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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 16-0290

AMERICAN NATIONAL PROPERTY  
AND CASUALTY COMPANY

*Petitioner,*

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

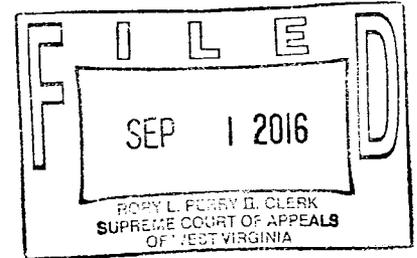
ERIE INSURANCE PROPERTY AND  
CASUALTY COMPANY,

*Petitioner,*

v.

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

*Respondents.*



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**REPLY BRIEF OF PETITIONER  
ERIE INSURANCE PROPERTY AND CASUALTY COMPANY**

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## I. INTRODUCTION

Petitioner Erie Insurance Property and Casualty Company (“Erie”) submits this reply brief on two questions certified by the Northern District of West Virginia. This Court should answer the first question in the affirmative and hold that, upon applying West Virginia public policy and rules of contract construction, the unambiguous exclusion for bodily injury “expected or intended by ‘anyone we protect’” in Erie’s homeowner insurance policy precludes coverage for the claim of negligent supervision in the underlying case brought by Respondents Mary A. Neese, individually and as administratrix of the Estate of Skylar Neese, and David Neese against Respondent Patricia Shoaf, who is Erie’s insured, because the murder of Skylar Neese was expected or intended by Rachel Shoaf, who is a co-insured. The Court has applied family exclusions and similar exclusions, which exclude coverage for an innocent insured based on the acts of a co-insured, in a homeowner or umbrella policy. In addition, the Court has applied intentional acts exclusions to torts based on intentional acts even when the claims are couched in terms of negligence. Moreover, the majority of jurisdictions to consider the question apply exclusions similar to the exclusion in Erie’s policy to preclude coverage to an insured based on the intentional or criminal acts of a co-insured.

The Court should further answer the second question in the negative and hold that the unambiguous severability clause in Erie’s policy does not prevail over the unambiguous intentional acts exclusion and require Erie to apply the exclusion separately to each insured as if each was the only insured, despite the intentional and criminal acts of Rachel Shoaf. The Court has held that a severability clause does not defeat a family exclusion. Moreover, the majority of jurisdictions to consider the question have held that a severability clause does not change the meaning of similar exclusions that preclude coverage for the intentional acts of any insured.

## II. ARGUMENT

### A. Applying West Virginia Public Policy and Rules of Contract Construction, the Unambiguous Exclusion in Erie's Policy for "Bodily injury, property damage, or personal injury expected or intended by 'anyone we protect' . . .," Precludes Liability Coverage for Insureds Who Did Not Commit any Intentional Act.

#### 1. West Virginia public policy and rules of construction allow courts to apply family exclusions and similar exclusions, which exclude coverage for an innocent insured based on the acts of a co-insured, in a homeowner or umbrella policy.

West Virginia public policy and rules of construction allow courts to apply family exclusions and similar exclusions, which exclude coverage for an innocent insured based on the acts of a co-insured, in a homeowner or umbrella policy. Respondents fail to distinguish *Rich v. Allstate Insurance Co.*, 191 W. Va. 308, 445 S.E.2d 249 (1994), *Sayre v. State Farm Fire & Casualty Co.*, No. 11-0962, 2012 WL 3079148 (W. Va. May 25, 2012), and *Berkhouse v. Great American Assurance Co.*, No. 13-0264, 2013 WL 6152414 (W. Va. Nov. 22, 2013), on this point. In *Rich*, this Court upheld the validity of an insurer's homeowner policy exclusion that excluded "'bodily injury to an insured person . . . whenever any benefit of this coverage would accrue directly or indirectly to *an insured person*.'" *Rich*, 445 S.E.2d at 251 (emphasis added). In that case, an insured person was defined in the policy as "'[the named insured] and, if a resident of your household: (a) any relative; and (b) any dependent person in your care.'" *Id.* The Court held that the language of the policy was clear and that it "unmistakably exclude[d] *any 'insured person'* from coverage for bodily injury." *Id.* (emphasis added). The Court expressly rejected an argument made by a minor child that the exclusionary language in the policy, particularly to the extent that it excluded coverage for a minor child in the care of the named insured, was contrary to the public policy of West Virginia. *Id.* The Court concluded:

We . . . 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.* at 252.

In *Sayre*, the Court upheld the validity of a family exclusion in a homeowner policy, which excluded liability coverage for bodily injury to “you [the named insured] *or any insured.*” *Sayre*, 2012 WL 3079148 at \*1 (emphasis added). Respondents’ attempt to distinguish *Sayre* insofar as it held that State Farm’s severability clause was inapplicable is unavailing as discussed below.

In *Berkhouse*, the Court held that an umbrella policy’s liquor liability exclusion, which excluded “[a]ny liability of *any ‘Insured,’*” excluded coverage for negligent training and supervision claims against the Charleston Moose Lodge. *Berkhouse*, 2013 WL 6152414 at \*4 (emphasis added).

*Rich* establishes that West Virginia public policy and rules of construction allow courts to apply unambiguous exclusions, which preclude coverage for bodily injury to *an insured person*, to preclude coverage for *any insured person*. *Sayre* applied an unambiguous exclusion for liability coverage for bodily injury to *any insured* to preclude coverage for a co-insured, and *Berkhouse* applied an unambiguous exclusion to preclude coverage for negligent training and supervision claims where the policy excluded liability of *any insured*. Read together, these cases irrefutably support the conclusion that West Virginia public policy and rules of contract construction allow courts to apply the unambiguous exclusion in Erie’s policy for “bodily injury, property damage, or personal injury expected or intended by ‘anyone we protect’ . . .,” to preclude liability coverage for the claim of negligent supervision against Patricia Shoaf in the underlying case based on the intentional act of Rachel Shoaf in murdering Skylar Neese.

2. **West Virginia public policy and rules of construction require courts to apply intentional acts exclusions to torts based on intentional acts even when the claims are couched in terms of negligence.**

West Virginia public policy and rules of construction require courts to apply intentional acts exclusions to torts based on intentional acts even when the claims are couched in terms of negligence. Respondents' reliance on *Columbia Casualty Co. v. Westfield Insurance Co.*, 217 W. Va. 250, 617 S.E.2d 797 (2005), is misplaced. In that case, the Fourth Circuit certified a question to this Court as to whether two inmate deaths by suicide in the Randolph County Jail were "occurrences" under an insurance policy issued to the Randolph County Commission. The Court concluded that there was potential insurance coverage for the claims made against the Randolph County Commission by the estates of the two inmates who committed suicide because when the policy language was applied to and from the perspective or standpoint of the county commission the deaths were "occurrences" under the insurance policy terms. *Columbia Casualty*, 617 S.E.2d at 797-98. The Court noted that because of the specific language used in the Fourth Circuit's certified question, it need not discuss the relationship between the terms "occurrence" and "accident" in the insurance policy at issue, or the exclusionary language in the policy relating to intentional acts, except to say that no other language in the policy appeared to be inconsistent with its holding. *Id.*, 617 S.E.2d at 799 n.2.

Respondents' attempt to distinguish Judge Goodwin's well-reasoned opinion in *Westfield Insurance Co. v. Merrifield*, No. 2:07-cv-00034, 2008 WL 336789, \*\*5-6 (S.D.W. Va. Feb. 5, 2008), fails. In *Merrifield*, the Court held that an exclusion in a homeowner insurance policy precluded coverage for negligence claims brought against insured parents whose son was convicted of first degree murder, death of a child by guardian or custodian, and sexual abuse by a guardian. The Court in *Merrifield* rejected the mother's argument that *Columbia Casualty*

should be extended to require the policy exclusions – as opposed to the insuring language involved in *Columbia Casualty* – to be viewed from the perspective of the mother. The Court reasoned that the policy unambiguously barred coverage for injuries arising out of sexual molestation. *Merrifield*, 2008 WL 336789 at \*\*5-6.

Respondents' attempt to minimize the significance of *West Virginia Fire & Casualty Co. v. Stanley*, 216 W. Va. 40, 602 S.E.2d 483 (2004), following *Columbia Casualty* likewise fails. In *Stanley*, the Court applied *Horace Mann Insurance Co. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988) and *Smith v. Animal Urgent Care, Inc.*, 208 W. Va. 664, 542 S.E.2d 827 (2000), to claims in an underlying case against a husband and wife, who were insureds under a homeowner policy, in an action arising from the alleged sexual misconduct of their minor son, who was a co-insured. The Court held:

10. “The inclusion of negligence-type allegations in a complaint that is at its essence a sexual harassment claim will not prevent the operation of an ‘intentional acts’ exclusion contained in an insurance liability policy which is defined as excluding ‘bodily injury’ ‘expected or intended from the standpoint of the insured.’” Syllabus Point 4, *Smith v. Animal Urgent Care, Inc.*, 208 W. Va. 664, 542 S.E.2d 827 (2000).

*Stanley*, 602 S.E.2d 483 at Syl. Pt. 10.

In *American Modern Home Insurance Co. v. Corra*, 222 W. Va. 797, 671 S.E.2d 802 (2008), the Court answered a question certified by the United States District Court for the Southern District of West Virginia in the negative and held in relevant part:

2. Absent policy language to the contrary, a homeowner's insurance policy defining “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in . . . bodily injury or property damage,” does not provide coverage where the injury or damage is allegedly caused by the homeowner's conduct in knowingly permitting an underage adult to consume alcoholic beverages on the homeowner's property.

*Id.* at Syl. Pt. 2.

The Court in *Corra* relied heavily on its prior decision in *Stanley*. *Corra*, 671 S.E.2d at 805. The Court in *Corra* expressly rejected the defendants' attempt to distinguish *Stanley* and cases cited therein on the basis that they involved intentional torts, reasoning as follows:

Despite the fact that the defendants have not alleged that Mr. Corra committed an intentional tort, we believe that our discussion in these cases concerning the meaning of the terms "occurrence" and "accident" to include events that are unexpected or unforeseen is relevant to determining whether Mr. Corra's knowing conduct constituted an "occurrence" under the policy below.

*Id.* at 806 n.6.

Moreover, the Court in *Corra* discussed *Columbia Casualty*, but then reasoned as follows:

In the instant case, we believe that it is obvious that where a homeowner engages in conduct knowingly, that conduct clearly cannot be said to be unexpected and unforeseen from the perspective of the homeowner. In other words, conduct engaged in knowingly is not an "accident" and thus not an "occurrence" under Mr. Corra's homeowner's policy. Accordingly, we now hold that absent policy language to the contrary, a homeowner's insurance policy defining "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results during the policy period in . . . bodily injury or property damage," does not provide coverage where the injury or damage is allegedly caused by the homeowner's conduct in knowingly permitting an underage adult to consume alcoholic beverages on the homeowner's property.

The defendants in the declaratory judgment action below present a number of arguments in their briefs as to why this Court should answer the certified question in the positive, none of which we find compelling. Mr. Corra, the homeowner spends much time in his brief arguing that he was wrongly convicted of furnishing alcoholic beverages to minors. However, this Court finds Mr. Corra's criminal conviction to be immaterial to the certified question which does not concern *knowingly furnishing* alcohol to underage individuals but rather *knowingly permitting* underage individuals to consume alcohol on Mr. Corra's property. Second, Mr. Corra asserts that under our law an "occurrence" under a homeowner's policy exists unless the policyholder commits an intentional act and expected or intended the resulting damage. We do not find this to be an accurate characterization of our law. As seen from our discussion above, an "occurrence," in addition to excluding intentional conduct, also excludes conduct that is foreseen and expected. Again, knowing conduct is certainly foreseen or expected, and thus cannot be considered an "occurrence." . . .

The defendants . . . all argue that the real issue presented in this case is whether a homeowner's policy should cover a homeowner who negligently permitted the use of his property for the consumption of alcohol by underage adults which proximately caused a motor vehicle accident that occurred off the premises causing injury. We disagree. Simply by framing their claims as arising in negligence, the defendants cannot prevent the operation of "occurrence" language in a homeowner's policy where it is shown that the homeowner knowingly permitted underage adults to consume alcoholic beverages on his property.

Finally, the estates . . . contend that the triggering event or occurrence under Mr. Corra's homeowner's policy was the automobile accident which, they allege, was an unforeseen happening. Again, we disagree. Generally, in determining the existence of an "occurrence" which gives rise to coverage under a homeowner's policy, the essential inquiry is on either the condition of the insured premises or the *activity of the insured*. Because the automobile accident occurred off of Mr. Corra's property, the issue is whether Mr. Corra's activity gives rise to the coverage.

*Id.* at 806-07 (emphasis in original) (footnotes omitted).

*Stanley* held that an intentional acts exclusion in an insurance policy precluded insurance coverage for claims couched in terms of negligence against a husband and wife, who were insureds in an action arising from the alleged sexual misconduct of their co-insured minor son. *Merrifield* held that an exclusion in a homeowner insurance policy precluded coverage for negligence claims brought against insured parents whose son was convicted of intentional crimes, rejecting the mother's argument that *Columbia Casualty* should be extended to require the policy exclusions to be viewed from the perspective of the mother. *Corra* declined to extend *Columbia Casualty* to circumstances similar to this action where the underlying action alleges that the insured allowed and condoned children to engage in illegal activity. Read together, these cases support the conclusion that West Virginia public policy and rules of construction require application of Erie's intentional acts exclusion to preclude liability coverage for the claim of negligent supervision against Patricia Shoaf in the underlying case.

3. **The majority of jurisdictions to consider the question apply intentional acts exclusions, similar to the exclusion in Erie’s policy, to preclude coverage to an insured based on the intentional or criminal acts of a co-insured.**

Respondents do not dispute that the majority of jurisdictions that have decided the issue allow intentional acts exclusions, similar to the exclusion in Erie’s homeowner policy, to preclude coverage to an insured based on the intentional acts of any co-insured. Mrs. Shoaf’s attempt to distinguish first-party property claims from liability insurance is to no avail as courts have not made that distinction. For example, in *Postell v. American Family Mutual Insurance Co.*, 823 N.W.2d 35 (Iowa 2012), the Court held that an innocent insured spouse whose co-insured husband started a house fire in a suicide attempt could not recover under a homeowner insurance policy that included an exclusion for intentional loss “by or at the direction of *any insured*”, citing to both first-party property claims and liability claims as follows:

*See Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 752 (Colo. 1990) (finding “any insured” created a joint obligation under the policy’s intentional acts exclusion applying to the insured innocent parents and insured minor son who committed vandalism); *Trinity Universal Ins. Co. v. Kirsling*, 139 Idaho 89, 73 P.3d 102, 105 (2003) (holding that an intentional acts exclusion which excluded “any loss” arising out of any act committed by or at the direction of “an insured” and “with the intent to cause a loss” barred coverage); *Woodhouse v. Farmers Union Mut. Ins. Co.*, 241 Mont. 69, 785 P.2d 192, 194 (1990) (holding “an insured” unambiguously bars coverage to an innocent coinsured); *McAllister v. Millville Mut. Ins. Co.*, 433 Pa. Super. 330, 640 A.2d 1283, 1289 (1994) (denying coverage to innocent coinsured when other insured committed arson and policy included an intentional acts provision referring to “an insured” and a neglect exclusion referring to “any insured”); *Doley v. R.I. Joint Reins. Ass’n*, 589 A.2d 313, 316 (R.I. 1991) (holding that the policy’s intentional loss exclusion referring to “an insured” imposes a joint obligation); *Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685, 688 (Utah 1999) (finding the intentional loss exclusion referring to “an insured” denied coverage to innocent coinsured when the other coinsured burned down the house); *see also Century-Nat’l Ins. Co. v. Garcia*, 51 Cal. 4th 564, 568-69, 120 Cal. Rptr. 3d 541, 246 P.3d 621 (2011) (recognizing that statutory language of “any insured” increasing the hazard of loss or concealing fraud refers to joint or collective liability, not several as when the standard policy refers to “the insured”).

*Id.* at 45-46 n.6. *See also Co-op. Ins. Cos. v. Woodward*, 2012 VT 22, 45 A.3d 89, 93 n.1 (2012) (holding that an exclusion in a homeowner policy for loss caused by the intentional acts of “an insured” applied to both insureds and precluded coverage for claims of insured wife’s negligent supervision of husband who kidnapped, drugged, sexually assaulted, and killed niece, noting that claim for negligent supervision did not allege injuries distinct from those associated with insured husband’s intentional and criminal conduct concluding that “[p]ublic policy weighs against coverage for such damages where the parties likely did not contemplate that the insurance policy would cover sexual abuse of children”); *Villa v. Short*, 195 N.J. 15, 947 A.2d 1217, 1219 (2008) holding that intentional acts exclusion unambiguously excluded liability coverage for claims against all insureds based on intentional acts of any insured where insureds were sued in connection with sexual assaults committed by son); *J.G. v. Wangard*, 753 N.W.2d 475, 488 (Wis. 2008) holding that exclusion for damages arising out of act intended by “any covered person” unambiguously barred liability coverage for wife’s alleged negligence in failing to prevent husband’s intentional sexual assaults of minor); *Johnson v. Allstate Ins. Co.*, 1997 ME 3, 687 A.2d 642, 644 (1997) (holding homeowners’ policy precluded liability coverage to one named insured for damages arising out of criminal child abuse by another named insured, where allegation against first insured was negligence in allowing abuse to occur and where policy excluded coverage for injury “intentionally caused by an insured person”); *Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 752 (Colo. 1990) (*en banc*) (holding with majority that intentional acts exclusion for property damage “which is expected or intended by any insured” clearly and unambiguously expressed intention to deny coverage to insured parents based on damage that was intended or expected by co-insured minor son, who committed acts of vandalism at elementary school).

Moreover, Mrs. Shoaf's reliance on *Icenhour v. Continental Insurance Co.*, 365 F. Supp. 2d 743 (S.D.W. Va. 2004) and *Hawkins v. Glens Falls Insurance Co.*, 115 W. Va. 618, 177 S.E.442 (1934), is misplaced. In *Icenhour*, the court held in the context of a first-party property claim that the intentional acts exclusion in a multiple line policy was void because it was less favorable than the intentional acts exclusion in the Standard Fire Policy. The court in *Icenhour* reasoned that "[A]s a 'multiple line' coverage document, the policy's fire protection component must be 'at least as favorable to the insured as the applicable portions of the standard fire policy . . .'" *Id.* (quoting W. Va. Code § 33-17-2). Its holding is limited accordingly. See W. Va. Code § 33-17-2 (stating generally that provisions of Standard Fire Policy do not apply to multiple line coverages providing casualty insurance combined with fire insurance). Indeed, Mrs. Shoaf expressly acknowledges in her brief the differences between first-party property and liability claims. Manifestly, Mrs. Shoaf has not made a first-party property claim under a Standard Fire Policy. *Icenhour* and *Hawkins* are wholly inapplicable.

Mrs. Shoaf's argument that the definition of "anyone we protect" in Erie's policy must be construed conjunctively to essentially mean everyone that Erie protects is specious. The policy contains the following definition:

"**anyone we protect**" means **you** and the following **residents of your** household:

1. relatives and wards;
2. other persons in the care of **anyone we protect**.

Under *Home and Family Liability Protection*, **anyone we protect** also means:

3. any person or organization legally responsible for animals or watercraft which are owned by **you**, or any person included in 1. or 2., and covered by this policy. Any person or organization using or having custody of custody of these animals or watercraft in the course of any **business**, or without permission of the owner is not **anyone we protect**;

4. any person with respect to any vehicle covered by this policy. Any person using or having custody of this vehicle in the course of any **business** use, or without permission of the owner is not **anyone we protect**.

A.R. at 139.

In *Carper v. Kanawha Banking & Trust Co.*, 157 W. Va. 477, 207 S.E.2d 897 (1974), the

Court held:

20. Because of the frequent inaccurate usage of the disjunctive “or” and the conjunctive “and” in statutory enactments, courts have the power to change and will change “and” to “or” and vice versa, whenever such conversion is necessary to effectuate the intention of the Legislature and give effect to the overall provisions of a statute.

*Id.* at Syl. Pt. 20.

The Court applied the rationale of *Carper* in the context of an insurance policy in *Fraze* *v. New York Life Insurance Co.*, 120 W. Va. 81, 196 S.E. 556 (1938). In *Fraze*, the Court explained that the clause of the policy at issue provided for the protection of the insured against total and presumably permanent disability. The policy defined the character of the disability insured against as follows: “Disability shall be considered total whenever the Insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit . . . .” *Id.*, 196 S.E. at 557. Despite the use of the word “or” in the policy, the Court held that a jury instruction that was worded in the disjunctive was reversible error. *Id.*

Indeed, in *White v. Erie Insurance Property & Casualty Co.*, No. 15-0521, 2016 WL 314 1575 (W. Va. June 3, 2016), this Court quite naturally construed the definition of the term “anyone we protect” in Erie’s automobile policy disjunctively. In *White*, the Court stated: “The policy defines ‘anyone we protect’ as ‘you’ *or* any ‘relative.’” (emphasis added).

In *Kundahl v. Erie Insurance Group*, 703 A.2d 542 (Pa. Super. 1997), the court rejected an argument similar to the argument made by Mrs. Shoaf. In *Kundahl*, the court held as follows:

[I]n the present case, the Kundahls' homeowner's policy specifically precludes coverage of loss where the intentional or negligent acts by **"anyone we protect"** caused the loss. A loss caused by **"anyone we protect"** unequivocally evinces joint responsibility, since the term "anyone" is naturally inclusive as opposed to exclusive. See Webster's New Collegiate Dictionary 93 (9<sup>th</sup> Ed. 1987). Thus, if any one [insured] violates the policy, coverage must be denied to all insureds. See *McAllister [v. Millville Mut. Ins. Co.]*, 433 Pa. Super. 330, 640 A.2d 1283, 1289 (1994) ("The use of the terms 'any' and 'an' in the exclusions clearly indicate that the insureds' obligations under the policy's neglect and intentional provisions are joint, not several." (emphasis added)). We conclude, therefore, that the trial court erred in finding that the homeowner's policy was ambiguous. *McAllister, supra*.

*Id.* at 545 (citation omitted) (footnote omitted).

In this action as in *White* and *Kundahl*, the Court should construe the term "anyone we protect" disjunctively in the context of the intentional acts exclusion in Erie's policy and conclude that a loss caused by "anyone we protect" unequivocally evinces joint application. Moreover, the Court should distinguish *Icenhour* because that case was decided in the context of a first-party property claim and expressly relied on the Standard Fire Policy, which Mrs. Shoaf concedes is not at issue in this action. The Court should find the reasoning of the majority of courts persuasive and hold that Erie's unambiguous intentional acts exclusion for bodily injury "expected or intended by 'anyone we protect'" precludes liability coverage for the claims against Patricia Shoaf based on the intentional act of Rachel Shoaf, who is also an insured, in murdering Skylar Neese.

**B. The Unambiguous Severability Clause in Erie's Policy, which States that the Insurance Applies Separately to Each Insured, Does Not Prevail over the Exclusion or otherwise Require Erie to Apply the Exclusion Separately to Each Insured, Despite the Intentional Actions of a Co-insured.**

**1. This Court has held that a severability clause does not defeat a family exclusion.**

This Court has held that a severability clause<sup>1</sup> does not defeat a family exclusion. In *Sayre v. State Farm Fire & Casualty Co.*, No. 11-0962, 2012 WL 3079148 (W. Va. May 25, 2012), this Court rejected the insured's argument that a severability clause in the "Conditions" section of a homeowner's policy created an ambiguity that defeated a family exclusion. In *Sayre*, the Court agreed with the circuit court's conclusion that the severability clause had no application and concluded that summary judgment was proper for State Farm. *Id.* at \*2. Although *Sayre* did not decide the question presented in this action, it supports the conclusion that a severability clause does not defeat an unambiguous intentional acts exclusion because it is consistent with the majority of jurisdictions to have considered the question.

Contrary to Respondents' argument, the *dicta* in *Sayre* does not support their position. Even if a severability clause exists to potentially confer liability coverage to one insured even when another insured may not be entitled to liability coverage, it could only have that effect when an exclusion does not operate to preclude insurance coverage for any insured. Nothing in *Sayer* suggests that a severability clause changes the meaning of an intentional acts exclusion that precludes coverage for intentional and criminal acts of any insured. Indeed, applying Erie's policy – including the intentional acts exclusion -- separately to Patricia Shoaf and Rachel Shoaf in accordance with the severability clause compels the conclusion that the claims against both are excluded from coverage.

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<sup>1</sup> As noted in Erie's opening brief at page 23, the District Court labeled Erie's unambiguous Limits of Protection provision a severability clause. It should be further noted that this provision is contained only in the liability coverage section of Erie's policy; it is not contained in the property coverage section. A.R. at 137-38, 152..

**2. The majority of jurisdictions to consider the question have held that a severability clause does not change the meaning of an intentional acts exclusion that precludes coverage for intentional and criminal acts of any insured.**

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The majority of jurisdictions to consider the question have held that a severability clause does not change the meaning of an intentional acts exclusion that precludes liability coverage for intentional and criminal acts of any insured. Indeed, several cases have soundly refuted the argument made by Respondents for the minority position. For example, In *American Family Mutual Insurance Co. v. Wheeler*, 287 Neb. 250, 842 N.W.2d 100 (2014), the court considered both the majority and minority positions, citing to *Minkler v. Safeco Insurance Co. of America*, 49 Cal. 4th 315, 110 Cal. Rptr. 3d 612, 232 P.3d 612, 615 (2010), and *Premier Insurance Co. v. Adams*, 632 So. 2d 1054 (Fla. App. 1994), and explained:

Summed up, the majority position emphasizes the plain meaning of the “an insured” or “any insured” language in a particular exclusion. It emphasizes that the severability clause’s command to apply the insurance separately to each insured does not change the exclusion’s plain language or create ambiguity in its application. The minority position, on the other hand, concludes that the severability clause’s command to apply the insurance separately to each insured requires that each insured’s conduct be analyzed as if he or she were the only insured under the policy. Or, at the very least, such an interpretation is a reasonable one, making the policy ambiguous, which a court must construe in favor of coverage.

We find the majority position more persuasive and adopt it here. It is consistent with our of-stated approach to give language in an insurance contract its plain meaning. We have in the past concluded that the “an insured” language, and implicitly the “any insured” language, is clear and unambiguous. Such language means what it says, and the severability clause does not operate to override this clear and unambiguous language. In other words, applying the insurance separately to each insured, as the severability clause requires, does not change that the exclusions reference “an insured” or “any insured.” As one appellate court explained, “The act of applying the policy separately to each insured does not alter or create ambiguity in the substance or sweep of the exclusion.

*Wheeler*, 842 N.W.2d at 107 (footnotes omitted).

In addition, in *Co-operative Insurance Cos. v. Woodward*, 2012 VT 22, 45 A.3d 89

(2012), the Court discussed *Minkler*, but then rejected its reasoning as follows:

¶ 16. Assuming, without deciding, that the provision at issue is a severability clause, we conclude that this clause has no effect on – and cannot override – the intentional-acts exclusion for certain acts committed by “an insured.” . . . Even 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. See, e.g., *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 329 (Minn. Ct. App. 2008) (“Use of phrase ‘any insured’ in [insurer’s] severability clause does not create ambiguity when applying the exclusion.”); *J.G. v. Wangard*, 2008 WI 99, ¶¶ 46-49, 313 Wis. 2d 329, 753 N.W.2d 475 (holding severability clause did not render “any insured” exclusion ambiguous); *Mut. of Enumclaw Ins. Co. v. Cross*, 103 Wash. App. 52, 10 P.3d 440, 444-45 (2000) (holding that “an insured” exclusion was “clear and specific language [that] prevail[ed] 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.*, 1997 ME 3, ¶ 8, 687 A.2d 642 (“An unambiguous exclusion is not negated by a severability clause.”); see also *Safeco Ins. Co. of Am. v. White*, 2009-Ohio-3718, 122 Ohio St. 3d 562, 913 N.E.2d 426, ¶ 71 (O’Donnell, J., concurring and dissenting) (collecting cases with majority view). Because exclusions for “an insured” serve to collectively bar all insureds, and because of the weight of decisional authority, we conclude that the clause at issue does not create ambiguity when read in conjunction with an intentional-acts exclusion referring to “an insured.”

*Woodward*, 45 A.3d at 95 (citations omitted).

In *Johnson v. Allstate Insurance Co.*, 1997 ME 3, 687 A.2d 642 (1997), the Court expressly declined to follow *Worcester Mutual Insurance Co. v. Marnell*, 398 Mass. 240, 496 N.E.2d 158 (1986). The Court reasoned:

The primary case relied on by plaintiff, *Worcester Mut. Ins. Co. v. Marnell*, 398 Mass. 240, 496 N.E.2d 158 (1986), demonstrates the defect in plaintiff’s argument. The Marnells sought coverage under their homeowner’s policy for wrongful death damages arising from negligent supervision of their underage son. The son, also an insured under the policy, left a party at the Marnell house in a drunken state and crashed his car, resulting in the death of a passenger. The policy excluded coverage for bodily injury arising out of the use of a motor vehicle owned or operated by *any* insured person. The court ruled that the severability clause mandated coverage for the Marnells’s negligent supervision, despite the plain language of the exclusion precluding it. To reach this result the

*Marnell* court acknowledged that it rendered the term “any” in the exclusionary clause meaningless. *Id.* at 245, 496 N.E.2d 158. Because this approach ignores and does violence to the plain language of the insurance contract, we decline to follow it. Although ambiguous language is to be construed against the insurer, we will not rewrite the contract when the language of the policy is unambiguous.

*Id.*, 687 A.2d at 645 (citations omitted).

Similarly, in *Chacon v. American Family Mutual Insurance Co.*, 788 P.2d 748 (Colo. 1990) (*en banc*), the Court expressly rejected *Marnell*, reasoning as follows:

Some courts which have considered similar exclusionary provisions, however, have held that they did not preclude recovery by an innocent insured. For example, in *Worcester Mutual Insurance Co. v. Marnell*, 398 Mass. 240, 496 N.E.2d 158 (1986), the parents, named insureds, were sued by a third party for damages caused by their son, an unnamed insured, in an automobile accident. The automobile exclusion, contained in their homeowner's policy, provided that coverage did not apply to bodily injury or property damage “arising out of the ownership, maintenance, use, loading or unloading of ... a motor vehicle owned or operated by or rented or loaned to any insured....” *Id.* 496 N.E.2d at 159. The *Worcester* court held that the severability clause contained in the policy required that each insured be treated as having separate insurance coverage, which resulted in coverage being precluded only as to the son. The *Worcester* court acknowledged that its interpretation of the exclusionary clause rendered the word “any” superfluous, but felt this interpretation was preferable to the approach advocated by the insurance carrier, which the court indicated would “render the entire severability of insurance clause meaningless.” *Id.* at 161. *See also West Bend Mutual Ins. Co. v. Salemi*, 158 Ill.App.3d 241, 110 Ill.Dec. 608, 511 N.E.2d 785 (1987) (holding that “any insured” language could reasonably be interpreted as denying coverage only to the culpable party).

We find the reasoning of the majority of courts more persuasive than that of *Worcester*, 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 752-3 (footnotes omitted).

As explained in 3 Allan D. Windt, *Insurance Claims and Disputes* (6th ed.):

[I]t has been held that an “any insured” exclusion will be treated like a “the insured” exclusion if the policy contains a severability clause; that is, a provision stating that the “insurance applies separately to each insured.” Such a holding is not justifiable. A severability clause provides that each insured will be treated independently under the policy. The fact remains, however, that as applied even independently to each insured, an “any insured” exclusion unambiguously eliminates coverage for each and every insured.

. . . The rationale used by the courts that have held . . . that a severability clause renders an “any insured” exclusion meaningless – have done so on the basis that, otherwise, the severability clause would itself be meaningless. That is untrue. A severability clause would still have meaning in a variety of contexts.

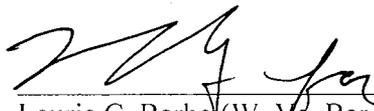
*Id.* at § 11:8.

This Court should find the reasoning of the majority of courts persuasive as well. *Wheeler, Woodward, Johnson, Chacon*, and other cases in the majority persuasively refute the minority position. Courts and commentators agree that the specific terms of an intentional acts exclusion must prevail over the general terms of a severability clause or the former will be rendered meaningless.

### **III. CONCLUSION**

For all of the foregoing reasons, this Court should answer the first certified question in the affirmative and hold that the unambiguous exclusion for bodily injury “expected or intended by ‘anyone we protect’” in Erie’s homeowner insurance policy precludes liability coverage to Patricia Shoaf for the claims in the underlying case brought by Respondents Mary A. Neese, individually and as administratrix of the Estate of Skylar Neese, and David Neese against Respondent Patricia Shoaf, who is Erie’s insured. This Court should further answer the second certified question in the negative and hold that the unambiguous severability clause in Erie’s policy does not prevail over the unambiguous exclusion for bodily injury “expected or intended by ‘anyone we protect’”.

Respectfully submitted this 1st day of September 2016.



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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September 2016, I caused the foregoing "*Reply Brief of Petitioner Erie Insurance Property and Casualty Company*" to be served on counsel of record via U.S. Mail in a postage-paid envelope addressed as follows:

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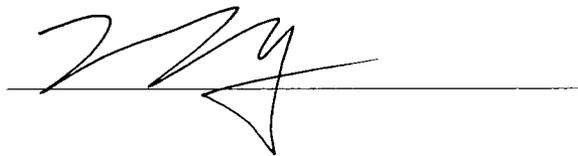
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A handwritten signature in black ink, appearing to be 'J. Michael Benninger', is written over a horizontal line.