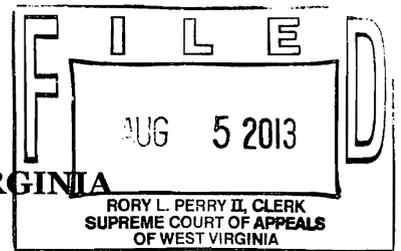


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



**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)**

**REPLY BRIEF OF PETITIONER DARIN I. DRANE**

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## I. ARGUMENT

### A. Respondent Never Addressed the Issue of the Creation of Ambiguity by the Policy's Definition of "Occurrence" and the Failure of the Exclusion and the Endorsement to Use This Term.

The great failure of Respondent's Brief is that it never acknowledges, analyzes, or addresses petitioner's main argument as to **why** the Policy is ambiguous: that the ambiguity in the Policy is created by the use of the defined term "occurrence" in the main body of the Policy, but which does not appear in either the Policy's Assault and Battery Exclusion (the "Exclusion") or the Limited Assault or Battery Coverage Endorsement (the "Endorsement"). The ambiguity is created by the failure of the Exclusion or the Endorsement to use the term "occurrence" to create an exception to the Policy's definition of that term. In that respect, the Respondents' brief mirrors the Policy itself and the Circuit Court's opinion in failing to consider the ramifications of this issue. Rather, the Respondent merely continues to assert, over and over, that the Policy language is "clear and unambiguous," conclusorily, without examination. However, a step-by-step analysis of the Policy reveals the flaw in respondent's conclusion, and in the Circuit Court's opinion.

The starting point for such an analysis is to review 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 part<sup>1</sup>:

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<sup>1</sup> A complete copy of the Policy may be viewed at pp. 37 – 57 of the Appendix.

**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 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 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 is limited to Twenty-five Thousand Dollars (\$25,000.00). Appendix at p. 38.

**B. The Policy is Ambiguous and Must be Construed  
Against the Drafter and Insurer.**

The language of the Policy is ambiguous and must be construed against its drafter, the insurer. 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.<sup>2</sup> 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.

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.<sup>3</sup>

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<sup>2</sup>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.

<sup>3</sup>Respondent Max has not raised any of these issues or made any such assertion in any of its filings in the Circuit Court.

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 Columbia Casualty Co. v. Westfield Insurance Co., 617 S.E.2d 797 (W.Va. 2005). 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 Exclusion and Endorsement Relied on by Respondent are Ambiguous and Cannot be Enforced.**

Nowhere in either the Exclusion or the Endorsement relied on by respondent will one find the term “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. Despite its alleged specificity, the 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. The Exclusion does not create an exception to, or otherwise change the Policy's definition of the term "occurrence."

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. It even supplies the bold emphasis in the original. This statement is clear evidence that the Endorsement was not intended to negate coverage that was otherwise available under the Policy. Like the Exclusion, the Endorsement also fails to create an exception to, or to otherwise change, the Policy's definition of the term "occurrence."

Furthermore, 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. Like the Policy, the Respondent's Brief and the Circuit Court's opinion fail to address this issue.

### **C. The Endorsement Should Not Operate to Restrict Coverage to \$25,000.**

Respondent argues that the Endorsement restricts coverage to \$25,000 because the claims arise from gunshot injuries. This argument also must fail, first because it fails to consider the ambiguity resulting from the Endorsement's failure to modify the definition of an "occurrence" under the Policy (as is more fully discussed above), and secondly, because it does not analyze the nature of the claim against the insured. Respondent states, at p. 13 of its Brief: "The issue of whether or not Petitioner alleges negligence or an intentional tort against Venom is wholly irrelevant to the question of insurance coverage" under the Endorsement. This statement is not only incorrect, but is directly contradictory to statements made by the Respondent in its Reply Brief in the Circuit Court (See: Appx. pp. 79-80).

Whether there is coverage for a claim is tested by the allegations and legal theories asserted in a complaint. See: West Virginia Fire & Casualty Co. v. Stanley, 602 S.E.2d 483 (W.Va. 2004); Butts v. Royal Vendors, Inc., 504 S.E.2d 911 (W.Va. 1998); Bruceston Bank v. United States Fidelity & Guaranty Insurance Co., 486 S.E.2d 19 (W.Va. 1997); Silk v. Flat Top Construction, Inc., 453 S.E.2d 356 (W.Va. 1994); Horace Mann Insurance Co. v. Leeber, 376 S.E.2d 581 (W.Va. 1988). This all goes back to the well-established principle that coverage must be analyzed from the standpoint of the **insured** rather than a non-insured, which again is more fully discussed in subsection I. B. 1. herein, and in subsection V. B. of Petitioner's Brief previously filed with this Honorable Court. The Endorsement does not limit coverage here any more than the Exclusion precludes it. The Policy still covers an "occurrence" such as the negligence alleged against Venom by petitioner and others

#### **D. The Exclusion Must be Examined as Part of the Coverage Analysis.**

Respondent complains in several places in its brief that petitioner's arguments relative to the Exclusion are "misplaced and irrelevant." In fact, respondent has devoted a section of its brief to this topic. (Respondent's Brief, Section VI. D., beginning at p. 15).

However, petitioner was merely responding to issues raised by the respondent itself in the respondent's Complaint for Declaratory Judgment and in its Reply to petitioner's Response to Complaint for Declaratory Judgment and Motion for Summary Judgment filed in the Circuit Court below. In those pleadings, respondent discussed and cited the Exclusion at length.

For example, respondent first cited and set forth the Exclusion at par. no. 22 of its Complaint (Appx. pp. 8-9). It further argued that the Exclusion excluded coverage for petitioner's claims under the Policy at par. nos. 26 and 31 of its Complaint (Appx. pp. 12 and 14). In its Reply to petitioner's Response filed in the Circuit Court, respondent devoted approximately five pages to the Exclusion, setting forth its terms and discussing its applicability to defeat petitioner's claims, (Appx. at pp. 81-83, 87-88) without addressing the ambiguity created by the language of the Exclusion. Respondent's Brief reiterates some of this argument at pp. 7-9. Yet now, petitioner's argument related to the Exclusion is "misplaced and irrelevant"?

As demonstrated more fully in subsection A. above, the relevance is that the Exclusion does not preclude coverage under the Policy for an incident or accident that meets the definition of an "occurrence" and is therefore covered. Because the Supreme Court's review of the Circuit Court's coverage determination is *de novo*, it is proper to

again progress through the steps of a proper coverage analysis. Such an analysis leads to the inescapable conclusion that the Policy is ambiguous, that there is coverage for this incident of One Million Dollars under the CGL provisions of the Policy, and that the Circuit Court's decision was in error.

## II. 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 Exclusion or 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." Neither the Exclusion nor the Endorsement create an exception to or otherwise modify the definition of the term "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 Endorsement 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 pursuant to the Endorsement, 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 “**Reply 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 5th day of August, 2013:

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