INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 25-ICA-213

HOMESITE INSURANCE COMPANY OF FLORIDA,
Plaintiff Below, Petitioner

v.

ZURICH AMERICAN INSURANCE COMPANY
And
J.F. ALLEN COMPANY, INC.
Defendants Below, Respondents

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

Assignment of Error Number 1: The Circuit Court erred by finding that the auto exclusion contained in the Homesite Policy does not preclude coverage for J.F. Allen for the claims asserted against J.F. Allen in the Green Lawsuit.

Assignment of Error Number 2: The Circuit Court erred by finding that the auto exclusion contained in the Homesite Policy is ambiguous, and therefore must be interpreted against Homesite.

STATEMENT OF THE CASE

I. THE APRIL 20, 2022 AUTO ACCIDENT

On April 20, 2022, a motor vehicle accident occurred on Route 20 in Buckhannon, West Virginia, between a truck owned by a company called Nu Creek, LLC ("Nu Creek") and operated by a man named Richard Marple ("Mr. Marple"), and a vehicle owned and being operated by a man named Larry R. Green ("Mr. Green").[1] Mr. Green died as a result of injuries he received in the April 20, 2022 accident.[2]

II. THE GREEN LAWSUIT AND CONFIDENTIAL SETTLEMENT

On or about October 27, 2022, Debra D. Green ("Ms. Green"), in her capacity as the Executrix of the Estate of Mr. Green, filed Civil Action Number 22-C-199-3 in the Circuit Court of Harrison County, West Virginia (the "Green Lawsuit") against J.F. Allen Company, Inc. ("J.F. Allen"), Nu Creek and Mr. Marple, alleging that all three defendants wrongfully caused the automobile accident in which Mr. Green died, and seeking damages for the wrongful death of Mr. Green.[3] The Complaint in the Green Lawsuit alleged that J.F. Allen was negligent, reckless, or

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[1] Paragraph 5 of Homesite's Complaint (**AR0020**), as admitted by Paragraph 5 of J.F. Allen's Answer (**AR0033**), and Paragraph 8 of Zurich's Answer (**AR0153**).
[2] Id.
[3] The Complaint in the Green Lawsuit (**AR0307-0330**).

otherwise guilty of wrongful acts, in its retention of Nu Creek and Mr. Marple as contractors, and thereby proximately caused or contributed to causing the April 20, 2022 automobile accident in which Mr. Green died.[4]

On or about April 4-5, 2024, the defendants in the Green Lawsuit (and some of their various liability insurers) reached a Confidential Settlement with Ms. Green to settle the Green Lawsuit.[5] As part of the Confidential Settlement, J.F. Allen agreed to pay a portion of the settlement proceeds with its own funds, in addition to other funds paid by various insurers, while reserving J.F. Allen's right to litigate the instant action.[6]

III. THE ZURICH INSURANCE POLICIES

For the period of time that is relevant to this matter, Zurich issued at least two insurance policies to J.F. Allen: A Business Automobile Policy, Policy Number BAP 5098870-12 (the "Zurich Auto Policy")[7]; and a Commercial General Liability Policy, Policy Number GLO 5098869-12 (the "Zurich GL Policy")[8]. The Zurich Auto Policy ran from April 1, 2022 to April 1, 2023, and is subject to a limit of liability of $5,000,000.00 per accident. The Zurich GL Policy ran from April 1, 2022 to April 1, 2023, and is subject to a limit of liability of $2,000,000.00 per occurrence.

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[4] Paragraphs 55-72 of the Complaint in the Green Lawsuit (**AR0323-0326**).
[5] The Confidential Settlement in the Green Lawsuit (**AR1241-1255**) is filed under seal with the Intermediate Court of Appeals pursuant to Rule 40(c) of the West Virginia Rules of Appellate Procedure. Due to the fact that the settlement agreement is confidential, the Circuit Court allowed it to be filed under seal.
[6] **AR1245**, **AR1249**.
[7] The Zurich Auto Policy (**AR0332-0428**).
[8] The Zurich GL Policy (**AR0429-0512**).

IV. THE HOMESITE AND AXIS INSURANCE POLICIES

A. The Axis Policy

Axis Surplus Insurance Company ("Axis") issued an excess liability insurance policy to J.F. Allen that is explicitly excess to the Zurich GL Policy, and bears Policy Number P-001-000124611-04 ("Axis Excess Policy")[9]. The Axis Excess Policy ran from April 1, 2022 to April 1, 2023, and has a limit of liability of $4,000,000.00, both for each occurrence and in the aggregate.

The Axis Excess Policy contains an Automobile Liability Exclusion[10] which states as follows:

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It is agreed that the following exclusion is added to the policy:

Automobile Liability

The policy does not apply to any claim, **suit**, **loss** or any other cost or expense arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**.

For purposes of this exclusion only, the following definition will apply:

Loading or unloading means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an **auto**;

b. While it is in or on an **auto**; or

c. While it is being moved from an **auto** to the place where it is finally delivered; but **loading or unloading** does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the **auto**.

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[9] The Axis Excess Policy (**AR0513-0553**).
[10] **AR0553**.

The word "**suit**" is defined in the Axis Excess Policy as follows:[11]

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Suit means a civil proceeding in which covered **loss** is alleged. **Suit** includes:

a. an arbitration proceeding in which such loss is claimed and to which the Insured must submit, or does submit with our consent; or

b. any other alternative dispute resolution proceeding in which such loss is claimed and to which the Insured submits with our consent or the underlying insurer's consent.

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The word "**loss**" is defined in the Axis Excess Policy as follows:[12]

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Loss means damages the Insured becomes legally obligated to pay as judgments or settlements.

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B. The Homesite Policy

Homesite also issued a commercial excess liability insurance policy to J.F. Allen: Policy Number CXP-7558082-01 (the "Homesite Policy").[13] The Homesite Policy had a policy period that ran from April 1, 2022 to April 1, 2023, and it was subject to a limit of liability of $4,000,000.00 for each event and in the aggregate. The Homesite Policy is explicitly excess to the Axis Excess Policy.

The Insuring Agreement of the Homesite Policy[14] states, in pertinent part, as follows:

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SECTION I – COVERAGE

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[11] **AR0538**.
[12] **AR0537**.
[13] The Homesite Policy (**AR0554-0579**).
[14] **AR0556**.

1. Insuring Agreement

> We will pay on behalf of the insured and in excess of "underlying limits" those sums the insured becomes legally obligated to pay as damages because of "injury or damage" to which this insurance applies. Except as otherwise stated in this policy, this insurance follows the same provisions, exclusions and limitations of the "controlling underlying insurance" in effect at the inception date of that policy. This insurance will not be broader than "controlling underlying insurance."
>
> This insurance only applies if:
>
> a. the "injury or damage" is caused by an "event" in the coverage territory;
> b. the "injury or damage" first occurs during the policy period; and
> c. "controlling underlying insurance" applies to the "injury or damage" and is exhausted by the payment of, or agreement to pay, judgments or settlements to which this insurance also applies.
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> The amount we will pay is limited as described in SECTION III – LIMITS OF INSURANCE.

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The DEFINITIONS section of the Homesite Policy contains the following definition of "controlling underlying insurance"[15]:

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> "Controlling underlying insurance" means the policy or policies shown in the Declarations as such that apply to the "injury or damage."

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The Declarations section of the Homesite Policy identifies the Controlling Underlying Insurance as being defined by the Controlling Underlying Insurance Endorsement.[16] The

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[15] **AR0558**.
[16] **AR0554**.

Controlling Underlying Insurance Endorsement of the Homesite Policy identifies the Axis Excess Policy as the Controlling Underlying Insurance.[17] Per the insuring agreement of the Homesite Policy quoted above, the Homesite Policy "follows the same provisions, exclusions and limitations of" the Axis Excess Policy, unless explicitly stated otherwise.[18] Therefore, the Axis Excess Policy automobile exclusion quoted above is incorporated into the Homesite Policy.

V. THE COMPETING MOTIONS FOR SUMMARY JUDGMENT

Pursuant to a briefing schedule issued by the Court[19], Homesite, J.F. Allen and Zurich all filed competing motions for summary judgment, addressing the questions of whether liability insurance coverage exists for J.F. Allen as to the Green Lawsuit under the Zurich Auto Policy and/or the Homesite Policy. On April 25, 2025, the Circuit Court of Upshur County issued an Order which granted J.F. Allen's motion for summary judgment on the insurance coverage issues and denied the competing motions for summary judgment filed by Homesite and Zurich.[20]

Specifically relevant to the instant appeal, the Circuit Court's April 25, 2025 Order found, as a matter of law, that insurance coverage exists under the Homesite Policy for J.F. Allen as to the Green Lawsuit.[21] The April 25, 2025 Order further found, as a matter of law, that the relevant auto exclusion contained in the Homesite Policy is ambiguous, and therefore must be interpreted against Homesite.[22] It is from these two specific rulings contained in the April 25, 2025 Order that Homesite has filed the instant appeal.

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[17] **AR0559**.
[18] **AR0556**.
[19] **AR1237**.
[20] **AR0001-0014**.
[21] **AR0009-0011**.
[22] **AR0013**.

SUMMARY OF ARGUMENT

This appeal is centered on the proper application of the Homesite Policy's auto exclusion to the uncontroverted facts of this case. The Homesite Policy's auto exclusion reads as follows:

> The policy does not apply to any claim, **suit**, **loss** or any other cost or expense arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**. [23]

The Circuit Court committed multiple errors as part of its ruling that the Homesite Policy's auto exclusion does not apply in this matter.

The Circuit Court first erred by relying on Huggins v. Tri-County Bonding Co., 175 W. Va. 643, 337 S.E. 2d 12 (1985), for the proper interpretation of the Homesite Policy's auto exclusion. Huggins analyzes a very different insurance policy exclusion, in a very different type of insurance policy from the one at issue here. Critically, the exclusion at issue in Huggins did not include language which applies the exclusion to claims or damages "arising out of" the operation (or ownership, maintenance, use, etc.) of an auto, but the Homesite Policy's auto exclusion contains that broad language. Moreover, the insurance policy at issue in Huggins was not an "occurrence" based insurance policy (an issue important to the Supreme Court in Huggins), but the Homesite Policy is clearly an "occurrence" based insurance policy.

The Circuit Court further erred by relying on Huggins for the proposition that these types of insurance policy exclusions should be interpreted by focusing on the "theory of liability" being pursued against the insured by the claimant, rather than focusing on the "cause of damages" sought by the claimant. Huggins does not adopt such a general approach to interpreting insurance policy exclusions. However, regardless of any debate regarding the reach of Huggins in this regard, the law in West Virginia is now clearly expressed in American National Property and Casualty

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[23] **AR0553**.

Company v. Clendenen, 238 W. Va. 249, 793 S.E. 2d 899 (2016). In American National, the Supreme Court clearly adopted a "cause of damages" approach to interpreting these types of insurance policy exclusions.

The Circuit Court further erred by holding that the words "claim, **suit** or **loss**" as used in the Homesite Policy's auto exclusion are focused on the specific type of cause of action pursued by the claimant, rather than the damages sought by the claimant. Using a plain, ordinary English definition of the word "claim," and the explicit definitions of the words **suit** and **loss** incorporated by reference into the Homesite Policy, all three words ultimately refer to the damages sought by the claimant. None of them refer to the specific type of cause of action pursued by the claimant against the insured. Therefore, the only reasonable interpretation of these three words is that they are focused on the cause of the damages sought by the claimant, not on the specific type of cause of action pursued by the claimant against the insured.

The Circuit Court further erred by finding that the Homesite Policy's auto exclusion only applies if the claim, **suit** or **loss** in question arose out of the insured's ownership, maintenance, operation, use or entrustment of an auto. The Homesite Policy's auto exclusion contains no such limitation. It is explicitly triggered when the claim, **suit** or **loss** in question arose out of "the" operation (or ownership, maintenance, use, etc.) of any auto; it does not require that the claim, **suit** or **loss** in question arose out of "the insured's" operation (or ownership, maintenance, use, etc.) of any auto. Case law from a federal court in West Virginia, as well as from courts across the country, make it clear that the use of the word "the," instead of "the insured's," signifies that anyone's operation (or ownership, maintenance, use, etc.) of any auto will trigger the exclusion.

Finally, the Circuit Court erred by holding that the Homesite Policy's auto exclusion is ambiguous, and therefore must be interpreted against Homesite. The Circuit Court reached that

conclusion based solely on the notion that the parties disagreed regarding the proper interpretation of the exclusion. However, the law is clear that mere disagreement among the parties (or even among courts) regarding the proper interpretation of an insurance policy does not signify that the insurance policy is ambiguous. In reality, the Homesite Policy's auto exclusion is clear and unambiguous. It applies to any claim, **suit** or **loss** (which, through the application of definitions, signify the damages sought by the claimant) arising out of anyone's use of any auto.

The proper application of the Homesite Policy's auto exclusion to the uncontroverted facts of this case calls for this Court to reverse the specific portions of the Circuit Court's April 25, 2025 Order which granted summary judgment to J.F. Allen and denied summary judgment to Homesite on the issue of whether there is liability insurance coverage for J.F. Allen under the Homesite Policy for the Green Lawsuit. Such proper application of the exclusion further calls for this Court to enter judgment for Homesite on that same issue.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in this matter because the criteria outlined in Rule 18(a) of the West Virginia Rules of Appellate Procedure do not render oral argument unnecessary: No party has waived oral argument, this appeal is not frivolous, the parties disagree as to whether the dispositive issues have been authoritatively decided, and this Court's decisional process would benefit from oral argument.

Oral argument should take place pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, as opposed to Rule 19, because this case involves an issue of first impression.

ARGUMENT

I. STANDARD OF REVIEW

A Circuit Court's entry of summary judgment is reviewed *de novo*. Syllabus Point 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E. 2d 755 (1994).

II. THE CIRCUIT COURT COMMITTED MULTIPLE ERRORS AS PART OF ITS RULING THAT THE HOMESITE POLICY'S AUTO EXCLUSION DOES NOT PRECLUDE COVERAGE FOR J.F. ALLEN FOR THE CLAIMS ASSERTED AGAINST J.F. ALLEN IN THE GREEN LAWSUIT

A. THE CIRCUIT COURT ERRED BY RELYING ON THE HUGGINS CASE FOR THE PROPER INTERPRETATION OF THE HOMESITE POLICY'S AUTO EXCLUSION

1. Huggins analyzes a very different insurance policy exclusion from the Homesite Policy's auto exclusion, and is therefore not applicable here

The Circuit Court cites Huggins v. Tri-County Bonding Co., 175 W. Va. 643, 337 S.E. 2d 12 (1985), for the proper interpretation of the Homesite Policy's auto exclusion, as follows:

> The West Virginia Supreme Court of Appeals previously found that claims related to the negligent entrustment of a vehicle do not trigger auto exclusions in an insurance policy. *Huggins v. Tri-County Bonding Co.*, 175 W. Va. 643, 337 S.E. 2d 12 (1985). The Court reasoned that the liability was predicated upon the act of negligently entrusting the vehicle to a third party, not the fact that an automobile accident occurred. *Id.* at 18. In so finding, the Supreme Court of Appeals stated, that although the negligent operation of the vehicle completes the causal connection between the original negligent act (negligent entrustment) and the ultimate injury, the mere fact that an auto accident is involved does not necessarily invoke an auto exclusion for a negligent entrustment claim. *Id.* at 17.
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> *****
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> Because the Homesite automobile exclusion focuses on the nature of the claim rather than bodily injury, the exclusion was not triggered in the Green Lawsuit, and therefore, is not a bar to insurance coverage for J.F. Allen.[24]

As will be shown below, the Circuit Court erred by relying on the Huggins case for anything other than demonstrating the importance of the "arising out of" language contained in the

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[24] **AR0011**.

Homesite Policy's auto exclusion, as contrasted with the insurance policy exclusion at issue in Huggins.

In Huggins, Nationwide Mutual Fire Insurance Company ("Nationwide") issued a homeowner's policy to Mr. Myers which contained the following exclusion:

> This Policy Does Not Apply . . . to . . .the ownership, maintenance, operation or use, including loading or unloading, of land motor vehicles[.]
>
> Huggins, footnote 2.

Mr. Myers allegedly negligently entrusted a vehicle to his son, who caused an auto accident which resulted in bodily injury to a claimant. When Mr. Myers was sued for negligent entrustment, he sought coverage from Nationwide, which resisted providing such coverage. The insurance coverage issue rose as a certified question to the Supreme Court of Appeals of West Virginia.

The Supreme Court's decision in Huggins turned on the question of how the above exclusion was worded. Nationwide argued that many courts have found that an auto exclusion contained in a homeowner's policy applies to a claim of negligent entrustment. Huggins, 175 W. Va. at 647, 337 S.E. 2d at 15. But Mr. Myers argued that, in nearly all such cases, the policy language of the auto exclusion was different from, and broader than, the language contained in the Nationwide policy at issue. Mr. Myers argued that the Nationwide policy failed to exclude coverage for a claim that "**arises out of** the ownership, maintenance, operation or use, including loading or unloading of a land motor vehicle." (emphasis added). Huggins, 175 W. Va. at 647, 337 S.E. 2d at 16.

The Supreme Court agreed with Mr. Myers, and found (among other considerations) that the lack of the broad phrase "arises out of" limits the application of the exclusion contained in the Nationwide policy. Huggins, 175 W. Va. at 649, 337 S.E. 2d at 17. The Supreme Court cited Cooter v. State Farm Fire & Cas. Co., 344 So. 2d 496 (Ala. 1977) as a typical example of how the

addition of the "arises out of" language expands the scope of the exclusion to include claims for negligent entrustment. Huggins, footnote 9. As quoted by the Supreme Court in Huggins, the court in Cooter stated: "The clear and unambiguous language here applicable is susceptible of but one meaning; that this homeowner's policy excludes personal liability coverage for bodily injury arising out of the ownership and use of an automobile owned or operated by the insured." Cooter, 344 So. 2d at 499, as quoted in Huggins, footnote 9.

The Homesite Policy's auto exclusion contains precisely the "arising out of" language that the Supreme Court of Appeals of West Virginia found the exclusion at issue in Huggins to be lacking:

> The policy does not apply to any claim, **suit**, **loss** or any other cost or expense arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**. [25]

Therefore, the Circuit Court erred by applying any of the Supreme Court's analysis of the exclusion at issue in Huggins to the Homesite Policy's auto exclusion. They are different exclusions, and according to the Supreme Court, those differences matter a great deal.

The sole importance of Huggins in this matter is as one of several cases that indicate the breadth of the phrase "arising out of" when used in insurance policy provisions. According to the Supreme Court in Huggins, the lack of the broad phrase "arises out of" limits the application of the exclusion contained in the Nationwide policy. Huggins, 175 W. Va. at 649, 337 S.E. 2d at 17. This has been interpreted by the federal courts in West Virginia as an indication that the Supreme Court would broadly construe the phrase "arising out of". See Rich v. First Mercury Insurance Co., 482 F. Supp. 3d 511, 520 (S.D. W. Va. 2020); Norfolk Southern Ry. Co. v. National Union

[25] **AR0553**.

Fire Ins. Co of Pittsburgh, PA, 999 F. Supp. 2d 906, 912-913 (S.D. W. Va. 2014); and Nutter v. St. Paul Fire & Marine Ins. Co., 780 F. Supp. 2d 480, 483 (N.D. W. Va. 2011).[26]

Consistent with Huggins, Baber, Dotts, Rich, Norfolk Southern, and Nutter, this Court should adopt a broad construction of the phrase "arising out of" and find, in contrast to the Supreme Court's analysis of a very different insurance policy in Huggins, that Ms. Green's claim and **suit**, and J.F. Allen's **loss** (all as described in more detail below), all arise out of Mr. Marple's operation of the Nu Creek truck, thereby triggering the Homesite Policy's auto exclusion. This Court should reverse the Circuit Court's grant of summary judgment for J.F. Allen on the issue of coverage under the Homesite Policy for the Green Lawsuit.

2. Huggins did not adopt a "theory of liability" approach to interpreting insurance policy exclusions

The Circuit Court further erred by reading Huggins as generally adopting a "theory of liability" manner of viewing exclusions similar to those at issue in Huggins. A "theory of liability" manner of viewing such exclusions focuses on the type of claim being made by the claimant against the insured in order to discern whether a policy exclusion applies. This is to be contrasted with a "cause of damages" manner of viewing such exclusions, which focuses on the cause of the damages being sought by the claimant, rather than the specific cause of action being pursued by the claimant. In the Huggins case specifically, the "theory of liability" being pursued by the claimant against the insured was for negligent entrustment of a vehicle to the at-fault driver, rather than negligent operation of the vehicle in question.

However, contrary to the findings of the Circuit Court in the instant matter, the Supreme Court in Huggins did not directly adopt a "theory of liability" manner of viewing such exclusions;

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[26] Also cited by the federal courts as indications of the breadth of the phrase "arising out of": Baber v. Fortner by Poe, 186 W. Va. 413, 416-417, 412 S.E. 2d 814, 817-818 (1991), which in turn cites Dotts v. Taressa J.A., 182 W. Va. 586, 592, 390 S.E. 2d 568, 574 (1990), for the same proposition.

rather, it sidestepped the issue by claiming the "cause of damages" cases cited by the insurance company on this issue were not applicable, due to differences in how the specific insurance policy at issue in Huggins was written.

Specifically, the insurance company in Huggins cited several cases in support of a "cause of damages" view of such exclusions. See Huggins, 175 W. Va. at 649-650, 337 S.E. 2d at 18. However, the Supreme Court said that, in most of those cases, the coverages were triggered by "occurrences", whereas the insurance policy at issue in Huggins was triggered by "negligent personal acts," not "occurrences". See Huggins, 175 W. Va. at 650, 337 S.E. 2d at 18.

Essentially, the Supreme Court found reasons to not apply the majority rule "cause of damages" viewpoint to its interpretation of the insurance policy at issue in Huggins. The Supreme Court did not adopt in Huggins a general principle of interpreting such exclusions from a "theory of liability" standpoint instead of a "cause of damages" viewpoint; it merely expressed reasons to not apply the "cause of damages" viewpoint to that particular insurance policy at issue in Huggins, due to peculiarities with that policy.

In contrast to the insurance policy at issue in Huggins, the Homesite Policy is clearly an "occurrence" based insurance policy. Its insuring agreement explicitly states that the insurance only applies if "the 'injury or damage' is caused by an 'event' in the coverage territory[.]".[27] The Homesite Policy defines an "event" as "an occurrence, offense, accident, act, or other 'injury or damage' causing event[.]"[28] So, the above-cited basis relied upon by the Supreme Court in Huggins for not applying the majority rule "cause of damages" interpretation of the policy exclusion at issue in Huggins simply does not apply to the Homesite Policy's auto exclusion.

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[27] **AR0556**.
[28] **AR0558**.

In short, the auto exclusion at issue in Huggins substantially differs from the Homesite Policy's auto exclusion, in a manner that is highlighted by the Supreme Court in Huggins as being critically important; and the insuring agreement at issue in Huggins substantially differs from the insuring agreement contained in the Homesite Policy, in such a way as to indicate that the case law distinguished by the Supreme Court in Huggins is applicable to the Homesite Policy. The Circuit Court erred in relying on Huggins to interpret the Homesite Policy's auto exclusion.

3. American National has now established a "cause of damages" approach to interpreting insurance policy exclusions in West Virginia, regardless of the argued significance of Huggins

Even if one can read Huggins as adopting a "theory of liability" approach to interpreting exclusions like the Homesite Policy's auto exclusion, that is not the current state of the law in West Virginia. The Supreme Court has now clearly adopted a "cause of damages" view of such exclusions, according to American National Property and Casualty Company v. Clendenen, 238 W. Va. 249, 793 S.E. 2d 899 (2016).

In American National, two teenage girls had murdered a third teenage girl. The parents of the murder victim sued the two teenage girls, but also sued the mothers of the teenage girls for negligent supervision of their daughters and negligent entrustment to them of an auto used in the murder, which acts of negligence the victim's parents alleged were contributing factors in their daughter's murder.

The homeowner's insurance policies insuring the two mothers each contained both intentional acts and criminal acts exclusions. In one of the policies, a criminal acts exclusion stated that the liability insurance coverage did not apply to bodily injury "[a]rising out of any criminal act committed by or at the direction of **any insured**[.]" The other policy's criminal acts exclusion

stated that the policy did not cover "**[p]ersonal injury** arising out of willful violation of a law or ordinance by **anyone we protect**[.]" American National, 238 W. Va. at 253, 793 S.E. 2d at 903.

The central question in American National was whether liability insurance coverage was excluded as to the two mothers, neither of whom were guilty of any intentional acts or criminal acts. Among their other arguments in favor of insurance coverage, the plaintiffs argued that their claims against the two mothers were for negligent supervision, and that the exclusions should be interpreted as being triggered (or not) by their theory of recovery against the two mothers, not by the criminal acts of the daughters, consistent with the view that coverage for each insured should be examined independently of how other insureds may be treated.

The Supreme Court rejected this argument, and found the exclusions to be clear and enforceable against the two mothers. In its opinion, the Supreme Court relied heavily on a decision from the Court of Appeals of Louisiana: Perkins v. Shaheen, 867 So. 2d 135 (La. App. 3rd Cir. 2004). The Supreme Court included the following quote from Perkins in American National to explain the reasoning behind such an interpretation of the above exclusions:

> The focus of the policy exclusion is on the *cause of the damages*, not the cause of action alleged. All damages caused by intentional acts are excluded, regardless of the classification of the cause of action against the individual defendants. [The plaintiff] cannot avoid the consequences of the policy language by attempting to couch her allegations against the [defendant parents] as negligent, rather than intentional.
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> American National, 238 W. Va. at 259, 793 S.E. 2d at 909, quoting Perkins, 867 So. 2d at 139 (emphasis added by the Supreme Court).

Later, the Supreme Court emphasized this point in its own words:

> Here, the Neeses seek the same wrongful death damages against both Sheila and Rachel and their mothers. The focus of the intentional/criminal acts exclusions is on the cause of the damages, not the negligent supervision and negligent entrustment causes of actions alleged against Tara Clendenen and Patricia Shoaf. *Perkins*, 867 So. 2d at 139. As all such bodily injury claims arise from the

> intentional and criminal conduct of Sheila Eddy and Rachel Shoaf, insureds under the policy, the exclusions preclude coverage for all of the claims.
>
> American National, 238 W. Va. at 261, 793 S.E. 2d at 911.

Relevant to the question of whether this Court should employ a "theory of liability" interpretation of the Homesite Policy's auto exclusion, or a "cause of damages" interpretation of that exclusion, there is no logical difference between the criminal acts exclusions at issue in American National and the Homesite Policy's auto exclusion at issue here. In American National, the criminal acts exclusions excluded coverage for claims "[a]rising out of any criminal act committed by or at the direction of **any insured**" and "arising out of willful violation of a law or ordinance by **anyone we protect**[.]" American National, 238 W. Va. at 253, 793 S.E. 2d at 903. The Homesite Policy's auto exclusion excludes coverage for claims "arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**."[29] In American National, the Supreme Court interpreted the "arising out of" language as addressing the cause of the damages at issue. The cause of the damages in that case was the murder of a child by another insured. It did not matter that the insureds in question were accused of mere negligence. The exclusion still applied.

In like manner, this Court should interpret the "arising out of" language contained in the Homesite Policy's auto exclusion as addressing the cause of the damages at issue. The damages Ms. Green sought from J.F. Allen (as well as the other defendants, Mr. Marple and Nu Creek) were for the wrongful death of her husband in the April 20, 2022 motor vehicle accident. The cause of that death was Mr. Marple's use of the Nu Creek vehicle in the accident. Therefore, Ms. Green's claim (i.e., the demand she made to the Green Lawsuit defendants for money), her **suit** (i.e., her civil proceeding in which she alleged **loss**, meaning that J.F. Allen was legally obligated

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[29] **AR0553**.

to pay her wrongful death damages), and J.F. Allen's **loss** (i.e., the wrongful death damages that J.F. Allen became legally obligated to pay to Ms. Green as part of the Confidential Settlement), all arise out of Mr. Marple's use of the Nu Creek vehicle. The theory of liability Ms. Green chose to pursue against J.F. Allen does not matter for the application of the Homesite Policy's auto exclusion. What matters instead is the cause of the damages Ms. Green sought, and obtained, from J.F. Allen.

This way of interpreting such exclusions (i.e., focusing on the cause of the damages, rather than the theory of liability alleged), is the majority view in the United States. The appellate courts in West Virginia frequently cite Allan D. Windt's treatise on insurance law, Insurance Claims and Disputes: Representation of Insurance Companies & Insureds (6th Ed. 2023), as persuasive authority regarding esoteric insurance coverage issues. In § 11:22, Mr. Windt discusses this issue, and describes the majority view:

> Typically, liability policies other than automobile policies contain an exclusion for bodily injury or property damage arising out of the use, ownership, or maintenance of an automobile. In order for the exclusion to apply, there need only be a causal connection between the injury/damage and the automobile, and it should not matter that a concurrent cause of the injury was nonvehicle-related. The existence of such a concurrent cause does not eliminate the fact that the injury arose out of the use of an automobile.
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> *****
>
> Assuming that a claimant's injuries do arise out of the use of an automobile, the next question that arises relative to the applicability of the exclusion is whether it makes any difference if the theory upon which the insured is sued is one that is nonvehicle-related. The answer should be no. The standard exclusion applies if the claimant's injury arose out of the use of an automobile. The focus of the policy language is solely on the injury. Either it was caused by the use of an automobile or it was not. Accordingly, it should be entirely irrelevant whether the insured is being sued because he or she was driving the automobile, or whether the insured is being sued because he or she, e.g., negligently allowed someone else to drive the automobile. The nature of the insured's alleged involvement with the automobile accident should be irrelevant.

Insurance Claims and Disputes, § 11:22 (citations omitted).

American National has clearly adopted this "cause of damages" approach of interpreting such insurance policy exclusions. Even if Huggins had previously adopted the "theory of liability" approach (which it did not), such is clearly no longer the case.

B. THE CIRCUIT COURT ERRED BY HOLDING THAT THE WORDS "CLAIM, SUIT OR LOSS" AS USED IN THE HOMESITE POLICY'S AUTO EXCLUSION ARE FOCUSED ON THE SPECIFIC TYPE OF CAUSE OF ACTION PURSUED BY THE CLAIMANT, RATHER THAN THE DAMAGES SOUGHT BY THE CLAIMANT

The Homesite Policy's auto exclusion states, in relevant part:

> The policy does not apply to any claim, **suit**, **loss** or any other cost or expense arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**. [30]

The Circuit Court found:

> Because the Homesite automobile exclusion focuses on the nature of the claim rather than bodily injury, the exclusion was not triggered in the Green Lawsuit, and therefore, is not a bar to insurance coverage for J.F. Allen.[31]

The word "claim" is not defined in the Homesite Policy or the Axis Excess Policy. In the absence of such a definition, "[l]anguage in an insurance policy should be given its plain, ordinary meaning." Syl. Pt. 1, Soliva v. Shand, Morahan & Co., Inc., 176 W. Va. 430, 345 S.E. 2d 33 (1986) (overruled on other grounds by National Mutual Insurance Co. v. McMahon & Sons, 177 W. Va. 734, 356 S.E. 2d 488 (1987)); accord Syl. Pt. 2, Russell v. State Automobile Mutual Insurance Co., 188 W. Va. 81, 422 S.E. 2d 803) (1992).

Black's Law Dictionary (12th Ed. 2024) defines "claim" in this context to mean: "A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in

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[30] **AR0553.**
[31] **AR0011.**

a civil action specifying what relief the plaintiff asks for."[32] Nothing in this specific definition references the specific type of cause of action being pursued by the claimant.[33]

The word "**suit**" is defined by the Axis Excess Policy as "a civil proceeding in which covered **loss** is alleged."[34] Nothing in this definition references the specific type of cause of action being pursued by the claimant.

The word "**loss**" is defined by the Axis Excess Policy as "damages the Insured becomes legally obligated to pay as judgments or settlements."[35] Nothing in this definition references the specific type of cause of action that causes the insured to be legally obligated to pay damages.

Ms. Green asserted a claim (i.e., a demand for money damages in a lawsuit) against J.F. Allen (and others) as part of her **suit** (i.e., a civil proceeding in which she alleged a covered **loss**; that is, damages J.F. Allen may be legally obligated to pay as a judgment or settlement).[36] Later, as a result of the Confidential Settlement between Ms. Green, the defendants in the Green Lawsuit, and some of their insurers, J.F. Allen experienced a **loss** in the form of damages J.F. Allen became legally obligated to pay to Ms. Green as part of the Confidential Settlement.[37]

As shown above, all three words that trigger the Homesite Policy's auto exclusion (claim, **suit**, **loss**) ultimately refer to the damages sought by the claimant in question, rather than the specific type of cause of action being pursued by the claimant. In the case of Ms. Green and the Green Lawsuit, the damages she sought (and obtained, via the Confidential Settlement) were clear.

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[32] Third discrete definition, Black's Law Dictionary (12th Ed. 2024).
[33] In fairness, the fourth discrete definition contained in Black's Law Dictionary makes reference to the type of cause of action. However, this is clearly not the case regarding the defined terms **suit** and **loss**, as shown above and below. Only one of these three terms (claim, **suit** or **loss**) need apply in order for the Homesite Policy's auto exclusion to be triggered.
[34] **AR0538**.
[35] **AR0537**.
[36] **AR0307-0330**.
[37] **AR1241-1255**.

She sought damages from all three defendants (Mr. Marple, Nu Creek, and J.F. Allen) for the wrongful death of her husband in the April 20, 2022 motor vehicle accident between the vehicles driven by Mr. Green and Mr. Marple. She alleged in Paragraph 27 of her Complaint:

> As a direct and proximate result of the negligence, recklessness, and other wrongful acts of Defendant Marple, Defendant Nu Creek, LLC, and Defendant J.F. Allen Company, Inc., Larry R. Green suffered serious injuries and ultimately died as a result of these injuries.[38]

She further alleged in Paragraph 28 of her Complaint:

> As a direct and proximate result of the negligence, recklessness, and other wrongful acts of Defendant Marple, Defendant Nu Creek, LLC, and Defendant J.F. Allen Company, Inc., Debra D. Green (Larry Green's wife), Jeremy Ray Green and Nathan Andrew Green (Larry Green's sons), Bernard "Chuck" Green and Stewart "David" Green (Larry Green's brothers), Sherry Green and Chrissy Bailes (Larry Green's sisters), and Barbara Green (Larry Green's mother), and the other heirs and statutory beneficiaries of Larry R. Green pursuant to W.Va. Code §55-7-6(b) suffered and will continue to suffer damages for which they are entitled to recover, including (without limitation) death, conscious pain and suffering, sorrow, mental anguish, and solace, which includes loss of society, companionship, comfort, guidance, kindly offices, and advice of the decedents; loss of services, protection, care and assistance by the decedents; lost wages; reasonable funeral expenses; and other damages which a jury in this matter deems fair and just.[39]

Ms. Green specifically sought to hold J.F. Allen partially responsible for causing the April 20, 2022 motor vehicle accident between the vehicles driven by Mr. Green and Mr. Marple. She did so by alleging that J.F. Allen had engaged in wrongful conduct through its retention and continued use of Mr. Marple and Nu Creek as contractors, despite issues with their background. In Paragraph 56, she alleged:

> Defendant J.F. Allen owed a duty to conduct a reasonable investigation into the background of Defendant Nu Creek and Defendant Marple as to their fitness to act as a motor carrier and/or operate commercial motor vehicles on the public roadways prior to retaining Defendant Nu Creek and/or Defendant Marple to operate commercial motor vehicles for-hire.[40]

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[38] **AR0317**.
[39] **AR0317-0318**.
[40] **AR0323**.

She further alleged violations of that duty in Paragraph 57 of the Complaint in the Green Lawsuit:

> By retaining Defendant Nu Creek and/or Defendant Marple as contractors to haul cargo in commercial motor vehicles on the roadways when Defendant J.F. Allen knew or should have known that Defendant No Creek was an illegal chameleon carrier and Defendant Marple was unfit to safely operate a commercial motor vehicle, Defendant J.F. Allen was negligent and aided, abetted, and/or encouraged Defendant Nu Creek and Defendant Marple to violate the applicable trucking safety rules which are designed for the protection of the motoring public, including the decedent, Larry R. Green.[41]

In Paragraph 70 of the Complaint in the Green Lawsuit, Ms. Green alleged that the above-described misconduct by J.F. Allen partially caused the April 20, 2022 motor vehicle accident between the vehicles driven by Mr. Green and Mr. Marple, which caused Mr. Green's death:

> Notwithstanding having the aforementioned authority to haul cargo issued from the public authorities, Defendant J.F. Allen contracted with Defendant Nu Creek to perform such activity which resulted in the wrongful death of Larry R. Green; therefore, Defendant J.F. Allen is subject to liability for the injuries and wrongful death suffered by the decedent, Larry R. Green.[42]

As shown, Ms. Green filed a claim—a **suit**—against J.F. Allen seeking money damages for the wrongful death of her husband in the April 20, 2022 accident between vehicles driven by Mr. Green and Mr. Marple. J.F. Allen experienced a **loss** when, pursuant to the Confidential Settlement, it became legally liable to pay Ms. Green money damages for the wrongful death of her husband in the April 20, 2022 accident between vehicles driven by Mr. Green and Mr. Marple. Ms. Green's claim—her **suit**—and J.F. Allen's **loss**—all three operative terms of the Homesite Policy's auto exclusion—all ultimately reference the wrongful death damages Ms. Green sought, and obtained, from J.F. Allen. They do not reference the specific type of cause of action being pursued by the claimant. Therefore, the Circuit Court erred by holding that these words are focused

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[41] **AR0323-0324**.
[42] **AR0326**.

on the specific type of cause of action being pursued by the claimant, rather than the damages sought by the claimant.

C. THE CIRCUIT COURT ERRED BY FINDING THAT THE HOMESITE POLICY'S AUTO EXCLUSION ONLY APPLIED IF THE CLAIM, SUIT OR LOSS AROSE OUT OF THE INSURED'S OWNERSHIP, MAINTENANCE, OPERATION, USE OR ENTRUSTMENT OF AN AUTO

The Homesite Policy's auto exclusion states, in relevant part:

> The policy does not apply to any claim, **suit**, **loss** or any other cost or expense arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**. [43]

In Paragraph 10 of the April 25, 2025 Order, the Circuit Court stated the following in regard to the Homesite Policy's auto exclusion:

> In order to trigger the exclusion, the claim, suit or loss must arise out of ownership, maintenance, operation, use, or entrustment of any auto. The claim, suit or loss against J.F. Allen in the Green Lawsuit was one of negligent retention of an independent contract. In order to be liable in that suit, J.F. Allen was neither alleged to have owned, maintained, operated, use or entrusted an auto. As such, J.F. Allen's liability was premised upon acts independent of the automobile accident. (emphasis added)[44]

While Paragraph 10 of the April 25, 2025 Order is part of the Circuit Court's explanation for its focus on the nature of the claim brought against J.F. Allen (i.e., alleged negligent retention of an independent contract), it nonetheless has the effect of requiring that the insured be the entity engaging in the ownership, maintenance, operation, use, or entrustment of the auto in question in order for the exclusion to apply.

It is critical to a correct understanding of the Homesite Policy's auto exclusion to note the distinction between "the . . . operation . . . of any auto" and "the **insured's** . . . operation . . . of any

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[43] **AR0553**.
[44] **AR0010**.

auto."[45] The Circuit Court erred by applying Homesite Policy's auto exclusion such that it must be the insured's operation of an auto that gives rise to the claim, **suit** or **loss** in question. But the clear and unambiguous language of the exclusion imposes no such restriction. By conditioning the application of the exclusion on "the" operation of any auto, rather than on "the insured's" operation of any auto, the Homesite Policy's auto exclusion is triggered by anyone's operation of any auto, if such operation gives rise to the claim, **suit** or **loss** in question.

This is well illustrated by a case decided by Judge Stamp of the United States District Court for the Northern District of West Virginia: Essex Insurance Co. v. Neely, 5:04-cv-139, 2008 WL 619194 (N.D. W. Va., Mar. 4, 2008). In Essex, Essex Insurance Company had issued a commercial general liability insurance policy to Lucky Lady Saloon, which was sued for allegedly serving alcohol to an intoxicated individual (Mr. Matthews) who later drove his vehicle, caused an accident, and injured the occupants of another vehicle, Mr. Neely and Ms. Fitzsimmons. Lucky Lady Saloon sought liability insurance coverage from Essex for the lawsuit against it. Essex brought a declaratory judgment action, seeking a declaration that, among other exclusions, the following exclusion contained in the relevant insurance policy excluded coverage for Lucky Lady Saloon:

> This insurance does not apply to "bodily injury" or "property damage" arising out of, caused by or contributed to by the ownership, non-ownership, maintenance, use or entrustment to others of any "auto". Use includes operation and "loading and unloading."

Essex, *9-10.

Judge Stamp granted summary judgment to Essex. Specifically regarding the above quoted auto exclusion, Judge Stamp found the exclusion to be clear and unambiguous, and applied it as

[45] In the interest of brevity, Homesite will focus its discussion of the exclusion to the most relevant action word in the list of potentially applicable action words: operation. It is Mr. Marple's operation of the Nu Creek truck at the time of the April 20, 2022 motor vehicle accident that is most relevant to this matter.

written. While the opposing parties argued that the exclusion should be limited in application to the business vehicles of Lucky Lady Saloon, Judge Stamp found that the exclusion's plain language imposes no such restriction on its application. Essex, *9-10. According to Judge Stamp, Mr. Matthews' use of his own vehicle (i.e., any "auto") to cause the auto accident triggered the applicability of the auto exclusion. Therefore, there would be no coverage for Lucky Lady Saloon under the Essex commercial general liability insurance policy for the "liquor liability" lawsuit brought by Mr. Neely and Ms. Fitzsimmons, the two individuals injured in the auto accident with Mr. Matthews.

The parallels to the instant matter are obvious. Mr. Marple drove a Nu Creek vehicle and caused the motor vehicle accident in which Mr. Green died. Ms. Green sued J.F. Allen for alleged negligence, recklessness or other wrongful conduct in its approval of Mr. Marple and Nu Creek as contractors. Similar to the exclusion at issue in Essex, the Homesite Policy's auto exclusion states:

> The policy does not apply to any claim, **suit**, **loss** or any other cost or expense arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**. [46]

In the same way that Judge Stamp found the auto exclusion in the Essex policy to be clear and unambiguous in the Essex case, and simply applied it as written, this Court should do likewise. The Green Lawsuit was a claim—a **suit**—against J.F. Allen (and Mr. Marple and Nu Creek) for wrongful death damages arising out of Mr. Marples' operation of the Nu Creek truck, which caused the death of Mr. Green. Later, J.F. Allen (along with Mr. Marple, Nu Creek, and various insurers) reached a Confidential Settlement by which J.F. Allen is legally obligated to pay wrongful death damages to Ms. Green for the death of her husband, thereby constituting a **loss** to J.F. Allen. Such **loss** likewise arose out of Mr. Marples' operation of the Nu Creek truck, which caused the death

[46] **AR0553**.

of Mr. Green. The Homesite Policy's auto exclusion is clearly applicable to the damages J.F. Allen is legally obligated to pay to Ms. Green as part of the Confidential Settlement.

The majority of courts faced with the same question as Judge Stamp in the Essex case have reached the same conclusion, as shown below.

In Lehrner v. Safeco Ins./Am. States Ins. Co., 171 Ohio App. 3d 570, 872 N.E. 2d 295, 2007-Ohio-795 (Ct. App. Ohio 2007), an employee of Lavello's Pizza, Mr. Jock, experienced a seizure while delivering pizza for Lavello's, and struck two pedestrians (the Lehrners), injuring one and killing the other. A lawsuit was filed against the Herberts, the owners of Lavello's Pizza, for (among other things) negligent hiring, retention, and supervision.

Utica First Insurance Company had issued a business-owner's liability insurance policy to the Herberts. The Herberts sought coverage from Utica for the lawsuit in question, and Utica disputed such coverage. The Utica policy contained the following exclusion:

> We do not pay for bodily injury or property damage that arises out of the ownership, operation, maintenance, use, occupancy, renting, loaning, entrusting, supervision, loading or unloading of . . . an auto[.]
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> Lehrner, 171 Ohio App. 3d at 580, 872 N.E. 2d at 302.

The court found that the exclusion was clear and unambiguous, and therefore found that no coverage exists for the Herberts under the Utica policy regarding the Lehrners' lawsuit. It did not matter that the use of the auto in question was Mr. Jock's use; the clear language of the policy excluded coverage.

In Maxum Indemnity Company v. Kaur, 356 F. Supp. 3d 987 (E.D. Cal. 2018), a truck driver (Mr. Sangam) caused an accident with a vehicle being driven by Mr. Singh, causing Mr. Singh's death. A lawsuit was filed against Kaur, which provided truck driving training to Mr.

Sangam; the lawsuit alleged negligent training. Maxum had issued a general liability insurance policy to Kaur, which contained the following exclusion:

> This insurance does not apply to: . . . 'bodily injury' or 'property damage' arising out of the ownership, maintenance, operation, use, chartering, renting, entrustment to others, 'loading or unloading' of any aircraft, 'auto' or watercraft, including the supervision, hiring, employment, training or monitoring of, or failure to warn, anyone in connection with the ownership, maintenance, operation, use, chartering, renting, or entrustment to others of any aircraft, 'auto' or watercraft.
>
> Maxum, 356 F. Supp. 3d at 991.

Maxum argued that there was no coverage under the policy, due to the wording of the above exclusion. Kaur argued that the exclusion should only apply to the use of Kaur's vehicles, or to accidents that occur while Kaur is in the midst of training the driver in question. Maxum, 356 F. Supp. 3d at 997. After a detailed analysis, the court determined that the auto exclusion should be applied as written, and found that there was no coverage for Kaur under the Maxum policy regarding the lawsuit in question, due to the plain language of the auto exclusion. The negligent conduct in question (Mr. Singh's negligence) involved the use of an auto. Therefore, the exclusion applied. Maxum, 356 F. Supp. 3d at 999-1005.

In Nautilus Insurance Company v. JDW Inc., 2:18-cv-190, 2021 WL 5083716 (N.D. Ind., Nov. 2, 2021), JDW ran a bar. A patron of the bar (Mr. Foust) allegedly became intoxicated, began driving, and struck a pedestrian (Mr. Mick) with his vehicle. Mr. Mick sued JDW for serving alcohol to Mr. Foust, as well as negligently hiring, training, and supervising its staff, and thereby causing the auto accident in question. Nautilus had issued a commercial general liability insurance policy to JDW which contained an auto exclusion for claims "arising out of the ownership, maintenance, use or entrustment to others of any . . . 'auto'[.] JDW, *4. JDW argued that the exclusion does not apply, because it was not the insured's car that was involved in the accident, and the insured was not driving or involved in the accident. The court found as follows:

> [T]hese arguments ignore the exclusion's actual language. There is nothing requiring that the car be owned or used by the insured or its agents; rather, it excludes coverage of incidents caused by "the ownership, maintenance, use or entrustment to others *of any* . . . 'auto.'
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> JDW, *4.

In Scottsdale Insurance Company v. Central Hotel, Inc., 4:21-cv-00052, 2022 WL 4468406 (S.D. Ind., Sept. 26, 2022), Central Hotel allegedly served alcohol to an intoxicated patron (Mr. Beagles), who left the hotel in his vehicle and caused an auto accident in which Ms. Davis was injured. Ms. Davis filed a lawsuit against Central Hotel, claiming that its negligent service of alcohol to Mr. Beagles contributed to the accident in which she was injured. Scottsdale had issued a commercial excess liability insurance policy to Central Hotel, which contained the following exclusion:

> Insurance provided under this Coverage Part does not apply to: . . . Any "injury or damage" arising out of the ownership, maintenance, operation, use, loading or unloading or entrustment to others of any auto.
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> Central Hotel, *2.

The court found that the exclusion is clear and unambiguous, and excludes coverage for Central Hotel regarding Ms. Davis' lawsuit against it. The accident arose out of Mr. Beagles' use of his vehicle, which triggers the plain language of the exclusion. Central Hotel, *2-7.

The Allan D. Windt treatise cited above, Insurance Claims and Disputes: Representation of Insurance Companies & Insureds (6th Ed. 2023), discusses this issue at § 11:22:

> Typically, liability policies other than automobile policies contain an exclusion for bodily injury or property damage arising out of the use, ownership, or maintenance of an automobile. In order for the exclusion to apply, there need only be a causal connection between the injury/damage and the automobile, and it should not matter that a concurrent cause of the injury was nonvehicle-related. The existence of such a concurrent cause does not eliminate the fact that the injury arose out of the use of an automobile.

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> Assuming that a claimant's injuries do arise out of the use of an automobile, the next question that arises relative to the applicability of the exclusion is whether it makes any difference if the theory upon which the insured is sued is one that is nonvehicle-related. The answer should be no. The standard exclusion applies if the claimant's injury arose out of the use of an automobile. The focus of the policy language is solely on the injury. Either it was caused by the use of an automobile or it was not. Accordingly, it should be entirely irrelevant whether the insured is being sued because he or she was driving the automobile, or whether the insured is being sued because he or she, e.g., negligently allowed someone else to drive the automobile. The nature of the insured's alleged involvement with the automobile accident should be irrelevant.
>
> Insurance Claims and Disputes, § 11:22 (citations omitted).

The above cases, and Mr. Windt's treatise, all demonstrate the majority view regarding the proper interpretation of insurance policy language that is triggered by "the" operation of an auto. When insurance policies use this language, it does not matter whose operation is at issue, as long as the accident in question arose from someone's operation of an auto. The majority of courts will not interpret such policy language to only apply if the insured is the one operating (or owning, maintaining, etc.) the auto in question. To do so would be to subvert the plain language of the insurance policy.

Therefore, consistent with the majority of courts across the country, this Court should simply apply the insurance policy language at issue here as it is written, and find that the Homesite Policy's auto exclusion is clear, unambiguous, and applicable. This Court should find, as a matter of law, that Ms. Green's claim and **suit** against J.F. Allen arose from Mr. Marple's use of the Nu Creek truck in causing Mr. Green's death in the April 20, 2022 accident. This Court should likewise find, as a matter of law, that the subsequent **loss** experienced by J.F. Allen when it became legally liable to pay a portion of the Confidential Settlement proceeds to Ms. Green as wrongful death damages arose from Mr. Marple's use of the Nu Creek truck in causing the accident in which

Mr. Green died. The Circuit Court erred by holding otherwise; therefore, this Court should reverse the holding of the Circuit Court.

III. THE CIRCUIT COURT ERRED BY HOLDING THAT THE HOMESITE POLICY'S AUTO EXCLUSION IS AMBIGUOUS, AND THEREFORE TO BE INTERPRETED AGAINST HOMESITE

In its April 25, 2025 Order, the Circuit Court stated as follows:

> At minimum, Homesite's arguments in its memorandum of law highlight ambiguities in the applicable provisions of these insurance policies. Notably, Homesite asserts that if it is correct in its interpretation, then the Zurich policy should and does provide coverage. Conversely, Homesite recognizes if it is wrong, then the automobile exclusion would not bar coverage for J.F. Allen.
>
> *****
>
> Accordingly, the Court finds that regardless of its ruling on the applicable policy provisions, the insurance policies are ambiguous given these competing interpretations asserted by the parties. As such, the Court finds that both policies must be interpreted in favor of the insured on coverage.[47]

Two paragraphs earlier, the Circuit Court noted J.F. Allen's argument that, because Homesite and Zurich both present reasonable arguments regarding the insurance coverage issues in this matter, this Court should find both policies to be ambiguous, interpret both policies against each respective insurer, and find coverage exists for J.F. Allen under both policies as to the Green Lawsuit.[48] As will be shown below, the Circuit Court's agreement with J.F. Allen's argument in this regard is clear error.

Under West Virginia law, "[t]he term 'ambiguity' is defined as language 'reasonably susceptible of two different meanings' or language 'of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning[.]'" Syl. pt. 1, in part, Shamblin v. Nationwide Mut. Ins. Co., 175 W. Va. 337, 332 S.E. 2d 639 (1985).

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[47] **AR0013**.
[48] **AR0013**.

However, "[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. pt. 1, Berkeley Cty. Pub. Serv. Dist. v. Vitro Corp. of Am., 152 W. Va. 252, 162 S.E. 2d 189 (1968).

In Motorists Mutual Ins. Co. v. Zukoff, 244 W. Va. 33, 851 S.E. 2d 112 (2020), the Supreme Court of Appeals of West Virginia recently addressed this very issue. The Circuit Court found a commercial liability policy to be ambiguous because certain terms were not defined by the policy, and were therefore open to different interpretations. The Supreme Court disagreed; it found the policy language to be clear and unambiguous, and applied it as written. The Supreme Court included the above Syllabus Point from Berkeley Cty. Pub. Serv. Dist. in its own Syllabus in the Zukoff case.

The law in other jurisdictions is the same: Mere disagreement between the parties, and even between the courts, regarding how to interpret an insurance policy, does not make the insurance policy language ambiguous. See Peace ex rel. Lerner v. Northwestern Nat. Ins. Co., 228 Wis. 2d 106, 136, 596 N.W. 2d 429, 442 (Wis. 1999) ("The pollution exclusion clause does not become ambiguous merely because the parties disagree about its meaning . . . or because they can point to conflicting interpretations of the clause by different courts."). See also Shree Ganesh, Inc. v. Argonaut Great Central Ins. Co., 4:13-cv-00398, 2015 WL 12517436 (S.D. Iowa, June 15, 2015) at *8 ("To be sure, an insurance policy is not ambiguous merely because the parties disagree about the meaning of its terms . . . [n]or is a policy ambiguous because courts disagree about the meaning of a policy's terms."). See also Rohlf v. Continental Casualty Company, 4:20-cv-00173, 2021 WL 6622191 (S.D. Iowa, Jan. 19, 2021) at *4 ("An insurance policy is not ambiguous simply because the parties or courts disagree about the meaning of its terms."). See also Chief of Staff LLC v.

Hiscox Insurance Company, Inc., 532 F. Supp. 3d 598, 603 (N.D. Ill. 2021) ("[D]isagreement among courts regarding the interpretation of an insurance policy provision does not, by itself, render the provision ambiguous.").

Homesite has demonstrated above that the insurance policy language at issue in this matter is clear and unambiguous. It has also shown that the majority of courts in the United States simply enforce similar policy language as written. To be sure, the other parties to this appeal disagree with this approach. However, such disagreement does not render the insurance policy language ambiguous. This Court should simply enforce the language as written.

This point bears emphasis: Homesite seeks to have this Court do nothing more than simply read the actual words of the Homesite Policy's auto exclusion, and apply them as they are written. 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. Syl. Pt. 2, Shamblin v. Nationwide Mut. Ins. Co., 175 W. Va. 337, 332 S.E. 2d 639 (1985), quoting Syl., Farmers' & Merchants' Bank v. Balboa Insurance Co., 171 W.Va. 390, 299 S.E.2d 1 (1982), in turn quoting syl., Tynes v. Supreme Life Insurance Co., 158 W.Va. 188, 209 S.E.2d 567 (1974). Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended. Syl. pt. 4, Cox v. Amick, 195 W. Va. 608, 466 S.E. 2d 459 (1995), quoting Syllabus, Keffer v. Prudential Ins. Co., 153 W.Va. 813, 172 S.E.2d 714 (1970), syl. pt. 1, Russell v. State Auto. Mut. Ins. Co., 188 W.Va. 81, 422 S.E.2d 803 (1992), syl. pt. 1, Miller v. Lemon, 194 W.Va. 129, 459 S.E.2d 406 (1995).

The Homesite Policy's auto exclusion is plain and unambiguous. There is nothing to be interpreted; the exclusion simply needs to be enforced as written. The Circuit Court erred by holding otherwise.

CONCLUSION

For the reasons set forth above, Homesite asks this Court to reverse the specific portions of the Circuit Court's April 25, 2025 Order which granted summary judgment to J.F. Allen and denied summary judgment to Homesite on the issue of whether there is liability insurance coverage for J.F. Allen under the Homesite Policy for the Green Lawsuit. Homesite further asks this Court to enter judgment for Homesite on that same issue.

Respectfully submitted,

HOMESITE INSURANCE COMPANY OF FLORIDA

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 25-ICA-213

HOMESITE INSURANCE COMPANY OF FLORIDA,
Plaintiff Below, Petitioner

v.

ZURICH AMERICAN INSURANCE COMPANY
And
J.F. ALLEN COMPANY, INC.
Defendants Below, Respondents

CERTIFICATE OF SERVICE

I, Don C.A. Parker, hereby certify that on this 23rd day of July, 2025, I electronically filed the foregoing **"PETITIONER'S BRIEF"** with the Clerk of Court using the West Virginia E-Filing system, which will serve a copy of the same upon the following counsel of record:

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