simple fact that someone had a gun that went off in a bar of crowded people and that three people appear to have been randomly shot.

If the facts surrounding the discharge of the gun ultimately do not support a finding that the shooting was intentional or reckless; in other words, the shooting was accidental, then the policy's general coverage for "bodily injury" caused by an "occurrence" which is defined as "an accident," would be invoked and the policy limits of \$1,000,000.00 would be applicable to the claims. This is why a factual determination of what happened on the evening of February 21, 2101 is so important and the details surrounding that event should not simply have been assumed by the Court.

In the case of Mt Vernon Fire Insurance Company v. Dobbs, 873 F.Supp.2d. 762, (Dis. Ct. W.Va. 2012) the District Court addressed a declaratory judgment action filed by an insurer that had issued to a bar, a CGL policy similar to the policy at issue. In that case, the bar's employee allegedly assaulted the plaintiff, a patron, who sued the bar. The insurance policy had a specific exclusion for assault and battery, similar to the exclusion in this case; and, similar to the provisions in this case, did cover bodily injuries caused by an occurrence. The Court stated that the plaintiff could not characterize the conduct of the employee as negligent in order to avoid the application of the exclusion for willful, wanton or reckless conduct. In this case, the Court noted that even though the allegation was that the employee's conduct was willful, wanton or reckless, the assault would still be deemed "intentional" therefore, the exclusion was applicable. In other

words, reckless or wanton conduct is still intentional conduct that would give rise to a claim for battery. Here, even though battery is defined in the endorsement as intentional or reckless conduct, the intent is the same; in order for the endorsement to be applicable, the battery has to have been intentional. Because the shooting in this case could have been accidental, and there are not facts to support a finding that the shooting was intentional at this time, the endorsement does not automatically apply to Plaintiff's claims.

As Drane has pointed out in his Brief in Support of the Petition for Appeal, what seems obvious is that the endorsement for assault and battery is meant to be applied to an intentional act and not an accident. Neither the endorsement nor the exclusion in the policy have any language or definitions related to coverage for an occurrence which is defined as an accident. And, reading the policy language together, and giving the terms their usual and ordinary meaning, the exclusion and endorsement should be applicable to intentional acts of assault or battery and not negligent acts indirectly related thereto. Therefore, if a fact finder were to determine that the discharge of the gun was accidental, then the event would give rise to an occurrence under the policy and the \$1,000,000.00 limits would be applicable, and both the assault and battery exclusion and endorsement would not be relevant.

Further, because insurance policies are to be construed against the drafter; because any ambiguity which exists is to be construed in favor of the insured; and, in ruling on a motion for summary judgment, all the operable facts are to be construed in favor of the non-moving party; the proper result in this case should have been that the MSJ of Max should have been denied.

The one very basic fact that is at the heart of this legal issue and the decision of the Court, is an unknown, material issue of fact; how and why were three gun shots fired in the bar on the evening in question? Why were the three Plaintiffs shot? Without these fact being answered by competent evidence, there is no way that the lower Court could have determined what policy provisions of Max's CGL issued to Flowers were applicable to the claims of Plaintiffs. As a result, the Court could not have properly determined that the facts gave rise to a finding of Battery and that the Limited Endorsement for coverage for Battery was applicable. Therefore, the Court's granting of Max's MSJ was clearly wrong as a matter of law. At a minimum, there is a material issue of fact to be litigated in this case on the coverage issue as to whether the shooting was a battery or not; therefore, the granting of Max's summary judgment motion was improper.

B. The Court committed error in not recognizing that Plaintiff Drane's Complaint asserted a cause of action for negligence against Defendant Flowers; therefore, Max's CGL policy should provide coverage for said claims resulting in "bodily injury" from an "occurrence" irrespective of whether the unknown assailant's shooting is found to be intentional or accidental.

As Petitioner Drane states in his Brief, the allegations in his Complaint against flowers are based upon negligence. In Count 1 of Drane's Amended Complaint, he asserts 8 actions or omissions from action that are alleged to create a cause of action of negligence against Flowers, resulting in his personal injury. None of these allegations are associated with a claim of intentional misconduct and none of these allegations relate to the actual shooting itself. Therefore, these claims of negligence should be covered under Max' CGL policy as an occurrence. Clearly, none of these allegations can be interpreted as alleging that the Bar or its employees actually engaged in a battery toward Plaintiffs.

Under the Endorsement for Assault and Battery, it states that the limits of coverage are applicable because of bodily injury arising out of an event of assault, battery or physical altercation whether caused by the insured's failure to keep the premises safe or the negligent conduct of the insured. On first look, it would appear that even Plaintiff's claims of negligence against Flowers would still bring into play this endorsement and the \$25,000.00 limits of coverage. However, what is important is that there would still have to be an initial finding of battery under the facts of the case for the endorsement to apply, even to allegations of negligence against the insured. Therefore, again, the factual issue in dispute in this case could still be determined in such a way that the accidental shooting could be defined as an occurrence and the negligence claims against the insured in the Complaint would be covered under the \$1,000,000.00 limits and not the endorsement.

In the alternative, there is also an argument to be made that this inclusion of negligence claims against the insured, contained within the endorsement, giving rise to limits of \$25,000.00 is in conflict with the general provisions of the policy covering an occurrence of negligence, meaning that the policy language is ambiguous; and, therefore, should be interpreted in favor of the insured. In essence, the policy cannot provide \$1,000,000.00 of coverage in one section and then take that coverage away in another provision, under the same set of facts.

In Sphere Drake, P.L.C. v. 101 Variety, Inc., 35 F.Supp.2d 421, (Dis. Ct. Pa. 1999) the Pa. District Court was faced with an insurer litigating a declaratory judgment action seeking a determination that it did not have to indemnify a bar for a claim by a patron who was shot by a police officer, clearly not an employee of the bar. The shooting of the

plaintiff by the officer was apparently the result of an intentional discharge of the weapon but by a stray bullet. A fact pattern that may also exist in this case. Just as in this case, the exclusion in the insurance policy for assault and battery/negligent hiring, excluded indemnification for claims of assault and battery, whether caused by or at the instructions of or the negligence of the insured, his employees, patrons or any cause whatsoever; or allegations that the insured's negligence in connection with the hiring, retention, training or supervision, contributed to the assault and battery. Id., p. 428. These same broad exclusions are present in the endorsement to the CGL policy at issue here. In other words, the insurers have tried to limit coverage for assault or battery no matter what the direct or indirect cause is, whether related to the conduct of the insured, a third-party or the negligence of the insured that permitted the assault or battery to take place. The Pa. District Court looked to the language of the exclusion and the allegations in the Complaint and still stated that the CGL may still provide coverage if the injuries claimed in the complaint were alleged, in the alternative, to have been caused by the negligent conduct of the insured. The same result should have occurred herein.

In Gawrieh v. Scottsdale Insurance Co., 83 Ark. App. 59, 117 S.W.3d 634 (2003), A similar fact pattern to the one at issue herein was presented, with the insurer bringing a declaratory judgment action, just as Max has done. In the policy at issue in that case, claims excluded were for assault and battery committed by any insured, any employee or any other person whether committed by or at the direction of the insured; the failure of the insured to prevent the assault or the negligent hiring, training or supervision by the insured. Id., p. 63. The Court in that case, in interpreting the exclusionary language of the policy, determined that the language at issue was ambiguous and was to be construed

in the favor of the insured and of coverage, because the language could be read two different ways, as excluding all assaults and batteries, including those committed by third-parties or to assaults or batteries committed by or at the direction of the insured. Id., p. 70. If this language of that exclusion was deemed to be ambiguous, then the language of the endorsement herein, as to the scope of the cause of the alleged battery, should also be deemed ambiguous and interpreted in favor of finding coverage for Flowers.

Finally, in Liquor Liability Joint Underwriting Association of Massachusetts v. hermitage Insurance Company, 419 Mass. 316, 644 N.E.2d 964 (1995), the issue was whether an assault and battery endorsement, similar to the one here, provided coverage for an allegation of negligent failure to provide security; one of the claims in this case. The issue was that the endorsement indicated that an assault and battery could not be deemed an accident.. Ultimately, the Court determined that the language of the endorsement did not clearly state that the coverage was excluded for negligence claims and that the insured could have accomplished such with clear and unambiguous language in the endorsement; therefore, the Court determined that the language of the policy was ambiguous and was interpreted in the favor of finding coverage for the insured. As here, Max's attempt to have the endorsement provide only limited coverage for an accident that would give rise to the existence of an occurrence, should also mandate a finding that the assault and battery endorsement is ambiguous and the claims presented by Drane for negligence against Flowers should be covered under the general provisions of the CGL policy. The lower Court's Order granting Max's MSJ holding differently is wrong as a matter of law and should be reversed.

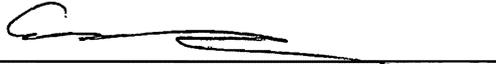
VIII. CONCLUSION

The Circuit Court made two specific, clear errors in granting Max's Motion for Summary Judgment and holding that Max's duty to indemnify Flowers is limited to the eroding \$25,000.00 insurance policy limits contained within the Assault and Battery Endorsement to the CGL policy at issue; the Court made an improper finding of fact that the incident at issue, the shooting of Plaintiffs by an unknown patron of the Venom bar, was an intentional act of Battery; thereby the endorsement limits were applicable instead of the \$1,000,000.00 limits of the CGL policy. There is no evidence in the record that supports the factual determination that the shooting was either accidental or intentional; and, this issue of fact must be decided by a jury and not the Court. Therefore, there exists a material issue of fact that is relevant to an interpretation of the CGL policy and the endorsement at issue. Second, the Court erroneously determined that the CGL policy and the endorsement are clear and unambiguous as to the conduct and the coverage at issue, in association with Plaintiffs' claims in this case. The Plaintiffs claims against Flowers are based upon negligence and they are not bringing a cause of action for battery. Therefore, the nature of the Plaintiffs' claims fall within the definition of an "occurrence" and not the definition of Battery within the Endorsement; therefore, triggering the indemnification provisions of the CGL and not the endorsement. Further, to the extent that the language of the assault and battery endorsement is interpreted in conjunction with the provision of the CGL policy and what that policy covers, the endorsement is ambiguous as to coverage for claims of negligence brought against the insured regarding claims arising out of the conduct of a patron; therefore, the policy provisions and

coverage determination must have been made in favor of the insured and in favor of coverage for the insured as opposed to in favor of the insurer.

As a result, the Circuit Court's granting of Max's Motion for Summary Judgment was in error as a matter of law and, the Supreme Court should vacate said Order and remand the case for further proceedings consistent with the above discussion, and any and all other relied deemed appropriate.

**John Young and Young Insurance Agency
By Counsel**



Albert C. Dunn, Jr. (WV State Bar # 5670)
ALLEN, KOPET & ASSOCIATES, PLLC
P. O. Box 3029
Charleston, WV 25331-3029
(304) 342-4567

Counsel for Defendant/Petitioner Matthew Edward Dreher

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 13-0317

DARIN I. DRANE
Petitioner

vs. Appeal from Order of Circuit Court Cabell County (11-C-216)

**MAX SPECIALITY INSURANCE COMPANY,
A VIRGINIA COMPANY**
Respondent

CERTIFICATE OF SERVICE

I, Albert C. Dunn, Jr., counsel for the Defendants John Young and Young Insurance Agency, do hereby certify that I have served a true and accurate copy of the foregoing **BRIEF IN SUPPORT OF PETITION FOR APPEAL OF DAREN I DRANE** upon the following counsel of record by depositing the same in the United States mail, with postage prepaid on June 24, 2013, addressed as follows:

Duane Ruggier, II, Esquire
Pullin, Fowler, Flanagan, Brown & Poe
901 Quarrier Street
Charleston, West Virginia 25301

Thomas H. Peyton, Esquire
Peyton Law Firm
Post Office Box 216
Nitro, West Virginia 25413

Mary H. Sanders, Esquire
Huddleston Bolen, LLP
Post Office Box 3786
Charleston, West Virginia 25330

Thomas A. Rist, Esquire
Rist Law Offices
103 Fayette Avenue
Fayetteville, West Virginia 25840

Scott Andrews, Esquire
Jon Hoover, Esquire
Hoover & Andrews
Post Office Box 249
Barboursville, West Virginia 25504

Dana F. Eddy, Esquire
Eddy Law Offices
1222 Capitol Street, Suite 300
Charleston, West Virginia 25301



Albert C. Dunn, Jr., Esquire (WVSB #5670)