



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 16-0290

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**AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,  
Petitioner and Plaintiff Below,**

**vs.**

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

**AND**

**ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,  
Petitioner and Plaintiff Below,**

**vs.**

**MARY A NEESE, Individually and as Administratrix  
of the Estate of Skylar Neese, DAVID NEESE, TARA  
CLENDENEN, and PATRICIA SHOAF,  
Respondents and Defendants Below.**

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**RESPONDENT JAMES R. CLENDENEN'S SUMMARY RESPONSE**

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**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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## **RESPONDENT JAMES R. CLENDENEN'S SUMMARY RESPONSE**

This Summary Response is submitted pursuant to Rule 10(e), *West Virginia Rules of Appellate Procedure*, on behalf of Respondent James R. Clendenen in response to *Petitioner American National Property and Casualty Company's Brief Regarding Certified Questions*.

Respondent James R. Clendenen adopts and incorporates herein by reference the entirety of his wife Respondent Tara L. Clendenen's Summary Response filed in this case.

### **ARGUMENT**

#### **Respondent James R. Clendenen is the only "named insured," "you," or "your" under the ANPAC policy.**

A careful review of ANPAC's West Virginia Special Homeowners Policy issued to Respondent James R. Clendenen reveals that he is the only named insured. AR58-66. The **Definitions** section of the homeowners policy defines "you," and "your" as the "named insured" shown in the **Declarations**—this being only Mr. Clendenen. AR70. The policy further states:

**"Insured"** means you and the following residents of your household:

- a. your relatives;
- b. any other person under the age of 21 who is in the care of any person named above.

AR70.

#### **The policy provision defining "insured" as "your relative" is ambiguous.**

Although this issue was not raised below, Respondent James R. Clendenen, upon the lifting of the stay issued by the District Court, will seek leave to amend his answer and affirmative defenses to include the results of deeper research, which reveals that the term "your relative," as applied by ANPAC to include Shelia R. Eddy as an "insured" for the purpose of

excluding personal liability coverage to her mother, Respondent Tara L. Clendenen, is ambiguous, and this case is ripe for consideration. Respondent Tara L. Clendenen's daughter, Shelia R. Eddy, is Respondent James R. Clendenen's stepdaughter. Thus, Ms. Eddy is only related to him by affinity, not by blood.

Moreover, neither the ANPAC policy, Chapter 33 of the *West Virginia Code* nor any case decision from this Court defines the term "relative" for purposes of analysis in this case. However, in *Frost ex rel. Anderson v. Whitbeck*, 257 Wis.2d 80, 96, 654 N.W.2d 225, 232 (2002), the Supreme Court of Wisconsin held that, "we conclude that the word 'relative' in the policy exclusion is ambiguous." It further said that, "the word 'relative' in the context of the policy exclusion is so imprecise and elastic as to lack a certain interpretation." *Id.* at 233. In addition, the Court in *Forner v. Butler*, 319 S.C. 275, 278, 460 S.E.2d 425, 427 (1995), held that, "[i]n the context of insurance contracts, 'relative' has been reasonably interpreted as restricted to those related by consanguinity and excluding those related by affinity." (Citations omitted.) Therefore, Respondent James R. Clendenen requests that this Court hold that the term "relative" is ambiguous and construe it so as to not include a stepdaughter and in favor of coverage being extended by ANPAC to his wife, Respondent Tara L. Clendenen.

**The policy provision defining "in the care of" is ambiguous.**

As to the ambiguity of the ANPAC term "in the care of," the Court of Appeals of Oregon, in *Oregon Mut. Ins. Co. v. Clemems*, 124 Or.App. 155, 861 P.2d 372 (1993), said:

OMIC's alternative ground for summary judgment was the policy exclusion for a person under 21 years of age who was in the care of the insured. The phrase "in your care" is not defined in the policy. OMIC argues that it should be interpreted broadly, so that the exclusion would apply even when the policyholders do not have direct supervision over a child. Defendants argue that the phrase is ambiguous. **We agree that it is ambiguous, because it "could reasonably be given a broader or narrower meaning,**

**depending upon the intention of the parties in the context in which such words are used by them.** *Shadbolt v. Farmers Insur. Exch.*, 275 Or. 407, 411, 557 P.2d 478 (1976). Therefore, our task is to interpret the phrase “according to what we perceive to be the understanding of the ordinary purchaser of insurance.” *Joseph v. Utah Home Fire Ins. Co.*, 313 Or. 323, 834 P.2d 885 (1992). (Emphasis added.)

With ambiguity in this term, and construction to be made in favor of personal liability coverage, Shelia R. Eddy would not be deemed “any insured” under the ANPAC policy, and her intentional and criminal acts should not serve as a contractual basis to exclude coverage to Respondent Tara L. Clendenen.

**If no ambiguity exists with the phrase “in the care of,” the determination of whether Shelia R. Eddy was “in the care of” Respondent James R. Clendenen is a factual one reserved for the trier of fact.**

While there is contrary case authority to *Oregon Mut. Ins. Co. v. Clemems* which holds that the term “in the care of” is unambiguous, the common thought is that there are numerous factors which should be decided by a factfinder to give “meaning of the phrase.” *Henderson v. State Farm Fire & Cas. Co.*, 460 Mich. 348, 358, 596 N.W.2d 190, 195 (1999) (setting forth eight non-exclusive common sense factors which are deemed relevant for the factfinder to consider in answering when someone is “in the care of” someone else.) *See also*, *Rigby v. Allstate Indem. Co.*, 225 Md.App. 98, 123 A.3d 592 (2015); *Hanson Farm Mut. Ins. Co. of South Dakota v. Degen*, 2013 S.D. 29, 829 N.W.2d 474 (2013); *Mitsock v. Erie Ins. Exchange*, 2006 PA Super 287, 909 A.2d 828 (2006); and *Oliva v. Vermont Mut. Ins. Co.*, 150 N.H. 563, 842 A.2d 92 (2004). In the event there is no determination of ambiguity of the “in the care of” phrase, then upon remand, the District Court should be instructed to consider the *Henderson* factors in making a final factual determination as to whether Shelia R. Eddy was “in the care of”

Respondent James R. Clendenen at the time of committing the intentional and criminal acts in this case.

**CONCLUSION**

Respondent James R. Clendenen requests that this Court reformulate the certified questions presented for review to include its holding that ambiguity exists in the ANPAC policy created by the terms “your relative” and “in the care of,” as they are used and applied by ANPAC to deny personal liability coverage to Respondent Tara L. Clendenen, and that this Court’s answers to the certified questions be made in such a manner as to require ANPAC to provide her a defense and personal liability indemnity benefits in the underlying civil action filed by the Neeses.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, J. Michael Benninger, counsel for Respondent James R. Clendenen, do hereby certify that on August 11, 2016, the foregoing *Respondent James R. Clendenen's Summary Response* was duly served upon counsel of record by depositing true and exact copies thereof in the regular course of the United States Mail, First Class, postage prepaid, addressed as follows:

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A handwritten signature in black ink, appearing to read 'JWB', is written over a horizontal line. The signature is stylized and cursive.

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