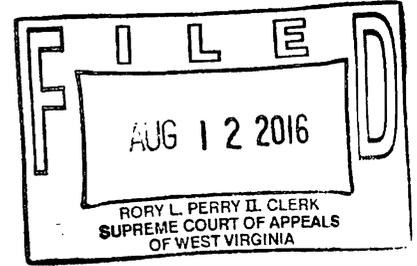


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 16-0290



AMERICAN NATIONAL PROPERTY  
AND CASUALTY COMPANY,

*Petitioner,*

vs.)

TARA CLENDENEN, *et al.*

*Respondents,*

and

ERIE INSURANCE PROPERTY AND  
CASUALTY COMPANY,

*Petitioner,*

vs.

MARY A. NEESE, *et al.*,

*Respondents.*

**RESPONDENT, PATRICIA SHOAF'S BRIEF  
REGARDING CERTIFIED QUESTIONS**

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## I. STATEMENT OF CASE

This matter comes to this Court by way of two certified questions from the United States District Court for the Northern District of West Virginia. [AR532-33.] The Respondent, Patricia Shoaf, urges this Court to answer the certified questions such that the Erie policy under which she was insured provides coverage to her for the negligence claims asserted against her in the state court action. This Court held in *Valentine v. Sugar Rock, Inc.*, that it would give certified questions “plenary review, and may consider any portion of the federal court’s record that are relevant to the question of law to be answered.” 234 W. Va. 526, syl. pt. 2, 766 S.E.2d 785, syl. pt. 2 (2014). Accordingly, this Statement of the Case is not limited to the District Court’s Order of Certification, but also includes reference to the federal court’s record, which is included in the Appendix Record.

### A. Procedural History

On July 6, 2012, S.N. was killed by two minors, S.E. and R.S.<sup>1</sup> [AR128 & 497-98.] S.E. pleaded guilty to first degree murder of S.N., and R.S. pleaded guilty to second degree murder of S.N. [AR498.] On June 4, 2014, David and Mary Neese filed suit in the Circuit Court of Monongalia County, West Virginia, on their own behalf and behalf of S.N.’s estate against S.E., R.S., Tara Clendenen, and Patricia Shoaf.<sup>2</sup> [AR498.] The allegations against Tara Clendenen and Patricia

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<sup>1</sup>At the time of her death, S.N., S.E. and R.S. were all juveniles. [AR 128.] In accordance with Rule 40(e)(1) of the Rules of Appellate Procedure, the deceased and others have been identified by their initials. W. Va. R. App. P. 40(e)(1) (2016) (“Initials or a descriptive term must be used instead of a full name in: cases involving juveniles, even if those children have since become adults . . .”).

<sup>2</sup>On August 2, 2016, the state court proceeding was stayed pending resolution of the consolidated declaratory judgment actions. (*Mary Neese, et al. v. [S.E], et al.*, Civ. Action No. 14-C-487, Cir. Court of Mon. County, W. Va., Order, August 2, 2016.)

Shoaf are that they were negligent and careless in the supervision and guidance of their respective minor children, by:

- a. failing to monitor and confirm their daughters' activities, behavior and whereabouts;
- b. negligently and unwittingly providing instruments, weapons, opportunity, and means to harm S.N; and *inter alia*
- c. negligently and recklessly allowing and condoning their daughters' use of marijuana.

[AR128-29.]

As a result of the suit, Tara Clendenen requested that American National Property and Casualty Insurance Co. ("ANPAC") defend her under her homeowners insurance policy, and Patricia Shoaf requested the same of Erie Insurance Property and Casualty Co. ("Erie") pursuant to the homeowners insurance policy it had issued to her. [AR523.] ANPAC and Erie subsequently filed separate complaints for declaratory judgment in the United States District Court for the Northern District of West Virginia contesting coverage under the applicable policies. [AR524.] After consideration of cross-motions for summary judgment on the issue of whether or not coverage exists for the Respondents, the District Court granted the Respondents' motions for summary judgment in part and found that as to Tara Clendenen and Patricia Shoaf, the killing of S.N. was an "occurrence" within the meanings of the applicable policies. [AR508.] The District Court then concluded that there was an issue as to how the intentional acts exclusions under the applicable policies should be applied in this matter considering the language of the policies as well as the inclusion in each policy of a severability clause. [AR520.] The District Court then certified two questions to this Court relating to whether the ANPAC and Erie policies provide coverage to each policy owner respectively relating to the murder of S.N by S.E. and R.S. [AR532-33.]

**B. Erie Policy**

Patricia Shoaf is the Named Insured in the policy issued by Erie. [AR133.] The Erie policy provides the following provisions that are relevant to this matter:

Throughout **your** policy and its endorsements the following words have a special meaning when they appear in bold type:

**DEFINITIONS**

\*\*\*

- **“anyone we protect”** means **you** and the following residents of your household:

- X<sup>[3]</sup> 1. relatives and wards;
- X 2. other persons in the care of **anyone we protect**.

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

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

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<sup>3</sup>The Erie policy states:

This policy contains many XTRA PROTECTION FEATURES developed by The ERIE. Whenever an “X” appears in the margin of this policy, YOU receive XTRA PROTECTION, either as additional coverage or as a coverage not found in most homeowners policies.

[AR139.] Notably, this language about XTRA PROTECTION FEATURES is within the actual policy, and is not an advertisement. Consequently, Erie intended to broaden coverage where other insurers may not have intended to do so.

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- **“You”, “your” or “Named Insured”** means the person(s) named on the **Declarations** under **Named Insured**. Except in **GENERAL POLICY CONDITIONS SECTION**, these words include **your** spouse if a **resident** of the same household.

\*\*\*

## BODILY INJURY LIABILITY COVERAGE

## PROPERTY DAMAGE LIABILITY COVERAGE

## OUR PROMISE

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.

\*\*\*\*

## WHAT WE DO NOT COVER -- EXCLUSIONS

\*\*\*

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 cover reasonable acts committed to protect persons and property.<sup>[4]</sup>

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<sup>4</sup> In *Farmers & Mechanics Mut. Ins. Co., v. Cook*, this Court concluded that “self-defense or defense of another is not, as a matter of law, expected or intended by the policyholder. Where a policyholder establishes he or she properly acted in self-defense or in defense of another, the insurance company may not rely upon an intentional acts exclusion to deny coverage.” 210 W. Va.

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RIGHTS AND DUTIES -- CONDITIONS - SECTION II

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(2) LIMITS OF PROTECTION

This insurance applies separate to **anyone we protect**. Regardless of the number of people we protect, claims made or persons injured, our total liability under Personal Liability Coverage for damages resulting from one **occurrence**, offense, claim or suit will not exceed the amount shown on the Declarations for *Personal Liability Coverage*. All **bodily injury, property damage and personal injury** resulting from one accident or from continuous or repeated exposure to the same general conditions is considered the result of one **occurrence**, offense, claim or suit.

[AR139-40, and 149-52.]

**II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

By Order on April 27, 2016, this Court set this matter for oral argument pursuant to Rule 20 for September 21, 2016. W. Va. R. App. P. 20 (2016).

**III. SUMMARY OF ARGUMENT & PROPOSED RESPONSES TO CERTIFIED QUESTIONS**

The District Court certified the following two questions to this Court:

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'<sup>[5]</sup>. . . , 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

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394, syl. pt. 9, 557 S.E.2d 801, syl. pt. 9 (2001).

<sup>5</sup>See *supra* at 3 for the definition of "anyone we protect" as well as the other applicable bolded portions of the policy.

and require the insurers to apply the exclusions separately to each insured, despite the intentional and criminal actions of co-insureds?

[AR532-33.]

This Respondent proposes that the Court rewrite the first question by dividing it in two to address each policy differently, Insofar as Erie’s policy terms are defined differently in the favor of Ms. Shoaf.<sup>6</sup> W. Va. Code § 51-1A-4 (2016). With regard to the Erie policy, the Court should answer the first question in the negative, that Erie’s policy does not preclude liability coverage for her in this matter since she did not commit any intentional act. As examined below, Erie’s selected term for those it insures is “anyone we protect.” [AR139]. In the policy “anyone we protect” is defined with a “special meaning” specifically selected by Erie. [AR139.] Under West Virginia law, when a term or expression is defined by a statute, rule, or contract, the Court uses the “intended meaning of words or terms.” *E.g., Jackson v. Belcher*, 232 W. Va. 513, syl. pt. 4, 753 S.E.2d 11, syl. pt. 4 (2013). By using Erie’s written intended “special meaning” of the expression “anyone we protect,” the exclusionary language should be read as follows:

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 **[Patricia Shoaf and R.S.]**.

[AR139 & 150.] Thus, the exclusion does not operate unless both Patricia Shoaf **and** R.S. intended the death of S.N. There are no allegations that Patricia Shoaf committed any intentional acts with regard to S.N.’s death. [AR507] Accordingly, the Court should answer the first certified question as to Erie’s policy in the negative, as Erie cannot satisfy the terms of its own exclusion, which is to

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<sup>6</sup>This Respondent has no position with regard to whether the intentional and criminal acts exclusion in the policy issued by ANPAC excludes coverage for Tara Clendenen.

be read strictly against it. *Nat'l Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W. Va. 739, syl. pt. 8, 724 S.E.2d 343, syl. pt. 8 (2012) (citation omitted). (“Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.”)

As to the second certified question, the court should find that a clause in a homeowners liability policy that provides “[t]his insurance applies separately to **anyone we protect**” or “this insurance applies separately to each insured” requires the court to determine if the one seeking coverage for the alleged damages has allegedly committed the excluded act. [AR152 & 85.] These so-called “severability clauses” create separate policies, save the policy limit, for each individual or entity insured. *E.g., U.S. Fid. & Guar. Co. v. Globe Indem. Co.*, 327 N.E.2d 321, 323 (Ill. 1975).

In a memorandum decision, this Court quoted favorably, a circuit court order that found:

[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.

*Sayre v. State Farm Fire & Cas. Co.*, No. 11-0962 at 2 (May 25, 2012) (memorandum decision).

In this matter, Erie seeks to disclaim liability coverage to its Named Insured [AR133] based upon the conduct of a minor additional insured. [AR128, 139, & 150.] The allegations against Patricia Shoaf in the Complaint are not derivative in nature like *respondeat superior*, or the family purpose doctrine, but are claims that she herself was negligent, and that this negligence combined with the negligence of Tara Clendenen and the intentional acts of S.E. and R.S. contributed to the damages of S.N.’s family. [AR124-130.] This Court should find that in Erie’s case, the severability clause operates to require Erie to evaluate the exclusion as to Patricia Shoaf in the following manner:

1. **Bodily injury, property damage or personal injury** expected or intended by [Patricia Shoaf].

[AR139 & 150.] Accordingly, the Court should answer the second certified question in the affirmative, and find that severability clauses in West Virginia require that the policy read separately for each insured, and that coverage for each insured is based upon his or her own alleged wrongful conduct.

#### **IV. APPLICABLE LEGAL STANDARD**

##### **A. Certified Questions**

This court employs a *de novo* standard of review when responding to certified questions from a federal court pursuant to West Virginia Code § 51-1A-3. *Valentine*, 234 W. Va. at syl. pt. 1, 766 S.E.2d at syl. pt. 1. In responding to the certified questions from the federal court, this Court has stated that it will “give the question[s] plenary review.” *Id.* at syl. pt. 2, 766 S.E.2d at syl. pt. 2. Moreover, this Court has full authority to reformulate the questions asked. W. Va. Code § 51-1A-4.

##### **B. Legal Standard Applied to Interpretation of Insurance Policies**

In West Virginia, “Where the provisions in 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.” *E.g., Glen Falls Ins. Co. v. Smith*, 217 W. Va. 213, 220-21, 617 S.E.2d 760, 767-68 (2005) (citation omitted). In some cases, the plain meaning intended is provided by a specific definition written into the policy. In other words, when a statute, rule, or contract includes a definition section, the principle of applying the plain meaning is suspended and the Court uses the specific definition employed by the legislature, rule making authority, or in this case, insurer, to interpret the statute, rule, or contract by using the definition within the statute: *E.g., Jackson*, 232 W. Va. at syl. pt. 4, 753 S.E.2d at syl. pt. 4 (quoting *Miners in General Group v. Hix*, 123 W. Va. 637, syl. pt. 1, 17 S.E.2d 810, syl. pt. 1 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982)) (“In the *absence* of any definition of the

intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.”) (emphasis added). The reason the Court employs the definition in the policy instead of the plain ordinary meaning is simple: by defining the term or expression, the author has advised the public and the courts of what it intended by a certain term or expression, regardless of what the common usage may be or what any dictionary may say. In other words, the drafters of documents use the definition section to avoid judicial interpretation of the meaning of a term or expression.

Although this Court has not stated this precise principle of interpretation with regard to insurance contracts, this Court—as well as other courts—engages in this practice when analyzing policy language. This Court has routinely looked to the definition portion of insurance policies for the definition of terms before reciting the definitions, and if no definition exists, and only if no definition exists, the Court then resorts to determining the plain meaning of the term.<sup>7</sup>

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<sup>7</sup>*E.g.*, *Flowers v. Max Specialty Ins. Co.*, 234 W. Va. 1, 12 761 S.E.2d 787, 98 (2014) (applying terms defined in the policy by the definition in the policy, and interpreting terms not defined by the policy); *Chafin v. Farmers & Mechs. Mut. Ins. Co. of W. Va.*, 232 W. Va. 245, 248, 751 S.E.2d 765, 768 (2013) (noting that the policy only indicated what the term “collapse” did not include, and did not otherwise define it prior to finding that it was an ambiguous term); *Glen Falls Ins. Co.*, 217 W. Va. at 221, 617 S.E.2d at 768 (analyzing the policy’s definition of “family member” instead of looking to the dictionary); *W. Va. Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 49, 602 S.E.2d 483, 492 (2004) (before reciting definitions of “accident,” noting that the term was not defined in the policy); *Farmers Mut. Ins. Co. v. Tucker*, 213 W. Va. 16, 20, 576 S.E.2d 261, 265 (2002) (applying the definition of the term “insured” from the policy, but interpreting the term “household” which was not defined by the policy); *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 484, 509 S.E.2d 1, 8 (1998) (noting prior to analyzing the meaning of dispute terms that none of the terms in dispute were defined in the policy); *State Bancorp, Inc. v. U.S. Fid. & Guar. Ins. Co.*, 199 W. Va. 99, 105, 483 S.E.2d 228, 235 (1997) (noting that “‘accident’ is not defined in the policies” before resorting to the dictionary definition); *Metro. Prop. & Liab. Ins. Co. v. Accord*, 195 W. Va. 444, 448, 465 S.E.2d 901, 905 (1995) (“In ascertaining whether liability coverage is available, it is first necessary to examine the relevant policy language. Under the Metropolitan policy terms, the liability section *defines* those persons who are deemed to be insureds . . . .”) (emphasis added); *Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995) (“Our primary concern is to give effect to the plain meaning of the policy and, in doing so, we construe all parts of the

If a policy's provisions are ambiguous, however, they will be construed liberally in favor of the insured. *E.g., Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 378, 376 S.E.2d 581, 584 (1988). A policy provision is ambiguous if it is “reasonably susceptible of two different meanings or . . . of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Id.* at 221, 617 S.E.2d at 768. (citation omitted). “This principle [of interpretation] applies to policy language on the insurer’s duty to defend the insured, as well as to policy language on the insurer’s duty to pay.” *Id.* More significantly, this Court has repeatedly stated that “[w]here the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.” *E.g., Nat’l Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W. Va. 739, syl. pt. 8, 724 S.E.2d 343, syl. pt. 8 (2012) (citation omitted).

## V. ARGUMENT

Usually it is the insurance company that is asserting technical arguments about the way in which a policy should be read based upon the terms of the policy, while the policy holder is pleading with the Court for an interpretation of the policy using plain meaning. However, sometimes, the policy language is so poorly written that a technical argument does not help the insurer. *See, e.g., Atl. Cas. Ins. Co. v. Pasko Masonry, Inc.*, 718 F.3d 721, 723 (7th Cir. 2013) (“The exclusion is poorly drafted. The term ‘contractor’ is exemplified rather than clearly defined.”); *Am. Home Assur. Co. v. Pope*, 591 F.3d 992, 1001 (8th Cir. 2010) (noting that an intentional acts exclusion was “so poorly drafted [that it left] open a question of what it does and does not cover”). In this matter, the policy language itself does not support the interpretation proposed by its author—Erie. The

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document together. We will not rewrite the terms of the policy; instead, we enforce it as written.”); *see also, e.g., State Auto Prop. & Cas. Co. v. Wohlfeil*, 889 F. Supp. 2d 799, 804 (N.D. W. Va. 2012) (applying West Virginia law while applying the policy’s definitions to define common expressions such as “property damage,” “bodily injury,” and “occurrence”).

Respondent is requesting this Court to strictly apply the definition of a unique term selected and drafted by her insurance company to determine that an exclusion does not operate to preclude coverage for her, while the insurer is requesting the court to completely ignore that an expression it drafted has a specific meaning it chose.<sup>8</sup>

Specifically, Erie wants this court to treat its policy identically to that of the one issued by ANPAC, suggesting that “any insured” (used in ANPAC’s policy) has the same meaning as “anyone we protect” (used in Erie’s policy). While the Respondent would agree with Erie that when read aloud they sound similar, but when the policy is read in its entirety, and analyzed one cannot help but notice that the entire expression “any insured” is not a defined term— “insured” is—in the ANPAC policy, whereas the entire expression “anyone we protect” is a defined term in the Erie policy. By including the pronoun “anyone” within the defined expression, Erie has created a situation in which its intentional acts exclusion is not operative if “anyone” it indemnifies commits an intentional act that causes damages, but rather only excludes damages that were intentionally caused by **all** insureds, because “anyone we protect” is defined as “**you** and . . . relatives and wards.” In other words, the plain and ordinary meaning of the exclusion as read, is overwritten by the specific definition that Erie selected for “anyone we protect.” [AR139.]

Erie’s use of the colloquial expression “anyone we protect” instead of the traditional “insured,” does not require Erie to indemnify R.S. for the murder of S.N. *See Stanley*, 216 W. Va. at 55, 602 S.E.2d at 498 (Starcher, J., concurring) (“There is no way on God’s green earth that [Leeber and Jesse Stanley] should have been permitted to shift the cost of their conduct onto an

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<sup>8</sup>It is not without significance that at no place in Erie’s Appellate brief does it provide the Court with the definition of “anyone we protect,” nor does it advise the Court as to why the expression is in single quotation marks in the certified question.

insurance company.”). As noted by Judge Keeley, the murder was not an “occurrence” from R.S.’s standpoint. [AR506.] Consequently, the Court would never get to the question of whether the intentional acts exclusion applies. Further, the severability clause in Erie’s policy, requires that the policy be read separately as to each individual insured. After applying the severability clause, this Court should read the intentional acts exclusion as follows for Patricia Shoaf:

We do not cover under *Bodily Injury Liability coverage . . .*:

1. **Bodily injury, property damage or personal injury** expected or intended by [Patricia Shoaf].

[AR139, 150, & 152.] Likewise, the policy would be read similarly for R.S.:

We do not cover under *Bodily Injury Liability coverage . . .*:

1. **Bodily injury, property damage or personal injury** expected or intended by [R.S.].

[AR139, 150, & 152.] Therefore, this Court should answer the certified questions such that it is clear that the Erie policy does provide coverage to Patricia Shoaf for the claims asserted against her in the Circuit Court of Monongalia County, West Virginia, by the Estate of S.N. and S.N.’s parents.

**A. As to Erie Homeowners Policy, this Court Should Answer the First Certified Question Separately, and Find That Erie’s Intentional Acts Exclusion Requires the Policy to Be Read as “Bodily Injury, Property Damage or Personal Injury Expected or Intended by [Patricia Shoaf and R.S.]”**

1. **Before this court analyzes the intentional acts exclusion, the Court must re-write the exclusion in accordance with the definition selected by Erie.**

*I hate definitions.*<sup>9</sup>

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<sup>9</sup>BENJAMIN DISRAELI, EARL OF BEACONSFIELD, VIVIAN GREY bk. II., ch. 6 (1826).

The Respondent agrees with Erie that the intentional acts exclusion is unambiguous. However, the Respondent disagrees with Erie's conclusion as to how the specific definition of "anyone we protect" is to be read in the exclusion. Erie has taken the position that the intentional acts exclusion should be read to mean that if bodily injury is expected or intended by anyone we protect, then there is no coverage. However, such a reading of the policy fails to recognize that the exclusion has a defined term within it with a "special meaning":

We do not cover under *Bodily Injury Liability coverage* . . . :

1. **Bodily injury, property damage or personal injury** expected or intended by **anyone we protect** even if:

[AR139 & 150.] By bolding the entire expression "anyone we protect" in the exclusion, Erie has advised all readers of the policy that the **entire** expression has a "special meaning," and that the reader is to employ that "special meaning" when reading the expression "anyone we protect" throughout the policy. [AR139 (Throughout **your** policy and its endorsements the following words have a special meaning when they appear in bold type: . . .).] By comparison, ANPAC's intentional acts exclusion states as follows:

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

[AR82.] ANPAC's policy then states that "certain words and phrases are defined as follows:" and defines "insured" to mean "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.] Accordingly, in the ANPAC policy, the pronoun "any" is not included within the defined expression "insured." In other words, although both Erie and ANPAC's exclusions use the pronoun "any" or "anyone," they are not to be read the same, as "anyone we protect" is a defined term.

As discussed above, when interpreting documents, this Court first reviews the document for a definition. *Hix*, 123 W. Va. 637, syl. pt. 1, 17 S.E.2d 810, syl. pt. 1 (1941), *overruled on other grounds by Rutledge*, 170 W. Va. at 162, 291 S.E.2d at 477) (“In the *absence* of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.”) (emphasis added). In *Hix*, this Court made it clear in the legislative context, the Court would not resort to defining terms if there was a definition section. This Court consistently reviews insurance policy’s definition section, and does not provide a general definition if the policy has already provided a specific meaning of a term. *See supra* note 7; *see also, e.g., Columbia Cas. Co. v. Westfield Ins. Co.*, 217 W. Va. 250, 251-52, 617 S.E.2d 797, 798-99 (2005) (“Discussions in judicial opinions of insurance coverage issues often involve parsing the convoluted and confusing language of insurance policies.”) Additionally, this Court has substituted defined terms with the applicable definitions when discussing insureds or named insureds. In *Glen Falls Ins. Co.*, the court substituted “your” with “Billie Joe Smith.” 217 W. Va. at 221, 617 S.E.2d at 768 (stating “he must, among other requirements, have also been ‘a resident of [Billie Joe Smith’s] household’ and have been ‘actually residing in [Billie Joe Smith’s] household on the date the loss occurred’”). In *Farmers Mut. Ins. Co v. Tucker*, the Court substituted “you” with “Locie,” the name of the insured who was defined as “you.” 213 W. Va. at 19, 576 S.E.2d at 264 (“The property insurance policy provided liability coverage for any of Locie’s ‘relatives if residents of [Locie’s] household.’”) In *Rich v. Allstate Ins. Co.*, the Court substituted “you” with “the named insured.” 191 W. Va. 308, 310, 445 S.E.2d 249, 251 (1998) (“[the named insured] and, if a resident of your

household: (a) any relative; and (b) any dependent person in your care”).<sup>10</sup> In other words, the Respondent’s request that the Court substitute “anyone we protect” for the definition Erie assigned is not a foreign practice to this Court.

In most insurance policies, the one purchasing the policy is referred to as the Named Insured, and those protected by the policy are called Insureds or Additional Insureds. Erie has taken the unusual step of using the colloquial expression “anyone we protect” to identify (not describe) who it insures. Although the expression “anyone we protect,” taken in general conversation outside of the terms and conditions of the policy may be easier for the average person to understand than the term “Insured,” the question in this matter is not what “anyone we protect” means, as Erie has defined this expression as follows:

- “**anyone we protect**” means **you** and the following residents of your household:
  - X 1. relatives and wards;
  - X 2. other persons in the care of **anyone we protect**.

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

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

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<sup>10</sup>Although the Court in *Rich* does not clearly provide all of the definitions to state clearly that “the Named Insured” has been substituted for “you,” several Allstate cases from that time period indicate that “you” was the removed term from the Allstate policy language, and that the Named Insured meant “you.” *E.g., Allstate Ins. Co. v. DiGiorgi*, 9 F. Supp. 2d 657, 658-59 (S.D. W. Va., 1998).

course of any **business** use, or without permission of the owner is not **anyone we protect**

[AR139.] The definition of “anyone we protect” is conjunctive (*and*) not disjunctive (*or*), as it states that it insured “**you and.**” [*Id.* (italics added)]. All parties agree that “you” means Patricia Shoaf. Further, the next question is who are “the following residents of **your** household: 1. relatives and ward; 2. Other persons in the care of **anyone we protect . . .**”? [AR139.] There is no dispute that R.S. meets this second portion of the definition. Therefore in completing the substitution of expression for “anyone we protect,” it should be read as “[Patricia Shoaf] and [R.S.]” Again, Erie chose to use the conjunction “and” in its definition of “anyone we protect,” not the disjunctive “or.”

**2. In order for the intentional acts exclusion to be applied as written, the Court must find that all insureds acted expected or intended the injury.**

The intentional acts exclusion states that Erie does not cover:

1. **Bodily injury, property damage or personal injury** expected or intended by [Patricia Shoaf and R.S.] even if:
  - a. the degree, ind 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.

[AR150.] As examined above, by defining the expression “anyone we protect,” Erie is forcing the Court to use to substitute the definition of “anyone we protect” (*viz.* “Patricia Shoaf and R.S.”) in place of the defined term to analyze the exclusion. Accordingly, when the applicable defined term is exchanged for its definition, as this court has done in the past, and as Erie requires by its own language, the intentional acts exclusion reads:

1. **Bodily injury, property damage or personal injury** expected or intended by [Patricia Shoaf and R.S.] . . . .

[AR139 &150.] The next step for the Court is determine whether the Complaint by S.N.'s family alleges that the various injuries to S.N. were expected or intended by **both** Patricia Shoaf and R.S., since Erie uses the conjunctive *and* instead of the disjunctive *or* to define its insureds. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 194, 342 S.E.2d 156, 160 (1986) (stating “an insurer's duty to defend is tested by whether the allegations in the plaintiff's complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy”) (citation omitted). In this matter it is clear that the Complaint in the state court action clearly does not allege any intentional acts on the part of Patricia Shoaf. [AR124-130.] Rather, all of the allegations against Patricia Shoaf relate to negligence on her part. Further, there is no allegations in the declaratory judgment action or anywhere else that Patricia Shoaf intended or expected the injuries to S.N. Consequently, since Erie cannot establish that the injuries complained of in the State Court were expected and intended by **both** Patricia Shoaf and R.S. (viz. “**anyone we protect**” as defined in the policy), the Court must find that the intentional acts exclusion is not operative, and that Erie owes a duty to defend and indemnify Patricia Shoaf in the state court action.

**3. Erie's use of different terms in its exclusions to identify whose conduct is excluded, supports the Respondent's position that “anyone we protect” should be read in the conjunctive as [Patricia Shoaf and R.S.]**

Instead of the defined expression “anyone we protect,” Erie could have used “Insured,” “Alpha Whisky Papa,” “Apple White Penguin” or the simple variable “X.” Since the expression is “defined” within the policy, it simply does not matter what grouping of characters are used as the expression itself. *Jackson*, 232 W. Va. at syl. pt. 4, 753 S.E.2d at syl. pt. 4. Regardless of what defined expression is used, the Court would substitute the definition for the defined term to determine the application of the exclusion. Notably, Erie's policy tacitly acknowledges that such

substitution will be done with its defined terms. Every exclusion of the homeowners liability portion of the policy referncing the insured, uses the expression “anyone we protect” except one. [AR150-51.] Exclusion 12, the so called “injury to insured exclusion” is the only place Erie does not use the expression “anyone we protect” to refer to those it insures.<sup>11</sup> [AR151.] Exclusion 12 states:

12. **Bodily injury or personal injury to you and if residents of your house of your household, your relatives, and persons under the age of 21 in your care or in the care of your resident relatives.**

[AR151 (underline added); *compare* Exclusion 1 of Erie’s policy (intentional acts exclusion using the defined expression “anyone we protect”) *with* Exclusion 12 (injury to an insured exclusion in which the policy says “you and if residents) AR150-151.] Significantly, those identified as excluded from coverage mirrors the definition of “anyone we protect” with the a minor deviation. Exclusion 12 uses the disjunction “or” immediately preceding the last clause (“in the care of your resident relatives”) instead of and as is used in the definition of “anyone we protect”.<sup>12</sup> [*Compare*

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<sup>11</sup>Erie’s policy has two sets of Exclusions that apply to Bodily Injury Liability Coverage. The first set starts on AR150, and the second begins on AR151. Exclusion 12 (the “injury to an insured” exclusion) that is referenced above is the second Exclusion 12 on AR151, not to be confused with the first Exclusion 12 (the “punitive damages” exclusion).

<sup>12</sup>It is worth noting that Erie uses “anyone we protect” in its automobile policies as well. [AR185 & 200.] Just as in the homeowners policy, in the liability portion of the policy and UM/UIM endorsement, “anyone we protect” is always defined with the conjunction “and” to conclude the list. [*Compare* AR139 *with* AR185, 200, &204.] Similarly to its homeowners policy, in the liability portion of the automobile policy when referring to its insureds it uses “anyone we protect” throughout all the exclusions, but exclusion 4. [AR186-87.] In exclusion 4 of the automobile liability policy, the policy provides a situation in which the exclusion does not apply, and instead of using the term “anyone we protect,” it spells out those identified in the definition, but uses the disjunction “or” at the end of the list. [AR186.] In the UM/UIM endorsement, Erie also uses its specially designed expression for insured in all of the exclusions but exclusion 6, where it specifically designates those excluded from coverage with the disjunction “or.” [AR201.] The Respondent recognizes that this case does not involve the automobile policies, and that automobile policies are different in nature from homeowners liability policies, but Erie’s automobile policies are instructive to demonstrate for the Court that Erie intentionally avoids using its “defined expression” for insured in some locations, where it otherwise would. *C.f. Valentine*, 234 W. Va. at syl. pt. 2, 766 S.E.2d

AR139(definition of “anyone we protect”) *with* AR151 (Exclusion 12).] In other words, by switching to the use of the definition with the change to the disjunctive in Exclusion 12, Erie is advising the Court that it intended for the intention acts exclusion (Exclusion 1) to be read differently than the injury to an insured exclusion (Exclusion 12). [AR151.] It would be intellectually disingenuous for Erie to suggest that all of a sudden in Exclusion 12, after using the term “anyone we protect” in Exclusions 1, 2, 3, 5, 6.b, 6.c(1), 6.c(2), 6.c(3), 8, 9 [AR150-51], 13(c), 13 (e), [AR173 (a 2010 policy endorsement)], and the second set of exclusions 3, 4, 5, 6, 7, 8, 9, 10, and 11 [AR151], that Erie’s drafting department decided to go for a stylistic change in the middle of the document. Clearly, the distinction resulted because Erie acknowledge in the drafting process that the special definition of “anyone we protect” with the insureds listed in the conjunctive (and) required them to be separated out when the disjunctive (or) was intended.

If Erie truly had intended to disclaim coverage for the negligent parenting claims asserted by the family of S.N., then Erie had at least two options. First, it could have drafted Exclusion 1 as it did Exclusion 12 itemizing those insured and using the disjunction “or” instead of using the defined expression “anyone we protect.” [AR151.] Second, Erie could have easily drafted a provision that said it does not cover claims for negligent parenting or supervision where the negligent parenting or supervision claim stems from an intentional acts by another insured. Although this seems rather specific, Erie has done just this in its homeowners policy presumably in response to other judicial decisions, whether in West Virginia or elsewhere:

**We do not cover liability arising out of the negligent entrustment of an aircraft, motor vehicle or watercraft excluded in 6.**

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at syl. pt. 2. (noting that this Court has stated that will “give the [certified] question[s] plenary review.”)

We also do not cover statutorily imposed vicarious parental liability for the actions of a child or minor using an **aircraft**, motor vehicle or watercraft excluded in 6.

[AR151.]<sup>13</sup>

It is anticipated that in response to Respondent’s arguments, Erie will cite to *J.G. v. Wangard*, 753 N.W.2d 475 (Wis. 2008) and *Kundahl v. Erie Insurance Group*, 703 A.2d 542 (Pa. Super. 1997), as support in Erie’s plain reading of the expression “anyone we protect” in the exclusion. [AR487.] In response to *Wangard*, the insurance company used “covered person” as the defined term for insured, not “any covered person.” 753 N.W.2d at 480 (“‘covered person’ includes ‘you or a family member’”). Consequently, the *Wangard* policy is more akin to discussing the ANPAC policy. As to *Kundahl*, the Court looked at the individual portions of the defined term, and did not analyze it as one defined term. 703 A.2d at 544 (analyzing what *anyone we protect* meant instead of relying upon policies definition of “anyone we protect”). In other words, there is no evidence that the court was ever presented with the argument that Respondent is making here: In accordance with this Court’s practice, the defined term is substituted for its specific definition in the policy. Again, the Respondent does not dispute that the literal translation of “anyone we protect” would seem to exclude coverage for all insureds based upon the intentional act of anyone insured; however, when the exclusion is read with the definitions section side by side to provide effect to the “special meaning” selected by Erie, the Court must conclude that both insureds be liable of the intentional act before the exclusion is applicable.

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<sup>13</sup>Notably, ANPAC’s policy has similar exclusionary language regarding entrustment and statutorily imposed liability. [AR83.]

**B. This Court Should Answer the Second Certified Question in the Affirmative, and Find That Severability Clause Requires Exclusions to Be Looked at from the Point of View of Each Individual Insured's Conduct to Determine Whether Coverage Is Excluded for the Allegations Against That Insured.**

- 1. The clear and unambiguous terms of the severability clause indicate that the policy requires the intentional acts exclusion to be viewed from the point of each insured's individual conduct to be operative.**

The Erie policy states “[t]his insurance applies separately to **anyone we protect**”<sup>14</sup> and the ANPAC policy “this insurance applies separately to each insured.” [AR152 & 85.] The insurance companies in this matter have spent pages trying to tell this Court that a severability clause means something other than what it states, by discussing the clause’s history, and intended purpose. In fact, the insurers have tried to trap the Court into using the expression “innocent co-insured” with regard to discussing the severability clause and liability policies. (Erie Br. at 16, & 20-22; ANPAC Br. at 11, 16, 28-30, & 33; *Amicus* BR. at note 5.) However, the expression “innocent co-insured” is only applicable to the property portion of homeowners policies, as it is a reference to whether one insured was innocent of the intentional damage to insured property caused intentionally by another insured. In fact, all of the cases cited by the insurers in this matter relating to “innocent co-insureds” were either property policy claims or cases in which the courts were citing to property policy claims when using the “innocent co-insured” expression.<sup>15</sup> Although some Courts have corrupted the expression

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<sup>14</sup>Of course, the Respondent’s position is that Erie’s policy should be read as “[t]his insurance applies separately to [**Patricia Shoaf and R.S.**].”

<sup>15</sup>Although several of the cases cited by the insurers (including the *Amicus*) for the use of the “innocent co-insured” phrase may be liability cases, the expression comes from first-party cases. *West Am. Ins. Co. v. AV&S*, 145 F.3d 1224, 1228 (10th Cir. 1998) (analyzing a liability policy) (quoting *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass’n*, 117 F.3d 1328, 1336 (11th Cir. 1997) (analyzing a first-party property policy)); *Allstate Ins. Co. v. Kim*, 121

“innocent co-insured” and used it in the context of liability claims like this, this Respondent would urge this Court to avoid using the “innocent co-insured” expression when discussing liability policies, as it confuses the issue. Quite frankly, it is curious that the insurers would engage in a discussion of the “innocent co-insured” expression in their briefs, considering West Virginia has been an “innocent co-insured” state for property policies since 1934. *Icenhour v. Continental Ins. Co.*, 365 F. Supp.2d 743, 749-51 (S.D. W. Va. 2004) (analyzing *Hawkins v. Glens Falls Ins. Co.*, 115 W. Va. 618, 177 S.E. 442 (1934) and concluding that with regard to homeowners’ property policies, West Virginia would allow an innocent co-insured to recover despite the excluded conduct of another insured). This Respondent acknowledges the differences between the two portions of the

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F. Supp. 2d 1301, 1308 (D. Haw. 2000) (analyzing a liability case) (quoting *Carbone v. Gen. Accident Ins. Co.*, 937 F.Supp. 413 (E.D. Pa. 1996) (analyzing a first-party property claim)); *Am. Family Mut. Ins. Co. v. Bower*, 752 Supp. 2d 957, 966 (N.D. Ind. 2010) (analyzing a liability claim) (citing *McCauley Enters. Inc. v. New Hampshire Ins. Co.*, 716 F. Supp. 718, 721 (D. Conn. 1989) (analyzing a first-party property claim)); *Standard Fire Ins. Co. v. Proctor*, 286 F.Supp.2d 567 (D. Md. 2003) (analyzing a liability policy) (quoting *Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 751 (Colo. 1990) (analyzing a liability case) (quoting *e.g.*, *Sales v. State Farm Fire & Cas. Co.*, 849 F.2d 1383, 1385 (11th Cir. 1988) *rev’d on other grounds*, 902 F.2d 933 (11th Cir.1990) (a first-party property claim and multiple other first-party property claims for the “innocent co-insured” expression))); *McFarland v. Utica Fire Ins. Co.*, 814 F. Supp. 518 (S.D. Miss. 1992) (analyzing a first-party property claim); *Noland v. Farmers Ins. Co.*, 892 S.W.2d 271 (Ark. 1995) (analyzing a first-party property claim); *West Bend Mut. Ins. Co. v. Salemi*, 511 N.E.2d 785 (Ill. App. Ct. 1987) (analyzing a first-party property claim); *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35 (Iowa 2012) (analyzing a first-party property claim); *Brumley v. Lee*, 963 P.2d 1224 (Kan. 1998) (analyzing a liability claim) (quoting *Carbone*, 937 F.Supp at 422 (analyzing a first-party property claim); *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 897 (Minn. 2006) (a liability claim) (quoting *Hogs Unlimited v. Farm Bureau Mut. Ins. Co.*, 401 N.W.2d 381, 383 (Minn. 1987) (analyzing a first-party property claim and using the innocent insured language)); *SECURA Supreme Ins. Co. v. M.S.M.*, 755 N.W.2d 320, 328 (Minn. App., 2008) (analyzing a liability claim) (quoting *Watson v. United Servs. Auto. Ass’n*, 566 N.W.2d 683, 689 (Minn. 1997) (analyzing a first party property claim and used the expression of “innocent insured”)); *Dolcy v. Rhode Island Joint Reinsurance Assoc.*, 589 A.2d 313 @. I. 1991) (analyzing a first-party property claim); *Ryan v. MFA Mut. Ins. Co.*, 610 S.W.2d 428 (Tenn. Ct. App. 1980) (analyzing a first-party property claim); *Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685 (Utah 1999) (analyzing a first-party property claim); *Error v. Western Home Ins. Co.*, 762 P.2d 1077 (Utah 1988) (analyzing a first-party property claim).

policy (fire/property and liability). However, if this Court is inclined to do as the insurers in this matter have urged, and consider foreign cases involving property and fire claims that discuss the liability of “innocent co-insureds,” then this Court should look first to *Hawkins* and find that West Virginia has been an “innocent co-insured” state for 80 years.

Despite both insurers’ discussion of the background of the severability clause, both carriers quote *Rich v. Allstate*:

Where provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed.

191 W. Va. at syl. pt. 1, 445 S.E.2d at syl. pt. 1. (Erie’s Br. at 7; ANPAC’s Br. at 17.) The language of the severability clauses is plain and unambiguous. The policy is to be applied separately to each insured. The plain language of the policies in question mandate that each policy be read so that the intentional acts exclusions is only applicable to deny the insured seeking coverage if the insured seeking coverage allegedly committed acts which were excluded. In this matter, no such allegations of excluded conduct by Patricia Shoaf exist to preclude coverage of the claims made against her. [AR507.]

Erie’s attempt at excluding coverage in this situation is even more troubling, insofar as Erie noted that it was providing coverage to R.S. as an “additional coverage or as a coverage not found in most homeowners policies.” [AR139 (placing an X in the margin next to “relatives and wards” and stating that where an X is located in the policy, the policyholder receives XTRA PROTECTION).] *Cf. Minkler v. Safeco Ins. Co. Of Am.*, 49 Cal. 4th 315, 332-33 (Cal. 2010) (noting that mother “had no reason to expect that [son’s] . . . consequent status as an additional insured on her homeowners policies, would *narrow* her own coverage, and the protection of her separate assets, against claims arising from his intentional acts”). In other words, if Erie had not included this XTRA

Protection for minors, it would seem to reason that it could not then claim that the minor's conduct resulted in uncovered liability claims.<sup>16</sup>

The Respondent does not contend that Erie could not have excluded coverage for the claims asserted against her by S.N. and her parents in the state court action. Rather, the Respondent contends that to do so, would have required Erie to use language like it did with the negligent entrustment of automobiles, boats, or airplanes, or as Erie did in Exclusions 12. [AR151.] However, Erie did not use such language. Accordingly, the Respondent urges this Court to find that based upon the clear language of Erie policy, the intentional act exclusion in the Erie policy must be read as follows:

1. Bodily injury, property damage or personal injury expected or intended by **[Patricia Shoaf]**.

[AR139 & 150.] In the alternative, even if the Court does not find that the severability clause operates as Respondent proposes, the Erie policy still must be read as:

1. Bodily injury, property damage or personal injury expected or intended by **[Patricia Shoaf and R.S.]**.

[AR139 & 150.] Thus, in either event, if Ms. Shoaf was not liable of any intentional act, then coverage should exist for her.

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<sup>16</sup>Of course, one could presume that Erie did not include R.S. as an insured under the policy simply to provide extra liability protection to Ms. Shoaf; rather, the real purpose was to allow Erie to exclude claims that R.S. would have against Ms. Shoaf in the event of injury to R.S. around the house or elsewhere. *Cf., e.g., Rich*, 191 W. Va. at 312, 445 S.E.2d at 253 (upholding the injury to insured exclusion being applied to a minor).

**2. The severability clause provides each insured with his, her, or its own policy such that its protection is not corrupted by another's wrongful conduct.**

The insurers in this matter went to great length to describe the history of the severability clause, and how it dates back to the 1950s relating to the use of the expression “the ‘insured’” and that it is to spread protection to all insureds. [ANPAC Br. at 24; Erie Br. at 23 & 29.] However, Erie’s policy never uses the expression “the ‘insured’”; rather, Erie’s policy uses “anyone we protect” as its defined expression without an article (a, an, or the) in front of it. [AR139-176.] Consequently, the insurers stated purpose of the clause would appear to be unnecessary. Moreover, the insurers have failed to provide a scenario where the liability policy only provide coverage to one of the insureds and not the other *without* the severability clause. Clearly, “[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.” *Sayre*, No. 11-0962 at 2.

In this Court’s memorandum decision in *Sayre*, the issue was whether or not a severability clause operated to nullify the “family exclusion,” which mirrors the so-called “injury to insured” exclusion discussed above. No. 11-0962 at 2. The exclusion in *Sayre* stated that it excluded coverage for “bodily injury to you or any insured.” *Id.* The claimant sought to negate the family exclusion by operation of the severability clause, but this Court affirmed the Circuit Court’s finding:

[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.* The *Sayre* Court seemed to be adopting the position of the *Minkler* Court. In *Minkler*, Supreme Court of California found that “the original intent [of the severability clause] was to make clear the separate application of policy exclusions, not just liability limits, to each individual insured.” 49 Cal. 4th at 324. The *Minkler* Court went on to explain that when the severability clause was juxtaposed against an intentional acts exclusion using the term “an insured” or “any insured,”<sup>17</sup> an ambiguity resulted in which the Court had to find that the policy “[c]ondition[ing]” stating that “[t]his insurance” applies separately to each insured is not reasonably susceptible of the construction that the entire policy, particularly its exclusions from coverage, has such a separate effect as to each insured.” *Id.*; accord., *Premier Insurance Co. v. Adams*, 632 So.2d 1054, 1055 (Fla. Dist. Ct. App. 1994) (finding that the severability clause juxtaposed with the intentional acts exclusion created an ambiguity to be read in the favor of the insured); *Brumley*, 963 P.2d at syl. pt. 5 (“An 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.”); *Worcester Mut. Ins. Co. v. Marnell*, 496 N.E.2d 158 (Mass. 1986) (finding that the severability clause required the exclusion to be read solely against the each insured individually).

This Court should find that the analysis in *Minkler*, *Adams*, *Brumley*, and *Marnell*, is appropriate for application in West Virginia based upon West Virginia’s practice of viewing claims from the standpoint of the individual insured. “The purpose of insurance liability policies is to

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<sup>17</sup>The *Minkler* Court stated that in California “an insured” or “any insured” were treated the same. *Id.* at 318. (“Absent contrary evidence, 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.”)

provide a defense and indemnification to an insured for claims arising from the insured's own negligent acts or omissions." *J.H. v. W. Va. Div. of Rehab. Servs.*, 224 W. Va. 147, 680 S.E.2d 392,401 (2009) (citing *Erie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement*, 206 W. Va. 506, 511, 526 S.E.2d 28, 33 (1999)). "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." *Columbia Cas. Co.*, 217 W. Va. at syl. pt., 617 S.E.2d at syl. pt. In *Columbia Cas. Co.*, the Court was faced with the question of whether claims against a county commission for negligence were excluded based upon the intentional act (suicide) of two inmates. *Id.* at 251, 617 S.E.2d at 798. The Court found that the insured's standpoint controlled for determining whether there was an "occurrence" or an "intentional act." *Id.* at 254, 617 S.E.2d at 801. In so finding, the Court relied upon *Tackett v. American Motorists Ins. Co.*, which "called for resolving doubts regarding insurance coverage in favor of an insured." 213 W. Va. 524, syl. pt. 5, 584 S.E.2d 158, syl. pt. 5 (2003). Based upon the foregoing, it becomes clear that West Virginia's insurance law is more similar to the interpretation by the Courts of California, Florida, Kansas, and Massachusetts, than those states which fail to recognize the purpose of the severability clause, and that this Court should adopt the *Minkler* analysis for purposes of the severability clause.

3. **There is no evidence in the record that applying the severability clause separately to each insured such that the intentional acts exclusion is only applicable when the insured commits the intentional act will create significant issues for insurers.**<sup>18</sup>

The *Amicus* insurers in this matter propose that taking Ms. Shoaf and Ms. Clendenen's position on the severability clauses in this matter will result in an insurance crisis. [*Amicus* Br. at 14-15.] However, there are no references to the record or other authorities to indicate the authority of such sweeping statements. [*Id.*] Certainly, with California, Florida, Kansas, and Massachusetts, among other states, having adopted the Respondent's position, the *Amicus* would have had data to show that interpretations by outlier jurisdictions have resulted in insurance crisis or in the inability for insurers to underwrite reasonably. Yet, since no such insurance data is cited by the *Amicus*, and since no such evidence was produced in the Appendix Record by the Petitioners, this Court should ignore this entire argument. Of course, one could hypothesize that Erie and ANPAC will either do nothing, or simply revise their policies to address the ambiguities. Presumably Erie and ANPAC revised their policies previously with regard to negligent entrustment claims following judicial interpretations of policy language. [AR83 & 151; *cf. supra* note 4.] Or, Erie and ANPAC could remove the severability clause provisions and replace them with "joint obligation provisions" that state:

The terms of this policy impose joint obligations on persons defined as an insured person. This means that the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person defined as an insured person.

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<sup>18</sup>Otherwise known as, "The Respondent's response to Chicken Little, The Boy Who Cried Wolfe, and other fairy tails."

*Allstate Ins. Co. v. Steele*, 74 F.3d 878 (8th Cir. 1996) (“We admit to finding this provision more than a little mysterious, but we note that most courts that have interpreted it have found that an insured's intentional acts bar claims against other insureds for negligent supervision.”) (citations omitted). In any event, there is no evidence in the appendix that application of the Respondent’s position will result in anything more than coverage being extended for Patricia Shoaf for the claims asserted against her. In fact, it does not even mean that Erie will have to pay any money to S.N.’s family, as there are still questions of liability to be analyzed yet in the state court action.

## **VI. CONCLUSION**

Erie’s insurance policy contains different language from that of ANPAC’s, and should be read as such when answering the District Court’s certified questions. By defining “anyone we protect” as opposed to using “insured,” Erie has created a situation where all insureds must have intentionally caused bodily injury in order for the intentional acts exclusion to apply. Due to the severability clause, this Court should find that the intentional acts exclusion be read solely as to whether Patricia Shoaf committed an intentional act. On the other hand, if the Court does not accept the Petitioner’s reading of the expression “anyone we protect,” the Court should still find that the inclusion of the severability clause creates an ambiguity in the policy that must be read in favor of the insured.

Wherefore, the Court should revise the first certified question by parsing into two questions, one for each policy language, and answer it as to Patricia Shoaf’s policy in the negative based upon Erie’s special meaning of “anyone we protect.” As to the second certified question, this Court should find that in a liability policy, the “severability clause” prohibits an insurer from excluding coverage for one insured based upon the excluded conduct of another.

**Respectfully submitted,**

**Respondent,  
Patricia Shoaf,  
by counsel**

A handwritten signature in black ink, appearing to read "Paul W. Gwaltney, Jr.", is written over a horizontal line.

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## CERTIFICATE OF SERVICE

I, Paul W. Gwaltney, Jr., Esq., hereby certify that on this 11<sup>th</sup> day of August 2016, I caused the foregoing **Respondent, Patricia Shoaf's Brief Regarding Certified Questions** to be served on counsel of record *via* U.S. Mail in a postage-paid envelope addressed as follows:

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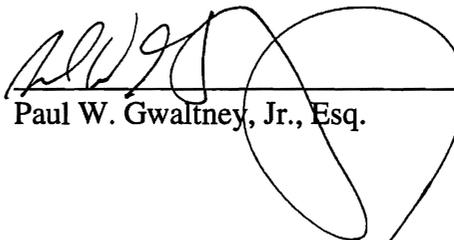
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