

No. 16-0290

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,

Petitioner and Plaintiff Below,

v.

**TARA CLENDENEN, JAMES CLENDENEN,
MARY A. NEESE, Administratrix and Personal Representative
of the Estate of Skyler Neese, deceased,
DAVID NEESE, and MARY A. NEESE, individually,**

Respondents and Defendants Below.

AND

ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,

Petitioner and Plaintiff Below,

v.

**MARY A. NEESE, Individually and as Administratrix of the Estate of Skyler Neese,
DAVID NEESE, TARA CLENDENEN, and PATRICIA SHOAF,**

Respondents and Defendants Below.

**PETITIONER AMERICAN NATIONAL PROPERTY AND CASUALTY
COMPANY'S BRIEF REGARDING CERTIFIED QUESTIONS**

Civil Action Nos. 1:14-cv-155 and 1:14-cv-172
In the United States District Court for the Northern District of West Virginia
(Honorable Irene M. Keeley, Judge)

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE AND BACKGROUND1

 A. THE *NEESE COMPLAINT*3

 B. THE ANPAC HOMEOWNER’S POLICY4

 C. THE DECLARATORY JUDGMENT ACTION6

 D. THE QUESTIONS CERTIFIED8

II. SUMMARY OF ARGUMENT8

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....12

IV. ARGUMENT12

 A. THE UNAMBIGUOUS INTENTIONAL/CRIMINAL INJURY EXCLUSIONS IN THE ANPAC HOMEOWNER’S POLICY PRECLUDE COVERAGE FOR TARA CLENDENEN FOR THE CLAIMS MADE IN THE *NEESE COMPLAINT*.....12

 QUESTION CERTIFIED: Applying West Virginia public policy and rules of contract construction, do the unambiguous exclusions in American National’s policy for bodily injury or property damage “which is expected or intended by any insured even if the actual injury or damage is different than expected or intended,” and “arising out of any criminal act committed by or at the direction of any insured,” . . . preclude liability coverage for insureds who did not commit any intentional or criminal act?

 1. THE INTENTIONAL/CRIMINAL INJURY POLICY EXCLUSIONS ARE UNAMBIGUOUS13

 2. WEST VIRGINIA RULES OF INSURANCE CONTRACT CONSTRUCTION REQUIRE THAT THE UNAMBIGUOUS EXCLUSION BE APPLIED AS WRITTEN.....14

 3. APPLICATION OF THE UNAMBIGUOUS EXCLUSION TO PRECLUDE LIABILITY COVERAGE FOR INSURED WHO DID NOT COMMIT ANY INTENTIONAL OR CRIMINAL ACT DOES NOT OFFEND WEST VIRGINIA PUBLIC POLICY18

 B. THE SEVERABILITY CLAUSE DOES NOT “PREVAIL” OVER UNAMBIGUOUS POLICY EXCLUSIONS23

 QUESTION CERTIFIED: If so, do the unambiguous severability clauses in the insurance policies, which state that the insurance applies separately to each insured, prevail over the exclusions and require the insurers to apply the exclusions separately to each insured, despite the intentional and criminal actions of co-insureds?

 1. THE SEVERABILITY CLAUSE DOES NOT APPLY TO “ANY INSURED” EXCLUSIONS, SUCH AS THE INTENTIONAL/CRIMINAL INJURY EXCLUSIONS.....24

2. THE SEVERABILITY CLAUSE DOES NOT CREATE AN AMBIGUITY WHEN
COMBINED WITH THE INTENTIONAL/CRIMINAL INJURY EXCLUSIONS.....26

3. THE SEVERABILITY CLAUSE DOES NOT “PREVAIL” OVER THE
INTENTIONAL/CRIMINAL INJURY EXCLUSIONS33

V. CONCLUSION36

TABLE OF AUTHORITIES

Cases

Allen v. Commercial Casualty Ins. Co., 131 N.J.L. 475, 37 A.2d 37 (1944)19

Allstate Ins. Co. v. Kim, 121 F.Supp.2d 1301 (D.Haw. 2000)..... 11, 27, 31-33

Am. Family Mut. Ins. Co. v. Copeland-Williams, 941 S.W.2d 625 (Mo.App. 1997)27

Am. Family Mut. Ins. Co. v. Corrigan, 697 N.W.2d 108 (Iowa 2005)..... 14, 21, 27, 30-31

Am. Family Mut. Ins. Co. v. Mission Med. Group, 72 F.3d 645 (8th Cir. 1995)..... 13-14

Am. Family Mut. Ins. Co. v. Wheeler, 287 Neb. 250, 842 N.W.2d 100 (2014)..... 10-12, 24, 35

Am. Family Mut. Ins. Co. v. White, 204 Ariz. 500, 65 P.3d 449 (Ariz.App. 2003).....27

Am. States Ins. Co. v. Surbaugh, 231 W. Va. 288, 745 S.E.2d 179 (2013).....15

Argent v. Brady, 386 N.J.Super. 343, 901 A.2d 419 (App.Div. 2006).....25, 26

Bailey v. Lincoln General Ins. Co., 255 P.3d 1039 (Colo. 2011).....22

BP Am., Inc. v. State Auto Property & Cas. Ins. Co., 148 P.3d 832 (Okla. 2005),
as corrected, (Oct. 30, 2006).....27, 34

California Cas. Ins. Co. v. Northland Ins. Co., 48 Cal.App.4th 1682,
56 Cal.Rptr.2d 434 (1996)27, 32

Chacon v. Amer. Family Mut. Ins. Co., 788 P.2d 748 (Colo. 1990).....10, 16, 22, 27, 29, 30, 33

Cherrington v. Erie Ins. Prop & Cas. Co., 231 W. Va. 470, 745 S.E.2d 508 (2013)10, 11, 14

Co-operative Ins. Companies v. Woodward, 191 Vt. 348, 45 A.3d 89 (2012).....13, 21, 26

Cordle v. General Hugh Mercer Corp., 174 W. Va. 321, 325 S.E.2d 111 (1984).....19

EMCASCO Ins. Co. v. Diedrich, 394 F.3d 1091 (8th Cir. 2005)14

Farmers' & Merchants' Bank v. Balboa Insurance Co., 171 W. Va. 390, 299
S.E.2d 1 (1982)17

Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Assn.,
117 F.3d 1328 (11th Cir. 1997)27

Gorzen v. Westfield Ins. Co., 207 Mich.App. 575, 526 N.W.2d 43 (1994).....27

Great Cent. Ins. Co. v. Roemmich, 291 N.W.2d 772 (S.D. 1980).....27

Hensley v. Erie Insurance Co., 168 W. Va. 172, 283 S.E.2d 227 (1981).....20

Horace Mann Ins. Co. v. Leeber, 180 W. Va. 375, 376 S.E.2d 581 (1988)..... 10, 18-21

J.G. v. Wangard, 313 Wis.2d 329, 753 N.W.2d 475 (2008)26

Johnson v. Allstate Ins. Co., 687 A.2d 642 (Me. 1997).....26, 27, 34

Keffer v. Prudential Ins. Co. of America, 153 W. Va. 813, 172 S.E.2d 714 (1970).....14

<i>Kemper Nat. Ins. Companies v. Heaven Hill Distilleries, Inc.</i> , 82 S.W.3d 869 (Ky. 2002)	17-18
<i>McCauley Ents., Inc. v. New Hampshire Ins. Co.</i> , 716 F.Supp. 718 (D.Conn. 1989)	27
<i>Michael Carbone, Inc. v. Gen. Acc. Ins. Co.</i> , 937 F.Supp. 413 (E.D.Pa. 1996).....	27
<i>Minkler v. Safeco Ins. Co. of America</i> , 232 P.3d 612 (Cal. 2010).....	34
<i>Mut. of Enumclaw Ins. Co. v. Cross</i> , 103 Wash.App. 52, 10 P.3d 440 (2000).....	26, 27
<i>Natl. Ins. Underwriters v. Lexington Flying Club, Inc.</i> , 603 S.W.2d 490 (Ky.App. 1979)	24
<i>National Mutual Insurance Co. v. McMahon & Sons, Inc.</i> , 177 W. Va. 734, 356 S.E.2d 488 (1987)	11, 14
<i>Neuman v. Mauffray</i> , 771 So.2d 283 (La. App. 1 st Cir. 2000).....	17
<i>N. Sec. Ins. Co. v. Perron</i> , 172 Vt. 204, 777 A.2d 151 (2001)	13
<i>Northwest G.F. Mut. Ins. Co. v. Norgard</i> , 518 N.W.2d 179 (N.D. 1994)	24, 25, 27, 34
<i>Oaks v. Dupuy</i> , 653 So.2d 165 (La.App. 1995).....	27
<i>Perkins v. Shaheen</i> , 867 So.2d 135 (La. App. 3 rd Cir. 2004).....	16-18
<i>Polan v. Travelers Ins. Co.</i> , 156 W. Va. 250, 192 S.E.2d 481 (1972).....	14
<i>Postell v. Am. Family Mut. Ins. Co.</i> , 823 N.W.2d 35 (Iowa 2012).....	10, 34
<i>Potesta v. United States Fidelity & Guaranty Co.</i> , 202 W. Va. 308, 504 S.E.2d 135 (1998).....	11, 14
<i>Rich v. Allstate Ins. Co.</i> , 191 W. Va. 308, 445 S.E.2d 249 (1994).....	10, 17, 19-21
<i>Safeco Ins. Co. of Am. v. White</i> , 122 Ohio St.3d 562, 913 N.E.2d 426 (2009).....	26
<i>Sayre ex rel. Estate of Culp v. State Farm Fire & Cas. Co.</i> , No. 11-0962, 2012 WL 3079148 (W.Va. Supreme Court, May 25, 2012) (memorandum decision)	25
<i>SECURA Supreme Ins. Co. v. M.S.M.</i> , 755 N.W.2d 320 (Minn.Ct.App. 2008).....	26-29, 33
<i>Shamblin v. Nationwide Mutual Ins. Co.</i> , 175 W. Va. 337, 332 S.E.2d 639 (1985)	9, 17, 20
<i>Soliva v. Shand, Morahan & Co., Inc.</i> , 176 W. Va. 430, 345 S.E.2d 33 (1986)	11, 14-15, 34
<i>Standard Fire Ins. Co. v. Proctor</i> , 286 F.Supp.2d 567 (D.Md. 2003).....	29, 33
<i>Tennant v. Smallwood</i> , 211 W. Va. 703, 568 S.E.2d 10 (2002)	14
<i>Travelers Indem. Co. v. Bloomington Steel & Supply Co.</i> , 718 N.W.2d 888 (Minn. 2006)	28
<i>Tynes v. Supreme Life Insurance Co.</i> , 158 W. Va. 188, 209 S.E.2d 567 (1974).....	17
<i>W. Virginia Fire & Cas. Co. v. Stanley</i> , 216 W. Va. 40, 602 S.E.2d 483 (2004).....	15

Statutes and Regulations

W. VA. CODE § 51-1A-1 et seq.8

Rules

W.VA.R.A.P. 18(a)12

W.VA.R.A.P. 20.....12

Secondary Sources

2 COUCH ON INS. § 22:31 17-18

3 Windt, INSURANCE CLAIMS AND DISPUTES (6th Ed.), Section 11:8.....11, 16, 35

Appleman, INSURANCE LAW AND PRACTICE § 7004 (rev. ed. 1981)22

Randall, *Redefining the Insurer's Duty to Defend*, 3 CONN. INS. L. J. 221 (1996/1997).....15

**PETITIONER AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY'S
BRIEF REGARDING CERTIFIED QUESTIONS**

For the better part of a century, the law of West Virginia has required unambiguous terms in a written contract to be applied by the courts – not construed. This Honorable Court has consistently applied this principle of contract law to the questions of coverage and indemnification under insurance contracts issued in this State, including homeowner's policies. American National Property and Casualty Company ("ANPAC") asks nothing more than adherence to this well-settled principle of West Virginia insurance law when addressing the two (2) questions certified by the United States District Court for the Northern District of West Virginia. Application of the admittedly unambiguous provisions of the ANPAC policy in question requires that the subject terms be applied to negate coverage and the duty to defend under the policy and the certified questions answered accordingly.

By contrast, Respondents seek a results-oriented approach that would have this Court abandon this most basic of principles and rewrite the unambiguous terms of the insurance agreement in their favor. They ask this Court to answer the certified questions in such a way as to manufacture coverage where none exists for the sole purpose of providing a source of compensation for a tragic event. In this respect, they would have West Virginia become an outlier by ignoring the majority rule, the plain language and meaning of the policy terms and requiring the Petitioners to insure claims for bodily injuries caused by the intentional and criminal acts of insureds.

I. STATEMENT OF THE CASE AND BACKGROUND:

This case arises from a declaratory judgment action instituted by ANPAC seeking a declaration that it does not have a duty to defend or indemnify Tara Clendenen with regard to the

claims being asserted against her in a wrongful death action filed in the Circuit Court of Monongalia County, West Virginia. [AR15]. As noted in the Order of Certification entered by the Northern District of West Virginia, ANPAC seeks declaratory judgment that Mrs. Clendenen, its insured, is not covered under her homeowner's insurance policy and that ANPAC has no duty to defend or indemnify her in the state court action. [AR524].

A dreadful murder took place. A grieving family now seeks civil justice from not only the perpetrators of the crime but their families, as well. But the issue before this Honorable Court is not whether the family of Skylar Neese, a teenage girl taken from this world far too early, is deserving of justice. The issue before this Court concerns the law of defense and indemnity under a clear and unambiguous insurance contract. The questions certified by the United States District Court for the Northern District of West Virginia involve the interplay between two (2) unambiguous terms in separate homeowner's policies of insurance: the intentional/criminal injury exclusion and the severability clause. Though it may get obscured by the tragic circumstances that led to this lawsuit, the central issue at hand is rather simple – whether an insurance company can be required to provide defense and indemnification for an additional insured where the policy clearly and unequivocally excludes coverage for bodily injuries “expected or intended by any insured” or “arising out of any criminal act committed by or at the direction of any insured.” While West Virginia has yet to weigh in on the issue, the majority of jurisdictions to address these questions have consistently answered them in such a way as to deny coverage where, as here, the underlying injury was intentionally and/or criminally inflicted by an insured under the policy. Notwithstanding the heartbreaking story that gave rise to the underlying complaint, the fact is that the homeowner's policies purchased by the Respondents did not afford coverage for damages stemming from murder.

A. THE *NEESE COMPLAINT*.

There is no denying that the normally quiet community of Monongalia County was rocked in early 2013, when it was discovered that Skylar Neese, a University High School student missing since the night of July 5, 2012, had been brutally murdered by her friends and teenage classmates. Sheila Eddy and Rachel Shoaf ultimately confessed to the crime, including the grisly details. Sheila pled guilty to first degree murder and was sentenced to life in prison with mercy. [AR17]. Rachel pled guilty to second degree murder and was sentenced to 30 years in prison. [AR17].

Following the guilty pleas of Sheila and Rachel, the family of Skylar Neese initiated a wrongful death lawsuit on June 4, 2014. *Mary A. Neese, Administratrix and Personal Representative of the Estate of Skylar A. Neese, Deceased, and David B. Neese and Mary Neese, Individually, v. Sheila Eddy, Rachel Shoaf, Tara Clendenen and Patricia Shoaf*, in the Circuit Court of Monongalia County at Civil Action No. 14-C-487 (“the *Neese Complaint*”). [AR91-100]. The Complaint in the tort case spells out in explicit details the method and manner of the crime and the role each party is alleged to have had in the wrongful death of Skylar Neese.

The *Neese Complaint* starts with the allegation that Sheila and Rachel devised a plan to kill Skylar. [AR95]. According to the Complaint, Sheila and Rachel arranged to meet Skylar after her work shift on July 5, 2012. *Id.* That night, Skylar “snuck out of her home” and got into the vehicle with Sheila and Rachel. *Id.* The teenage girls then drove to a rural spot across the Pennsylvania line, parked, exited the vehicle and began to smoke marijuana. *Id.* When Skylar had her back turned, according to the allegations, Sheila and Rachel took out knives they had concealed on their persons and “violently and repeatedly stabbed Skylar A. Neese in the neck and back, producing fatal injuries.” [AR96]. In their Complaint, Mr. and Mrs. Neese assert a

wrongful death claim based upon the intentional and criminal conduct of Sheila and Rachel. They specifically allege that, during the early morning hours of July 6, 2012, Sheila Eddy and Rachel Shoaf “willfully, maliciously, deliberately, and unlawfully murder[ed] and kill[ed] Skylar A. Neese.” [AR96].

Count III of the *Neese Complaint* asserts a claim against Tara Clendenen and Patricia Shoaf for negligent supervision of their then-minor daughters, Sheila and Rachel. As the federal court concluded, the *Neese Complaint* notably does not allege that Mrs. Clendenen or Mrs. Shoaf were part of the plan or had any reason to know of the same. [AR507]. Instead, they allege that, as the parent guardian and custodian of Sheila, Mrs. Clendenen was negligent and careless in her supervision and guidance of her daughter. [AR98-100]. They allege in collective terms that Mrs. Clendenen and Mrs. Shoaf failed to monitor the girls’ activities, behavior and whereabouts and “negligently and unwittingly” provided the “instruments, weapons, opportunities, and means” necessary to harm Skylar. [AR99; AR507]. The Neeses claim that, due to the negligence of the respective mothers, Sheila and Rachel had “the opportunity and means” to carry out their plan, “ultimately resulting in the death of Skylar A. Neese.” [AR99-100]. The Neeses seek wrongful death damages arising from the murder of Skylar Neese from Sheila Eddy, Rachel Shoaf, Tara Clendenen and Patricia Shoaf. [AR97; AR98; AR100].

B. THE ANPAC HOMEOWNER’S INSURANCE POLICY.

In July 2012, Tara Clendenen, who was residing with her husband, James Clendenen, was an insured under a homeowner’s insurance policy issued by ANPAC to James Clendenen. [AR16] Sheila Eddy, who pled guilty to first degree murder in the death of Skylar Neese, was also an insured under the ANPAC homeowner’s policy issued to James Clendenen, as she was a minor in the care of Tara Clendenen during that time period. [AR70]. Mrs. Clendenen requested

that ANPAC provide defense and indemnification with respect to the claims asserted in the *Neese Complaint*. [AR90]. ANPAC agreed to provide a defense to Mrs. Clendenen in the *Neese* action pursuant to a reservation of rights. [AR18; AR523].

The insurance policy at issue, ANPAC Homeowner's Policy number 47-H-761-55L-3, provides in pertinent part, as follows:

SECTION II—LIABILITY COVERAGES

Coverage E—Personal Liability

If a claim is made or a suit is brought against any **insured** for damages because of **bodily injury** or **property damage** to which this coverage applies, we will:

- a. pay up to our **limit of liability** for the damages for which the insured is legally liable; ...

Coverage F—Medical Payments to Others

We will pay the necessary medical expenses incurred or medically ascertained within three years from the date of an accident causing **bodily injury**. Medical expenses mean reasonable charges for medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, prosthetic devices, and funeral services.

[AR20; AR81-82]. The policy also provides certain conditions and limitations under the liability section of the policy as follows:

SECTION II—CONDITIONS

- a. **Limit of Liability.** Regardless of the number of insureds, claims made or persons injured, our total liability under Coverage E for all damages resulting from any one **occurrence** shall not exceed the **limit of liability** for Coverage E stated in the **Declarations**. ...
- b. **Severability of Insurance.** This insurance applies separately to each **insured**. This condition shall not increase our limit of liability for any one **occurrence**.

[AR21; AR85].

The homeowner's policy also states that the coverage provided by Coverages E and F is subject to the following exclusions, among others:

SECTION II EXCLUSIONS

1. **Coverage E—Personal Liability and Coverage F—Medical Payments to Others** do not apply to bodily injury or property damage:
 - a. Which is expected or intended by any insured even if the actual injury or damage is different than expected or intended;

 - p. Arising out of any criminal act committed by or at the direction of any insured;

[AR21; AR82-83] (emphasis added). Punitive and exemplary damages are also excluded under Coverage E. [AR84].

C. THE DECLARATORY JUDGMENT ACTION.

ANPAC filed a declaratory judgment action in the United States District Court for the Northern District of West Virginia seeking a determination that the homeowner's insurance policy does not provide coverage for the claims being asserted in the *Neese Complaint* and that ANPAC has no duty to defend or indemnify Eddy or Clendenen in the *Neese* case. [AR15; AR524]. In its declaratory judgment action, ANPAC also sought a ruling as to coverage under a separate automobile policy issued by ANPAC to James Clendenen but not covering the automobile operated by Sheila Eddy on the night in question. [AR16; AR23]. Petitioner Erie Insurance Property and Casualty Company ("Erie"), which issued a homeowner's insurance policy insuring Patricia and Rachel Shoaf and automobile policies insuring various automobiles owned by the Shoafs and Clendenens, filed its own declaratory judgment action. [AR104]. The actions were consolidated by the federal court. [AR269].

ANPAC and Erie filed motions for summary judgment in the consolidated declaratory judgment action, seeking application of the respective intentional/criminal injury exclusions as

plainly written. [AR296; AR316]. The Neese Respondents filed a response and cross-motion for summary judgment. [AR347]. The Clendenen Respondents filed a response and joined in the Neese cross-motion. [AR377]. Respondent Patricia Shoaf filed a response to Erie's motion for summary judgment [AR386] and cross-motion for summary judgment against Erie. [AR383]. Respondents conceded the respective automobile policies did not afford coverage for the claims in the *Neese Complaint*. [AR358; AR387; AR527]. Respondents also conceded that Sheila Eddy and Rachel Shoaf were not entitled to defense and indemnification because of their criminal actions. [AR357-358; AR527]. But Respondents argued for coverage for Tara Clendenen and Patricia Shoaf for their alleged negligent acts. [AR349; AR378-381; AR387-389]. The Neeses, in particular, argued that the severability clause created an ambiguity in the insurance agreements. [AR349-50; AR362-364]. The Clendenens joined in that argument. [AR379-382].

In its ruling on the respective motions, the District Court concluded that (1) the death of Skylar Neese was an "occurrence" from the perspective of Tara Clendenen and Patricia Shoaf, (2) under the respective exclusions, Sheila Eddy and Rachel Shoaf were not entitled to defense and indemnification for their intentional, criminal acts, (3) as conceded by the parties, the respondents were not entitled to coverage under any of the automobile insurance policies, (4) neither Patricia nor Rachel Shoaf are entitled to defense and indemnification under the personal injury portion of the Erie homeowner's policy, and (5) the "language of the exclusions and severability clauses in the relevant homeowner's policies is not ambiguous." [AR518; AR526-527].

Nevertheless, finding that "[i]t is unclear how, under its public policy and rules of contract construction, West Virginia would prioritize the exclusions and severability clauses ... to determine whether coverage is available to Mrs. Shoaf and Mrs. Clendenen in the state court

action,” the federal court decided to certify questions to this Honorable Court pursuant to the Uniform Certification of Questions of Law Act, W. VA. CODE § 51-1A-1 et seq. [AR519; AR528].

D. THE CERTIFIED QUESTIONS.

QUESTION CERTIFIED: Applying West Virginia public policy and rules of contract construction, do the unambiguous exclusions in American National’s policy for bodily injury or property damage “which is expected or intended by any insured even if the actual injury or damage is different than expected or intended,” and “arising out of any criminal act committed by or at the direction of any insured,” . . . preclude liability coverage for insureds who did not commit any intentional or criminal act?¹

QUESTION CERTIFIED: If so, do the unambiguous severability clauses in the insurance policies, which state that the insurance applies separately to each insured, prevail over the exclusions and require the insurers to apply the exclusions separately to each insured, despite the intentional and criminal actions of co-insureds?

II. SUMMARY OF ARGUMENT:

It is precisely because the claims for wrongful death damages in the *Neese Complaint* are all inextricably tied to the intentional criminal conduct of Sheila Eddy, an insured under the ANPAC policy, and public policy favors application of unambiguous intentional/criminal injury exclusions as written, that ANPAC respectfully submits that the first certified question must be answered in the affirmative. The second certified question must be answered in the negative because the severability clause in the ANPAC policy does not conflict with application of the intentional/criminal injury exclusions as written. To hold otherwise would do violence to the

¹ ANPAC is addressing each certified question in relation to the language of the policy it issued to Mrs. Clendenen. Erie has submitted a separate Brief in which it is anticipated that it will address the portion of each question addressed to the language of its policy.

plain language of the insurance policy and the intent of the parties without furthering the historical purpose of the severability condition.

Distilled to its essence, the first certified question asks whether West Virginia public policy or rules of statutory construction prohibit an exclusion that unambiguously denies coverage to all insureds for bodily injuries caused by the intentional and/or criminal act of any one of them. Utilizing the well-settled rules of contract construction in West Virginia and applying public policy, the first certified question must be answered in the affirmative. ANPAC's policy explicitly prohibits liability coverage for a bodily injury claim that "is expected or intended by *any insured*" or "arising out of any criminal act by or at the direction of *any insured*." Application of this unambiguous language precludes coverage to any ANPAC insured for claims of bodily injury arising from intentional and/or criminal conduct an insured, irrespective of whether the particular insured seeking coverage committed the intentional or criminal act resulting in the bodily injury. The focus is on the nature of the injuries claimed, not the actions of the insured seeking coverage. Just as standard homeowner's policies exclude coverage for punitive or exemplary damages, the exclusions at issue in this case remove from coverage any claims for bodily injuries that resulted from the intentional or criminal conduct of an insured.

The most fundamental of insurance contract rules in West Virginia is that plain and unambiguous provisions that are not contrary to statute, regulation or public policy will be applied and not construed. Syl. Pt. 2, *Shamblin v. Nationwide Mutual Ins. Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985). The federal District Court has already determined that the subject ANPAC policy exclusions are unambiguous. And, this Court has previously held that intentional injury exclusions and exclusions that remove a whole class of injuries from coverage are

consistent with the public policy of this State, even when the outcome deprives innocent victims of compensation. *See, e.g., Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988); *Rich v. Allstate Ins. Co.*, 191 W. Va. 308, 445 S.E.2d 249 (1994). *See also, Chacon v. Amer. Family Mut. Ins. Co.*, 788 P.2d 748, 750 (Colo. 1990) (intentional injury exclusions are consistent with public policy). To answer the first question in the negative and hold otherwise would negate the plain, ordinary, unambiguous meaning of the policy exclusions, rewrite the terms of the policy, and reject the long standing rule of construction that “language in an insurance policy should be given its plain, ordinary meaning.” *Cherrington v. Erie Ins. Prop & Cas. Co.*, 231 W.Va. 470, 745 S.E.2d 508 (2013)(internal citations omitted).

ANPAC submits that the second certified question must be answered in the negative for two (2) reasons. First, the severability condition and the exclusions do not conflict. Even if the severability clause requires insurers to apply policy provisions separately to each insured, the net effect of the intentional/criminal injury exclusion is still a negation of coverage. The majority of courts across the Country addressing the impact of severability clauses on exclusionary language utilizing “an insured” or “any insured” have concluded that the severability clause has no bearing on the application of the exclusionary language. *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 46-47 (Iowa 2012). The severability clause requires the insurance to be applied separately to each insured, but it does not alter the plain language of the exclusion or create ambiguity in its application. *Am. Family Mut. Ins. Co. v. Wheeler*, 287 Neb. 250, 255, 842 N.W.2d 100, 105 (2014). The result is the same because, as discussed above, the “any insured” exclusions preclude coverage for a class of damages, whether the insured seeking coverage is alleged to have committed an intentional or negligent act. Holding otherwise would artificially manufacture an ambiguity to provide coverage that does not otherwise exist.

The second reason is that answering the question in the affirmative would not only run counter to the purpose of the severability clause but also require this Court to rewrite the plain language of an unambiguous insurance provision. The severability clause was created to apply to exclusions referencing “the insured,” such as employee exclusions or workers’ compensation exclusions. See, *Wheeler*, 287 Neb. at 260-61, 842 N.W.2d at 107-08, citing 3 Windt, INSURANCE CLAIMS AND DISPUTES (6th Ed.), Section 11:8. The clause is “intended to afford each insured a full measure of coverage up to the policy limits, not to negate the policy’s intentional acts exclusion.” *Allstate Ins. Co. v. Kim*, 121 F. Supp 2d 1301, 1308 (D. Haw. 2000). The majority of courts addressing such a clause in connection with an exclusionary clause worded “any insured” or “an insured” have held that the exclusionary clauses expresses a contractual intent to create joint obligations and preclude coverage to innocent co-insureds, despite the presence of a severability clause. *Id.*

West Virginia law requires that insurance policies be read in such a way as to give full effect to unambiguous terms as written, avoid absurd results and ambiguities or torturing the language to create ambiguities. *Cherrington v. Erie Ins. Prop & Cas. Co.*, 231 W. Va. 470, 745 S.E.2d 508, 524 (2013); *Soliva v. Shand, Morahan & Co., Inc.*, 176 W.Va. 430, 432-33, 345 S.E.2d 33, 34-35 (1986), *overruled on other grounds by National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. United States Fidelity & Guaranty Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998); *Payne v. Weston*, 195 W.Va. 502, 466 S.E.2d 161 (1995).

Simply put, reading the severability clause as having no effect on the “any insured” intentional/criminal injury exclusions is the only reasonable way to read the policy consistent with the majority rule and West Virginia insurance law. Applying the ANPAC policy separately

to each insured, as required by the severability clause, does not change the exclusionary language, its meaning, or its application. Because the “any insured” exclusions are unambiguous, whether James Clendenen, Tara Clendenen, or Sheila Eddy read the same through his/her individual lens, each would necessarily appreciate the fact that the exclusions are intended to preclude coverage for a bodily injury claim arising from the intentional or criminal conduct of one or more of them. By contrast, to answer the second certified question in the affirmative would not only run counter to the purpose of the severability clause but “would render the ... ‘any’ language superfluous, while adopting the majority position would not.” *Wheeler*, 287 Neb. at 260-61, 842 N.W.2d at 107-08.

To be faithful to the public policy and rules of construction of West Virginia, ANPAC respectfully submits that the first certified question must be answered in the affirmative and the second certified question in the negative.

III. STATEMENT REGARDING ORAL ARGUMENT:

Pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure, ANPAC respectfully submits that oral argument is appropriate in this case under Rule 20 of the Rules of Appellate Procedure as it involves matters of first impression and fundamental public importance as to the rules of construction, issues of public policy and the interplay of two (2) unambiguous insurance terms, and at least one prior ruling of this Honorable Court.

IV. ARGUMENT:

A. THE UNAMBIGUOUS INTENTIONAL/CRIMINAL INJURY EXCLUSIONS IN THE ANPAC HOMEOWNER’S POLICY PRECLUDE COVERAGE FOR TARA CLENDENEN FOR THE CLAIMS MADE IN THE *NEESE COMPLAINT*.

QUESTION CERTIFIED: Applying West Virginia public policy and rules of contract construction, do the unambiguous exclusions in American National’s policy for bodily injury or property damage “which is expected or intended by any insured even if the actual injury or damage is different

than expected or intended,” and “arising out of any criminal act committed by or at the direction of any insured,” . . . preclude liability coverage for insureds who did not commit any intentional or criminal act?

1. THE INTENTIONAL/CRIMINAL INJURY POLICY EXCLUSIONS ARE UNAMBIGUOUS.

As the Order of Certification provides and the first certified question indicates, the United States District Court for the Northern District of West Virginia explicitly found both the exclusions and the severability clause to be unambiguous. [AR515-16; AR527]. The exclusions explicitly remove “bodily injury or property damage . . . [w]hich is expected or intended by any insured . . . [or] [a]rising out of any criminal act committed by or at the direction of any insured” from coverage under the Personal Liability and Medical Payments Coverage sections of the ANPAC homeowner’s policy. [AR21; AR82-82] (emphasis added).

Not only is it readily apparent that the language used is plain and easily understood, this “any insured” language has been held unambiguous by numerous courts across the country. The Supreme Court of Vermont noted that,

where a policy excludes coverage when “an insured” commits an intentional act, the exclusion applies to “all claims which arise from the intentional acts of any one insured, even though the claims are stated against another insured.” . . . [T]here is no “meaningful difference” between the terms “an insured” and “any insured.”

Co-operative Ins. Companies, 191 Vt. at 355, 45 A.3d at 94, quoting *N. Sec. Ins. Co. v. Perron*, 172 Vt. 204, 777 A.2d 151, 163 (2001) (“courts have uniformly concluded that the exclusion applies to all claims which arise from the intentional acts of any one insured, even though the claims are stated against another insured”); accord *Am. Family Mut. Ins. Co. v. Mission Med. Group*, 72 F.3d 645, 648 (8th Cir. 1995) (intentional acts exclusion barred coverage for negligent supervision claim against parent, citing cases from California, Florida, and Michigan law “applying the exclusion to a co-insured who has not participated in the underlying intentional

act”); *EMCASCO Ins. Co. v. Diedrich*, 394 F.3d 1091, 1096-97 (8th Cir. 2005) (where one insured intended the injury, the plain language of the intentional acts exclusion applied to preclude coverage for the negligence claims against the other insureds). The same is true for similar criminal acts exclusion language. *See, e.g., American Family Mut. Ins. Co. v. Corrigan*, 697 N.W.2d 108, 116 (Iowa 2005) (“[the insurer’s] use of the term ‘any insured’ in its criminal acts exclusion unambiguously convey[ed] an intent to exclude coverage when recovery is sought for bodily injury proximately caused by the criminal act of *any* insured.”) (emphasis in original).

**2. WEST VIRGINIA RULES OF INSURANCE CONTRACT
CONSTRUCTION REQUIRE THAT THE UNAMBIGUOUS EXCLUSION
BE APPLIED AS WRITTEN.**

This Court has stated that “determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.” Syl. Pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002). Insurance policies are construed according to the express language set forth therein and the “[l]anguage in an insurance policy should be given its plain, ordinary meaning.” *Cherrington v. Erie Ins. Prop & Cas. Co.*, 231 W. Va. 470, 486, 745 S.E.2d 508, 524 (2013) *citing*, Syl. Pt. 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W.Va. 430, 345 S.E.2d 33 (1986), *overruled on other grounds by National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. United States Fidelity & Guaranty Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998). *Accord Polan v. Travelers Ins. Co.*, 156 W.Va. 250, 255, 192 S.E.2d 481, 484 (1972). “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.” *Cherrington, supra*, quoting, Syl., *Keffer v. Prudential Ins. Co. of America*, 153 W.Va. 813, 172 S.E.2d 714 (1970). In *Soliva*, this Court pointed to four (4) rules of construction.

(1) The contract should be read as a whole with all policy provisions given effect. *See generally 2 Couch on Insurance 2d* § 15:29 (rev. ed. 1984). If the policy as a whole is unambiguous then the insured will not be allowed to create an ambiguity out of sections taken out of context.

(2) The policy language should be given its plain, ordinary meaning. *See, e.g., Adkins v. American Casualty Co.*, 145 W.Va. 281, 285, 114 S.E.2d 556, 559 (1960). In no event should the plain language of the policy be twisted or distorted. *See Green v. Farm Bureau Mut. Auto. Ins.*, 139 W.Va. 475, 477, 80 S.E.2d 424, 425 (1954). A doubt which would not be tolerated in other kinds of contracts will not be created merely because the contract is one of insurance. *See generally 2 Couch on Insurance 2d* § 15:86 (rev. ed. 1984).

(3) A policy should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties. *See, e.g., Thompson v. State Auto. Mut. Ins.*, 122 W.Va. 551, 554, 11 S.E.2d 849, 850 (1940).

(4) If, after applying the above rules, reasonably prudent and intelligent people could honestly differ as to the interpretation of the contract language, then an ambiguity will be said to exist. *See syl. pt. 1, Prete v. Merchants Property Ins.*, 159 W.Va. 508, 223 S.W.2d 441 (1976); *2 Couch on Insurance 2d* § 15:84 (rev. ed. 1984). Any ambiguity in an insurance contract will be interpreted against the insurer unless it would contravene the plain intent of the parties. *See, e.g., syl. pt. 2, Marson Coal Co. v. Insurance Co. of Pa.*, 158 W.Va. 146, 210 S.E.2d 747 (1974).

Soliva, at 432-33, 345 S.E.2d at 34-35. *See also, Payne v. Weston*, 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995) (“a court should read policy provisions to avoid ambiguities and not torture the language to create them”) (citations and internal quotations omitted); *Am. States Ins. Co. v. Surbaugh*, 231 W. Va. 288, 292-93, 745 S.E.2d 179, 183-84 (2013). “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.” *Id.*, at 295, 745 S.E.2d at 186.

Looking at the “four corners” of the *Neese Complaint*,² it is undeniable that the actions of Sheila Eddy were intentional and criminal, and that the bodily injury and death of Skylar Neese

² In West Virginia, the insurer’s duty defined by the allegations in the “four corners” of the complaint compared with the “four corners” of the insurance policy. *W. Virginia Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 55-56, 602 S.E.2d 483, 498-99 (2004), (citing Randall, *Redefining the Insurer’s Duty to Defend*, 3 CONN. INS. L. J. 221, 226 (1996/1997)).

was the result of intentional and criminal activity. The *Neese Complaint* alleges that Sheila Eddy, the daughter of Tara Clendenen, along with Rachel Shoaf “willfully, maliciously, deliberately, and unlawfully” murdered and killed Skylar Neese. [AR95-96].

Relevant to this discussion, however, is the fact that the *Neese Complaint* does not assert separate injuries resulting from the alleged negligent acts of Tara Clendenen. Rather, the assertion is that Tara Clendenen negligently supervised her daughter and as a result thereof, Sheila Eddy had the “opportunity and means” to “inflict fatal injuries upon Skylar A. Neese.” [AR98-100]. The *Neese Complaint* requests recovery for one injury – the death of Skylar A. Neese. Thus, it is beyond dispute that all of the claims against Tara Clendenen in the *Neese Complaint* seek damages for a bodily injury that was intentionally and criminal inflicted by an ANPAC insured and, therefore, come within the language of the unambiguous exclusions.

The clear intent of the unambiguous intentional/criminal injury exclusions is to preclude coverage for such damages, irrespective of the theory of liability. As the Supreme Court of Colorado stated, “[t]he majority of courts which have considered this issue have held that ‘unlike the phrase, “the insured,” the phrase “any insured” unambiguously expresses a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured.’” *Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 751 (Colo. 1990), quoting *Sales v. State Farm Fire & Cas. Co.*, 849 F.2d 1383, 1385 (11th Cir. 1988). *See also* 3 Windt, *INSURANCE CLAIMS AND DISPUTES* (6th Ed.), Section 11:8 (“The fact remains, however, that as applied even independently to each insured, an “any insured” exclusion unambiguously eliminates coverage for each and every insured.”).

In a similar case, the Court of Appeals of Louisiana found that homeowner and farm liability policies excluded coverage for the parents’ alleged negligent supervision of their minor

child who threw another minor through a plate glass window. *See, Perkins v. Shaheen*, 867 So.2d 135 (La. App. 3rd Cir. 2004). The policies at issue excluded from coverage bodily injury “resulting from intentional acts or directions by you or any insured.” *Id.* at 137. In holding the exclusionary language applied to the negligent supervision claim, the Court noted that the “exclusionary clause is not restricted to intentional acts of the particular insured sought to be held liable, but it is broad enough to exclude coverage for any loss intentionally caused, or at the direction of, an insured person...” *Id.* at 139, citing *Neuman v. Mauffray*, 771 So. 2d 283 (La. App. 1st Cir. 2000). The *Perkins* Court also explained the purpose of the intentional acts exclusion:

The focus of the policy exclusion is on the cause of the damages, not the cause of action alleged. All damages caused by intentional acts are excluded, regardless of the classification of the cause of action against the individual defendants. [The plaintiff] cannot avoid the consequences of the policy language by attempting to couch her allegations against the [defendant parents] as negligent, rather than intentional.

Id. (emphasis added).

“Where provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed.” Syl. Pt. 2, *Shamblin v. Nationwide Mutual Ins. Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985), quoting, Syl., *Farmers’ & Merchants’ Bank v. Balboa Insurance Co.*, 171 W.Va. 390, 299 S.E.2d 1 (1982), quoting Syl., *Tynes v. Supreme Life Insurance Co.*, 158 W.Va. 188, 209 S.E.2d 567 (1974). *See also*, Syl. Pt. 1, *Rich v. Allstate Ins. Co.*, 191 W. Va. 308, 445 S.E.2d 249 (1994). More importantly, “the rule that exceptions to and limitations upon the coverage otherwise provided by an insurance contract will be strictly construed against the insurer will not overcome plain contract language.” 2 COUCH ON INS. § 22:31 (emphasis added), citing, *Kemper Nat. Ins. Companies v. Heaven Hill Distilleries, Inc.*, 82

S.W.3d 869 (Ky. 2002) (Strict construction of policy exclusions should not overcome plain, clear language resulting in a strained or forced construction.).

The clear intent of the intentional/criminal injury exclusions is to preclude coverage for injuries that arise from intentional or criminal conduct of any insured, including negligence claims against other insureds, such as the claim against Tara Clendenen. It is undisputed that, no matter the theory of liability, the Neese family is making a claim for the same wrongful death damages against both Sheila and her mother, Tara. The focus of the criminal acts and intentional acts exclusions is on the cause of the damages, not the negligent supervision and negligent entrustment causes of actions alleged against Tara Clendenen. *Perkins*, 867 So.2d at 139. As all such bodily injury claims arise from the intentional and criminal conduct of Sheila Eddy, an **insured** under the policy, the exclusions preclude coverage for any of the claims.

Moreover, since the exclusionary language is admittedly unambiguous and plainly states that bodily injury is excluded from coverage when it results from intentional acts or arises out of the criminal acts of “any insured,” strict construction against ANPAC is not an issue. *See*, 2 COUCH ON INS. § 22:31, *supra*. Accordingly, the two applicable policy exclusions operate to prohibit coverage for the Neese’s claims against Tara Clendenen and ANPAC has no duty to defend or indemnify Tara Clendenen.

3. APPLICATION OF THE UNAMBIGUOUS EXCLUSION TO PRECLUDE LIABILITY COVERAGE FOR INSUREDS WHO DID NOT COMMIT ANY INTENTIONAL OR CRIMINAL ACT DOES NOT OFFEND WEST VIRGINIA PUBLIC POLICY.

In fact, quite the opposite is true. As this Court observed some years ago, intentional injury exclusions and exclusions that remove a whole class of injuries from coverage are consistent with the public policy of this State, even where the result of the same is to deprive innocent victims of compensation. *See, e.g., Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375,

376 S.E.2d 581 (1988); *Rich v. Allstate Ins. Co.*, 191 W. Va. 308, 445 S.E.2d 249 (1994). In

Rich, this Court observed that:

‘Much has been written by text writers and by the courts as to the meaning of the phrase “public policy.” All are agreed that its meaning is as “variable” as it is “vague,” and that there is no absolute rule by which courts may determine what contracts contravene the public policy of the state. The rule of law, most generally stated, is that “public policy” is that principle of law which holds that “no person can lawfully do that which has a tendency to be injurious to the public or against public good * * *” even though “no actual injury” may have resulted therefrom in a particular case “to the public.” It is a question of law which the court must decide in light of the particular circumstances of each case.

The sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government-with us-is factually established.’

Id., at 311, 445 S.E.2d at 252 (1994), quoting, *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 321, 325, 325 S.E.2d 111, 114 (1984), (quoting *Allen v. Commercial Casualty Ins. Co.*, 131 N.J.L. 475, 37 A.2d 37, 38-39 (1944)).

Nearly thirty (30) years ago, this Court found intentional injury exclusions to be consonant with West Virginia public policy in *Horace Mann*. In that opinion, this Court held that, because the policy contained an “intentional injury” exclusion, the insurer did not have duty to defend or to pay damages on behalf of an insured teacher who was sued for having sexual contacts with a minor student. *Horace Mann*, 180 W. Va. at 380, 376 S.E.2d at 586. The exclusion at issue in the Horace Mann homeowner’s insurance policy provided that: “This policy does not apply to liability ... caused intentionally by or at the direction of any insured[.]” *Id.*, at 377, 376 S.E.2d at 583. The Court discussed the majority viewpoint employing an objective test to reject an alleged duty to defend and pay in sexual misconduct liability cases and the minority

view that applied a subjective test to require a duty to defend unless the actor actually intended to cause the specific injury. *Id.*, at 380, 376 S.E.2d at 586.

This Court rejected the minority viewpoint, including its justification of providing a potential source of compensation for the injured person, by noting that “[t]his Court has recognized, however, that ‘[m]ost courts conclude that it is against public policy to permit insurance coverage for a purposeful or intentional tort [, meaning a tort involving the intent to act and to cause some harm].’” *Id.* at 380, 376 S.E.2d at 586, quoting *Hensley v. Erie Insurance Co.*, 168 W.Va. 172, 178, 283 S.E.2d 227, 230 (1981). Following the majority view, this Court found the act was “inherently injurious,” applied the exclusion and held that the insurer owed no duty to defend and indemnify the insured. *Horace Mann*, at 380-81, 376 S.E.2d at 586-87.

In *Rich*, this Court found that the so-called “family exclusion” was not void as against public policy. *Rich*, 191 W. Va. at 311, 445 S.E.2d at 252. A minor child residing in the insured household was injured while riding a lawnmower and suit was brought against the insured grandparent for negligence. *Id.* at 309-10, 445 S.E.2d at 250-51. The subject Allstate homeowner’s policy excluded from coverage claims for bodily injury to an “insured person ... whenever any benefit of this coverage would accrue directly or indirectly to an insured person.” *Id.* at 310, 445 S.E.2d at 251. Applying the exclusion, the trial court granted summary judgment to Allstate in the declaratory judgment action. The guardian of the minor child appealed. *Id.* at 309, 445 S.E.2d at 250.

The guardian argued that the exclusion violated the public policy of this State to protect the interests of minor children. *Id.* at 310, 445 S.E.2d at 251. This Court determined the exclusion to be unambiguous and, in accord with the rules of construction from *Shamblin*, would be applied, not construed, absent some legislative or public policy violation. This Court

determined there was no statutory prohibition against the exclusion. “There is no legislative declaration regarding the requirements of homeowner’s insurance coverage. Therefore, the parties must rely exclusively upon the policy language in order to determine whether there is coverage in this instance.” *Id.* And, though it was an issue of first impression in West Virginia, this Court concluded that the “family exclusion” had been held “not to be violative of public policy in other jurisdictions,” *Id.* at 310-11, 445 S.E.2d at 251-52, and that the “appellant has failed to establish that the exclusionary language within the homeowner’s insurance policy tended to be ‘injurious to the public or against public good.’” *Id.* at 311, 445 S.E.2d at 252. Hence, the Court held that that the exclusion was valid in West Virginia.

We, therefore, are of the opinion that such exclusionary language, in the absence of any sort of legislative mandate, is valid and not contrary to the state’s public policy. In the absence of such legislative mandate, the parties are free to accept or reject the insurance contract and the risks provided for therein.

Id.

The public policy stance in *Horace Mann* and *Rich* remains the majority rule in the country. Whether the insured seeking coverage is accused of intentional, criminal or just negligent conduct, unambiguous intentional/criminal injury exclusions have been held consistent with public policy in other jurisdictions.

Importantly, the complaint claims fault against homeowner for negligent supervision of her now ex-husband, but father does not allege injuries that are “distinct from those associated with [uncle’s] intentional and criminal conduct.”... Public policy weighs against coverage for such damages where the parties likely did not contemplate that the insurance policy would cover sexual abuse of children.

Co-operative Ins. Companies v. Woodward, 191 Vt. 348, 354 n.1, 45 A.3d 89, 93 n.1 (2012).
See also, Corrigan, 697 N.W.2d at 117 (“Although insurance policies are interpreted favorably toward the insured, this rule applies only when there is an ambiguity in the policy, and we have

found none here.... No statute, rule, or prior decision of this court has been identified that would make the insurance policy provisions at issue here against public policy.”).

Rejecting the proposition that a criminal acts exclusion in an excess insurance policy was void as against public policy, the Supreme Court of Colorado noted that:

There are multiple, competing public-policy principles animating Colorado’s insurance laws: not only is it the public policy of this state to protect tort victims, but it is also the public policy of this state to provide insurers and insureds the freedom to contract, allowing insurers to shift risk based on their insureds’ misconduct, especially when that misconduct significantly increases the risk of insurers’ liability and may be encouraged by indemnification.

Bailey v. Lincoln General Ins. Co., 255 P.3d 1039, 1046-47 (Colo. 2011). *See also, Chacon*, 788 P.2d at 750 (Colo. 1990)(“An insurance policy is a contract which should be interpreted consistently with the well settled principles of contractual interpretation.... This approach acknowledges that: ‘[A]n insurance contract is a mutual agreement, ratified by the insured by his acceptance, both parties are bound by its provisions, unless waived or annulled for lawful reasons. In the absence of statutory inhibition, an insurer may impose any terms and conditions consistent with public policy which it may see fit.”), quoting Appleman, *INSURANCE LAW AND PRACTICE* § 7004, at 37–39 (rev. ed. 1981) (footnotes omitted).

The same analysis applies here. The ANPAC policy issued to James Clendenen and providing coverage to Tara Clendenen and Sheila Eddy, contains exclusions that apply to restrict the risks being insured as to each of them. Once such exclusion is the punitive damages exclusion. [AR84]. Another is the intentional/criminal injury exclusion found in Section II – Exclusions of the ANPAC homeowner’s policy. [AR21; AR82-83]. The mistake Respondents make is a textual one. They would have this Court rewrite the exclusions to focus on the acts of the insured seeking coverage, Mrs. Clendenen, when, as noted above, the exclusions apply by explicit terms to exclude a specific class of injury. Respondents would have this Court rewrite

the exclusion to substitute “the insured” for the plain unambiguous phrase, “any insured.” This would fundamentally alter the risks being insured and would be contrary to the plain intent of the policy as a whole. To rewrite the policy in this way would force an insurer, such as ANPAC, to cover an injury intentionally and criminally caused by one of its insureds. In this particular case, it would require ANPAC to provide coverage for intentional homicide, or murder. The first certified question is easily answered in the affirmative because the correct application of the exclusions is to exclude coverage where, as in this case, the *injury* underlying the tort lawsuit was undeniably caused by the intentional and criminal acts of an insured.

B. THE SEVERABILITY CLAUSE DOES NOT “PREVAIL” OVER UNAMBIGUOUS POLICY EXCLUSIONS.

QUESTION CERTIFIED: If so, do the unambiguous severability clauses in the insurance policies, which state that the insurance applies separately to each insured, prevail over the exclusions and require the insurers to apply the exclusions separately to each insured, despite the intentional and criminal actions of co-insureds?

The answer is, “No.” The severability, or separation of insureds, clause contained in the ANPAC policy conditions does not alter or in any way negate the effect of the intentional/criminal injury exclusions to exclude coverage for the claims asserted against Tara Clendenen in the *Neese Complaint*. Simply put, the severability clause is not in conflict with the intentional/criminal injury exclusions. The two (2) provisions co-exist.

The law of West Virginia requires a construction that avoids absurdity and the alteration of the plain language and intent expressed thereby. Given its intent to apply to exclusions using the phrase “the insured” or “insured,” the severability clause has no effect on “any insured” exclusions. Likewise, application of the “any insured” exclusions to broadly preclude a class of injury from coverage for all insureds does not affect the severability clause. By contrast, permitting the severability provision to “prevail” in the manner contemplated by the Respondents

would require the elimination of terms from the policy. It would fly in the face of the public policy concerns identified above and, in essence, require that the phrase “any insured” be replaced with “the insured,” something definitely not contemplated by the insuring agreement.

1. **THE SEVERABILITY CLAUSE DOES NOT APPLY TO “ANY INSURED” EXCLUSIONS, SUCH AS THE INTENTIONAL/CRIMINAL INJURY EXCLUSIONS.**

As the Supreme Court of North Dakota declared in *Northwest G.F. Mut. Ins. Co. v. Norgard*, 518 N.W.2d 179 (N.D. 1994), “the purpose of severability clauses is to spread protection, to the limits of coverage, among all of the ... insureds. The purpose is not to negate bargained-for exclusions which are plainly worded.” *Id.* at 183, quoting, *Natl. Ins. Underwriters v. Lexington Flying Club, Inc.*, 603 S.W.2d 490, 492 (Ky.App. 1979). The clause originated in the 1950s in response to court decisions “expanding” the employee exclusion in automobile liability policies (intended to reflect the availability of worker’s compensation coverage for employees of the insured) beyond the scope intended by the drafters. As the Supreme Court of Nebraska explained, the clause is intended to affect those exclusions that use the phrase, “the insured,” such that other insureds under the same policy would still enjoy coverage for claims made, for example, by the employees of co-insureds.

Severability clauses are common in insurance contracts, as is this particular language. Historically, severability clauses became part of the standard insurance industry form contract in 1955 to clarify “ ‘what insurance companies had intended all along, namely that the term “the insured” in an exclusion refer[red] merely to the insured claiming coverage.’ ”

Wheeler, 287 Neb. at 255, 842 N.W.2d at 105.

The severability clause was never intended to (nor does it) afford additional coverage or nullify existing exclusions. “The severability clause is not denominated a ‘coverage provision,’ and it would be unreasonable to find that it operated independently in that capacity to increase

the insurance afforded under the insuring provisions of the policy, or to partially nullify existing coverage exclusions.” *Argent v. Brady*, 386 N.J. Super. 343, 355, 901 A.2d 419, 427 (App. Div. 2006).

As far as the undersigned has been able to determine, this Court has only addressed the severability clause in one prior opinion, essentially agreeing with the reasoning in *Norgard* and *Argent*. In *Sayre ex rel. Estate of Culp v. State Farm Fire & Cas. Co.*, No. 11-0962, 2012 WL 3079148 (W.Va. Supreme Court, May 25, 2012) (memorandum decision), the Estate of Linda Culp obtained judgment against the husband who killed her and attempted to collect on the judgment from the couple’s homeowner’s policy. State Farm denied coverage, citing the unambiguous family exclusion, which excluded claims for bodily injury to “you [the named insured] or any insured[.]” *Id.* at *1. The Estate argued that the presence of the severability clause created an ambiguity which defeated the family exclusion. The circuit court rejected that argument and granted summary judgment to State Farm. On appeal, this Court found no error, agreeing with the following analysis of the circuit court:

[The severability] clause appears to exist to potentially confer liability coverage to one insured even when another insured may not be entitled to liability coverage, where multiple insureds are alleged to be *liable* for one occurrence. In this case, there are no liability claims against the Estate of Linda Culp, and further, the Estate of Linda Culp could not be liable to itself; accordingly, the severability clause has no application.

Id. at *2 (emphasis in original). As the footnote explained, the circuit court was not required to address “additional policy exclusions that might apply.” *Id.* at *1 n.1.

Because the intentional/criminal injury exclusions in the subject ANPAC policy are unambiguous and explicitly exclude a class of damages from coverage, the severability clause is not in conflict with these exclusions.

2. THE SEVERABILITY CLAUSE DOES NOT CREATE AN AMBIGUITY WHEN COMBINED WITH THE INTENTIONAL/CRIMINAL INJURY EXCLUSIONS.

A majority of the courts addressing the issue agree. As the Supreme Court of Vermont recently observed, “[e]ven if each insured—in this case, uncle and homeowner—is treated as having separate coverage, the exclusionary language remains unambiguous because ‘an’ is collective. Father’s contention that the two provisions ‘simply cannot be reconciled’ is therefore without merit. A majority of courts reach the same result.” *Co-operative Ins. Companies v. Woodward*, 191 Vt. 348, 356, 45 A.3d 89, 95 (2012), citing, *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 329 (Minn.Ct.App. 2008) (“Use of the phrase ‘any insured’ in [insurer’s] severability clause does not create ambiguity when applying the exclusion.”); *J.G. v. Wangard*, 313 Wis.2d 329, 354-56, 753 N.W.2d 475, 488-89 (2008) (holding severability clause did not render “any insured” exclusion ambiguous); *Mut. of Enumclaw Ins. Co. v. Cross*, 103 Wash.App. 52, 62, 10 P.3d 440, 444-45 (2000) (holding that intentional acts exclusion was unambiguous and “clear and specific language in an exclusion prevails over a severability clause, i.e., that an exclusion is not negated by or rendered ambiguous by a severability clause”); *Johnson v. Allstate Ins. Co.*, 687 A.2d 642, 644 (Me. 1997) (Answering certified question by holding that the policy “unambiguously excluded” coverage for damages intentionally caused by any insured and “[a]n unambiguous exclusion is not negated by a severability clause.”). See also, *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 579-80, 913 N.E.2d 426, 440 (2009) (O’Donnell, J., concurring and dissenting) (“A majority of courts, however, have held that a severability clause does not create any ambiguity and does not alter the plain meaning and application of an any-insured exclusion.”).³

³ Citing, *J.G. v. Wangard*, 313 Wis.2d 329, 354-56, 753 N.W.2d 475, 488-89 (2008); *Argent v. Brady*, 386 N.J.Super. 343, 354-56, 901 A.2d 419, 426-27 (App.Div. 2006); *Am. Family Mut. Ins. Co. v.*

The West Virginia Supreme Court has not specifically addressed the issue raised in the second certified question. However, ANPAC offers the following small sample of opinions as persuasive authority from other jurisdictions explaining the majority viewpoint.

Rejecting a claim that the allegedly negligent parents should find coverage in a situation where their co-insured minor child attacked a neighbor, the Court of Appeals of Minnesota described in detail how the criminal acts exclusion and the severability clause can co-exist in a case eerily similar to the instant one. In *SECURA*, Patrick and Susan McArdle's fourteen (14) year old son, M.S.M., entered Jaclyn Larson's residence and repeatedly stabbed her with a knife that he received from his parents as part of a collection. *SECURA*, 755 N.W.2d at 322. Larson suffered grave injuries but recovered. *Id.* M.S.M. pleaded guilty and was convicted of attempted first-degree murder in a juvenile proceeding. *Id.* Larson sued the boy for negligence, or in the alternative, assault and battery, and the McArdles for negligent supervision and negligent entrustment of the knife used in the attack. *Id.* The McArdles tendered defense of the lawsuit to their homeowner's insurer, SECURA. The insurer refused to provide a defense to the son but defended the parents under a reservation of rights and instituted a declaratory judgment action based on the criminal acts exclusion in the policy. *Id.* The McArdles entered into a settlement with Larson and assigned their rights to contest SECURA's refusal to indemnify as part of the

Corrigan, 697 N.W.2d 108, 116–117 (Iowa 2005); *BP Am., Inc. v. State Auto Property & Cas. Ins. Co.*, 148 P.3d 832, 839-42 (Okla. 2005); *Am. Family Mut. Ins. Co. v. White*, 204 Ariz. 500, 507, 65 P.3d 449, 456 (Ariz.App. 2003); *Mut. of Enumclaw Ins. Co. v. Cross*, 103 Wash.App. 52, 62, 10 P.3d 440, 445 (2000); *Allstate Ins. Co. v. Kim*, 121 F.Supp.2d 1301, 1308 (D.Hawaii 2000); *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Assn.*, 117 F.3d 1328, 1336 (11th Cir. 1997) (Florida law); *Johnson v. Allstate Ins. Co.*, 687 A.2d 642, 644 (Me. 1997); *Am. Family Mut. Ins. Co. v. Copeland-Williams*, 941 S.W.2d 625, 629 (Mo.App. 1997); *Michael Carbone, Inc. v. Gen. Acc. Ins. Co.*, 937 F.Supp. 413, 420 (E.D.Pa. 1996); *California Cas. Ins. Co. v. Northland Ins. Co.*, 48 Cal.App.4th 1682, 1696–1697, 56 Cal.Rptr.2d 434 (1996); *Oaks v. Dupuy*, 653 So.2d 165, 168-169 (La.App. 1995); *Northwest G.F. Mut. Ins. Co. v. Norgard*, 518 N.W.2d 179 (N.D. 1994); *Gorzen v. Westfield Ins. Co.*, 207 Mich.App. 575, 578-579, 526 N.W.2d 43 (1994); *Chacon*, 788 P.2d at 752; *McCauley Ents., Inc. v. New Hampshire Ins. Co.*, 716 F.Supp. 718, 721 (D.Conn. 1989); *Great Cent. Ins. Co. v. Roemmich*, 291 N.W.2d 772, 774 (S.D. 1980).

settlement agreement. *Id.* The trial court granted the insurer's motion for summary judgment and Larson appealed. *Id.* at 323.

On appeal, the Court of Appeals observed that, under Minnesota law, unambiguous provisions in an insurance policy must be given their plain and ordinary meaning. *Id.* The Court of Appeals concluded that the criminal acts exclusion was unambiguous and applied to the claims against the McArdles.

Larson's injuries were undeniably causally connected to M.S.M.'s criminal conduct in attacking her. As such, Larson's injuries "result[ed] from" this criminal act, notwithstanding the fact that the McArdles' negligence may have also contributed to the same injuries. Accordingly, the district court correctly interpreted and applied this phrase in SECURA's policy to allow invocation of the criminal-act exclusion.

Id., at 327-28.

Addressing Larson's companion argument that the "any insured" language of the criminal acts exclusion was inconsistent with the severability clause, the Court of Appeals began by noting that, in contrast to the situation where the exclusion uses the phrase, "the insured," an exclusion that employs the phrase, "'any insured' or 'an insured' ... *unambiguously* excluded coverage' for the ['innocent' co-insured]." *Id.*, at 328, quoting, *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 895 (Minn. 2006). The Court went on to hold that,

A simple application of the policy reinforces our conclusion that no ambiguity is created when the two clauses interact. When applying the criminal-act exclusion to Patrick McArdle alone, as the severability clause requires, the plain and unambiguous result is the exclusion of coverage for Larson's negligence claim because the bodily injuries that her claim is premised on "result[ed] from" the "criminal acts" of "any insured," with the "any insured" being M.S.M. The same result occurs when the policy is applied separately to Suzanne McArdle. The act of applying the policy separately to each insured does not alter or create ambiguity in the substance or sweep of the exclusion. Because there is no ambiguity, there is no basis for application of the reasonable-expectation doctrine.

SECURA, 755 N.W.2d at 329. The Court of Appeals held that summary judgment was proper as to the parents' claim for coverage "[b]ecause the [criminal acts] exclusion precludes insurance coverage for Larson's injuries that she sustained when M.S.M. attacked her." *Id.*

In another case of assault and battery, the United States District Court for the Southern District of Maryland considered the interplay between the intentional injury exclusion and the severability clause in another homeowner's policy. *Standard Fire Ins. Co. v. Proctor*, 286 F.Supp.2d 567, 574-75 (D.Md. 2003). In *Proctor*, the victim, Kevin Lockhart, was involved in a minor traffic incident with Cornelius Proctor, his elderly neighbor. *Id.* at 568-69. During the encounter, Cornelius' son, Gary Proctor, entered the fray and began beating Mr. Lockhart, causing severe injuries to his face and loss of vision in his right eye. *Id.* at 569. Lockhart sued both men, alleging assault and battery against Gary and negligence against Cornelius. *Id.* The Proctor's homeowner's insurer brought a declaratory judgment action in federal court seeking a ruling as to its duty indemnify and/or defend the Proctors in the underlying lawsuit. *Id.* Finding that the severability clause did not prohibit the application of the intentional acts exclusion to the allegedly negligent co-insured, Cornelius, the *Proctor* Court agreed with the majority of jurisdictions and interpreted the phrase "'any insured' as unambiguously expressing 'a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured.'" *Id.* at 574-75, citing, *Chacon*, 788 P.2d at 751. Thus, the *Proctor* Court concluded that the "any insured" intentional acts exclusion precluded coverage for the allegedly negligent insured, where the bodily injuries resulted from the intentional acts of another co-insured. *Proctor*, 286 F.Supp.2d at 574-75.

The Supreme Court of Colorado's opinion in *Chacon* is often cited for the majority rule that a homeowner's policy which contained a severability clause and exclusion for intentional

acts committed by any insured precluded recovery by all insureds for the intentionally caused injuries. *Chacon*, 788 P.2d at 750-51. There, the Chacon's teenage son vandalized an elementary school. *Id.* at 749. The district's insurer sued the Chacon's for reimbursement of the costs of repair and the Chacon's sought coverage under their homeowner's policy. *Id.* The claim was denied on the basis of the intentional act exclusion. *Id.* The Chacon's brought an action against the insurer, with both the trial court and the appellate court ruling in favor of the carrier. *Id.* at 749-750. On appeal, the Supreme Court of Colorado noted the importance of the exclusion's reference to the actions of "any insured" versus the actions of "the insured" and concluded that exclusion "unambiguously expresses a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured." *Id.* at 751. The Court also rejected the Chacon's argument that application of the "any insured" intentional injury exclusion failed to give meaning to the severability clause. *Id.* at 752. The *Chacon* Court observed that a severability clause "is not inconsistent with the creation of a blanket exclusion for intentional acts." *Id.* at 752 n. 6. The *Chacon* Court concluded that

We find the reasoning of the majority of courts more persuasive ... because it considers and gives effect to all the policy provisions and recognizes that an insurance policy is a contract between the parties which should be enforced in a manner consistent with the intentions expressed therein. The inquiry is an objective one, focusing on what a reasonable person would have understood the contract to mean. Here, the policy provides that liability coverage does not apply to property damage "which is expected or intended by any insured." This provision clearly and unambiguously expresses an intention to deny coverage to all insureds when damage is intended or expected as a result of the actions of any insured.

Id. at 752.

The Supreme Court of Iowa, in *Corrigan*, also addressed the criminal act exclusion and whether the presence of a severability clause barred coverage for a co-insured's alleged negligent supervision of his son who had injured a child and pled guilty to child endangerment. *Corrigan*,

697 N.W.2d at 110. The *Corrigan* Court noted that the alleged acts of negligence by the father were not independent of the acts of the son, and that the negligent supervision claim against the father included as an element of proof the tort committed by the father's son. *Id.* at 112-13. Also important was the exclusion's use of the term "any insured" versus "the insured." The *Corrigan* Court stated that "the use of the term 'any insured' in its criminal acts exclusion unambiguously conveys an intent to exclude coverage when recovery is sought for bodily injury proximately caused by the criminal act of any insured." *Id.* at 116.

Finding that the severability of interest clause did not prohibit the application of the "any insured" exclusionary language to all insureds, the *Corrigan* Court also reasoned that interpreting the exclusion as only applicable where the insured seeking coverage had committed a criminal act would require the court to agree that "the insured" meant the same as "any insured." *Id.* The *Corrigan* Court concluded that, even though the severability of interest clause required reading of the criminal acts exclusion from the viewpoint of the father, "the plain language of the exclusion mandates" that consideration of whether the claims against the father "include as an element conduct by *any* insured that is a violation of the criminal law." *Id.* at 117. Given that the claim of negligent supervision against the father was "casually connected" to the co-insured son's criminal act, the claims were not distinct and severable. *Id.* The *Corrigan* Court concluded the bodily injury claims arose out of a violation of criminal law and were thereby excluded from coverage. *Id.*

Finally, in *Allstate Ins. Co. v. Kim*, the District Court of Hawaii addressed a similar situation where parents sought coverage for the negligence claims against them arising from an assault committed by their minor son. The court found coverage was precluded by the intentional injury exclusion even though the policy contained a limit of liability clause stating

“this insurance applies separately to each insured person.” *Kim*, 121 F.Supp.2d at 1307-08. The court observed that the intentional injury exclusion was consistent with the “sound public policy that a wrongdoer should not profit from his own wrongdoing or be indemnified against the effects of his wrongdoing” and “public policy against insurance for losses resulting from such acts.” *Id.* at 1306-07. Determining that the limits of liability clause did not prevent application of the intentional acts exclusion to bar coverage for the alleged negligence of the parents, the *Kim* Court noted the provision, “was intended to afford each insured a full measure of coverage up to the policy limits, not to negate the policy’s intentional acts exclusion.” *Id.* at 1308. The court commented that “the majority of courts” have held that the “any insured” exclusion expresses a “contractual intent to create joint obligations and preclude coverage to innocent co-insureds,” despite the presence of a severability clause. *Id.* To hold otherwise “would effectively nullify exclusions from coverage in any case involving coinsured and a policy with a severability provision.” *Id.* at 1309.

The *Kim* Court further remarked that “[i]t is inconceivable that parties to a policy would include clauses specifically excluding coverage for claims based on certain types of conduct, but intend those exclusions to have no effect in any case involving claims against coinsured spouses.” *Id.*, quoting, *California Casualty Ins. Co. v. Northland Ins. Co.*, 48 Cal.App.4th 1682, 56 Cal.Rptr.2d 434, 442 (1996). To the contrary,

The plain, ordinary, and accepted sense in common speech meaning and interpretation of the exclusion clause is that it is a specific and tailored provision designed to notify the policy holders that they are not covered for any intentional or criminal act and to so limit coverage. The plain, ordinary meaning of the Limits of Liability Clause is that it spreads the protection of the insurance policy to all the insureds up to the policy limits and is not designed to negate the exclusions which are plainly worded.

Kim, 121 F.Supp.2d at 1309. Accordingly, the court concluded that the insurer had no duty to defend and indemnify parents in the negligence action. *Id.*

For the same reasons, the plain, ordinary and accepted common sense meaning of the two applicable exclusionary clauses contained in the ANPAC homeowner's policy preclude coverage to Tara Clendenen for bodily injury "which is expected or intended by any insured" or bodily injury "arising out of any criminal act committed by or at the direction of any insured." [AR21; AR82-83] (emphasis added). The presence of the severability of insurance clause does not negate these plainly worded blanket exclusions of distinct classes of injuries. The use of the term "any insured" "expresses a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured." *Chacon*, 788 P.2d 751.

Further, the negligent supervision and negligent entrustment claims advanced against Tara Clendenen in the *Neese* complaint are necessarily dependent on the conduct of Sheila Eddy. Just as the courts held in *SECURA*, *Proctor*, and *Chacon*, *Corrigan*, and *Kim*, even when applying the severability clause to the exclusions, the exclusionary language still prohibits coverage to allegedly negligent co-insured, Tara Clendenen. Given the fact that the damages claimed against Mrs. Clendenen all arose from the intentional and criminal conduct of Sheila Eddy, a co-insured, there is no coverage under the policy for Tara Clendenen.

3. THE SEVERABILITY CLAUSE DOES NOT "PREVAIL" OVER THE INTENTIONAL/CRIMINAL INJURY EXCLUSIONS.

While a severability clause can make it clear that the insurance policy applies separately to each insured, it cannot create coverage where none exists. To hold that a severability clause affords coverage in contravention of an "any insured" exclusion goes against the weight of authority and "requires the court to ignore and treat as superfluous, the term "any" in the policy language. It also ignores the purpose of the severability clause — to afford each insured a full

measure of coverage up to the policy limits, rather than to negate bargained-for and plainly-worded exclusions....” *BP America, Inc. v. State Auto Property & Cas. Ins. Co.*, 148 P.3d 832, 841 (Okla. 2005), as corrected, (Oct. 30, 2006) (footnotes omitted). *See also, Postell*, 823 N.W.2d at 46-47 (“We have already considered the question of what effect severability-of-interest clauses have on insurance policy exclusions. The answer—none.... Our rule remains consistent with the majority position of other jurisdictions”); *Norgard*, 518 N.W.2d at 183–84 (“To construe the severability clause to provide coverage in these circumstances is repugnant to the plainly-worded exclusion”); *Johnson*, 687 A.2d at 645 (limiting the effect of exclusions on the basis of severability clauses “ignores and does violence to the plain language of the insurance contract”); *Cross*, 103 Wash.App. at 62, 10 P.3d at 444-45 (“clear and specific exclusion language in an exclusion prevails over a severability clause, *i.e.*, that an exclusion is not negated by or rendered ambiguous by a severability clause”). *Cf., Minkler v. Safeco Ins. Co. of America*, 232 P.3d 612, 625 (Cal. 2010) (recognizing majority rule and collecting cases).

As this Court stated in *Soliva* and *Payne*, “[a] policy should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties,” *Soliva*, 176 W.Va. at 432-33, 345 S.E.2d at 34-35 (citations omitted), and “a court should read policy provisions to avoid ambiguities and not torture the language to create them.” *Payne*, 195 W.Va. at 507, 466 S.E.2d at 166 (citations and internal quotations omitted).

Only one interpretation of the ANPAC provisions gives effect to both the exclusions and the severability clause. Reading the severability clause as applying only to “the insured” or “insured” and having no effect on the joint obligations expressed by the “any insured” exclusions avoids ambiguity in the reading of the ANPAC policy and is the only way to avoid torturing the language of the policy. In this way, the clause preserves the application of such terms and

obligations and the policy as a whole to cover those risks intended to be insured. By contrast, reading the policy provisions in such a way as to have the severability clause “prevail” over the “any insured” exclusions would impermissibly rewrite the word “any” out of the exclusions and add coverage for risks not intended to be covered.

Adopting the majority position, the Supreme Court of Nebraska summed up the reasons why this Honorable Court should follow suit.

Our goal in interpreting insurance policy language is to give effect to each provision of the contract. Adopting the minority position would render the “an” or “any” language superfluous, while adopting the majority position would not. Further, we do not agree with the ... argument that the majority position renders the severability clause meaningless. First, the severability clause affects the interpretation of exclusions referencing “the insured.” There are such exclusions in these policies, such as the “Illegal Consumption of Alcohol” exclusion. And second, ... the severability clause still has application outside of its role in interpreting the scope of exclusions. Here, the exclusions (generally speaking) bar coverage for injuries intentionally caused by “any insured”.... The meaning of that language is plain. We hold that a severability clause stating that the insurance “applies separately to each insured” does not change that language, its meaning, or its application.... We conclude that the severability clause does not affect the unambiguous language of the policies’ exclusions, which bar coverage for [the insured].

Wheeler, 287 Neb. at 260-61, 842 N.W.2d at 107-08 (footnotes omitted), citing 3 Windt, INSURANCE CLAIMS AND DISPUTES (6th Ed.), Section 11:8 n.10 (citing to cases involving application of severability clause to completed operations hazard loss conditions, breach of warranty exclusions, and employee exclusions).

The severability of insurance condition in the ANPAC homeowner’s policy does not “prevail” over what the District Court has already determined are plain and unambiguous exclusions against claims for bodily injury arising from the intentional/criminal injury of “any insured.” The claims asserted against Tara Clendenen in the *Neese Complaint* are for the same injury – the death of Skylar Neese – caused by the intentional and criminal acts of Sheila Eddy,

an insured under the ANPAC policy. Therefore, this Court should join the majority of other courts to address the issue and find that the plain, ordinary meaning of the applicable exclusionary clauses bars coverage for the claims against Tara Clendenen and the severability of insurance condition does not alter or change that result.

V. CONCLUSION.

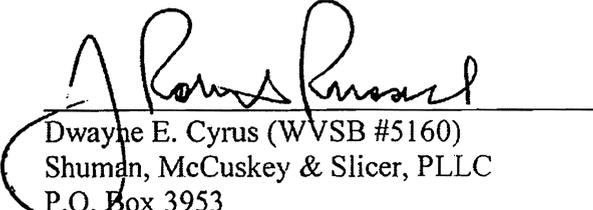
A tragic death occurred. Mary and David Neese suffered a terrible loss. But, a heartbreaking loss does not alter the plain and unambiguous provisions of a written insurance contract or provide coverage where it does not already exist. The simple fact is the Neeses seek the same wrongful death damages from Sheila Eddy, the convicted murderer and co-insured, that they seek from Tara Clendenen, the insured parent who was allegedly negligent in her supervision of Sheila, thereby giving Sheila the “means” and “opportunity” to murder the Neeses’ daughter.

In the underlying declaratory judgment action, the United States District Court for the Northern District of West Virginia has determined that the “any insured” intentional/criminal injury exclusions in the ANPAC homeowner’s policy issued to James Clendenen are unambiguous. These exclusions evidence a clear intent to preclude a whole class of injuries from coverage under the policy, no matter which insured is seeking coverage. Such blanket exclusions are consistent with the public policy of this State and the public policy to avoid indemnification or encouragement of intentional or criminal conduct that has been recognized by a majority of courts. The severability clause, having no effect on wholesale exclusions of categories of injury, does not conflict with the exclusions and, thus, does not prevail over the same. Accordingly, the law of West Virginia requires application of the plain language of the policy as written in order to give full effect to its intent.

The law of this State, the rules of insurance contract construction and the public policy issues involved all dictate that the first question certified by the federal court be answered in the affirmative and the second question be answered in the negative.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2016, I served true and correct copies of the foregoing "*American National Property And Casualty Company's Brief Regarding Certified Questions*" on the following counsel of record by electronic mail and United States mail, first class, postage paid, and addressed as follows:

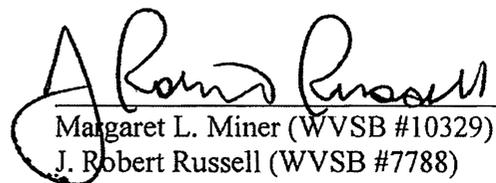
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