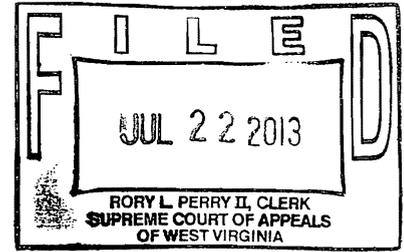


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 13-0317**

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



**v.**

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

**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 its insureds, John D. Flowers and Dave Flowers, Inc., d.b.a. Venom, Inc. John D. Flowers is the owner of Venom, Inc. (also known as “Club Venom”) which operated as a nightclub/bar located at 1123 4<sup>th</sup> Avenue in Huntington, West Virginia.

On or about the night of February 21, 2010, Petitioner, Darin Idris Drane was a patron of the aforementioned Club Venom. Sometime during the evening, an altercation allegedly occurred between Darin Idris Drane and an unidentified man<sup>1</sup>. During the altercation, the unidentified man allegedly grabbed a gun from his waist and fired inside Club Venom. The altercation and subsequent shooting resulted in three Venom patrons, including Petitioner, Darin Idris Drane, receiving gunshot wounds.

The applicable Max Specialty insurance policy for Venom, Inc., Policy Number MAX012700001936 [hereinafter “the Policy”], was a renewal policy effective from 08/21/2009 through 03/23/2010. (Appendix, 37-57). 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 for “Assault or Battery.” (Appendix, 39). However, it also includes an endorsement for “Limited Assault or Battery Coverage.” (Appendix, 40). The “Limited Assault or Battery Coverage” endorsement provides coverage up to limits of \$25,000.00.

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<sup>1</sup> Upon information and belief, the identity of the “unidentified man” is presently unknown to all parties and to law enforcement.

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, 1-26). 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, 109-124). 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." Thereafter, Petitioner noticed his appeal.

#### IV. SUMMARY OF ARGUMENT

The Circuit Court did not err in holding that the subject policy's "Limited Assault or Battery" endorsement is applicable to this case, and limits the insurance coverage available relative to the underlying incident to \$25,000.00. The language of the applicable policy of insurance is clear and

unambiguous. In making its decision, the Circuit Court relied upon well established law set forth by this Honorable Court in a number of published opinions on insurance policy and contract interpretation.

In his appeal brief, the Petitioner attempts to muddy the waters by presenting arguments based upon the policy's "intentional acts exclusion." The subject policy's "intentional acts exclusion" is not at issue in this matter. The Circuit Court, in its analysis of the underlying facts and subject insurance policy, was asked to interpret the policy's "Limited Assault or Battery" endorsement, not the "intentional acts exclusion." As such, any argument regarding the "intentional acts exclusion" is completely misplaced. Simply put, the language of the "Limited Assault or Battery Endorsement" is clear and unambiguous and limits all claims arising in this case to coverage of \$25,000.00.

## **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 Plain and Unambiguous Language of the Insurance Contract Limits Coverage for Damages Arising from Assault or Battery to \$25,000.00.**

Petitioner’s entire argument ignores the plain language of the subject insurance policy. “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).

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.

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.” Moreover, pursuant to the plain language of the insurance contract, coverage is excluded for such liability regardless of the cause of the “assault, battery, or physical altercation.” In fact, the exclusion expressly states that coverage for this type of liability is excluded “[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.” The contract language is clear. The policy simply does not provide coverage for damages arising from assault, battery, or physical altercation. This is true regardless of whether the damages sound in negligence, intentional tort, or some combination thereof.

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 Coverages.” The “Limited Assault or Battery Coverages” Endorsement to the subject policy states as follows:

**LIMITED ASSAULT OR BATTERY COVERAGES**

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE  
READ IT THOROUGHLY.**

This endorsement modifies the insurance provided under  
the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART  
COMMERCIAL UMBRELLA LIABILITY COVERAGE  
PART  
LIQUOR LIABILITY COVERAGE FORM**

**Schedule**

<b>LIMITES [sic] OF INSURANCE</b>	<b>PREMIUM</b>
\$25, 000 <u>Per Event</u>	\$300
\$25, 000 <u>Aggregate</u>	

For the above premium, the MXG108-Assault or Battery Exclusion is inapplicable; the Limit of Insurance shown in the above schedule applies.

**1. COVERAGE-LIMITED ASSAULT COVERAGE**

We will pay those sums 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;

- a) Whether or to 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, or, near, or away from an insured’s premises, or
- b) Whether or not caused by or arising out of an insured’s failure to properly supervise or keep an insured’s premises in a safe condition, or
- c) Whether or not caused by or arising out of an 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.
- d) 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.

**LIMITS OF INSURANCE**

The most we pay under the COMMERCIAL GENERAL LIGILITY 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.

**DEFINITIONS:** [sic]  
(For purposes of this endorsement)

“**Assault**” means any attempt or 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.

No other obligation or liability to pay sums or performs acts or services is covered

**All other policy terms, exclusions and conditions remain the**

**same.**

Thus, any liability arising from “assault, battery, or physical altercation” is provided only limited coverage pursuant to the clear and unambiguous language of the subject policy’s “Limited Assault or Battery Coverages.” Moreover, 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.” In fact, 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 negligent, reckless, or wanton conduct by an insured, an insured’s employees, patrons or other persons.” The contract language is clear. The “Limited Assault or Battery Coverages” 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.

**C. The Limited Assault or Battery Coverage Endorsement is Applicable to the Underlying Claims for Gun-Shot Injuries.**

The undisputed facts of the underlying claims are essentially as follows: (1) a gun was fired at Club Venom; (2) as a result of a gun being fired at Club Venom, certain individuals were injured with gun-shot wounds; (3) the individuals injured with gun-shot wounds now seek legal remedies from Club Venom; (4) Club Venom seeks coverage under its policy of insurance. Given these undisputed facts, there is no question that the “Limited Assault or Battery Coverages” Endorsement is triggered, and coverage is thereby limited to \$25,000.00.

Under the clear language of the policy, the gun-shot wounds are damages arising from a battery. “Battery” is defined by the policy 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.” Because the gun-shot wounds in this matter are: (1) a use of force against a person without his or her consent; and (2) entail an injury whether or not the injury is intended or expected, the gun-shot wounds arise from battery pursuant to the unambiguous language of the insurance contract. Moreover, the gun-shot wounds are included in the final clarifying sentence stating that battery includes the use of a weapon.

Petitioner argues that his allegations of negligence do not trigger the subject Endorsement. 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 applicable “Limited Assault or Battery Coverages” Endorsement. The subject Endorsement clearly states that the insurer 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...” (**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.

In fact, the subparagraphs of the “Limited Assault or Battery Coverages” Endorsement reinforce the idea that the limitation on coverage applies regardless of the circumstances leading to the insured’s legal obligation to pay damages. The plain language of the Endorsement states that the limited coverage of \$25,000.00 applies whether or not “caused by or arising out of an insured’s failure to properly supervise or keep an insured’s premises in a safe condition, or... caused by or arising out of an insured’s act or omission in connection with the prevention, suppression, failure to

warn... including but not limited to, negligent hiring, training, and/or supervision.” Moreover, the subparagraphs plainly state that the limited coverage of \$25,000.00 applies 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.”

“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).

“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 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 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 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.

**D. The Limited Assault or Battery Coverage Endorsement Limits Coverage to \$25,000.00. Petitioner’s Arguments Relative to the Intentional Acts Exclusion are Misplaced and Irrelevant.**

Petitioner spends a great portion of his appeal brief analyzing coverage from the perspective of an intentional acts exclusion. The Respondent does not seek limitation of coverage stemming from an intentional acts exclusion. Instead, the circuit court has held that coverage is limited pursuant to the plain language of the “Limited Assault or Battery Coverages” Endorsement. The subject Endorsement is not an intentional acts exclusion. The subject Endorsement, by its own plain and unambiguous language, contemplates limited coverage for damages arising from assault, battery, or physical altercation, whether or not those damages arise from negligent or intentional acts. Therefore, Petitioner’s arguments are improperly framed, misguided, and wholly irrelevant to the issue before this Honorable Court.

Similarly, Petitioner’s citation of Columbia Casualty Co. v. Westfield Ins. Co., 617 S.E.2d 797 (W.Va. 2005), is misplaced. No analysis is being performed from the standpoint of the unknown shooter. Instead, the analysis of the subject insurance policy language is entered into from the perspective of, Venom, the insured. This is the only manner in which such analysis can be accomplished. This is because the analysis necessarily contemplates the plain and unambiguous contract language agreed to by the insured.

As referenced above, claims for assault or battery are typically exempted from coverage in the subject insurance policy. However, in this case, the insured contracted for “Limited Assault or Battery Coverages.” It is under the “Limited Assault or Battery Coverages” that any coverage is available whatsoever. Therefore, an analysis of the policy language from the standpoint of the insured includes the fact that the insured paid an extra \$300.00 as an insurance premium in exchange for the specific “Limited Assault or Battery Coverages” Endorsement. The plain and unambiguous language of the subject Endorsement, set forth above, is applicable in this matter, and represents the contracted for coverage specifically purchased by the insured.

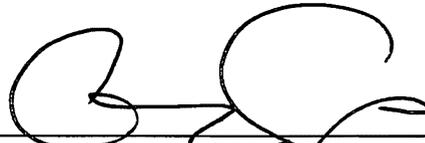
## VII. CONCLUSION

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 Coverages” Endorsement. The subject “Limited Assault or Battery Coverages” 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 Coverages” Endorsement, whether or not the shooting incident is considered an accident, or an intentional act. The “Limited Assault or Battery Coverages” Endorsement operates independently of any “intentional acts exclusion,” and the Circuit Court appropriately analyzed the policy’s plain language from the standpoint of the insured. 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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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.**

**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 **22nd day of July, 2013.**

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