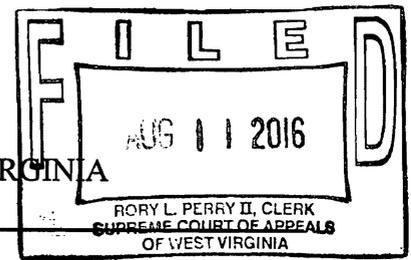


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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 Skylar 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 Skylar Neese,
DAVID NEESE, TARA CLENDENEN, and PATRICIA SHOAF,

Respondents.

**BRIEF OF RESPONDENTS DAVID NEESE AND MARY A. NEESE,
INDIVIDUALLY AND AS ADMINISTRATRIX AND PERSONAL
REPRESENTATIVE OF THE ESTATE OF SKYLAR NEESE**

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STATEMENT OF THE CASE

I. The Underlying State Action

Teenagers Sheila Eddy, Rachel Shoaf, and Skylar Neese had been friends for years. (AR95.) In the spring and summer of 2012, Sheila and Rachel wanted to terminate their friendship with Skylar but were afraid to do so because they believed Skylar would disclose some embarrassing information she knew about them. (AR95.) So, Sheila and Rachel plotted to kill Skylar instead. (AR95.) On the night of July 5, 2012, Sheila and Rachel picked Skylar up in a car belonging to Sheila's mother, Tara Clendenen. (AR95, 99.) Sheila and Rachel drove Skylar to a remote location outside of Brave, Pennsylvania, where they stabbed Skylar to death and hid her body. (AR95-98.) Sheila and Rachel eventually confessed to and were convicted of the murder. (AR522.)

In 2014, Skylar's parents, Respondents David and Mary Neese, filed a wrongful death civil action in the Circuit Court of Monongalia County, West Virginia (the "State Action"), against Sheila, Rachel, Mrs. Clendenen, and Patricia Shoaf, Rachel's mother, to recover damages in connection with Skylar's death. (AR94.) The Neeses asserted, among other things, that Mrs. Clendenen and Mrs. Shoaf had been negligent in their supervision of Sheila and Rachel in numerous respects, such as failing to monitor their activities, behavior, and whereabouts, and in Mrs. Clendenen's case, in entrusting to Sheila the car the girls used to drive Skylar to Pennsylvania on the night of her murder. (AR98-100.)

II. The Insurance Policies

At the time of Skylar's death, Mrs. Clendenen and her daughter, Sheila, were insured under policies issued to James Clendenen, Mrs. Clendenen's husband, by Petitioner American National

Property and Casualty Company ("ANPAC" or "American National"), including an automobile policy and ANPAC Homeowners Policy No. 47-H-761-55L-3 (the "ANPAC Homeowners Policy"). (AR52-89.) At that time, Mrs. Shoaf and her daughter, Rachel, were insured under policies issued to Mrs. Shoaf by Petitioner Erie Insurance Property and Casualty Company ("Erie"), including automobile policies and Erie Ultracover HomeProtector Insurance Policy No. Q55-7600737 (the "Erie Homeowners Policy"). (AR133-176.)

A. The ANPAC Homeowners Policy

The ANPAC Homeowners Policy was issued to Mr. Clendenen, who was the named "insured" under the Policy, along with "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." (AR53, 70.)

The ANPAC Homeowners Policy provides personal liability coverage as follows:

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

- a. pay up to our **limit of liability** for the damages for which the **insured** is legally liable; and
- b. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages resulting from the occurrence equals our **limit of liability**.

(AR81.) An "occurrence" for purposes of the personal liability coverage is

an accident, including exposure to conditions, which results in:

- a. **bodily injury**; or
- b. **property damage**

during the policy period. Repeated or continuous exposure to substantially the same general conditions is considered to be one **occurrence**.

(AR71.)

The ANPAC Homeowners Policy contains certain exclusions from the personal liability coverage, including the following:

Coverage E - Personal Liability and Coverage F - Medical Payments to Others do not apply to **bodily injury** or **property damage**:

a. which is expected or intended by any **insured** even if the actual injury or damage is different than expected or intended;
[or]

....

p. arising out of any criminal act committed by or at the direction of any **insured**[.]

(AR82-83.) And within Section II - Conditions, which are specifically applicable to Coverage E, personal liability, appears the following:

Severability of Insurance. This Insurance applies separately to each **insured**. This condition shall not increase our **limit of liability** for any one **occurrence**.

(AR85.)

B. The Erie Homeowners Policy

The Erie Homeowners Policy includes the following insuring agreement for personal injury liability coverage:

We will pay all sums up to the amount shown on the **Declarations** which **anyone we protect** becomes legally obligated to pay as damages because of **bodily injury** or **property damage** caused by an **occurrence** during the policy period. **We** will pay for only **bodily injury** or **property damage** covered by this policy.

(AR149.) An "occurrence" for purposes of the personal injury liability coverage, "means an accident, including continuous or repeated exposure to the same general harmful conditions."

(AR140.) The named insured is Patricia Shoaf. (AR133.) The coverage extends to "**anyone we protect**" which includes "the following **residents of your** household: 1. relatives and wards[.]"

(AR139.)

The Erie Homeowners Policy also contains certain exclusions from the personal injury liability coverage, including the following:

We do not cover under Bodily Injury Liability Coverage, Property Damage Liability Coverage, Personal Injury Liability Coverage, and Medical Payments To Others Coverage:

1. **Bodily injury, property damage, or personal injury** expected or intended by **anyone we protect** even if:
 - a. the degree, kind, or quality of the injury or damage is different than what was expected or intended; or
 - b. a different person, entity, real or personal property sustained the injury or damage than was expected or intended.

....

We do not cover under Bodily Injury Liability Coverage, Property Damage Liability Coverage, or Personal Injury Liability Coverage:

....

9. **Personal injury** arising out of willful violation of a law or ordinance by **anyone we protect**.

(AR150-151.) Like the ANPAC Homeowners Policy, the Erie Homeowners Policy contains severability of insurance language: "This insurance applies separately to **anyone we protect**."

(AR152.)

III. The Federal Declaratory Judgment Actions

Both ANPAC and Erie filed diversity actions pursuant to 28 U.S.C. § 1332 in the U.S. District Court for the Northern District of West Virginia seeking a judicial determination of their respective duties to defend and indemnify their insureds under the relevant insurance policies. (AR15, 104.) The two cases were consolidated by order of U.S. District Judge Irene M. Keeley. (AR269.) ANPAC and Erie each filed a motion for summary judgment (AR286, 316), and the Defendants filed cross-motions for summary judgment (AR347, 377, 383).

In her Memorandum Opinion and Order Following Status Conference, Judge Keeley made the following conclusions:

1. Skylar's death was an "occurrence" from the perspective of Mrs. Clendenen and Mrs. Shoaf;
2. Neither Mrs. Shoaf nor Rachel Shoaf is entitled to coverage under the personal injury portion of the Erie homeowner's policy [eg. libel, slander, defamation of character, invasion of privacy, and wrongful detention];
3. Neither the severability clauses nor the exclusions in the homeowner's policies are ambiguous;
4. Neither Eddy nor Shoaf is entitled to coverage under any of the insurance policies in this case; and,
5. The defendants are not entitled to coverage under any of the automobile insurance policies.

(AR518; *see also* AR526-527.) But Judge Keeley also determined that there was a case-dispositive issue concerning the interaction of the exclusions and the severability clauses that had not previously been addressed by this Court and should not be decided in the first instance by a U.S. District Court sitting in diversity. (AR516-517.)

IV. The Certified Questions

As a result, Judge Keeley issued her Order of Certification to the Supreme Court of Appeals of West Virginia, in which she certified these two questions:

1. 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," and the unambiguous exclusion in Erie's policy for "[b]odily injury, property damage, or personal injury expected or intended by 'anyone we protect' . . .," preclude liability coverage for insureds who did not commit any intentional or criminal act?
2. 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?

(AR520.)

SUMMARY OF ARGUMENT

This Court has repeatedly held that "[i]n determining whether under a liability insurance policy an occurrence was or was not an 'accident'—or was or was not deliberate, intentional, expected, desired, or foreseen—primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue." *E.g.*, Syl. Pt., *Columbia Cas. Co. v. Westfield Ins. Co.*, 217 W. Va. 250, 617 S.E.2d 797 (2005). The Court adopted this rule because the whole purpose of liability insurance policies is to provide a defense and indemnification to an insured for claims arising from the insured's own negligence. That is what Mrs. Clendenen and Mrs. Shoaf are seeking in this case—insurance for the claims against

them based on their own negligent acts and omissions that contributed to the intentional acts of their daughters in murdering Skylar Neese.

But ANPAC and Erie essentially contend that even though Skylar's death was an "occurrence" from the standpoint of Mrs. Clendenen and Mrs. Shoaf, coverage should nevertheless be denied under exclusions for the intentional or criminal acts of "any insured" or "anyone we protect" because it is appropriate to view those exclusions from the perspective of their coinsureds, Sheila and Rachel, who, unlike Mrs. Clendenen and Mrs. Shoaf, did intend to bring about Skylar's death. That position is inconsistent with the rule adopted by this Court in *Columbia Casualty* based on its recognition that liability policies are all about insuring against one's own negligence, rather than the intentional acts of another.

Even more problematic for ANPAC and Erie is the inclusion in their own policies of severability language specifically stating that "*this insurance applies separately to,*" in the case of ANPAC, "*each insured,*" and "*to anyone we protect*" in the Erie Homeowners Policy. The effect of this plain language is unmistakable—it is as though each insured has her own insurance policy with ANPAC or Erie. As a result, the exclusions are applied separately to Mrs. Clendenen and Mrs. Shoaf, neither of whom is alleged to have committed any intentional or criminal acts for which coverage is sought. Therefore, even if the exclusionary provisions have the effect of precluding coverage for a negligent insured based on the intentional or criminal acts of a coinsured, as the Petitioners argue, there is at least a conflict between the exclusions and the severability provisions. Applying standard rules of contract construction applicable to West Virginia insurance contracts, the ambiguity created by the conflict must be resolved against the insurer and in favor of the insured. Or, in the words of the second certified question, the severability provisions must "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." (AR520.)

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court has already scheduled this case for oral argument, pursuant to West Virginia Rule of Appellate Procedure 20, on September 21, 2016.

ARGUMENT

I. STANDARD OF REVIEW

When answering certified questions from a federal court pursuant to the Uniform Certification of Questions of Law Act, W. Va. Code §§ 51-1A-1 to -13, the court employs a plenary standard of review. Syl. Pt. 2, *Valentine v. Sugar Rock, Inc.*, 234 W. Va. 526, 766 S.E.2d 785 (2014). Contrary to the statement in Erie's Brief that the Court should "assume that the findings of fact by the certifying court are correct" (Erie's Br. 2 n.1), the court is not bound by, or constrained to consider only, the facts contained in the federal court's certification order. *See Valentine*, 234 W. Va. at 533, 766 S.E.2d at 792 (expressly disavowing the court's statement in *L.H. Jones Equip. Co. v. Swenson Spreader LLC*, 224 W. Va. 570, 573 n.3, 687 S.E.2d 353, 356 n.3 (2009), that "[t]his Court is bound by the facts contained in the district court's certification order"). Rather, the court "may consider any portions of the federal court's record that are relevant to the question of law to be answered." *Id.*, Syl. Pt. 2. In order to fully address the law involved in answering the certified questions, the Court may reformulate the questions. *See* W. Va. Code § 51-1A-4; Syl. Pt. 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993).

II. APPLYING WEST VIRGINIA PUBLIC POLICY AND RULES OF CONTRACT CONSTRUCTION, EXCLUSIONS TO COVERAGE FOR ACCIDENTAL BODILY INJURY BASED ON THE EXPECTED OR INTENTIONAL OR CRIMINAL ACTS OF "ANY INSURED" OR "ANYONE WE PROTECT" DO NOT PRECLUDE LIABILITY COVERAGE FOR INSUREDS WHO DID NOT ACTUALLY COMMIT AN INTENTIONAL OR CRIMINAL ACT

The first certified question asks whether, applying West Virginia public policy and rules of contract construction, exclusions to coverage for accidental bodily injury based on the expected or intentional or criminal acts of "any insured" or "anyone we protect" preclude liability coverage for insureds who did not actually commit an intentional or criminal act. (AR520.) Various expressions of West Virginia public policy and rules of contract construction are relevant in answering this question.

Beginning with the more general propositions, this Court has indicated that "[t]he purpose of insurance liability policies is to provide a defense and indemnification to an insured for claims arising from the insured's own negligent acts or omissions," which is exactly what Mrs. Clendenen and Mrs. Shoaf are seeking in this case. *Columbia Cas. Co. v. Westfield Ins. Co.*, 217 W. Va. 250, 254, 617 S.E.2d 797, 801 (2005); accord *J.H. v. W. Va. Div. of Rehab. Servs.*, 224 W. Va. 147, 156, 680 S.E.2d 392, 401 (2009), *abrogated on other grounds by W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014). To that end, West Virginia "calls for resolving doubts regarding insurance coverage in favor of an insured." *Columbia Cas. Co.*, 217 W. Va. at 254, 617 S.E.2d at 801; *see also* Syl. Pt. 5, *Elk Run Coal Co. v. Canopus U.S. Ins.*, 235 W. Va. 513, 775 S.E.2d 65 (2015) ("It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." (quoting Syl. Pt. 4, *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488

(1987), *overruled on other grounds by Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998), and by *Parsons v. Halliburton Energy Servs.*, 237 W. Va. 138, 785 S.E.2d 844 (2016)). Construction of contract terms in favor of the insured extends to policy exclusions seeking to limit coverage, which "will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." Syl. Pt. 8, *Nat'l Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W. Va. 739, 724 S.E.2d 343 (2012) (quoting Syl. Pt. 5, *McMahon & Sons*, 177 W. Va. 734, 356 S.E.2d 488); cf. Syl. Pt. 10, *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 745 S.E.2d 508 (2013) ("An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion." (quoting Syl. Pt. 7, *McMahon & Sons*, 177 W. Va. 734, 356 S.E.2d 488)). Finally, in construing any insurance policy, the Court's "primary concern is to give effect to the plain meaning of the policy and, in doing so, we construe all parts of the document together." *Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995); see also *Glen Falls Ins. Co. v. Smith*, 217 W. Va. 213, 222, 617 S.E.2d 760, 769 (2005) (the policy being construed should "be read as a whole, giving meaning to each term").

Turning now to the specific rule of contract construction most at issue in this case, this Court, beginning with the *Columbia Casualty* case, has said time and again that the question of whether a particular occurrence was intended or expected should be decided from the standpoint of the insured whose coverage under the policy is in issue (Mrs. Clendenen and Mrs. Shoaf under the policies at issue here):

In determining whether under a liability insurance policy an occurrence was or was not an "accident"—or was or was not deliberate, intentional, expected, desired, or foreseen—primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue.

Syl. Pt., 217 W. Va. 250, 617 S.E.2d 797; accord Syl. Pt. 4, *Cherrington*, 231 W. Va. 470, 745 S.E.2d 508; Syl. Pt. 4, *J.H.*, 224 W. Va. 147, 680 S.E.2d 392; Syl. Pt. 1, *Am. Modern Home Ins. Co. v. Corra*, 222 W. Va. 797, 671 S.E.2d 802 (2008). Not surprisingly, discussion of the *Columbia Casualty* case is hard to come by in the briefs filed by ANPAC and Erie, which instead focus primarily on cases decided before *Columbia Casualty*. Among those cases are *West Virginia Fire & Casualty Co. v. Stanley*, 216 W. Va. 40, 602 S.E.2d 483 (2004), and *Smith v. Animal Urgent Care, Inc.*, 208 W. Va. 664, 542 S.E.2d 827 (2000), both of which were cited by this Court in *Columbia Casualty*, but did not interfere with the Court's formulation of the rule stated above.

In the *Columbia Casualty* case, the insurance policy provided coverage during the policy period for an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." 217 W. Va. at 252, 617 S.E.2d at 799. The word "accident" was not defined in the policy at issue, which gave rise to the question of whether there was coverage under the policy issued to the Randolph County Commission for claims made against the commission by the estates of two inmates who committed suicide in the Randolph County jail. The Court held that while the deaths would not be accidental if considered from the perspective of the inmates who intentionally killed themselves, the coverage question should be decided from the perspective or standpoint of the commission, the insured whose coverage under the policy was at issue. *Id.* at 254, 617 S.E.2d at 801. From that perspective, "the death by suicide of a jail inmate can be reasonably seen as an accident, if the commission did not have a desire, plan, expectation, or intent that the death would occur." *Id.* at 252, 617 S.E.2d at 799.

In so holding, the Court explained that to adopt the argument that whether the actor's conduct was intentional or accidental should be determined from the perspective of the actor and not the insured would

preclude liability insurance coverage for insureds in many cases involving allegedly intentional or non-accidental conduct by actors who had a substantial and material role in causing an injury, but where the insured seeking coverage cannot be fairly "tarred with the same brush" of that actor's coverage-defeating conduct. Premises liability, product liability, negligent hiring and supervision, and negligent entrustment cases come to mind. *We see no intent in our cases interpreting and applying general liability policies to deny liability coverage to insureds in a wide range of cases where an insured was allegedly negligent but did not (actually or constructively) intend to cause a specific injury. The purpose of insurance liability policies is to provide a defense and indemnification to an insured for claims arising from the insured's own negligent acts or omissions.*

Id. at 254 n.5, 617 S.E.2d at 801 n.5 (emphasis added); *accord J.H.*, 224 W. Va. at 156, 680 S.E.2d at 401; *see also USF Ins. Co. v. Orion Dev. RA XXX, LLC*, 756 F. Supp. 2d 749, 758 (N.D. W. Va. 2010) ("This Court sees no intent in the cases interpreting and applying general liability coverage to deny liability coverage simply because an insured was allegedly negligent but did not (actually or constructively) intend to cause a specific injury."). The holding and reasoning of *Columbia Casualty* were followed in the *J.H.* and *USF Insurance* cases. *See USF Ins.*, 756 F. Supp. 2d at 758 (viewed from the perspective of the insured employer, sexual assaults by its employee were accidental "occurrences" covered under the insured's liability policy); *J.H.*, 224 W. Va. at 156, 680 S.E.2d at 401 (viewed from the perspective of the insured State Division of Rehabilitation Services, the sexual molestation of one resident by another fell within the definition of "occurrence" in the state's liability policy).

Here, the Neeses asserted against Mrs. Clendenen and Mrs. Shoaf claims of negligent supervision and negligent entrustment like those envisioned by the Court in *Columbia Casualty*.

Under the holdings of that case and *J.H.*, Mrs. Clendenen and Mrs. Shoaf had a reasonable expectation that they would be covered under the ANPAC and Erie Homeowners Policies for their own negligent acts. *Cf. Minkler v. Safeco Ins. Co. of Am.*, 232 P.3d 612, 624 (Cal. 2010) (mother had "no reason to expect that [her son's] residence in her home, and his consequent status as an additional insured on her homeowners policies, would *narrow* her own coverage . . . against claims arising from *his* intentional acts" (court's emphasis)). Their expectations flow from the West Virginia public policy reflecting that the "purpose of insurance liability policies is to provide a defense and indemnification to an insured for claims arising from the insured's own negligent acts or omissions." *J.H.*, 224 W. Va. at 156, 680 S.E.2d at 401; *Columbia Cas.*, 217 W. Va. at 254 n.5, 617 S.E.2d at 801 n.5.

Should the rules be any different where the question of intent or expectation to defeat coverage arises from language in a policy exclusion rather than a definition of "occurrence"? Because of the specific language used by the U.S. Court of Appeals for the Fourth Circuit in certifying the question answered by this Court in *Columbia Casualty*,¹ the Court did not specifically discuss "exclusionary language in the policy relating to intentional acts"² . . . except to say that no other language in the policy appears to be inconsistent with our holding and reasoning stated herein." 217 W. Va. at 252 n.2, 617 S.E.2d at 799 n.2. Even so, it is submitted that the principle recognized in *Columbia Casualty* is broad enough to cover the situation presented in this case as well. In fact,

¹"Under West Virginia law, were the suicidal deaths of Robinson and Everson [the inmates], either or both, 'occurrences' within the meaning of the Westfield Insurance Company commercial general liability policy at issue in this case?" 217 W. Va. at 251, 617 S.E.2d at 798.

²The Court noted that "[a]n intentional acts exclusion in a liability policy is operable when the policyholder commits an intentional act and expects or intends the specific resulting damage." *Id.* at 252 n.2, 617 S.E.2d at 799 n.2.

the Court did say that "[i]n West Virginia, consideration of the accidental/non-accidental and similar *intentional-or-not nature of conduct or injuries* has routinely involved consideration of and giving weight to the perspective and standpoint of the insured whose coverage is at issue." *Id.* at 253, 617 S.E.2d at 800 (emphasis added); *see also id.*, Syl. Pt. ("In determining whether under a liability insurance policy an occurrence . . . was or was not deliberate, *intentional, expected, desired, or foreseen*—primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue." (emphasis added)). In other words, when determining whether coverage-defeating conduct was intentional or not, the focus should be on the conduct of the insured whose coverage is at issue, given that the purpose of liability policies is to provide insurance for claims arising from the insured's *own* negligent acts or omissions.

ANPAC and Erie seek to alter this rule based on the use of the "any person" or "anyone we protect" language in their policy exclusions. That is a lot of freight for those terms to bear. In the only nod that either of the Petitioners makes to *Columbia Casualty*, Erie suggests that the court in an unreported federal case rejected an attempt to "extend" the rule of *Columbia Casualty* to require that "policy exclusions—as opposed to the insuring language involved in *Columbia Casualty*— . . . be viewed from the perspective of the" insured." (Erie's Br. 15 (citing *Westfield Ins. Co. v. Merrifield*, No. 2:07-cv-00034, 2008 WL 336789 (S.D. W. Va. Feb. 5, 2008)).) Obviously, the Court is not bound by the federal district court's decision in *Merrifield*. *See State ex rel. Johnson & Johnson Corp. v. Karl*, 220 W. Va. 463, 477 n.18, 647 S.E.2d 899, 913 n.18 (2007). In any event, Erie's reading of *Merrifield* is too broad. In that case, the mother of an individual who killed a three-year old boy through physical and sexual abuse sought coverage under her insurance policy against claims that her negligence contributed to the boy's death. The district court found that the mother

was not covered because the policy unambiguously "bar[red] coverage for injuries arising out of sexual molestation." 2008 WL 336789, at *6. Unlike here, no question was presented in that case as to whether the inclusion of "any person" or "anyone we protect" terms can permissibly alter the focus on whose conduct is at issue, regardless of whether such language is included in insuring language or in a policy exclusion.

Even if the position staked out by ANPAC and Erie in this case is not against West Virginia public policy or the rules of construction set forth in *Columbia Casualty* and other cases decided by this Court, the use of the "any person" or "anyone we protect" language in the exclusions is sufficient to do no more than create an ambiguity as to whose conduct is at issue in deciding whether to apply the exclusions, especially in light of the severability provisions included in each of the policies. That question is addressed next.

III. THE SEVERABILITY CLAUSES IN THE ANPAC AND ERIE HOMEOWNERS POLICIES "PREVAIL OVER" THE INTENTIONAL OR CRIMINAL ACT EXCLUSIONS IN THE POLICIES, AT LEAST TO THE EXTENT OF CREATING AN AMBIGUITY THAT MUST BE RESOLVED BY APPLYING THE EXCLUSIONS SEPARATELY TO EACH INSURED, DESPITE THE INTENTIONAL AND CRIMINAL ACTIONS OF COINSUREDS

Judge Keeley's second certified question asks whether the severability clauses in each of the Homeowners Policies "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?" (AR520.) The issue is relatively straightforward. Both of the Homeowners Policies include severability language to the effect that "[t]his insurance applies separately to each insured," in the case of the ANPAC Homeowners Policy (AR85), and "to anyone we protect," in the Erie Homeowners Policy

(AR152). Because all of "this insurance" applies separately to each insured, that includes the exclusions, thereby negating the Petitioners' contention that an insured seeking coverage for her own negligence can be barred based on an exclusion for the intentional or criminal acts of a coinsured. Giving effect to the severability clause, as required under West Virginia rules of contract construction, *see Glen Falls Ins. Co.*, 217 W. Va. at 222, 617 S.E.2d at 769 (insurance policies should "be read as a whole, giving meaning to each term"); *Payne*, 195 W. Va. at 507, 466 S.E.2d at 166 (all parts of an insurance policy should be construed together), at the very least creates an ambiguity with regard to the exclusions, which must be resolved in favor of coverage, *see* Syl. Pt. 8, *Miller*, 228 W. Va. 739, 724 S.E.2d 343.

ANPAC, for its part, argues that the severability clause can be given effect because it serves another function, namely, spreading protection to the limits of coverage among all of the insureds. (ANPAC's Br. 24.) ANPAC points to a Nebraska case discussing the history of the severability clause, which was supposedly first added to liability policies with the intention

to affect those exclusions that use the phrase, "the insured," such that other insureds under the same policy would still enjoy coverage for claims made, for example, by the employees of co-insureds.

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

(*Id.* (internal quotation marks and alteration omitted) (quoting *Am. Family Mut. Ins. Co. v. Wheeler*, 842 N.W.2d 100, 105 (Neb. 2014)).) But ANPAC and the Nebraska case have it backwards. The exact same argument was made by the insurer in the *Minkler* case decided by the California Supreme Court. 232 P.3d at 618 ("Safeco explains that severability clauses were first added to commercial

liability policies in the mid-1950's to countermand a line of decisions which had held that a provision excluding coverage for 'the insured' in a policy with multiple insureds operated collectively, so as to exclude coverage for all, with respect to a particular occurrence, if it excluded coverage for any."). But as the court correctly pointed out, this history, rather than resolving any ambiguity caused by the clause at issue there, "actually *undermines* Safeco's limited construction of the current clause by establishing that the original intent *was to make clear the separate application of policy exclusions, not just liability limits, to each individual insured.*" *Id.* (court's emphasis). The interpretation offered by the insurer in *Minkler*, and ANPAC here, would be much more persuasive if all ambiguity had been avoided simply by replacing "this insurance" in the severability clause with "the limits of liability," so that the provision would read "[t]he limits of liability of this policy apply separately to each insured." *See id.* ("Such language would have made clear that the clause's purpose was not to make exclusions from coverage individual rather than collective, but merely to extend the full individual indemnity limits to each person among several insureds under the same policy, subject to the per occurrence ceiling.").³

³This observation by the *Minkler* court also gives the lie to the perfunctory "sky-is-falling" argument made by *amicus curiae* West Virginia Insurance Federation threatening no less than the destabilization of West Virginia's entire insurance market if the Court were to rule against ANPAC and Erie in this matter. (Amicus Br. 14-15.) The Federation asserts that "if the exclusions applied only to the individual that engaged in the intended or expected act, then the policies would say so," and the insurers supposedly would have collected different premiums to reflect their increased exposure. (Amicus Br. 15.) But the policies *do* say so, right there in the severability provisions, or it is at least ambiguous whether they say so, in light of the severability clauses. If this decision goes against the insurance companies, they can, as the *Minkler* court pointed out, easily fix the issue just by cleaning up the language in the severability provisions *they* include in the policies *they* write, which are generally "convoluted and confusing" anyway. *See Columbia Cas. Co.*, 217 W. Va. at 252, 617 S.E.2d at 799. Chicken Little aside, the Neeses are confident that the insurance market will continue on as it did before, regardless of what the Court decides in this case.

Notably, the *Minkler* court's reading of the severability provision is entirely consistent with this Court's statement in *Sayre v. State Farm Fire & Casualty Co.*, No. 11-0962, 2012 WL 3079148 (W. Va. May 25, 2012), that

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

Id. at *2 (court's alteration and emphasis). Here, by contrast, there are liability claims against multiple insureds (Mrs. Clendenen and her daughter Sheila in the ANPAC Homeowners Policy, Mrs. Shoaf and her daughter Patricia in the Erie Homeowners Policy) alleged to be liable for one occurrence, the death of Skylar. Accordingly, the severability clauses in the Homeowners Policies do have application in this case to confer liability coverage on Mrs. Clendenen and Mrs. Shoaf, even though Sheila and Patricia are not entitled to coverage under the intentional or criminal act exclusions.

The language at issue in *Sayre* and in *Minkler* was identical to that in the ANPAC Homeowners Policy: "This insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence." *See id.*; *Minkler*, 232 P.3d at 615 (substituting "will" for "shall"). In *Minkler*, Scott Minkler sued David Schwartz and David's mother, Betty Schwartz, alleging that David had sexually molested Scott. Scott alleged, among other things, that some of the acts of molestation occurred in Betty's home, and as a result of her negligent supervision. Betty was the named insured, and David an additional insured, under a series of homeowners policies issued by Safeco Insurance Company of America. The policies' liability coverage provisions promised to defend and indemnify, within policy limits, "an" insured for personal injury or property

damage arising from a covered "occurrence," but they specifically excluded coverage for injury that was "expected or intended" by "an" insured, or was the foreseeable result of "an" insured's intentional act. There is no difference between the "an insured" language in the Safeco policies at issue in *Minkler* and the "any insured" language in the ANPAC and Erie Homeowners Policies here. The California Supreme Court specifically noted that

in a policy with multiple insureds, exclusions from coverage described with reference to the acts of "an" or "any," as opposed to "the," insured are deemed under California law to apply collectively, so that if one insured has committed acts for which coverage is excluded, the exclusion applies to all insureds with respect to the same occurrence.

232 P.3d at 614.

However, the Safeco policies' "Conditions" provisions also contained a severability clause materially identical to the ones set forth in the ANPAC and Erie Homeowners Policies. Because of the inclusion of the severability clause in the policies, the question became "whether such a clause establishes, in a case like this, an exception to the rule described above, so that Betty is barred from coverage only if her *own* conduct in relation to David's molestation of Scott fell within the policies' exclusion for intentional acts." *Id.* Or, as the Ninth Circuit put it in certifying the question to the California Supreme Court:

Where a contract of liability insurance covering multiple insureds contains a severability-of-interests clause in the "Conditions" section of the policy, does an exclusion barring coverage for injuries arising out of the intentional acts of "an insured" bar coverage for claims that one insured negligently failed to prevent the intentional acts of another insured?"

Id. at 616. The California Supreme Court (in a unanimous decision) answered its slightly reformulated version of that question "no," *id.* at 624, concluding that

an exclusion of coverage for the intentional acts of "an insured," read in conjunction with a severability or "separate insurance" clause like the one at issue here, creates

an ambiguity which must be construed in favor of coverage that a lay policyholder would reasonably expect. Given the language of the "separate insurance" clause, a lay insured would reasonably anticipate that, under a policy containing such a clause, each insured's coverage would be analyzed separately, so that the intentional act of one insured would not, in and of itself, bar liability coverage of another insured for the latter's independent act that did not come within the terms of the exclusion. We thus determine that Betty was not precluded from coverage for any personal role she played in David's molestation of Scott *merely* because *David's* conduct fell within the exclusion for intentional acts.

Id. at 614-15 (court's emphasis).

The court began its discussion of the issues by canvassing the rules of contract interpretation applicable to insurance policies—including that the goal in construing insurance contracts is to give effect to the parties' mutual intentions; if contractual language is clear and explicit, it governs; the policy must be examined as a whole to determine whether an ambiguity exists; and only if the terms are ambiguous will the contract be interpreted so as to protect the objectively reasonable expectations of the insured—with the "tie-breaker" rule being that ambiguities are resolved against the insurer, and more specifically that exclusions from coverage are interpreted narrowly against the insurer. *Id.* at 616-17. As outlined above, these are the same rules applied in construing insurance policies in West Virginia.

Applying these rules, the court concluded that the "severability or 'separate insurance' clause created ambiguity as to the scope of the exclusion for intentional acts by 'an' insured." *Id.* at 617; *see also id.* at 618 ("[W]e are convinced that the severability clause in Betty's Safeco policies, when read in conjunction with the exclusion for the intentional acts of 'an insured,' created an ambiguity as to whether a coverage exclusion for an intentional act or injury by one insured extended to all other insureds under the policies.").

Though Safeco argues otherwise . . . , a reasonable interpretation of the severability language simply *contradicts* any inference that a coverage exclusion for

the intentional acts of "an insured"—i.e., one insured among several—would bar coverage for all others, such that all must sink or swim together. The severability clause stated that "[t]his *insurance*" (italics added) was "separately" applicable to "each insured." The broad reference to separate application of "this insurance" suggested . . . that *each* person the policies covered would be treated, for *all policy purposes*, as if he or she were the sole person covered—i.e., that in effect, each insured had an *individual* policy whose terms applied only to him or her.

Id. at 617 (court's emphasis). In so concluding, the court rejected Safeco's arguments based on the second sentence of the severability provision ("This condition will not increase our limit of liability for any one occurrence."), the history of the severability provision (as noted above), and the fact that the severability clause appeared not in the "Exclusions" provisions of the policies, but in the "Conditions" provisions. *Id.* at 617-18.

Having found an ambiguity based on the interaction of the intentional acts exclusion and the severability clause, the court set out to resolve the ambiguity, which it did by focusing on the reasonable expectations of the insured, just as this Court would.⁴ *See id.* at 624 ("The ambiguity thus created must be resolved, if possible, in a way that preserves the objectively reasonable coverage expectations of the insured seeking coverage."). And the court concluded that

in light of the severability clause, Betty would reasonably have expected Safeco's policies, whose general purpose was to provide coverage for each insured's "legal[] liab[ility]" for "injury or . . . damage" to others, to cover her *separately* for her *independent* acts or omissions causing such injury or damage, so long as *her* conduct did not fall within the policies' intentional acts exclusion, even if the acts of *another* insured contributing to the same injury or damage *were* intentional. Especially when informed by the policies that "[t]his insurance applies separately to each insured," it is unlikely Betty understood that by allowing David to reside in her home, and thus

⁴"With respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Syl. Pt. 8, *McMahon & Sons*, 177 W. Va. 734, 356 S.E.2d 488. The doctrine of reasonable expectations ordinarily applies only to ambiguous policy provisions. *Cherrington*, 231 W. Va. at 493 n.43, 745 S.E.2d at 531 n.43.

to become an additional insured on her homeowners policies, "[she was] *narrowing [her] own coverage* for claims arising from his [intentional] torts.

Id. at 618 (court's emphasis and alterations) (quoting *Safeco Ins. Co. of Am. v. Robert S.*, 28 P.3d 889, 902 (Cal. 2001) (Baxter, J., concurring and dissenting)). The court's statement concerning the "general purpose" of liability coverage harkens back to this Court's holding in *Columbia Casualty* that in determining whether under a liability insurance policy an occurrence was or was not intentional or expected, "primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue," because the "purpose of insurance liability policies is to provide a defense and indemnification to an insured for claims arising from the insured's own negligent acts or omissions," and there is no intent in the Court's cases "to deny liability coverage to insureds . . . where an insured was allegedly negligent but did not (actually or constructively) intend to cause a specific injury." 217 W. Va. at 254 & n.5, 617 S.E.2d at 801 & n.5; *accord J.H.*, 224 W. Va. at 156, 680 S.E.2d at 401.

In rendering its decision in *Minkler*, the court thoroughly covered the case law both in California and elsewhere. With regard to the prior California decisions, it is noted only that one of those cases was *California Casualty Insurance Co. v. Northland Insurance Co.*, 56 Cal. Rptr. 2d 434 (Ct. App. 1996), which was incorrectly cited by ANPAC to suggest that California applies a rule that a severability clause does not create any ambiguity with regard to an "any insured" exclusion (*see ANPAC's Br. 26-27 & n.3*).⁵ ANPAC compounded its error by quoting language from a federal

⁵This is true of several other cases cited in ANPAC's footnote 3 as well. For example, ANPAC cites federal cases applying Florida and Connecticut law to suggest that in those states a severability clause does not create an ambiguity with regard to the application of an "any insured" exclusion. (*See ANPAC's Br. 26-27 & n.3* (citing *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 117 F.3d 1328, 1336 (11th Cir. 1997) (Florida law); *McCauley Enters. v. N.H. Ins. Co.*, 716 F. Supp. 718, 721 (D. Conn. 1989) (Connecticut law)).) But Florida and Connecticut both follow the rule that a severability

district court decision in Hawaii that was, in turn, taken from the 1996 California appellate court case. (See ANPAC's Br. 32 (quoting *Allstate Ins. Co. v. Kim*, 121 F. Supp. 2d 1301, 1309 (D. Haw. 2000) (in turn quoting *Cal. Cas. Ins.*, 56 Cal. Rptr. 2d at 442)).) But looking at the case in 2010, the *Minkler* court was "satisfied that *California Casualty Ins. Co.* is not dispositive or persuasive authority on the issue before us." 232 P.3d at 620. After the unanimous decision by California's highest court in *Minkler*, there is no question as to where California stands on the issue of whether a severability clause creates ambiguity as to the scope of an "any insured" exclusion.

The bigger question is where the rest of the country stands on the issue. The Petitioners have pointed out, like the California Supreme Court in *Minkler*, that "decisions in other jurisdictions have disagreed about the effect of a severability clause, in a liability policy covering multiple insureds, on an exclusion for the intentional, criminal, or fraudulent acts of 'an' or 'any' insured." *Id.* at 622. While "[s]ome have concluded that, when one of these indefinite articles is used in the exclusion, the presence of a severability clause renders the scope of the exclusion ambiguous, . . . [a] greater number of cases, we recognize, have taken the opposite view[.]" *Id.* at 622-23 (collecting cases). But while recognizing that the weight of authority was against it on the issue, the *Minkler* court, like a substantial minority of courts in other jurisdictions, decided to

agree with those cases giving effect to a severability or "separate insurance" clause as against an exclusion of coverage for the intentional acts of "an" insured. As we have explained, even if a provision excluding coverage for injury arising from the specified acts of "an" insured would normally mean that the excludable conduct of one insured bars coverage for all, a policy provision stating that "[t]his insurance applies *separately to each* insured" (italics added) reasonably implies a contrary

provision renders ambiguous an exclusion for intentional or criminal acts by "an" or "any" insured. See, e.g., *Heylin v. Gulfstream Prop. & Cas. Ins., Co.*, 147 So. 3d 659 (Fla. Dist. Ct. App. 2014) (following *Premier Ins. Co. v. Adams*, 632 So. 2d 1054 (Fla. Dist. Ct. App. 1994)); *Nationwide Mut. Fire Ins. Co. v. Pahl*, No. CV106007423, 2013 WL 5780825, at *5-6 (Conn. Super. Ct. Oct. 3, 2013).

result, at least in certain circumstances. Such a severability or "separate insurance" clause may reasonably be read as applying both the policy's coverage *and its exclusions* individually to each person protected by the policy, with the result, in a case like this one, that an exclusion of coverage for a specified kind of culpable conduct applies only to the individual insured or insureds who committed it.

Id. at 624 (court's emphasis). After examining the issue, the Court should similarly come to the correct conclusion, not the popular one espoused by the Petitioners.

ANPAC and Erie discussed a number of cases on the majority side of things. Having already discussed at length the *Minkler* decision, which does as good a job as any in the minority explaining why the majority has it wrong, the Neeses will not take up any more of the Court's time going through each of the other decisions that get it right line by line. Instead, they will focus briefly on just one more out-of-state case, which is particularly noteworthy in the context of this one in light of its relation to this Court's decision in *Columbia Casualty*.

In *Brumley v. Lee*, 963 P.2d 1224 (Kan. 1998), the Kansas Supreme Court examined language nearly identical to that in the Homeowners Policies in this case and held that "[a]n insurance policy containing exclusionary and severability of interests clauses is construed to require that the exclusions are to be applied only against the insured for whom coverage is sought and that coverage as to each insured must be determined separately based on the facts applicable to each insured." *Id.*, Syl. Pt. 5. The insured in *Brumley* sought coverage under his homeowners policy for a claim that he was negligent concerning his wife's murder of the plaintiffs' child. There, as here, the policy provided personal liability coverage for bodily injury caused by an "occurrence," defined as "an accident, including exposure to conditions, which results, during the policy period, in bodily injury or property damage." *Id.* at 1228. The term "accident" was not defined in the policy. The policy, like the Homeowners Policies in this case, contained an exclusion providing that the personal

liability coverage did "not apply to bodily injury or property damage . . . which is expected or intended by any insured." *Id.* Finally, the policy also contained the same severability provision as the ANPAC Homeowners Policy: "Severability of Insurance. This insurance applies separately to each insured. This condition shall not increase our limit of liability for any one occurrence." *Id.*

While recognizing a line of contrary cases, the court concluded that the use of the word "any" in the exclusionary language did "not eliminate the ambiguity created by the policy's severability clause." *Id.* The court explained:

With the severability clause each insured, in effect, has his or her own insurance policy. When looked at in that light, the ambiguity is easier to see. There are a number of insureds (in essence separate policies—one for each insured) in most instances because homeowner's policies define insureds as residents of the household. Thus, if residents of a household include two parents and two teenage sons, there are four insureds. If the two teenagers vandalize a building and the parents are sued for negligence, the exclusions are applied only against the insureds for whom coverage is sought.

Id. The court went on to hold that even apart from the ambiguity created by the severability provision,

the lack of any definition for "accident" in the . . . policy and the failure to specify from whose standpoint the accident determination is to be made when more than one insured is involved weighs in favor of finding ambiguity in the "occurrence" definition and, therefore, construction in favor of the insured.

Id. at 1233; *see also id.*, Syl. Pt. 8 ("The determination of an accident within the definition of an occurrence in a liability insurance policy is to be made from the standpoint of the insured, not from the viewpoint of the victim, to whom any calamity may seem unfortuitous.").

Brumley thus highlights the connection between concluding that (1) whether an "occurrence" was or was not an "accident" or was or was not intentional or expected should be determined from the standpoint of the insured whose coverage under the policy is at issue, as this Court has already

done, Syl. Pt., *Columbia Cas. Co.*, 217 W. Va. 250, 617 S.E.2d 797, and (2) a severability provision renders ambiguous an "any person" intentional act exclusion, which this Court should likewise do. In light of the similar policy of providing a defense and indemnification to an insured for claims arising from the insured's own negligence that informs both conclusions, they should not be disconnected, as ANPAC would have the Court do. In both instances, the liability policy should be interpreted from the standpoint of the insured, as required by the severability clause included by the insurer itself. To answer the second certified question posed by Judge Keeley, the severability provision should "prevail over" the "any insured" or "anyone we protect" exclusions, at least in the sense of creating an ambiguity that must be resolved in favor of the insured seeking coverage under West Virginia's public policy and familiar rules of contract construction applicable to insurance policies.

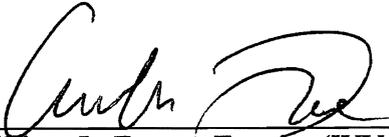
CONCLUSION

A principled reading of the ANPAC and Erie Homeowners Policies reveals conflicting provisions, casting doubt on the intentions of the parties in entering into the insurance contracts. Doubts and ambiguities must be resolved in favor of the insureds. For the reasons stated herein, the Court should answer the first certified question "no," and the second certified question "yes."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, I served true and correct copies of the foregoing ***Brief of Respondents David Neese and Mary A. Neese, Individually and as Administratrix and Personal Representative of the Estate of Skylar Neese*** on the following counsel of record by email and U.S. mail, first-class postage prepaid:

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