

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

No matter how much Respondents seeks to confuse the issues, the answers to the questions certified by the Northern District of West Virginia are readily apparent. Applying the most fundamental rules of contract construction in West Virginia – namely, that unambiguous and express written terms, being the best evidence of the intent of the parties, are applied as written, not construed – the first certified question has to be answered in the negative. The exclusion for bodily injuries resulting from the intentional or criminal conduct of “any insured” must be applied to negate coverage for the claims against Tara Clendenen – or any other insured under the ANPAC policy, for that matter. After all, Sheila Eddy, an “insured” under the ANPAC policy,¹ is specifically alleged in the *Neese Complaint* to have committed murder. And, the Respondents have not pointed to a single decision of this Court that permits an unambiguous policy exclusion to be judicially written out of an insuring agreement to provide coverage that does not exist.

¹ James and Tara Clendenen admitted that Sheila Eddy was an insured under the ANPAC policy in their Answer to the Complaint in the underlying declaratory judgment action. (AR259). The questions certified to this Court by the Northern District of West Virginia are necessarily based upon the pleadings and record as it is currently constituted. Mr. Clendenen should not be heard in his attempt to infect these proceedings with a Summary Response advancing an argument lacking any support in the current record, contradictory to his pleadings in the federal court action, and based upon a fundamental misreading of the ANPAC policy.

In addition to being unfaithful to his record admission in federal court, Respondent James Clendenen misreads the definition of “insured” under the ANPAC policy in his haste to throw a wrench into the proceedings. While Clendenen focuses on the subdivisions of the definition of “insured” (AR70), he fails to recognize that the simple starting point for any discussion of whether Sheila Eddy is an “insured” is her relationship to Tara Clendenen, not James Clendenen. For, in the main paragraph under “Definitions,” the policy makes it clear that “you” or “your” refer to not only the named insured but also “the spouse if a resident of the same household.” (AR70). So, no matter which definition you choose for “relatives” – consanguine or social – the fact is there is no real doubt as to Sheila Eddy’s status as a “relative” of Tara Clendenen. For Respondent James Clendenen to suggest there is some doubt in the record such as would justify consideration of his newly hatched and baseless argument is an affront to the Northern District of West Virginia and a preposterous waste of this Honorable Court’s time.

Respondents spend most of their Briefs on the second certified question – whether the unambiguous severability clause “prevails” over the unambiguous intentional acts exclusion. But, like the first question, the answer to the second question is not in doubt if the clause is applied as written and this Court adopts the majority rule. The severability clause merely requires that the policy be read from the vantage point of each “insured” and the intentional acts exclusion applies when the injury results from intentional acts committed by “any insured.” There is no conflict between these provisions. They can be read together in such a way as to avoid rewriting of the policy or absurd results, as required under our rules of insurance contract construction. Whether read from the vantage point of James Clendenen, Tara Clendenen or Shiela Eddy, the insurance policy was never intended to cover claims made for injuries resulting from the intentional acts any one or more of them.

I. THE UNAMBIGUOUS INTENTIONAL/CRIMINAL INJURY EXCLUSIONS IN THE ANPAC HOMEOWNERS POLICY PRECLUDE COVERAGE FOR ALL INSURED WHEN THE BODILY INJURY CLAIM RESULTS FROM AN INTENTIONAL OR CRIMINAL CONDUCT OF ANY ONE OF THEM.

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? **Answer: Yes.**

The most fundamental of insurance contract construction 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 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, 486, 745 S.E.2d 508, 524 (2013)(internal citations omitted).

Respondents focus almost exclusively on the discussion found in *Columbia Casualty Co. v. Westfield Ins. Co.*, 217 W. Va. 250, 617 S.E.2d 797 (2005), dodging the issue central to the first certified question. *Columbia Casualty* was concerned with an entirely different issue – the what is an “occurrence” under West Virginia law where, as this Court noted, “accident” was not defined in the policy. *Id.* at 252, 617 S.E.2d at 799. Applying the rule of Syllabus Point 5 of *Tackett v. American Motorists Ins. Co.*, 213 W. Va. 524, 584 S.E.2d 158 (2003), this Court resolved the corresponding “doubt” regarding coverage in favor of the insured. *Id.*

Columbia Casualty had nothing to do with the exclusion at issue in the instant situation. The subject matter of intentional acts exclusions and the attendant public policy or rules of contract construction that govern the same was noticeably absent from the body of that opinion. Moreover, Respondents have not come forward with any authority for the proposition that the limited holding of *Columbia Casualty* has ever been extended to the discussion of an unambiguous “any insured” intentional/criminal acts exclusion. Instead, they attempt to stretch

language from *Columbia Casualty* beyond its context. Foreshadowing the problem with such an approach, this Court warned that,

[d]iscussions in judicial opinions of insurance coverage issues often involve parsing the convoluted and confusing language of insurance policies. There is an elevated risk in such discussions of making similarly convoluted and confusing judicial statements – particularly when the statements are taken outside of the boundaries of the case in which they are made.

Columbia Casualty, at 251-52, 617 S.E.2d at 798-99.

It is clear that the statements in *Columbia Casualty* were not intended to be applied outside the confines of the issue addressed therein, much less used in an attempt to nullify unambiguous policy language, as Respondents attempt to do here. The attempt to apply the statements of that case in the instant context does exactly what the Court warned against – artificially creates confusion where none existed.

Respondents also seek to invalidate the plain and unambiguous provisions of the “any insured” intentional acts exclusion through reference to general statements regarding the purposes of liability insurance and the doctrine of reasonable expectations.² The problem with this approach is that it ignores the foundation of the doctrine of reasonable expectations and outright contradicts perhaps the most sacrosanct and venerable rule of contract construction.

The doctrine of reasonable expectations, from its origins in Syllabus Point 8 of *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), is “essentially a rule of construction.” *McMahon & Sons*, at 742 n.7, 356 S.E.2d at 496 n.7. Thus, “[i]n West Virginia, the doctrine of reasonable expectations is limited to those instances ... in which the policy language is ambiguous.” *Id.* at 742, 356 S.E.2d

² The Neese Respondents focus on the reasonable expectations of the insured – which, of course, does not apply to them, as they were not insureds under the ANPAC policy, and for which they do not have standing.

at 496, citing, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W.Va. 430, 433, 345 S.E.2d 33, 36 (1986).³ Conversely, “ “[w]here 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.” Syllabus, *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 172 S.E.2d 714 (1970).” Syl. Pt. 2, *West Virginia Fire & Cas. Co. v. Stanley*, 216 W.Va. 40, 602 S.E.2d 483 (2004).

The underlying premise of the first certified question is a finding already made by the federal court – that the “any insured” intentional acts exclusion is unambiguous. Accordingly, the doctrine of reasonable expectations does not apply and the rules of insurance contract construction in West Virginia require the exclusion to be applied as it is written, so long as the exclusion does not violate the public policy of the State of West Virginia, which it does not.

“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.” *Rich v. Allstate Ins. Co.*, 191 W. Va. 308, 310, 445 S.E.2d 249, 251 (1994). The intentional acts exclusion has been upheld as consistent with the public policy of this State.

Our holding today is fully supportive of the reasons behind the insurance industry’s adoption of the intentional acts exclusion. The rationale behind the intentional acts exclusion is obvious: insurance companies set their premiums based upon the random occurrence of particular insured events. If a policyholder can consciously, deliberately control the occurrence of these events through the commission of intentional acts, the liability of the insurance company becomes impossible to define. The exclusion therefore prevents individuals from “purchasing insurance as a shield for their *anticipated intentional misconduct*. Without such an exclusion, an insurance company’s risk would be incalculable.” *Preferred Mut. Ins. Co. v. Thompson*, 23 Ohio St.3d 78, 81, 491 N.E.2d 688, 691 (1986).

³ The doctrine has also been applied to situations where the policy provision upon which denial of coverage is based differ from prior representations made by the insurer. *See, e.g., New Hampshire Ins. Co. v. RRK, Inc.*, 230 W. Va. 52, 58, 736 S.E.2d 52, 58 (2012)

Farmers & Mechanics Mut. Ins. Co. of W. Virginia v. Cook, 210 W. Va. 394, 403, 557 S.E.2d 801, 810 (2001). And, while the issue of an “any insured” intentional acts exclusion was not before the Court in *Cook*, the same reasoning applies.

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.”).

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.

Perkins v. Shaheen, 867 So.2d 135, 139 (La. App. 3rd Cir. 2004) (emphasis added). Upholding the analogous categorical elimination of coverage under the “family exclusion,” this Court has previously held 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.” *Rich*, at 311, 445 S.E.2d at 252.

Simply put, the “any insured” intentional acts exclusion contained in the ANPAC policy issued to James Clendenen and providing coverage to Tara Clendenen and Sheila Eddy, is intended to apply to remove a whole class of damage claims (intentionally caused injuries) from

the policy's parameters. Respondents have pointed to no public policy or rule of insurance contract construction that prohibits such a provision. Accordingly, the first certified question must be answered in the affirmative.

II. THE SEVERABILITY CLAUSE DOES NOT EFFECT THE UNAMBIGUOUS "ANY INSURED" INTENTIONAL/CRIMINAL ACT POLICY EXCLUSIONS IN THE ANPAC HOMEOWNERS POLICY.

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? **Answer: No.**

This question, like the first, is also easily answered. Respondents recite in excruciating detail the text of the *Minkler* decision but, just like the Supreme Court of California, fail to grapple with the obvious. Applying the plain language of the severability clause yields the result that, where there is a question as to which insured is implicated by "the insured" or just plain "insured," the language is to be interpreted from the viewpoint of the insured seeking coverage. However, where, as with the instant intentional acts exclusion, the reference is to the collective "any insured," the clear intent is to reach a whole classification of claims and the severability clause cannot negate the plain language of the exclusion.

Respondents miss the mark when they focus on *Minkler v. Safeco Ins. Co. of America*, 49 Cal.4th 315, 232 P.3d 612, 625 (Cal. 2010) and *Brumley v. Lee*, 963 P.2d 1223 (Kan. 1998). Besides admittedly representing the distinctly minority viewpoint across the country, *Minkler* and *Brumley* are imminently distinguishable from the instant situation.

In *Minkler*, the alleged victim of sexual molestation by the adult son of the Safeco policyholder sued both the perpetrator and the policyholder mother. The claim against the policyholder mother was for negligent supervision. *Minkler*, 49 Cal.4th at 319, 232 P.3d at 615.

The plaintiff got a default judgment against the policyholder mother and settled for an assignment of her rights against Safeco and the plaintiff brought a suit in federal court against Safeco for breach of contract and breach of the covenant of good faith and fair dealing. *Id.* at 320, 232 P.3d at 616. Citing the severability of interests clause, the plaintiff argued that the policyholder mother was entitled to coverage notwithstanding the intentional acts exclusion cited by Safeco in denying coverage and defense in the underlying claim. *Id.*

At the outset, the difficulty in applying the reasoning in *Minkler* to this case is that the policy was materially different. While the policy in *Minkler* contained a similar severability clause, the basic coverage and intentional acts exclusions used different language. The basic personal liability coverage provision indicated referred to coverage to be provided to “an insured” for claims of bodily injury. *See id.* at 318, 232 P.3d at 614. By contrast, the instant ANPAC policy refers to coverage being afforded to “the insured.” (AR81).

Likewise, the intentional acts exclusion in the *Minkler* case “specifically excluded coverage for injury that was ‘expected or intended’ by ‘an’ insured, or was the foreseeable result of ‘an’ insured’s intentional act.” *Id.* As noted in the previous section, the ANPAC policy at issue here excludes from coverage bodily injury “which is expected or intended by any insured even if the actual injury or damage is different than expected or intended.” (AR82) (emphasis added). Whether the article, “an,” is ambiguous or not, that debate is not germane to the situation at hand. The term utilized in the ANPAC policy exclusions, “any insured,” is manifestly clear in its intent.

The viewpoint in *Minkler* is the decided minority viewpoint for several reasons. First, *Minkler* found that application of the severability clause created an ambiguity and thereby coverage without any real explanation. As the Supreme Court of Vermont noted, this

“ambiguity” is fictional. “Even if each insured – in this case, uncle and homeowner – is treated as having separate coverage, the exclusionary language remains unambiguous because [it’s terminology] is collective.” *Co-operative Ins. Companies v. Woodward*, 191 Vt. 348, 356, 45 A.3d 89, 95 (2012). Rejecting the rationale of *Minkler*, the Vermont Court found the “contention that the two provisions ‘simply cannot be reconciled’ is therefore without merit. A majority of courts reach the same result.” *Id.*

Likewise, the Supreme Court of Nebraska rejected the holding of *Minkler* and its vacuous reasoning. The Nebraska Court observed that “applying the insurance separately to each insured, as the severability clause requires, does not change that the exclusions reference ‘an insured’ or ‘any insured’ ... [and] ‘does not alter or create ambiguity in the substance or sweep of the exclusion.’” *American Family Mut. Ins. Co. v. Wheeler*, 287 Neb. 250, 259-60, 842 N.W.2d 100, 107 (2014), quoting, *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 329 (Minn.Ct.App. 2008).

The difference between *Minkler* and *Wheeler* is that the Supreme Court of Nebraska, in adopting the majority position, reconciled the plain language of the exclusion with the plain language of the severability clause and the Supreme Court of California, in adopting the minority position, did not. *Minkler* focused on the reasonable expectations of the insured without any deference to that very rule of contract construction – a contract’s plain and unambiguous language will be applied, not construed, by the courts. By contrast, the majority position represented by *Wheeler* is faithful to the rules of insurance contract construction. “Adopting the minority position would render the “an” or “any” language superfluous, while adopting the majority position would not.” *Wheeler*, at 260, 842 N.W.2d 107. Whereas, the majority position of *Wheeler* gives meaning to **both** the exclusion and the severability clause.

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.

Id., at 260, 842 N.W.2d 107-08.⁴ The majority position is, therefore, consistent with the rules of insurance contract construction this Court outlined in *Soliva*.

(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).

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); *American 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.” *Id.*, at 295, 745 S.E.2d at 186.

By contrast, the minority position in *Minkler* requires a rewrite of the policy, eliminating words from otherwise unambiguous provisions, something that runs afoul of our rules of insurance contract construction, as enunciated in *Soliva*. The minority position requires the courts to assume the parties did not mean what they said in writing and remove words from an insurance contract – a clear violation of the universally recognized rules of contract construction.

⁴ Additional examples of how the severability clause applies in situations involving the use of the term “the insured” in the instant ANPAC policy are given below.

The minority position assumes an ambiguity is created by the severability clause without deference to the origin of the severability clause or analysis. Taken to its logical extreme, the minority position would hold that the insurer is not permitted under any circumstances to exclude from coverage a whole class of bodily injury claims, irrespective of the plain wording of the exclusion. The hole in this logic was recently pointed out by the Southern District of Alabama in the context of a cross-suits exclusion.

When such clauses (which are also known as severability clauses) became standard in liability insurance policies more than a half century ago, the insurance industry's purpose and intent was to clarify "that the term 'the insured' in an exclusion refers merely to the insured claiming coverage." ... In light of this underlying purpose for writing separation of insureds clauses into insurance policies, the construction of such a clause in conjunction with a particular contractual exclusion turns on the exclusion's precise wording. More specifically, the distinction that surfaces time and again in the case law is that separation of insureds clauses affect interpretation of policy exclusions using the term "the insured" (essentially modifying that term to mean "the insured claiming coverage"), but have no effect on the interpretation of exclusions using the term "an insured" or "any insured." ...

The legal effect of the Separation of Insureds Clause is to treat each insured separately, such that, for example, (i) one insured's knowledge is not automatically imputed to another, and (ii) the term "the insured" in an exclusion refers merely to the particular insured claiming coverage. But the Cross Suits Exclusion says nothing about "the insured," as it excludes coverage for "[a]ny liability of any 'Insured' covered under this policy to any other 'Insured' covered under this policy." (Ohio Cas. Exh. A, at 20.) The Separation of Insureds Clause does not muddy, undermine or negate the language of the Cross Suits Exclusion at all. The Court perceives no reason, and Holcim has identified none, why enforcement of the plainly written, clear Cross Suits Exclusion to exclude coverage for Holcim's liability to White would be at odds with the Separation of Insureds Clause's requirement that the insurance "applies separately to each Insured against whom claim is made or suit brought." (*Id.* at 17.) That the Policy must be applied separately to each insured against whom claim is made does not logically suggest that the plainly worded Cross Suits Exclusion cannot operate to exclude coverage for any insured's liability to any other insured. Holcim argues otherwise, but never explains its reasoning.

In short, Holcim points to a vague, unspecified conflict when there is none, and portrays the Cross Suits Exclusion as ambiguous when in fact its meaning is clear.

Ohio Cas. Ins. Co. v. Holcim (US), 744 F. Supp. 2d 1251, 1270-73 (S.D. Ala. 2010). *See also*, *Abbeville Offshore Quarters Inc. v. Taylor Energy Co.*, 286 Fed.Appx. 124, 128 (5th Cir. 2008) (“when determining the effect of a ‘separation of insureds’ provision upon a given exclusion, we look to the precise terms used in that particular exclusion”) (citation and internal quotation marks omitted); *Paylor v. First Mountain Morg. Corp.*, 2008 WL 4605304, *7 (Mich.Ct.App. Oct. 9, 2008) (“[t]he effect of a separation of insureds provision on an exclusion depends on the terms of the exclusion.... If Citizens Insurance wished to exclude coverage arising out of the violation of a penal statute, regardless of which insured committed the violation, it could have done so by using the phrase ‘any insured.’ Because the phrase ‘the insured’ was used, it is plain that the application of the exclusion must be determined by reference to a particular insured.”), citing, *Bituminous Cas. Corp. v. Maxey*, 110 S.W.3d 203, 214 (Tex.App., 2003).

To use the severability clause to alter or amend a plainly worded exclusion would also alter the intent to the parties and the risks agreed to be insured. As the Texas Court of Appeals noted in *Bituminous Casualty*,

To hold that the term “any insured” in an exclusion clause means “the insured making the claim” would collapse the distinction between the terms “the insured” and “any insured” in an insurance policy exclusion clause, making the distinction meaningless. It would also alter the plain language of the clause, frustrating the reasonable expectations of the parties when contracting for insurance. We should not adopt an unreasonable construction of an insurance contract. Moreover, construing the term “any” the same as the word “the” in an exclusion clause when an insurance policy contains a separation of insureds or severability of interests clause would require a tortured reading of the terms of the policy.... It would also expand liability beyond that bargained for by a reasonable person who followed the plain language of the policy and would invite collusion among insureds, whereby any one insured could make a claim for coverage of damages caused by any other insured. We should not give the terms of a contract such an expansive reading without a definite expression of the parties’ intent that we do so.

Bituminous Casualty, 110 S.W.3d at 214 (citations omitted).

Like the situations in *Holcim* and *Bituminous Casualty*, using the severability clause to render the “any insured” intentional acts exclusion present in the Clendenen’s ANPAC homeowners policy would completely frustrate the intent of the parties. The plain language of the exclusion is a clear expression of the intent of the parties to exclude from coverage bodily injuries resulting from the intentional conduct (in this case, murder) of one of the insureds. The Respondents offer no explanation as to how the severability clause alters this plain intent. Their citation to *Minkler* and the minority position is of no help. The Supreme Court of California assumed an ambiguity without analysis in *Minkler* and used that presumed ambiguity to reach the result that was desired. Respondents’ regurgitation of the conclusory statements from that opinion does not add substance where it is lacking.

The Neeses also claim that Connecticut follows the rule that a severability clause renders an “any insured” intentional acts exclusion ambiguous. But, the decision they cite was merely a trial court decision in Connecticut denying a motion for summary judgment. The case did not involve the question of indemnity and did not involve the same exclusionary language at issue here. “The homeowners policy also contains an exclusion of coverage for intentional conduct, but it applies only to ‘the insured’ who committed or directed the intentional acts. By its terms it does not exclude coverage for Mrs. Pahl [the allegedly negligent insured].” *Nationwide Mut. Fire Ins. Co. v. Pahl*, No. CV106007423, 2013 WL 5780825, at *4 n.3 (Conn. Super. Ct. Oct. 3, 2013). After noting that the subject policies excluded coverage for bodily injury “caused intentionally by or at the direction of an insured,” the *Pahl* Court observed that, in the case of the homeowners policy, “however, the intentional act exclusion “applies only to the insured who committed or directed the act.” *Id.* at *3. This language is noticeably absent from the ANPAC policy here. Moreover, “[t]he court’s ruling extends only to Nationwide’s duty to defend not to

its duty to indemnify, on which the court can express no opinion.” *Id.* at *6 n.4. Thus, *Pahl* is of no real persuasive value for the discussion at hand. If anything, the *Pahl* decision supports the position of ANPAC and the majority rule across the country.

Respondents’ citation to *Brumley v. Lee*, 265 Kan. 810, 963 P.2d 1224 (Kan. 1998) is similarly unavailing. In *Brumley*, a lawsuit was filed against two homeowners arising from the death of a child in their care. One insured was accused of intentionally striking the child, resulting in death, and the other insured was accused of negligence. The majority of the Kansas Supreme Court curiously found that the use of the term “any” in the exclusion was ambiguous. *Id.*, at 814-15, 963 P.2d at 1227-28. In construing the severability clause in light of this ambiguity, the *Brumley* Court held that the policy afforded coverage for a negligent insured, even if the incident also involved the intentional act of another insured. *Id.*

The reasoning of *Brumley* is questionable, at best. The decision appears to have been the result of the court’s desire to uphold prior precedent, in which it had determined that the term, “an,” in the intentional acts exclusion was ambiguous. *Id.* at 814, 963 P.2d at 1227. The *Brumley* Court engaged in a confusing discussion of the “ambiguity” of “an” and “any” and concluded that the mere fact that the insurer added one letter – a “y” – to a single word in the policy did not eliminate the ambiguity. Then, the court directed any detractors to read the Random House Dictionary. *Id.* at 815, 963 P.2d at 1228.

As might be expected, the *Brumley* Court’s conclusion in this regard has not gained wide acceptance. In a direct rejection of this proposition, the Supreme Court of New Jersey held that “an insured” in insurance policy exclusions is not ambiguous. “In the present case, the policy language excludes all insureds from coverage for damages caused by the intentional or criminal acts of an insured. We will not search for ambiguities where there are none.” *Villa v. Short*, 195

N.J. 15, 26, 947 A.2d 1217, 1223-24 (2008). *See also, Allstate Ins. Co. v. Stamp*, 134 N.H. 59, 62, 588 A.2d 363, 365 (1991) (noting that “Allstate’s use of the indefinite article ‘an,’ rather than the definite ‘the,’ before ‘insured’ is a clear reference to any insured who commits an intentional act resulting in damages, regardless of whether or not he is the particular insured seeking coverage”), citing, *Pawtucket Mut. Ins. Co. v. Lebrecht*, 104 N.H. 465, 468, 190 A.2d 420, 422-23 (1963).

The *Pawtucket* decision from the Supreme Court of New Hampshire is particularly instructive. There, the seventeen year old son of the policyholders and a resident of their household allegedly committed an assault on another minor. *Pawtucket*, at 466, 190 A.2d at 422. The victim’s parents instituted a lawsuit against both the minor and his policyholder parents. The lawsuit alleged that the policyholder parents were negligent in the custody and control of their minor son, leading to his assault on the victim. *Id.* In the ensuing declaratory judgment action, the insurer argued that coverage for the claims against the policyholder parents was excluded as a result of the intentional conduct of the minor (as an insured under the policy). *Id.* The intentional acts exclusion in the policy provided that “there will be no liability coverage for ‘injury ... caused intentionally by or at the direction of the Insured.’” *Id.*, at 467, 190 A.2d at 422. The Supreme Court of New Hampshire looked to the severability of interests clause to determine that the exclusion must be applied from the viewpoint of the insured seeking coverage and, thus, provided coverage to the allegedly negligent policyholder parents.

It is reasonable to assume that when the [insurance] company used the definite expression ‘the Insured’ in certain provisions of the policy and the more indefinite or general expression ‘any Insured’ or ‘an Insured’ in other provisions, it intended to cover differing situations.... [T]he provisions excluding from liability coverage injuries intentionally caused by ‘the Insured’ was meant to refer to a definite, specific insured, namely the insured who is involved in the occurrence [that] caused the injury and who is seeking coverage under the policy.

Id. at 468, 190 A.2d at 422-23.

The *Pawtucket* decision from over 50 years ago demonstrates the fallacy of the instant Respondents' position and the minority rule. To borrow a line from the Neese Respondents, they and the minority rule exemplified in *Minkler* "have it backwards." (Neese Brief, at p.16). Looking at the situation from a different perspective, the utility of the severability clause comes into sharp focus. If, as in *Pawtucket*, the intentional act exclusion in the ANPAC policy had referred to "the insured," the severability clause would have required the exclusion to be interpreted from the viewpoint of Tara Clendenen (the allegedly negligent insured).

But, that is not the case here. To eliminate any confusion and make the intent clear, the intentional/criminal acts exclusions in the instant ANPAC policy use the term "any insured," a term that is entirely unambiguous. As the Supreme Court of New Hampshire noted in *Pawtucket* and then *Stamp*, the particular exclusion language is the key. And, the meaning of "any insured" is unmistakable. The clear intent was to encompass the intentional or criminal conduct of all insureds in the exclusion, even if read from the vantage point of just Tara Clendenen.

Besides the intentional acts exclusion, there are other examples of "the insured" versus "any insured" in the ANPAC policy that demonstrate the proper application of the severability clause. The clause operates to clarify where coverage is both afforded and excluded. For example, in Section II – Coverage F – Medical Payments to Others, the policy contains the following:

As to others, this coverage applies only:

- a. to a person on the **insured location** with the permission of **any insured**; or
- b. to a person off the **insured location**, if the **bodily injury**:
 - (1) arises out of a condition in the **insured location** or the ways immediately adjoining;
 - (2) is caused by the activities of **any insured**;
 - (3) is caused by a **residence employee** in the course of the **residence employee's** employment by **any insured**; or

(4) is caused by an animal owned by or in the care of any insured.

(AR82) (emphasis added). Thus, the policy provides medical payments coverage for various acts of “any insured,” irrespective of the actions of the insured seeking coverage.

On the other side of the ledger, in addition to the “any insured” intentional acts exclusion, the policy excludes coverage for **bodily injury** to “you or any insured” (Section II-Exclusions, 2.f.) and for **bodily injury**:

- (1) arising out of the transmission of communicable diseases by “any insured,” (Section II-Exclusions, 1.c.);
- (2) resulting from sexual misconduct, whether “any insured” participated in committing any sexual misconduct or remained passive after having knowledge of any sexual misconduct (Section II-Exclusions, 1.d.);
- (3) arising out of any act or omission of “any insured” as an officer or member of the board of directors of any corporation or other organization (Section II-Exclusions, 1.e.);
- (4) arising out of any premises owned by or rented to “any insured” which is not an **insured location** (Section II-Exclusions, 1.g.);
- (5) arising out of the ownership, maintenance, use, loading, or unloading of **motor vehicles** “owned or operated by or rented or loaned to any insured” (Section II-Exclusions, 1.h.);
- (6) arising out of the entrustment by “any insured” to any person of a watercraft, aircraft or **motor vehicle** (Section II-Exclusions, 1.k.).

(AR82 – AR83).

Another example of the interplay between the severability clause and policy provisions can be found in the workers’ compensation/employer liability exclusion. This exclusion states that personal liability coverage does not apply to:

bodily injury to any person eligible to receive any benefits:

- (1) required to be provided; or
- (2) voluntarily provided by the insured under any:
 - (a) workers’ or workmen’s compensation law;
 - (b) nonoccupational disability law; or
 - (c) occupational disease law.

(AR84) (emphasis added). Say, for instance, an employee of James Clendenen files a civil action against James and Tara Clendenen with respect to an on-the-job injury. This provision

would exclude coverage for the claims made against James Clendenen. However, by applying the severability clause and the reference to “the insured”, the claim against Tara Clendenen would not necessarily be excluded, if she was not an employer or otherwise required to provide workers’ compensation benefits to the plaintiff.

For the foregoing reasons, ANPAC submits that the second certified question must be answered in the negative. The severability condition and the intentional/criminal act exclusions do not conflict. Even if the severability clause requires application of the policy provisions separately to each insured, the net effect is to modify the terms, “the insured” or just plain “insured.” The severability clause, however, cannot be used to eliminate policy language, negate unambiguous exclusions or otherwise alter the plain intent of the parties, such as remove the word “any” from the intentional/criminal injury exclusion. 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. *See, e.g., Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 46-47 (Iowa 2012); *American Family Mut. Ins. Co. v. Wheeler*, 287 Neb. 250, 255, 842 N.W.2d 100, 105 (2014).

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*, 231 W. Va. at 486, 745 S.E.2d at 524; *Soliva*, 176 W.Va. at 432-33, 345 S.E.2d at 34-35; *Payne*, 195 W.Va. at 507, 466 S.E.2d at 166.

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

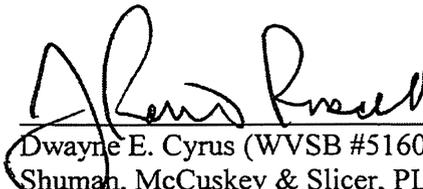
11:8. Reading the severability clause as only modifying policy provisions referencing “the insured” or just plain “insured” gives that clause meaning. While, at the same time, applying an unambiguous “any insured” intentional/criminal acts exclusion according to its plain wording gives that exclusion the full effect intended – to exclude a whole class of claims.

III. CONCLUSION.

Mary and David Neese deserve sympathy and respect for their loss. But, the language of the ANPAC homeowners policy issued to James Clendenen is clear. It specifically excludes from coverage bodily injuries resulting from the intentional or criminal conduct of “any insured.” As the exclusion does not refer to “the insured,” the severability clause does not operate to modify that result. The Neeses have unmistakably alleged that their daughter was murdered by Sheila Eddy, whom James and Tara Clendenen have admitted was an insured under the terms of James’ ANPAC homeowners policy. Therefore, the policy exclusion applies and Tara Clendenen is not entitled to coverage and a defense of the related negligence claims made against her in the Neese Complaint. 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.

Respectfully submitted.

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I hereby certify that on September 1, 2016, I served true and correct copies of the foregoing "*American National Property And Casualty Company's Reply 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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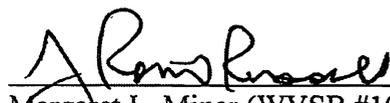
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