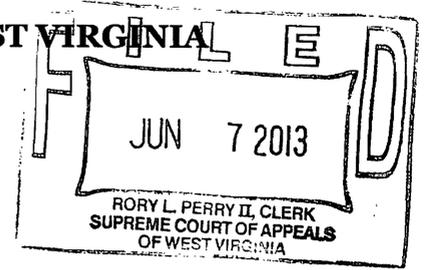


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DARIN I. DRANE,
Petitioner,

Vs.

Appeal No. 13-0317

MAX SPECIALTY INSURANCE COMPANY,
a VIRGINIA CORPORATION,
Respondent.

(Civil Action No. 11-C-216 in the Circuit Court of Cabell County, WV)

BRIEF OF PETITIONER DARIN I. DRANE

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

Respondent.

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I. ASSIGNMENT OF ERROR

Whether the trial court erred in holding that coverage under the policy for petitioner (and the other gunshot victims) was limited to the \$25,000 limit under the Limited Assault and Battery Endorsement of the Policy, rather than the One Million Dollar limit available under the CGL provisions.

II. STATEMENT OF THE CASE

Respondent's Complaint for declaratory judgment arose out of an incident that occurred at Club Venom, a bar in Huntington which was owned and operated by John David Flowers ("Flowers") and/or Dave Flowers, Inc. d/b/a Venom, Inc. ("Venom"). The complaint in this declaratory judgment action was brought by respondent Max Specialty Insurance Co. ("Max"), which issued a commercial liability insurance policy to Flowers and/or Venom. See: Appendix, pp. 1 – 26. Specifically, that policy is identified as Policy No. MAX012700003560 for the policy period of August 21, 2009 through August 21, 2010, and is hereinafter referred to as the "Policy." Appendix at pp. 3, 4.

Petitioner Darin Idris Drane ("Drane") was a customer or invitee of Club Venom who was injured in the February 21, 2010 incident when an unidentified man opened fire inside the club (hereinafter, the "incident"). Appendix, p. 3. No one alleges that petitioner fired any shots in the incident. Petitioner was one of three shooting victims who sustained injuries in the incident. The others were Robert Turbeville and Kaitlin Grace Marcum. Appendix, p. 3.

Respondent filed its Complaint for declaratory judgment on the Policy on or about April 12, 2011. See: Circuit Court's Docket Sheet, Appendix p. 125. Petitioner

then filed his Response which addressed the legal arguments which plaintiff Max set forth in its Complaint on or about July 19, 2011. Docket Sheet, Appendix p. 125. A complete copy of the Response is located at pp. 27 – 65 of the Appendix. Respondent filed its Reply to petitioner’s Response on or about July 26, 2011. Docket Sheet, Appendix p. 125. A complete copy of the Reply is located at pp. 66 – 104 of the Appendix. Petitioner argued that contrary to respondent’s assertions in its Complaint, the Policy is ambiguous and must be construed against Max to provide coverage for the incident in an amount of not less than One Million Dollars (\$1,000,000.00)¹.

For numerous reasons which are neither relevant nor germane to this appeal, the hearing on the declaratory judgment issues, and consequently the trial court’s ruling on those issues, was delayed for several months. Prior to the hearing, petitioner filed a Notice of Renewed Response to Coverage Arguments, which also designated his previous Response brief as a cross-Motion for Summary Judgment on the coverage issues, on or about September 19, 2012. Docket Sheet, Appendix p. 128. A copy of the Notice is located at pp. 105 – 108 of the Appendix. A hearing was held on the declaratory judgment and the coverage issues raised on November 27, 2012. Docket Sheet, Appendix p. 128. The Cabell County Circuit Court entered its Order ruling on these issues on February 8, 2013. Appendix pp. 109-124. Petitioner timely filed his Notice of Appeal on March 11, 2013.

¹ Petitioner never disputed respondent’s contention that the Policy excludes coverage for punitive damages.

III. SUMMARY OF ARGUMENT

The trial court erred in holding that coverage under the Policy for petitioner (and the other gunshot victims) was limited to the \$25,000 limit under the Limited Assault and Battery Endorsement of the policy, rather than the One Million Dollar limit available under the CGL provisions.

There is no evidence from the trial court's order that it considered the arguments made by petitioner in the brief he filed on those issues shortly after the complaint was filed. The trial court's decision does not comport with established principles of insurance policy and contract interpretation as previously set forth by this Honorable Court in a number of decisions as cited herein. The language of the Policy is ambiguous because the Limited Assault and Battery Endorsement and the Policy's intentional acts exclusion do not limit or exclude coverage for an occurrence as defined by the Policy. The ambiguities in the Policy must be construed against the drafter, the respondent. Further, coverage must be analyzed from the standpoint of the insured, not some unidentified party.

The trial court's decision fails to heed these black-letter principles. There should be One Million Dollars in coverage available to petitioner and the other gunshot victims. The trial court's ruling is in error and must be reversed.

IV. STATEMENT AS TO ORAL ARGUMENT

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

V. ARGUMENT

A. Standard of Review

A circuit court's entry of a declaratory judgment is reviewed *de novo*. Syl. Pt. 1, Farmers and Mechanics Mutual Insurance Company of West Virginia v. Cook, 557 S.E.2d 801 (W.Va. 2001); Syl. Pt. 3, Cox v. Amick, 608, 466 S.E.2d 459 (W.Va. 1995). Furthermore, 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. Syl. Pt. 2, Farmers and Mechanics v. Cook; Erie Insurance Property & Cas. Co. v. Stage Show Pizza, JTS, Inc., 553 S.E.2d 257 (W.Va. 2001); Syl. Pt. 2, Riffe v. Home Finders Associates, Inc., 517 S.E.2d 313 (W.Va. 1999).

B. The Circuit Court Did Not Properly Apply Established Contract Interpretation Principles

It is well-established in West Virginia that where terms of an insurance policy are clear and unambiguous the court need only apply the exclusion to the facts presented by the parties when determining coverage. State Auto Mutual Ins. Co. v. Alpha Eng. Services, Inc., 542 S.E.2d 876 (W.Va. 2000).

It is equally well settled that ambiguous terms in an insurance contract must be construed against the insurer and in favor of the insured. Change Inc. v. Westfield Ins.

Co., 542 S.E.2d 475 (W.Va. 2000); National Mutual Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488 (W.Va. 1987). Policy language is ambiguous when it is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning. Change Inc., 542 S.E.2d 475. When words of an insurance policy are susceptible of two or more interpretations, that which will sustain the claim and cover the loss must be adopted. Farmers Mutual Ins. Co. v. Tucker, 576 S.E.2d 261 (W.Va. 2002).

Any exclusionary language must also be strictly construed against the insurer and in favor of the insured. Stage Show Pizza, 553 S.E.2d 257. Moreover, in interpreting a contract, a court should give effect to every clause. Columbia Gas Transmission Corp. v. E. I. DuPont de Nemours & Co., 217 S.E.2d 919 (W.Va. 1975).

The Circuit Court's major error was in failing to analyze coverage from the standpoint of the insured. Courts are generally in agreement that under an intentional acts exclusion, a policyholder may be denied coverage only if the policyholder (1) committed an intentional act, and (2) expected or intended the specific resulting damage. Farmers and Mechanics v. Cook, 557 S.E.2d at 807; State ex rel. Davidson v. Hoke, 532 S.E.2d 50, 57 (W.Va. 2000). Both an intentional act and an intended or expected consequence must be present before the exclusion operates to avoid coverage. Id. The same rationale should apply to an endorsement which purports to provide limited coverage for an intentional tort such as assault and/or battery.

Similarly (and instructively), in Columbia Casualty Co. v. Westfield Insurance Co., 617 S.E.2d 797 (W.Va. 2005), this Honorable Court was asked, via certified question from the United States Court of Appeals for the Fourth Circuit, whether the suicide of a jail inmate was an "occurrence" under a liability policy issued to the county commission.

Finding that the suicide was an accident and therefore an “occurrence” under the subject policy, the Court held:

In determining whether under a liability insurance policy an occurrence was or was not an “accident” – or was or was not deliberate, intentional, expected, desired or foreseen – primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue. Id. at Syl. Pt.

The Court in Columbia Casualty reasoned that while a suicide might not be accidental from the inmate’s perspective, from the perspective or standpoint of the county commission that has duties and responsibilities in connection with the jail, the death by suicide can be seen as accidental if the commission had no desire, plan, expectation or intent that the death occur. Id. at 799. The Court noted that there was no alleged conduct that would justify imputing the inmate’s presumed suicidal intent to the insured, the county commission. Id. at fn. 5.

The same considerations should apply here, where the shooter’s identity is unknown, and there is no evidence suggesting that the shooter was an employee of the insured, or that the shooter’s intent should be imputed to the insured. The Circuit Court’s opinion is flawed because its analysis lacks this perspective. It did not analyze the policy and the coverage issues presented from the standpoint of the insured, rather than the unidentified, (and presumably uninsured) shooter. Therefore, an analysis of the relevant policy provisions from the insured’s standpoint is now required in order to properly determine the amount of coverage available under the Policy.

C. Relevant Policy Provisions

Initially, we must examine the policy language which confers coverage before looking at any exclusions. Coverage is conferred by the Policy's Commercial General Liability Coverage Form, **SECTION 1 – COVERAGES, COVERAGE A, BODILY INJURY AND PROPERTY DAMAGE LIABILITY**, which provides in pertinent part²:

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. . . .

...

- b. This insurance applies to “bodily injury” and “property damage” only if:

- (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory;”
- (2) The “bodily injury” or “property damage” occurs during the policy period; and
- (3) Prior to the policy period, no insured listed under Paragraph 1 of Section II – Who is an Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. . . . (Appendix at p. 42).

The Commercial General Liability Coverage Form provides the following pertinent definitions in **SECTION V – DEFINITIONS**:

3. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

...

13. “Occurrence” means an accident, including continuous or repeated exposure

² A complete copy of the Policy may be viewed at pp. 37 – 57 of the Appendix.

to substantially the same general harmful conditions. (Appx. at pp. 54, 55).

In its Complaint, respondent discussed the Policy's ASSAULT AND BATTERY EXCLUSION, and the LIMITED ASSAULT OR BATTERY COVERAGE available under the Policy. The Exclusion contains the following definitions:

"Assault" means any attempt of threat to inflict injury to another including any conduct that would reasonably place another 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 persons sustain bodily injury arising out of the dispute.

All other terms, conditions, definitions and exclusions apply. (Appx. at p. 39).

The Limited Assault or Battery Coverage Endorsement contains the following definitions, which vary slightly from the Exclusion:

"Assault" means any attempt of threat to inflict injury to another including any conduct that would reasonably place another 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 persons sustain bodily injury arising out of the dispute.

"Event" may be comprised of one or more incidents of assault and battery taking place in one twenty-four (24) hour period.

...

All other policy terms, exclusions and conditions remain the same. (Emphasis in original). (Appendix at p. 41).

Finally, the Policy's Declarations Page provides a limit for each occurrence of Commercial General Liability of One Million Dollars (\$1,000,000.00). The Endorsement for the Limited Assault or Battery Coverage is limited to Twenty-five Thousand Dollars (\$25,000.00). Appendix at p. 38.

D. The Policy is Ambiguous and Must be Construed Against the Drafter and Insurer, Max

The language of the Policy is ambiguous and must be construed against its drafter, the insurer, Max. In addition to the legal principles cited above related to contract/policy interpretation, it is paramount that for an insurer to avoid coverage on the basis of an intentional act exclusion, the insurer must demonstrate that the insured intended or expected the result as well as the act. See: Farmers and Mechanics Mutual Ins. Co. v. Cook, 557 S.E.2d 801 (W.Va. 2001). The court must also analyze not only the terms and conditions of the Policy but also the nature of the claims against the insured.

1. The Policy Covers Acts of Negligence by Venom.

In his Complaint, petitioner did not assert a cause of action against the unidentified shooter. Rather, he asserted a cause of action of negligence against Venom and/or Flowers related to the manner in which Venom provided security at the club. See: Complaint, par. nos. 15 – 20; Appendix pp. 62 – 63.³ There are no allegations that Venom or Flowers was guilty of any intentional act. There are no allegations against the shooter. There are no allegations that the shooter was an insured under the Policy.

³ Petitioner filed his Complaint after respondent filed its Complaint for declaratory judgment, but prior to the time he was served with respondent's Complaint. The circuit court later consolidated the complaints filed by petitioner and the other shooting victims, under Civil Action No. 11-C-216, the number of the declaratory judgment action, because it was the first filed.

There appears to be no dispute that Venom is insured under the Policy. There appears to be no dispute that the subject incident occurred within the policy period, and no dispute that it occurred within the “coverage territory” as defined by the Policy (and which includes the entire United States). There also appears to be no dispute that petitioner sustained “bodily injury” as a result of the incident.⁴

Based on the foregoing, the only other determination that needs to be made to establish coverage for the incident under the Policy is to determine whether it was an “occurrence.” The Policy clearly covers the insured Venom for damages it must pay for bodily injury resulting from an occurrence, which essentially means an accident. From Venom’s standpoint, the incident was an accident. There are no allegations that Venom intended the shooter to fire his gun, or that it intended any of its customers to be shot. The analysis of coverage under the Policy simply cannot be based on the intent of one who is not an insured.

From Venom’s standpoint, this incident was an accident, and constitutes an “occurrence” under the Policy, just like the jailhouse suicide was found to be an “occurrence” when analyzed from the standpoint of the county commission in the Columbia Casualty case. Therefore, any review of the Policy must end in the conclusion that the Policy provides coverage to Venom for this incident in the amount of One Million Dollars.

2. The Exclusions or Limitations Relied on by Respondent are Ambiguous and Cannot be Enforced.

Nowhere in either the Assault or Battery Exclusion or the Limited Assault or Battery Coverage Endorsement relied on by respondent will one find the term

⁴ Respondent Max has not raised any of these issues or made any such assertion in any of its filings in the Circuit Court.

“occurrence.” Appendix at pp. 39 – 41. These provisions do not exclude coverage for an “occurrence”; they do not limit coverage for an “occurrence.” Both assault and battery are intentional torts. See: Criss v. Criss, 356 S.E.2d 620 (W.Va. 1987). Here, the element of intent rested with the shooter, not Venom. Petitioner did not sue Venom for assault, battery, or any other intentional tort. He sued for negligence. Appendix at pp. 62-63. The Policy’s Assault or Battery Exclusion is not applicable to the incident. Even if it is, it creates an ambiguity because nowhere does it take away coverage for an incident which meets the Policy’s definition of “occurrence.”

If the respondent wanted to take away coverage for an “occurrence”, it could easily have done so by using specific language to this effect. The Exclusion fails to mention the term “occurrence” at all. Nor does it use the term “event”. Furthermore, it clearly states, “All other terms, conditions, definitions and exclusions apply.” Appendix at p. 39.

Rather than use the term “occurrence,” the Endorsement uses the term “event,” which has a different definition than “occurrence” and refers only to assault and battery. Moreover, the Endorsement also clearly states that “All other policy terms, exclusions and conditions remain the same.” Appendix at p. 41.

The Exclusion and/or the Endorsement might apply if a Venom employee had shot petitioner, or beat him up, but that is not the case. Where a specific, defined term such as “occurrence” is not used in an exclusion or purported limitation of coverage, one can only conclude that the exclusion or limitation is not applicable and does not defeat an “occurrence.” The drafter/respondent’s failure to be more specific about the terms and conditions of its policy render the policy ambiguous. The Policy is subject to multiple interpretations. The Policy therefore must be construed against respondent.

3. The Policy's Liability Limit for an "Occurrence" Is One Million Dollars (1,000,000.00).

Respondent argues that the Policy limits coverage for this incident to a maximum of Twenty-five Thousand Dollars (\$25,000.00). This argument fails because the Limited Assault or Battery Coverage Endorsement is not applicable or creates an ambiguity which must be construed against respondent, as argued above. The Declarations of the Policy provide that the liability limit for each "occurrence" is One Million Dollars (\$1,000,000.00). According to the Declarations of the Policy, Venom paid a premium for this coverage of \$3,074.00. Appendix at p. 37. Because it is clear that this incident constitutes an "occurrence" under the Policy, this is the liability limit applicable to resolve any claims against Venom for its negligence which caused or contributed to the incident and the injuries to petitioner.

The Circuit Court erred when it found that only \$25,000.00 in coverage was available under the Policy's Limited Assault or Battery Coverage Endorsement, rather than the One Million Dollar general liability limit of the Policy. The Circuit Court failed to analyze the coverage issues presented under established principles of contract and insurance policy interpretation. There is no evidence that the Circuit Court considered the arguments Petitioner made in his Response. Therefore, the judgment of the Circuit Court must be reversed.

VI. CONCLUSION

This Honorable Court must find that the Policy covers Venom for the incident and provides a liability limit of One Million Dollars. There is no dispute that the incident occurred within the policy period, occurred within the coverage territory, and resulted in bodily injury to Petitioner. Analyzed from the insured's standpoint, this was an accident. Venom did not expect or intend the result which occurred here. Petitioner has alleged only negligence against Venom and/or Flowers, not any intentional tort. Therefore, based on the claims against Venom and the language of the Policy, the incident is an "occurrence" as that term is defined by the Policy, resulting in coverage under the Policy. The Circuit Court's decision fails to follow this well-established principle of insurance coverage analysis.

To the extent the Assault or Battery Exclusion or the Limited Assault or Battery Coverage Endorsement say otherwise, they are ambiguous. Neither of those provisions contains the term "occurrence". Therefore, neither of those provisions excludes or limits coverage for an incident which qualifies as an "occurrence." To the extent anyone can argue otherwise, the Policy is then subject to multiple interpretations. The Circuit Court's ruling did not address this argument, which was again error on the part of the Circuit Court. Moreover, the coverage analysis and the analysis of those provisions must proceed from the standpoint of the insured, Venom, not the shooter, who is not an insured and is not party to any lawsuit. Because the Limitation provision is ambiguous or simply inapplicable, the stated \$25,000 limit is not applicable. This Honorable Court must find that the Policy's general liability limit for occurrences is applicable here, which is One Million Dollars.

WHEREFORE, for all of the foregoing reasons, petitioner, by counsel, hereby respectfully requests that this Honorable Court reverse the February 8, 2013 judgment of the Cabell County Circuit Court finding that there is coverage for this incident in the amount of \$25,000, that this Honorable Court enter an order declaring that there is coverage for this occurrence in the amount of One Million Dollars pursuant to the Policy's general liability limit, and for such other relief as this Honorable Court deems just and proper.

RESPECTFULLY SUBMITTED:

Darin Idris Drane,

By Counsel



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CERTIFICATE OF SERVICE

I, Scott W. Andrews, counsel for petitioner, do hereby certify that I have served a true and accurate copy of the “**Brief of Petitioner Daren I. Drane**” on the following individuals by depositing the same in the United States Mail, first class, postage prepaid, on the 7th day of June, 2013:

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A handwritten signature in black ink, appearing to read "Scott W. Andrews", written over a horizontal line.

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