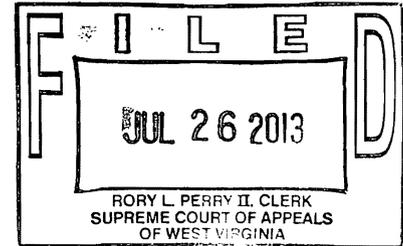


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 13-0317**

**Darin I. Drane, Defendant Below,  
Petitioner**



**v.**

**Max Specialty Insurance Company,  
a Virginia corporation, Plaintiff Below,  
Respondent**

**RESPONDENT, MAX SPECIALTY INSURANCE COMPANY'S  
BRIEF IN RESPONSE TO JOHN YOUNG AND YOUNG INSURANCE COMPANY**

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**I. TABLE OF CONTENTS**

I. Table of Contents.....2

II. Table of Authorities.....3

III. Statement of the Case.....4

IV. Summary of Argument.....4

V. Statement Regarding Oral Argument.....5

VI. Argument.....5

A. Standard of Review.....5

B. The Question as to Whether or Not the  
Subject Shooting was an Intentional Act is  
Immaterial to the Issue Before the Court.....6

C. Allegations of Negligence Related to the  
Gunshot Injuries Trigger the Limited Assault or Battery  
Coverage Endorsement, Not General Liability Coverage.....7

D. The Circuit Court’s February 8, 20913 Order is  
Fully Supported by West Virginia Legal Precedent.....8

VII. Conclusion.....9

VIII. Certificate of Service.....11

## II. TABLE OF AUTHORITIES

### *CASES*

<u>Bennett v. Dove</u> , 277 S.E.2d 617 (W.Va. 1981).....	8
<u>Benson v. AJR, Inc.</u> , 698 S.E.2d 638 (W.Va. 2010).....	8
<u>Cotiga Development Co. v. United Fuel Gas Co.</u> , 128 S.E.2d 626 (W.Va. 1962).....	8
<u>Cox v. Amick</u> , 466 S.E.2d 459 (W.Va. 1995).....	5
<u>Dan’s Carworld, LLC v. Serian</u> , 677 S.E.2d 914 (W.Va. 2009).....	8
<u>Farmers &amp; Mechs. Mut. Ins. Co. v. Cook</u> , 557 S.E.2d 801, 805 (W.Va. 2001).....	5, 6
<u>Murray v. State Farm Fire &amp; Cas. Co.</u> , 509 S.E.2d 1 (W.Va. 1998).....	5
<u>Payne v. Weston</u> , 466 S.E.2d 161 (W.Va. 1995).....	9
<u>Riffe v. Home Finders Associates, Inc.</u> , 517 S.E.2d 313 (W.Va. 1999).....	6

### **III. STATEMENT OF THE CASE**

John Young and Young Insurance Company (hereinafter sometimes referred to as “Young”) have filed a Brief in Appeal No. 13-0317 in Support of the Petition of Darin I. Drane. Respondent, Max Specialty has previously filed its Brief in Response to the Petition filed by Darin I. Drane. Max Specialty now files this Brief in Response to the “John Young and Young Insurance Company’s Brief in Support of Petition for Appeal of Darin I. Drane.” In an effort to conserve the valuable time and resources of this Honorable Court, and in an attempt to promote the efficiency of the briefing process, Max Specialty respectfully refers this Honorable Court to the Statement of the Case set forth in its Brief in Response to Petitioner Darin I. Drane, filed on July 22, 2013.

### **IV. SUMMARY OF ARGUMENT**

Young’s Brief misstates the findings of the Cabell County Circuit Court, as set forth in the Circuit Court’s February 8, 2013 “Order Granting Motion for Declaratory Judgment.” (Appendix, 109). The Circuit Court did not hold that “the shooting of Plaintiffs by the unidentified male was the result of an intentional act of battery upon the Plaintiffs.” *See*, Young Brief, pg.6. Whether or not the subject shooting was intentional has never been a determinative issue as to the declaratory judgment action filed by Max Specialty. A review of the Circuit Court’s Order reveals that the Circuit Court found that the patrons of Venom “who are now involved in this case suffered bodily injuries and/or medical expenses arising out of an event of battery or physical altercation that occurred in the insured’s premises. Therefore, the Limited Assault or Battery Coverage applies to the undisputed facts of the case.” *See*, Appendix 118.

The Circuit Court’s holding mirrors the plain language of the subject policy of insurance, and finds that, whether or not the shooting was intentional, the injuries alleged by the Venom patrons

arise from battery and/or physical altercation pursuant to the definition of those words found in the subject “Limited Assault or Battery Coverage.”

Similarly, the question of whether or not negligence is alleged by the Venom patrons is of no consequence to the final analysis of the insurance coverage. The damages alleged by the Venom patrons have been found to be “bodily injury or medical expense, arising out of an event of assault, battery, or physical altercation” as those terms are defined in the subject insurance contract. *See*, Appendix, 118.

The Circuit Court committed no error in applying the plain language of the “Limited Assault or Battery Coverage” Endorsement. Max Specialty respectfully requests that this Honorable Court affirm the February 8, 2013 Order of the Cabell County Circuit Court.

#### **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. The Question as to Whether or Not the Subject Shooting was an Intentional Act is Immaterial to the Insurance Coverage Issue Before the Court.**

Young's Petition sets the foundation for its argument by citing the definition of "battery" found in the subject "Limited Assault or Battery Coverage" Endorsement. Young's Petition correctly cites the definition of battery 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." *See*, Young Brief, pg. 8. The Brief's very next sentence appears to disregard a substantial portion of the cited definition of "battery" when it asks: "Was the shooting intentional in this case?" *See, Id.*

By focusing only on the word "intentional," the Young Brief completely misconstrues the entire foundation for the Circuit Court's Order. The policy definition of "battery" does include the word intentional. However, the policy definition does not end there. It goes on to state that a battery could also be "reckless physical contact." It also states that, in the alternative, a "battery" could be "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 definition goes on to state that the aforementioned "use of force includes, but is not limited to the use of a weapon."

Thus, Max Specialty was not required to prove that the firing of the weapon was intentional.

In fact, Max Specialty was not required to prove that the firing of the weapon was reckless. Max Specialty needed only to prove that someone was injured via a use of force without that person's consent. The Circuit Court applied the policy definitions to the facts of the case and correctly held that the gun-shot injuries are injuries arising from a "battery" and/or a "physical altercation" as those terms are defined by the subject insurance contract.

**C. Allegations of Negligence Related to the Gun-Shot Injuries Trigger the Limited Assault or Battery Coverage Endorsement, Not General Liability Coverage.**

The Young Petition next makes an argument that is very similar in nature to arguments advanced by the Drane Petition. The Young Brief asserts that, because the Venom patrons' Complaints allege that Venom's actions were negligent, the "Limited Assault or Battery Coverage" Endorsement is not triggered. Such arguments do not fully contemplate the plain and unambiguous language of the "Limited Assault or Battery Coverage" Endorsement.

The subject Endorsement clearly states that Max Specialty will only pay \$25,000.00 in insurance coverage for damages "that **the insured becomes legally obligated to pay as damages** because of bodily injury; or medical expense, arising out of an event of assault, battery, or physical altercation that occurs in, on, near, or away from an insured's premises..." *See*, Appendix, 40 (**emphasis added**). As such, the "Limited Assault or Battery Coverages" Endorsement is applicable to any sums that Venom becomes legally obligated to pay as damages, whether or not those damages take the form of damages for negligence or damages for intentional tort.

Pursuant to the plain language of the insurance contract, coverage is limited to \$25,000.00 for such liability regardless of the cause of the "assault, battery, or physical altercation." Further, the Endorsement expressly states that coverage for this type of liability is limited to \$25,000.00

“[w]hether or not caused by or arising out of any insured’s act or omission in connection with the prevention suppression, failure to warn of the “assault,” “battery,” or “physical altercation,” including but not limited to, negligent hiring, training and/or supervision.” *See, Id.* Further still, coverage is limited to \$25,000.00 “[w]hether or not caused by or arising out of negligent, reckless, or wanton conduct by an insured, an insured’s employees, patrons or other persons.” *See, Id.*

The contract language is clear. The “Limited Assault or Battery Coverage” Endorsement to the policy limits coverage for damages arising from assault, battery, or physical altercation to \$25,000.00. This is true regardless of whether the damages sound in negligence, intentional tort, or some combination thereof.

**D. The Circuit Court’s February 8, 2013 Order is Fully Supported by West Virginia Legal Precedent.**

This Honorable Court has long held that provisions of contracts should be given the full weight of their plain meaning. “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).

West Virginia applies the same rule of contractual construction to contracts for 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).

The policy language in the “Limited Assault or Battery Coverages” Endorsement is plain and unambiguous. The limited coverage is applicable to injuries arising from batteries, which are defined as any use of force against a person without his or her consent. The underlying claims in this suit involve injuries arising from the use of force against persons without their consent, namely gun-shot wounds. Thus, the “Limited Assault or Battery Coverages” Endorsement is applicable in this case, and the limit of available coverage is \$25,000.

## VII. CONCLUSION

In conclusion, there is no question that the underlying claims for gun-shot wound injuries are damages as a result of a battery as defined by the “Limited Assault or Battery Coverage” Endorsement. The subject “Limited Assault or Battery Coverage” Endorsement states that the limit of insurance coverage in this case is \$25,000.00. 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 shooting incident triggers the “Limited Assault or Battery Coverage” Endorsement, whether or not the shooting incident is considered an accident, or an intentional act. Assertions of negligence fail to avoid application of the “Limited Assault or Battery Coverage” Endorsement. Coverage in this case is clearly and unambiguously limited to \$25,000.00 by the applicable policy language.

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 pursuant to the plain and unambiguous language of the insurance contract. The Respondent further requests other relief as deemed just and proper by this Honorable Court.

**MAX SPECIALTY INSURANCE  
COMPANY**  
**By Counsel,**



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**DARIN I. DRANE, Defendant Below,  
Petitioner,**

v.

**MAX SPECIALTY INSURANCE COMPANY,  
a Virginia corporation, Plaintiff Below,  
Respondent.**

**CERTIFICATE OF SERVICE**

The undersigned counsel for Respondent, Max Specialty Insurance Company, does hereby certify that a true copy of the foregoing “*Respondent Max Specialty Insurance Company’s Brief in Response to John Young and Young 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 **26th day of July, 2013**.

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